



## NINTH ITEM ON THE AGENDA

**Reports of the Committee on  
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## Introduction

1. The Committee on Freedom of Association set up by the Governing Body at its 117th Session (November 1951), met at the International Labour Office, Geneva, on 6, 7 and 14 November 2008, under the chairmanship of Professor Paul van der Heijden.
2. The members of Argentinian, Colombian and Peruvian nationality were not present during the examination of the cases relating to Argentina (Cases Nos 2593 and 2603), Colombia (Cases Nos 2355, 2356, 2573, 2574, 2599 and 2600) and Peru (Case No. 2594), respectively.

\* \* \*

3. Currently, there are 136 cases before the Committee, in which complaints have been submitted to the governments concerned for their observations. At its present meeting, the Committee examined 38 cases on the merits, reaching definitive conclusions in 23 cases and interim conclusions in 15 cases; the remaining cases were adjourned for the reasons set out in the following paragraphs.

### **Serious and urgent cases which the Committee draws to the special attention of the Governing Body**

4. The Committee considers it necessary to draw the special attention of the Governing Body to Cases Nos 2268 and 2591 (Myanmar), 2318 (Cambodia), 2445 and 2540 (Guatemala), 2450 (Djibouti), 2528 (Philippines), 2566 (Islamic Republic of Iran), 2581 (Chad) because of the extreme seriousness and urgency of the matters dealt with therein.

### **New cases**

5. The Committee adjourned until its next meeting the examination of the following cases: Nos 2647 (Argentina), 2648 (Paraguay), 2649 (Chile), 2651 (Argentina), 2652 (Philippines), 2653 (Chile), 2654 (Canada), 2655 (Cambodia), 2656 (Brazil), 2657 (Colombia), 2658 (Colombia), 2659 (Argentina), 2660 (Argentina), 2661 (Peru), 2662 (Colombia), 2663 (Georgia), 2664 (Peru), 2665 (Mexico), 2666 (Argentina), 2667 (Peru), 2668 (Colombia), 2669 (Philippines), 2670 (Argentina), 2671 (Peru), 2672 (Tunisia), 2673 (Guatemala) and 2674 (Bolivarian Republic of Venezuela) since it is awaiting information and observations from the Governments concerned. All these cases relate to complaints submitted since the last meeting of the Committee.

### **Observations requested from governments**

6. The Committee is still awaiting observations or information from the Governments concerned in the following cases: Nos 2177 and 2183 (Japan), 2323 (Islamic Republic of Iran), 2341 (Guatemala), 2362 (Colombia), 2465 (Chile), 2476 (Cameroon), 2508 (Islamic Republic of Iran), 2522 (Colombia), 2560 (Colombia), 2567 (Islamic Republic of Iran), 2601 (Nicaragua), 2602 (Republic of Korea), 2633 (Côte d'Ivoire), 2641 (Argentina), 2643 (Colombia) and 2645 (Zimbabwe).

## Partial information received from governments

7. In Cases Nos 2241 (Guatemala), 2361 (Guatemala), 2516 (Ethiopia), 2565 (Colombia), 2595 (Colombia), 2608 (United States), 2609 (Guatemala), 2612 (Colombia), 2617 (Colombia), 2623 (Argentina), 2625 (Ecuador), 2629 (El Salvador), 2639 (Peru), 2640 (Peru), 2642 (Russian Federation), 2644 (Colombia) and 2646 (Brazil), the Governments have sent partial information on the allegations made. The Committee requests all these Governments to send the remaining information without delay so that it can examine these cases in full knowledge of the facts.

## Observations received from governments

8. As regards Cases Nos 1787 (Colombia), 1865 (Republic of Korea), 2254 (Bolivarian Republic of Venezuela), 2265 (Switzerland), 2422 (Bolivarian Republic of Venezuela), 2434 (Colombia), 2478 (Mexico), 2498 (Colombia), 2518 (Costa Rica), 2533 (Peru), 2539 (Peru), 2553 (Peru), 2587 (Peru), 2592 (Tunisia), 2596 (Peru), 2597 (Peru), 2606 (Argentina), 2614 (Argentina), 2620 (Republic of Korea), 2621 (Lebanon), 2624 (Peru), 2627 (Peru), 2631 (Uruguay), 2634 (Thailand), 2635 (Brazil), 2636 (Brazil), 2637 (Malaysia), 2638 (Peru) and 2650 (Bolivia), the Committee has received the Governments' observations and intends to examine the substance of these cases at its next meeting.

## Urgent appeals

9. As regards Cases Nos 2470 (Brazil), 2557 (El Salvador), 2615 (El Salvador), 2619 (Comoros), 2626 (Chile) and 2630 (El Salvador), the Committee observes that, despite the time which has elapsed since the submission of the complaints, it has not received the observations of the Governments. The Committee draws the attention of the Governments in question to the fact that, in accordance with the procedural rules set out in paragraph 17 of its 127th Report, approved by the Governing Body, it may present a report on the substance of these cases if their observations or information have not been received in due time. The Committee accordingly requests these Governments to transmit or complete their observations or information as a matter of urgency.

## Withdrawal of the complaint

### Case No. 2588 (Brazil)

10. With regard to case No. 2588, the Committee, at its meeting in March 2008, urged the Government to take the necessary measures, including consulting with the representative employers' organization, to have an investigation carried out into all the allegations made by the complainant organization (alleged acts of favouritism by General Motors towards two trade unions (SINMGRA and Ex-Association), dismissals and harassment of workers for not supporting or joining those unions, etc.) and to communicate the findings of that investigation [see 349th Report, paras 499–513]. *In this regard, the Committee notes with satisfaction that the National Confederation of Metalworkers (CNM), the complainant organization in this case, states that its dispute with General Motors of Brazil in Gravataí, regarding the representation of that category of workers has been settled. The CNM requested the Committee to close the file on this complaint. Taking account of this information, the Committee accepted the withdrawal of the complaint.*

## Article 26 complaint

11. As regards the article 26 complaint against the Government of the Bolivarian Republic of Venezuela, the Committee recalls its recommendation for a direct contacts mission to the country in order to obtain an objective assessment of the actual situation.

## Transmission of cases to the Committee of Experts

12. The Committee draws the legislative aspects of the following case to the attention of the Committee of Experts on the Application of Conventions and Recommendations: Greece (Case No. 2502).

## Effect given to the recommendations of the Committee and the Governing Body

### Case No. 2561 (Argentina)

13. The Committee last examined this case at its March 2008 meeting [see 349th Report, paras 370–382] and on that occasion formulated the following recommendations:
  - (a) With regard to the forced entry by unidentified individuals at the offices of the Director of the CTA's legal service in February 2007 and at the headquarters of the CTA in the federal capital in March 2007, with the theft of computers, and (at the office of the Director of the legal service) of fax equipment, the Committee expects that the investigation to which the Government refers will be concluded in the near future and will make it possible to identify and punish those responsible. The Committee requests the Government to keep it informed in this regard.
  - (b) With regard to the allegation that stones were thrown at the residence of Mr Alejandro Garzón, General Secretary of the Provincial Executive Council of the ATE in Santa Cruz, and he and his family received telephone death threats, the Committee, noting the ATE's statements to the effect that it has made a formal complaint to the police, requests the Government to inform it of the action taken in connection with this complaint and the outcome of the investigations, stating in particular whether or not those responsible have been identified and punished.
14. In its communication of 25 April 2008, the Government indicates, in relation to the complaint presented by the Congress of Argentine Workers (CTA) concerning the forced entry by unidentified individuals into the offices of the Director of the CTA's legal service, that the Investigating Prosecutor's Office No. 7 has reported that the case, involving unknown perpetrators, has been under examination by the Criminal Investigations Department since 26 November 2007.
15. *The Committee takes note of this information. The Committee expects that the investigation into the forced entry by unidentified individuals into the offices of the Director of the CTA's legal service and the theft of computer equipment will be concluded without delay and that those responsible will be identified, tried and punished. The Committee requests the Government to keep it informed in this regard as well as in relation to the investigations concerning: (1) the entry of unidentified persons into the headquarters of the CTA in the federal capital in March 2007; and (2) the allegation that stones were thrown at the residence of Mr Alejandro Garzón, the General Secretary of the Provincial Executive Council of ATE in Santa Cruz, and that he and his family received telephone death threats.*

**Case No. 2562 (Argentina)**

16. The Committee examined this case at its meeting in March 2008 [see 349th Report, paras 383–407] and on that occasion expressed deep regret at the death of teacher Mr Carlos Fuentealba after being shot by police during a demonstration by education workers in Neuquén Province, and requested the Government to keep it informed of the outcome of the legal proceedings against the person accused of causing his death.
17. In a communication dated 8 July 2008, the Government recalls that the complaint was presented by the Association of Education Workers of Neuquén (ATEN) and the Confederation of Education Workers of Argentina (CTERA) and that these organizations had organized a march which resulted in the unfortunate death of Mr Fuentealba. The Government reports that, immediately after the event, the physical perpetrator was detained and tried in the criminal courts. The Government attaches the decision according to which the First Criminal Chamber of Neuquén Province sentenced Mr José Darío Poblete to life imprisonment and permanent barring of his rights for having committed aggravated murder, as this act involved abuse of authority by a member of the police and premeditated violence through use of a firearm. *The Committee takes note of this information.*

**Case No. 2433 (Bahrain)**

18. The Committee last examined this case, which concerns legislation prohibiting government employees from establishing trade unions of their own choosing, at its June 2008 meeting. The Committee, noting that parliament was still considering amendments to the Trade Union Act, stressed once again that all public service employees (with the exception of the armed forces and police) should be able to establish organizations of their own choosing to further and defend their interests; it once again strongly urged the Government to take the necessary measures, without delay, to amend article 10 of the Trade Union Act in accordance with this principle and recalled that the technical assistance of the Office was available in this regard. Additionally it requested the Government to take the appropriate steps to compensate the deputy head of the postal workers' union, Ms Najjeyah Abdel Ghaffar, for the periods of suspension without pay imposed upon her for statements she had made to the press on the hardships faced by postal workers, as well as for her confession — obtained in the course of an administrative investigation — that she continued to defend the postal workers' union, which had been characterized by the Government as an “illegal and unlawful entity”. The Committee also requested the Government to ensure that no further disciplinary action was taken against her or other members of public sector trade unions for activities undertaken on behalf of their organizations, pending the amendment to article 10 of the Trade Union Act [see 350th Report, paras 25–30].
19. In its communication of 26 May 2008, the Government reiterates that, as article 10 of the Trade Union Act prohibits government employees from establishing trade unions, the postal workers' union is an illegal organization and, consequently, Ms Najjeyah Abdel Ghaffar was disciplined for her actions on behalf of the organization. The Government adds that the amendment of national laws falls exclusively within the competence of the legislature; until article 10 of the Trade Union Act is amended, it is bound to prohibit the formation of government employees' organizations in such a vital sector which provides the citizens of the country with a wide range of services.
20. *As concerns its previous recommendation on the need to amend the Trade Union Act, the Committee notes with deep regret that the Government confines itself to stating that the legislature alone is responsible for amendments to national laws, which in this case would be necessary in order to bring them into conformity with fundamental principles of freedom of association, stressing once again that all public service employees (with the*

exception of the armed forces and police) should be able to establish organizations of their own choosing to further and defend their interests, the Committee once again strongly urges the Government to take the necessary measures, without delay, to amend article 10 of the Trade Union Act in accordance with this principle. The Committee deeply regrets, moreover, that the Government simply reiterates that the postal workers' union is an illegal organization, while providing no indication that it has taken action with respect to its previous recommendation concerning Ms Najjeyah Abdel Ghaffar. In these circumstances, the Committee recalls once again that one of the fundamental principles of freedom of association is that workers should enjoy adequate protection against all acts of anti-union discrimination in respect of their employment such as dismissal, demotion, transfer or other prejudicial measures. This protection is particularly desirable in the case of trade union officials because, in order to be able to perform their trade union duties in full independence, they should have a guarantee that they will not be prejudiced on account of the mandate which they hold from their trade unions. The Committee has considered that the guarantee of such protection in the case of trade union officials is also necessary in order to ensure that effect is given to the fundamental principle that workers' organizations shall have the right to elect their representatives in full freedom [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, para. 799]. The Committee once again requests the Government to take the appropriate steps to compensate Ms Najjeyah Abdel Ghaffar for the periods of suspension without pay imposed upon her, and to ensure that no further disciplinary action is taken against her or other members of public sector trade unions for activities undertaken on behalf of their organizations, pending the amendment to article 10 of the Trade Union Act.

### Case No. 2491 (Benin)

21. This case was last examined by the Committee at its March 2007 meeting and involves allegations of interference by the authorities in the activities of the National Trade Union of Workers of the Ministry of Public Service, Labour and Administrative Reform (SG/SYNTRA/MFPTRA) and discriminatory measures (transfers, restrictions on the right to hold meetings) against the trade union organization's leaders [see 344th Report, paras 332–352]. On that occasion, the Committee made the following recommendations:
- (a) With regard to the allegations concerning the transfer of trade union officials and members belonging to the complainant organization, the Committee requests the Government to examine, with the complainant organization, how best to limit the impact of the transfer of the trade union members in question and requests the Government to engage in full and frank consultation whenever it deems it necessary to transfer significant numbers of workers, including trade union members.
  - (b) With regard to the alleged restrictions on the right to hold meetings, the Committee, bearing in mind the Government's statement that trade union meetings have never been prohibited at the Ministry, requests the Government to respect fully the right to hold trade union meetings without demanding the communication of the agenda, which should remain an internal trade union matter.
  - (c) With regard to the allegations concerning: (1) acts of favouritism on the part of the authorities towards the SYNATRA trade union (which allegedly has close links to the Director of the Office of the Minister); and (2) the reduction or withholding of the retraining allowances of nine trade union members because of their participation in a strike, the Committee requests the Government to clarify these matters with the complainant organization, with a view to ensuring full respect for the principles of freedom of association. The Committee requests the Government to keep it informed in this regard.
22. In a communication dated 25 March 2008, the Government states that it has taken note of the Committee's recommendation regarding the need to guarantee the full right to hold meetings. It adds that an advisory committee, made up of representatives of the

administration and the representative organizations of the workers of the Ministry, has been put in place in order to issue opinions on the transfers envisaged or requested by the workers themselves. Finally, the Government states that talks are currently under way with SYNTRA/MFPTRA on the issue of the transfer of trade union members referred to in the complaint, in order to reach a negotiated settlement.

23. *The Committee notes with interest the information relating to the steps taken by the Government to seek, in consultation with the complainant organization, a negotiated settlement concerning the issues at hand. The Committee hopes that the talks will quickly lead to a solution that is satisfactory to all parties, in accordance with the principles of freedom of association it previously recalled.*

### **Case No. 2570 (Benin)**

24. This case was last examined by the Committee at its session of June 2008 [see 350th Report, paras 256–273] and concerns allegations of violation of trade union rights during a protest march and incidents that occurred near the Ministry of Justice at which trade union officials were injured. The Committee requested the Government to give the necessary instructions to the security forces and to the highest authorities of the State to prevent the recurrence in future of incidents such as that of 25 May 2007, which endangered the life of trade union leaders. Noting that despite the Government's indication that the complainant organization wished to withdraw the complaint the Committee had not received any request to this effect from the National Federation of Workers' Unions of Benin (UNSTB), it requested the Government or the complainant organization to inform it of any settlement reached between the parties concerning the incident of 25 May 2007 or any court decision handed down in that connection. The Committee notes that in a communication received at the International Labour Office on 13 September 2008, the UNSTB informs the Committee of its wish to withdraw the complaint concerning the incidents of 25 May 2007.

25. *The Committee notes with interest this request for withdrawal of the complaint and observes that for the complainant organization the dispute in question has been settled.*

### **Case No. 2448 (Colombia)**

26. The Committee last examined this case at its meeting in March 2008. On that occasion, the Committee requested the Government to keep it informed with regard to the final outcome of the administrative and legal action currently pending on the allegations of failure to respect the collective agreement and pressure exerted by the Red Cross of Colombia to make the workers give up the collective agreement. The Committee takes note of the communication of the General Confederation of Labour (CGT) dated 20 May 2008, which refers to the issues that are being examined. The Committee also notes that, in its communication dated 29 May 2008, the Government states that, in its ruling of 31 January 2007, the Tenth Labour Court acquitted the Red Cross in respect of the complaints filed by SINTRACRUZROJA. The appeal submitted by the trade union has yet to be resolved. *The Committee requests the Government to keep it informed of the final outcome of the appeal.*

27. With regard to the allegations presented by the CGT regarding the intention of Supertiendas y Droguerías Olímpica SA to put in place an extralegal benefits scheme, the Committee had requested the trade union to provide the proof to which it referred in its communication, which had not been enclosed. *As this documentation has not been sent, the Committee will not proceed with the examination of these allegations.*

**Case No. 2489 (Colombia)**

28. The Committee last examined this case at its March 2008 meeting [see 349th Report, paras 672–689, approved by the Governing Body at its 301st Session]. On that occasion the Committee made the following recommendations:
- (a) With regard to the alleged pressure and threats suffered by SINTRAUNICOL at the hands of the Vice-Chancellor of the University of Córdoba and the paramilitary commanders of the United Self-Defence Forces of Colombia (AUC) to persuade them to renegotiate the collective agreement, the Committee points out the extremely serious nature of these allegations and once again condemns the existence and actions of paramilitary organizations which, in violation of human rights and freedom of association principles, regard trade unionists as targets, and urges the Government to:
    - (i) take measures to guarantee the safety of the threatened trade union leaders, to which end the Committee requests the Government to consult the trade union without delay to determine who should be afforded such protection; and
    - (ii) have a truly independent investigation into these allegations carried out without delay by a person who enjoys the confidence of the parties, and, if these allegations are found to be true, take the necessary measures to punish those responsible. *The Committee requests the Government to keep it informed on this matter.*
  - (b) With regard to the allegations concerning the meeting held by SINTRAUNICOL on 17 February 2003, which was deemed to be an illegal work stoppage by the administrative authorities under Decision No. 0002534:
    - (i) the Committee requests the Government to take the necessary measures to amend articles 450 and 451 of the Substantive Labour Code so that the education sector is not regarded as an essential public service in which the exercise of the right to strike may be prohibited and so that illegality rulings concerning strikes are made not by the Government but by an independent body that has the confidence of the parties; and
    - (ii) with regard to Decision No. 0002534 which declared the work stoppages illegal, taking into account that this decision is based on legislation that is not in conformity with the principles of freedom of association, the Committee requests the Government to invalidate this decision as well as any other disciplinary proceedings initiated against the SINTRAUNICOL trade union leaders under this decision (apart from those for which, according to the Government, an acquittal decision was issued on 9 December 2005, i.e. before this complaint was presented).
29. In its communication dated 29 May 2008, the Government states, with regard to the pressure and threats suffered by SINTRAUNICOL at the hands of the Vice-Chancellor of the University of Córdoba and the paramilitary commanders, and with regard to carrying out an independent investigation that enjoys the confidence of the parties, that these issues should be examined within the framework of Case No. 1787. The Committee observes, however, that, despite the serious nature of the allegations, the Government has not sent any concrete information as to whether an investigation has been initiated in this regard and the stage that investigation has reached. *In view of the serious nature of these allegations, the Committee again urges the Government to take immediately the necessary measures to have an in-depth investigation carried out into these allegations in order to establish whether they are true and, if so, who is responsible, and to keep it informed in this regard. The Committee shall proceed with the examination of these allegations in the framework of Case No. 1787.*
30. With regard to subparagraph (b) of the recommendations regarding the declaration by the administrative authorities that a permanent assembly held by SINTRAUNICOL was illegal, the Committee notes with interest the recent adoption of Act No. 1210, which amends article 451 of the Substantive Labour Code, establishing that “the legality or illegality of a collective work stoppage shall be decided through judicial proceedings”. *In*

*these circumstances, the Committee once again requests the Government to invalidate Decision No. 0002534, which declared the aforementioned permanent assembly illegal and categorized it as a work stoppage. The Committee takes note of the information provided by the Government, according to which there have been no new disciplinary proceedings since the acquittal decision was issued on 9 December 2005.*

### **Case No. 2497 (Colombia)**

31. The Committee last examined this case at its November 2007 meeting [see 348th Report, paras 379–401]. On that occasion, the Committee requested the Government to take the necessary measures to ensure that the workers in the Pereira Waste Management SA, Pereira Telecommunications SA, Pereira Electricity SA (ESP) and Pereira Water and Sanitation SA, successor companies to Pereira Public Enterprises, received the pension benefit established in the collective agreements concluded following the approval of the new legislation, for the period during which the said agreements had been in force while ensuring that the same benefit was not paid twice. *The Committee takes note of the communication dated 21 August 2008 from the General Labour Confederation (CGT), in which the CGT reiterates its comments.*
32. In a communication of 16 June 2008, the Government sent a communication from the manager of ESP indicating that the enterprise was in compliance with the legal provisions in force and that the legal action initiated by various pensioners and the representative of the Association of Pensioners of Pereira was rejected on the grounds that, under sections 50 and 142 of Act No. 100 of 1993, the pension benefit established in section 66 of the collective agreement had been replaced by a more favourable benefit. *The Committee takes note of this information.*

### **Case No. 2556 (Colombia)**

33. The Committee last examined this case at its March 2008 meeting [see 349th Report of the Committee, paras 746–755, approved by the Governing Body at its 301st Session]. The Committee recalls that it concerns the refusal of the administrative authority to enter the Union of Chemical and Pharmaceutical Industry Workers (UNITRAQUIFA), its statutes and its executive committee in the trade union register, among other things, because its members included workers from the temporary agencies serving the sector's industries.
34. *In a communication of 29 May 2008, the Government indicates that, according to the report sent by the Office for the Coordination of Labour, Employment and Social Security of the Ministry of Social Protection, the trade union organization lodged motions for reversal and appeal, which were rejected, the administrative channels have been exhausted and the trade union organization may seek a court order to annul the resolution which rejected its registration. The Committee recalls that all workers, without distinction whatsoever, whether they are employed on a permanent basis, for a fixed term or as contract employees, should have the right to establish and join organizations of their own choosing [see **Digest**, op. cit., para. 255]. Under these circumstances, the Committee reiterates that UNITRAQUIFA workers should have the right to establish an industrial organization as they see fit, inasmuch as all of them are working within pharmaceutical companies, irrespective of the type of relationship they have with those companies, as they may wish to become part of a trade union organization representing the interests of the workers in that sector at national level. The Committee once again requests the Government to take the necessary measures, without delay, to register UNITRAQUIFA, its statutes and its executive committee, and to keep the Committee informed in this respect and in respect of any legal action that is taken.*

**Case No. 2511 (Costa Rica)**

35. The Committee last examined this case at its June 2007 meeting [see 346th Report, paras 879–902], and, on that occasion, made the following recommendations:
- (a) As to the alleged slowness of procedures in resolving cases involving anti-union acts, the Committee, while noting that according to the Government, a “Bill to reform labour proceedings” is currently on the parliamentary agenda in order to ensure flexible and swift judicial procedures, requests the Government to keep it informed of developments regarding the Bill in question and expects that it will resolve the problem of the excessive slowness of procedures.
  - (b) As to the dismissal of the members of the executive committee of DINADECO (SINTRAINDECO) (Lucrecia Garita Argüedas, Rafael Ayala Häusermann and Giselle Vindas Jiménez) a few months after the trade union was established, the Committee requests the Government to keep it informed of the outcome of the judicial or administrative proceedings relating to the dismissals of the trade union leaders in question, and should it be found that they were dismissed on anti-union grounds, to take measures to ensure that they are reinstated in their posts or in similar posts corresponding to their abilities, with payment of wages due and appropriate compensation. Moreover, if the competent judicial authority finds that reinstatement is not possible, the Committee requests that they be fully compensated.
  - (c) Regretting that the Government has not sent its observations concerning the alleged dismissal of the leaders of SINTRAINDECO, Oscar Sánchez Vargas and Irving Rodríguez Vargas, the Committee requests the Government to take measures to ensure that an investigation is carried out in this regard and, should it be found that they were dismissed on anti-union grounds, to take measures to ensure that they are reinstated in their posts, with payment of wages due and appropriate compensation. The Committee requests the Government to keep it informed in this regard. Moreover, if the competent judicial authority finds that reinstatement is not possible, the Committee requests that they be fully compensated.
  - (d) As to the allegations relating to the small number of collective agreements in the country and the very high number of direct agreements signed with non-unionized workers, the Committee expresses its concern at the situation regarding collective bargaining and requests the Government to keep it informed in that respect, as well as with regard to all measures adopted in relation to the small number of collective agreements with a view to ensuring the application of Article 4 of Convention No. 98 regarding the promotion of collective bargaining with workers’ organizations.
36. In a communication dated 20 February 2008, the Government states that there are currently no documents pending or further information which necessitate a statement by the Government. The Government states that it reiterates its reply of 21 December 2006. In this regard, the Government recalls in general that it does not concur with the rash allegations made by the complainant organization, given that they are highly subjective and have no basis in fact or in law. According to the Government, the complainant organization has failed to respect the constitutional principle of due process in that it turned to an international legal body without having first exhausted the legal channels provided by law to deal with unfair labour practices, which amounts to improper use of the bodies of the ILO.
37. The Government adds that it is fully prepared to resolve the administrative and legal proceedings concerning the alleged unfair labour practices referred to by the complainants through the drafting of reasonable policies aimed at protecting the rights of unionized workers, in accordance with the constitutional guarantees of due process and legitimate defence. The Government reiterates that the Ministry of Labour and Social Security organized several meetings with the parties concerned, in an attempt to find a solution which would bring about social and labour peace within the National Community Development Office (DINADECO). It also states that it has taken a clear stance against

anti-union practices and does not hesitate to apply the full force of the law in those cases where it has been proven that such illegal acts have been committed. For these reasons the Government requests the Committee to reject the complaint in question, given that the competent authorities have acted within the law and in accordance with the principles of the ILO.

38. *The Committee notes this information and welcomes the organization of meetings with the parties by the Ministry of Labour in order to find a solution. As regards the alleged improper use of the ILO bodies, the Committee wishes to point out that its procedure does not require the exhaustion of national procedures [special procedures for the examination in the International Labour Organization of complaints alleging violations of freedom of association, para. 30]. As to the issues referred to in recommendations (a) and (d), the Committee observes that these will be examined within the framework of Case No. 2518. As to recommendations (b) and (c), the Committee reiterates its previous statements and requests the Government to send the specific information requested on that occasion.*

### **Case No. 2449 (Eritrea)**

39. The Committee last examined this case at its November 2007 meeting [see 348th Report, paras 620–628] and on that occasion it formulated the following recommendations:

In view of the failure of the Government to provide sufficient information concerning the two-year detention of the three trade union leaders in this case, despite the complainants' contention that they were arrested and detained on grounds related to their trade union activities and the Committee's previous request to this effect and from the information available to it, the Committee can only infer that the arrests and detention of Messrs Minase Andezion, Tewelde Ghebremedhin and Habtom Weldemicael were in fact linked to their trade union activities. In these circumstances, the Committee urges the Government to provide any necessary assistance for the reinstatement of the three trade union leaders in their posts and to ensure that they are adequately compensated for the damages which they have suffered during their two-year detention. The Committee requests the Government to keep it informed of all steps taken in this regard. The Committee also requests the Government to refrain from arresting trade union leaders in the future.

40. In its communication dated 9 June 2008, the Government indicates that the three trade union leaders were released in April 2007 and once again stresses that the cause of their detention was unrelated to their trade union activities. The Government further indicates that it promotes voluntary bilateral dispute settlement methods among the parties by allowing them to freely govern their employment relationship through conciliation and arbitration first. Pursuant to the Labour Proclamation, whenever the conciliation process fails to settle the labour dispute, the matter is brought before the relevant courts. On the basis of the procedure described above, after the release of the three trade union leaders, the National Confederation of Eritrean Workers (NCEW) has taken the responsibility to amicably resolve their cases through conciliation. The conciliation resulted in agreeing on a certain amount of compensation to be awarded and/or on the reinstatement: one of the trade unionists was reinstated at his previous workplace; another is about to be reinstated; the reinstatement of the third trade unionist is not yet assured. As the enterprise where he was previously working no longer functioned, the NCEW is looking into possible options for this worker.
41. *The Committee notes the information provided by the Government with regard to the reinstatement of one trade union leader, future reinstatement of another and continuing conciliation procedure with regard to the third. The Committee notes that these achievements are due to the efforts made by the NCEW to amicably resolve the above cases through conciliation procedures with the employers concerned. The Committee recalls however that it had concluded that the arrests and detention of Messrs Minase*

*Andezion, Tewelde Ghebremedhin and Habtom Weldemicael were linked to their trade union activities and urged the Government to provide the necessary assistance for their reinstatement in their posts and to ensure that they are adequately compensated for the damages which they have suffered during their two-year detention. The Committee therefore requests the Government to make all efforts to ensure that the third trade union leader is also reinstated and that he receives adequate compensation for the damages suffered during his two-year imprisonment. The Committee also requests the Government to refrain from arresting trade union leaders in the future.*

### **Case No. 2292 (United States)**

42. The Committee examined this case – which concerns executive orders which deny federal airport screeners their collective bargaining rights by exempting them from the Federal Service Labor-Management Relations Statute (FSLMRS) – at its November 2006 meeting [343rd Report, paras 705–798]. On that occasion, the Committee reached the following recommendation:

Recalling that priority should be given to collective bargaining as the means to settle disputes arising in connection with the determination of terms and conditions of employment in the public service, the Committee requests the Government to carefully review, in consultation with the workers' organizations concerned, the matters covered within the overall terms and conditions of employment of federal airport screeners which are not directly related to national security issues and to engage in collective bargaining on these matters with the screeners' freely chosen representative. It requests the Government to keep it informed of the measures taken in this regard. The Committee further trusts that all necessary measures will be taken to ensure that the organizational rights of these employees are effectively guaranteed in practice and that they may be represented in respect of their individual grievances by the organizations freely chosen by them.

43. The Government provided information in communications dated 1 February 2007 and 22 April 2008. In its communication dated 1 February 2007, the Government raises some concerns with regard to certain procedural irregularities that it believed resulted in the Committee's reviewing the case without the benefit of all of the relevant facts (this communication had already been brought to the Committee's attention at its meeting in March 2007). According to the Government, the examination by the Committee at its November 2006 meeting, did not take into consideration and in fact barely acknowledged the full factual circumstances relating to the employment of the airport security screeners, now employed as Transportation Security Officers (TSOs) by the Transportation Security Administration (TSA). The Government adds that when, in March 2005, the Committee adjourned the examination of this case and requested additional information from both the Government and the complainant, the Government advised the Office that it intended to submit further observations once it received and reviewed the complainant's supplementary documentation. Its rationale was that this would obviate the need to provide two additional sets of observations. It continued to await further input from the complainant and had every reason to believe that if the Committee decided to proceed to review the case without the benefit of the complainant's supplemental submission, it would be provided with ample time to provide its own additional input. The Government states that it was extremely disappointed that this did not happen. The Government finally indicates that it respects the role of this Committee in upholding the principles of freedom of association as reflected in the ILO Constitution and the ILO Declaration on Fundamental Principles and Rights at Work, and will provide the Committee with a detailed response to its conclusions and recommendations.
44. In its communication dated 22 April 2008, the Government recalls as indicated in Appendix 5 of its initial observations, submitted in December 2004, that the TSA was established immediately following the terrorist attacks of 11 September, 2001, in response

to public demand for measures that would ensure that safety in the skies was given the same priority as safety on the streets and at the borders. Key to the ability to provide protection of the nation's civil aviation system was the creation of a federal workforce of professional civil servants to screen passengers and cargo at the nation's approximately 450 commercial airports.

45. Since the December 2004 submission, the Government has continued to enhance the professional status of the TSO workforce. The TSA made significant changes in the job title, job series and pay levels for screeners. Initially, screeners fell within Government's civil service job series for safety technicians and were paid an entry level salary for that series. More recently, screeners have been reclassified to the position of TSO, within the civil service job series for compliance inspection. This position is within the law enforcement family of job series. Full performance of this position in this series is paid at a higher band level with more expert levels at the two higher band levels. This change has served to improve morale and allowed TSA to compete in attracting highly qualified employees. Significantly, this change also makes the TSOs more competitive in applying for other related law enforcement positions within the Department of Homeland Security (DHS), including the US Border Patrol and the Federal Air Marshal Service. In addition, TSA requires rigorous national security background checks for all TSOs that are equivalent to those required for employees to receive information classified as "secret", a level of security classification held by top government officials.
46. While TSOs do engage in specific tasks within defined parameters (as observed by the Committee in the previous examination of this case), they also perform various tasks requiring discretion as to the methods and means of performing their work. A review of the TSO job description shows that TSOs, in performing their responsibilities – identifying dangerous objects in baggage, cargo and on passengers and preventing those objects from being transported onto aircraft – must bring many skills to bear in fully performing their jobs. This work calls for independent judgement and the exercise of discretion. The Standard Operating Procedures for screening operations also give the TSOs considerable discretion in making decisions on the level and kind of screening.
47. A review of the scope of TSOs' responsibilities throughout a typical day makes this clear. TSOs receive a security intelligence briefing before starting their shifts. TSOs use and monitor sophisticated security systems, including walk-through and hand-held metal detection equipment, X-ray systems, explosive trace detection systems, and explosive detection systems. Working from their experience, their training, the up to date security information they receive at the start of the shift, and the information they obtain from the detection equipment, the TSOs must exercise judgement and discretion as part of their responsibilities with respect to each passenger who approaches the checkpoint. A TSO may decide to clear the passenger and his or her bags for entry into the secured area, or a TSO may decide to refer a passenger or his or her bags for additional screening because something alerts the TSO that the person or baggage may pose a threat. In the course of screening, a TSO must secure unauthorized weapons and hazardous materials, and prevent unauthorized entry to secured areas of the airport and other transportation areas. TSOs must be observant of suspicious behaviour that might require additional scrutiny, either during screening or by law enforcement officials. They must be on the look-out for vulnerabilities that may provide an opening for a terrorist to try to harm the aircraft or any passengers, and respond to security breaches. They must constantly evaluate the screening processes and procedures with a view to suggesting improvements. They may perform maintenance of complicated screening equipment. Clearly, all of these duties relate to the TSOs' national security function.
48. The day-to-day duties of TSOs could be viewed as routine and mechanical only by an observer who does not understand the complex interplay of intelligence, sophisticated

technology and careful observation of passenger behaviour that are involved in security screening. A review of a particular shift during which no terrorist act occurred on a TSO's watch should not lead to the conclusion that a TSO is only exercising specific tasks within clearly defined parameters. There are several layers of security that work together to provide a security net protecting passengers and aircraft. TSOs must be prepared to react quickly and appropriately to potential threats to security, which, unfortunately, do occur. At the agency level, there is a related need to respond quickly to newly obtained intelligence regarding the security landscape, which may be illustrated by a recent emergency situation. When British authorities exposed a plot to blow up several US aircraft using an innovative method of constructing an improvised explosive device, TSA rewrote its security directives overnight and was able to implement new passenger screening requirements immediately. This required TSA to rapidly inform a security workforce of approximately 43,000, including the TSOs, and train that workforce in a matter of hours on new procedures at the security checkpoints. The TSOs were instrumental in effecting this major change in US security procedures. The Government attaches to its reply a chart that shows the items that have been confiscated by TSOs from passengers from 2005–07.

49. Collective bargaining requirements, including potentially bargaining with a union over aspects of implementation of technology, deployment of personnel, the means and methods of work, or the impact and implementation of changes in the workplace, would have greatly impaired TSA's ability to make rapid changes in response to a threat such as the one described above. The Government's action should not suggest, as the complainant argues, that the Government views collective bargaining as a security threat. Rather the notification and negotiation process entailed in collective bargaining is incompatible with the need to adapt and respond to terrorist threats without delay. Furthermore, in the context of communications between TSA and the complainant AFGE, the union expressed its view that personnel decisions be based on seniority. This is also incompatible with the national security requirement, embodied in the Aviation and Transportation Security Act (ATSA), for retention based on demonstrated performance and subject matter expertise. TSOs also accomplish other security missions both at the airport and with respect to other transportation modes. TSOs are designated as emergency essential personnel who may be required to stay and perform their duties in emergency situations, including national and local emergencies and extreme weather. For example, immediately after Hurricane Katrina, TSA deployed TSOs to New Orleans, Louisiana, to assist in reopening the New Orleans airport and maintaining security while hundreds of sick and displaced persons were airlifted out of the city. TSOs accomplished functions ranging from collecting unauthorized weapons and preparing people for emergency evacuation transport, to cleaning up the airport and landing strips, and collecting identification of displaced persons. Without the flexibility to deploy TSOs from various locations immediately, emergency air transportation out of the New Orleans area would have been significantly hampered, which would have worsened an already catastrophic situation. Further, following the Madrid train bombings, TSA stepped up its efforts to enhance security on rail and mass transit systems nationwide by creating and deploying Visual Intermodal Protection and Response (VIPR) teams. Comprised of federal air marshals, surface transportation security inspectors, TSOs, behaviour detection officers and explosives detection canine teams, VIPR teams over the past two years have augmented security at key transportation facilities in urban areas around the country. VIPR teams work with local security and law enforcement officials to supplement existing security resources, provide deterrent presence and detection capabilities, and introduce an element of unpredictability to disrupt potential terrorist planning activities. TSOs may also provide security screening during significant public events designated by the Government as National Special Security Events. These types of missions, consisting of continuously changing circumstances, are also incompatible with collective bargaining.

- 50.** The Government believes that the Committee's conclusions and recommendations do not fully recognize the extraordinary impact that collective bargaining would have on the day-to-day security operations of TSA. The administrator of TSA is responsible for managing a complicated security system in place at more than 450 commercial airports, screening approximately 2 million passengers a day, on thousands of commercial flights. The necessity to react to changing air carrier schedules, weather disruptions, and special events that focus large numbers of passengers at particular airports and the necessity to provide for screening, not only of passengers and their checked baggage, but of air cargo, airport employees, and contractors working at airports, requires the same flexibility in scheduling and duties that are also required during recognized emergencies. Simply put, collective bargaining is incompatible with the need to flexibly manage this workforce to effectively accomplish TSA's mission.
- 51.** The Committee questioned whether the TSOs may appropriately be considered public servants engaged in the administration of the State, suggesting instead that they might be analogous to other persons employed by the Government, by public undertakings, or autonomous public institutions. Clearly, the TSA is neither a public undertaking nor an autonomous institution. It is a subdivision of the DHS, a cabinet-level agency, which comprises many other agencies that address border and other national security and emergency response. The TSOs are all civil service employees of DHS. Accordingly, they are civil servants employed by a government ministry.
- 52.** The Government is troubled that the Committee has suggested that the TSOs are not public servants engaged in the administration of the State because they are "clearly not making national policy that may affect security". This appears to be a new and unduly restrictive narrowing of the Committee's long-held understanding of this concept, which the Committee has traditionally described as persons who by their functions in Government ministries or other comparable bodies are "directly engaged in the administration of the state", or who are acting as "supporting elements" in these activities.
- 53.** In fact, the mission of TSA relates to one of every nation's primary responsibilities: the protection of its citizens, borders, and critical infrastructure. The TSOs are the first line of defence in guarding and protecting US commercial flights from terrorist attacks of an unforeseen nature and the guarantors of security in air travel. Their duties are directly related to the protection and preservation of the military, economic and productive strength of the United States. Even Conventions Nos 87 and 98 recognize that the principle of the right to engage in collective bargaining is tempered by the recognition that states may determine for themselves the degree to which military and police may engage in collective bargaining. Article 9 (1) of Convention No. 87 and Article 5 (1) of Convention No. 98 are identically worded and provide that "The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws and regulations". The TSOs' function is analogous to that of the police and armed forces and, as discussed above, the TSO job classification falls in the law enforcement family of job series. While TSOs fall within the exception for persons engaged in the administration of State, even if this exception did not exist, TSOs must be considered as belonging to the category of persons tasked with the job of securing the nation's safety. As such, the Government believes that it may appropriately determine for itself the extent to which the right to engage in collective bargaining should be a part of the TSOs' terms and conditions of work.
- 54.** The Committee expressed the concern that the determination of the TSA administrator is not reviewable by the judicial branch of the Government. However, the administrator's authority to exempt TSOs from collective bargaining has been judicially reviewed. [See *American Federation of Government Employees, AFL-CIO v. James M. Loy*, 367 F.3d 932 (D.C. Cir. 2004).]

55. A question may arise as to why privately employed contract screeners authorized under 49 USC § 44919 (Pilot Program) and § 44920 (Screening Opt-Out Program) are authorized to engage in collective bargaining while federal government TSOs are not. When the ATSA was passed, Congress gave TSA the statutory authority to exempt federal Government TSOs from collective bargaining on the grounds of national security, which TSA properly exercised in January 2003. This authority has been recognized and upheld by the US judicial system. [*American Federation of Government Employees, AFL-CIO, v. James M. Loy*, 367 F.3d 932 (D.C. Cir. 2004)]. However, Congress did not give TSA the statutory authority to exempt contract screeners from collective bargaining. [Firstline Transportation Security, Inc. and International Union, Security, Police and Fire Professionals, 347 N.L.R.B. No. 40 (28 June, 2006).]
56. To understand this difference in treatment, it is necessary to remember the circumstances under which the statute creating the TSA was passed. In responding to the crisis of confidence in air travel that occurred in the aftermath of the attacks of 11 September 2001, the question of whether security screeners would be a professional force of federal employees or whether they would be employed by government contractors was hotly contested. The belief that a professional force of federal employees qualified as specified by law would best provide safety in air travel prevailed. However, a compromise measure for those who believed that these services should be provided by the private sector, was included in the form of the Pilot Program and the Screening Opt-out Program. Under the Pilot Program, TSA selected five airports from more than 450 commercial airports nationwide where the screening of passengers and baggage would be performed by qualified private screening companies under contract with TSA. This programme is vastly different from the system that was in place prior to the 11 September attacks. Instead of a purely private sector model, the Pilot Program is actually a hybrid Government-private model in which the private sector contractor must not only comply with ATSA's strict standards, but where the TSA is directly involved in the day-to-day administration of the contracts and has direct operational authority and control over security activities in these airports.
57. As noted in Firstline Transportation Security, TSA still has the authority to completely control the security requirements of the functions performed by the contractor [347 N.L.R.B. No. 40, slip op. at 9]. It is important to understand that the security requirements of TSA are not negotiable, including those changes that must be immediately implemented due to a potential threat to national security. Under these contracts, the contractor is solely responsible for managing its own workforce and meeting contract requirements established by TSA for providing screening services. If the contractor is not complying with the strict operational requirements demanded by TSA, TSA may immediately terminate the contract for failure to comply. Accordingly, should the collective bargaining process create a circumstance in which the contractor would not be able to meet TSA's operational requirements and thereby fail to meet its contractual obligations, TSA would be authorized to terminate the contract.
58. The Government also refers to the issue of TSA workplace initiatives. Even though the right to engage in collective bargaining is not included in the terms and conditions of the TSOs' employment, TSA has undertaken many initiatives to create a hospitable and supportive working environment. As TSA has matured as an organization, TSA has proactively taken steps to improve morale, reduce injuries and attrition, and address workplace quality issues in general. TSA's goal to be a responsible employer of choice is based on the philosophy that the engagement of and direct communication between front-line employees, management, and leadership will bring about a high-performing agency, characterized by high morale, low attrition, and sharing of best practices. The Government provides an update on various programmes that TSA has instituted that provide TSOs with due process and the ability to raise workplace issues for prompt resolution.

- 59.** The Government refers to a Model Workplace and Integrated Conflict Management System and National Advisory Councils (NAC). The NAC were created to further a regular dialogue between leadership and TSA's field-deployed workforce, including the uniformed TSO population. Two National Advisory Councils were established in January 2006. One advisory council is comprised of TSOs, Lead TSOs, and Supervisory TSOs, and the other of Assistant Federal Security Directors (AFSDs) for screening. These councils meet together quarterly to raise and discuss issues that affect the TSO work environment, morale, and performance with TSA leadership. Members of the two advisory councils regularly work together to consider and make recommendations with respect to employee concerns and performance, further strengthening the communication between the TSO workforce and management. These National Advisory Councils provide the TSO workforce with direct access to the administrator and senior management on all issues concerning security and workforce conditions and have given rise to a number of initiatives relating to the workplace climate and conditions of the TSOs, including those related to a Safety and Wellness Culture, a Career Progression Program, Alternative Resolutions to Conflict (ARC), a TSO Bonus Program and Pay for Performance, the Federal Employees Health Benefits (FEHB) pilot program (to allow part-time TSOs to obtain more affordable health benefits), the Office of the Ombudsman, and an Idea Factory.
- 60.** The Government also refers to the Disciplinary Review Board (DRB). The DRB provides the TSO workforce with the right to appeal adverse personnel actions, such as a suspension for more than 14 days or removal, to the DRB. Union representatives may act as personal representatives for individuals who appeal to this board. TSA was not required to implement such an appeals body, but wanted to provide the TSO workforce with a fair, transparent and prompt appeals process. The DRB incorporates due process procedures similar to those of the Merit Systems Protection Board (MSPB). In addition, the DRB provides a more streamlined and rapid process than the MSPB.
- 61.** In conclusion, the Government indicates that the foregoing observations, relating to the employment of TSOs as well as more current information relating to TSA's workplace initiatives, demonstrate that TSA is in full conformity with the fundamental ILO principles of freedom of association and employee participation in matters relating to their employment. TSOs enjoy the right to association and to organize, and may form and join unions. TSA has facilitated this right by establishing procedures to allow members of unions to have their dues automatically deducted from their pay checks, and by allowing union members to be represented by their union in grievance procedures. US law provides, consistent with ILO principles, that the Administrator of TSA may determine the terms and conditions of employment of the TSOs. Based upon considerations of national security, the Administrator of TSA appropriately determined that the notification and negotiation requirements entailed in collective bargaining are incompatible with TSA's need to rapidly adapt and respond to security threats. TSA must use security expertise and performance as the basis for personnel decisions in order to successfully respond to evolving threats. Accordingly, collective bargaining was not included as part of the TSOs' terms and conditions of employment.
- 62.** These observations should provide a fuller understanding of the Government's rationale for determining that TSOs are a category of employee for whom there is a valid exception to the principle of the right to engage in collective bargaining. Moreover, TSOs clearly fall within the category of persons for whom the availability of collective bargaining is a matter of national law. As noted above, TSA has initiated a variety of innovative programs which have both provided TSOs with the ability to address their workplace issues and served to improve their working environment.

63. *The Committee takes due note of the detailed information provided by the Government concerning the work of Transport Security Officers (TSOs) and the various workplace initiatives that have been undertaken. The Committee notes with interest that according to the Government, the TSA has established new procedures to allow union members to be represented by their union in grievance proceedings, as requested by the Committee.*
64. *The Committee also notes that the Government maintains its position that TSOs are public servants engaged in the administration of the State because the TSA is a subdivision of the Department of Homeland Security, a cabinet-level agency which addresses border and other national security and emergency responses. In this regard, the Committee recalls from the previous examination of this case its concern relating to the use of an ever-enlarged definition of work connected to national security to exclude employees that are further and further away from the type of employee considered to be “engaged in the administration of the State” [343<sup>rd</sup> Report, para. 794]. While the Committee does consider that the work of TSOs, as the tasks of numerous other workers across the country that affect or implement in one form or another the measures adopted for national security reasons, relate without a doubt to questions of security, it cannot consider, in keeping with its previous recommendations, that the clearly non-policy making aspects of those working in an enlarged security administration can be assimilated without limit into a category of workers whose collective bargaining rights can be denied.*
65. *The Committee further notes in this respect, the Government’s argument that the tasks of federal airport screeners – now transportation security officers TSOs – are incompatible with the right to engage in collective bargaining because of the important security component of these tasks. The Government considers these aspects as non negotiable and emphasizes that collective bargaining requirements, including potentially bargaining with a union over aspects of implementation of technology, deployment of personnel, the means and methods of work, or the impact and implementation of changes in the workplace, would have greatly impaired TSA’s ability to make rapid changes in response to a threat. The Committee has however addressed the security concerns in its previous examination of this case and in this light focused its recommendation on collective bargaining over the terms and conditions of employment of TSOs which are not directly related to national security issues, and which would include issues such as wages, general hours of work, etc. While taking due note of the various programmes that the TSA has instituted to provide TSOs with due process and the ability to raise workplace issues for prompt resolution, the Committee observes that these do not constitute substitutes for the right to engage in collective bargaining.*
66. *In light of the above, the Committee once again urges the Government to carefully review, in consultation with the workers’ organizations concerned, the matters covered within the overall terms and conditions of employment of TSOs which are not directly related to national security issues so as to engage in collective bargaining on these matters with the screeners’ freely chosen representative. The Committee requests the Government to keep it informed in this respect.*

### **Case No. 2460 (United States)**

67. The Committee last examined this case at its March 2007 meeting [see 344th Report, paras 940–999] and on that occasion it formulated the following recommendations:

The Committee requests the Government to promote the establishment of a collective bargaining framework in the public sector in North Carolina – with the participation of representatives of the State and local administration and public employees’ trade unions, and the technical assistance of the Office if so desired – and to take steps aimed at bringing the state legislation, in particular, through the repeal of NCGS sections 95–98, into conformity

with freedom of association principles, thus ensuring effective recognition of the right of collective bargaining throughout the country's territory. The Committee requests to be kept informed of developments in this respect.

68. In its communication dated 25 February 2008, the Government indicates that, in January 2007, state officials – including members of the Governor's staff, state budget personnel experts and officials from the North Carolina Office of State Personnel – held meetings with the North Carolina Police Benevolent Association, the North Carolina Association of Educators, the UE Local 150 and the State Employees' Association of North Carolina. This meeting, characterized by UE Local 150 as historic, stemmed from the Governor's 8 August 2006 Election Order 105, which directed all state institutions, departments, etc., to permit access to representatives of employees' organizations for the purposes of membership recruitment and consultation, as well as to meet with the Governor's representatives each year before the legislature convenes to discuss issues of mutual concern. The UE Local 150 used the 2007 meeting to urge the Governor not to veto any bill in the upcoming legislative session that would repeal NCGS sections 95–98.
69. The legislation to repeal NCGS sections 95–98 was introduced in the 2007–08 session of both houses of the North Carolina General Assembly. On 27 March 2007, Senate Bill 1543, “An Act providing for contracts between public employers and labour organizations representing public employees for the purpose of collective bargaining and establishing the public employee relations commission to ensure fair dealing between public employers and labour organizations” was introduced in the North Carolina Senate. In addition to the repeal of NCGS sections 95–98, the Bill also proposed a framework within which public employee and employer representatives would be allowed to meet and confer on questions of wages, hours and other conditions of employment, and to enter into appropriate contracts. The Bill was referred to the Committee on Rules and Operations of the Senate. No further action in this respect has been taken.
70. On 18 April 2007, House Bill 1583, “An Act to restore contract rights to state and local entities”, was introduced in the North Carolina House of Representatives. Like Senate Bill 1543, House Bill 1583 proposed to repeal NCGS sections 95–98. It also proposed the repeal of a statutory provision that prohibits employee payroll deductions of dues to employee associations that engage in collective bargaining. The Committee on the Judiciary reported the Bill favourably and referred it to the Committee on Appropriations as accomplishment for which the 55,000-member State Employees' Association of North Carolina has taken credit. Neither Senate Bill 1543 nor House Bill 1583 has been passed by the full Senate or the House of Representatives.
71. The Government concludes by stating that the United States remains firmly committed to the principles and rights set forth in the ILO Constitution and the Declaration of Philadelphia. North Carolina's public employees and their unions and employee associations remain free to exercise the right to freedom of association and the right to participate in the democratic processes at the local, state and federal levels. The United States will continue to report on pertinent development to the Committee.
72. *The Committee notes the information provided by the Government. It welcomes and encourages the legislative initiatives taken in the North Carolina Senate and House aimed at repealing NCGS sections 95–98 and thereby removing the collective bargaining ban imposed on state and local public employees. The Committee requests the Government to continue promoting the establishment of a collective bargaining framework in the public sector in North Carolina and effective recognition of the right of collective bargaining – with the participation of representatives of the state and local administration and public employees' trade unions. The Committee requests to be kept informed of developments in this respect.*

**Case No. 2502 (Greece)**

73. The Committee recalls that this case concerns Act No. 3371/2005 which enables employers/banks to unilaterally denounce collective agreements concerning the supplementary pension funds of bank employees, and then provides that the funds in question will be obligatorily integrated into a single public fund. The Committee last examined this case at its May–June 2008 meeting [350th Report, approved by the Governing Body at its 302nd Session, paras 90–95]. On that occasion, the Committee requested the Government: (i) to indicate the measures taken pursuant to the decision of the Single-Member Court of First Instance of Athens which had found that the unilateral denunciation of collective agreements was invalid, that the obligatory transfer of assets from the supplementary pension fund to the public funds was contrary to articles 4(1) and (2) and 5(1) of the Constitution, and that the legislative intervention into this matter was not justified by reasons of general public or social interest (in a lawsuit filed against Emporiki bank); to keep it informed of the outcome of other lawsuits (filed by the Mutual Assistance Fund of the personnel of GENIKI BANK and this bank’s employees’ association); to communicate the forthcoming decision of the Court of Cassation as soon as it is handed down; to keep the Committee informed of any steps taken by the Human Rights Ombudsperson; (ii) to keep the Committee informed of any steps taken to amend section 2, paragraph 3, of Act No. 1876/1990 so as to ensure that supplementary pension schemes may be the subject of collective bargaining; (iii) to refrain from any further legislative interference so as to allow for the issue of the future of the supplementary pension funds of bank employees and their assets to be determined by mutual agreement of the parties; (iv) finally, the Committee once again invited the Government to host full and frank consultations on this matter with the full participation of both parties, and to amend Act No. 3371/2005 to reflect their eventual agreement.
74. The Government provided its observations in a communication dated 2 June 2008. The Government indicates that the abovementioned decision of the Single-Member Court of First Instance of Athens cannot deal with the issue of constitutionality of the provisions of article 26 of Act No. 3455/2006, concerning the integration of employees and pensioners of the supplementary pension fund into the (public) Unified Pension Fund of Bank Employees (ETAT), and of article 62, paragraph 6, of Act No. 3371/2005, respecting the undertaking by ETAT of the management of supplementary pension funds of bank employees. For this reason, the temporary enforcement of the above decision is not possible nor is the decision capable of having legal effect, until the relevant provisions are declared unconstitutional by a competent court; the application, therefore, of the provisions of Act No. 3455/2008 cannot be affected. It is expected that the Plenary of the Council of State will try the appeal lodged by the OTOE and other bank employee unions relating to the constitutionality of Presidential Decree No. 209/2006 (*Official Gazette* 209A) on “Determination of terms and conditions for the management of and dealing with issues relating to Supplementary Pension Funds of bank employees by the Unified Pension Fund of Bank Employees (ETAT)”, which has been scheduled for 6 June 2008. By means of the decision to be made, the constitutionality of the general provisions of Act No. 3371/2005 and, by extension, of Act No. 3455/2006 and of other acts respecting integration of bank employees into ETAT will also be considered. Finally, the European Commission has accepted that, by means of the regulations provided for in Act No. 3371/2005, the public and general character of social insurance is expanded to bank employees (article 22, paragraph 5, of the Constitution of Greece), equal treatment of all employees, including bank employees, is safeguarded, the already acquired social insurance rights are ensured and terms of parity among banks are established.
75. *The Committee notes from the Government’s communication that the Single-Member Court of First Instance of Athens did not have competence to rule on the constitutionality of article 26 of Act No. 3455/2006, concerning the integration of employees and*

*pensioners of a supplementary pension fund into the (public) ETAT, and of article 62, paragraph 6, of Act No. 3371/2005, respecting the undertaking by ETAT of the management of supplementary pension funds of bank employees; a decision on this subject was awaited from the plenary of the Council of State which would (at the time of the communication) hold a hearing on this matter on 6 June 2008. The Committee, noting with regret that this issue has been pending since 2005 and any further delay in issuing a court decision is likely to make the resolution of the matter extremely difficult, requests the Government to keep it informed of the decision of the Council of State as soon as it is handed down and expresses the firm expectation that such decision will be issued without further delay.*

76. *Recalling that this case concerns allegations which go beyond social security legislation as such, but rather touch upon the Government's actions to unilaterally modify collective agreements concerning pension funds, the Committee notes that the Government does not provide any new information on the hosting of further consultations with the full participation of both parties so as to amend Act No. 3371/2005, and recalls that a negotiated solution is always preferable to judicial proceedings or legislative intervention. The Committee once again strongly urges the Government to hold further full and frank consultations on the future of the supplementary pension funds of bank employees and of their assets so that these matters are determined by mutual agreement of the parties to the collective agreements by which the supplementary pension funds were set up, and to which only they contributed, and to amend Act No. 3371/2005 to reflect the agreement of the parties.*
77. *The Committee finally notes with regret that the Government does not provide further information on steps taken to amend section 2, paragraph 3, of Act No. 1876/1990 so as to ensure that supplementary pension schemes may be the subject of collective bargaining. The Committee refers this legislative aspect of the case to the Committee of Experts on the Application of Conventions and Recommendations.*

### **Case No. 2390 (Guatemala)**

78. At its November 2007 session, the Committee made the following recommendations on the issues still pending [see 348th Report, paras 110–112]:

The Committee observes that the two Horticultura de Salamá trade unionists whose reinstatement was ordered by the courts are currently abroad. The Committee requests the complainant organization to inform these trade unionists of the court decision concerning their reinstatement so that they can act on it as they see fit.

As to the allegations concerning dismissals and anti-union acts by the NB Guatemala company, the Committee notes the decision of the Human Rights Procurator in which he considers that no violation of freedom of association has taken place. The Committee invites the complainant organization to provide its comments in that regard if it so wishes.

Lastly, the Committee regrets that the Government has not sent the information requested on the allegations concerning INTECAP (acts of interference, pressure and threats against workers to force them to leave the trade union). Therefore, the Committee reiterates its earlier recommendation, and again requests the Government to take the necessary measures to ensure that an independent inquiry is carried out into the alleged facts and to keep it informed in that regard, as well as of the result of the tripartite committee's attempts at conciliation.

79. In its communication dated 1 April 2008, the Government states that it has submitted the pending issues to the Tripartite Committee on International Labour Affairs in order to find a solution to those issues. Several meetings have already been held and information will be provided on the agreements reached by the parties.

80. *The Committee takes note of this information and requests the Government to keep it informed in this regard. The Committee points out that the pending issues date back to 2004 and hopes that they will be resolved soon.*

### **Case No. 2580 (Guatemala)**

81. At its March 2008 session, the Committee made the following recommendation regarding the transfer of the Executive Committee members of the Union of Workers of the Criminal Investigation Department (SITRADICMP) [see 349th Report, para. 871]:

The Committee requests the Government, in the absence of any information to the contrary, to adopt the necessary measures to cancel the transfer of the Executive Committee members and to ensure that the union and its members can exercise their legitimate activities without being subjected to intimidation and persecution. The Committee requests the Government to keep it informed in this regard.

82. In its communication dated 28 April 2008, the Government states that the Attorney-General and the head of the personnel department of the Attorney-General's Office, by an agreement dated 23 July 2007, cancelled the transfer of the workers, Mr Javier de León Salazar, Mr José Alejandro Reyes Canales and Mr Axel Vinicio Lemus Figueroa, as a result of their having objected in court to their transfers, which had been confirmed by the Council of the Attorney-General's Office. The agreement was reached pursuant to a court order issued against the Council of the Attorney-General's Office, in strict compliance with the rule of law and the right of the interested parties to appeal administrative acts using the remedies and proceedings available to them under the law, and in strict compliance with the recommendation made by the Committee on Freedom of Association.

83. *The Committee notes this information with interest.*

### **Case No. 2512 (India)**

84. The Committee examined this case at its November 2007 meeting [see 348th Report, paras 838–906] and on that occasion it formulated the following recommendations:

- (a) The Committee urges the Government to conduct an independent inquiry without delay into all alleged acts of anti-union discrimination suffered by the officials and members of the MRF United Workers' Union and, if these allegations are found to be true, to provide redress for the damages suffered. Specifically, the Committee requests the Government to ensure that:
- all workers dismissed for their trade union activities are reinstated in service with all consequent benefits, including full payment of lost wages subject to substantive evidence and/or information warranting the contrary;
  - all workers suspended for their trade union activities are allowed to resume work and are granted all consequent benefits, including arrears of wages;
  - all pending disciplinary proceedings initiated on the grounds of trade union membership and activities are dropped;
  - false criminal charges against trade union members are dropped and that the concerned workers are compensated;
  - trade union members transferred because of their membership or union activities are allowed to return to their previous workplaces.

The Committee further requests the Government to take the necessary measures to ensure that the members of the complainant organization are not discriminated against in the matter of wages and other benefits and that they are not engaged in the pre-compounding chemical section of the Banbury area of the Arakonam factory in a

discriminatory manner. The Committee requests the Government to keep it informed of the outcome of the inquiries carried out.

- (b) The Committee requests the labour and judicial authorities, in order to avoid a denial of justice, to pronounce on the dismissals without delay and emphasizes that any further undue delay in the proceedings could in itself justify the reinstatement of these persons in their posts.
- (c) The Committee urges the Government to conduct an independent inquiry without delay into all allegations of interference by the factory management into trade union internal affairs and, if the allegations of the complainant are found to be true, to take all necessary steps to ensure that there are sufficiently dissuasive sanctions imposed so that the management refrains from any further such acts so as to safeguard the independence of any workers' organization at the factory and, in particular, so as to ensure that the complainant organization may carry out its activities freely. It requests the Government to keep it informed in this regard.
- (d) The Committee requests the Government to actively consider, in full and frank consultations with the social partners, legislative provisions expressly sanctioning violations of trade union rights and providing for sufficiently dissuasive sanctions against acts of anti-union discrimination and interference in trade union internal affairs.
- (e) The Committee urges the Government, in consultation with the social partners, to amend the relevant provisions of the Industrial Disputes Act so as to ensure that suspended workers and trade unions may approach the court directly, without being referred by the State Government.
- (f) The Committee requests the Government to take appropriate measures to obtain the employer's recognition of the MRF United Workers' Union for collective bargaining purposes. The Committee requests the Government to keep it informed in this respect.
- (g) The Committee requests the Government to consider laying down objective rules for the designation of the most representative union for collective bargaining purposes, when it is not clear by which union the workers wish to be represented. It requests the Government to keep it informed in this regard.
- (h) The Committee requests the Government to solicit information from the employers' organizations concerned, as well as those of the enterprise concerned, with a view to having at its disposal their views on the questions at issue.

**85.** In its communication dated 6 February 2008, the MRF United Workers' Union submits that it has made various representations to the central and the Tamil Nadu governments, as well as to the employer, seeking implementation of the Committee's recommendations, to no avail. The complainant alleges that the management of the Arakonam factory of MRF Limited continues to victimize its members by unjust issue of warning letters and show cause notices on false grounds. The complainant provides a list of 12 workers who received such letters between August 2007 and January 2008. Furthermore, on 24 December 2007, the management of the factory issued a written notice to the attention of all workers of the enterprise indicating that the recommendations of the ILO are not court orders and do not carry much significance (a copy of the notice is submitted by the complainant).

**86.** The complainant further alleges that on 1 February 2008, at the behest of the enterprise management, the MRF Arakonam Workers' Welfare Union, its puppet union, lodged a false complaint at the Arakonam Taluk Police Station against three office bearers and ten members of the complainant organization alleging that they had prevented workers from going to the factory to work first shift (7 a.m. to 3 p.m). According to the MRF United Workers' Union, the false complaint was lodged against its members in retaliation following the distribution near the gate of the factory of leaflets informing of the proceedings at the Tamil Nadu Legislative Assembly on 30 January 2008 where the issue of difficulties faced by the MRF workers was raised. At that time, office bearers of the MRF Arakonam Workers' Welfare Union threatened the activists of the complainant

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organization, used offensive language and attempted to attack them with soda bottles. In this regard, a complaint was lodged at the Arakonam Taluk Police Station.

87. Finally, in the same communication, the complainant submits that it came to its knowledge that the management of the enterprise was planning to enter into a settlement with the MRF Arakonam Workers' Welfare Union, ignoring the complainant union, genuinely representative of the factory workers.
88. By a communication dated 1 October 2008, the complainant reiterates that the Government has failed to implement the Committee's recommendations and submits additional information in this respect.
89. In its communication dated 28 April 2008, the Government indicates that this case falls under the jurisdiction of the state government of Tamil Nadu. The observations of the Committee were therefore sent to the government of Tamil Nadu for its comments, on the basis of which, the Government submits the following information.
90. The government of Tamil Nadu established a three-member committee, with the District Collector as its chairperson, one representative from the office of the Joint Commissioner of Labour and one representative from the office of the Joint Chief Inspector of Factories, to conduct an in-depth inquiry into all alleged acts of anti-union discrimination suffered by the officials and members of the complainant trade union.
91. With regard to the dismissals, the Government indicates that 26 cases are currently pending before the Labour Court for adjudication. Although the judiciary is an independent authority, the government of Tamil Nadu had nevertheless written a letter to the High Court on 6 March 2008 requesting speedy processing of the pending cases. The Government transmits a copy of the communication in which it cites recommendation (b) of the Committee and lists the workers concerned.
92. With regard to the cases of suspension pending inquiry, 28 cases have ended in dismissal and are also pending before the Labour Court. The government of Tamil Nadu has requested the High Court to process these cases speedily. In nine cases, suspension has been inflicted as punishment. There have been no further proceedings against the order of suspension by way of raising a dispute under the Industrial Disputes Act. Had the union challenged the punishment awarded under the Industrial Disputes Act, the Government would have intervened in the matter. Since no industrial dispute has been raised by the union challenging the orders, there is no legal action pending with the Government.
93. With regard to dropping false criminal charges, according to the management, one case has ended in acquittal and another was not pursued.
94. With regard to the issue of transfer of trade union members, according to the management, there have been job changes within the department and interdepartmentally, but there have been no transfers from unit to unit. The complainant trade union has not filed any industrial dispute challenging mala fides transfers. However, the issue of transfers has been referred by the Government for adjudication.
95. The committee established by the Government in March 2008 has been requested to take the necessary action to hold inquiries into the allegation of engagement of members of the complainant trade union in the pre-compounding chemical section of the Banbury area of the Arakonam factory in a discriminatory manner and into allegations of interference by the factory management into trade union internal affairs (recommendation (c)) and to submit its report to the Government within two months.

96. Recommendation (d). The Government indicates that the Commissioner of Labour had a meeting with the enterprise management and advised it not to indulge in anti-union discrimination.
97. Recommendation (e). According to the Government, industrial disputes are conciliated and adjudicated in accordance with the Industrial Disputes Act. The legislative proposals are initially discussed in inter-ministerial meetings. The legislative amendments are also discussed with the social partners in various forums. Before taking a final decision on the matter, the suggestions and views of the social partners are considered. Amendments to the state legislation have to be deliberated before the State Labour Advisory Board, a tripartite consultative body.
98. Recommendations (f) and (g). The Government refers to the procedure laid down under the Code of Discipline to determine whether an organization has the capacity to be the sole representative body for collective bargaining purposes. The State Evaluation and Implementation Committee makes an appropriate decision following a presentation of a plea for recognition by a petitioner union.
99. Recommendation (h). According to the information provided by the MRF management, the MRF United Workers' Union has only 114 members out of 1,364 workers. It is a minority union caught up in an inter-union rivalry. This union tarnishes the image and reputation of the company and disturbs industrial harmony. This opinion is shared by the MRF Arakonam Workers' Welfare Union.
100. *The Committee notes the information provided by the Government and the complainant's new allegations. The Committee welcomes the steps taken by the Tamil Nadu government to implement its recommendations, including sending a communication to the High Court requesting a speedy process of cases of alleged anti-union dismissals, meeting of the Commissioner of Labour with the enterprise management and advising it not to indulge in anti-union discrimination, and the establishment of a committee to examine the alleged acts of anti-union discrimination and interference in trade union affairs at the Arakonam factory. However, the Committee notes with concern the new allegations of the continuing anti-union discrimination and interference, which it expects will also be examined by the committee, and requests the Government to provide its observations thereon. The Committee further expects that if the committee concludes that these allegations are substantiated, sufficiently dissuasive sanctions will be imposed so as to ensure that the management refrains from any further such acts and that the complainant organization may carry out its activities freely. The Committee requests the Government to keep it informed in this respect and to submit a copy of the committee's report. The Committee further requests the Government to keep it informed of the outcome of the court cases concerning the dismissed workers.*
101. *The Committee notes the explanation provided by the Government with regard to the orders of suspension which, according to the Government, were inflicted as punishment. The Government argues that the failure by the workers to challenge the said orders under the Industrial Disputes Act prevented it from intervening in the matter. In this respect, the Committee once again recalls that where cases of alleged anti-union discrimination are involved, the competent authorities dealing with labour issues should begin an inquiry immediately and take suitable measures to remedy any effects of anti-union discrimination brought to their attention [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 835]. The Committee therefore requests the Government to ensure that an independent investigation into the nine cases of suspension is carried out without delay and if it is found that the workers were suspended due to their legitimate trade union activities, to fully compensate the workers concerned*

for the damages suffered. The Committee requests the Government to keep it informed in this respect.

- 102.** *With regard to the allegation of criminal charges brought against members and office bearers of the complainant organization, while the Government refers to two cases (one of which was not pursued and the other ended in acquittal), the Committee recalls from the previous examination of this case that the MRF United Workers' Union alleged six such cases. The Committee further notes a new allegation of allegedly false charges being filed. In these circumstances, the Committee requests the complainant and the Government to provide information on all pending charges against members and office bearers of the MRF United Workers' Union.*
- 103.** *The Committee further requests the Government to keep it informed of the outcome of the case concerning the alleged transfers of trade union members, which have been referred by the Government for adjudication.*
- 104.** *The Committee recalls that it had previously requested the Government to take the necessary measures so as to bring the legislation in the country into conformity with freedom of association principles. In particular, it requested the Government to actively consider, in full and frank consultations with the social partners:*
- *adoption of the legislative provisions expressly sanctioning violation of trade union rights and providing for sufficiently dissuasive sanctions against acts of anti-union discrimination;*
  - *amendment of the relevant provisions of the Industrial Disputes Act so as to ensure that suspended workers and trade unions may approach the court directly, without being referred by the state government; and*
  - *laying down objective rules for the designation of the most representative union of collective bargaining purposes, when it is not clear by which union the workers wish to be represented.*
- 105.** *The Committee notes that the Government limits itself to providing information on the general procedure for legislative changes. Emphasizing that the membership of a State in the International Labour Organization carries with it the obligation to promote respect for trade union rights in fact and in law, the Committee requests the Government to provide information on any concrete envisaged legislative changes pursuant to the previous request of the Committee. The Committee expects that the necessary measures will be taken so as to bring the legislation into full conformity with freedom of association principles. While noting the Government's indication that the Code of Discipline provides for the procedure for determining representative capacity of an organization, the Committee recalls from the previous examination of the case that the decisions of the State Evaluation and Implementation Committee are of a recommendatory nature. The Committee further once again requests the Government to take appropriate measures to obtain the employer's recognition of the MRF United Workers' Union for collective bargaining purposes and to keep it informed in this respect.*
- 106.** *The Committee notes the recent complainant's communication. It requests the Government to provide its observations on the allegations contained therein.*

### **Case No. 2304 (Japan)**

- 107.** The Committee last examined this case, which concerns the arrest and detention of trade union officers and members, massive searches of trade union offices and residences of

trade union leaders, and the confiscation of trade union property, at its June 2007 meeting. The Committee noted that the compensation claim against the Government brought by the Japan Railway Welfare Association (JRWA) had been partially recognized and partially dismissed by the Tokyo District Court, and that the action brought against the Government by the complainant, the Japan Confederation of Railway Workers' Unions (JRU) for compensation based on state liability had been dismissed by the same court. Further noting that both cases were now before the Tokyo High Court on appeal, the Committee requested the Government to transmit copies of the High Court's decisions once they were handed down; it also requested the Government to provide its observations on the complainant's allegations concerning a 2005 search in which over 2,000 basic union documents were seized and still yet to be returned [see 346th Report, paras 101–108].

- 108.** In its communication of 22 May 2007, the complainant indicates that, the day after the 15 February 2007 raid of its premises by the Tokyo police [see 346th Report, para. 103], it had organized a press conference to criticize the undue search and refute the allegations of embezzlement involving JRU-related organizations that had prompted the raid's organization, as well as the confiscation of numerous union documents over the course of the raid. Immediately following the press conference, the police applied for a writ and, on 19 February 2007, conducted searches at the residences of JRU officers, including one who had criticized the police at the press conference; the complainant states that these searches were in retaliation for the holding of the press conference.
- 109.** The complainant states that over the past four and a half years, five cases had been brought against it, of which two had been dropped by the prosecutor. Additionally 27 people had been identified as suspected of wrongdoing, 175 locations had been searched and 5,686 items of property had been confiscated. On 9 April 2007, the Metropolitan Police Department (MPD) sent papers to the prosecutor concerning three of four alleged suspects in the embezzlement case noted in its previous examinations of the case [see for example, 346th Report, para. 106]. The complainant adds in this regard that the statute of limitations applicable to two of the suspects has expired. Furthermore, although more than two years have passed and more than 2,000 union documents were confiscated, the prosecution has not brought an indictment against the alleged suspects, demonstrating that the police investigations had been unfounded.
- 110.** In April 2007, several documents were submitted to the Tokyo District Court as evidence by a journalist in a libel suit. The documents, composed in 1997, indicate that the MPD assumed an extremist group had infiltrated the JRU and diverted union funds into its pockets; they were given by an unidentified source possessing "investigative authority" to the journalist mentioned above, who in turn wrote a series of articles labelling the JRU as a "terrorist" organization. The police have refused to make the said documents public; they therefore have not been subject to verification. The complainant further indicates that on 27 April 2007 the 59th trial of the Urawa Train Depot case was held. The Tokyo District Court closed the case following final arguments by the defence attorneys and a final statement by the defendants, and judgement is to be rendered on 17 July 2007.
- 111.** In its communication of 7 January 2008, the complainant states that the seven defendants in the Urawa Train Depot case were convicted in July 2007 for the crime of coercion (the defendants were accused of intimidating a member of their union 14 times from January to June 2001, thus making him secede from the union on 28 February 2001 and resign from his job in the East Japan Railway Company on 31 July of the same year). In its decision the Tokyo District Court concluded, *inter alia*, that the individual who was deemed to have been coerced by the defendants to leave the East Japan Railway Workers' Union (JREU), an affiliate of the complainant, wished to remain a member of the union in spite of his reluctance to participate in the union's activities. The Court further determined, arbitrarily, that a number of acts — including union consultations that were intended to persuade the

individual concerned to desist from acting against the union and its policies, critical words aimed at the said individual during union meetings, and a verbal confrontation between the latter and union members in the bathroom — all constituted “intimidation” and resulted in his resignation from the union. The defendants immediately appealed the District Court’s decision, and the case would subsequently be heard by the Tokyo High Court.

- 112.** Following their conviction, six of the seven defendants were dismissed by their employer, the JR East Company, on grounds that convicted workers disturb worksite order and considerably ruin the company’s credibility. In view of the defendants’ appeal of their conviction, the complainant maintains that the dismissals run counter to the principle of the presumption of innocence.
- 113.** As concerns the criminal investigations of the complainant, of the four cases in which papers were filed with the public prosecutor, three have been dropped and the statute of limitations applicable to the remaining one has expired. The fact that no prosecutions have been brought forward demonstrates that the investigations were unfounded. The complainant further indicates that, in the suits for damages for the confiscation of thousands of union documents over the course of these investigations, it was revealed that an investigator had leaked secret documents of the MPD to a magazine reporter. The said documents indicate that the MPD had attempted to claim that a far-left group, the “Kakumaru-ha”, had penetrated the JRU; on the basis of these documents the reporter subsequently wrote a series of stories accusing the JRU of terrorism. The complainant contends that, although the MPD denies the existence of these documents, clearly it had manipulated information and created a pretext for conducting criminal investigations with the intention of undermining the JRU.
- 114.** The complainant asserts that the Tokyo High Court, in hearing the appeal of the defendants in the Urawa Train Depot case, must take into consideration the principle of the right to organize. It asserts moreover that the JR East Company’s dismissal of six of the defendants should be rescinded, and that the police must refrain from manipulating information in order to justify the conduct of criminal investigations intended to undermine the union.
- 115.** In its communication of 1 September 2008, the Government indicates that on 17 July 2007 the Tokyo District Court found the defendants in the Urawa Train Depot case guilty of coercion and handed down a suspended sentence. The defence appealed the judgement to the Tokyo High Court on the same day; the appeal was currently pending. The Government also states that the prosecutor would return all items confiscated further to this case at an appropriate time in the proceedings. Furthermore, in relation to the Urawa Train Depot case the JREU had initiated four legal actions against the Government and the Tokyo Metropolitan Government (TMG) for state liability for compensation. These were currently being heard in the Tokyo District Court.
- 116.** As concerns the state liability for compensation claims brought by the JRWA and the JRU, respectively, the Government indicates that the Tokyo High Court dismissed the JRWA’s appeal and reversed the defendants’ loss in the original trial. The JRWA appealed the decision to the Supreme Court on 27 February 2008; the appeal was currently pending. As concerns the compensation claim brought by the complainant JRU, the Government indicates that the Tokyo High Court dismissed the JRU’s appeal on 29 November 2007, and that the Supreme Court subsequently dismissed the JRU’s appeal of the Tokyo High Court’s decision on 5 June 2008: the decision has therefore become final.
- 117.** As concerns the investigations of the JRU for possible embezzlement, the Government states that the Tokyo District Public Prosecutor’s Office decided in April 2008 to suspend prosecution of the suspects in this matter. Moreover, all items confiscated further to these investigations have been returned.

- 118.** *The Committee notes the information provided by the complainant and the Government. With respect to the various legal proceedings, the Committee notes, firstly, that on 17 July 2007 the Tokyo District Court found the seven defendants in the Urawa Train Depot case guilty of coercion and handed down a suspended sentence; the defendants subsequently appealed their conviction to the Tokyo High Court. The Committee trusts that the Tokyo High Court will bear in mind the principles of freedom of association in reviewing this case. The Committee recalls the importance it attaches to the principle of freedom of speech within the framework of the exercise of legitimate union activity. It requests the Government to keep it informed of developments regarding the appeal and to provide a copy of the Tokyo High Court's decision as soon as it is handed down. Further noting however that, in spite of the appeal pending before the Tokyo High Court, six of the seven defendants have been dismissed by the JR East Company on grounds that convicted workers disturb worksite order and harm the company's credibility, the Committee requests the Government to take the necessary measures for these dismissals to be reviewed once the Tokyo High Court's decision has been rendered.*
- 119.** *The Committee notes that on 29 November 2007 the Tokyo High Court dismissed the complainant JRU's appeal in the latter's state liability for compensation suit, and that the Supreme Court dismissed the appeal of the Tokyo High Court judgement on 5 June 2008. The Tokyo High Court also dismissed the JRWA's appeal in the latter's state liability for compensation suit on 14 February 2008, and the JRWA's appeal of the Tokyo High Court decision is currently pending before the Supreme Court. The Committee requests the Government to provide a copy of the Supreme Court's decision in the suit brought by the JRU, as soon as it is handed down, as well as to provide a copy of the Supreme Court's decision on the JRWA's appeal.*
- 120.** *The Committee notes the complainant's allegation that the 19 February 2007 searches of the residences of JRU officers were undertaken in retaliation for holding a press conference to criticize the 15 February 2007 raid of JRU premises. Further noting the Government's indications that the Tokyo District Public Prosecutor's Office decided to suspend the prosecution of the suspects in the embezzlement investigations by April 2008, and that all items confiscated in connection with these investigations have been returned, the Committee trusts that any future judicial procedures concerning the JRU and its officers will be undertaken in such a manner so as not to interfere with the free exercise of trade union activities.*

### **Case No. 2447 (Malta)**

- 121.** The Committee examined this case at its meeting of May–June 2008. It concerns an amendment to the law on public holidays which nullified existing collective agreement clauses on this matter and restricted the right to adopt such clauses in future agreements [350th Report, approved by the Governing Body at its 302nd Session, paras 123–125]. In the absence of a response from the Government to its earlier recommendations and of any information on the measures taken to give effect to them, the Committee once again asked the Government to amend article 6 of the National Holidays and Other Public Holidays Act so as to ensure that this provision: (i) does not render automatically null and void any provisions in existing collective agreements which grant workers the right to recover public holidays falling on a Saturday or Sunday; and (ii) does not preclude voluntary negotiations in the future over the issue of granting workers the right to recover national or public holidays which fall on a Saturday or Sunday on the basis of a collective agreement.
- 122.** In a communication of 2 June 2008, the Government states that, further to the Committee's recommendations, the Minister responsible for labour asked the Employment Relations Board, a tripartite body, to propose suitable measures that would accommodate the Government's declared aim of increasing competitiveness and productivity. The Board met

five times to discuss the matter and proposed repealing article 6 of the National Holidays and Other Public Holidays Act and introducing instead a measure whereby there would be a deduction of a number of days from the vacation leave entitlement for a limited period (four years). The proposal was accepted by all the employers' and employees' representatives on the Board with the exception of the General Workers' Union (GWU). The Government regrets this lack of unanimity and states that present circumstances compel it to proceed with caution and leave matters as they stand. Although it feels that conditions are not right to rescind article 6 of the National Holidays and Other Public Holidays Act, the Government nevertheless remains fully committed to seeking a solution to the matter in full consultation with the social partners. It points out that it took this decision in the belief that it is crucial to maintaining productivity and competitiveness in the nation's best interests.

- 123.** *The Committee takes note of the information supplied by the Government. It notes in particular that the Employment Relations Board was asked to discuss possible measures to give effect to its earlier recommendations and, with the Board having failed to reach a consensus on a proposal, the Government felt the need to proceed with caution and for the time being not to amend article 6 of the National Holidays and Other Public Holidays Act as the Committee requested. The Committee nevertheless noted the Government's statement that it remains fully committed to seeking a solution to the matter in consultation with the social partners. Recalling the views it expressed in its earlier examinations of this case, in which it observed in particular that the interruption by law of provisions in already concluded collective agreements is not in conformity with the principles of free collective bargaining, since the voluntary negotiation of collective agreements, and therefore the autonomy of the bargaining partners, is a fundamental aspect of freedom of association principles, and that measures taken unilaterally by the authorities to restrict the subjects that may be negotiated are often incompatible with Convention No. 98, the Committee is bound to reiterate its request to the Government to amend article 6 of the National Holidays and Other Public Holidays Act so as to ensure that this provision: (i) does not render automatically null and void any provisions in existing collective agreements which grant workers the right to recover public holidays falling on a Saturday or Sunday; and (ii) does not preclude voluntary negotiations in the future over the issue of granting workers the right to recover national or public holidays which fall on a Saturday or Sunday on the basis of a collective agreement. While noting the efforts the Government has already made to find an agreed solution that reconciles the principles of freedom of association with the interests of all the parties, the Committee encourages the Government rapidly to resume consultations with the social partners on appropriate measures to implement its recommendations. It asks to be kept informed in this respect.*

### **Case No. 2575 (Mauritius)**

- 124.** The Committee examined this case, which concerns alleged irregularities in the process leading to the setting up of a new bargaining structure, called the National Wages/Pay Council (NPC), as well in this body's composition, mode of designation of representatives and of objectives, at its March 2008 meeting [see 349th Report, approved by the Governing Body at its 301st Session, paras 900–958]. On that occasion, the Committee reached the following recommendation:

The Committee requests the Government to take a renewed initiative aimed at full and frank consultations with representatives of the social partners whose representativity has been objectively proved, with a view to holding in-depth discussions on ways and means to improve the functioning, composition and objectives of the NPC so as to arrive at a conclusion in this regard, which is satisfactory to all parties concerned. The Committee requests to be kept informed of developments in this respect.

- 125.** The Government provided its observations in communications dated 9 April 2008 and 29 May 2008. In the first place, the Government expressed concern at the Committee's conclusion that consultations with the social partners were unilaterally interrupted without giving sufficient time to fully discuss the views of the parties and give every opportunity to arrive at a common position given that in its opinion, the trade unions had been given every opportunity to discuss the mechanism to replace the National Tripartite Committee, as evidenced by the minutes of the various meetings held with their representatives. Given that at the meeting of 5 February 2007, the President of the State Employees Federation stated that no further discussions should be held on the National Wages Council (later retitled National Pay Council (NPC)), since all the trade unions were against its setting up, it was rather the representatives of the workers' organizations who had discharged themselves from the process.
- 126.** The Government further states that no draft legislation could be provided to the unions as it decided to set up the NPC administratively on 26 January 2007, and there was therefore no draft legislation to provide. While it was envisaged by the Government at one point in time to make appropriate provisions for the establishment of the NPC in draft legislation amending the Industrial Relations Act, the Government agreed to the recommendation of the Director of the International Labour Standards Department to separate the consideration of the National Wages Council from the proposed legislation and proceeded accordingly.
- 127.** As regards the question of the unilateral appointment of representatives of trade unions on the NPC, the Government refers to paragraph 947 of the General Survey of 1992 on wage-setting machinery. It maintains that faced with the union's refusal to participate in the newly created NPC, the Government had no alternative than to appoint the workers' representatives who expressed willingness to serve on the NPC, so as to ensure that the workers' interests were duly taken on board at the level of the Council. The Government adds that despite the letter dated 13 April 2007, wherein the trade union's representatives informed that they would not submit the names of any representative to sit on the NPC, the Minister met the representatives of the trade unions on 16 April 2007 and appealed to them to participate even under protest. They were again requested, through a letter dated 16 April 2007, to reconsider their decision. The Government emphasizes in this regard that all the efforts were deployed to ensure the representation of the most representative trade unions on the Council.
- 128.** The Government draws attention to the fact that in its reply it focused on the main thrust of the complaint and based itself on facts, not perceptions. It raises concern at the reference to the Consultation (Industrial and National Levels) Recommendation, 1960 (No. 113), which by the fact of being a Recommendation cannot create any obligation on the Government. The decision of the Government to proceed with the setting up of the NPC and the appointment of workers' representatives on the NPC rests on the observations of the Committee of Experts on the Application of Conventions and Recommendations made in its General Survey of 1982 on Convention No. 144 and in its General Survey of 1992 and on Convention No. 26. Both Conventions Nos 26 and 144 have been ratified by the Government of Mauritius. After the workers' representatives flatly refused to form part of the NPC, the Government had to consider alternative courses of action which would best serve the interest of the workers. It could not be held hostage by a group of trade unions which represent only 20 per cent of the workers and ignore the interests of the remaining 80 per cent of the workers. The Government reiterates the observations of the Committee of Experts in its General Survey of 1992 on wage-fixing machinery: "This does not prevent the competent authorities, in certain cases where the organizations concerned (i.e. the employers' and workers' organizations) have made no appointment, from designating representations of the said organizations on the minimum wage-fixing bodies".

The Government was guided by these observations in the course of action it took in the circumstances described.

- 129.** Furthermore, according to the Government, since the Committee has not recommended the dissolution of the NPC as requested by the complainant, in line with the recommendation of the Committee, fresh consultations were held with the stakeholders with a view to arriving, if possible, at a consensus on how best to improve the functioning, composition and objectives of the NPC. Furthermore, the Chairperson of the NPC to whom reference was made in the complaint resigned from his office to take employment abroad and a new Chairperson who is a retired senior chief executive of the Government took over. No adverse comment has been made by any party on his appointment.
- 130.** A meeting was held with the representatives of all trade union federations, grouped under a Trade Union Common Platform (TUCP), on 10 April 2008 to discuss ways and means to improve the functioning, composition and objectives of the NPC. At the meeting, the representatives of the federations insisted that the inflation rate should be the only criterion to determine the annual salary compensation and they made the following additional requests: (i) the Chairperson of the NPC to be appointed “by consensus of the three social partners”; (ii) the number of workers’ representatives on the NPC to be increased to ten as Government and employers have a total of ten representatives on the Council; the government representatives being considered as employers’ representatives in view of the fact that the Government is also an employer; (iii) the nomination of the workers’ representatives to be made by the trade unions themselves, on the basis of their representativity; (iv) the obligation for the Government to accept or reject in toto the recommendations of the NPC, if arrived at by consensus, and the trade unions to have the right to go on strike in case no consensus is reached at the level of the NPC and the Government decides on a salary compensation which is not acceptable to the workers; and (v) pending conclusion of the ongoing discussions on the NPC, an independent committee to be set up immediately with the participation of the unions to evaluate the loss of purchasing power due to price increases during the last 12 months.
- 131.** The views and proposals of the TUCP were examined by the Government. As regards the requests of the trade unions at (i) and (iii) above, the Government noted that this has always been the guiding principle for such nominations but, given the stand of the unions, exceptionally alternative arrangements had to be made. In a letter dated 22 April 2008, the Minister informed all the trade union federations that the Government has decided as follows: (i) as a chairperson was already in office, henceforth such appointment will be made on the basis of interactive consultations among the three social partners; (ii) the nomination of the workers’ representatives on the NPC will be made by the trade unions themselves, on the basis of their representativity; (iii) the representativeness of the three partners on the Council was equitable reckoning with the fact that government representatives act as a neutral party, focusing on facilitation of discussion and not as representatives of employers; (iv) the inflation rate could not be the only criterion for determination of the annual salary compensation; (v) it was not desirable to set up any committee to evaluate the loss of purchasing power due to price increase as such an exercise was already one of the attributions of the NPC; and (vi) any strike action contemplated by the trade union movement on the quantum of the salary compensation would have to follow the procedures established under the law. In the same letter, the Minister also reiterated, in the national interest and with a view to further strengthening social dialogue, that their active involvement and participation in the work of the Council would provide workers of the country with an appropriate forum to discuss issues pertaining to the annual salary compensation. The federations were requested to agree among themselves and submit the names of the five workers’ representatives for appointment as members of the NPC.

- 132.** In a letter dated 25 April 2008 to the Minister, the TUCP noted the Government's position on the mode of designation of the unions' representatives and the Chairperson on the NPC and requested for further discussions in order to finalize outstanding matters particularly relating to the objectives of the NPC. There was an exchange of letters between the Minister and the federations of trade unions on 29 April, 2 and 5 May 2008 wherein the TUCP was urged to submit the names of their representatives on the Council, whilst concurrently discussions are held, on how to further improve the objectives of the NPC. The TUCP finally informed the Minister on 6 May 2008 of the designation of five workers' representatives to sit on the Council. The said five workers' representatives together with five representatives designated by the Mauritius Employers' Federation were subsequently appointed as members of the NPC on 6 May 2008.
- 133.** The NPC met on 8, 16 and 21 May 2008 and after consideration of the memoranda submitted by the workers' and employers' organizations, made recommendations to the Government on 21 May 2008 for the payment of a salary compensation for the financial year 2008–09. It is to be noted that the members representing workers on the Council maintained their stand that the computation of the compensation should be based on increase in cost of living only. Following submission of their memorandum, the workers' representatives refused to participate in the discussions of the NPC. They left the meeting when the employers presented their memorandum at the meeting of 16 May. They also refused to discuss the proposals which the Chairperson presented to the Council at its meeting of 21 May, after examination of the memoranda submitted by the employers' and the workers' representatives and left the meeting.
- 134.** Whilst the NPC was considering the determination of the salary compensation, the Minister had, concurrently, a meeting with the representatives of all the federations of trade unions on 12 May 2008 to pursue discussions on the ways to improve the objectives of the National Pay Council as recommended by the ILO. At that meeting, the representative of the General Workers Federation (GWF) stated that his federation and two other federations, namely the Federation of Progressive Unions and the Federation des Travailleurs Unis, have not been party to the nomination of the five workers' representatives on the NPC in view of their objection to the NPC taking on board such criteria as national ability to pay, national productivity and employment and unemployment rate to determine the annual salary compensation. As proposed by the Minister, it was agreed that discussions would continue with a view to achieving consensus on how best to improve the objectives of the NPC. The help of experts, such as the Director of the Central Statistics Office, would be enlisted if necessary.
- 135.** *The Committee recalls, in its previous observation, that the background of this case concerns the longstanding efforts to amend the Industrial Relations Act, with ILO technical assistance, pursuant to the conclusions and recommendations reached by this Committee in Case No. 2281. During the last examination of the follow-up to its recommendations in Case No. 2281, the Committee noted that past efforts had not led to any results and that the Government was considering the drafting of a new bill [349th Report, para. 951]. The present complaint is situated in the context of consultations for the new bill, and concerns the introduction into these consultations of an element that the complainant has alleged had not been agreed to, namely, changes in the system of minimum wage setting which had been in place in Mauritius for the last 30 years.*
- 136.** *As regards the question of consultations, the Committee recalls that its previous conclusions merely refer to the fact that once the trade unions refused to discuss the issue of the NPC any further, the Government nevertheless, proceeded with its administrative establishment with immediate effect. In so doing, the Government proceeded with changes that fundamentally transformed a system which had been in force for 30 years. In the meantime, and taking duly into account the recommendations of the Office that the matter*

*of amending the IRA and that of establishing a new national wages council be presented in two separate phases, the Committee observes that these important and controversial changes to the wages council were brought forward in priority over the long-awaited amendments to the IRA on the basis of its recommendations made over four years ago.*

- 137.** *The Committee is nevertheless pleased to note that fresh consultations have been recently held on ways to improve the composition and functioning of the NPC. It notes with interest that workers' representatives have been nominated by the TUCP to the NPC. The Committee also notes, however, that the workers' representatives appointed by the TUCP eventually decided to abstain from the NPC and have refused to participate in its discussions as of May 2008, thus maintaining their stand that the computation of the salary compensation should be based on the increase in the cost of living only. It also notes that the complainant to the present case, the General Workers' Federation, as well as the Federation of Progressive Unions and the Federation des Travailleurs Unis refused to participate in the NPC in protest for taking on board such criteria as national ability to pay, national productivity and employment and unemployment rate in order to determine the annual salary compensation.*
- 138.** *The Committee trusts that the Government will continue to pursue full and frank consultations on ways to improve the composition and functioning of the NPC, including the basis on which the salary compensation should be decided. The Committee requests the Government to keep it informed in this regard and requests it to provide further information on the Government's response to the TUCP recommendations that the Government accept or reject in toto those recommendations of the NPC that may be decided by consensus and to clarify whether workers may go on strike against an NPC decision should it lack consensus.*

### **Case No. 2525 (Montenegro)**

- 139.** The Committee last examined this case, concerning allegations of violation of the right to strike of workers of Podgorica Aluminium Factory (KAP), at its March 2008 meeting [see 349th Report paras 184–189]. On that occasion, it requested the Government: (1) to amend the Law on Strike, in consultation with social partners so as to bring it in conformity with the principles of freedom of association; and (2) to keep it informed of the outcome of the proceedings with regard to the damages claimed by the employer from the eight members of the strike committee, and to transmit any court judgments handed down in that regard.
- 140.** In a communication dated 25 May 2008, the Government indicates that the Ministry of Health, Labour and Social Welfare has established a tripartite team for drafting amendments to the Law on Strike, and that in the drafting of the amendments, special emphasis will be given to the “minimum service” provisions.
- 141.** With regard to the employer's claim for damages against eight members of the strike committee, the Government indicates that the proceedings are conducted in the Primary Court and that the judicial process on this claim is under way.
- 142.** *The Committee notes the information submitted by the Government. It expects that sections 10 and 10(a) of the Law, which currently provide that the minimum services, where negotiation has failed, are to be determined by the employer, will be amended so as to ensure that any disagreement in respect of the determination of minimum service should be settled by an independent body having the confidence of the parties conceived as previously requested by the Committee. The Committee requests the Government to keep it informed of the developments in this respect.*

143. *With regard to the employer's claim for damages against eight members of the strike committee, the Committee, once again, emphasizes that no one should be penalized for carrying out a legitimate strike and that sanctions could be imposed only in respect of violations of strike prohibitions which are themselves in conformity with the principles of freedom of association. The Committee further recalls from the previous examination of this case that the employer's claim was filed in August 2006 and stresses, in this respect, the importance it attaches to legal proceedings against trade unionists being concluded expeditiously, as justice delayed is justice denied. The Committee therefore, once again, requests the Government to keep it informed of the outcome of the proceedings and to transmit any court judgments handed down in this regard.*

### **Case No. 2591 (Myanmar)**

144. The Committee examined this case at its March 2008 meeting [see 349th Report, paras 1062-1093] and on that occasion it formulated the following recommendations:

- (a) The Committee requests the Government:
  - (i) to take the necessary measures to amend the national legislation so as to allow trade unions to operate in conformity with Conventions Nos 87 and 98; and
  - (ii) to recognize the Federation of Trade Unions of Burma (FTUB) as a legitimate trade union organization.

It requests the Government to keep it informed in this respect.

- (b) The Committee requests the Government to carry out an independent investigation without delay into the allegation of ill-treatment of the detained persons and, if it is found to be true, to take appropriate measures, including compensation for damages suffered, giving precise instructions and apply effective sanctions so as to ensure that no detainee is subjected to such treatment in the future. It requests the Government to keep it informed in this respect.
- (c) The Committee strongly urges the Government to release Thurein Aung, Wai Lin, Nyi Nyi Zaw, Kyaw Kyaw, Kyaw Win and Myo Min without delay and to keep it informed in this respect.
- (d) Recalling that the holding of public meetings and the voicing of demands of a social and economic nature on the occasion of May Day are traditional forms of trade union action and that the full exercise of trade union rights calls for a free flow of information, opinions and ideas and, to this end, workers and their organizations should enjoy freedom of opinion and expression at their meetings, in their publications and in the course of other trade union activities, the Committee expects that no person will be punished for exercising his or her rights to freedom of association, opinion and expression.
- (e) Once again recalling that the right of workers and employers to freely establish and join organizations of their own choosing cannot exist unless such freedom is established and recognized in both law and practice, the Committee once again requests the Government to refrain from any acts preventing the free operation of any form of organization of collective representation of workers, freely chosen by them to defend and promote their economic and social interests, including organizations which operate in exile, such as the FTUB, since they cannot be recognized in the prevailing legislative context of Myanmar. The Committee further requests the Government to issue instructions to that effect to its civil and military agents as a matter of urgency and to keep it informed in this respect.

145. In its communications dated 30 April, 2 June and 23 October 2008, the Government reiterates that the six persons were not arrested for holding the May Day event but for breaching the legislation in force, involvement in unlawful activities and attempted terrorism.

- 146.** The Government indicates that in order to ensure that workers and employers can establish organizations of their own choice, and thereby to implement Convention No. 87, the new State Constitution of Myanmar contains article 354(a), (b), (c), according to which:

There shall be liberty in the exercise of the following rights, subject to the laws enacted for State security, prevalence of law and order, community peace and tranquillity or public order and morality:

- (a) the right of the citizens to express freely their convictions and opinions;
- (b) the right of the citizens to assemble peacefully without arms;
- (c) the right of the citizens to form associations and unions.

The above articles ensure a legislative framework under which free and independent workers' organizations could be established.

- 147.** With regard to the recommendation of the Committee to recognize the FTUB, the Government stresses that as a legitimate government, it has a sovereign right to recognize only the organizations that are legally established within the country. According to Article 10 of Convention No. 87, "organization" means any organization of workers or of employers for furthering and defending the interests of workers or of employers. The FTUB does not represent workers of Myanmar. Moreover, Article 8 of Convention No. 87 stipulates that "in this Convention workers and employers and their respective organization, like other persons or organized collectivities, shall respect the law of the land". Not only does the FTUB not respect the internal laws of the country but the leader of the FTUB was a fugitive from justice and fled the country because of breaching its laws. It is therefore not possible to recognize the organization as a legal one, despite the fact that the FTUB is recognized by the ILO and has an associated organization status with the International Trade Union Confederation. The Government states that it will only recognize a workers' organization representing the entire workforce of Myanmar.

- 148.** With regard to the Committee's requests to carry out an independent investigation into the allegation of ill-treatment of the detained persons and to release Thurein Aung, Wai Lin, Nyi Nyi Zaw, Kyaw Kyaw, Kyaw Win and Myo Min, the Government once again submits that the allegations in this case are based on false information. The six persons in question are taking instructions, trained and provided with financial assistance by the FTUB, an exile terrorist group, to incite the general public to create instability in the country. The Government strongly and categorically objects to the recommendation of the Committee. The Government considers that pursuant to Convention No. 87, the Committee on Freedom of Association has to deal with the specific issues of workers and employers. Moreover, the ILO, as one of the Specialized Agencies of the United Nations, should observe section 2(7) of the UN Charter.<sup>1</sup> The Government considers that the requests of the Committee interfere into internal affairs of the country, into its domestic law and the judicial power of a sovereign State. The Supreme Court reviewed the cases of the six persons on 4 April 2008. The Myanmar judicial system is independent and there can be no interference with its judicial process. The Government draws the Committee's attention to Article 8 of Convention No. 87, according to which, the law of the land should be respected and suggests that the ILO supervisory bodies respect internal laws of a member State.

<sup>1</sup> Which states: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII".

149. *The Committee deeply regrets both the position of the Government expressed in its reply asserting interference in its internal affairs and the failure to submit any new information or present any new evidence. The Committee draws the Government's attention to the fact that by virtue of its Constitution, the ILO was established in particular to improve working conditions and to promote freedom of association in the various countries. Consequently, the matters dealt with by the Organization in this connection no longer fall within the exclusive sphere of States and the action taken by the Organization for the purpose cannot be considered to be interference in internal affairs, since it falls within the terms of reference that the ILO has received from its Members with a view to attaining the aims assigned to it [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 2]. The Committee also recalls that a special procedure was established in 1951 for the protection of freedom of association under the responsibility of two bodies, namely, the Fact-Finding and Conciliation Commission on Freedom of Association and the Committee on Freedom of Association, pursuant to negotiations and agreements between the Governing Body of the ILO and the United Nations Economic and Social Council and that since then, it had examined, in a constructive manner and through a balanced tripartite approach, over 2,600 cases from all over the world.*
150. *The Committee emphasizes that it is a fundamental obligation of a member State to respect human and trade union rights, and stresses, in particular, that when a State decides to become a Member of the Organization, it accepts the fundamental principles embodied in the Constitution and the Declaration of Philadelphia, including the principles of freedom of association [see **Digest**, op. cit., para. 15], which it should observe in law and in practice. The Committee expresses its deep concern at the extreme gravity of the issues raised in this case and at the violation of fundamental human rights and freedom of association principles in law and in practice. The Committee deplores that the Government has failed to implement its recommendations. It therefore refers to its previous examination of this case and once again urges the Government:*
- *to take the necessary measures to amend the national legislation so as to allow trade unions to operate in conformity with Conventions Nos 87 and 98 and to recognize the FTUB as a legitimate trade union organization;*
  - *to carry out an independent investigation without delay into the allegation of ill-treatment of the detained persons and, if it is found to be true, to take appropriate measures, including compensation for damages suffered, giving precise instructions and apply effective sanctions so as to ensure that no detainee is subjected to such treatment in the future;*
  - *to release Thurein Aung, Wai Lin, Nyi Nyi Zaw, Kyaw Kyaw, Kyaw Win and Myo Min without delay;*
  - *to ensure that no person will be punished for exercising his or her rights to freedom of association, opinion and expression;*
  - *to refrain from any acts preventing the free operation of any form of organization of collective representation of workers, freely chosen by them to defend and promote their economic and social interests, including organizations which operate in exile, such as the FTUB, since they cannot be recognized in the prevailing legislative context of Myanmar; and to issue instructions to that effect to its civil and military agents.*

*The Committee expects that all of the above recommendations will be fully implemented as a matter of urgency and requests the Government to keep it informed in this respect.*

**Case No. 2590 (Nicaragua)**

151. The Committee last examined this case at its meeting of March 2008, at which it made the following recommendations:

- (a) Bearing in mind the status of Mr Chávez Mendoza as a trade union official, and that the legislation requires the authorization of the Ministry of Labour to dismiss a trade union official, which did not occur in the present case, the Committee requests the Government to take the measures necessary to ensure that he is reinstated in his post without loss of pay until the judicial authority gives its final judgement and to send a copy of the ruling as soon as it is handed down.
- (b) The Committee further requests the Government to take the necessary measures so that an independent investigation is carried out to determine if there is in fact an anti-union policy against trade unions that are not in agreement with the Government and, if these allegations are shown to be true, immediately to put an immediate end to such anti-union measures and to guarantee the free exercise of trade union activities of those organizations and their officials. The Committee requests the Government to keep it informed in this respect.

152. In its communication of 12 March 2008, the Government states that it sent observations in a timely reply, and repeats that in Nicaragua there are two means of redress available to workers claiming their rights, administrative remedies, through the Ministry of Labour, and judicial remedies, through the labour courts. In this case, Mr Donaldo José Chávez Mendoza chose the second option, so judicial proceedings are under way in the appropriate labour court.

153. *The Committee takes note of this information. It recalls that when it last examined this case, pointing out that Mr Chávez Mendoza had the status of a trade union official and that the legislation requires the authorization of the Ministry of Labour to dismiss such an official, it observed that this did not occur in the present case. In these circumstances, the Committee once again urges the Government to take the necessary steps to ensure that Mr Chávez Mendoza is reinstated in his post without loss of pay until the judicial authority has ruled on his dismissal, and asks the Government to keep it informed in this regard and to send a copy of the final ruling as soon as it is handed down. The Committee reiterates its previous recommendation and asks the Government to take the necessary steps to ensure that an independent investigation is carried out to determine whether there is in fact an anti-union policy against trade unions that are not in agreement with the Government and, if these allegations are shown to be true, to put an immediate end to such anti-union measures and to guarantee free exercise of the trade union activities of those organizations and their officials.*

**Case No. 2372 (Panama)**

154. At its June 2007 meeting, the Committee requested the Government to keep it informed regarding the *amparo* (protection of constitutional rights) appeal before the Supreme Court of Justice regarding the dismissal of the maritime sector trade union leader, Mr Luis Fruto [see 346th Report, para. 1270].

155. In its communication dated 29 April 2008, the Government transmits the ruling of the Supreme Court of Justice stating that the *amparo* appeal lodged by the trade union leader Mr Luis Fruto is groundless as it is based on aspects which are purely legal and not constitutional.

156. *The Committee takes note of this information.*

**Case No. 2532 (Peru)**

- 157.** The Committee last examined this case at its meeting in March 2008 and on that occasion requested the Government to ensure that the legal provisions relating to the use of premises for union activities are observed, and to invite the National Trade Union of Health Social Security Workers (SINACUT EsSalud) and the health social security authorities to conduct negotiations with a view to reaching an agreement on arrangements for exercising the right to hold meetings, including deciding the venue for trade union meetings, and to keep it informed in this regard [see 349th Report, paras 1157–1170].
- 158.** In its communication dated 18 August 2008, the complainant organization objects to resolution No. 1293-GG-ESSALUD-2007 dated 29 September 2007, approving directive No. 013-GG-ESSALUD-2007, which lays down the rules for granting leave and facilities to the officers of the EsSalud administrative and support workers' trade unions, which, according to the complainant organization, is at variance with the fundamental rights laid down in the Constitution, treaties and other applicable legal provisions. The complainant organization alleges that the new regulations favour the Single Central Organization of Workers (CUT) with regard to the issue of permanent trade union leave.
- 159.** In its communication dated 30 May 2008, the Government states that there is a lack of understanding between the parties and observes that there is constant disagreement between the institution and its workers. On the one hand, the Central Human Resources Office of EsSalud states that the matter is not specifically regulated and that it should be settled on the basis of what is reasonable. Members of the trade union should reserve premises in advance, taking account of the institution's planned schedule of official events, in order to carry out their meetings without any unforeseen obstacles. On the other hand, the members of the union do not accept that position and voice their concern that a detrimental situation might arise where the union has reserved one of the institution meeting rooms in advance, but the institution then cancels the reservation prior to the event in order to hold an event of its own. The Government states that it considers that the use of premises of public institutions by unions should be scheduled so as not to interrupt the institution's own activities. Similarly, if the employer denies authorization to use its facilities, it must justify its refusal by demonstrating that such use might disrupt the normal functioning of public activities. In a communication of 10 September 2008, the Government indicates that, with regard to the current state in EsSalud and in particular the unionized workers' request, through report No. GCRH-OGA-ESSAULD-2007 dated 12 May 2008, the Head of Human Resources – OGA-ESSAULD indicated that the institution refrained from any interference which would prejudice trade union rights or obstruct their exercise in law, recognizing the need to facilitate the exercise of trade union functions during or outside working hours. With regard to the trade union office requested by SINACUT, the Head of Assets and Services indicated that for the moment it is not possible to satisfy the request by the union because of the lack of space, which is due to the public auction of the Torre Trecca Building in the Arenales Complex, as a result of which various spaces were taken away or rearranged in the institutions.
- 160.** *The Committee takes note of this information. The Committee again recalls that the right to hold meetings is essential for workers' organizations to be able to pursue their activities and that it is for employers and workers' organizations to agree on the modalities for exercising this right, and that the Labour Relations (Public Service) Convention, 1978 (No. 151), ratified by Peru, provides in Article 6 that such facilities shall be afforded to the representatives of recognized public employees' organizations as may be appropriate in order to enable them to carry out their functions promptly and efficiently, both during and outside their hours of work and that the granting of such facilities shall not impair the efficient operation of the administration or service concerned. The Committee again requests the Government to invite SINACUT EsSalud and the health social security*

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*authorities to conduct negotiations with a view to reaching an agreement on arrangements for exercising the right to hold meetings, including deciding the venue for trade union meetings. Furthermore, the Committee requests the Government to send its observations relating to the allegations recently submitted by the SINACUT EsSalud.*

### **Case No. 2559 (Peru)**

- 161.** At its meeting in June 2008, the Committee noted that union official Mr Roger Augusto Rivera Gamarra (whose reinstatement had been ordered by a ruling of the Supreme Court of Justice dated 13 September 2007) was reinstated in the National Institute for Agricultural Research on 18 January 2008 and that the planned budget item is due to include the payment of the outstanding wages, in accordance with the ruling of the Supreme Court [see 350th Report, paras 157–159].
- 162.** In its communication dated 11 July 2008, the Union of Agricultural Public Sector Workers (SUTSA), the complainant organization, alleges that, although union official Mr Roger Augusto Rivera Gamarra has been reinstated in his post, he has unfortunately not been paid his outstanding wages for 2004, 2005, 2006, 2007 and the months of January, February, March and April 2008.
- 163.** In its communication dated 30 May 2008, the Government states that, by letter No. 228-2008-MTPE/9.1, dated 11 March 2008, it submitted report No. 13-2008-MTPE/9.120, indicating that the Minister of Labour had been informed by letter No. 107-2008-INIA-OGAJ/DG, dated 27 February 2008, that on 18 January 2008 the First Civil Court of Huaral had carried out the reinstatement of Mr Roger Augusto Rivera Gamarra in the post he had occupied in the Donoso Experimental Facility (Huaral), under the provisions of Legislative Decree No. 276. That measure was executed by the National Institute for Agricultural Research by transferring a vacant post from the San Roque-Iquitos Experimental Facility to the Donoso Experimental Facility, since the Economic and Financial Office had refused the request for a budgetary increase in this facility during the fiscal year 2007–08. In a communication of 10 September 2008, the Government indicates that it was informed that by Decision No. 529/2008-INIA-OGA No. 154/ORH dated 10 March 2008, the Director-General of the Administrative Office of the National Institute for Agricultural Research requested the budgetary transfer of 29,594 new soles for the payment of the remuneration in favour of Mr Roger Augusto Rivera Gamarra (the worker reinstated in his post in January following the court ruling relating to the present case in the DONOSO Experimental Facility (Huaral) under the provisions of Legislative Decree No. 276) during the current fiscal year. Moreover, through Decision No. 605/2008-INIA-OGA No. 172/ORH-SUBP dated 19 March of the current year, a budgetary extension was requested in order to give effect to the judicial ruling which ordered the payment of wages due to the complainant for the time that he was out of work from the DONOSO Experimental Facility (Huaral). In its communication of 17 October 2008, the Government sends proof of payment of the wages due to Mr Rivera Gamarra following his reinstatement in his post; these wages include salaries and benefits for 2008 (but not before).
- 164.** *The Committee takes note of this information and trusts that union official Mr Roger Augusto Rivera Gamarra is paid his outstanding wages, in accordance with the ruling of the Supreme Court.*

**Case No. 2486 (Romania)**

- 165.** The Committee last examined this case at its March 2008 meeting [see 349th Report paras 1222–1245] and made the following recommendations:
- (a) With regard to Miron Cozma, the Committee requested the Government to lift the ban on his staying in or passing through Bucharest and Petrosani and to ensure his safety in relation to an alleged plot to murder him.
  - (b) With regard to the trade unionists Constantin Cretan, Dorin Lois and Vasile Lupu, who are still in prison, the Committee requested the Government to review their situation and consider their immediate release, and to keep it informed in this regard.
- 166.** The Committee recalls that this case concerns the arrest, imprisonment and other penal sanctions imposed on six trade union leaders, including Miron Cozma, the leader of the League of Miners' Unions of Jiu Valley (LSMVJ), as well as Constantin Cretan, Dorin Lois and Vasile Lupu, for incitement to subvert the authority of the State in connection with the organization of a miners' strike and march on Bucharest, during which violent incidents took place. During the last examination of this case, the Committee noted that Miron Cozma had been released on 2 December 2007 but a ban on entering or staying in Bucharest and Petrosani, a large mining town, for a period of 17 years, was not lifted [349th Report, para. 1239].
- 167.** In a communication dated 23 May 2008, the Government indicates that the Ministry of Justice is not competent to lift the ban on staying or passing through Bucharest and Petrosani imposed against Miron Cozma. The only body with competence to lift this security measure is the authority which imposed it in the first place under section 116 of the Penal Code and only if the reasons for imposing it have ceased (section 116 (5) of the Penal Code).
- 168.** With regard to Constantin Cretan, the Government indicates that his prison sentence was interrupted for two months from 14 July to 14 September 2006 for family reasons, in conformity with the decision of the Appeals Court of Craiova. In November 2008, the competent body will discuss the possibility of releasing him on parole in conformity with the Penal Code. His prison sentence expires on 28 November 2010. He has been frequently visited by his family as well as trade union leaders and representatives from France, Germany, Spain, Ukraine and Switzerland. In December 2006, he was visited by a delegation of doctors from France who examined him. He has been granted permission to leave the prison for five days on two occasions as he has participated and shown interest in work and educational activities.
- 169.** With regard to Lois Dorin Mihai, the Government indicates that in December 2008, the competent body will discuss the possibility of releasing him on parole in conformity with the Penal Code. His prison sentence expires on 15 August 2010. He maintains contacts with his family and has been granted permission to leave the prison on two occasions for five and three days respectively, as he has participated and shown interest in work and educational activities.
- 170.** With regard to Vasile Lupu, the Government indicates that in December 2008, the competent body will discuss the possibility of releasing him on parole in conformity with the Penal Code. His prison sentence expires on 27 September 2010. He maintains contacts with his family and has been granted permission to leave the prison on one occasion for three days.

171. The Government adds that it does not have the competence to control the judgements rendered concerning this case, for instance on the issue of the immediate release of the trade unionists, which pertain to the judicial authority. The Government also attaches the decision of the High Court of Cassation of 28 September 2005, which modified the complementary penalty restricting the exercise of certain civil rights by the trade unionists. It appears from the text, that the Court amended the sentence imposed by the Appeals Court in February 2003, so as to maintain only the restriction of the right to elect and be elected in public authority or public elective positions. The Government finally indicates that it is not competent to take measures to ensure the security of Miron Cozma, since the latter has not addressed himself to the authorities.
172. *With regard to its previous request for the Government to lift the ban on Miron Cozma's staying in or passing through Bucharest and Petrosani, the Committee notes that according to the Government, the only body with competence to lift this security measure is the authority which imposed it in the first place and only if the reasons for imposing it have ceased (section 116(5) of the Penal Code). Noting that this ban was imposed in the context of violent incidents which date as far back as 1999, the Committee requests the Government to undertake an assessment of the situation so as to determine whether in its view, the reasons for imposing this ban continue to apply and if this is found to no longer be the case, to request the competent authority to lift this security measure.*
173. *With regard to its previous request for the Government to take all necessary measures to ensure the safety of Miron Cozma, the Committee notes that according to the Government, Miron Cozma has not addressed himself to the competent authorities to seek protection. Noting that it has not received any further information from the complainant on this issue, the Committee invites the complainant to bring any elements at its disposal to the competent authorities if it believes that Mr. Cozma needs state protection.*
174. *With regard to Constantin Cretan, Dorin Lois and Vasile Lupu, the Committee notes that the possibility of releasing them on parole will be examined in November and December 2008. The Committee hopes that Constantin Cretan, Dorin Lois and Vasile Lupu will be released without further delay, after a review of their situation.*

### **Case No. 2087 (Uruguay)**

175. The Committee last examined this case at its meeting of November 2007 [see 346th Report, paras 187–189]. On that occasion it expressed the hope that the Court of Administrative Proceedings would issue a ruling in the near future on the appeals lodged against the General Labour and Social Security Inspectorate Decree of 28 April 2003, which sanctioned the Savings and Loans Cooperative of Officials of the Armed Forces (CAOFA) for having dismissed workers because of their trade union membership, and requested the Government to keep it informed of the ruling.
176. By a communication of 23 May 2008, the Government sent a copy of the ruling handed down by the Court of Administrative Proceedings in “CAOFA v/the State – Ministry of Labour and Social Security”, upholding the impugned decision (the General Labour and Social Security Inspectorate Decree penalizing CAOFA with a fine for breach of Conventions Nos 87 and 98).
177. *The Committee takes due note of this information.*

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178. Finally, the Committee requests the Governments concerned to keep it informed of any developments relating to the following cases.

Case	Last examination on the merits	Last follow-up examination
1914 (Philippines)	June 1998	March 2008
2068 (Colombia)	November 2005	June 2008
2086 (Paraguay)	June 2002	June 2007
2139 (Japan)	June 2002	June 2008
2171 (Sweden)	March 2003	March 2008
2173 (Canada)	March 2003	March 2006
2252 (Philippines)	November 2003	June 2008
2275 (Nicaragua)	November 2005	March 2008
2297 (Colombia)	May–June 2004	June 2008
2302 (Argentina)	November 2005	November 2007
2330 (Honduras)	November 2004	June 2008
2338 (Mexico)	March 2005	March 2008
2354 (Nicaragua)	March 2006	March 2008
2368 (El Salvador)	March 2006	March 2008
2383 (United Kingdom)	March 2005	March 2008
2384 (Colombia)	June 2008	–
2394 (Nicaragua)	March 2006	November 2007
2396 (El Salvador)	November 2006	March 2008
2397 (Guatemala)	March 2006	March 2008
2402 (Bangladesh)	November 2005	June 2008
2413 (Guatemala)	November 2006	March 2008
2428 (Bolivarian Republic of Venezuela)	March 2006	–
2435 (El Salvador)	June 2007	June 2008
2455 (Morocco)	June 2006	June 2008
2462 (Chile)	June 2008	–
2469 (Colombia)	June 2007	March 2008
2477 (Argentina)	June 2007	June 2008
2480 (Colombia)	June 2007	June 2008
2487 (El Salvador)	June 2007	March 2008
2514 (El Salvador)	June 2007	March 2008
2517 (Honduras)	November 2007	June 2008
2521 (Gabon)	June 2007	March 2008
2523 (Brazil)	June 2007	June 2008
2524 (United States)	March 2008	–
2536 (Mexico)	March 2008	–
2546 (Philippines)	March 2008	–
2547 (United States)	June 2008	–

Case	Last examination on the merits	Last follow-up examination
2548 (Burundi)	March 2008	–
2550 (Guatemala)	June 2008	–
2555 (Chile)	March 2008	–
2558 (Honduras)	June 2008	–
2564 (Chile)	March 2008	–
2572 (El Salvador)	March 2008	–
2578 (Argentina)	June 2008	–
2583 (Colombia)	June 2008	–
2584 (Burundi)	June 2008	–

**179.** The Committee hopes these Governments will quickly provide the information requested.

**180.** In addition, the Committee has just received information concerning the follow-up of Cases Nos 1890 (India), 1991 (Japan), 2006 (Pakistan), 2046 (Colombia), 2096 (Pakistan), 2153 (Algeria), 2160 (Bolivarian Republic of Venezuela), 2169 (Pakistan), 2188 (Bangladesh), 2227 (United States), 2229 (Pakistan), 2236 (Indonesia), 2242 (Pakistan), 2249 (Bolivarian Republic of Venezuela), 2273 (Pakistan), 2286 (Peru), 2291 (Poland), 2301 (Malaysia), 2317 (Republic of Moldova), 2326 (Australia), 2336 (Indonesia), 2371 (Bangladesh), 2373 (Argentina), 2380 (Sri Lanka), 2382 (Cameroon), 2386 (Peru), 2395 (Poland), 2399 (Pakistan), 2400 (Peru), 2402 (Bangladesh), 2419 (Sri Lanka), 2430 (Canada), 2439 (Cameroon), 2441 (Indonesia), 2466 (Thailand), 2474 (Poland), 2481 (Colombia), 2483 (Dominican Republic), 2488 (Philippines), 2499 (Argentina), 2500 (Botswana), 2501 (Uruguay), 2506 (Greece), 2520 (Pakistan), 2527 (Peru), 2529 (Belgium), 2537 (Turkey), 2552 (Bahrain), 2554 (Colombia), 2579 (Bolivarian Republic of Venezuela), 2585 (Indonesia) and 2589 (Indonesia), which it will examine at its next meeting.

CASE NO. 2593

DEFINITIVE REPORT

**Complaint against the Government of Argentina  
presented by  
the Association of State Workers (ATE)**

*Allegations: The complainant alleges acts of anti-union discrimination by the authorities in the Department of the Environment and Sustainable Development against members and representatives of the ATE, and refusal by the Department to negotiate with the ATE regarding its claims*

**181.** The present complaint is contained in a communication from the Association of State Workers (ATE) dated 13 September 2007.

**182.** The Government sent its observations in a communication dated 15 July 2008.

- 183.** Argentina has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

#### **A. The complainant's allegations**

- 184.** In its communication of 13 September 2007, the ATE states that it is presenting a complaint against the Government of Argentina for violating ILO Convention No. 87 through anti-union discrimination and reprisals by the Department of the Environment and Sustainable Development, a body subordinate to the Cabinet Office. The ATE states that the present complaint concerns the following violations: (a) the Department of the Environment and Sustainable Development has systematically violated the principle of good faith in bargaining by discriminating against one trade union organization signatory to the collective labour agreement (CLA); and (b) there have been tendencies to persecute and take reprisals against representatives of the workers of that organization.
- 185.** The complainant organization states that it has carried out trade union activities at the Department in question for a long time, even when this Department was under the authority of the Ministry for Social Development, the Ministry of Health and, as now, the Directorate of the Ministers' Cabinet. Thus, on 26 October 2006, an electoral process took place to elect the internal board of the Department of the Environment and Sustainable Development. The mandate of this body ran from 26 October 2006 until 26 October 2008. On 2 November 2006, the ATE's executive council for Buenos Aires notified the Department of the Environment and Sustainable Development of the results of the electoral process, with the names of the representatives elected by workers at the organization in question. The same notification was sent to the Ministry of Labour, Employment and Social Security on 13 December 2006 (No. 1.200.390).
- 186.** The ATE states that, in this context and in the face of excessive hiring of workers outside the legal mechanisms established by CLA No. 214/06 (to which the ATE is signatory), and given that this excessive hiring of short-term contract workers was being used to bypass not only salary mechanisms but also, and above all, the employment stability of public officials, the internal board of trade union representatives demanded that such workers be regularized. In this context, and given the knowledge that the employer, through its representative, had held a meeting on 20 February 2007 with the National Civil Servants' Union (UPCN) to address matters pertaining to the CLA, the ATE sent a letter dated 27 February 2007, as follows:

Buenos Aires, February 2007. – In the name of and representing the National Executive Board of the Association of State Workers (ATE), we are writing to you because it has come to our attention that the ATE was excluded from participating in the meeting held on 20 February of this year under the auspices of the Department of the Environment and Sustainable Development, which involved only one of the trade union bodies eligible for the purpose. The agreement signed on 20 February implies a commitment between the Secretary of State for the Environment and Sustainable Development and only one of the sector's representative associations, while the Department has refused to reply to our organization's innumerable salary claims. The attitude assumed constitutes unfair practice under the terms of section 53 of the National Law on Trade Union Associations, No. 23551. In view of the above, given that the ATE is one of the representative bodies signatory to the collective labour agreement (CLA) endorsed by Decree No. 214/06, and as the conduct displayed threatens the guarantee to democratize labour relations, as well as the principle of freedom of association enshrined in our national Constitution and international treaties of constitutional rank (ILO Conventions Nos 87 and 98), we demand that such conduct ceases on pain of a complaint being raised under Acts Nos 23551 and 23592, and before the ILO Committee on Freedom of Association.

- 187.** The ATE states that, notwithstanding the above, the internal board of the ATE on 7 March 2007 presented a petition to the Department of the Environment and Sustainable Development requesting an interview in order to present the relevant trade union complaints. This request was based on individual claims and the Department therefore refused to hear the internal board's representation. Faced with the ATE's trade union actions, the authorities behaved in an anti-union and discriminatory manner, refusing to talk to the organization and exacting reprisals against its representatives.
- 188.** The ATE alleges that the stance taken by the State has been to order the transfer of two representatives and relieve a third one of his functions, and to discriminate against the ATE by holding meetings within the framework of CLA No. 214/06 with only one representative trade union body. In fact, the employer ordered the transfer of Ms Patricia Hebe Báez Rocha and representative Mr Matías Javier Osterc, and relieved the organization's general delegate, Ms Alicia Rodríguez, of her functions.
- 189.** Having become aware of this subjugation, the ATE sent a letter to Dr Picolotti on 21 March 2007, as follows:

Buenos Aires, March 2007. – In the name of and representing the National Council of Management of the Association of State Workers, we are writing to you because it has come to our attention that changes have been ordered to the working conditions of our representative Patricia Hebe Báez Rocha, identity card No. 18.272.552, who performs her duties in the organization which you head. In that regard, as you are aware (notification from the council of management dated 2 November 2006), Ms Báez Rocha was elected on 26 October 2006 as spokesperson for this association's internal board within the Department of the Environment and Sustainable Development and, consequently, your actions violate the legal protection established under sections 48 and 52 of Act No. 23551, section 1 of Act No. 23592, article 14bis of the Constitution, as well as international treaties and ILO Conventions Nos 87 and 98. In view of all the above, we demand that, within not more than 48 hours, you revoke the changes in working conditions of the above employee, reinstate her in her post and desist from this anti-union and persecuting attitude, on pain of the appropriate legal action, a complaint to the ILO and an action for disloyal practices. You have been duly notified.

- 190.** To the transfer and persecution of ATE representatives can be added the discriminatory attitude shown by holding meetings with only one of the trade union bodies in the sector signatory to the CLA, despite repeated requests from the complainant that a solution be found to the problems of workers existing in the Department of the Environment and Sustainable Development. The ATE alleges that, on 20 July 2007, the State, as the employer, held a meeting with the UPCN, without even inviting the ATE, in order to move forward on the requests that the ATE had previously made, and also on matters relating to the CLA, to which both trade union organizations are signatory. Consequently, on 25 July 2007 a letter was sent to the Department of the Environment and Sustainable Development as follows:

Buenos Aires, July 2007. – In the name of and representing the National Council of Management of the Association of State Workers (ATE), we are writing to you because it has come to our attention that our organization was excluded from participating in the meeting held on 20 July 2007 under the auspices of the Department of the Environment and Sustainable Development, which involved only one of the trade union bodies eligible for the purpose. In fact, the document signed on 20 July shows an agreement between the Department and one trade union concerning matters relating to working conditions and CLA No. 214/06 at the Department, while our organization has been refused replies to the innumerable labour-related requests it has made. The attitude assumed constitutes unfair practice under the terms of section 53 of the National Law on Trade Union Associations, No. 23551 and is one more piece of behaviour that demonstrates the discrimination occurring against our organization within the Department. In view of the above, given that the ATE is one of the signatory representative bodies to the CLA endorsed by Decree No. 214/06, and as the conduct you have displayed threatens the guarantee to democratize labour relations, as well as the principle of

freedom of association enshrined in our national Constitution and international treaties of constitutional rank (ILO Conventions Nos 87 and 98), we demand that you cease such conduct on pain of a complaint being raised under Acts Nos 23551 and 23592, and before the ILO Committee on Freedom of Association.

191. The ATE states, however, that not only has the Department remained silent in the face of this request, but on 6 August 2007 another meeting was held with the UPCN behind the ATE's back. In summary, the Argentine State, through the Department of the Environment and Sustainable Development, has systematically violated the fundamental collective and trade union rights of workers. The attitude taken by the Department of the Environment and Sustainable Development can be seen from various angles, but taken together they show clear anti-union activity because the employer is the same in all cases. First, there have been reprisals against workers' representatives for participating in trade union action and defending the rights of their peers, that is to say, discrimination on the grounds of participation in a trade union. Second, the employer has adopted a reluctant attitude towards bargaining and has violated collective labour principles, which constitutes discrimination and bad faith in bargaining.
192. According to the ATE, workers and representatives who complained that staff were being hired outside the legal mechanisms of the CLA and that the stability of employment of civil servants was being violated, were persecuted, being subjected to transfers, being relieved of duties, and being subjected to non-payment of salaries, discrimination and violence in the workplace, among other irregularities in the Department.
193. Three representatives of the ATE internal board, Ms Báez Rocha, Mr Osterc and Ms Rodríguez, have suffered the consequences of pursuing trade union activities in the form of being transferred or relieved of their duties despite enjoying trade union immunity. It should be noted, with respect to Ms Báez Rocha, that a reinstatement action was brought (*"Báez Rocha, Patricia Hebe v. Department of the Environment and Sustainable Development, complaints, summary proceedings"*) which resulted in a reinstatement ruling and an acknowledgement that the Department had violated current trade union laws and that there had been unlawful practices in the process of hiring the staff concerned. Nevertheless, the Department of the Environment and Sustainable Development continued to persecute and mistreat the other representatives (and the union in general) and to relieve them of their duties.
194. The complainant organization alleges bad faith in bargaining on the part of the Department of the Environment and Sustainable Development, which has systematically refused to negotiate with the ATE regarding complaints and the actual circumstances of workers in the organization. Thus, on 20 February 2007, it held a meeting with representatives of only the UPCN, evidence of this being the letter sent by the ATE on 27 February 2007. Regardless of the request sent, after exacting reprisals against ATE representatives, the Department again met with the UPCN to address matters relating to the sectoral CLA, signing an agreement on 20 July 2007. In the face of these new acts of discrimination, the ATE sent a letter on 25 July 2007 requesting that the Department refrain from negotiating with only one of the parties as this constituted discrimination. The Department of the Environment and Sustainable Development, ignoring the ATE's request, met again with the UPCN on 6 August 2007.
195. The ATE states that this attitude is contrary to the principle of good faith in bargaining established in Act No. 24185 concerning collective labour agreements between the national civil service and its employees, section 9 of which states: "The parties shall be obliged to bargain in good faith. This principle places upon the parties the following rights and obligations ... (b) to hold meetings that may be necessary in appropriate locations and with appropriate frequency and regularity ... (e) to make efforts to reach agreements that take into account the diverse circumstances involved." It is the understanding of the ATE that

the actions of the administration in refusing to bargain collectively within the Department of the Environment and Sustainable Development and in taking decisions unilaterally constitute an unfair practice which is reflected not only in its refusal to bargain collectively with a trade union association eligible to do so, but also in its delaying tactics which have the effect of obstructing the bargaining process; in that respect the conduct of the State, as the employer, in the bargaining process shows a clear attitude of bad faith contrary to the spirit of the domestic and international legislation mentioned above.

## B. The Government's reply

196. In its communication of 15 July 2008, the Government denies that the administration has persecuted and exacted reprisals against workers' representatives of the complainant organization. The Government states, with regard to Ms Báez Rocha, that she initiated legal action, as recounted in "*Báez Rocha, Patricia Hebe v. Department of the Environment and Sustainable Development*, complaints, summary proceedings" (judicial proceedings No. 111713/2007), and also applied for interim measures of protection (Case No. 10130/07, "*Báez Rocha, Patricia Hebe v. Department of the Environment and Sustainable Development*, constitutional protection"), citing the fact that her working conditions had been altered, and claiming protection under sections 40, 48 and 50 of Trade Union Act No. 23551. Rulings have been given in both cases. The Government states, furthermore, that a legal ruling exists which was given after the case had been heard, in accordance with the procedure established in law. During the case, the plaintiff was represented by the ATE's own lawyers, exercising the rights accorded to her in law. As a result, the Government considers it unreasonable and without basis in fact or in law to present a complaint to the ILO, given that the national legal system has already dealt with the case.
197. With regard to Mr Osterc and Ms Rodríguez, the Government states that they have never been transferred or relieved of their duties. This is confirmed by the service certificates presented by their superiors in charge of the areas for which they were hired, and by the contracts they signed. Neither their contracts nor their services were interrupted throughout 2007 and the same situation has continued this year.
198. The Government adds that it is important to highlight the open channel of communication that has always existed between the ATE and the human resources unit of the Department of the Environment and Sustainable Development. The Department's human resources unit has always dealt with all formal and informal requests made to the administration to deal with all aspects considered important, even those which were not within the competence of the Department, which were referred to the relevant departments, for example national parity with regard to salary increases and moving staff onto permanent contracts. The Department has not maintained silence in the face of the ATE's requests, as can be seen from the reply sent to the ATE in a letter dated 9 March 2007, in which the Department denied that it had engaged in unfair practice or infringed the principles of freedom of association. The same letter also made it clear that various meetings had been held with the organization in question at which the Department responded to all concerns raised.

## C. The Committee's conclusions

199. *The Committee observes that, in the present case, the complainant alleges that, after the internal board of ATE representatives began to submit complaints of excessive hiring of short-term contract workers by the Department of the Environment and Sustainable Development without respecting the legal mechanisms established by the collective labour agreement, the authorities responsible for that Department: (1) held meetings with the UPCN to address matters relating to the collective agreement without inviting the ATE or*

*responding to its salary claims, although the ATE is party to the collective agreement endorsed by Decree No. 214/06; and (2) decided, as part of a campaign of reprisals and persecution, to transfer trade union representatives Ms Patricia Hebe Báez Rocha (who won a legal action for reinstatement) and Mr Matías Javier Osterc, and to relieve trade union representative Ms Alicia Rodríguez of her duties.*

- 200.** *With regard to the allegations of anti-union discrimination against three ATE leaders (transfer and subsequent reinstatement of Ms Báez Rocha, transfer of Mr Osterc and decision to relieve Ms Rodríguez of her duties), the Committee takes note of the Government's statements to the effect that: (1) in the case of trade union leader Ms Báez Rocha, the judicial authorities issued a ruling ordering her reinstatement to similar duties to those she had been performing or, failing that, to other duties compatible with her new situation, with payment of wages due; and (2) contrary to the complainant's allegations, Mr Osterc and Ms Rodríguez have never been transferred or relieved of their duties and neither their contracts nor their services were interrupted at any point during 2007 or, so far, in 2008. In these circumstances, the Committee will not proceed with the examination of these allegations.*
- 201.** *With regard to the allegation that the authorities in the Department of the Environment and Sustainable Development held meetings with the UPCN – even signing an agreement on 20 July 2007 – to address matters relating to the collective agreement, without inviting the ATE or responding to its salary claims, although the ATE is party to the collective agreement endorsed by Decree No. 214/06, the Committee takes note of the Government's statements to the effect that: (1) it is important to highlight the open channel of communication that has always existed between the ATE and the human resources unit of the Department of the Environment and Sustainable Development; (2) the Department's human resources unit has always dealt with all formal and informal requests made to the administration to deal with all aspects considered important, even those which were not within the competence of the Department, which were then referred to the relevant departments, for example national parity with regard to salary increases and moving staff onto permanent contracts; and (3) the Department has not maintained silence in the face of the ATE's requests, as can be seen from the reply sent to the ATE in a letter dated 9 March 2007, in which the Department denied that it engaged in any unfair practice or infringed the principles of freedom of association.*
- 202.** *In this regard, the Committee observes that, although the Government states that there is an open channel of communication with the ATE and that it has on numerous occasions met with representatives of the organization to discuss all matters considered important, it neither responds to nor denies the specific allegations that it has excluded the ATE from meetings which it held with the UPCN to address matters relating to the collective agreement in force, to which the ATE is signatory. In these circumstances, observing that the ATE has trade union personality (recognition as one of the most representative organizations which, among other benefits, grants it the right to bargain collectively) and is signatory to the collective labour agreement, in relation to which the authorities of the Department of the Environment and Sustainable Development held meetings with the UPCN (which also has trade union personality), the Committee requests the Government to ensure that the ATE is not subject to discrimination when meetings are held concerning the collective agreement in force to which ATE is party.*

### **The Committee's recommendation**

- 203.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendation:*

*Observing that the ATE has trade union personality (recognition as one of the most representative organizations which, among other benefits, grants it the right to bargain collectively) and is signatory to the collective labour agreement, in relation to which the authorities of the Department of the Environment and Sustainable Development held meetings with the UPCN (which also has trade union personality), the Committee requests the Government to ensure that the ATE is not subject to discrimination when meetings are held concerning the collective agreement in force to which the ATE is party.*

CASE NO. 2603

REPORT IN WHICH THE COMMITTEE REQUESTS  
TO BE KEPT INFORMED OF DEVELOPMENTS

**Complaint against the Government of Argentina  
presented by  
the Association of Workers of the Provincial and Municipal  
Public Administration of Salta (ATAP)**

*Allegations: The complainant organization alleges the transfer for anti-union reasons of a trade union leader and the refusal by the Ministry of Finance and Public Works of the Province of Salta to deduct the trade union dues of the association's members*

- 204.** The complaint is contained in a communication of the Association of Workers of the Provincial and Municipal Public Administration of Salta (ATAP) dated 22 March 2007. ATAP sent additional information in a communication dated 19 November 2007 and further allegations in a communication dated 22 April 2008.
- 205.** The Government sent its observations in a communication dated 28 October 2008.
- 206.** Argentina has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. The complainant's allegations**

- 207.** In its communications dated 22 March and 19 November 2007, and 22 April 2008, ATAP states that it obtained legal personality and/or trade union registration on 24 July 2006 through resolution No. 727/06 of the Ministry of Labour, Employment and Social Security of the Republic of Argentina. During the electoral process organized on 24 January 2007, in the light of the broad terms of section 50 of Act No. 23551 and section 29 of Regulatory Decree No. 467/88, the electoral board of the association informed the executive of the Province of Salta that a "Celeste-Rojo" list was to be submitted in the electoral and voting process that ATAP would be holding on 26 January 2007 to comply with the rules.
- 208.** With that process completed, on 1 February 2007 the trade union, through the Territorial Agency of Salta, informed the competent body, the Trade Union Directorate of the

National Ministry of Labour, Employment and Social Security in due time and in accordance with procedure that it had completed its electoral process as the rules required, and enclosed supporting documentation. On 2 February 2007, it formally notified in detail to the executive (the Governor of the Province of Salta) the composition of its new management committee and audit committee, whose legal mandate was to run from 29 January 2007 to 28 January 2011.

- 209.** On 6 February 2007, ATAP informed, among other bodies of the provincial public administration, the Secretariat for Medical Assistance and Social Welfare which reports directly to the Governor of the Province, that Ms Marina del Valle Guanca had been appointed to the post of second substitute member of ATAP's audit committee. ATAP recounts that, after about two years working as an intern in which she engaged in moonlighting, on 9 March 2005, through Decree No. 523/05, she was appointed by the executive of the Province of Salta to an "administrative post". On 20 June 2006, she was made "Head of the Operational Procurement Unit of the Financial Administrative Service" of the abovementioned Secretariat. On 16 January 2007, through Decree No. 315/07, the executive of the Province appointed her as from 1 December 2006, to a "Group T, subgroup 2, level 5, rank IV function, which is specific to posts involving the management, supervision or assessment of staff and/or tasks".
- 210.** In February 2007, Ms Marina del Valle Guanca was notified, while taking her annual leave entitlement, that she was to be "relocated" from the Secretariat for Medical Assistance and Social Welfare to the Administrative Secretariat Division of the Directorate of Archives of the Province, where she would take up a "technical post".
- 211.** The complainant states that, on 19 February 2007, Ms Marina del Valle Guanca sought a review of that decision. On 8 March 2007, having received no reply and the time limits prescribed in section 177 of Act No. 5348 on Administrative Procedures having expired, she formally requested the executive to issue a prompt ruling on the matter. To date she has received no reply.
- 212.** ATAP alleges that, regardless of whether the post is a technical or an administrative one, the so-called "relocation" of Ms Marina del Valle Guanca, constitutes a substantial and unlawful change in working conditions and a flagrant violation of freedom of association by the executive of the Province of Salta, which was prompted by her trade union activity and not the needs of the service, the apparent justification in Decree No. 628/07.
- 213.** In fact, the transfer, or "relocation", is linked to her membership of the audit committee of ATAP's management committee.
- 214.** The complainant organization considers that, since there was no prior judicial order to remove the trade union immunity of trade union leader Ms Marina del Valle Guanca, Decree No. 628/07 is unlawful, being seriously flawed because it violates the guarantees established in favour of trade union leaders under ILO Conventions Nos 87, 98, 135 and 151, which have all been ratified by Argentina and which are currently in force in the country.
- 215.** In its communication of 19 November 2007, ATAP alleges that on 20 April 2007 the executive of the Province of Salta notified Ms Marina del Valle Guanca of Decree No. 1198 of 17 April 2007 dismissing her. ATAP states that she was denied access to the case file, that she lodged an application for clarification and that on 22 June 2007 she was informed that her application for review had been rejected.
- 216.** According to ATAP, her denunciation of acts of corruption, which are notorious, was another reason for Ms Marina del Valle Guanca's termination, this being the more serious

as at the time she was receiving medical treatment, and indeed still is. For her transfer and subsequent termination, the Province of Salta failed to seek a prior judicial order to lift Ms Marina del Valle Guanca's trade union protection, as required by the case law of the National Labour Court of Appeal, Court II: in a ruling of 25 May 2007, in *Alvarez, Maximiliano and Others v. Cencosud SA*, the latter granted the right to trade union stability including to leaders of unions which were in the process of being set up and had not yet obtained trade union registration. The Office of the State Public Prosecutor also found that the trade union leader in question did not enjoy the right to prior judicial dispensation before her dismissal.

217. As to the Province's response in "*Guanca, Marina del Valle v. Province of Salta; Secretariat of Medical Assistance and Social Welfare in re: Trade Union Protection*", File No. 18892/07, heard by the Administrative Court of First Instance, the Province of Salta explicitly acknowledges, in yet another display of bad faith, that the administrative file pertaining to the case has been removed.
218. The complainant organization further alleges that, on 23 August 2006, it applied to the Ministry of Finance and Public Works for a check-off code (*código de descuento*) enabling it to deduct trade union dues, commercial and mutual loans, supplementary health insurance and financial or bank credits from its members' wages. ATAP based that application in particular on the principles of the ILO's Committee on Freedom of Association and Committee of Experts on the Application of Conventions and Recommendations.
219. ATAP adds that, on 13 November 2006, having received no answer whatsoever, it sought a prompt response to its application in the abovementioned case. On 15 January 2007, having still received no answer from the Ministry of Finance and Public Works, ATAP reiterated its original application. On 13 February 2007, the legal adviser of the Ministry of Finance and Public Works of the Province formally requested a photocopy of the trade union status of ATAP, stating that the aim was to allow the application in the abovementioned case to be followed up, "conscious of the fact that, at provincial level, Decree No. 2412/00 is still in force, section 1 of which allows the check-off or deduction of legally authorized trade union dues in the case of bodies with trade union status".
220. ATAP stated on 27 February, again in connection with the same case, that it renewed its application for a check-off code. It also reaffirmed the basis in law for its application, citing the recommendations of the ILO's supervisory bodies, and a series of international standards which are contained in Argentine law and have constitutional rank as well as being included in the case law of the Supreme Court of the Nation.
221. ATAP believes that the decision by the Ministry of Finance and Public Works of the Province to delay and/or refuse the grant of a check-off code violates the freedom of association provided for in ILO Conventions Nos 87, 98, 135 and 151.
222. Through resolution No. 42/08 of 31 March 2008, the Minister of Labour and Social Welfare of the Province decided to: "Article 1. Reject the application made by the Association of Workers of the Provincial and Municipal Public Administration in the light of the content of the preamble." The preamble states, among other things, that: "Pursuant to section 38 of Act No. 23551, only associations with trade union status, not those which are merely registered, may deduct trade union dues." "As noted in the proceedings, the Association of Workers of the Provincial and Municipal Public Administration has only legal personality (resolution No. 727/06 of the National Ministry of Labour and Social Security)."

- 223.** The complainant organization further submits that on 7 March 2008 it sought review of a decision by the provincial executive, citing infringement of civil rights and violation of and/or discrimination against the freedom of association of three of its members.
- 224.** In fact, following a long period of psychological and work-related harassment by the management, the three ATAP representatives, permanent members of staff at the General Tax Directorate of the Province, Sergio Martín Zamboni, finance secretary, Fátima Elizabeth Gramajo, third substitute member and Walter Rodolfo Alderete, second regular member of the electoral board, were formally removed from their original places of work without any legal grounds whatsoever, in violation of freedom of association, through Decree No. 660 of 14 February 2008 signed by the Ministry of Finance and Public Works, the Secretary-General of the Interior and the Governor, and published in Official Journal No. 17812 of 21 February 2008.
- 225.** On 8 February 2007, ATAP formally notified the then Provincial Labour Directorate, through Note No. 080/07, of the composition of the new management committee and audit committee.

## **B. The Government's reply**

- 226.** By its communication dated 28 October 2008, the Government transmits the report of the Ministry of Labour and Social Welfare of the Province of Salta, in which it is indicated, in respect of Ms Marina del Valle Guanca's case, that a decree on her reinstatement in her previous job is under preparation and will be communicated. Furthermore, with regard to the check-off code requested by ATAP, enabling it to deduct trade union dues, commercial and mutual loans, supplementary health insurance and financial or bank credits from its members' wages, the Government indicates that if registered trade unions have the right to deduct trade union dues from their members (section 23(d) of Law No. 23.551), the administrative authority (as an employer) is not required to authorize this check-off code for such associations, unless a voluntary agreement to this effect concluded by the various parties has been duly communicated.

## **C. The Committee's conclusions**

- 227.** *The Committee notes that in the present case the Association of Workers of the Provincial and Municipal Public Administration of Salta (ATAP) alleges that the executive of the Province of Salta: (1) in the first instance changed the working conditions of the trade union leader, Ms Marina del Valle Guanca, who was subsequently terminated through Decree No. 1198/07, by reason of her membership of the audit committee of the ATAP management committee, and despite the fact that there was no prior judicial order to lift her trade union protection; (2) transferred from their workplaces three ATAP trade union leaders who were permanent members of staff at the General Tax Directorate of the Province, Sergio Martín Zamboni, finance secretary, Fátima Elizabeth Gramajo, third substitute member and Walter Rodolfo Alderete, second regular member of the electoral board. Furthermore, the Committee observes that, two years after ATAP had applied for a check-off code to enable it to deduct the trade union dues of its members, the Ministry of Labour and Social Welfare of the Province rejected that request, in violation of the principles of freedom of association.*
- 228.** *With regard to the allegation that the executive of the Province of Salta changed, in the first instance, the working conditions of the trade union leaders, Ms Marina del Valle Guanca, and finally dismissed her through Decree No. 1198/07, because of her membership of the audit committee of the ATAP management committee, despite the fact that no prior judicial order had been issued to lift her trade union protection, the Committee notes with*

*interest the Government's indication that a decree on her reinstatement in her previous job is under preparation and will be communicated. In these circumstances, the Committee expects that the decree on reinstatement without loss of pay of the trade union leader Ms Marina del Valle Guanica will be adopted without delay. The Committee requests the Government to keep it informed in this regard.*

- 229.** *As to the alleged transfer from their workplace of three ATAP leaders who were permanent members of staff at the General Tax Directorate of the Province, Sergio Martín Zamboni, finance secretary, Fátima Elizabeth Gramajo, third substitute member and Walter Rodolfo Alderete, second regular member of the electoral board, the Committee notes that the Government did not provide its observations and requests it to ensure that an investigation is carried out into the matter without delay and, should it be found that the three were transferred on anti-union grounds, to take steps to ensure their immediate reinstatement in their former posts. The Committee requests the Government to keep it informed in this regard.*
- 230.** *As to the allegation that, in violation of the principles of freedom of association, the Ministry of Labour and Social Welfare of the Province rejected the application made by ATAP two years ago for a check-off code to enable it to deduct the trade union dues of its members, the Committee notes that, according to the Government, if registered trade unions have the right to deduct trade union dues from their members (section 23(d) of Law No. 23.551), the administrative authority (as an employer) is not required to authorize this check-off code for such associations, unless a voluntary agreement to this effect concluded by the various parties has been duly communicated. In this respect, the Committee requests the Government to take steps in order to facilitate an agreement between ATAP and the relevant authorities of the Province of Salta on the deduction of trade union dues from members' wages. The Committee requests the Government to keep it informed in this regard.*

### **The Committee's recommendations**

- 231.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a)** *The Committee expects that the decree on reinstatement without loss of pay of the trade union leader of the Association of Workers of the Provincial and Municipal Public Administration of Salta (ATAP), Ms Marina del Valle Guanica will be adopted without delay. The Committee requests the Government to keep it informed in this respect.*
- (b)** *As to the alleged transfer from their workplace of three ATAP leaders who were permanent members of staff at the General Tax Directorate of the Province, Sergio Martín Zamboni, finance secretary, Fátima Elizabeth Gramajo, third substitute member and Walter Rodolfo Alderete, second regular member of the electoral board, the Committee requests the Government to ensure that an investigation is carried out into the matter without delay and, should it be found that the three were transferred on anti-union grounds, to take steps to ensure their immediate reinstatement in their former posts. The Committee requests the Government to keep it informed in this regard.*
- (c)** *The Committee requests the Government to take steps in order to facilitate an agreement between ATAP and the relevant authorities of the Province of*

*Salta on the deduction of trade union dues from members' wages. The Committee requests the Government to keep it informed in this regard.*

CASE NO. 2582

REPORT IN WHICH THE COMMITTEE REQUESTS  
TO BE KEPT INFORMED OF DEVELOPMENTS

**Complaint against the Government of Bolivia  
presented by  
the Latin American Confederation of Judiciary Workers (CLTJ)**

*Allegations: Disciplinary proceedings and sanctions of one to three months of suspension from duty of trade union leaders because of their participation in an extraordinary assembly of the trade union organization and the votes they cast at that assembly*

- 232.** The Latin American Confederation of Judiciary Workers (CLTJ) presented its complaint in a communication of June 2007. It presented new allegations on 16 August 2007.
- 233.** At its May 2008 meeting, the Committee observed that despite the time which had elapsed since the last examination of the case, it had not received the information requested of the Government. The Committee drew the attention of the Government to the fact that, in accordance with the procedural rules set out in paragraph 17 of its 127th Report, approved by the Governing Body, it may present a report on the substance of the case even if the Government's observations or information have not been received in due time and requested the Government to transmit the information requested as a matter of urgency [see 350th Report, para. 10].
- 234.** Bolivia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. The complainant organization's allegations**

- 235.** In its communications of June and 16 August 2007, the CLTJ alleges violation of the right of assembly, reprisals and acts of persecution against the trade union leaders of the National Association of Employees of the Judiciary and the Administration (ANAFUJA). It refers in particular to disciplinary proceedings (No. 13/2006-SER) initiated ex officio by the Council of the Judicature against Ms Magda Valdez Mejía, Chairperson of ANAFUJA–La Paz. Moreover, administrative proceedings were initiated against Ms Ana María Murillo Michel, Chairperson, and Mr Lucio Medrano Flores, General Secretary of ANAFUJA Nacional which resulted in their suspension, for three months and one month, respectively, and in which their right of defence was not observed. According to the complainant organization, these measures were taken as a result of the votes cast by the trade union leaders during an extraordinary assembly of ANAFUJA–La Paz and ANAFUJA Nacional, which took place in accordance with the statutes and regulations and which was convened in reaction to non-compliance with an agreement reached between the judicial authorities and ANAFUJA on 17 August 2005. The assembly voted in favour

of strike action with a view to forcing compliance with the agreement and protesting against the restructuring process under way in the judiciary. It was in the light of these decisions that the sanctions were imposed.

## B. The Committee's conclusions

236. *The Committee regrets that, despite the time that has elapsed since the case was last examined, the Government has not sent the information requested although it has been invited on various occasions, including by means of an urgent appeal, to submit its observations and comments on the case.*
237. *Under these circumstances, and, in accordance with the applicable rules of procedure [see 127th Report, para. 17, approved by the Governing Body at its 184th Session], the Committee is bound to present a report on the substance of the case without the benefit of the information it hoped to receive from the Government.*
238. *The Committee reminds the Government that the purpose of the whole procedure established by the ILO for the examination of allegations of violations of freedom of association is to promote respect for trade union rights, in law and in fact. The Committee remains convinced that if the procedure protects governments from unreasonable accusations, governments on their side should recognize the importance of formulating, so as to allow objective examination, detailed replies to the allegations brought against them.*
239. *The Committee observes that, according to the CLTJ, the trade union leaders of ANAFUJA at national level and at the level of the district of La Paz (Ms Magda Valdez Mejía, Chairperson of ANAFUJA–La Paz, Ms Ana María Murillo Michel and Mr Lucio Medrano Flores, members of ANAFUJA Nacional) were the subject of disciplinary proceedings and sanctions of one to three months of suspension from duty because of their participation in an extraordinary assembly of the trade union organization where it was decided, by vote, to authorize a strike condemning the non-compliance by the judicial authorities with an agreement reached on 17 August 2005, and protesting against the restructuring process under way.*
240. *In this regard, the Committee recalls that no person should be dismissed or prejudiced in employment by reason of trade union membership or legitimate trade union activities, and it is important to forbid and penalize in practice all acts of anti-union discrimination in respect of employment [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 771]. The Committee urges the Government to take the necessary steps without delay to ensure that an inquiry is held into the administrative proceedings and the sanctions of suspension imposed on the trade union leaders of ANAFUJA Nacional and ANAFUJA–La Paz and, if it is found that these measures were taken because the trade union leaders legitimately exercised their right to vote at an extraordinary assembly of the trade union, to take the necessary steps to ensure that said measures are set aside and that they are reinstated in their posts with back pay, if this has not been done yet. The Committee requests the Government to keep it informed in this regard.*

## The Committee's recommendation

241. *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendation:*

*The Committee urges the Government to take the necessary steps without delay to ensure that an inquiry is held into the administrative proceedings*

*and the sanctions of suspension imposed on the trade union leaders of ANAFUJA Nacional and ANAFUJA–La Paz and, if it is found that these measures were taken because the trade union leaders legitimately exercised their right to vote at an extraordinary assembly of the trade union, to take the necessary action to ensure that said measures are set aside and that they are reinstated in their posts with back pay, if this has not been done yet. The Committee requests the Government to keep it informed in this regard.*

CASE NO. 2318

INTERIM REPORT

**Complaint against the Government of Cambodia  
presented by  
the International Trade Union Confederation (ITUC)**

***Allegations: The murder of two trade union leaders; the continuing repression of trade unionists in Cambodia***

- 242.** The Committee has already examined the substance of this case on three occasions, most recently at its May–June 2007 session where it issued an interim report, approved by the Governing Body at its 299th Session [see 346th Report, paras 356–395].
- 243.** As a consequence of the lack of a reply on the part of the Government, at its May–June 2008 meeting [see 350th Report, para. 10], the Committee launched an urgent appeal and drew the attention of the Government to the fact that, in accordance with the procedural rules set out in paragraph 17 of its 127th Report, approved by the Governing Body, it may present a report on the substance of this case even if the observations or information from the Government have not been received in due time.
- 244.** Cambodia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. Previous examination of the case**

- 245.** In its previous examination of the case, the Committee made the following recommendations [see 346th Report, para. 395]:
- (a) The Committee emphasizes once again the seriousness of the allegations pending which refer, inter alia, to the murder of trade union leaders Chea Vichea, Ros Sovannareth and Hy Vuthy. The Committee deeply deplores these events and once again draws the Government's attention to the fact that such a climate of violence leading to the death of trade union leaders is a serious obstacle to the exercise of trade union rights.
  - (b) The Committee once again strongly urges the Government to reopen the investigation into the murder of Chea Vichea and to ensure that Born Samnang and Sok Sam Oeun may exercise, as soon as possible, their right to a full appeal before an impartial and independent judicial authority.
  - (c) The Committee strongly urges the Government to immediately institute independent inquiries into the murders of Ros Sovannareth and Hy Vuthy and to keep it informed of the outcome.

- (d) The Committee strongly urges the Government to institute, without delay, independent judicial inquiries into the assaults on trade unionists, Lay Sophead, Pul Sophead, Lay Chhamroeun, Chi Samon, Yeng Vann Nuth, Out Nun, Top Savy, Lem Samrith, Chey Rithy, Choy Chin, Lach Sambo, Yeom Khun and Sal Koem San, and to keep it informed of developments in this respect.
- (e) The Committee requests the Government to take the necessary steps to prevent the blacklisting of trade unionists and, in particular, of the 17 trade unionists mentioned by the complainant.
- (f) The Committee requests the Government to transmit its observations respecting the dismissal of Lach Sambo, Yeom Khun and Sal Koem San following the strike action at the Genuine Garment Factory, as well as any relevant court judgements as a matter of urgency.
- (g) The Committee once again urges the Government to take measures to ensure that the trade union rights of workers in Cambodia are fully respected and that trade unionists are able to exercise their activities in a climate free of intimidation and risk to their personal security and lives.
- (h) The Committee once again expresses its deep concern with the extreme seriousness of the case and, in the absence of any significant efforts on the part of the Government to thoroughly investigate all of the above matters in a transparent, independent and impartial manner, strongly suggests that the Government accept an ILO expert mission to carry out an investigation into the above allegations and thus assist the Government in redressing any violations of trade union rights and bringing to an end the emerging climate of impunity. The Committee calls the Governing Body's special attention to the situation.

## **B. The Committee's conclusions**

- 246.** *The Committee deplores that, despite the time that has elapsed since the submission of this complaint, it has not received the Government's observations, although the Government has been invited on several occasions, including by means of an urgent appeal, to present its comments and observations on the case. The Committee strongly urges the Government to be more cooperative in the future.*
- 247.** *Under these circumstances, and in accordance with the applicable rules of procedure [see 127th Report, para. 17, approved by the Governing Body], the Committee finds itself obliged to present a report on the substance of the case without the benefit of the information which it had hoped to receive from the Government.*
- 248.** *The Committee recalls that the purpose of the whole procedure established by the International Labour Organization for the examination of allegations of violations of freedom of association is to promote respect for this freedom in law and in fact. The Committee remains confident that, if the procedure protects governments from unreasonable accusations, governments on their side will recognize the importance of formulating, for objective examination, detailed replies concerning allegations made against them.*
- 249.** *The Committee welcomes the Government's acceptance of the ILO direct contacts mission to Phnom Penh, which took place from 21 to 25 April 2008. The direct contacts mission, which had been previously requested by the Committee and by the ILO Conference Committee on the Application of Standards in June 2007, was led by Justice Rama Pal and concerned the serious matters raised within the present case and the issues raised in comments of the Committee of Experts on the Application of Conventions and Recommendations. The Committee does observe with concern, however, from the mission report that the mission had on one occasion experienced some verbal intimidation.*

- 250.** *The Committee takes due note of the conclusions of the direct contracts mission and observes that one of the mission's principal findings concerns the lack of an effective and impartial judiciary. In this respect the mission report conclusions state, firstly, that the judicial system's ability to discharge its mandate is compromised by a lack of capacity, as evidenced for instance by the fact that court decisions and proceedings are often unrecorded and unpublished. The report further concludes, on the basis of the indications received over the course of the mission, that the judiciary is subject to political interference and has been unable to exercise its functions in an impartial and independent manner. The Committee notes this information with deep concern. Noting moreover the mission report's conclusion that the assassinations of trade union leaders and the emerging climate of impunity in the country cannot effectively be remedied without first addressing this underlying problem, the Committee consequently urges the Government to take the necessary steps to ensure the independence and effectiveness of the judicial system, including through capacity-building measures and the institution of safeguards against corruption. It suggests that the Government have recourse to the technical cooperation facilities of the Office in this regard, notably in the area of reinforcing institutional capacity, and requests the Government to keep it informed of all steps taken in this regard.*
- 251.** *The Committee recalls that it had previously urged the Government to reopen the investigation into the murder of Chea Vichea and to ensure that Born Samnang and Sok Sam Oeun may exercise, as soon as possible, their right to a full appeal before an impartial and independent judicial authority. The Committee had also urged the Government to institute independent judicial inquiries into the murders of trade union leaders Ros Sovannareth and Hy Vuthy. In this connection, while taking due note of the efforts made by the Government to ensure that the mission met with those concerned in these cases, including the two persons serving prison terms for the murder of Chea Vichea, the Committee observes with deep concern the mission report's conclusion that the Government had nevertheless demonstrated an unwillingness to engage in fully frank discussions over these serious matters, and had provided no concrete indications that it would act upon these or any of the Committee's previous recommendations. The mission report also indicates that a hearing date has yet to be fixed for Born Samnang and Sok Sam Oeun before the Supreme Court, and that one individual, Thach Saveth, was sentenced to 15 years in prison for the murder of Ros Sovannareth, in a trial lasting one hour that was characterized by breaches of procedural rules and the absence of full guarantees of due process of law. Thach Saveth is currently serving his sentence in prison.*
- 252.** *In light of the above-noted information, and recalling moreover that it had previously expressed deep concern over the absence of any significant efforts on the part of the Government to thoroughly investigate all of the above matters in a transparent, independent and impartial manner, the Committee can only deplore the Government's failure to act upon its previous recommendations on the murders of Chea Vichea, Ros Sovannareth and Hy Vuthy. It further deplores the fact that Thach Saveth has been sentenced to prison for the murder of Ros Sovannareth, in a trial closely mirroring that of Born Samnang and Sok Sam Oeun in that it had been characterized by the absence of full guarantees of due process. In these circumstances, the Committee must once again stress the importance of ensuring full respect for the right to freedom and security of person and freedom from arbitrary arrest and detention, as well as the right to a fair trial by an independent and impartial tribunal, in accordance with the provisions of the Universal Declaration of Human Rights. The Committee yet again emphasizes, in the strongest possible terms, that the killing, disappearance or serious injury of trade union leaders and trade unionists requires the institution of independent judicial inquiries in order to shed full light, at the earliest date, on the facts and the circumstances in which such actions occurred and in this way, to the greatest extent possible, determine where responsibilities lie, punish the guilty parties and prevent the repetition of similar events. The absence of*

*judgements against guilty parties creates in practice an atmosphere of impunity, which reinforces the climate of violence and insecurity, and which is extremely damaging to the exercise of trade union rights [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 48 and 52]. The Committee once again strongly urges the Government to reopen the investigations into the murders of Chea Vichea and Ros Sovannareth and to ensure that Born Samnang, Sok Sam Oeun and Thach Saveth may exercise, as soon as possible, their right to a full appeal before an impartial and independent judicial authority. The Committee also urges the Government to immediately institute an independent inquiry into the murder of Hy Vuthy.*

**253.** *Finally the Committee once again urges the Government to implement the rest of its previous recommendations, which are summarized as follows:*

- *The Committee strongly urges the Government to institute without delay independent judicial inquiries into the assaults on trade unionists Lay Sophead, Pul Sopheak, Lay Chhamroeun, Chi Samon, Yeng Vann Nuth, Out Nun, Top Savy, Lem Samrith, Chey Rithy, Choy Chin, Lach Sambo, Yeom Khum and Sal Koem San, and to keep it informed of developments in this respect.*
- *The Committee requests the Government to take the necessary steps to prevent the blacklisting of trade unionists.*
- *The Committee requests the Government to transmit its observations respecting the dismissal of Lach Sambo, Yeom Khun and Sal Koem San following strike action at the Genuine garment factory.*
- *The Committee once again urges the Government to take measures to ensure that the trade union rights of workers in Cambodia are fully respected and that trade unionists are able to exercise their activities in a climate free of intimidation and risk to their personal security and their lives.*
- *The Committee once again expresses its deep concern with the extreme seriousness of the case and the absence of any significant efforts on the part of the Government to thoroughly investigate all of the above matters in a transparent, independent and impartial manner. It calls the Governing Body's special attention to the situation.*

### **C. The Committee's recommendations**

**254.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) *The Committee emphasizes once again the seriousness of the allegations pending, which refer, inter alia, to the murder of trade union leaders Chea Vichea, Ros Sovannareth and Hy Vuthy. The Committee deeply deplores these events and once again draws the Government's attention to the fact that such a climate of violence leading to the death of trade union leaders is a serious obstacle to the exercise of trade union rights.*
- (b) *The Committee urges the Government to take the necessary steps to ensure the independence and effectiveness of the judicial system, including through capacity-building measures and the institution of safeguards against corruption. It suggests that the Government has recourse to the technical cooperation facilities of the Office in this regard, notably in the area of*

*reinforcing institutional capacity, and requests the Government to keep it informed of developments in this respect.*

- (c) The Committee once again strongly urges the Government to reopen the investigations into the murders of Chea Vichea and Ros Sovannareth and to ensure that Born Samnang, Sok Sam Oeun and Thach Saveth may exercise, as soon as possible, their right to a full appeal before an impartial and independent judicial authority. The Committee also urges the Government to immediately institute an independent inquiry into the murder of Hy Vuthy.*
- (d) The Committee strongly urges the Government to institute without delay independent judicial inquiries into the assaults on trade unionists Lay Sophead, Pul Sopheak, Lay Chhamroeun, Chi Samon, Yeng Vann Nuth, Out Nun, Top Savy, Lem Samrith, Chey Rithy, Choy Chin, Lach Sambo, Yeon Khum and Sal Koem San, and to keep it informed of developments in this respect.*
- (e) The Committee requests the Government to take the necessary steps to prevent the blacklisting of trade unionists.*
- (f) The Committee requests the Government to transmit its observations respecting the dismissal of Lach Sambo, Yeom Khun and Sal Koem San following strike action at the Genuine garment factory.*
- (g) The Committee once again urges the Government to take measures to ensure that the trade union rights of workers in Cambodia are fully respected and that trade unionists are able to exercise their activities in a climate free of intimidation and risk to their personal security and their lives.*
- (h) The Committee once again expresses its deep concern with the extreme seriousness of the case and the absence of any significant efforts on the part of the Government to thoroughly investigate all of the above matters in a transparent, independent and impartial manner. It calls the Governing Body's special attention to the situation.*

CASE NO. 2622

REPORT IN WHICH THE COMMITTEE REQUESTS  
TO BE KEPT INFORMED OF DEVELOPMENTS

**Complaint against the Government of Cape Verde  
presented by  
the Cape Verde Confederation of Free Trade Unions (CCSL)**

***Allegations: The complainant organization objects to certain provisions of the new Labour Code, as well as the process of drafting and adopting that Code***

255. The present complaint is contained in a communication of the Cape Verde Confederation of Free Trade Unions (CCSL) dated 14 December 2007. Previously, the CCSL sent additional information relating to the complaint in communications dated 7 February 2008 and 14 April 2008.
256. The Government sent its observations in a communication dated 26 March 2008.
257. Cape Verde has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. The complainant's allegations**

258. In its communication dated 14 December 2007, the CCSL states that the Government submitted a draft Cape Verdean Labour Code for public discussion in July 2003. Right from the start, the CCSL made clear its reservations regarding this draft in the light of the negative consequences of its adoption (both for the workers and for labour relations in Cape Verde) in its initial form.
259. In the meantime, the draft Labour Code was submitted to the Council for Social Cooperation for discussion. The Council decided to set up a technical committee responsible for the harmonization and integration of the proposals put forward by the various social partners, as well as for reaching a consensus in order to produce a draft Labour Code that would at least satisfy all the parties concerned.
260. The complainant organization states that, following three years of arduous work and extensive and difficult negotiations, through a Memorandum of Understanding signed by the members of the technical committee, the technical advisers of the trade union and employers' organizations and the Government submitted what was to be the new Labour Code to their respective organizations for study and discussion within the framework of the Council for Social Cooperation. The CCSL, although broadly in favour of the proposal submitted by the technical committee (which was a considerable improvement on the draft Labour Code initially submitted by the Government) was, and is still opposed to certain provisions it feels are prejudicial to the interests of the workers and labour relations in Cape Verde, as well as being contrary to Conventions Nos 87 and 98.
261. In the first place, the CCSL objects to section 70, indent (3) of the Labour Code, which states that trade unions shall meet the costs of publication of their statutes in the *Official Journal*. The CCSL believes that this provision violates Convention No. 87. For example, the complainant organization states that the statutes of the Trade Union Association of Registry, Notary and Civil and Criminal Identification Workers (ASTRANIC) were not published in the *Official Journal* owing to the fact that this organization was asked to pay the equivalent of €1,800 in publishing fees.
262. Furthermore, the complainant organization states that section 70, indent (4) of the Labour Code states that trade union organizations can only undertake activities once their statutes have been published in the *Official Journal*. The CCSL states that trade union organizations are by nature not-for-profit organizations and requiring them to pay a vastly

inflated rate for the publication of their statutes (in order that they might undertake activities) is tantamount to restricting freedom of association.

- 263.** Secondly, the CCSL objects to section 110, indent (1) of the new Labour Code which transfers responsibility for the publication of collective labour agreements in the *Official Journal* to the organizations of the workers and the employers. The complainant organization states that this is counterproductive and contrary to the principle of the promotion of collective bargaining in Cape Verde. According to the Government, this measure was adopted because on a prior occasion the Ministry of Labour had to pay the equivalent of €7,000 for the publication of the collective labour agreement signed between the trade unions and the enterprises of the private security sector.
- 264.** Thirdly, the CCSL objects to section 353, indent (1) of the new Labour Code, which drastically cuts the holidays of maritime workers from ten days per month of employment to 2.5 days per month of employment. The complainant organization believes that maritime labour is particular in nature and the holiday periods existing for other professions cannot be applied to the maritime sector. In the light of this, the CCSL believes that the previously existing holiday regime should continue to be applied.
- 265.** Fourthly and most seriously of all, the CCSL alleges that the Government, outside of the framework of the technical committee set up to harmonize, integrate and build a consensus on the proposals put forward by the various social partners, decided to introduce the provision contained in section 15 of the preamble to Legislative Decree No. 5/2007, which was neither discussed nor agreed on within the technical committee. The CCSL states that this provision is an attempt by the Government to discount the periods of service completed by workers on fixed-term contracts in Cape Verde from 1994 to the present day in order to avoid the conversion of fixed-term contracts into open-term contracts, this being a clear violation of the pre-existing rights of the workers under these circumstances and of Convention No. 98.
- 266.** Fifthly, the CCSL states that, independently of the Council for Social Cooperation, the Government, in a clear attempt to avoid its responsibilities, decided not to submit the technical committee's Memorandum of Understanding for discussion within the Council for Social Cooperation, as had been agreed initially, approving the Labour Code without any discussion having taken place within the Council in this regard, with the Labour Code being submitted to the President for promulgation.
- 267.** In its communication of 7 February 2008, the CCSL states that, with regard to section 15 of the preamble of Legislative Decree No. 5/2007, the legal expert Dr. Germano Almeida (who was responsible for the Labour Code) stated in an interview that the Government had amended provisions of the Code a short time beforehand. This fact strengthens and confirms the complaint presented by the complainant organization. As to the reduced holiday periods for maritime workers, the new Code removes the pre-existing right of maritime workers through section 15 of Decree-Law No. 36/93 of 21 June and no longer takes into account the period reserved for weekly rest and national and municipal public holidays of maritime workers, thus violating Convention No. 98.
- 268.** In its communication of 14 April 2008, the CCSL states that it made a submission to the Office of the Attorney-General of the Republic of Cape Verde on 14 April 2008, with the aim of having section 15 of Legislative Decree No. 5/2007 of 16 October (approving the Labour Code) declared unconstitutional.

## B. The Government's reply

269. In its communication of 26 March 2008, the Government states that the Constitution of Cape Verde proclaims the country to be a sovereign republic which guarantees the respect of human dignity, while recognizing the inviolability and inalienability of human rights for all, of peace and of justice and the main aim of which is to create an economic, social and cultural democracy which will allow for the construction of a free and just society based on solidarity. Thus the State of Cape Verde recognizes the primacy of the Constitution and is based on democratic legality, necessarily respecting and ensuring the respect of laws, both national and international.
270. International law, be it general or common in nature, is an integral part of Cape Verde's domestic law and international treaties and agreements are binding both domestically and internationally from the moment they have been approved or ratified by the country and officially published. Thus, the Government states that it is also committed to respecting the abovementioned undertakings; in particular the principle of legality and it is in this context that the complaint presented by the CCSL must be examined.
271. The Government states that it decided, through the Ministry of Labour, Family and Solidarity, within the field of the reform of the public administration, to promote the review of the existing labour legislation in order to guarantee greater social justice. The social partners participated in the drafting of the Labour Code in a general manner and both the organizations of employers and the trade union organizations took an interest and laid out their positions regarding the text as a whole, as can be seen from the complaint presented by the CCSL.
272. In accordance with the instruments of international law in force in the country, principally ILO Conventions Nos 87 and 98, under domestic legislation all workers have the freedom to establish trade union or professional associations for the defence of their interests and collective or individual rights. Thus, freedom of association is fully respected, with trade union pluralism in particular, as well as independence, autonomy and democracy in relation to the employers, State, political parties, church or religious groups, being guaranteed: no one may be forced to join a union, remain a trade unionist, or pay trade union dues to a trade union to which they do not belong. This freedom is recognized as a right, a freedom and a guarantee which, as well as being governed by a specific regime provided for under the Constitution, is also covered by the general regime applied to fundamental rights which are directly applicable and bind all public and private bodies.
273. The regime governing the abovementioned principles was maintained intact within the framework of the labour review and, despite the claim made by the CCSL, the fact that trade unions must meet the costs of publication of their statutes in the *Official Journal* does not constitute a violation of the ILO Conventions, given that section 73, indent (3) is in accordance with the provisions of Convention No. 87 with regard to relations between trade union organizations and the State, ensuring that there is no possibility of interference with or control of trade union organizations. In general, every effort is made to ensure that the State abstains from intervening in such a manner as to slow down or obstruct the right to freedom of association from the moment of the establishment of any trade union organization. Furthermore, trade union organizations acquire legal personality once they have submitted their statutes to the competent services of the ministry responsible for the field of labour and the fact that activities can be undertaken following the publication of those statutes in the *Official Journal* is not a restriction on the abovementioned principle. In fact, that principle is strengthened and guaranteed by publication, the very aim of which is to ensure the security of the trade union organization and its members given that, following publication, the statutes, together with their intrinsic benefits, become public knowledge.

274. The Government refutes the claim that domestic legislation, and in particular the Labour Code, violates and is applied in such a manner as to restrict the guarantees provided for under ILO Conventions Nos 87 and 98. Furthermore, Article 7 of Convention No. 87 states that the acquisition of legal personality by workers' and employers' organizations, federations and confederations shall not be made subject to conditions of such a character as to restrict the application of the provisions of Articles 2, 3 and 4 hereof, and as has already been shown, these provisions are fully and absolutely guaranteed.
275. The Government observes that the complainant organization also alleges that section 110, indent (1), which states that collective labour agreements and affiliation agreements must be published at the expense of those concerned in the *Official Journal* within 30 days of their submission, when this is considered to be definitive, by order of a member of the Government responsible for the field of labour, violates Conventions Nos 87 and 98. Cape Verdean legislation makes ample provision for collective agreements as agreements between private parties. It is up to the workers and the employers to decide when to initiate the bargaining process and to sign agreements. The Constitution states that not only members of trade union organizations but all workers have the right to be titular to collective agreements; furthermore, trade union organizations do not enjoy a monopoly when it comes to concluding such agreements. In this regard, section 100 of the Labour Code, based on the pronouncements of the ILO, ensures that non-unionized workers shall enjoy this right, given that the autonomy and the right to collective bargaining of the workers is derived from the recognition of their freedom of association, which is recognized in the case of all workers, both positively and negatively.
276. This ample recognition is explained in part by the principle of range concerning the content of the collective agreements recognized by Cape Verdean legislation. That is to say, so long as the parties to an agreement do not intend including in that agreement provisions contrary to the constitutional or legal standards in force, or provisions which imply that workers will receive treatment less favourable than that established under law, those parties enjoy a wide margin of manoeuvre when establishing the content of collective agreements (sections 98 and 99 of the Labour Code). Furthermore, as to the principle of primacy of bargaining and the subsidiarity of non-negotiable sources, the legislator has enshrined the principle of the primacy of bargaining (section 108 of the Labour Code) both with regard to the basic rules which must be respected and the review of working and employment conditions. Thus, the competent government department in the field of labour, along with the relevant government department or that responsible for the economic sector, will do everything possible to promote the voluntary resolution of disputes emerging from the bargaining process as and when these occur.
277. If collective agreements are to have full effect then they must be published in the *Official Journal*, with the costs involved being met by those concerned. The principle of publicity is enshrined precisely in order to promote collective bargaining and its outcomes. Only with publication will the readership, principally the workers, discover the content of collective agreements and therefore respect and ensure respect of those agreements. In conclusion, the domestic legislation reflects, clearly and unequivocally, recognition of the fact that collective agreements are more effective in achieving peaceful labour relations because they have been concluded by the interested parties themselves and that they play a role in promoting the international pronouncements and opinions of ILO Conventions Nos 87 and 98.
278. As to maritime workers, section 353, indent (1) of the Labour Code states that maritime workers have the right to at least 2.5 days of leave per month of employment. In cases where compulsory rest days have not been taken, they may be accumulated together with the annual holidays to which the maritime worker is entitled, with the agreement of both parties. This section is fully in accordance with international maritime labour legislation

and takes into account the particular needs of workers in this sector; in particular, it is in accordance with the ILO Maritime Labour Convention, 2006, in that a minimum of 2.5 days of leave per month of employment is established.

- 279.** The Government states that it should be remembered that the Labour Code is extremely wide ranging and generous in this regard, given that it allows for more favourable treatment of the worker through instruments of collective regulation, internal regulations and individual employment contracts while encouraging collective bargaining. On the other hand, contrary to the claim made by the CCSL, existing rights will not be affected given that the existing legislation will continue to be implemented in the future.
- 280.** As to fixed-term contracts, with regard to which greater security was required, section 15 of the preamble to the legislative decree approving the Labour Code states that the regime established in this respect does not apply to situations involving or initiated by an employment contract prior to its entry into force, with regard to deadlines concerning the lapse or expiry of contracts. As to the allegation that this section was introduced without a discussion taking place or a consensus being achieved within the technical committee, the Government states that, under section 65 of the Constitution of the Republic of Cape Verde, in the case of the defence of the rights and interests of the workers, trade unions have the legal right to participate nominally in the drafting of labour legislation. This right to participate is regulated by Act No. 17/B/96 of 30 December, which states that no draft or legal proposal relating to labour legislation may be discussed and voted on by the National Assembly unless the trade union organizations have previously been heard regarding the issue in question. Meanwhile, this participation has taken the form of consultation, with the option to set up a technical committee in this regard, as in the present case.
- 281.** The Government states that, during the process of drafting the Labour Code, a general call was issued to the social partners requesting their participation in the process. Both the associations of employers and the trade union organizations were aware of this and set out their positions regarding the text as a whole, as can be seen from the complaint presented by the CCSL. The participation of the trade union associations in the drafting of the Labour Code can be seen in their acknowledgement of the first draft and the respective reforms that were introduced prior to being definitively approved. Thus, the trade union associations were given the chance to express their views on the text through the submission of criticisms, suggestions, or opinions, or even the submission of alternative proposals, which were taken into account with regard to the definitive draft of the Code which was adopted. There has never been any question of the trade union organizations participating in the work of the legislative bodies, nor of any right to a veto.
- 282.** The Government states that the participation of the trade union organizations in the process of drafting the Labour Code took place in accordance with the Constitution; that is to say, all the social partners concerned were given the chance to take part and, in full knowledge of the facts, to influence the content of the text. Furthermore, in the Memorandum of Understanding signed between the Ministry of Labour, Family and Solidarity and the social partners regarding the main lines of the draft Labour Code, the parties agreed that the Government was to be responsible for clarifying the situation regarding fixed-term employment contracts ongoing at the time of entry into force of the new Labour Code while respecting the commitment made when adopting the article in question. Under these circumstances, the provisions of section 15 of the legislative decree approving the Labour Code must be held to be in accordance with the Constitution, international standards and the commitment made.
- 283.** Furthermore, the Government states that contrary to the claims made by the CCSL, this provision is not simply an attempt by the Government to discount the periods of service

completed by workers on fixed-term contracts; its aim, rather, is to provide them with a certain amount of security given that previously no regulations existed regarding this issue, with workers spending their entire working careers in a situation of doubt and precariousness. The adoption of these standards is not an arbitrary measure; rather, it reflects the current political, economic, social and cultural reality and was carried out once all the proposed solutions had been considered. Previously existing legislation did not set a limit on the duration or number of successive contracts. Workers found themselves in the abovementioned situation of doubt and precariousness every time their contracts came up for renewal, unless they took legal action, with all of its inherent complications, and managed to prove that their circumstances corresponded to an open-term contract rather than a fixed-term contract.

- 284.** Currently, in the light of the legislation in force and in the absence of any need to have recourse to the courts, after five years' employment, workers automatically become permanent employees of the enterprise in question, thus obtaining greater security. Thus, argues the Government, the CCSL is incorrect in its assertion regarding the violation of the existing rights of the workers.
- 285.** Finally, the Government states that in all its actions it has constantly upheld the principle of legality and the commitments made, in particular at an international level, and the complaint presented by the CCSL should, therefore, be rejected.

### **C. The Committee's conclusions**

- 286.** *The Committee observes that in the present case the complainant organization objects to various provisions of the new Labour Code and alleges that the Government submitted the Code for promulgation by the President of the Republic without taking into account the Memorandum of Understanding drawn up by a technical committee made up of representatives of the various social actors. More specifically, the complainant organization criticizes section 70, indents (3) and (4) which state that the costs of publication of trade union statutes in the Official Journal must be met by the trade union organization in question (the complainant organization cites a case in which statutes were not published because of the high cost involved: the equivalent of €1,800) and that trade unions can only initiate their activities following publication of their statutes; section 110, indent (1), which transfers responsibility for the publication of collective labour agreements in the Official Journal to the organizations of workers and employers (in the past, the Ministry of Labour had to pay the equivalent of €7,000 for the publication of an agreement reached in the private security sector); section 353, indent (1), which cuts the holidays of maritime workers to 2.5 days per month of employment; section 15 of the preamble of Legislative Decree No. 5/2007 which is an attempt to discount the periods of service completed by workers on fixed-term contracts in Cape Verde from 1994 to the present day when dealing with the issue of the conversion of fixed-term contracts into open-term contracts.*
- 287.** *As to section 70, indents (3) and (4), which state that the costs of publication of trade union statutes in the Official Journal must be met by the trade union organization in question (the complainant organization cites a case in which statutes were not published because of the high cost involved: the equivalent of €1,800) and that trade unions can only initiate their activities following publication of their statutes, the Committee notes that the Government reports that: (1) indent (3) is in accordance with the provisions of Convention No. 87 with regard to relations between trade union organizations and the State, ensuring, as it does, that there is no possibility of interference with or control of trade union organizations; (2) every effort is made to ensure that the State abstains from intervening in such a manner as to slow down or obstruct the right to freedom of association from the moment of the establishment of any trade union organization; (3) trade union*

organizations acquire legal personality once they have submitted their statutes to the competent services of the ministry responsible for the field of labour and the fact that activities can be undertaken following the publication of those statutes in the Official Journal is not a restriction on the abovementioned principle. In fact, that principle is strengthened and guaranteed by publication, the very aim of which is to ensure the security of the trade union organization and its members given that, following publication, the statutes become public knowledge.

288. In this regard, the Committee recalls that “although the founders of a trade union should comply with the formalities prescribed by legislation, these formalities should not be of such a nature as to impair the free establishment of organizations” [see **Digest of decisions and principles of the Freedom of Association Committee**, 2006, fifth edition, para. 276]. In this regard, and in these circumstances, the Committee considers that obliging trade union organizations to meet the costs of publishing their statutes in the Official Journal when this involves large amounts of money (as in the present case) seriously impedes the free exercise of the right of the workers to establish organizations without previous authorization, thus violating Article 2 of Convention No. 87. Under these circumstances, the Committee requests the Government, in consultation with the social partners, to take the necessary steps to amend or repeal this provision of the Labour Code.
289. As to section 110, indent (1), which transfers responsibility for the publication of collective labour agreements in the Official Journal to the organizations of the workers and the employers (in the past, the Ministry of Labour had to pay the equivalent of €7,000 for the publication of an agreement reached in the private security sector), the Committee notes that the Government indicates that: (1) ample provision is made under Cape Verdean labour legislation for collective agreements as agreements between private parties. It is up to the workers and the employers to decide when to initiate the bargaining process and to sign agreements; (2) the Constitution states that not only members of trade union organizations but all workers have the right to be titular to collective agreements; section 100 of the Labour Code, based on the pronouncements of the ILO, ensures that non-unionized workers shall enjoy this right, given that the autonomy and the right to collective bargaining of the workers is derived from the recognition of their freedom of association, which is recognized in the case of all workers, both positively and negatively; (3) if collective agreements are to have full effect then they must be published in the Official Journal, with the costs involved being met by those concerned. The principle of publicity is enshrined precisely in order to promote collective bargaining and its outcomes; (4) only with publication will the readership, principally the workers, discover the content of collective agreements and therefore respect and ensure respect of those agreements; and (5) in conclusion, the domestic legislation reflects, clearly and unequivocally, recognition of the fact that collective agreements are more effective in achieving peaceful labour relations because they have been concluded by the interested parties themselves and that they play a role in promoting the international pronouncements and opinions of ILO Conventions Nos 87 and 98.
290. In this regard, the Committee believes that obliging the parties to a collective agreement to meet the cost (extremely high in the present case) of publication of that agreement in the Official Journal seriously impedes the application of Article 4 of Convention No. 98 which enshrines the principle of promotion of collective bargaining. Under these circumstances, the Committee requests the Government, in consultation with the social partners, to take the necessary steps to amend or repeal this provision of the Labour Code. Likewise, the Committee recalls that the Committee of Experts has reiterated on various occasions the need for the Government to promote further collective bargaining in the country [see report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part IA), Convention No. 98, observations for 2007, 2005, 2003 and 2002] and encourages the Government to take increased measures, in

*consultation with the workers' and employers' organizations concerned, in accordance with Convention No. 98, to promote collective bargaining in Cape Verde [see 342nd Report, Case No. 2408, Cape Verde, paras 272 and 273].*

- 291.** *As to the allegations that section 353, indent (1), reduces the holiday time of maritime workers to 2.5 days per month of employment and that section 15 of the preamble of Legislative Decree No. 5/2007 is an attempt to discount the periods of service completed by workers on fixed-term contracts in Cape Verde from 1994 to the present day when dealing with the issue of the conversion of fixed-term contracts into open-term contracts, the Committee believes that the content of these sections is not specifically linked to issues of freedom of association and will not pursue the examination of these allegations. Recalling that labour matters in general should be subject to discussion and consultation with the social partners in the framework of social dialogue, the Committee requests the Government to take measures in this respect. Moreover, with regard to the reference by the Government to the Maritime Labour Convention, 2006, the Committee recalls that according to article 19(8) of the ILO Constitution, "In no case shall the adoption of any Convention or Recommendation by the Conference, or the ratification of any Convention by any Member, be deemed to affect any law, award, custom or agreement which ensures more favourable conditions to the workers concerned than those provided for in the Convention and Recommendation."*
- 292.** *The Committee further notes that the complainant organization states that it made a submission to the Office of the Attorney-General of the Republic of Cape Verde on 14 April 2008, with the aim of having section 15 of Legislative Decree No. 5/2007 of 16 October (approving the Labour Code) declared unconstitutional and requests the Government and the complainant organization to keep it informed of the outcome of this action.*
- 293.** *Finally, as to the allegation that the Government submitted the Code for promulgation by the President of the Republic without taking into account the Memorandum of Understanding drawn up by a technical committee made up of representatives of the various social actors, the Committee notes that the Government states that: (1) during the process of drafting the Labour Code, a general call was issued to the social partners requesting their participation in the process. Both the associations of employers and the trade union organizations were aware of this and set out their positions regarding the text as a whole, as can be seen from the complaint presented by the CCSL; (2) the participation of the trade union associations in the process of drafting the Labour Code can be seen in their acknowledgement of the first draft and the respective reforms that were introduced prior to being definitively approved; (3) thus, the trade union associations were given the chance to express their views on the text through the submission of criticisms, suggestions, or opinions, or even the submission of alternative proposals, which were taken into account with regard to the definitive draft of the Code which was adopted. There has never been any question of the trade union organizations participating in the work of the legislative bodies, nor of any right to a veto; (4) the participation of the trade union organizations in the process of drafting the Labour Code took place in accordance with the terms set out by the Constitution, that is to say, all the social partners concerned were given the chance to take part and, in full knowledge of the facts, to influence the content of the text; and (5) in the Memorandum of Understanding signed between the Ministry of Labour, Family and Solidarity and the social partners regarding the main lines of the draft Labour Code, the parties agreed that the Government was to be responsible for clarifying the situation regarding fixed-term employment contracts ongoing at the time of entry into force of the new Labour Code while respecting the commitment made when adopting the article in question. Under these circumstances, the provisions of section 15 of the Legislative Decree approving the Labour Code must be held to be in accordance with the Constitution, international standards and the commitment made. Taking this information into account and noting their contradictory nature vis-à-vis the allegations, the Committee*

*recalls in general that on numerous occasions it has emphasized the value of consulting organizations of employers and workers during the preparation and application of legislation which affects their interests [see **Digest**, op. cit., para. 1072].*

## **The Committee's recommendations**

**294. In the light of the foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:**

- (a) In the circumstance set out above, the Committee considers that obliging trade union organizations to meet the costs of publishing their statutes in the Official Journal when this involves large amounts of money (as in the present case) seriously impedes the free exercise of the right of the workers to establish organizations without previous authorization, thus violating Article 2 of Convention No. 87, and requests the Government, in consultation with the social partners, to take the necessary steps to amend or repeal this provision of the Labour Code.*
- (b) The Committee considers that obliging the parties to a collective agreement to meet the cost (extremely high in the present case) of publication of that agreement in the Official Journal seriously impedes the application of Article 4 of Convention No. 98 which enshrines the principle of promotion of collective bargaining, and requests the Government, in consultation with the social partners, to take the necessary steps to amend or repeal this provision of the Labour Code.*
- (c) The Committee notes that the complainant organization states that it made a submission to the Office of the Attorney-General of the Republic of Cape Verde on 14 April 2008, with the aim of having section 15 of Legislative Decree No. 5/2007 of 16 October (approving the Labour Code) declared unconstitutional and requests the Government and the complainant organization to keep it informed of the outcome of this action.*

CASE NO. 2355

INTERIM REPORT

### **Complaints against the Government of Colombia presented by**

- **the Single Confederation of Workers of Colombia (CUT)**
- **the General Confederation of Labour (CGT)**
- **the Confederation of Workers of Colombia (CTC)**
- **the Petroleum Industry Workers' Trade Union (USO)**
- **the Association of Managers and Technical Staff of the Colombian Petroleum Industry (ADECO)**
- **the National Trade Union of Workers of Operating, Contracting and Subcontracting Companies Providing Services and Activities in Petroleum, Petrochemical and Similar Industries (SINDISPETROL)**
- **the International Trade Union Confederation (ITUC) and**

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— the World Federation of Trade Unions (WFTU)

*Allegations: The complainant organizations allege that, after four months of negotiations with ECOPETROL SA over a list of claims, the administrative authority convened a Compulsory Arbitration Tribunal; subsequently a strike was called which was declared illegal by the administrative authority; the company ordered the mass dismissal of a large number of its workers, including many trade union officials. Furthermore, the National Trade Union of Workers of Operating, Contracting and Subcontracting Companies Providing Services and Activities in Petroleum, Petrochemical and Similar Industries (SINDISPETROL) alleges that several of its members were dismissed two days after it announced its establishment*

- 295.** The Committee last examined this case at its November 2007 meeting [see 348th Report, paras 228–319, approved by the Governing Body at its 300th Session]. The National Trade Union of Workers of ECOPETROL SA (SINCOPEPETROL) sent additional allegations in a communication dated 25 November 2007. The Association of Managers and Technical Staff of the Colombian Petroleum Industry (ADECO) and the Single Confederation of Workers of Colombia (CUT) sent additional allegations in a communication dated 27 November 2007. The World Federation of Trade Unions (WFTU) also sent additional allegations in a communication dated 16 August 2007. The CUT sent additional information in a communication of 22 August 2008.
- 296.** The Government sent its observations in communications dated 3 December 2007 and 18 February, 2 April, 16 and 30 July, 27 August 2008 and 5 September 2008.
- 297.** Colombia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Labour Relations (Public Service) Convention, 1978 (No. 151), and the Collective Bargaining Convention, 1981 (No. 154).

#### **A. Previous examination of the case**

- 298.** On last examining the case, the Committee made the following recommendations [see 348th Report, para. 319]:
- (a) While taking due note of the Government's repeated explanations of the specific circumstances in the country, the Committee once again requests the Government, in consultation with the representatives of workers' and employers' organizations, to take steps to make the necessary amendments to legislation (in particular section 430(h) of the Substantive Labour Code) so as to allow strikes in the petroleum sector, with the possibility of providing for the establishment of a negotiated minimum service following full and frank consultations with the participation of the trade unions, the employers and the public authorities concerned. It requests the Government to keep it informed of any measure adopted in this regard.

- (b) The Committee once again urgently requests the Government to take the necessary steps to modify section 451 of the Substantive Labour Code so that responsibility for declaring a strike illegal lies with an independent body which has the confidence of the parties involved. As regards the reference by the Government to the possibility of lodging an appeal against government rulings declaring a strike to be illegal, the Committee suggests that the Government explore the possibility of the administrative authority applying to an independent body such as the judicial authority whenever it considers a strike to be unlawful. The Committee requests the Government to keep it informed in this regard.
- (c) The Committee urges the Government to take steps to prevent the dismissal of the 104 workers reinstated at ECOPETROL SA pursuant to the ruling of the voluntary arbitration tribunal, as a consequence of the strike on 22 April 2004, to annul the 37 dismissals and sanctions barring the workers from public posts that have already been ordered and to ensure that the 45 dismissals already decided on are not carried out. The Committee requests the Government to keep it informed in this regard, in particular concerning the decision of the Council of Judicature on the action for protection of constitutional rights brought by the ECOPETROL workers (*tutela*).
- (d) As regards the legal proceedings still pending in relation to the seven dismissed trade union leaders, the Committee, taking into account that in the case of Mr Quijano his dismissal was based on legislation that does not conform to the principles of freedom of association, requests the Government to take steps to have him reinstated without delay and, if reinstatement is not possible, to ensure that he is fully compensated. The Committee also requests the Government to keep it informed of the final outcome of the appeals still pending concerning the three other trade union officials dismissed, and in the particular case of Mr Ibarguén the Committee requests that he be reinstated on a temporary basis as ordered by the judicial authority, until a ruling has been issued concerning the appeal.
- (e) As regards Mr Jamer Suárez and Mr Edwin Palma, USO members who according to the complainants have been held in custody on charges of conspiracy to commit offences and terrorism since 3 June and 11 June 2004 respectively, the Committee once again requests the Government to supply information without delay on the charges and the status of the proceedings instituted against them, to ensure that all the guarantees of a normal judicial procedure are in place and to keep it informed in this respect.
- (f) As regards the allegations presented by SINDISPETROL in relation to the dismissal of the founding members of the trade union five days after it had been established and two days after initiating the process of registering the trade union and informing ECOPETROL SA and its contractors of its establishment, and to the pressure exerted on other members of the executive body, leading them to relinquish their trade union duties, the Committee requests the Government to keep it informed with regard to the administrative labour investigation initiated by the Special Directorate of Barrancabermeja.
- (g) The Committee requests the Government to keep it informed regarding the outcome of the negotiations between the USO and ECOPETROL and, if appropriate, to confirm the recent conclusion of a collective agreement and to take the measures necessary to allow ADECO to bargain collectively with the enterprise on behalf of its members.
- (h) As to the conclusion of collective accords with non-unionized workers or those relinquishing trade union membership which offer better terms than the collective agreements, the Committee requests the Government to take the necessary measures to ensure that collective accords are not signed with non-unionized workers to the detriment of collective bargaining and collective agreements within the enterprise ECOPETROL SA and to keep it informed of any developments in this regard.

## B. New allegations

**299.** In its communication dated 25 December 2007, SINCOPEPETROL states in its allegations that the issues being examined in this case concern also its own members. Following the work stoppage that started on 22 April 2004, disciplinary procedures were initiated against

SINCOPEPETROL's members. According to the complainant, despite the fact that over 2,000 workers took part in the collective action, only 101 of its members were targeted by the disciplinary procedures, dismissed and declared unfit for public office or work for more than ten years because they had participated in the work stoppage. Although these public employees of ECOPEPETROL SA, who were members of the Petroleum Industry Workers' Trade Union (USO) that initiated the collective labour dispute over a list of demands submitted in exercise of the right of association and collective bargaining, were required to comply with and defend the Constitution, legislation, statutes, regulations and manuals governing basic and specific functions and to refrain from any action or omission liable to cause the suspension or disruption of an essential public service, the fact remains that the ILO, through such bodies as the former Petroleum Committee, the Committee on Freedom of Association and the Committee on the Application of Standards, has expressed the opinion that prospecting for petroleum and hydrocarbon fuels and their extraction, refining and distribution are not a public service that is essential to the survival of the community and the maintenance or conservation of public order.

- 300.** The disciplinary action taken by the administration of ECOPEPETROL SA through its disciplinary control office against workers who had been barred from public office and dismissed, simply for having taken part in the collective work stoppage called by the USO and declared illegal by the Government, is fundamentally flawed on grounds of false motive and abuse of power, inasmuch as the disciplinary body wrongly and arbitrarily qualifies calling and participating in a collective work stoppage that has been declared illegal – such as that called by USO at ECOPEPETROL SA on 22 April 2004 – as a “serious offence”. In the Disciplinary Procedures Act such work stoppages are banned under section 35, paragraph 34, of Act No. 734/02 CDU, where they are described as “most serious offences” (*falta gravísima dolosa*) that infringe paragraphs 5, 6, 7 and 8 of the said section. ECOPEPETROL administration's disciplinary body uses this definition to its own purpose, acting in this instance as both judge and jury on a fundamental point that influenced the eventual decision but was deliberately and misleadingly omitted from the actual text. There was no objective analysis showing to what extent each worker might be guilty of the charge against him or her, and the disciplinary body thus reached the erroneous conclusion that participation in the strike called at ECOPEPETROL SA by USO was just such a “serious offence”. Instead of taking into account the proper ontological and axiological criteria, the collective work stoppage or strike that had been declared illegal was arbitrarily qualified as a “collective dereliction of duty, function or service”, which does not correspond to the disciplinary principles of the Office of the Attorney-General in Colombia as regards the legal or administrative definition of that term for state employees. The grounds for qualifying an act as dereliction of duty without just cause, which justifies the administrative authority or appointments board declaring the post vacant subject to normal legal procedure, are set out in sections 126 and 127 of Decree No. 1950 of 1973, whose section 128 goes on to stipulate that “if the dereliction of duty disrupts the service, the employee at fault shall be liable to the corresponding disciplinary sanctions and civil or criminal charges”. This means that, under the said decree, disciplinary action is called for only when the service has in some way been disrupted.
- 301.** The complainant also states that the workers dismissed for taking part in the work stoppage without any judicial authorization to waive their trade union immunity included members of SINCOPEPETROL's own organization: Ariel Corzo Díaz, Moisés Barón Cárdenas, Alexander Domínguez Vargas, Héctor Rojas Aguilar, Wilson Ferrer Díaz, Fredys Jesús Rueda Uribe, Fredys Elpidio Nieves Acevedo, Genincer Parada Torres, Braulio Mosquera Uribe, Jimmy Alexander Patiño Reyes, Jair Ricardo Chávez, Ramón Mantuano Urrutia, Germán Luís Alvarino, Sergio Luís Peinado Barranco, Olga Lucía Amaya and Jaime Pachón Mejía.

- 302.** In a communication dated 27 November 2008, ADECO alleges that, under Decree No. 3164 of November 2003, certain categories of ECOPETROL employees are not covered by the collective agreements, including workers engaged in administration, accounting, general services, production, drilling, maintenance, mechanical work, oil-well services, industrial safety, electrical services, welding, metalwork, supplies, engineering, refining and office work, despite the fact that these posts are defined and classified in company agreements as operational units. Consequently, they are not entitled to the conditions laid down in collective agreements in terms of salaries and legal and extralegal benefits. ADECO also states that ECOPETROL has introduced a special benefits scheme, under a collective accord that it has concluded with employees who are not members of a trade union or who have relinquished their membership, and which offers more favourable terms than those enjoyed by union members, the object – according to the complainant – being to cut the membership of the existing trade unions in the company right down and to reduce them to minority status.
- 303.** The complainant further alleges that ECOPETROL refuses to bargain collectively, and that workers belonging to ADECO have therefore had no increase in salary since 2003. In other words, they are discriminated against compared with the other workers who have had a rise in pay.
- 304.** Moreover, ADECO claims that the arbitration award handed down by the Compulsory Arbitration Tribunal on 9 December 2003, the clarification issued on 17 December 2003 and the supplementary award of 23 July 2004 following the dispute between USO and ECOPETROL did not take account of ADECO's list of demands. According to the complainant, the Arbitration Tribunal was imposed by the Government unilaterally, without the workers having the option to call a strike. The trade union organization exhausted every possibility of appealing to the courts, since when it has been impossible for the company to negotiate the lists of demands that have been submitted. The fact is that on 2 December 2005, ADECO and USO each presented a separate list of demands on behalf of their members. And since both the trade unions and ECOPETROL SA had denounced the existing collective agreement on 1 December 2005 – within the legal time frame – the company decided on its own not to enter into any further collective bargaining with workers represented by ADECO and USO. In this way it arbitrarily extended the December 2003 arbitration award – which was in force for two years, i.e. until 8 December 2005 – and unilaterally extended the agreement right up to June 2006, in complete disregard of the intention of the trade unions to negotiate when they denounced the arbitration award on 1 December 2005. It thus became impossible to review conditions of employment, such as salaries, by negotiating the separate lists of demands that ADECO and USO had presented.
- 305.** On 6 May 2006, ADECO presented ECOPETROL SA with another list of demands on behalf of its members simultaneously with the other two unions operating in the company – USO and the National Trade Union of Workers of Operating, Contracting and Subcontracting Companies Providing Services and Activities in Petroleum, Petrochemical and Similar Industries (SINDISPETROL), the union representing the branch of activity. When the legal steps for reaching a direct settlement had been completed, the company refused to negotiate a single item of ADECO's list of demands. This left ADECO with no option but to ask for a Compulsory Arbitration Tribunal to be convened, which one year later, in May 2007, was only just beginning to meet to designate a third arbitrator. In the meantime, without engaging in any direct collective bargaining, the company had been encouraging ADECO's members to leave the organization by offering them unilateral benefits such as bonuses, vouchers, early retirement and salary adjustments, based on rigged and selective "merit" assessments that discriminated against employees at the same hierarchical and operational level who stayed with ADECO.

- 306.** The complainant adds that the situation is much the same at the Chevron Petroleum Company, which is also refusing to negotiate with ADECO while negotiating with two other minority organizations. The company is settling the current dispute with two trade union organizations representing the “daily payroll” (*rol diario*) workers, which have minority status compared to the total number of Chevron workers in Colombia that are represented by SINTRAPETROL and USO. It then imposes its pay policy on employees affiliated to ADECO, who are classified as “monthly payroll” (*rol mes*) workers.
- 307.** The two-year collective agreement signed by Chevron Petroleum Company on 3 April 2006 is designed to exclude ADECO from the guarantees thus negotiated. Although ADECO does receive an invitation to take part in the direct settlement negotiations, its lists of demands are systematically denied.
- 308.** The Ministry of Social Welfare was therefore asked to convene the Arbitration Tribunal in May 2006, but for some 19 months nothing happened. The collective dispute that originated with the list of demands that ADECO submitted to the Chevron Petroleum Company is now being resolved by a Compulsory Arbitration Tribunal, thanks to a legal decision which Chevron is hoping to have annulled by the Supreme Court of Justice.
- 309.** Given the situation, ADECO has lodged its own appeal in opposition to Chevron and has called on the Supreme Court of Justice to refer the matter back to the Tribunal so that it can (1) clarify certain points that have left ADECO members less well off than individual “monthly payroll” workers belonging to other trade unions, who are entitled to a range of extralegal benefits that they have been offered unilaterally, (2) resolve the points at issue, and (3) declare that the so-called supplementary extralegal benefits being contested by ADECO have not been properly interpreted and are in fact supplementary plans that are prohibited under the Compulsory Health Act.
- 310.** Finally, ADECO alleges that two of its officials, Raúl Fernández Zafra and Henry Vitoria O’Meara (whose reinstatement by court decision is still pending), have recently had their trade union immunity lifted.
- 311.** In a communication dated 27 November 2007, the CUT states that, following a work stoppage on 18 and 24 March 2004 in the Barrancabermeja and Cartagena refineries, four officials of USO’s Barrancabermeja section have been dismissed: Alirio Rueda (President), Gregorio Mejía (Vice-President), Juvencio Seija (General-Secretary) and Fernando Coneo (Press and Public Relations Secretary). The CUT claims that the disciplinary proceedings against them did not respect the principles of due process or their right to a proper defence.
- 312.** In its communication of 22 August 2008, the CUT refers to the recent adoption of Act No. 1210 which transfers to the labour tribunals the authority previously vested in the Ministry of Social Protection to declare strikes illegal. Nevertheless, the CUT observes that some problems remain in this Act with regard to the arbitral tribunals.

### **C. The Government’s reply**

- 313.** In its communications dated 3 December 2007 and 18 February, 2 April, 16 and 30 July and 27 August and 5 September 2008, the Government sent the following observations.
- 314.** With regard to point (a) of the Committee’s recommendations in its previous examination of the case, concerning the exercise of the right to strike in essential public services, the Government repeats its previous statements that the ruling handed down by the Constitutional Court (No. 450 of 1995), when it examined the enforceability of section 430(h) of the Substantive Labour Code, concluded that, inasmuch as the activities referred to therein are the very basis of the performance of other activities that are essential to the

exercise or enjoyment of fundamental rights, they themselves constitute an essential service.

**315.** The Constitutional Court's reasoning in reaching decision C-450 of 1995 was as follows:

... A service can be said to be a public service when the activities involved contribute directly and specifically to the protection of goods or the satisfaction of interests or the realization of values that have a connotation of respect – given the pre-eminence that is accorded to human rights and the guarantees that are provided for their protection so as to ensure that they are respected and enforced ...

**316.** In other words, there is a limit to the exercise of the right to strike in this type of activity, and that limit is part and parcel of the constitutional principles of a social state of law, wherein the prevalence of general over individual interests – in order to secure the fundamental objectives of the State – is particularly important.

**317.** The Government considers that the concept of essential service established by the supervisory bodies of the ILO does not take into account the spirit of the ILO Constitution as it pertains to the regulation of conditions of work, bearing in mind, as clearly stated in paragraph 3 of article 19, the specific circumstances of countries. In the case of Colombia, the Government believes that the said circumstances could be said to have been taken into account if due consideration were given to its line of argument, namely, that ECOPETROL is the only company in the country that refines petroleum and its paralysis could endanger people's safety, and even their health, because of the possible consequences of depriving the country of fuel.

**318.** The supervisory bodies have not clarified the scope of the word "safety" in their definition of essential service, and the Government considers that there is no valid reason why it should not encompass the situation of people deprived of their means of transport and living which in any society are so dependent on petroleum.

**319.** With regard to point (b) of the recommendations, the Government states that it has submitted to Congress Bill No. 190 of 2007, which transfers the authority for declaring a strike illegal to the labour courts – part of the judiciary, which is entirely independent of the Executive. The Bill is being discussed by Congress in extraordinary sessions that the Government has been convening since February 2008.

**320.** With regard to point (c) of the recommendations, concerning the situation of the 104 reinstated workers at ECOPETROL, the Government states that the company acted in conformity with domestic legislation (Act No. 734 of 2002) guaranteeing compliance with the provisions of article 29 of the Political Constitution, which gives effect to the concept of due process by proclaiming such principles as the presence of a competent judge, compliance with all procedural rules and the existence of a two-tier system. Moreover, the initiation and conduct of the disciplinary proceedings by the competent authority are the legal consequence of the implementation of the arbitration award handed down on 21 January 2005 by the Ad Hoc Voluntary Arbitration Tribunal, which explicitly ordered the reinstatement of a number of workers pursuant to the Single Code of Discipline, as is noted in paragraphs 6 and 7 of the resolution contained in the said award. ECOPETROL cannot disregard constitutional and legal rules and regulations such as articles 6 and 123 of the Constitution and Act No. 734 of 2002. In other words, officials responsible for discipline are under an obligation to comply with the said rules and regulations, since failure to do so has legal implications that affect the impartiality that is expected of disciplinary measures. It would therefore be procedurally incorrect, from the constitutional and legal standpoint, for the administrative authority embodying the disciplinary authority of the State, in accordance with Act No. 734 of 2002, to refrain from enforcing decisions reached in disciplinary proceedings.

- 321.** Finally, the Government asserts that, when taking decisions, the officials of ECOPETROL who are responsible for discipline do not take into account whether or not a worker belongs to a trade union but only his or her status as a public official. It cannot therefore be maintained that their action infringes workers' freedom of association.
- 322.** On the contrary, it should be emphasized that the company has fully complied with its commitments vis-à-vis the statutes of the Ad Hoc Voluntary Arbitration Tribunal, including the commitment to abide by the decision reached by the arbitration body, since it is specifically stated that "the decisions reached by the Tribunal are binding on the parties concerned". Consequently, as was its duty, the company proceeded to comply with the Tribunal's ruling as set out in the arbitration award handed down on 21 January 2005.
- 323.** With regard to point (d) of the recommendations concerning the reinstatement of workers who have been dismissed, such a decision – as has been explained on previous occasions – can be taken only through judicial channels, i.e. when a court ruling so disposes. This applies equally to compensation. In the case of Quijano Lozada, as noted before, those judicial channels have been exhausted and the decisions reached went against him. The ordinary labour court considered that his dismissal was in keeping with the provisions of domestic legislation. Furthermore, Mr Quijano's appeal for protection of his trade union rights failed inasmuch as the constitutional judge declared that he was not competent to deal with the matter and that the competence lay with the ordinary labour courts. As it has already explained, the Government considers that this allegation does not call for any more detailed examination, since the alleged issues were resolved by the judiciary, which is independent of the Executive and whose decisions must therefore be respected and complied with by the Government.
- 324.** With regard to point (e) of the recommendations concerning the incidents involving Jamer Suárez and Edwin Palma, according to the information supplied by the National Directorate of Attorney-Generals the investigation into the case concerning Jamer Suárez, has been closed since 25 August 2005 and, in the case of Edwin Palma, the directorate has requested more detailed information.
- 325.** With regard to point (f) of the recommendations concerning the labour administrative investigation initiated by the Social Office of Barrancabermeja against ECOPETROL and its subcontractors, following complaints lodged by SINDISPETROL with respect to anti-trade union acts and the infringement of trade union immunity, the Government states that the investigation eventually gave rise to resolution No. 00018 of 27 March 2007 issued by the Labour Inspectorate of the Territorial Directorate of the Special Labour Office of Barrancabermeja, which considered that the matter should be resolved by the judicial authority and therefore abstained from imposing any penalty on ECOPETROL's subcontractors, SADEVEN, BLSTINGMAR, Construcciones Rampint Ltda., Petro Advance, Montajes Morelco Ltda., Termotécnicas Coindustrial, Colmaquinas Ut and Inelectra Shrader Camargo, noting that the complainants were at liberty to appeal to an ordinary labour court. The Government states that the said resolution was now definitive, since no appeals were lodged against it. The Government attached a copy of the said resolution.
- 326.** With regard to point (g) of the recommendations concerning the collective bargaining with USO, ADECO and SINDISPETROL, the Government encloses a table showing negotiations that were held with the various trade union organizations, sent by ECOPETROL's coordinator for trade union negotiations and relations.
- 327.** The coordinator states that the collective dispute with USO ended with the conclusion of a collective labour agreement, whose text was deposited with the Ministry of Social Welfare

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in accordance with section 469 of the Substantive Labour Code. The agreement is applicable for three years, from 9 June 2006 to 8 June 2009.

- 328.** The company signed an annex with SINDISPETROL which is part and parcel of the new collective agreement and has likewise been deposited with the Ministry of Social Welfare.
- 329.** As regards ADECO, according to the information provided by the coordinator for trade union negotiations and relations, and taking into account the principle of the single nature of the agreement, the wages and benefits scheduled under the collective agreement for 2006–09 also applies to the members of SINDISPETROL. The Ministry of Social Welfare, ruling on ADECO’s proposal that a Compulsory Arbitration Tribunal be convened, agreed to its request. As a result, an arbitration award was handed down on 2 October 2007 which has not been implemented, since ECOPETROL has lodged an appeal against the award that has not yet been ruled upon by the Labour Appeals Chamber of the Supreme Court of Justice.
- 330.** The Government states that, according to ECOPETROL, ever since a direct agreement was reached ADECO’s representatives have always taken part in the negotiations as advisers and the steps taken by ECOPETROL have always complied with domestic legislation, as previously indicated.
- 331.** With regard to the latest allegations presented by ADECO to the effect that it was not taken into account in the 2002–04 collective bargaining process, the Government states that, according to ECOPETROL, ADECO’s assertions have no basis in law or in fact, since it spontaneously opted to have its demands incorporated in the list presented by USO, which undertook to represent its views; this is confirmed by the ADECO annex referring to the 2001–02 collective agreement as well as by the agreements entered into in 1996 and 1998 by the trade union organizations operating in ECOPETROL SA in the exercise of their trade union autonomy.
- 332.** The Government states further that, according to ECOPETROL, ADECO had access to all the regular procedural machinery to appeal against the rulings handed down by the Arbitration Tribunal and that, once the arbitration award had been handed down on 9 December 2003 and subsequently clarified and complemented, the trade union organizations operating in ECOPETROL SA appealed against the award. These appeals were resolved by the Labour Appeals Chamber of the Supreme Court of Justice, which decided not to annul the 9 December 2003 award, as clarified and complemented on 17 December 2003 following a number of requests for clarification and annulment presented by ADECO and USO. That being so, the Government does not understand how the union organization can claim that the decisions handed down by the Compulsory Arbitration Tribunal of the Labour Appeals Court of the Supreme Court of Justice constitute an infringement of the constitutional right to due process, when it was represented in the Compulsory Arbitration Tribunal by USO and, through its legal representative, introduced an appeal to have the decisions annulled that was resolved by the Labour Appeals Chamber of the Supreme Court of Justice – the latter being competent in such matters by virtue of section 10 of Act No. 712 of 2001 amending the Code of Labour Procedure.
- 333.** The 2001–02 collective agreement could not be automatically extended, as that is possible only if the parties concerned have not denounced section 478 of the Substantive Labour Code. This was not the case, however, since the parties had presented a partial denunciation of the agreement, thereby initiating the collective dispute that culminated in the implementation of the arbitration award.

- 334.** The Government explains that ECOPETROL exercised its legitimate right to denounce the collective agreement in accordance with the provisions of the labour legislation, that the collective dispute that ensued complied with the relevant rules and regulations and that USO – which was representing ADECO – did not on that occasion denounce any irregularity in the proceedings; consequently, it is unacceptable that ADECO should subsequently and mistakenly allege that the initial procedures were flawed.
- 335.** The Government states that, according to ECOPETROL, it is not true that the direct conciliation stage lasted longer than allowed under the rules and regulations. The direct conciliation stage failed despite the company's enormous efforts to reach an agreement on the underlying issues, i.e. both the points raised in the list of demands presented by USO, acting also as ADECO's representative, and ECOPETROL's partial denunciation of the collective agreement because of the impossibility of applying it in the face of ADECO's attitude throughout the initial stage of the negotiations.
- 336.** As to the passing of the resolution referring the matter to the Arbitration Tribunal, this was altogether in keeping with the law. USO, which at that time was ADECO's representative in matters of collective bargaining, was informed of the resolution and, in accordance with the principles governing administrative proceedings, lodged an appeal against it which, as required by law, was ruled upon by the Ministry of Social Welfare. It is therefore unacceptable that the two trade unions operating in the company should now claim that they knew nothing about the content and scope of the administrative procedure that entails convening the Tribunal just because of a supposed mistake in notification.
- 337.** The Government reiterates, as it had in the previous examination of the case, that the Ministry of Social Welfare exercised its legal authority to designate an arbitrator for USO, in view of the latter's unwillingness to appoint one itself. In support of the foregoing explanations, the Government refers to sections of the ruling handed down by the Labour Appeals Chamber of the Supreme Court of Justice, which heard the appeal lodged by ADECO to have the arbitration award annulled:

However, irrespective of the case law of the Court, which entitles it in such cases to disregard the whole issue, the fact here is that: on the one hand, as already stated, ADECO was represented by USO during the failed direct conciliation stage at which resort was had to Resolution No. 00382 of 25 March 2000, which requires the convening of the compulsory arbitration tribunal to examine and rule upon the collective labour dispute at ECOPETROL; on the other hand, USO subsequently refused to appoint an arbitrator to the tribunal as authorized by law. ... Consequently, if there had been any procedural irregularity at the direct conciliation stage, in the composition of the arbitration tribunal or in the notification of the award, it would not appear that USO had been unaware of the fact or that its right of defence (or that of ADECO that it was representing) was violated. That being so, the notification of ECOPETROL's denunciation of the collective agreement, the terms of the direct conciliation stage, the decision to convene the arbitration tribunal to resolve the matter and the appointment of the arbitrators on the tribunal do not appear to have entailed any violation of the right of defence of the trade union acting at that stage of the collective dispute on its own and on ADECO's behalf. It is therefore evident at this point that USO voluntarily chose on that occasion not to take part in the direct conciliation stage nor to designate an arbitrator for the compulsory arbitration tribunal, as the law entitled it to do, which at this point in the proceedings ....

- 338.** The Government adds that the highest ordinary court for labour matters made the following statement:

This Chamber has repeatedly deemed that the aspects of proceedings that could have been resolved through discussion early on in a dispute so as to reach a mutually acceptable decision prior to the submission of an appeal for annulment..., inasmuch as the examination that the Chamber is called upon to conduct in order to rule on the appeal presupposes that the

proceedings have up to that point been correctly conducted, given that the parties have signified their acquiescence by not contesting any procedural issues prior to the case being brought before the Court – an attitude which in any case must be seen as indicating their acceptance of an overall resolution of the matter at hand, since they have remained silent as to any possible irregularities that may have occurred earlier on in the collective dispute....

- 339.** As to the arbitration award, the Government states that, as required under domestic legislation, the Arbitration Tribunal is competent to rule on the various aspects of a collective labour dispute and therefore has full authority to determine, in the light of the trade union organization's list of demands and ECOPETROL's partial denunciation, the conditions that will govern contracts of employment. That being so, it is logical that, given that responsibility, the Tribunal should rule on all the points involved in the collective dispute, on the understanding that it does so at all times in a spirit of economic coordination and social equilibrium. In the exercise of its legal prerogatives, ECOPETROL partially denounced the collective agreement of 2001–02, identifying clearly those aspects that it considered necessary to examine, with the sole purpose of rendering the company financially viable and thereby safeguarding the source of labour and fully respecting workers' acquired rights.
- 340.** With regard to the Arbitration Tribunal's rulings on the points raised by ADECO in the list of demands, the Government states that, according to information provided by the chief of ECOPETROL's labour management unit, the demands that ADECO included in the list presented by USO were taken into account. As already mentioned on several occasions, USO was the company's recognized counterpart during the negotiation process that ended in the convening of the Compulsory Arbitration Tribunal. ADECO's demands were accordingly examined by the said Tribunal. It must be remembered that the arbitration award handed down by the Tribunal, as clarified and complemented by the ruling of 17 December 2003, was analysed by the Labour Appeals Chamber of the Supreme Court of Justice following the appeals for annulment presented by USO and ADECO and, in a ruling handed down on 31 March 2004, the Chamber resolved not to annul the decision to submit the matter to arbitration and instead to refer the case back to the arbitrators, with the requirement that within the space of ten days from the taking of that decision they reach agreement on those aspects of the partial denunciation of the collective agreement and of the list of demands that had not been explicitly resolved by the Compulsory Arbitration Tribunal. In a ruling handed down on 23 July 2004, the Tribunal accordingly complied with the instructions of the Labour Appeals Chamber of the Supreme Court of Justice and handed down a supplementary decision resolving the collective dispute between USO and ECOPETROL SA as a whole. In that decision, the Tribunal analysed and ruled on the points listed in its decision of 31 March 2004, which specifically included those raised by ADECO. It is abundantly clear from the foregoing that the trade union organization's claim that the principles of collective bargaining were infringed is quite incongruous.
- 341.** With regard to the allegations concerning the offer of additional benefits solely to non-unionized personnel, the Government states that, according to ECOPETROL, labour relations in the company are governed by the common labour legislation contained in the Substantive Labour Code. The chief of ECOPETROL's labour management unit (E) maintained in his statement that this was the case despite the changes that took place in the company in 2003. Consequently, except for the company's president and the chief of its internal control office, ECOPETROL's workers all have the status of public employees. However, as far as the rules and regulations governing their labour relations are concerned, they cease being considered as public employees and come instead under common law as it applies to individual persons, i.e. under the provisions of the Substantive Labour Code with its additions and amendments. By virtue of Agreement No. 01 of 1977, ECOPETROL introduced a benefits scheme for its management staff that differs from the arrangements agreed to in the collective agreements.

- 342.** As to the salary increases that ADECO claims it is not entitled to, the Government states that ECOPETROL cannot grant a raise unilaterally so long as the question of a salary increase is being negotiated collectively. When it ruled on the appeal lodged against the arbitration award, the court considered that the company's decision on salary increases and its retroactive effect was in conformity with domestic legislation.
- 343.** With regard to Decree No. 3164 of 2003, the Government states that, under the system of checks and balances of domestic legislation, a trade union organization may apply to the administrative disputes body, which is the competent authority for examining such matters. The Government states moreover that the chief of the ECOPETROL's labour management unit (E) said that the salary scale agreed to by the parties would nevertheless be applied to activities that do not appear in the comprehensive list of essential duties that are peculiar to the petroleum industries, as stipulated in Decree No. 3164 of 6 November 2003, due allowance being made for prevailing market conditions in the area and provided that the salaries are not below the legal minimum wage. With respect to social benefits, these must be at least the equivalent of those provided for in the Substantive Labour Code with its additions and amendments. The Government states that the said standard bears no relation to the collective agreement whose proceedings were challenged, since ECOPETROL SA has no authority and does not claim any competence to initiate administrative procedures of this nature (see article 189.11 of the Constitution and, specifically, section 3 of Legislative Decree No. 284 of 1957).
- 344.** With regard to the allegations that ECOPETROL SA encouraged resignations from trade unions by offering handouts, better working conditions and bonuses, the Government states that the allegations have not been duly proven by the trade union organization and describes them as too vague for it to be possible to investigate the matter properly. Besides, the complainant organization lodged an appeal for the protection of the workers' trade union rights on this point, and its appeal was rejected. The ruling that was handed down by the Fourth Labour Court of Bogotá stated that, with regard to the infringement of freedom of association, there was no evidence that the defendant party had infringed those rights, given that it was perfectly evident that ADECO existed, and, furthermore, that there was no evidence that any of its members had been prohibited or inhibited from exercising their right of association by any of the defendants. As to the right to equal conditions and equal opportunity, here again the court refused to extend its protection to the workers, inasmuch as ECOPETROL and USO offered ADECO equal opportunity to negotiate and that there was no discrimination in terms of salaries, benefits and working conditions. The Government goes on to cite a number of court decisions testifying to the absence of any evidence of trade union discrimination:
- In a ruling handed down on 6 June 1997, the Labour Circuit Court of Barrancabermeja decided “not to extend its protection to the right of association, the right to establish trade unions or associations and the right to collective bargaining, since those constitutional rights of Elvidio Manuel Peñaredonda Gamez, a member of ADECO, have not been violated”.
  - In a ruling handed down on 29 October 1997, the Labour Court of the Higher Tribunal of the Judicial District of Bogotá resolved in the first instance to deny in part the appeal for protection lodged as a transitory measure by Raúl Fernández Zafra on his own behalf against the Colombian Petroleum Company and the Ministry of Labour and Social Security. It considered that the case brought to protect “his fundamental rights to equal treatment and non-discrimination at work in decent and just conditions, freedom of association and collective bargaining from the actions and omissions of the defendant bodies, which clearly violated the right to freedom of association”, was not receivable. The statement in this decision regarding the right that the claimant considered to have been infringed is particularly significant.

- On 26 November 1997 the 20th Labour Circuit Court of Bogotá resolved “to reject as out of order the request for protection of constitutional rights brought against the Colombia Petroleum Company and the Ministry of Labour and Social Security by Carlos Julio Vera Martínez, a member of ADECO”, who was seeking protection of his rights to “equal treatment and non-discrimination at work, to work in decent and just conditions, to the right to equal pay and the maintenance of the *value* of his salary, to freedom of association and to collective bargaining”. In its resolution the court considered that there were other means of defence to which the complainant should resort, emphasizing that “the trade union can in a way be said to be hindering the administration of justice, and specifically the principle of procedural economy, inasmuch as, with its repeated appeals and in spite of their having been resolved by the higher courts, they persist in using this judicial machinery and thus to occupy the courts’ time even more”.
- 345.** The Government states that, according to information supplied by ECOPETROL, the company never denied its workers the right to freedom of association and that they are at liberty to exercise that right freely and to establish and join whatever organizations they wish.
- 346.** Regarding the claim that ECOPETROL SA has been reluctant to negotiate directly a new list of demands from ADECO, the Government points out that article 173 of the collective labour agreement concluded between USO and ECOPETROL on 11 June 2001 stipulates: “This agreement shall remain in effect for two years as from 1 January 2001 and shall be extended for a period of six months unless denounced in accordance with the law by either of the parties, or by both, within no less than 30 days prior to its expiration (paragraph 1). The agreement may also be denounced during the first 12 days of November 2002, in which case the corresponding list of demands must be presented along with the denunciation. In this event, negotiations on the list of demands shall begin on 7 January 2003 (paragraph 2). Should use not be made of the special provision contained in paragraph 1 of this article, the provisions of the main body of the article and of the law shall apply.”
- 347.** The Government recalls that the labour dispute that arose following the partial denunciation of the collective agreement of 2001–02 and the subsequent radicalization of the list of demands by USO on 28 November 2002 were referred for settlement to the Compulsory Arbitration Tribunal, which handed down the award of 9 December 2003 and its supplementary provisions of 17 December 2003 and 23 July 2004. As empowered by law, the Tribunal stipulated that the agreement was to be valid for two years from the date of the award, without pronouncing on the deadline set by the parties for its denunciation.
- 348.** The parties agreed that the agreement could be denounced “within no less than 30 days of its expiry”. Since neither of the parties denounced the agreement in 2002 prior to its expiration and the matter was not referred to the Compulsory Arbitration Tribunal, the company considered that it is the expiry date of the agreement that must be taken into account in the event of its denunciation. That being so, it was legally impossible for ECOPETROL SA to negotiate the list of demands presented by ADECO on 1 December 2005, since it was submitted after the date set for doing so, as ADECO was informed in communication ECP-000304 of 9 December 2005.
- 349.** The Government states that the extension of the agreement, the arbitration award and the supplementary rulings were legal inasmuch as ECOPETROL complied with the relevant rules, regulations and agreements. Moreover, collective bargaining – with the active participation of ADECO’s representatives – began in June 2006. In an administrative decision of 5 October 2006, the Ministry of Labour and Social Security ordered the convening of a Compulsory Arbitration Tribunal to examine and rule on the collective

dispute between ECOPETROL SA and ADECO. The Government adds that, according to the chief of ECOPETROL's labour management unit (E), the company complied with all legal provision in force with respect to the designation of the arbitrator and arbitration stage itself.

- 350.** With regard to point (h) of the recommendations concerning the conclusion of collective accords, the coordinator of trade union negotiations and relations (E) of ECOPETROL expressed the opinion that, by law, accords and agreements were part of the collective bargaining machinery designed to resolve and settle collective labour disputes and to prevent them leading to strikes.
- 351.** The objective of collective accords and agreements was "to determine the conditions governing labour contracts while they are in force". In other words, they both have not only a standard-setting aspect but also a compulsory or binding aspect.
- 352.** Accords and agreements are governed by common juridical rules and regulations.
- 353.** Where accords and agreements differ is in the fact that the former are concluded between employers and non-unionized workers while the latter are negotiated between one or more employers or associations, on the one hand, and one or more trade unions or federations, on the other.
- 354.** Employers have every liberty to conclude collective accords with non-unionized workers and such accords may exist side by side with collective agreements.
- 355.** That said, according to the coordinator, ECOPETROL SA has not in fact concluded any such accords, which the Government says renders the last observation irrelevant.
- 356.** As to the steps that it is called upon to take, the Government adds that, as stated in ruling SU-342/95 handed down by the Constitutional Court: "When a collective accord and a collective agreement exist side by side within an enterprise, the rights of all workers – whether unionized or not – must be respected, particularly the right to equality both in salary and in other conditions of work; an employer may not, in the guise of any form of accord or agreement whatsoever, offer prerogatives or concessions that improve the conditions of some workers at the expense of others, where there is no objective reason for the difference in treatment." The Constitutional Court has ruled on this point, as follows: "The court considers that the freedom of an employer to conclude collective accords that exist side by side with collective agreements, where this is legitimate in the light of the foregoing observations, is likewise bound by the provisions of the Constitution. ... This being so, the court hereby establishes as a general rule that the freedom of employers to regulate labour relations by means of collective accords, when such accords exist side by side with collective agreements within the enterprise, is restricted or limited by the rights, values and principles as a whole that are recognized in the Constitution. In other words, the said freedom remains undiminished and protected by the Constitution and by the law but may not be exercised or used by an employer to infringe the fundamental rights of workers and of a trade union organization."
- 357.** It can be taken from the above that employers in Colombia are entitled to enter into accords and agreements provided they respect the rights of unionized workers; otherwise, as stated earlier, those workers are entitled to express their disagreement by resorting to such legal machinery as exists for the initiation of appropriate action through the courts.
- 358.** With regard to the allegations presented by SINCOPEPETROL, the Government points out that the issues raised imply that the decisions taken in the course of the disciplinary proceedings referred to here entail an abuse of power. The Government adds that a

disciplinary measure can only be contested if there has indeed been such an abuse, and that this must be proven by the complainant, as required by article 177 of the Code of Civil Procedure, which states: “It shall be for the parties concerned to provide evidence of an alleged infringement of the rules and regulations such as justifies the juridical outcome that they seek.”

**359.** With regard to the latest allegations of the CUT according to which following other work stoppages on 18 and 24 March 2004 in the Barrancabermeja and Cartagena refineries, four official of USO’s Barrancabermeja section have been dismissed: Alirio Rueda (President), Gregorio Mejía (Vice-President), Juvencio Seija (General Secretary) and Fernando Coneo (Press and Public Relations Secretary), without respecting the principles of due process or their right to a proper defence, the Government indicates the following:

- these facts had taken place prior to the work stoppage of 22 April 2004;
- in the framework of an agreement signed to end the stoppage of 22 April, it was decided to nominate a special Barrancabermeja claims committee, in order to obtain information and decide on the four dismissals of Messrs Rueda, Mejía, Seija and Coneo, due to the stoppage of March.
- the decisions of the claims committee have the same value as those of a voluntary arbitral tribunal. After its establishment, the committee handed down its decisions on the dismissals. Thus, in its decision of 21 and 22 October 2004, it found in favour of the company and ruled that the dismissals had a just cause;
- the workers who were not in agreement with this decision, lodged an appeal for annulment to the High Court of the Judicial District of Bucaramanga, under section 141 of the Code of Labour Procedure. The court found in a final ruling that due process had been respected.

#### **D. The Committee’s conclusions**

**360.** *The Committee takes note of the new allegations presented and of the Government’s observations, including observations – which also reflect the views of the company concerned – on the recommendations formulated by the Committee in its previous examination of the case.*

**361.** *With regard to point (a) of the Committee’s recommendations in its previous examinations of the case, the Committee recalls that it concerned the declaration as illegal of the strike called at ECOPETROL on 22 April 2004, on the grounds that ECOPETROL operates in the petroleum sector, which is considered by Colombian legislation (section 430(h) of the Substantive Labour Code) to be an essential service in which strikes are prohibited. The Committee had, however, recalled on this point that the said sector was not one of those considered to be essential services in the strict sense of the term (i.e. those whose interruption would endanger the life, personal safety or health of the whole or part of the population) and to justify restricting the exercise of the right to strike, and had accordingly requested the Government, in consultation with the representatives of workers’ and employers’ organizations, to take steps to make the necessary amendments to Colombia’s legislation (in particular section 430(h) of the Substantive Labour Code) so as to allow strikes in the petroleum sector with the possibility of providing for the establishment of a negotiated minimum service following full and frank consultations with the participation of the trade unions, the employers and the public authorities concerned. The Committee recalls that the right to strike may be restricted or prohibited: (1) in the public service only for public servants exercising authority in the name of the State; or (2) in essential services in the strict sense of the term (that is, services the interruption of which would endanger*

the life, personal safety or health of the whole or part of the population). The Committee also recalls that what is meant by essential services in the strict sense of the term depends to a large extent on the particular circumstances prevailing in a country. Moreover, this concept is not absolute, in the sense that a non-essential service may become essential if a strike lasts beyond a certain time or extends beyond a certain scope, thus endangering the life, personal safety or health of the whole or part of the population [**Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 576 and 582].

362. The Committee regrets that the Government's reply does not contain substantial new elements. In fact, the Government notes once again that ECOPETROL is the only company in the sector that refines petroleum and explains why the petroleum sector is considered throughout the country as a service that is essential to its specific requirements and how a strike in that sector, in which moreover only one company operates, can affect transport at the national level and hence the safety of persons. Under these circumstances, the Committee must once again insist that the Government take steps without delay in consultation with the social partners, to amend the country's legislation so as to permit the exercise of the right to strike in the petroleum sector. The Committee recalls the prospect of establishing a minimum service following negotiations with the trade union organizations, the employer and the public authorities concerned. The Committee requests the Government to keep it informed in this regard.
363. With regard to point (b) of the recommendation the Committee recalls that it had requested the Government to take urgent steps to modify section 451 of the Substantive Labour Code so that responsibility for declaring a strike illegal lies with an independent body which has the confidence of the parties involved. On this point the Committee notes the information supplied by the Government to the effect that it has brought before Congress Bill No. 190 of 2007, which transfers the authority to declare a strike illegal to the labour courts – part of the judiciary – which is entirely separate from the Executive. In this respect, the Committee notes with interest that according to information provided by the CUT in its communication of August 2008, Act No. 1210 has been adopted and as a result, a declaration of illegality should be pronounced by the labour courts.
364. Under point (c) of the recommendations in its previous examination of the case, the Committee urged the Government to take steps to halt the dismissal of the 104 ECOPETROL workers following the strike on 22 April 2004 and to keep it informed in particular of the decision reached by the Council of Judicature in respect of the action for protection of their constitutional rights (tutela) brought by the workers at ECOPETROL SA.
365. On this point the Committee notes the Government's statement that the company acted in conformity with domestic legislation guaranteeing due process and that the initiation and conduct of the disciplinary procedure before the competent authority are the legal consequence of enforcing the arbitration award handed down on 21 January 2005 by the Ad Hoc Voluntary Arbitration Tribunal, which explicitly ordered the reinstatement of certain workers in accordance with the Single Code of Discipline. The Committee also notes the Government's statement that if the company disregarded the rules and regulations it would be guilty of renegeing on its obligations and that, when the officials responsible for discipline at ECOPETROL SA reach decisions, they take no account of whether or not workers belong to a trade union but only of their status as public officials. It cannot therefore be maintained that such decisions infringe workers' right of freedom of association.

366. *The Committee observes that the Government has sent no information on the action for protection of their constitutional rights (tutela) lodged by the workers with the Council of the Judicature.*
367. *The Committee reiterates the principles to which it drew attention in its previous examination of the case and once again urges the Government to take steps to stop the effects of the decision to dismiss 104 workers at ECOPETROL SA for taking part in the 2004 strike. The Committee also requests the Government to keep it informed of the outcome of the action for protection of their constitutional rights (tutela) lodged by the workers with the Council of the Judicature.*
368. *With regard to point (d) of the recommendations concerning the legal proceedings still pending in relation to the seven trade union leaders dismissed as a consequence of the 22 February 2004 strike, the Committee recalls that it requested: in the case of Mr Quijano, considering that his dismissal was the result of the work stoppage being declared illegal on the basis of legislation that does not conform to the principles of freedom of association, that the Government ensure that he is reinstated without delay and, if reinstatement is not possible, that he is fully compensated; that the Government keep the Committee informed of the outcome of the appeals still pending concerning the three other dismissed trade union officials; and, in the particular case of Mr Ibarguén, that he be reinstated on a temporary basis as ordered by the judicial authority until a ruling has been issued concerning the appeal. The Committee notes that, according to the Government, the reinstatement of dismissed workers and the payment of compensation can only be determined through judicial channels, i.e. when a court order has been handed down to that effect. It further notes that the Government states once again that Quijano Lozada has exhausted the possibilities of appeal to the judicial bodies, which ruled against him both in the ordinary proceedings and in the matter of the action for protection of his constitutional rights (tutela). Nevertheless, bearing in mind that Mr Quijano's dismissal was the result of his participation in a work stoppage that had been declared illegal on the basis of legislation that does not conform to the principles of freedom of association, the Committee urges the Government once again to take the necessary steps for him to be reinstated and, if reinstatement is not possible, that he is fully compensated. The Committee observes that the Government does not mention the appeals under way concerning the three other trade union officials who have been dismissed (Mejía Salgado, Suárez Amaya and Mr Ibarguén), particularly that concerning Mr Ibarguén whose reinstatement was ordered by the Sixth Labour Circuit Court of Cartagena. In these circumstances, the Committee requests the Government once again to keep it informed of the outcome of the appeals concerning these trade union officials and, in the case of Mr Ibarguén, to take steps to have him reinstated on a temporary basis as ordered by the judicial authority until his appeal has been ruled upon.*
369. *The Committee notes the allegations presented by the new complainant, SINCOPEPETROL concerning the dismissal, without lifting their trade union immunity, of union officials Ariel Corzo Díaz, Moisés Barón Cárdenas, Alexander Domínguez Vargas, Héctor Rojas Aguilar, Wilson Ferrer Díaz, Fredys Jesús Rueda Uribe, Fredys Elpidio Nieves Acevedo, Genincer Parada Torres, Braulio Mosquera Uribe, Jimmy Alexander Patiño Reyes, Jair Ricardo Chávez, Ramón Mantuano Urrutia, Germán Luís Alvarino, Sergio Luís Peinado Barranco, Olga Lucía Amaya and Jaime Pachón Mejía, in connection with the events of 22 April 2004, and without observing due process. The Committee notes that the Government states that the allegations do not contain sufficient evidence but does not refer to the dismissal of the officials without their trade union immunity being lifted. In these circumstances, recalling the principle whereby one way of ensuring the protection of trade union officials is to provide that these officials may not be dismissed, either during their period of office or for a certain time thereafter, except of course for serious misconduct [see *Digest op. cit.*, fifth edition, 2006, para. 804], the Committee requests the Government*

to carry out an investigation into these allegations without delay and, if it is found that the union officials were in fact dismissed without their trade union immunity being lifted (as required by law), to take steps to have them immediately reinstated. The Committee requests the Government to keep it informed in this respect.

- 370.** *With regard to point (e) of the recommendations, the Committee recalls that it requested the Government to supply information without delay on the charges and the status of the proceedings against Jamer Suárez and Edwin Palma, USO members who the complainants say were arrested on 3 June and 11 June 2004, respectively, on charges of conspiracy to commit offences and terrorism, and to ensure that the procedure respected all the guarantees. The Committee notes the information provided by the Government that the National Directorate of the Attorney-General has reported that the investigation in connection with Jamer Suárez was closed on 25 August 2005. In the case of Edwin Palma, the Office of the Attorney-General has asked for more specific details. On this point, the Committee recalls that in a previous examination of the case the Government had informed it that Edwin Palma was “in custody in the city of Barrancabermeja” [see 343rd Report, para. 480]. The Committee requests the Government, on the basis of that information, to take the necessary steps without delay to have the Attorney-General report on Mr Palma’s whereabouts and legal status.*
- 371.** *With regard to point (f) of the recommendation concerning the allegations presented by the SINDISPETROL, which refer to the dismissal of the founding members of the trade union five days after it had been established and to the pressure exerted on other members of the executive body, which resulted in their resigning their trade union posts, the Committee had requested the Government to keep it informed of the administrative labour investigation initiated by the Special Directorate of Barrancabermeja. The Committee notes the information supplied by the Government to the effect that the investigation eventually gave rise to resolution No. 00018 of 27 March 2007 issued by the Labour Inspector of the Territorial Directorate of the Special Labour Office of Barrancabermeja, who considered that the issues involved should be resolved by the judicial authority and therefore refrained from imposing any penalty on the firms under contract to ECOPETROL SA. The complainants were then free to appeal to the ordinary labour court. The Committee notes that the said resolution is final, since the workers concerned have not appealed to the judicial authority.*
- 372.** *With regard to point (g) of the recommendations, the Committee recalls that it had requested the Government to keep it informed regarding the outcome of the negotiations between USO and ECOPETROL SA, to confirm the recent conclusion of a collective agreement and to take the necessary measures to allow ADECO to bargain collectively with the enterprise on behalf of its members. On this point the Committee takes note of ADECO’s new allegations that its demands were ignored during the collective negotiations between ECOPETROL SA and USO which resulted in the arbitration awards of 9 and 17 December 2003 and 23 July 2004, that there were a number of procedural irregularities during the proceedings, that ECOPETROL refused to negotiate the list of demands presented by ADECO in December 2005 and that another Compulsory Arbitration Tribunal was convened when a new list of demands was presented in May 2006. The Committee notes ADECO’s allegations that, unlike other workers, its members have not had any pay increase since 2003.*
- 373.** *On this point the Committee notes with interest the Government’s indication that, according to information supplied by ECOPETROL’s coordinator for trade union negotiations and relations, the collective dispute with USO resulted in the conclusion of a collective agreement covering the period from 9 June 2006 to 8 June 2009, and that the company has signed an annex to the agreement with SINDISPETROL.*

- 374.** *With regard to the latest allegations of the CUT according to which following other work stoppages on 18 and 24 March 2004 in the Barrancabermeja and Cartagena refineries, four officials of USO's Barrancabermeja section have been dismissed: Alirio Rueda (President), Gregorio Mejía (Vice-President), Juvencio Seija (General Secretary) and Fernando Coneo (Press and Public Relations Secretary), without respecting the principles of due process or their right to a proper defence, the Committee takes note of the information provided by the Government to the effect that: (1) in the framework of an agreement signed to end the stoppage of 22 April (the latest stoppage which is the main object of this case), it was decided to nominate a special Barrancabermeja claims committee, in order to obtain information and decide on the four dismissals of Messrs Rueda, Mejía, Seija and Coneo, due to the stoppage of March; (2) in its decision of 21 and 22 October 2004, the committee found in favour of the company and ruled that the dismissals had a just cause; (3) the workers who were not in agreement with this decision, lodged an appeal for annulment to the High Court of the Judicial District of Bucaramanga, under section 141 of the Code of Labour Procedure. The court found in a final ruling that due process had been respected.*
- 375.** *Regarding the collective bargaining with ADECO and the new allegations presented by it, the Committee notes that the Government, commenting on the refusal to discuss the list of demands presented by the trade union organization during the 2002–04 bargaining process, states that the union organization had agreed to be represented by the USO and that the appeals lodged by ADECO with the Labour Appeals Chamber of the Supreme Court of Justice to have the procedure annulled because of alleged procedural irregularities were rejected. As to the points raised in the list of demands, the Supreme Court decided to refer the issues back to the arbitrators for a ruling. The Committee notes the Government's statement that a supplementary arbitration award was accordingly handed down on 23 July 2004 which took ADECO's demands into account. The Committee notes the company's rebuttal of ADECO's version and its statement that the latter's demands were included in the list of demands presented by USO and were duly taken into account. The Committee observes that the new collective agreement entered into by USO will also apply to the members of ADECO without any discrimination.*
- 376.** *As to the allegation that there have been no pay increases, the Committee notes that the Government states that an Arbitration Tribunal was convened in 2006 to consider ADECO's list of demands and on 2 October 2007 handed down a ruling that has not yet been enforced because of the appeal against it lodged by the company. The Committee requests the Government to keep it informed of the outcome of the said appeal.*
- 377.** *Regarding ADECO's allegation that, by virtue of Decree No. 3164 of 2003, several categories of ECOPETROL's workers are excluded from the collective agreements, the Committee notes the Government's statement that the trade union organization is at liberty to lodge an appeal against the decree with the administrative disputes body and that in any case the salary scale agreed to by the parties will be applied to those workers. The Committee requests the Government to guarantee the right to collective bargaining of all ECOPETROL's workers who, by virtue of the said decree, are not covered by the collective agreements that are in force in the company.*
- 378.** *With regard to point (h) of the recommendations concerning the conclusion, with non-unionized workers or with workers who relinquish their union membership, of collective accords that offer better terms than the collective agreements, the Committee notes ADECO's new allegations which likewise state that the company offers better terms to non-unionized workers and that this discourages workers from joining trade unions. The Committee also notes the Government's statement that Colombian legislation does make provision for collective accords with non-unionized workers but that no such accord has been concluded in ECOPETROL. As to ADECO's allegations that workers are being*

*offered better terms and working conditions to discourage them from joining trade unions, the Committee notes that, according to the Government, the organization lodged an appeal for protection of its trade union rights in this connection in 1997 and that the appeal was rejected by the Fourth Labour Court of Bogotá on the grounds that there was not enough evidence that the workers' right of association had been restricted. The Government also refers to other court decisions in 1997 that similarly rejected appeals lodged by ADECO for protection of workers' constitutional rights (tutela). The Committee observes, however, that those decisions date back to 1997 whereas the allegations refer to subsequent developments. In these circumstances, the Committee requests the Government to carry out as a matter of urgency an investigation to determine, on the basis of full information whether ECOPETROL employees who are not unionized are offered individually or otherwise benefits, better working conditions or bonuses to encourage them to resign from their trade union. The Committee requests the Government to keep it informed in this regard.*

- 379.** *With regard to the new allegations presented by ADECO concerning the refusal of Chevron Petroleum Company to bargain collectively with it, the appointment of a Compulsory Arbitration Tribunal and the appeals against the revoking of the arbitration decision lodged with the Supreme Court of Justice by the company and by ADECO, the Committee observes that the Government has not sent its observations on the subject and requests it to do so without delay, particularly with respect to the outcome of the appeal before the Supreme Court of Justice.*

### **The Committee's recommendations**

- 380.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to adopt the following recommendations:*

- (a) *Regarding the declaration as illegal of a strike called at ECOPETROL on 22 April 2004, the Committee once again urges the Government to take the necessary steps to amend the country's legislation without delay in consultation with the social partners, (in particular section 430(h) of the Substantive Labour Code) so as to allow the exercise of the right to strike in the petroleum sector, with the prospect of establishing a minimum service following negotiations with the trade union organizations, the employer and the public authorities concerned. It requests the Government to keep it informed in this regard.*
- (b) *The Committee once again urges the Government to take steps to stop the effects of the decision to dismiss 104 employees at ECOPETROL SA for taking part in the 2004 strike and to keep it informed of the outcome of the action for protection of their constitutional rights (tutela) brought by the workers before the Council of the Judicature.*
- (c) *With regard to the dismissal of Quijano Lozada, and bearing in mind that his dismissal for participating in a work stoppage that had been declared illegal was based on legislation that does not conform to the principles of freedom of legislation, the Committee once again calls on the Government to take steps to have him reinstated and, if this is no longer possible, to ensure that he is fully compensated. The Committee also requests the Government to keep it informed of the outcome of the judicial appeals under way that were lodged by the three other trade union officials who were dismissed (Mejía Salgado, Suárez Amaya and José Ibarguén) and, in the case of*

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*Mr Ibarguén, to take steps to have him reinstated on a temporary basis, as ordered by the judicial authority, until his appeal has been ruled upon.*

- (d) With regard to the allegations presented by SINCOPEPETROL concerning the dismissal of union officials Ariel Corzo Díaz, Moisés Barón Cárdenas, Alexander Domínguez Vargas, Héctor Rojas Aguilar, Wilson Ferrer Díaz, Fredys Jesús Rueda Uribe, Fredys Elpidio Nieves Acevedo, Genincer Parada torres, Braulio Mosquera Uribe, Jimmy Alexander Patiño Reyes, Jair Ricardo Chávez, Ramón Mantuano Urrutia, Germán, Luís Alvarino, Sergio Luís Peinado Barranco, Olga Lucía Amaya and Jaime Pachón Mejía, in connection with the work stoppage of 22 April 2004, the Committee requests the Government to carry out an investigation into these allegations without delay and, if it is found that these officials were in fact dismissed without their trade union immunity having been lifted, to take steps for their immediate reinstatement. The Committee requests the Government to keep it informed in this regard.*
- (e) With regard to Edwin Palma, who the USO states has been held in custody since 11 June 2004 on charges of conspiracy to commit offences and terrorism and who the Government has reported is in custody in the city of Barrancabermeja, the Committee requests that, on the basis of that information, the Government take steps without delay to have the Attorney-General report on Mr Palma's whereabouts and legal status.*
- (f) With regard to the allegations presented by ADECO concerning ECOPEPETROL's refusal to enter into collective bargaining, the Committee requests the Government to keep it informed of developments in the appeal lodged by the company against the decision handed down on 2 October 2007 in connection with the list of demands submitted by ADECO in May 2006.*
- (g) With regard to ADECO's allegations that, by virtue of Decree No. 3164 of 2003, several categories of employees of ECOPEPETROL SA are excluded from the provisions of collective agreements, the Committee requests the Government to guarantee the right to collective bargaining of all ECOPEPETROL's workers who, by virtue of the said decree, are not covered by the collective agreements that are in force in the company.*
- (h) The Committee requests the Government to carry out as a matter of urgency an investigation into the new allegations presented by ADECO to determine, on the basis of full information, whether ECOPEPETROL employees who are not unionized are offered individually or otherwise benefits, better working conditions or bonuses to encourage them to resign from their trade union, and to keep it informed in this regard.*
- (i) With regard to the new allegations presented by ADECO concerning the refusal of Chevron Petroleum Company to bargain collectively with it, the appointment of a Compulsory Arbitration Tribunal and the appeal to have the arbitration award revoked that was lodged with the Supreme Court of Justice by both the company and the trade union organization, the Committee observes that the Government has not sent its observations on the subject and requests it to do so without delay, particularly with respect to the outcome of the appeal before the Supreme Court of Justice.*

**Complaints against the Government of Colombia  
presented by**

- the National Union of Public Employees of the National Service for Training (SENA) (SINDESENA)
- the Union of Employees and Workers of SENA (SINDETRASENA)
- the Single Confederation of Workers of Colombia (CUT)
- the Academic Trade Union Association of Lecturers of the University of Pedagogy and Technology of Colombia (ASOPROFE-UPTC) and
- the Cali Municipal Enterprises Union (SINTRAEMCALI)

*Allegations: The National Union of Public Employees of the National Service for Training (SENA) (SINDESENA), the Union of Employees and Workers of SENA (SINDETRASENA) and the Single Confederation of Workers of Colombia (CUT) allege the collective dismissal of trade union members and trade union leaders as part of a restructuring process; the refusal to register the trade union SINDETRASENA; the refusal by the National Service for Training (SENA) to negotiate with the trade union organizations; the Academic Trade Union Association of Lecturers of the University of Pedagogy and Technology of Colombia (ASOPROFE-UPTC) alleges the dismissal of a trade unionist, and the Cali Municipal Enterprises Union (SINTRAEMCALI) alleges that the administrative authority declared a permanent assembly staged within the Municipal Enterprises of Cali (EMCALI) to be illegal and that this decision gave rise to the dismissal of 49 trade union members and leaders*

**381.** The Committee last examined this case at its meeting in November 2007 and submitted an interim report to the Governing Body [see 348th Report, paras 320–378, adopted by the Governing Body at its 296th Session].

**382.** The National Union of Public Employees of the National Service for Training SENA (SINDESENA) sent new allegations in a communication dated 2 June 2008. The Cali Municipal Enterprises Union (SINTRAEMCALI) sent additional information in communications dated 30 January and 10 June 2008. The Academic Trade Union Association of Lecturers of the University of Pedagogy and Technology of Colombia (ASOPROFE-UPTC) sent new allegations in a communication dated 22 October 2008.

383. The Government sent its observations in communications dated 18 February, 15 September and 17 October 2008.

384. Colombia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

## A. Previous examination of the case

385. In its previous examination of the case in November 2007, the Committee made the following recommendations [see 348th Report, para. 378]:

- (a) With regard to the dismissal of eight SINDESENA trade union leaders as part of the process of restructuring SENA, noting that the Government sends information on three of the trade union leaders, the Committee requests the Government to continue to keep it informed with regard to the cases still pending regarding the lifting of the trade union immunity of the remaining five trade union leaders (Wilson Neber Arias Castillo, Edgar Barragán Pérez, Pedro Sánchez Romero, Carlos Rodríguez Pérez and Oscar Luis Mendivil Romero).
- (b) As to SENA's refusal to bargain collectively, the Committee once again requests the Government to take the necessary measures to ensure that, in consultation with the trade union organizations concerned, legislation is amended without delay in order to allow employees of the public administration to bargain collectively and to bring it into line with the Conventions ratified by Colombia. The Committee requests the Government to keep it informed of any developments in this regard, and reminds it that it may avail itself of the technical assistance of the Office.
- (c) The Committee requests the Government to keep it informed of the final outcome of the disciplinary proceedings against Mr Ricardo Correa Bernal, Vice-Chairperson of the Medellín Subdirective and Secretary of the organization's national committee.
- (d) As to the declaration of illegality concerning a permanent assembly held by SINTRAEMCALI within EMCALI, which led to the dismissal of 45 trade union members and six union leaders:
  - (i) the Committee once again requests the Government to take the necessary measures to amend article 451 of the Substantive Labour Code, so that responsibility for declaring strikes or work stoppages illegal may be placed with an independent body which has the confidence of the parties involved, and to keep it informed of any developments in this regard;
  - (ii) the Committee expresses the firm hope that the Council of State will issue a ruling in the near future with regard to the occurrence of a work stoppage and the declaration of illegality issued by the Ministry of Social Protection in resolution No. 1696 of 2 June 2004, and trusts that the Council of State will take into account the principles set forth in the preceding paragraphs concerning the requirement for investigations and the declaration of illegal strikes to be undertaken by an independent authority. The Committee requests the Government to keep it informed in this regard;
  - (iii) as to the dismissal of 45 trade union members and six leaders for alleged participation in the work stoppage, the Committee once again requests the Government, in the light of the Council of State's ruling, once handed down, to re-examine the situation of those dismissed and to keep it informed in this regard;
  - (iv) as to the investigation launched before the Office of the Attorney-General into the violent events that occurred, the Committee requests the Government to provide information without delay;
  - (v) as to the launch of 462 separate disciplinary proceedings and the pressure put on workers not to discuss trade union issues under threat of dismissal, the Committee once again requests the Government to take the necessary measures to ensure that

an independent investigation is carried out into these allegations and to keep it informed in this regard.

- (e) The Committee requests the Government to keep it informed of the final outcome of the appeal against the judicial ruling ordering the reinstatement of Ms Isabel Cristina Ramos Quintero.

## **B. New allegations**

- 386.** In its communication dated 2 June 2008, the SINDESENA states that, in 2000, the management of SENA and the Ministry of Labour (now of Social Protection) and SINDESENA signed a workplace agreement, which was generally observed until the arrival of the current management. In 2004 and 2005, the existing trade union guarantees were denied, all trade union leave was cancelled, funding for tickets to guarantee that national trade union leaders are able to travel to exercise their mandate to defend the trade union members' interests as well as other statutory obligations were withdrawn, and transport was not provided for regional and national assemblies. The publication that SENA historically produced for SINDESENA, at its premises, and the provision of the supplies necessary for the trade union to operate were also suspended. As a result of this failure to comply with the agreement, the functioning of the trade union has been significantly affected and its activities have had to be suspended. Disciplinary proceedings were launched against several trade union leaders, including the Chairperson, Ms Aleyda Murillo, and the secretary of political affairs, Mr Wilson Arias Castillo, who, given their statutory obligations, had to carry out their trade union responsibilities without having been authorized to take trade union leave. Furthermore, there has been an unjustified delay in the response to the request for the authorization or modification of trade union leave, which demonstrates a failure to comply with the directive of the Ministry of Social Protection issued in December 2007. Furthermore, the number of authorizations for trade union leave is insufficient, which prevents the comprehensive implementation of the programmes of work and action plans adopted by SINDESENA.
- 387.** The complainant organization alleges that, as part of the policy of persecution, many disciplinary proceedings have been initiated in various regional offices against trade union leaders and members for their participation in activities planned by the trade union. In recent years, mass disciplinary proceedings have been launched in several regional offices, including the Capital District, Cundinamarca, Yopal, Córdoba, Tolima, Valle, Caldas, Antioquia, Norte de Santander, Atlántico and Magdalena, etc. In addition, individual disciplinary proceedings have been initiated in some regional offices against trade union leaders, such as María Inés Amézquita, Jesús Horacio Sánchez, Carlos Arturo Rubio, Gustavo Gallego, Aleyda Murillo Granados and Carmen Elisa Acosta.
- 388.** SINDESENA states that, as a result of the restructuring undertaken in 2004, the management of SENA decided to suppress the posts of eight trade union leaders. As a result of this decision, two trade union leaders in the regional offices of Guajira and Antioquia were removed from service. With regard to Mr Wilson Arias Castillo, one of the eight leaders whose posts were suppressed, the management arbitrarily denied him the legal compensation to which he was entitled as a result of the suppression of his post. SINDESENA alleges that all these measures were anti-union in nature and highlights that, while the company is seeking to lift the trade union immunity of these workers in order to dismiss them, at the same time, vacancies at the same hierarchical level are being advertised and SENA has not acceded to the request or the legal instruction to reinstate these workers.
- 389.** SINDESENA alleges that the current management has systematically refused to participate in meetings and discussions with the trade union. Furthermore, the management of SENA has accused the trade union of having links with professional demonstrators and has

searched the trade union headquarters for explosives. Since then, the trade unionists leaders feel more at risk pursuing their activities in many of the offices. In several regional offices, such as those in Antioquia, Atlántico, Cundinamarca, Boyacá, Tolima, Bolívar and Valle, trade unionists leaders are harassed and persecuted: they are constantly singled out and discredited; they are transferred without being consulted to places that are cut off from trade union activities; and four trade union leaders are being subject to irregular disciplinary proceedings that, illegally and with no respect for due process or the right to a defence, seek to dismiss them for allegedly participating in a day of protest as part of the SENA defence plan.

- 390.** The complainant organization states that the conditions in some of their branches within SENA premises have been systematically made worse, or the branches have been removed entirely, the telephone service has been disconnected, and in several regional offices the access of trade union leaders and members to the premises is restricted. In the regional offices of Valle del Cauca and Antioquia, for several years there have been attempts to remove the trade union from the headquarters assigned to them in SENA, which has required the intervention of the Ministry of Social Protection, among others.
- 391.** In clear violation of the freedom of association, several trade union leaders have been transferred without being consulted, which has led to a decrease in their earnings and affected their family life. Likewise, the organization's right to the use of notice boards and electronic mail to circulate information is not respected.
- 392.** SINDESENA states that, on 10 October 2007, it submitted a list of grievances, but that the management stated that it was "legally impossible to negotiate the lists of grievances of public employees", and insisted on maintaining an outdated view with regard to the right of bargaining of public servants.
- 393.** SINDESENA further alleges that, after being kidnapped and tortured, Jesús Heberto Caballero Ariza, a SINDESENA trade union leader who was employed in the Atlántico Executive Subcommittee as a substitute legal adviser and in SENA as an ethics instructor, was murdered on 16 April 2008.
- 394.** In the afternoon of Sunday 18 May 2008, unidentified armed individuals forcibly entered the SINDESENA trade union headquarters located at Nos 8–24, street No. 46, Bogotá, where SINDESENA trade union leaders and members visiting Bogotá usually stay. The employee responsible for looking after the house was attacked and beaten by the perpetrators who tied her up, searched the suitcases of the Chairperson of SINDESENA for the Atlántico Executive Subcommittee, stole money, a USB memory stick and documentation that contained reports on the recent murder of Mr Jesús Heberto Caballero Ariza, as well as evidence of threats against other trade union leaders, which were being guarded by the Chairperson of that trade union sub-office. Moreover, the trade union headquarters are constantly being watched by guards stationed outside.
- 395.** In its communications dated 30 January and 10 June 2008, the SINTRAEMCALI refers to the matters that are already being examined in the present case, and highlights the lack of willingness on the part of the Municipal Enterprises of Cali (EMCALI) to reconcile the situation, having confirmed its intention not to reinstate the dismissed workers.
- 396.** In its previous communication, dated 7 September 2007, SINTRAEMCALI states that the Council of State nullified Decision No. 1696, of 2 June 2004, issued by the Ministry of Social Protection, by which it had declared that the collective work stoppage carried out on 26 and 27 May 2004 was illegal, and which led to the dismissal of 51 workers.

397. In a communication dated 22 October 2008, the ASOPROFE-UPTC alleges threats directed against the President of the trade union.

### C. The Government's observations

398. In its communications dated 18 February, 15 September and 17 October 2008, the Government sends the following observations: as to subparagraph (a) of the recommendations made by the Committee when it last examined this case, the Government states that, with regard to the cases concerning the lifting of the trade union immunity of trade union leaders as part of the restructuring of the National Service for Training (SENA), the Secretary-General of SENA provided the following information:

- Marco Tulio Ramírez Brochero: the First Labour Court of the Circuit of Riohacha, in a ruling in the first instance, handed down on 15 December 2004, and the High Court of Riohacha, in a ruling in the second instance handed down on 3 March 2005, authorized SENA to terminate the legal and regulatory relationship of the individual concerned. On that basis, SENA issued Decision No. 000795 of 13 March 2005, retiring him from service. A letter was sent to Mr Ramírez Brochero informing him that he was being removed owing to the elimination of his post, as ordered in article 8 of Decree No. 250 of 2004, and that, by law, he had the right to compensation or to be transferred to an equivalent post in the public sector within the following six months, and that he should inform the Director-General of SENA of his decision in writing within the next five days. As Mr Ramírez Brochero gave no indication of his decision within that period, under the terms of article 46 of Decree No. 1568, and article 30 of Decree No 760 of 2005, he was deemed to have accepted the compensation, and was accordingly paid the sum of 41,077,316 Colombian pesos through Decision No. 000922 of 1 June 2005.
- Leonel Antonio González Alzate: the High Court of Armenia handed down a ruling in the second instance, dated 28 November 2005, in which it refused authorization to remove the civil servant (who enjoyed trade union immunity) from service. For this reason, his post was not suppressed and Mr González Alzate is still a staff member.
- Juan Clímaco Muriel Galeano: the Eleventh Labour Court of the Circuit of Medellín, in a ruling handed down in the first instance on 20 September 2005, and the High Court of Medellín, in a ruling handed down in the second instance on 2 February 2006, authorized SENA to terminate the legal and regulatory relationship with the individual concerned. Consequently, SENA issued Decision No. 000636 of 29 March 2006, retiring him from service. A letter was sent to Mr Muriel Galeano informing him that he was being removed owing to the elimination of his post, as ordered in article 8 of Decree No. 250 of 2004, and of his rights, by law, with regard to the suppression of his post. He chose, within the legal time frame, to be transferred to another equivalent post within the following six months. As there were no equivalent vacant posts to which he could be appointed in SENA, his request was referred on 31 May 2006 to the National Civil Service Commission by letter No. 019502, in order that he might be placed elsewhere in the public service. The National Civil Service Commission replied with letter No. 000547, dated 22 January 2007, filed in our central archive on 30 January 2007 under No. 002406, which states that "... his due reinstatement was not possible because no equal or equivalent posts were found, therefore, he should be offered a settlement and paid the corresponding compensation". Since Mr Juan Clímaco Muriel Galeano passed away on 9 September 2006, SENA paid the compensation to which he was entitled to Ms Blanca Nelly Alzate de Muriel, as his spouse and the sole claimant, in accordance with article 46, paragraph 3, of Decree No. 1568 of 1998 and article 28, paragraph 3, of Decree No. 760 of 2005, through Decision No. 000724, of 25 April 2007.

- Oscar Luis Medivil Romero: the High Court of Santa Marta, in a ruling handed down in the second instance on 2 November 2006, refused authorization to retire the civil servant (who enjoyed trade union immunity) from service. For this reason, his post was not suppressed and Mr Medivil Romero is still a staff member.
- Edgar Barragán Pérez: the High Court of Cúcuta, in a ruling handed down in the second instance on 8 February 2007, refused authorization to remove the civil servant (who enjoyed trade union immunity) from service. For this reason, his post was not suppressed and Mr Barragán Pérez is still a staff member.
- Wilson Neber Arias Castillo: the High Court of Cali, in a ruling handed down in the second instance on 10 December 2007, refused authorization to remove the civil servant (who enjoyed trade union immunity) from service; however, the public employee resigned from his post on 30 July 2007 and the resignation was accepted through Decision No. 000622, of 30 July 2007. He is therefore no longer a member of staff.
- Carlos Rodríguez Pérez: the Court of the First Instance refused authorization to remove the civil servant from service; on appeal, the High Court of Barranquilla also refused to authorize the dismissal.
- Pedro Sánchez Romero: no judicial ruling has been handed down; the proceedings are under way in the Fourth Labour Court of the Cartagena Circuit.

**399.** As for the new allegations presented by SINDESENA on the refusal to grant trade union leave, the launching of disciplinary proceedings against several trade union leaders, the refusal by SENA management to meet with the trade union in order to discuss pension matters, threats against trade union officials, the refusal by SENA to allow the trade union to publish its comments in the office board and a journal circulating internally, the Government indicates the following:

- With regard to the facts relative to human rights, like threats, etc., it requests that these issues be examined in the framework of Case No. 1787, so that it may send the corresponding observations in conformity with that process.
- With regard to the refusal of trade union leave, in the year 2004, the Secretary-General of SENA authorized 1,025 working days of paid trade union leave for the officers of the SINDESENA national board and subdirectorates in order to carry out various activities as well as another 744 working days of leave. The Government provides explanatory tables on the leave granted, the subdirectorates which benefited from it and the trade union activities to which it was allocated. For 2005, 2,332 working days of paid trade union leave were authorized in favour of the national board of SINDESENA and its subdirectorates, up until 31 December 2005. The Government adds, nevertheless, that administrative investigations were instituted on the refusal to grant trade union leave. As for 2006, the General Secretary of the SENA authorized trade union leave in official letters for the various activities of the national board and the subdirectorates of SINDESENA in the whole country (these are enumerated in detail in the Government's reply), thus having authorized the totality of trade union leave.
- As for the refusal to pay travel costs, the Government indicates that by virtue of article 41 of Decree 3738 of 2004 and resolution 0574 of 1995, public servants are paid travel costs only in the performance of their functions.
- As for the disciplinary proceedings against Alwyda Murillo and Wilson Arias Castillo, the SENA indicated that they were shelved by decision of 25 August 2006.

The other proceedings concerning Maria Ines Amezquita, Jesús Horacio Sánchez, Carlos Arturo Rubio and Gustavo Gallego, public servants of the Quidío region, are still under way.

- As for the SINDESENA premises, the Government indicates that in communications Nos 2-2008-008044 of 15 April 2008 and 2-2008-009450 of 6 May 2008, sent to the President of SINDESENA, the SENA carried out the necessary works to ensure improvements in the premises and better conditions in the headquarters of SINDESENA Valle Subdirectorate.
- As for the denial of the right to use office boards, the Government indicates that the trade union used the office board in order to make defamatory accusations against the administration of its public servants. Resolution No. 612 of 2008 regulated the optimum use of office boards in order to ensure that this means of communication is used in a harmonious manner and to guarantee respect for fundamental rights. The Government indicates that resolution No. 00284 was issued on 6 February 2008 in order to set institutional policies and measures for the administration, operation and use of the electronic mail system and Internet access in the office. SENA respects the role of the trade union and allows the use of electronic mail for carrying out representation activities.

**400.** As to subparagraph (b) of the recommendations, the Government is currently reaching an agreement with the Sectoral Committee of the Public Sector regarding the text of a decree whose main objective is to promote the collective bargaining of public employees. As to subparagraph (c) of the recommendations, the Government states, with regard to the disciplinary proceedings against Mr Ricardo Correa Bernal, that the Secretary-General of SENA stated that two disciplinary procedures had been launched against Mr Correa Bernal. The first was for physical aggression towards a SENA instructor, which resulted in a ruling imposing a three-month suspension from his duties. That ruling was confirmed on appeal. The second procedure was filed by an order dated 12 December 2007.

**401.** The company states that the Constitutional Court supported the proceedings prior to the dismissal of the workers and trade union leaders carried out by EMCALI, and determined that its actions respected the principles of freedom of association and trade union rights, and therefore did not grant the right of *tutela* for the protection of constitutional rights. SINTRAEMCALI had submitted a *tutela* action to the High Court of Valle del Cauca, requesting the reinstatement of the workers.

**402.** As to subparagraph (d)(i) of the recommendations, the Government states that it has presented to Congress Bill No. 190, of 2007, transferring the authority to declare a strike illegal to the labour courts, which are part of the judiciary and completely independent from the executive. This bill will be debated by Congress in special sessions convened by the Government from February 2008.

**403.** Furthermore, it states that the Colombian Substantive Labour Code establishes that any collective work stoppage involving public services is illegal, that the Ministry of Social Protection is responsible for declaring whether stoppages are illegal, and, if this is the case, the employer is at liberty to dismiss, for that reason, those who took an active part in the work stoppage. With regard to the workers with trade union immunity, their dismissal, in accordance with the law, shall not require judicial authorization. On this legal basis, the Ministry of Social Protection issued Decision No. 1696, of 2 June 2004, in which it declared that the occupation of the EMCALI premises was an illegal work stoppage and therefore the company proceeded to take steps to prove the direct participation of the workers involved in the occupation in order to dismiss them, while complying with all legal and constitutional requirements.

404. As to subparagraph (d)(ii) regarding the suit filed by SINTRAEMCALI before the honourable Council of State against Decision No. 1696, requesting that it be nullified, the company states that the decision taken by this administrative court does not have any affect, nor is it retroactive or reversible, with regard to the actions taken by EMCALI as a result of the decision declaring that the work stoppage was illegal, since that decision is covered by the presumption of legality and EMCALI took action on the basis of that administrative act. The company states that it is not possible for the Council of State to examine this case on the basis of the “principles set forth concerning the requirement for investigations and declarations of illegal strikes and work stoppages be undertaken by an independent authority” because it is not legally valid.
405. The Government states that the Council of State issued its ruling on 8 March 2008, which was published in a notification between 29 August and 2 September. In its ruling, the Council of State nullified Decision No. 1696, but it rejected the other claims with regard to the dismissal of the members of SINTRAEMCALI who participated in the permanent assembly. The Government states that the company submitted an appeal for clarification against the ruling.
406. As to subparagraph (d)(iv), the Government states that the Cooperation and International Relations Office requested information from the coordinator of the Group for the Defence of Human Rights of the Ministry of Social Protection, and that, when that information has been received, a copy will be sent.
407. As to subparagraph (d)(v), the Government wishes to know to which authority the Committee is referring when it requests that an independent investigation be carried out, since, as was clarified on a previous occasion, article 29 of the Constitution provides for due process in all judicial and administrative proceedings. According to that article, “no one may be judged except in accordance with laws that existed prior to the commission of the offence of which the individual is accused, by a competent judged or tribunal, and in accordance with all the proper formalities required in each case”. Furthermore, “any evidence obtained in violation of due process shall be null and void”. Therefore, the workers who are included in the disciplinary proceedings are covered by the guarantee of due process, and therefore their right to a defence will be respected.
408. The Government adds that the fact that the unionized workers are the subject of disciplinary proceedings does not mean that their right to form trade unions and freedom of association will be disregarded. Furthermore, Colombian legislation provides for mechanisms to defend workers, in the event that any of their fundamental rights are violated.
409. In this regard, the Government states that, since 5 September 2007, the matters raised in this case are also being examined by the Special Committee on the Handling of Cases referred to the ILO (CETCOIT).
410. As to subparagraph (e) of the recommendations, regarding the matter relating to Ms Isabel Cristina Ramos Quintero, the head of the legal office at the University of Pedagogy and Technology of Colombia (UPTC) stated that Ms Isabel Cristina Ramos Quintero filed an action for the protection of constitutional rights (*tutela*), which was processed by the Third Labour Court of Tunja. In its ruling the court ordered as a temporary measure to be completed within 48 hours that the university should “renew her contract as a fixed-term lecturer at the university ... As a result, the UPTC, by Decision No. 3685, of 9 September 2005, appointed Ms Isabel Cristina Ramos Quintero as a full-time fixed-term lecturer. In turn, the university, within the legal time limit and supported by the law and Constitution, appealed against the ruling of the Third Labour Court of the Tunja Circuit before the Labour Tribunal of the High Court of Tunja, which, by its ruling of 11 October 2005,

overturned the ruling of the Third Labour Court of the Tunja Circuit as part of *tutela* Case No. 2005-107, and thus the claims were rejected as unfounded. As a result of the above, Decision No. 3685 was overturned by Decision No. 3939, dated 14 October 2005, while the legal decision underpinning it was withdrawn from the legal system. It is important to point out that at present the lecturer, Ms Ramos Quintero, is employed by the university as a part-time lecturer, in accordance with Decision No. 2588, of 1 August 2007. Finally, at no time has the university disregarded the trade union rules; on the contrary, it adheres to the principles of the collective rights in force in Colombia and complies with the judicial rulings that were handed down in this case: despite the above, the lecturer was invited to be included in the UPTC database of eligible fixed-term lecturers and professors, and at present she is working part time as a fixed-term lecturer”.

#### **D. The Committee’s conclusions**

**411.** *The Committee takes note of the new allegations presented by the SINDESENA and the SINTRAEMCALI, as well as the Government’s observations regarding the recommendations made by the Committee when it last examined the case. The Committee further notes that the matters relating to the permanent assembly carried out at EMCALI are being examined by the CETCOIT with a view to finding a comprehensive solution to the conflict.*

#### **Restructuring the National Service for Training**

**412.** *As to subparagraph (a) of the recommendations, with regard to the cases concerning the lifting of the trade union immunity of trade union leaders as part of the restructuring process of the SENA, the Committee notes that, the complainant indicates in its new allegations that Mr Wilson Arias Castillo has been denied payment of the compensation to which he was entitled. The Committee also notes that, for its part, the Government states that, with regard to Mr Oscar Luis Medivil Romero, Mr Edgar Barragán Pérez, Mr Carlos Rodríguez Pérez and Mr Wilson Neber Arias Castillo, the judicial authority refused authorization to remove these civil servants (who enjoyed trade union immunity) from service. As a result, Mr Medivil Romero and Mr Barragán Pérez are still members of staff. Mr Wilson Arias Castillo resigned from his post on 30 July 2007 and the resignation was accepted through Decision No. 000622, of 30 July 2007. He is therefore no longer a staff member. The Committee notes that during the performance of his duties he had been granted trade union leave on many occasions.*

**413.** *The Committee notes, with regard to Messrs Ramirez Brochero, Gonzalez Alzate and Galeano, that the judicial authority authorized the lifting of the trade union immunity and they received the corresponding compensation. The case of Mr Pedro Sánchez Romero is pending before the Fourth Labour Court of the Cartagena Circuit. The Committee requests the Government to keep it informed of the final outcome of this case.*

**414.** *As to subparagraph (b) of the recommendations, with regard to the refusal of SENA to bargain collectively, the Committee notes that in its last communication SINDESENA refers to the persistent nature of SENA’s refusal. The Committee notes that, for its part, the Government states that it is at the agreement stage with the Sectoral Committee of the Public Sector regarding the text of a decree to promote the collective bargaining of public employees. In this regard, recalling that the Committee has already indicated on various occasions that, even though collective bargaining in the public service can be subject to specific modalities, the right to bargain collectively has been recognized in general for all public employees on the basis of the ratification of Conventions Nos 151 and 154. The Committee requests the Government to keep it informed of developments regarding the decree to promote the collective bargaining of public employees.*

415. *As to subparagraph (c) of the recommendations, with regard to the disciplinary proceedings against Mr Ricardo Correa Bernal, the Committee notes the information provided by the Government, according to which two disciplinary procedures have been launched. The first was for physical aggression towards a SENA instructor, which resulted in a ruling imposing a three-month suspension from his duties. That ruling was confirmed on appeal. The second procedure was filed by an order dated 12 December 2007.*
416. *With regard to the new allegations regarding: the refusal to grant trade union leave and other facilities that had been agreed on, such as airline tickets to attend trade union meetings, trade union premises and notice boards, the Committee takes note of the detailed information provided by the Government on the leave granted, the travel and the use of the office board and premises. The Committee recalls the importance of providing facilities for the proper conduct of trade union activities, and requests the Government to take the necessary measures to guarantee that the trade union can carry out its activities properly with the necessary facilities, as it has been doing until recently and to keep it informed of the disciplinary proceedings under way.*
417. *As regards the new allegations concerning the institution of disciplinary proceedings for the trade union activities of various trade union officials (María Inés Amézquita, Jesús Horacio Sánchez, Carlos Arturo Rubio, Gustavo Gallego, Aleyda Murillo Granados and Carmen Elisa Acosta), the Committee notes the detailed information provided by the Government and requests it to keep the Committee informed of the proceedings under way.*
418. *The allegations relating to the murder of Mr Jesús Heberto Caballero Ariza on 16 April 2008, the violent attack at the headquarters of SINDESENA on 18 May 2008 in Bogotá, and the accusations against the trade union of maintaining links with professional agitators will be examined within the framework of Case No. 1787 that is under examination by the Committee.*

### **Cali Municipal Enterprises**

419. *As to subparagraph (d) of the recommendations regarding the declaration of illegality by the administrative authority concerning a permanent assembly held by SINTRAEMCALI within EMCALI, which led to the dismissal of 45 trade union members and six union leaders, the Committee had requested the Government to take the necessary measures to amend article 451 of the Substantive Labour Code, so that responsibility for declaring strikes or work stoppages illegal may be placed with an independent body which has the confidence of the parties involved. In this regard, the Committee notes with interest the recent adoption of Act No. 1210 relating to the amendment of that article, by virtue of which the legality or illegality of a collective work stoppage shall be pronounced by the labour courts.*
420. *As to subparagraphs (d)(ii) and (iii) of the recommendations regarding the pending decision of the Council of State on the legality of Decision No. 1696, of 2 June 2004, by which the permanent assembly (or work stoppage, according to the company) in May 2004 was declared illegal and the dismissal of 45 trade union members and six leaders, the Committee notes that: (1) through Ruling No. 2004-00186-01, the Council determined that the decision was null and void; (2) but it rejected the claims regarding the dismissal of 45 trade union members and six leaders; and (3) the company, EMCALI, submitted an appeal for clarification. In this regard the Committee requests the Government to keep it informed of the final outcome of the appeal for clarification which is pending.*
421. *As to subparagraph (d)(iv) of the recommendations regarding the investigation launched by the Office of the Attorney-General into the violent events that took place during the permanent assembly, the Committee notes that a request for information has been made to*

*the coordinator of the Group for the Defence of Human Rights of the Ministry of Social Protection and that information will be provided in this regard. The Committee expresses serious concern regarding the fact that the Government has not provided specific information on the investigation into the violent events that took place in EMCALI in May 2004, recalls the importance of conducting the investigations without delay and urges that the investigation be concluded in the near future and that it will as a result be possible to identify and punish those responsible.*

- 422.** *As to subparagraph (d)(v) of the recommendations regarding the launch of 462 disciplinary proceedings and the pressure put on workers not to discuss trade union issues under threat of dismissal, the Committee notes that the Government states that, within the framework of these proceedings, due process is respected, but does not send any concrete information in this regard. In these circumstances, the Committee once again requests the Government to take the necessary measures to guarantee that the workers of EMCALI can exercise their trade union rights freely and without fear of reprisals, to carry out an independent investigation that has the confidence of the parties involved (such an investigation could be carried out by the judicial authority) into the pressure, threats and disciplinary proceedings against the workers, and to keep it informed in this regard.*

### **University of Pedagogy and Technology of Colombia**

- 423.** *As to subparagraph (e) of the recommendations regarding the appeal against the judicial decision ordering the reinstatement of Ms Isabel Cristina Ramos Quintero, the Committee notes the information provided by the Government, according to which Ms Ramos Quintero was reinstated by Decision No. 3685, by virtue of a tutela ruling for the protection of constitutional rights, but that the university appealed the ruling before the Labour Tribunal of the High Court of Tunja, which overturned it, thus rescinding Decision No. 3685. However, the Committee notes the information, according to which Ms Ramos Quintero is currently employed part-time as a lecturer by the university, in accordance with Decision No. 2588 of 1 August 2007.*
- 424.** *With regard to the latest communication of the ASOPROFE-UPTC concerning threats against the President of the trade union, the Committee requests the Government to take the necessary measures so that an investigation is carried out in this respect and that adequate protection is provided to Mr Luis Diaz Samboa. The Committee requests the Government to keep it informed in this respect.*

### **The Committee's recommendations**

- 425.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a)** *With regard to the cases concerning the lifting of the trade union immunity of trade union leaders as part of the restructuring process of the National Service for Training, the Committee requests the Government to keep it informed of the final outcome of the proceeding involving Pedro Sánchez Romero.*
  - (b)** *With regard to the refusal of SENA to bargain collectively, the Committee, recalling that, even though collective bargaining in the public service can be subject to specific modalities, the right to bargain collectively has been recognized in general for all public employees on the basis of the ratification*

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*of Conventions Nos 151 and 154, requests the Government to keep it informed of developments regarding the decree to promote the collective bargaining of public employees.*

- (c) With regard to the new allegations regarding the refusal to grant trade union leave and other facilities that had been agreed on, such as plane tickets to attend trade union meetings, trade union premises and notice boards, the Committee, recalling the importance of providing facilities for the proper conduct of trade union activities, requests the Government to take the necessary measures to guarantee that the trade union can carry out its activities properly with the necessary facilities, as it has been doing until recently.*
- (d) The Committee requests the Government to keep it informed of the disciplinary proceedings under way in respect of six trade union leaders of SINDESENA.*
- (e) As to the declaration of illegality by the administrative authority concerning a permanent assembly (a work stoppage), held by SINTRAEMCALI within EMCALI, which led to the dismissal of 45 trade union members and six leaders for their alleged participation in the work stoppage (Decision No. 1696), the Committee requests the Government to keep it informed of the final outcome of the appeal for clarification which is pending.*
- (f) With regard to the investigation launched before the Office of the Attorney-General into the violent events that took place during the permanent assembly, the Committee expresses serious concern regarding the fact that the Government has not provided specific information on the investigation into the violent events that took place in EMCALI in May 2004, recalls the importance of conducting the investigations without delay and urges that the investigation be concluded in the near future and that it will as a result be possible to identify and punish those responsible.*
- (g) With regard to the launch of 462 disciplinary proceedings and the pressure put on workers not to discuss trade union issues under threat of dismissal, the Committee once again requests the Government to take the necessary measures to guarantee that the workers of EMCALI can exercise their trade union rights freely and without fear of reprisals, to carry out an independent investigation that has the confidence of the parties involved (such an investigation could be carried out by the judicial authority) into the pressure, threats and disciplinary proceedings against the workers and to keep it informed in this regard.*
- (h) With regard to the latest communication of the ASOPROFE-UPTC concerning threats against the President of the trade union, the Committee requests the Government to take the necessary measures so that an investigation is carried out in this respect and that adequate protection is provided to Mr Luis Diaz Samboa. The Committee requests the Government to keep it informed in this respect.*

CASE NO. 2573

REPORT IN WHICH THE COMMITTEE REQUESTS  
TO BE KEPT INFORMED OF DEVELOPMENTS**Complaints against the Government of Colombia  
presented by**

- the Electricity Workers' Union of Colombia (SINTRAELECOL) and
- the World Federation of Trade Unions (WFTU)

*Allegations: Presented by the Electricity Workers' Union of Colombia (SINTRAELECOL) relating to: (1) the refusal by the enterprise Termotasajero SA to grant trade union leave; (2) non-respect of certain benefits such as supplementary food allowances and the appropriate respect of paid trade union leave; (3) wage discrimination against unionized workers; (4) the request to dismiss 16 workers within the enterprise. The case also refers to the allegations presented by the World Federation of Trade Unions (WFTU) relating to: (1) the refusal by the enterprise Empresa de Energía del Pacífico (EPSA) and the Compañía de Electricidad de Tuluá (CETSA) to bargain collectively with SINTRAELECOL; (2) the refusal by the enterprise Operadores Mineros del César (OMC) to bargain collectively with the National Union of Mining and Power Industry Workers (SINTRAMIENERGETICA)*

426. The Electricity Workers' Union of Colombia (SINTRAELECOL) presented its complaint in communications of 22 May and 15 July 2007. The World Federation of Trade Unions (WFTU) presented further allegations in a communication of 16 August 2007. The Government sent its observations in communications dated 31 October 2007 and 29 February and 27 August 2008.

427. Colombia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. The complainants' allegations**

428. In its communications dated 22 May and 15 July 2007, SINTRAELECOL alleges: (1) the refusal by the enterprise Termotasajero SA to grant periods of trade union leave provided for under section 10 of the collective agreement; (2) the non-respect of the guarantee of trade union immunity for various trade union leaders through the refusal to grant them the benefits established under the collective agreement, such as food or appropriate respect of wages; (3) wage discrimination against unionized workers who have not received a wage increase since 2002; (4) the enterprise's request, dated 5 May 2005, to dismiss 30 workers.

The Ministry of Social Protection only authorized the termination of 16 of the employment contracts involved but according to SINTRAELECOL only unionized workers were affected.

429. The complainant organization adds that the process of notification of the decision to proceed with the collective dismissal was flawed, as was the process of obtaining authorization from the Ministry of Social Protection for the dismissals.
430. The complainant organization states that, through resolution No. 1999 of 20 July 2007, the termination of 16 employment contracts was ratified regardless of the fact that, in the meantime, between the date of issue of resolution No. 002332 of 4 September 2006, authorizing the termination of the 16 employment contracts, and the issuing of resolution No. 1999, 13 workers had taken old-age retirement, been dismissed and/or opted for voluntary retirement.
431. As to the enterprise's refusal to pay the unionized workers a wage increase as of 1 March 2002, the complainant organization states that a *tutela* (protection of constitutional rights) action was brought and, following a ruling in the second instance issued by the 34th Civil Court of the Bogotá Circuit, the enterprise was ordered to pay the increase. However, the enterprise failed to pay the increase retroactively dating back to 2002 as ordered by the court, thus bringing itself into contempt of court before the competent authorities, a situation which is still pending.
432. In its communication of 16 August 2007, the WFTU alleges that the enterprise Empresa de Energía del Pacífico (EPSA) and the Compañía de Electricidad de Tuluá (CETSA) refused to bargain collectively with SINTRAELECOL Cauca branch.
433. At the same time they are carrying out an anti-union policy through the progressive elimination of the claims contained in the collective labour agreements, as well as the minimization and exclusion of trade union guarantees and freedoms through cutbacks affecting trade union leave and supplementary benefits.
434. The WFTU also alleges that in March 2007 the National Union of Mining and Power Industry Workers (SINTRAMIENERGETICA) presented a list of demands to the enterprise Operadores Mineros del César (OMC) but that the latter refused to bargain. To date the dispute has not been resolved.
435. The WFTU also refers to anti-union dismissals carried out within the enterprise Productos de Aluminios Munal SA and to threats against leaders of the Workers' Trade Union (USO).

## **B. The Government's reply**

436. In its communications dated 31 October 2007 and 29 February and 27 August 2008, the Government sends the following observations.
437. As to the refusal to grant trade union leave to the leaders of SINTRAELECOL, the Government states that the trade union signed a collective labour agreement with Termotasajero SA which specifies that the enterprise shall grant paid trade union leave to the number of worker delegates determined by law to attend national assemblies labour-related training courses, trade union congresses and trade union meetings of the sector; Termotasajero SA shall grant permanent paid trade union leave for one or more workers elected to the national management committee or to the management committee of the federation or confederation to which SINTRAELECOL belongs and trade union leave for

trade union meetings shall always be granted upon presentation of a request for attendance or an invitation.

438. The Government states that the enterprise denies that it refused to respect the trade union leave enshrined in the collective labour agreement. In fact, during 2006 and 2007, Termotasajero SA granted 6,827 hours of trade union leave.
439. The enterprise admits that on a number of occasions it refused to grant trade union leave to certain trade union leaders for reasons of service, as is allowed by the collective agreement which states that trade union leave shall be granted “whenever the number of absent workers is not so great that it adversely affects the normal functioning of the enterprise”.
440. As to the allegations relating to the refusal to recognize the guarantee of trade union immunity, the Government states that, in accordance with the enterprise’s statements, trade union immunity was respected because the employment contracts of those individuals enjoying that privilege were not terminated, rather, having reviewed the clause in the agreement on wage benefits for workers with trade union immunity, the enterprise came to certain conclusions regarding the erroneous application of the supplementary food allowance and respect of the average wage of the workers. In fact, no obligation existed to provide food for the workers at the power plant or to individuals on permanent trade union leave, because the agreement states that food shall be provided to those workers lending their services to the company on a permanent basis. It should be pointed out that one of the workers concerned by this decision took his case to court on two occasions, requesting protection of constitutional rights, but his claims were rejected as being unfounded.
441. As to the recognition of the wages of a trade union leader with permanent trade union leave, the Government states that the enterprise ascertained that the wages formula for trade union leave was being applied incorrectly and it therefore decided to apply it in the correct fashion. The worker concerned made use of the *amparo* (protection of constitutional rights) mechanism, which was granted until such a time as the ordinary labour courts decide whether Termotasajero SA’s interpretation of the clause of the agreement is founded or not.
442. As to the allegations relating to wage discrimination, according to which workers belonging to SINTRAELECOL have for the last five years, unlike non-unionized workers, been denied a wage increase, the Government states that Colombian labour legislation grants trade unions the ability to denounce collective labour agreements, to present lists of demands and discuss new working conditions. It also grants trade union organizations the facility not to denounce collective agreements, but rather to extend them for successive six-month periods. SINTRAELECOL has not denounced the collective agreement since 2002 in an effort to avoid the review of certain clauses by the enterprise. It is only logical that the staff covered by the collective agreement should not have enjoyed a wage increase, given that the only way for an enterprise to increase wages legally is for the agreement to be denounced and for a list of demands to be presented.
443. It is up to the workers to denounce the wage situation, given that, when it comes to issues covered by collective agreements, as in the present case, the employer cannot act unilaterally to increase or cut wages, for fear of violating ILO Convention No. 98 and therefore the agreement signed between the enterprise and the trade union organization.
444. On the other hand, the Government states that, following a *tutela* action brought by the members of SINTRAELECOL, the 34th Civil Court of the Bogotá Circuit granted the workers provisional *amparo* until such a time as the ordinary courts issue a ruling. Therefore, Termotasajero SA is bound to pay those workers covered by the collective agreement the updated wage for the period 28 February 2002 to 31 May 2007 and onward.

- 445.** As to the request for dismissal, the Government states that, in accordance with the statements made by Termotasajero SA, the workforce had to be rationalized in order to take into account technological innovations and investment. To this end, the enterprise put forward a voluntary retirement plan to the trade union which was rejected. The enterprise then made use of the mechanism established under Colombian labour law to present the Ministry of Social Protection with a request for the mass dismissal of 30 persons. This Ministry issued an administrative act authorizing the termination of 16 employment contracts. The Ministry spent two whole years considering the request, before partially agreeing to it, having complied with the legal requirements.
- 446.** As to the allegations presented by the WFTU relating to the enterprises EPSA and CETSA, the Government states that the manager of the enterprise EPSA reports that the direct settlement phase was initiated, in accordance with the list of demands presented by SINTRAELECOL, and that, once that stage was exhausted without an agreement being reached, SINTRAELECOL decided to convene an arbitration tribunal.
- 447.** The Government states that the manager of the enterprise CETSA also reports that the direct settlement phase was initiated in that enterprise in the light of the list of demands presented by SINTRAELECOL.
- 448.** As to the allegations relating to anti-union acts by the enterprise CETSA, the Government states that this enterprise has concluded two collective labour agreements with SINTRAELECOL, maintaining under the second agreement all those extra-legal benefits granted under the first agreement, as well as substantial wide-ranging economic gains. In 2007, two workers joined SINTRAELECOL and immediately enjoyed all the guarantees and benefits included in the collective agreement. The enterprise currently has a total of 81 employees on open-term contracts; in 2007, one person was employed on the same contractual basis.
- 449.** In March 2006, the enterprise CETSA adopted a skills-based workforce management model owing to organizational adjustments brought on by technological changes, the consequent adaptation of procedures and the need to meet the requirements of clients in a competitive marketplace. The adjustments made in 2006 covered human, technical and administrative aspects and made it possible for the enterprise to contract two workers. Furthermore, channels of communication were established with all the workers and their representatives. Moreover, in the light of the complaint made by the trade union organization, the Ministry intervened to investigate, with the enterprise providing all the necessary information. It was found that the adjustment process undertaken by the enterprise did not in any way violate the law. Following its intervention, the Ministry of Social Protection issued a ruling in favour of the enterprise.
- 450.** As to the allegations relating to the minimization and exclusion of trade union guarantees and freedoms through cutbacks affecting the trade union leave and allowances necessary to the functioning of the trade union, the Government states that in 2007 the enterprise granted seven periods of trade union leave, along with the corresponding travel expenses, on top of the leave and travel expenses requested during bargaining.
- 451.** The Government adds that, to date, no collective agreement has been signed for the period 2007–08 and for this reason the allowances and benefits have been maintained at the levels set under the collective agreement for 2006–07.
- 452.** As to the allegations relating to the enterprise EPSA, the Government states that, in accordance with the statements made by the manager of the enterprise, the enterprise respects, protects and guarantees the right to and exercise of trade union freedoms, in accordance with the Political Constitution. In 13 years of existence seven collective labour

agreements have been signed with SINTRAELECOL: during each of the bargaining processes the agreements have maintained all the substantial, far-reaching economic concessions.

- 453.** The Government adds that in 2007 six workers exercised their freedom of association and joined SINTRAELECOL. As a result, they immediately enjoyed all the guarantees and benefits bestowed by the collective agreement. The enterprise EPSA currently has a total of 698 workers, all of whom have open-term contracts with the enterprise. In 2007, 32 individuals were employed, all of them on the same contractual basis.
- 454.** The Government states that in 2006 the enterprise EPSA adopted a skills-based workforce management model based on technological changes in order to respond to the requirements of clients in a competitive marketplace. The adjustments made in 2006 covered all human, technical and administrative aspects. Moreover, these changes made it possible for the enterprise to take on another 162 workers on open-term contracts; channels of communication were set up between management and the entirety of the workforce and its representatives. The Government also states that the Ministry intervened in an administrative investigation and the enterprise provided all the information necessary. It was found that the adjustment process undertaken by the enterprise did not in any way violate the law. Following its intervention, the Ministry of Social Protection issued a ruling in favour of the enterprise.
- 455.** The Government adds that in 2007 the enterprise granted 51 periods of trade union leave, together with travel expenses, and gave the sum of 36,430,800 pesos to the trade union for its operations, in accordance with the collective agreement which establishes that “The enterprise EPSA shall support SINTRAELECOL on a monthly basis to the amount of seven monthly legal minimum wage payments, which shall be transferred in equal parts to the existing sub-directives.” This demonstrates how thoroughly the enterprise complies with the collective agreement. Given that no collective agreement was signed for the period 2007–08, the allowances and benefits have been maintained at the levels set under the collective agreement for 2006–07.
- 456.** As to the allegations made by the WFTU relating to the refusal by the enterprise OMC to bargain over the list of demands presented by the SINTRAMINERGETICA, the Government states, in accordance with the information provided by the general representative of the enterprise CMU that the enterprise OMC was an independent contractor with full technical and administrative autonomy in accordance with section 34 of the Substantive Labour Code. The enterprise OMC lent its services to the enterprise CMU as part of an agreement that consisted of operating mining teams for the extraction of coal and sterile material at the Yerbabuena mine, the concession for which is held by the enterprise CMU.
- 457.** The Government states, with regard to the presentation of the list of demands by SINTRAMIENERGETICA, that the abovementioned list was presented on 3 March 2006 by workers of the enterprise OMC belonging to the abovementioned trade union organization and consequently the employer granted the guarantees necessary to allow the process of collective bargaining to proceed, including tickets, travel expenses and accommodation in the city of Bucaramanga, the main base of the enterprise. As the parties failed to reach an agreement on the location at which negotiations were to take place, and on the cost of tickets and amount of travel expenses that the enterprise OMC was to cover for the trade union organization during the bargaining process, the trade union presented an administrative complaint against the enterprise for non-compliance with the duty to bargain concerning the list of demands presented by its workers.

458. The Territorial Directorate of César began an administrative labour inquiry, which was ruled on in the first instance by the Coordinator of the Prevention, Inspection, Vigilance and Monitoring Group, leaving the parties free to have recourse to the courts should they consider that a legal dispute existed.
459. The Government states that the general representative of the enterprise CMU reports that the enterprise OMC and the enterprise CMU agreed to terminate the commercial relationship on 31 July 2007, in so far as the enterprise OMC repeatedly alleged that the economic balance within the commercial relationship had been disrupted. At the time the commercial relationship between the two enterprises broke down there were 104 workers in the service of the enterprise OMC, working at the mines at Yerbabuena on contracts covering the duration of the operation. Once the agreement between the two enterprises was terminated, the operation for which the workers had been contracted ceased to exist and, consequently, the employment contracts were held to be at an end, in accordance with the Substantive Labour Code, section 61(a). Therefore, no workers were dismissed.
460. The Government adds that, in accordance with the statements made by the enterprise, 31 workers whose contracts had expired decided to stay on the premises of the enterprise CMU, while the remaining staff blocked the access routes to the Jagua de Ibirico mining complex. The blockade, which was held to be clearly illegal, affected not only the operations of the enterprise CMU, but also those of other enterprises in the area. Trade union leaders and workers from the enterprise Carbones de la Jagua SA joined in the blockade and this led to the drawing up of a report of verification by a Territorial Directorate of the Ministry of Social Protection of César, following a request by the enterprise for the stoppage to be declared illegal given that it had lasted for over 20 days, thus causing prejudice to the mining enterprises, their employees and contractors, the nation, the department of César and the municipality of la Jagua de Ibirico. During the stoppage various attempts were made at mediation involving the local and national authorities, as well as the Ministry of Social Protection. Alternative solutions aimed at ending the blockade were considered. The Government states that the enterprise CMU presented a complaint, the purpose of which was to protect private property and the right to work of its employees.
461. The enterprise was at all times willing to come to an agreement, putting forward proposals for the amicable resolution of the public order situation resulting from the labour dispute between the enterprise OMC and its former employees, a process in which the Ministry of Social Protection played an active role.
462. Finally an agreement was reached and on 3 September 2007 it was decided that: (i) the enterprise Carbones de la Jagua SA would directly and without a trial period contract 20 former workers of the enterprise OMC, preferably from the region; and (ii) the enterprise OMC would pay financial compensation equivalent to three months' basic wages to 59 persons not contracted by Carbones de la Jagua SA. The former workers of the enterprise OMC who did not wish to accept the abovementioned agreement were free to go before the ordinary labour courts in order to claim their rights.

### C. The Committee's conclusions

463. *The Committee observes that the present case refers to the allegations presented by the SINTRAELECOL relating to: (1) the refusal by the enterprise Termotasajero SA to grant trade union leave; (2) non-respect of certain benefits such as supplementary food allowances and the appropriate respect of paid trade union leave; (3) wage discrimination against unionized workers; and (4) the request to dismiss 16 workers within the enterprise. The case also refers to the allegations presented by the WFTU relating to: (1) the refusal by the enterprise EPSA and the CETSA to bargain collectively with SINTRAELECOL; and*

(2) the refusal by the enterprise OMC to bargain collectively with the SINTRAMIENERGETICA.

464. As to the allegations presented by SINTRAELECOL relating to the refusal to grant trade union leave, the Committee notes that, according to the Government, the enterprise admits that on a number of occasions it refused to grant trade union leave but states that this was for reasons of service and adds that the trade union organization and Termotasajero SA signed a collective labour agreement which provides for the granting of paid trade union leave to its workers and that during 2006 and 2007 over 6,827 hours of trade union leave were granted. Given this information, the Committee will not pursue its examination of these allegations.
465. As to the allegations relating to the non-respect of food allowances and the maintenance of wages for trade union leaders enjoying permanent trade union leave, the Committee notes that the Government states that the trade union immunity of the workers was respected and that those particular benefits had been granted in error. Those benefits were granted for a period of time to trade union leaders enjoying permanent trade union leave when the collective agreement, in fact, established said benefits for those who were working within the company on a permanent basis. With regard to the food allowances, the trade union leaders requested amparo on two occasions, with their requests being rejected as unfounded. As to the appropriate respect of wages, the trade union leader concerned lodged an amparo appeal, which has been granted while the courts in ordinary proceedings decide on the interpretation of the clause of the collective agreement relating to payment of wages to workers with trade union leave. The Committee requests the Government to take steps to ensure temporary payment of the abovementioned wages and to keep it informed of the outcome of the ordinary legal proceedings initiated.
466. As to the allegations relating to wage discrimination against workers belonging to SINTRAELECOL, the Committee notes that, according to the complainant organization, the enterprise has refused, since 2002, to pay them a wage increase granted to non-unionized workers. Consequently, a tutela action was brought, in the light of which the 34th Civil Court of the Bogotá Circuit ordered that the increase be paid to the workers in question. The Committee notes that, according to the allegations, the enterprise has not complied with this ruling in that it has not paid the increase retroactively dating back to 2002 as ordered by the court. Thus, proceedings for contempt of court were brought before the competent authorities and are still pending. In this regard, the Committee notes the Government's statement that, in accordance with Colombian legislation, when there is an existing collective agreement within an enterprise governing wages, the agreement must be amended if wages are to be increased. By law, in such a case the complainant organization must denounce the existing collective agreement as regards this point and present a list of demands. The Committee notes the Government's statement that the workers covered by the collective agreement did not receive a wage increase because SINTRAELECOL failed to present a list of demands. The Committee notes that the Government refers to the granting of provisional amparo to the workers by the 34th Civil Court of the Bogotá Circuit until the courts in ordinary proceedings have decided whether there are grounds for the abovementioned wage increase. Given that, according to the allegations, the enterprise has not paid the abovementioned increase retroactively dating back to 2002 as ordered in the tutela ruling, the Committee requests the Government to report whether Termotasajero SA has made this payment and should the enterprise have failed to do so, to take the necessary steps to ensure compliance with the tutela ruling without delay and expects that the judicial authority will take into account the principle established through national case law and the ILO principles of freedom of association, prohibiting anti-union discrimination against unionized workers in relation to non-unionized workers when issuing a ruling within the framework of the ordinary proceedings. The Committee

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*requests the Government to take all measures in its power to promote voluntary collective bargaining in good faith within Termotasajero SA.*

- 467.** *As to the allegations relating to the request by Termotasajero SA regarding the dismissal of 16 workers belonging to SINTRAELECOL, the Committee notes that, according to the allegations, the enterprise originally requested authorization to dismiss 30 workers but the Ministry of Social Protection authorized the dismissal of 16 and that these dismissals involved only unionized workers. The Committee notes that, according to the Government, the request for dismissal was made owing to the need to rationalize the workforce. A voluntary retirement plan was put to the trade union organization, which, in turn, rejected the proposal and the enterprise consequently requested permission to proceed with a mass dismissal as provided for by law. The Committee notes that the study of the request took two years, at the end of which time partial authorization was given for the dismissal of 16 workers. The Committee observes however that the Government failed to respond to the allegations that the dismissals involved only unionized workers. In this regard, recalling that the application of staff reduction programmes must not be used to carry out acts of anti-union discrimination [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 796], the Committee requests the Government to take the necessary measures so that an inquiry is carried out to determine whether the collective dismissal within Termotasajero SA involved only unionized workers and to keep it informed in this regard.*
- 468.** *As to the allegations presented by the WFTU relating to the refusal by the enterprises EPSA and the CETSA to bargain collectively with SINTRAELECOL Cauca branch, the Committee notes that, according to the complainant organization, the enterprises have adopted a policy of progressive elimination of the benefits contained in the collective labour agreements, as well as eliminating open-term contracts and cutting back on trade union leave and supplementary benefits for the functioning of the trade union organization. In this regard the Committee notes that, according to the Government, within the enterprise EPSA the negotiations/direct settlement (arreglo directo) phase was undertaken, in accordance with the list of demands presented by the trade union organization and, once this phase was exhausted, the trade union organization decided to request that an arbitration tribunal be convened: in the meantime, the existing collective agreement continues to be applied. As to the enterprise CETSA, the Committee notes that the Government states that the direct settlement phase was also initiated in this case: in the meantime, the existing collective agreement continues to be applied. The Committee notes that, according to the Government, the enterprises CETSA and SINTRAELECOL previously signed two collective labour agreements, maintaining under the second agreement all those extra-legal benefits granted under the first agreement; the enterprise has 81 employees on open-term contracts and, in 2007, one new worker was employed on the same contractual basis; in 2006 procedures within the enterprise were changed and adapted, with the participation of the trade union organization. The Committee notes that, in the light of a complaint made by the trade union organization, the Ministry of Social Protection opened an inquiry which concluded that the enterprise CETSA had not breached the legislation. The Committee also notes that, according to the Government, the enterprise granted trade union leave on seven occasions with travel expenses.*
- 469.** *As to the allegations relating to the enterprise EPSA, the Committee notes that the Government reports that the enterprise has signed seven collective agreements with SINTRAELECOL, and that during all the bargaining processes the previously existing financial benefits have been maintained in the new agreements; that the enterprise has 698 workers on open-term contracts and that in 2007 a further 32 workers were contracted on the same terms. The Committee also notes that operational adjustments were made within this enterprise, that the Ministry of Labour opened an inquiry in this regard which determined that the enterprise had not breached legislation and that in 2007 the*

*enterprise granted 51 periods of trade union leave and that at present it supports the trade union organization with a sum equivalent to seven minimum wages. Under these circumstances, the Committee will not pursue the examination of these allegations relating to the enterprises EPSA and the CETSA.*

- 470.** *As to the allegations relating to the refusal by the enterprise OMC to bargain regarding the list of demands presented by the SINTRAMIENERGETICA, the Committee notes that the Government states that the abovementioned enterprise was an independent contractor of the enterprise CMU at the Yerbabuena mine and that the trade union organization presented a list of demands in March 2006; as the parties failed to reach an agreement, the trade union organization presented an administrative demand against the enterprise. However, the administrative authority, finding that this was a legal dispute, abstained from issuing a ruling, leaving open the possibility of recourse to the judicial body. The Committee further notes that the enterprise OMC and the enterprise CMU dissolved their commercial relationship, in the light of which the employment contracts of 104 workers of the enterprise OMC were also terminated, with 31 of the workers involved deciding to occupy the enterprise while the remaining workers blocked the access routes to the la Jagua de Ibirico mining complex, affecting not only the enterprise CMU, but also other enterprises in the area. Workers from the enterprise Carbones de la Jagua SA joined in the blockade. The Committee notes that, in the meantime, the enterprise put forward numerous proposals for the resolution of the dispute, a process in which the Ministry of Social Protection played an active role and that finally, on 3 September 2007, an agreement was reached under which the enterprise Carbones de la Jagua SA would contract 20 workers whose contracts with the enterprise OMC had been terminated, with the enterprise OMC paying financial compensation equivalent to three months' basic wages to 59 persons, the remaining workers being free to go before the courts.*
- 471.** *As to the allegations made by the WFTU relating to the enterprise Productos de Aluminios Munal SA and to threats against leaders of the USO, the Committee observes that the abovementioned allegations are being examined within the framework of Cases Nos 2600 and 1787, respectively.*

## **The Committee's recommendations**

- 472.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a)** *As to the allegations relating to the non-respect of appropriate wages for the trade union leaders of SINTRAELECOL with permanent trade union leave, as regards which the judicial authority granted temporary amparo until such a time as the courts in ordinary proceedings should issue a ruling, the Committee requests the Government to take steps to ensure temporary payment of the abovementioned wages and to keep it informed of the outcome of the ordinary legal proceedings initiated.*
- (b)** *As to the allegations relating to wage discrimination against workers belonging to SINTRAELECOL, who, unlike the non-unionized workers, have not enjoyed a wage increase since 2002, the Committee requests the Government to report whether Termotasajero SA has paid the increase retroactively dating back to 2002 as ordered by the judge who granted tutela on a temporary basis until the judicial authority issues a ruling in ordinary proceedings, and, should the enterprise have failed to do so, to take the necessary steps to ensure compliance with the tutela ruling without delay*

*and expects that the judicial authority will take into account the principle established through national case law and ILO principles of freedom of association, prohibiting anti-union discrimination against unionized workers in relation to non-unionized workers when issuing a ruling within the framework of the ordinary proceedings.*

- (c) *Furthermore, the Committee requests the Government to take all measures in its power to promote voluntary collective bargaining in good faith within the enterprise Termotasajero SA.*
- (d) *As to the allegations relating to the request by the enterprise Termotasajero SA for the dismissal of 16 workers belonging to SINTRAELECOL, the Committee requests the Government to take the necessary measures so that an inquiry is carried out to determine whether the collective dismissal carried out within the enterprise only involved unionized workers and to keep it informed in this regard.*

CASE NO. 2574

DEFINITIVE REPORT

### **Complaint against the Government of Colombia presented by**

- **the Confederation of Workers of Colombia (CTC),**
- **the Single Confederation of Workers (CUT) and**
- **the Confederation of Pensioners of Colombia (CPC)**

*Allegations: The Confederation of Workers of Colombia (CTC), the Single Confederation of Workers (CUT) and the Confederation of Pensioners of Colombia (CPC) allege the suspension and reduction of pensions established in a collective agreement*

- 473.** The Confederation of Workers of Colombia (CTC), the Single Confederation of Workers (CUT) and the Confederation of Pensioners of Colombia (CPC) presented their complaint in a communication dated 28 May 2007. They presented further allegations in a communication dated 22 May 2008. The CPC presented further allegations in communications dated 23 August and 19 September 2007 and 21 August 2008.
- 474.** The Government sent its observations in communications dated 7 December 2007 and 22 April 2008.
- 475.** Colombia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Labour Relations (Public Service) Convention, 1978 (No. 151), and the Collective Bargaining Convention, 1981 (No. 154).

#### **A. The complainants' allegations**

- 476.** In their communications dated 28 May 2007 and 22 May 2008, the CUT, CTC and CPC allege non-compliance with the collective labour agreement concluded between the trade

unions of Puertos de Colombia and the enterprise Puertos de Colombia (COLPUERTOS) for the period 1991–93.

- 477.** In 1991, the Colombian Congress approved Act No. 1 ordering the liquidation of COLPUERTOS. Decrees Nos 35 and 36 regulating Act No. 1 of 1991 set up a fund with legal personality, administrative autonomy and its own assets, to take over the social liabilities and the obligations of COLPUERTOS. It was named the Social Liability Fund for the Enterprise Puertos de Colombia (FONCOLPUERTOS). It was established that COLPUERTOS was to be liquidated over a period of three years, by 31 December 1993.
- 478.** In June of 1997, the national Government issued Legislative Decree No. 1689 closing and liquidating FONCOLPUERTOS. The Ministry of Social Welfare set up an internal working group – the “Social Liability Fund” working group – by resolution No. 3137 of December 1998 to manage the social liability of COLPUERTOS.
- 479.** The complainant organizations state that the abovementioned working group passed various administrative resolutions ordering suspension of the payment of more than 400 invalidity pensions and the unilateral alteration of the initial amounts of numerous pensions; many of the pensioners concerned had these entitlements re-established through *tutela* (constitutional protection) proceedings, although a large number of former workers are still waiting for normal payments to resume.
- 480.** The complainant organizations also allege that the abovementioned working group has breached Acts Nos 44 of 1980, 717 of 2001 and 797 of 2003 by delaying the timely transfer and payment of survivors’ pensions by two to three years. They also allege that:
- Through resolutions Nos 264 of 3 May 2002, and 264 of 15 July 2002 and 745 of 2002, the working group ordered that minimum wages, both statutory and negotiated, be capped in the case of 192 pensioners. These resolutions also ordered the pensioners to repay certain sums of money, despite the fact that by law or by agreement they had acquired rights.
  - The working group excluded over 337 pensioners from the payroll because, according to the Ministry, the individual records of their former work contained no pension certificate, which is what opens entitlement to the pension.
  - The Ministry of Social Welfare ordered and is implementing deductions of up to 50 per cent from many pensions without the express and written consent of those concerned, in violation of section 73 of the Administrative Disputes Code on old-age pensions recognized by administrative decision.
  - Special judges have been appointed for the portworkers. In agreement with the Higher Council of the Judicature, the body which appoints judges in Colombia, the national Government created special tribunals to review and quash legal rulings by courts of first and second instance that found in favour of former COLPUERTOS workers.
  - Breach of due process in administrative rulings on pensions.
- 481.** In its communications of 23 August and 19 September 2007, the CPC alleges suspension of the payment of the pensions of over 700 pensioners and a reduction in the amount of the pensions paid to over 600 pensioners. In its communication of 21 August 2008, the CPC refers to the decision of the Second Criminal Court of the “circuito de decongestión” which declared null and void the administrative acts ordering the payment of numerous pensions.

## B. The Government's reply

482. In its communications dated 7 December 2007 and 22 April 2008, the Government states that it can be inferred from the complaint that the former workers are able to exercise freedom of association; that they have had access to and made use of the mechanisms the law provides for the defence of their pension rights. Furthermore, the trade union rights of the former workers have been respected and no attempt has been made to prevent their free exercise. The Government stresses that pension entitlements are individual, and not collective, rights. It adds that the administration has had to take action under both labour and criminal law because some cases have involved procedural fraud committed with a view to gaining recognition of the said pension rights, leading to criminal proceedings. The Government considers that these issues are not within the competence of the Freedom of Association Committee being outside the scope of the rights and freedom of association. The Government furthermore considers that the occurrences recounted in the present complaint have nothing to do with Conventions Nos 87 and 98.
483. The Government states that the actions of the Ministry of Social Welfare working group are in keeping with the legislation, according to an explanation given by the group's general coordinator, and are in no way inconsistent with the text of the abovementioned Conventions.
484. In his report, the coordinator of the working group states that the liquidation of Puertos de Colombia was ordered through Act No. 1 of 1991, with the State assuming the enterprise's social liability. FONCOLPUERTOS was set up through Decree No. 036 of 3 January 1992. There were irregularities in the administration of the Fund, which are currently being investigated by the criminal authorities; Legislative Decree No. 1689 of 1997 liquidated the Fund, leaving the State (the Ministry of Labour and Social Security – now Social Welfare) to deal with the legal proceedings and other labour-related claims previously dealt with by the Fund. The Internal Working Group on Management of the Social Liability of Ports of Colombia was set up through resolution No. 3137 of 1998. While FONCOLPUERTOS was in operation, public servants and former portworkers and their representatives engaged in unlawful acts such as double payment and undue payment and the unlawful recognition of entitlements. These were investigated as punishable acts by the Office of the Public Prosecutor General and sanctions were imposed by judges of the Republic giving rise to criminal proceedings for embezzlement; aggravated fraud; falsification of public documents; procedural fraud and *prevaricato por acción* (positive breach of public duty). As a result, 136 convictions were handed down to 708 offenders, with damages amounting to over 298,786 million Colombian pesos. There are still 914 cases pending. Despite all this, during the period 1991–93, in which the body was already in liquidation, five collective agreements were concluded which are still in force to the extent that they have not been amended.
485. The report denies the suspension of payments to a large number of individuals who had retired due to invalidity and points out that invalidity pensions are governed by mandatory provisions, so the administration is bound to apply them in carrying out its administrative duties. The group's decisions do not contravene conventions and/or collective agreements, and are certainly not inconsistent with the provisions of section 281 of the Substantive Labour Code. On the contrary, the group works within the boundaries set by those provisions, which authorize “regular assessment of the invalid, with a view to identifying the development of incapacity, preventing simulation and monitoring permanence”. An invalidity assessment report determines the grant of the invalidity pension and is the responsibility of autonomous boards set up through Decree No. 2463 of 2001. It is the basis for either confirming or amending the invalidity. Thus, once an assessment board has determined that someone is not an invalid, the pension must by law be terminated through an administrative implementing order with immediate effect. With this order, the Ministry

is quite simply applying the provisions of the law on the basis of the report issued for the purpose by the competent body.

- 486.** As to the delay in the grant and payment of survivors' benefits, the coordinator states that the payroll of pensioners of the liquidated enterprise Puertos de Colombia currently stands at 15,279 and consists of both pensioners and beneficiaries of survivors' pensions, and that around 418 pensioners die every year. This is why in the pensions dealt with by the group, there are on average 350 active administrative files of claims to entitlement to a survivors' pension. Although the law states that a claim must be answered at the latest two months after it has been filed, this deadline does not allow enough time for compliance with the provisions. In the vast majority of cases, the applicants fail to provide all the necessary documents; and under Act No. 44 of 1980, an *edicto emplazatorio* (notice) must be published summoning those who believe they are entitled to a survivors' pension to present themselves within 30 days, which in practice reduces the two months to a mere 15 days.
- 487.** Furthermore, the administrative decisions responding to the claims must be notified in person by a substitute of the official in charge and they are not infrequently the subject of administrative appeals. Only when it becomes final upon settlement of the appeal can a decision be applied to the pension payroll. It is thus impossible to process the claim within the legally established deadline.
- 488.** As to the allegation that by individual and specific administrative decisions pensions were reduced without the express written consent of the beneficiaries, the coordinator states that deductions from monthly pensions were ordered, on the basis of Decree No. 994 of 2003, so as to recover overpayments to pensioners and that it was not necessary to obtain the consent of the beneficiaries.
- 489.** The coordinator adds that resolutions Nos 262 and 264 of 3 May 2002 put an end to corrupt practices by applying caps – statutory or negotiated as the case may be – to 192 monthly pensions which had not been amended in accordance with the law and whose beneficiaries had been receiving undue and improper overpayments.
- 490.** Resolution No. 262 set out instructions for overseeing and coordinating the management of the group's functions to ensure compliance with the applicable constitutional and legal provisions, and for the liquidation of monthly pensions within the legal and/or agreed parameters. Furthermore, the resolution banned the payment of any amount by which a pension exceeded the maximum statutory or negotiated minimum monthly wage. A thorough in-depth study was conducted to determine those pensions that exceeded the applicable statutory or agreed monthly limits. The group has still not carried out a full review of each and every one of the pensions in accordance with Act No. 797 of 2003, which will allow the real amount of the pensions to be determined, as the Office of the Comptroller General of the Republic has requested.
- 491.** Through resolutions Nos 262 and 264 of May 2002, the pensions payroll of enterprise Puertos de Colombia was revised, blatant illegalities were eliminated and monthly pensions aligned with the legal or agreed limits on a case-by-case basis, while rights acquired legitimately and in good faith were respected, the aim being to protect public resources effectively. Resolution No. 264 of 3 May 2002 was communicated to the persons concerned but not notified to them personally, the point being made that both it and resolution No. 262 of 2002 are administrative acts of a general nature setting a policy framework. They ordered a revision of the payroll and laid down an obligation to issue individual and specific administrative acts. And this was done in every case.
- 492.** In its ruling of 10 March 2005, the Administrative Disputes Court of the Council of State, Second Section, Subsection B, found resolution No. 262 to be consistent with the law.

493. All the foregoing justifies and explains why the group ordered the refund of undue payments to pensioners, whereas it would be untenable to claim that former workers acted in good faith when it was perfectly plain that their pensions might not exceed the agreed or legal limit. Yet workers willingly accepted sums far higher than those to which they were legally entitled.
494. As to the issuing of resolution No. 482 of 15 July 2002 suspending payments to more than 300 COLPUERTOS pensioners, the coordinator states that the Advisory Council for the National Public Pensions Fund, through Act No. 32 of 4 July 2002, recommended to the pension administrators, in this case the group, that they refrain from paying those pensions on the payroll which did not have the number and date of the administrative act justifying payment of the pension. In order to regularize the situation of these workers and/or public employees, the pensions coordinator searched through the archives of the work records of the group and of the Ministry of Transport, and among the documents stored at the Office of the Public Prosecutor, for administrative acts justifying past payments, as there was no proper justification for meeting these costs out of public funds. The coordinator states that in accordance with resolution No. 482 and in the interests of due process, the opportunity was provided to show “proper justification for payments made” with payees being allotted a certain amount of time to produce evidence of their entitlement.
495. As to the judges hearing the cases, the coordinator states that the appointment of magistrates and judges is the responsibility of a public authority other than the executive, with constitutional duties and guarantees of autonomy and independence. *Jueces de descongestión* (judges called in to clear a backlog of cases) are widely used in Colombia as the caseload is such that timely completion of proceedings is impossible; so as to avoid impunity in cases of great import, judges and magistrates are made and appointed by the competent bodies.
496. As to the drawing up of administrative acts by civil servants of the group during the 2003–04 period despite the fact that this was not within their competence, the coordinator states that, in order to carry out the important task with which it had been entrusted, the Ministry of Labour and Social Security issued resolution No. 3137 of 1998, creating the internal working group on the management of FONCOLPUERTOS, which answered to the office of the Minister. In accordance with abovementioned Legislative Decree No. 1689, the group was set up specifically to deal with judicial proceedings, labour claims, payments due from the Fund on judicial order, labour-related reconciliations and payments to creditors, and the administration and revision of the pensions payroll. Later on the specific duties of the posts of the group’s staff were set out in resolution No. 219 of 2000, in order to implement the legal purpose laid down in section 6 of Legislative Decree No. 1689 of 1997. Following on from Act No. 790 of 2002, which ordered the abovementioned merger, Decree No. 205 of 2003 set out the objectives, organic structure and duties of the Ministry of Social Welfare in general, but not those of the group itself. However, the group is covered by resolution No. 2 of 2003 which creates, organizes and authorizes internal working groups within the Ministry of Social Welfare and determines the duties to be assigned to them.

### C. The Committee’s conclusions

497. *The Committee takes note of the allegations presented by the CTC, CUT and CPC dated 28 May 2007 and 22 May 2008 and the communications of the CPC dated 23 August and 19 September 2007 referring to non-compliance with the collective labour agreement between the trade unions of Puertos de Colombia and COLPUERTOS. The Committee notes that according to the allegations the liquidation of the abovementioned enterprise was ordered through Act No. 1 of 1991, and FONCOLPUERTOS with legal personality and administrative autonomy was created to deal with the social liabilities of the*

*enterprise (Regulatory Decrees Nos 35 and 36). The Committee notes that, owing to a series of irregularities, Legislative Decree No. 1689 of 1997 was issued ordering the closure and liquidation of FONCOLPUERTOS, with an internal working group being set up in the Ministry of Labour (now the Ministry of Social Welfare) through resolution No. 3137 of 1998, in order to manage the social liability of COLPUERTOS.*

- 498.** *The Committee notes that the complainant organizations state that the abovementioned working group ordered suspension, pending administrative rulings, of the payment of over 400 invalidity pensions and suspended payments to a further 700 persons; that it is in breach of the legislation on survivors' benefits; that it has terminated and reduced existing pensions (600 pensions), ordered the capping of 192 pensions, excluded 337 pensioners from the pension payroll and cut pensions by up to 50 per cent in other cases. The complainant organizations also allege that special judges were appointed to examine these issues and that there has been breach of due process.*
- 499.** *The Committee notes the Government's statement in this regard to the effect that the former COLPUERTOS workers enjoyed their right of association and were able to make use of the administrative and legal mechanisms at their disposal, and that the issues in dispute are not related to freedom of association. The Committee notes that the Government transmits the report sent by the coordinator of the working group stating that between 1991 and 1993 five collective agreements were signed in COLPUERTOS. The Committee also notes that, according to the coordinator, while FONCOLPUERTOS was in operation irregularities took place that were notorious throughout Colombia and led to the liquidation of the fund and the bringing of numerous legal proceedings. The Committee notes that according to the coordinator all these matters are being investigated by the labour courts and also by the criminal courts because offences were committed including double payment and undue payment of pensions; aggravated fraud; falsification of public documents and procedural fraud against the Treasury, involving amounts in excess of 298,786 million Colombian pesos. As a result, 708 individuals have been convicted.*
- 500.** *With regard to the suspension of the payment of 400 invalidity pensions, the Committee notes that the coordinator of the working group states that invalidity pensions are governed by binding rules and that, in the present case, following the relevant inquiries, it was shown that in some cases payments were being unduly made to persons suffering from no incapacity at all. As to the suspension of payment of a further 700 pensions, the Committee notes that, according to the coordinator's report, this was owing to the applicants' failure to produce proper justification. As to the delay in processing applications for survivors' pensions, the coordinator admits that because there are so many beneficiaries there have been some delays, but states that everything possible is being done to improve the situation. As to deductions and reductions in pensions, the Committee notes the coordinator's statement that these were made in the light of a thorough in-depth study and only where it was proved that the pension paid was greater than that provided for under the legislation or collective agreement. As to the appointment of special judges, the Committee notes the coordinator's statement that the judges known as "jueces de decongestión" were appointed for the purpose of speeding up legal proceedings, clarifying the facts and convicting offenders and that in the present case this was necessary because there were so many cases pending.*
- 501.** *The Committee notes the extensive documentation provided both by the complainant organizations and by the Government. It observes that, according to this evidence and to the statements submitted by the parties, the present complaint concerns the suspension and reduction of pensions payments to the former workers of COLPUERTOS, provided for under the legislation and collective agreements. The Committee observes that the abovementioned measures were adopted within the framework of inquiries carried out to determine whether the pensions were indeed payable, in the course of which breaches of*

*the law, procedural fraud, undue payments and other offences were uncovered, in some cases involving the payment of sums considerably greater than those provided for in the legislation and collective agreements, as well as payments to individuals who had no right to such benefits. The Committee observes that the judicial authorities, both labour and criminal, have examined many individual cases and that many more remain pending. The Committee observes furthermore that the individuals concerned have brought numerous administrative and judicial actions against such decisions, including applications for amparo (protection under the Constitution), and that in some cases these actions have been successful.*

**502.** *However, having examined the allegations and the Government's reply, the Committee takes the view that the issues raised are not related to freedom of association. Under these circumstances, unless the complainant organizations specify the manner in which the facts alleged affect freedom of association, the Committee will not pursue its examination of these matters.*

### **The Committee's recommendation**

**503.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to decide that this case does not call for further examination.*

CASE NO. 2599

REPORT IN WHICH THE COMMITTEE REQUESTS  
TO BE KEPT INFORMED OF DEVELOPMENTS

### **Complaint against the Government of Colombia presented by the Single Confederation of Workers (CUT)**

***Allegations: The Single Confederation of Workers, representing the National Union of Civil Aviation Workers, alleges unjustified transfers of several members of the trade union and the opening of disciplinary proceedings against members; breach of resolution No. 01139 of 2005 regulating trade union guarantees, and the repeal of that resolution by resolution No. 00387 of 1 February 2007, which meant the removal of numerous advantages enjoyed by the trade union***

**504.** The Single Confederation of Workers (CUT) submitted its complaint in a communication of 3 September 2007.

**505.** The Government sent its observations in a communication of 29 May 2008.

**506.** Columbia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. The complainant's allegations**

- 507.** In its communication of 3 September 2007, the CUT alleges anti-union acts against the National Union of Civil Aviation Workers (SINTRAERONAUTICO). Specifically, it refers to the transfer of several members of SINTRAERONAUTICO in the Simón Bolívar Airport of Santa Marta by unsubstantiated administrative decisions issued by the Director of Human Resources and upheld by the Director-General upon review, causing them financial loss, a decline in working conditions and break-up of the family unit.
- 508.** According to the complainant, in response to the trade union's action to fight corruption, the management of Aeronáutica Civil (AEROCIVIL), through its internal disciplinary control group, has taken disciplinary action and applied sanctions against union members.
- 509.** The complainant adds that AEROCIVIL has failed to comply with resolution No. 01139 of 10 March 2005 regulating the trade union guarantees applying to SINTRAERONAUTICO. That resolution was issued pursuant to article 39 of the Political Constitution of Colombia, ILO Convention No. 151, Act No. 27 of 1976, Act No. 411 of 1997, section 13 of Act No. 584 of 2000 and Decree No. 2813 of 2000, which are the legal provisions that apply specifically to the right of association and trade union guarantees of organizations of public servants. One of the reasons for issuing resolution No. 01139 of 10 March 2005 was to establish a system of trade union guarantees to be applied to the members of SINTRAERONAUTICO that accommodates all the abovementioned provisions.
- 510.** The non-compliance mainly concerns the following articles:
- Article 3. *Refusal to carry out performance appraisals*, in accordance with the established procedure, for members of the National Executive Board on union leave.
  - Article 4. *Refusal to issue the air tickets and travel allowances* established therein.
  - Article 6. *Refusal to issue the air tickets* established therein.
- 511.** The failure to conduct performance appraisals concerns the period from 1 February to 31 July 2006, in which the management simply omitted to appraise the performance of the trade union officials.
- 512.** The complainant states that the workers of AEROCIVIL receive a quarterly productivity bonus on the strength of their performance appraisals. By refusing to conduct appraisals for the trade union officials, the management has denied them the productivity bonus due to them – for two-quarters in some cases and three in others – since September 2006. When asked for information on the matter, the company replied that the bonus would be paid “as soon as its lawfulness is ascertained ...”. The upshot was that criminal complaints were filed against AEROCIVIL's management.
- 513.** As to the breach of Articles 3 and 4, the complainant asserts that the failure to issue air tickets had made it impossible to assist union members in difficult situations such as the unjustified and unfair transfer of SINTRAERONAUTICO members at Santa Marta airport and the confusion caused by the franchising of San Andrés and Providencia airports, and is preventing the contact with members in other airports that enabled the National Executive Board to train both unionized and non-unionized staff and keep them informed.
- 514.** The complainant adds that on 8 February 2007, the company management sent the National Executive Board of SINTRAERONAUTICO a legal opinion concluding that resolution No. 01139 of 10 March 2005 on trade union guarantees is unlawful in its

entirety and proposing that it be revoked and a new resolution issued; the latter, according to the complainant, abolishes trade union guarantees.

515. On 13 February 2007, SINTRAERONAUTICO filed an application for protection against AEROCIVIL for violation of trade union guarantees, and on 16 February applied to the Office of the Public Prosecutor for an investigation of AEROCIVIL's general management and to the Office of the President of the Republic for a right of petition.
516. On 20 February 2007 the company and the trade union held a meeting in order to seek agreement on the matter of trade union guarantees on the basis of a draft resolution which had been issued. They failed to reach an agreement but arranged a meeting for 23 February. However, on 21 February, resolution No. 00387 of 1 February 2007 regulating trade union guarantees in the Special Administrative Unit of Aeronáutica Civil, was published in an AEROCIVIL email. The resolution abolishes all the trade union guarantees that have existed in AEROCIVIL for many years.
517. The complainant points out that although the resolution is dated 1 February, it was published on 21 February, and that between those dates the trade union and the company management held several meetings and leave was granted to members under resolution No. 01139 of 2005 although it had already been revoked by the new resolution. Furthermore, no account was taken of the many petitions from senators and trade union and political representatives asking that resolution No. 01139 be maintained or that agreement be sought with the complainant organization.
518. According to the complainant organization, pursuant to the new resolution, disciplinary proceedings were opened against the treasurer of SINTRAERONAUTICO on grounds of absence without leave. Furthermore, after resolution No. 00387 of 1 February 2007 was published, union officials who had obtained leave for the entire working period allowable under resolution No. 01139 of 10 March 2007, came up against numerous problems. In addition, telephone access has been suspended and payment of the productivity bonus is still being withheld despite legal opinions from AEROCIVIL's legal adviser finding in favour of the union on each of these matters.
519. To date, none of the legal actions brought by SINTRAERONAUTICO, namely the right of petition sought from the Office of the President of the Republic, the action brought before the Ministry of Social Protection and the complaint filed to the Office of the President of the Republic, has succeeded.
520. The complainant states that the Ministry of Social Protection convened a conciliation hearing for 6 August 2007, at which the trade union was represented but AEROCIVIL was not.

## **B. The Government's reply**

521. In its communication of 29 May 2008, regarding the allegation that disciplinary action was brought against a number of trade union officials, the Government states that these proceedings involved no specific cases; however, AEROCIVIL denies any breach of due process and emphasizes that in all the actions it has brought, whether administrative or disciplinary, it has always observed labour and trade union rights and guarantees and respected the principle of good faith, the presumption of innocence, due process, and the right of defence and rebuttal.
522. As to the allegation that union members in the Santa Marta Simón Bolívar Airport were transferred for no reason whatsoever, thus sustaining financial loss, a decline in working conditions and break-up of the family unit, the Government states that, according to

AEROCIVIL, such transfers are frequent because it has a company-wide payroll, which allows the movement of staff, union members and non-members alike, in order to provide better service. AEROCIVIL points out that the transfer of Santa Marta Airport staff involved no trade union officers.

523. AEROCIVIL in fact wanted to relocate 23 employees in various bases throughout the country, but only two were actually transferred: Wilfredo Oliveros Mendoza y Gilberto Avila Piña, only one of whom belonged to a trade union, but he did not have trade union immunity.
524. In the information it provided, AEROCIVIL states that the transfers caused no injury whatsoever to the employees concerned and that their rights were respected. Besides, at Santa Marta Airport, there were more incoming than outgoing staff, and service was not affected.
525. As to the alleged disregard and violation of the working conditions set forth in resolution No. 01139 of 10 March 2005, and the denial of trade union leave and air tickets for union officials' travel, after examining the allegations in the light of AEROCIVIL's reply, the Government takes the view that in accordance with the Political Constitution and the applicable legislation, representatives of trade union organizations do enjoy the immunity and other guarantees they need to carry out their duties. Indeed, by Decree No. 2813 of 2000, the Government regulated the grant of the paid union leave that trade union representatives of public servants need in order to perform their duties. Thus, the content of resolution No. 01139 of 2005 was not in line with the legislation since, as AEROCIVIL observed, the prerogatives it grants were an obstacle to the proper running of the unit and amounted to unequal treatment vis-à-vis the other trade unions in AEROCIVIL, which had no such prerogatives. The Director of AEROCIVIL accordingly deemed it appropriate to align trade union guarantees such as trade union leave, the pay system, travel costs and performance appraisal with the legislation in force by issuing resolution No. 00387 of 1 February 2007, which expressly repealed resolution No. 01139 of 2005.
526. The Government points out that the Director of AEROCIVIL acted consistently with the provisions of Convention No. 151 in bringing the trade union guarantees into line with those set forth in the legislation and the Political Constitution. In referring to facilities to be afforded to public employees' organizations to enable them to carry out their functions promptly and efficiently, Convention No. 151 makes two points: (a) the granting of such facilities shall not impair the efficient operation of the administration or service concerned, and (b) the facilities must be appropriate to national conditions.
527. The Government refers to the Constitutional Court's considerations in decision C-201 of March 2002:

...

and in decision C-377 of 1998, on reviewing the constitutionality of "Convention No. 151 on protection of the right to organize and procedures for determining terms and conditions of employment in the public administration" and of Act No. 411 of 1997 approving the said instrument, the Court found the differentiation between official workers and public employees for the purposes of exercising the right to collective bargaining to be in keeping with the Constitution, pointing out that the former enjoy this right fully whereas for the latter, there are restrictions, since although they have the right to seek and reach agreement in the event of a dispute, **the authorities' power to set terms and conditions of employment unilaterally may on no account be affected.** The Court stated in this connection:

... unlike in the case of official workers, who have an unqualified right to bargain collectively, the search for agreed and negotiated solutions cannot affect the power that the Constitution confers on the authorities to set terms and conditions of employment unilaterally. This means that to establish mechanisms enabling public employees or their representatives to

take part in the determination of their terms and conditions of employment is lawful, provided it is understood that the final decision rests with the authorities indicated in the Constitution, namely Congress and the President at national level, and the assemblies, councils, governors and mayors in the various territorial divisions, which act autonomously for this purpose. In line with this restriction, it is also lawful to develop bodies in which to seek a negotiated and agreed solution in the event of a dispute between public employees and the authorities.

The foregoing on no account implies that the Court should qualify the scope of Articles 7 and 8 of the Convention under review in respect of public employees, since these provisions allow the specificities of national circumstances to be taken into account. **Thus, Article 7 does not lay down an unqualified right to collective bargaining for all public servants, but establishes that States shall take “measures appropriate to national conditions”** to encourage negotiation between the public authorities and organizations of public servants, which is consistent with the Court’s findings. (Emphasis added.)

- 528.** According to the Government, AEROCIVIL took the decision to repeal resolution No. 01139 of 2005, not with the intent of harming the trade union, but in order to apply the legislation in such a way that the facilities granted to the officials of the trade union are proper from the standpoint not only of the legislation but also of Convention No. 151, as will be appreciated.
- 529.** As to the allegations concerning the lack of performance appraisals, air tickets and travel allowances, the Government states that the rules are clear, and that there can be no performance appraisal in the absence of service in respect of fixed trade union leave, nor can tickets and allowances paid out of public funds be issued for activities outside the scope of the public service (Act No. 909 of 2004, Legislative Decree No. 790 of 2005 and the General Budget Act). Without performance there can be no appraisal and hence no benefits deriving from appraisal such as the productivity bonus. In any event, to date AEROCIVIL owes the trade officials nothing by way of productivity bonuses.
- 530.** The Government points out that the criminal proceedings against the company management were discontinued by the Prosecutor. The action for constitutional protection brought by SINTRAERONAUTICO against the Director of AEROCIVIL for violation of trade union guarantees was unsuccessful. The complaint lodged by the trade union with the Office of the Public Prosecutor against the Director of AEROCIVIL for violation of trade union guarantees was shelved and the application for rights of petition made to the Office of the President of the Republic were forwarded to the Ministry of Social Protection and duly answered.
- 531.** With regard to the air tickets for the chairperson, the Government points out that the public administration is governed by strict budgetary rules and that public employees may act only as the Constitution and the law, in the broad sense, allow. Employees in a public enterprise are responsible for the budget and public spending, so any budgetary expenditure unrelated to the enterprise may incur disciplinary or criminal action.
- 532.** As to the meeting between SINTRAERONAUTICO and the company, the Government states that it was convened in order to enlarge on the explanations given by the company’s legal adviser regarding the repeal of resolution No. 01139 of 2005.
- 533.** The Government adds that, according to the information supplied by AEROCIVIL, resolution No. 00387 amending resolution No. 01139 of 2005 on no account disregards trade union rights but merely brings the provisions into line with the legislation and the text of Convention No. 151. It also points out that resolution No. 00387 was published on 21 February 2007.
- 534.** As to the leave granted by the company management, AEROCIVIL explains that this was not based on any resolution, and that the disciplinary proceedings brought against the

treasurer of SINTRAERONAUTICO were unrelated to the matter of trade union leave. The Government stresses that disciplinary control is exercised autonomously and affords all the safeguards of due process established in the Constitution and the law.

535. In response to the allegation that the new provisions on consultation, negotiation and democratic resolve are unlawful, AEROCIVIL disagrees, deeming them to be consistent with the law and international agreements, and the rights of the workers.
536. Lastly, the Government states that the Territorial Directorate of Cundinamarca initiated an administrative labour investigation against AEROCIVIL for disregarding the trade union guarantees set forth in resolution No. 01139 and that in the course of it, a number of conciliatory hearings were to be held. Observations will be sent as soon as a reply has been obtained regarding the latest developments.

### **C. The Committee's conclusions**

537. *The Committee observes that in this case the Single Confederation of Workers, representing the National Union of Civil Aviation Workers, alleges that several members of the trade union were transferred for no reason and that disciplinary proceedings were initiated against members; that there was breach of resolution No. 01139 of 2005 regulating trade union guarantees, and that this resolution was repealed by resolution No. 00387 of 1 February 2007, which meant that numerous benefits enjoyed by the trade union organization were abolished.*

#### **Transfer of trade unionists**

538. *As regards the transfer of several members of the trade union at Santa Marta Airport, the Committee notes that according to the complainant, the transfer, which was carried out by Aeronáutica Civil (AEROCIVIL) caused those concerned financial loss, a decline in working conditions and break-up of the family unit. It further notes the complainant's allegation that in the course of the trade union's action to fight corruption, disciplinary proceedings have been initiated against some of its members.*
539. *The Committee notes that in connection with the transfers, the Government states that according to information supplied by AEROCIVIL, there are frequent transfers of staff in order to meet the needs of the service, that the transfers at Santa Marta Airport did not involve trade union officials, and that only two workers were actually transferred, only one of whom was a member of SINTRAERONAUTICO. With regard to the disciplinary proceedings, the Committee notes that, according to the Government, the allegations do not refer to specific disciplinary hearings and that AEROCIVIL stresses that it has always guaranteed due process and the procedural safeguards it affords. In these circumstances, the Committee will not proceed with the examination of the allegations unless the complainant organizations give the names of any trade unionists affected by disciplinary proceedings and details of the anti-union nature of such proceedings.*

#### **Repeal of the AEROCIVIL resolution on trade union facilities**

540. *With regard to the alleged breach of resolution No. 01139 of 2005 laying down trade union guarantees (union leave and the grant of free air tickets for trade union officials, etc.), and its subsequent repeal by resolution No. 00387 of 1 February 2007, the Committee notes that according to the complainant, resolution No. 01139 established trade union guarantees to apply to SINTRAERONAUTICO, but that AEROCIVIL disregarded the rights established in Articles 3, 4 and 6 that pertain to appraisal of*

performance for members of the Executive Board who are on fixed union leave, and the grant of air tickets for trade union officials to enable them to perform their duties in the country's various airports. The Committee notes that, according to the complainant, the failure to fulfil the obligation to appraise the performance of trade union officials means that the productivity bonus, which is awarded on the basis of such appraisal, has not been paid since September 2006 to officials on fixed trade union leave. The Committee notes that SINTRAERONAUTICO filed a criminal complaint against the company for non-payment. With regard to the failure to provide air tickets, the Committee notes that according to the complainant, this has prevented SINTRAERONAUTICO from meeting the needs of its members in the country's various airports.

- 541.** *The Committee further notes the complainant's reference to the repeal of resolution No. 01139 and the issuing of resolution No. 00387 of 1 February 2007 abolishing the trade union guarantees, and to the application for protection under the Constitution, the application to the Office of the Public Prosecutor for an investigation and the application to the Office of the President of the Republic for a right of petition, brought by the complainant organization in this connection. It notes that the complainant refers in particular to the delay in publishing the new resolution, and to the various meetings between AEROCIVIL and SINTRAERONAUTICO that were held between the issuing and the publication of that resolution at which the consistency of resolution No. 01139 with the law was discussed but no mention whatever made of the new resolution, which had already been issued. According to the complainant, the resolution took into account neither the outcome of those meetings nor the various requests submitted by other trade unions, members of parliament and political representatives that agreement be sought. The Committee likewise notes that disciplinary proceedings were brought against some trade union officials in connection with the use of trade union leave and that the Ministry of Social Protection convened a conciliation hearing for 6 August 2007, which AEROCIVIL did not attend.*
- 542.** *The Committee notes that the Government, for its part, states that Decree No. 2813 of 2000 regulated the grant of paid union leave to union representatives of public servants and that resolution No. 01139 of 2005 was inconsistent with the law because, according to AEROCIVIL, it granted prerogatives that made it difficult to run the institution properly and benefited only SINTRAERONAUTICO, thus causing an imbalance vis-à-vis the other trade unions in AEROCIVIL. With regard to performance appraisal, the Committee notes that, according to the Government, where no duties have been performed (in this case because the officials were on fixed trade union leave), there can be no appraisal and hence none of the benefits deriving from appraisal. The Committee notes with interest the Government's indication that, nevertheless, AEROCIVIL did, on its legal adviser's recommendation, pay the officials on fixed union leave the amount corresponding to the productivity bonus. The Committee notes that the criminal proceedings, the application for constitutional protection and the complaint lodged by the trade union against AEROCIVIL with the Office of the Public Prosecutor were unsuccessful.*
- 543.** *The Committee notes the Government's indication that resolution No. 00387 of 2007 amending resolution No. 01139 of 2005 merely brings its provisions into line with Convention No. 151. In this respect, the Committee recalls that according to article 19, paragraph 8 of the ILO Constitution, in no case shall the adoption of any Convention or Recommendation by the Conference, or the ratification of any Convention by any Member, be deemed to affect any law, award, custom or agreement which ensures more favourable conditions to the workers concerned than those provided for in the Convention or Recommendation.*
- 544.** *With regard to the denial of air tickets, the Committee notes the Government's statement that the law does not allow a public institution's funds to be used for purposes unrelated to*

*the institution, that the meeting between AEROCIVIL and SINTRAERONAUTICO before the new resolution was published was convened merely to explain to the trade union the legal adviser's views on the repeal of resolution No. 01139 of 2005, and that the leave the management of AEROCIVIL granted after the new resolution was issued had no basis in law. As to the disciplinary action which, according to the trade union, AEROCIVIL brought against members of SINTRAERONAUTICO in connection with their use of trade union leave, the Government asserts that the grounds for these proceedings were unrelated to such leave.*

- 545.** *Lastly, the Committee notes that on the matters referred to in the previous paragraph, the Government states that the Territorial Directorate of Cundinamarca initiated an administrative labour investigation against AEROCIVIL for disregard of the trade union guarantees established in resolution No. 01139 and that several conciliation hearings have been fixed. The Committee request the Government to keep it informed on this matter so that it can examine the allegations in full knowledge of the facts.*
- 546.** *Noting from the Government's observations that there were no prior consultations with the complainant organization about resolution No. 00387 of 1 February 2007, the Committee is bound to express regret, particularly as the latter resolution amended an earlier one, No. 01139 of 2005, granting the complainant organization a number of benefits which would cease to apply once the new resolution took effect. The Committee has emphasized the importance that should be attached to full and frank consultation on any questions or proposed legislation affecting trade union rights [see **Digest of decisions of the Committee on Freedom of Association**, fifth edition, 2006, para 1074]. Bearing in mind that the change in the regulation of trade union facilities appears to have affected the complainant organization adversely, the Committee requests the Government to continue to promote conciliation between the parties on this matter and hopes that AEROCIVIL and the trade union will find a solution to the issue.*

### **The Committee's recommendations**

- 547.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a)** *With regard to the alleged breach of resolution No. 01139 of 2005 laying down trade union guarantees and its repeal by resolution No. 00387 of February 2007, the Committee requests the Government to provide information on the administrative labour investigation pending before the Territorial Directorate of Cundinamarca so that the Committee can examine the allegations in full knowledge of the facts.*
- (b)** *Bearing in mind that the change in the regulation of trade union facilities appears to have affected the complainant organization adversely, the Committee requests the Government to continue to promote conciliation between the parties on this matter and hopes that AEROCIVIL and the trade union will find a solution to the issue.*

CASE NO. 2600

INTERIM REPORT

**Complaints against the Government of Colombia  
presented by**

- **the National Union of Workers in Metal Mechanics,  
Metallurgy, Iron, Steel, Electro-Metals and  
Related Industries (SINTRAIME)**
- **the Single Confederation of Workers of Colombia (CUT) and**
- **the World Federation of Trade Unions (WFTU)**

*Allegations: The National Union of Workers in Metal Mechanics, Metallurgy, Iron, Steel, Electro-Metals and Related Industries (SINTRAIME), the Single Confederation of Workers of Colombia (CUT) and the World Federation of Trade Unions (WFTU) allege the dismissal, on 28 July 2007, of two trade union leaders of SINTRAIME, by a metallurgical enterprise, and the use by that enterprise, to carry out regular production activities, of temporary workers who neither enjoy the right to unionize nor are covered by the collective agreement. It is also alleged that: pressure was put upon the workers of another enterprise which resulted in the non-renewal of the contracts of 18 workers; a wage increase provided for under the collective agreement was withheld in the case of those workers who had joined the trade union after 1 June 2007; two trade union leaders were dismissed and the enterprise used temporary workers to carry out regular production activities*

- 548.** The National Union of Workers in Metal Mechanics, Metallurgy, Iron, Steel, Electro-Metals and Related Industries (SINTRAIME) and the Single Confederation of Workers of Colombia (CUT) presented their complaints in communications dated 6 September 2007. The World Federation of Trade Unions (WFTU) presented its allegations in a communication dated 16 August 2007.
- 549.** The Government sent its observations in communications dated 29 February and 10 July 2008.
- 550.** Colombia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. The complainants' allegations**

- 551.** In their communications dated 6 September 2007, the CUT and SINTRAIME allege that a collective labour agreement has been signed and an arbitral award is in force between the enterprise Productos de Aluminio Munal SA and SINTRAIME, the representative body of the unionized workers, covering ten workers with over 20 years' seniority out of the 120 workers employed by the enterprise. The enterprise has repeatedly violated the international labour standards and agreements ratified by Colombia with regard to freedom of association and the right to organize. The administration proceeded to dismiss workers with the aim of destroying the trade union organization, which in the past, had around 160 worker members. Over the last few years, only ten workers, who all enjoy trade union immunity, have held out, two of whom have now been dismissed.
- 552.** In fact, on 28 July 2007, the enterprise Productos de Aluminio Munal SA proceeded unilaterally and without just cause to dismiss Mr Efrey Garay Escobar, a member of the Joint Committee on Occupational Medicine, Health and Safety. Mr Escobar enjoyed trade union immunity under section 11 of the existing collective labour agreement. The enterprise also dismissed Mr Luis Hernando Huertas Hernández, a member of the Statutory Claims Committee of the trade union's national executive board. Mr Hernández, who had over 18 years' seniority within the enterprise, enjoyed trade union immunity under section 30(b) of the statutes of the organization. The Ministry of Social Protection was notified of the trade union status of these two workers on 26 January 2007. This anti-union act is the culmination of a series of injustices stretching back over 15 years, during which time the enterprise has pushed the workers into taking strike action on three occasions and appearing before three arbitration tribunals, the final one meeting on 28 November 2006.
- 553.** The complainant organization adds that the enterprise's labour needs are met through a temporary employment agency, "Humanos Ltda". It states that, although by law, enterprises are allowed to contract temporary workers for occasional, incidental or casual labour when there is a need to replace staff members who are on holiday, on leave or off sick, some of these temporary workers have been working in the enterprise for more than eight years. These workers do not enjoy the right to freedom of association and are not covered by the collective labour agreement; their wages are increased at a rate below that of the legal minimum wage; the accident rate is high because there is no awareness, prevention or training mechanism in place; and the workers do not enjoy adequate social protection. The complainant organization encloses a communication sent to it by the enterprise on 15 June 2007, in which the enterprise states that the workers are not in an employment relationship and the collective agreement cannot, therefore, be applied in their case.
- 554.** In its communication of 16 August 2007, the WFTU refers to these allegations within the framework of Case No. 2573, but they will be examined within the present case.
- 555.** The complainant organizations also allege that anti-union acts were committed within the enterprise Compañía Manufacturera Andina (CMA). The enterprise employs around 820 workers, who are currently involved in a labour dispute. Of these workers, 86 belong to SINTRAIME and are covered by a collective agreement for the period 1 June 2006 to 31 May 2008; 585 are temporary employment agency workers; and 160 have fixed-term contracts and over 20 years' seniority, and have signed a collective agreement for the period 1 June 2006 to 31 May 2010. Under this agreement there should be a wage increase as of 1 June of each year. However, on the last occasion the management of the enterprise did not go ahead with the promised increase, and instead forced certain beneficiaries of the collective agreement to sign a document stating that the wage increase would not be implemented as of 1 June and that the agreement would be revised in January 2008. This situation highlights an unequal relationship in which an employer is abusing its dominant

position by imposing an apparent agreement on a group of workers who, owing to the high level of unemployment, had no other alternative than to accept what is an absurd decision on the part of the enterprise. The enterprise also forced those same workers to accept the renewal of their employment contracts at a lower wage rate than the one they had previously enjoyed. Any worker not accepting these conditions did not have his employment contract renewed.

- 556.** The complainant organizations add that the general manager of the enterprise has been intimidating workers who, with fixed-term contracts covered by the agreement, freely and spontaneously joined SINTRAIME, exercising the right to freedom of association. Eighteen workers were informed in writing that their employment contracts would not be renewed; this constitutes clear and deliberate anti-union persecution.
- 557.** Furthermore, workers who joined the trade union after 1 June 2007 have been denied the wage increase provided for under the collective labour agreement on the grounds that they are not entitled to it. Of the 217 workers who, according to the CMA, are employed under direct contracts, 86 joined the trade union, that is to say, more than one third of all the workers on direct contracts, which means, under the terms of section 471 of the Substantive Labour Code, that the current provisions of the agreement cover all workers employed by the enterprise, whether they are unionized or not.
- 558.** Faced with the trade union's claim, the enterprise proceeded to dismiss several workers who had joined the trade union, including Mr Pedro Jamel Avila and Mr Eduardo Cuéllar, who had both been chosen to sit on the executive board of the trade union.
- 559.** The enterprise CMA hires temporary contract workers and violates the provisions of section 77 of Act No. 50 and section 13 of Regulatory Decree No. 24/98, the relevant paragraph of which was amended by section 2 of Regulatory Decree No. 503/98, by retaining them in its service for periods of much more than one year. Certain workers have been in the company's service for three or four years, sometimes longer. Employers may only contract temporary workers for occasional, incidental or casual labour, when it is necessary to replace staff members who are on holiday, on leave or off sick.
- 560.** The complainant organizations add that the enterprise does not grant the workers' holiday leave, as provided for under section 286 of the Substantive Labour Code. SINTRAIME presented a complaint outlining these facts to the Ministry of Social Protection on 17 July 2007.

## **B. The Government's reply**

- 561.** In its communications of 29 February and 10 July 2008, the Government states, with regard to the allegations concerning the enterprise Productos de Aluminio Munal SA, that, according to the enterprise's communication, the workers Mr Efrey Garay and Mr Luis Huertas did not enjoy trade union immunity, as can be seen from the attached written record, dated 21 December 2006, of the Coordinator of the Trade Union Archive Group of the Ministry of Social Protection.
- 562.** The Government also states that the unilateral dismissal of the trade union leaders was legal under the terms of section 64 of the Substantive Labour Code, which allows employers to deem employment contracts to be terminated as long as the need for appropriate compensation has been acknowledged; this was done in the present case, and compensation was paid. In the present case, the following sums were paid in compensation: 19,958,867 pesos (US\$9,933.90) to Mr Garay and 15,206,253 pesos (US\$7,683.90) to Mr Huertas.

- 563.** The Government adds that the dismissals were carried out for economic and financial reasons unrelated to the workers' trade union membership, and that temporary agency workers were also dismissed.
- 564.** These trade union leaders each presented complaints before the Fifth and Twelfth Labour Courts of the Bogotá Circuit and the Government will abide by the decision handed down by that body.
- 565.** The Government transmits information provided by the enterprise which refers to the periods of trade union leave granted and the benefits agreed under the terms of the collective agreement.
- 566.** As to the recruitment of temporary staff, the Government states that employers enjoy economic freedom, in accordance with the provisions of the Political Constitution (article 333), which is understood to mean the right of individuals to carry on activities of an economic nature in order to maintain or increase their assets, provided that those activities are reasonable and proportional in order to prevent potential conflicts of rights. Employers can, in the exercise of this right, enter into contracts with temporary employment agency workers in order to enhance their efficiency, productivity and competitiveness, which is entirely consistent with Conventions Nos 87 and 98.
- 567.** As to the facts relating to the alleged anti-union persecution and violation of trade union immunity, the Government states that these are being investigated by the Eleventh Labour Inspectorate of the Territorial Directorate of Cundinamarca.

### **C. The Committee's conclusions**

- 568.** *The Committee notes that the present case refers to: (1) allegations presented by SINTRAIME, the CUT and the WFTU, relating to the dismissal, on 28 July 2007, of two trade union leaders of SINTRAIME by the enterprise Productos de Aluminio Munal SA and that enterprise's use of temporary workers who neither enjoy the right to unionize nor are covered by the collective agreement, to carry out regular production activities; (2) allegations made by SINTRAIME and the CUT relating to pressure put on workers of the enterprise CMA who decided to join SINTRAIME, pressure which led to the non-renewal of the contracts of 18 workers, the withholding of the wage increase provided for under the collective agreement in the case of workers who joined the trade union after 1 June 2007, and the dismissal of two trade union leaders. Allegations were also made concerning the use of temporary workers to carry out regular activities within the enterprise.*
- 569.** *As regards the allegations presented by SINTRAIME and the CUT relating to the enterprise Productos de Aluminio Munal SA, the Committee notes that according to the complainant organizations, on 28 July 2007, the enterprise proceeded unilaterally to dismiss, without just cause, two trade union leaders, Mr Efrey Garay Escobar, a member of the Joint Committee on Occupational Medicine, Safety and Hygiene, and Mr Luis Hernando Huertas Hernández, a member of the Statutory Claims Committee. The Committee notes that the Ministry of Social Protection was notified of the trade union status of these two workers on 26 January 2007. The Committee also notes that, in its communication of 16 August 2007, presented within the framework of Case No. 2573 which is currently being examined by the Committee, the WFTU refers to the dismissal of these trade union leaders. These allegations will be examined as to their substance in the present case.*
- 570.** *The Committee notes that the Government refuses to accept the status as trade union officials of the workers in question and attaches a written record from the Trade Union*

Archive dated 21 December 2006, in which the workers are not listed as trade union leaders of SINTRAIME. The Committee also notes the Government's statements to the effect that the workers were dismissed for economic and financial reasons but have initiated legal proceedings before the Fifth and Twelfth Labour Courts of the Bogotá Circuit, which are currently pending.

571. In this regard, the Committee observes that the Ministry of Social Protection was only recently (26 January 2007) notified of the appointments of Mr Garay Escobar and Mr Huertas Hernández and that is why their names do not appear on the record dated 21 December 2006 provided by the Government. Thus, at the time of their dismissal, on 28 July 2007, they were already trade union leaders. However, noting that the said trade union leaders have initiated legal actions in this regard, actions which are currently pending, the Committee requests the Government to keep it informed of the outcome of those proceedings.
572. As regards the allegations relating to the use of temporary workers, hired through a labour contractor to carry on the normal production activities of the enterprise, who do not enjoy the right of association and are not covered by the existing collective agreement, the Committee notes that, according to the complainant organizations, the use of temporary staff is allowed by law only in cases of occasional, incidental or casual labour, when there is a need to replace staff members who are on holiday, on leave or off sick. However, according to the allegations, many of the temporary workers have been working in the enterprise for over eight years. The enterprise, as is pointed out in a communication it sent to SINTRAIME, considers that no employment relationship exists between it and the temporary workers, and that they therefore cannot be covered by the existing collective agreement. In this regard, the Committee notes that according to the Government, enterprises enjoy economic freedom and can enter into contracts with temporary employment agency workers in order to enhance their efficiency and productivity. The Committee also notes the information provided by the Government, according to which the Eleventh Labour Inspectorate of the Territorial Directorate of Cundinamarca has initiated an inquiry into the trade union aspects of these allegations. Recalling that, in conformity with Article 2 of Convention No. 87, all workers, without distinction whatsoever, whether they are employed on a permanent basis, for a fixed term or as contract employees, should have the right to establish and join organizations of their own choosing, and temporary workers should be able to negotiate collectively [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth [revised] edition, 2006, paras 255 and 906], the Committee requests the Government to take the necessary steps to guarantee the right to organize and to bargain collectively of the temporary workers and to keep it informed as to the outcome of the ongoing administrative inquiry.
573. As regards the allegations relating to the enterprise CMA regarding pressure put on fixed-term workers belonging to SINTRAIME which resulted in the non-renewal of the contracts of 18 workers, the withholding of a wage increase provided for under the collective agreement in the case of those workers who had joined after 1 June 2007, the dismissal of the trade union leaders Mr Pedro Jamel Avila and Mr Eduardo Cuéllar for demanding the same increase, and the use of temporary workers provided through a labour contractor to carry out the regular production activities of the enterprise, the Committee regrets that the Government has not sent any observations in this regard and urges it to do so without delay.

## The Committee's recommendations

574. In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:

- (a) *As regards the allegations relating to the dismissal, on 28 July 2007, of two SINTRAIME trade union leaders, Mr Garay Escobar and Mr Huertas Hernández, the Committee requests the Government to keep it informed of the outcome of the pending judicial proceedings.*
- (b) *As regards the allegations relating to the use of temporary workers, provided through a labour contractor to carry on the normal production activities of the enterprise, who do not enjoy the right of association and are not covered by the existing collective agreement, the Committee requests the Government to take the necessary steps to guarantee the right to associate and to bargain collectively of the temporary workers and to keep it informed as to the outcome of the ongoing administrative inquiry.*
- (c) *As regards the allegations relating to the enterprise CMA regarding pressure put on fixed-term workers belonging to SINTRAIME which resulted in the non-renewal of the contracts of 18 workers, the withholding of a wage increase provided for under the collective agreement in the case of workers who had joined the trade union after 1 June 2007, the dismissal of the trade union leaders Mr Pedro Jamel Avila and Mr Eduardo Cuéllar for demanding the same increase, and the use of temporary workers provided through a labour contractor to carry on the regular production activities of the enterprise, the Committee regrets that the Government has not sent any observations in this regard and urges it to do so without delay.*

CASE NO. 2607

REPORT IN WHICH THE COMMITTEE REQUESTS  
TO BE KEPT INFORMED OF DEVELOPMENTS

**Complaint against the Government of the  
Democratic Republic of the Congo  
presented by  
the Confédération syndicale du Congo (CSC)**

***Allegations: Breaking off of collective bargaining by the employer and dismissal of trade union delegates***

575. The complaint is contained in a communication dated 22 October 2007 from the Confédération syndicale du Congo (CSC).
576. As the Government failed to respond, the Committee was obliged to postpone its examination of this case on two occasions. At its meeting in June 2008 [see the 350th Report, para. 10], the Committee issued an urgent appeal to the Government indicating that, in accordance with the rule of procedure established in paragraph 17 of its 127th Report, approved by the Governing Body, it could present a report on the substance of the case at its next meeting even if the information or observations requested were not provided in time. To date the Government has not supplied any information.
577. The Democratic Republic of the Congo has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and

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Collective Bargaining Convention, 1949 (No. 98), and the Workers' Representatives Convention, 1971 (No. 135).

## A. The complainant's allegations

- 578.** In a communication dated 22 October 2007, the CSC states that a number of trade union delegates were elected for the first time at the audiovisual enterprise RAGA following elections on 27 February 2007. The delegates in question, it is claimed, started talks with the management with a view to improving working conditions for staff at the company. During one meeting on 28 April 2007, the trade union officials are said to have suggested using the model contract of the National Employment Office and adapting it to the specific requirement of the company. The complainant organization reports that the employer broke off talks some days after the meeting in question, and published work and holiday timetables which would allow the employer to avoid paying any overtime work. Some weeks later, according to the CSC, the workforce was asked to sign a new type of contract which differed from the one originally proposed by the trade union delegation, and which would have had the effect of cancelling seniority.
- 579.** The complainant organization indicates that the trade union delegates complained about the management of the enterprise, describing it as non-transparent, and in correspondence dated 9 May 2007 alleged that there had been violations of the Labour Code; no action was taken in response to these allegations. On 19 May 2007, the employer notified the urban labour inspectorate and requested authorization for the dismissal of nine trade union delegates. That authorization was given in a letter, No. 22/121/DPIT/178/IUT/MBK-OPJ/2007 of 23 May 2007, and the nine delegates in question were informed of their dismissal without prior notice on 28 May 2007.
- 580.** In the light of this situation, the workforce held a work stoppage to demand the reinstatement of the trade union delegates. In addition a meeting convened by the Ministry of Labour and Social Security on 4 June 2007 ended with the adoption of Ministerial Order No. 12/CAB/MIN/TPS/OY/RN/12/2007 cancelling the decision of the urban labour inspectorate on the grounds that the trade union delegates were acting in the exercise of their legitimate mandate and had not exceeded their prerogatives in seeking the best living and working conditions. The complainant organization states that, despite the fact that the company management was informed of the Ministerial Order by the General Labour Inspector, the enterprise has still not reinstated the dismissed delegates and thus is, with the support of the Federation of Congolese Enterprises (FEC), calling into question the decision of the Ministry of Labour and Social Security.

## B. The Committee's conclusions

- 581.** *The Committee regrets that, despite the time that has passed since the presentation of the complaint, the Government has not replied to the allegations made by the complainant organization, despite the fact that it has been invited on more than one occasion, including by means of an urgent appeal, to present its own comments and observations on the case. The Committee urges the Government to be more cooperative in future.*
- 582.** *Under these circumstances and in accordance with the applicable procedural rule [see the Committee's 127th Report, para. 17, approved by the Governing Body at its 184th Session], the Committee is obliged to present a report on the substance of the case without having the information it had hoped to receive.*
- 583.** *The Committee reminds the Government that the purpose of the whole procedure established by the ILO for the examination of allegations of violations of freedom of*

association is to ensure respect for that freedom in law and in fact. The Committee remains confident that, if the procedure protects governments from unreasonable accusations, governments on their side will recognize the importance of formulating, for objective examination, detailed replies concerning allegations made against them [see the Committee's First Report, para. 31].

584. The Committee notes that this case concerns the employer's move to break off collective bargaining followed by the dismissal of trade union delegates. The Committee notes that the trade union delegates at the audiovisual enterprise RAGA elected to trade union office on 27 February 2007 entered into collective talks with the management of the company with a view to improving conditions of work. In this regard, in the course of the negotiations, the trade union delegation is said to have proposed using the model contract used by the National Employment Office, with certain changes in line with the specific requirements of the enterprise. The Committee notes that according to the complainant organization, the management broke off talks and unilaterally adopted new work schedules and holiday arrangements that allowed the employer to avoid paying overtime hours worked. The Committee also notes the information to the effect that, subsequently, the enterprise asked the entire workforce to sign a new type of employment contract that differed from the one originally proposed by the trade union delegation and would have had the effect of abolishing seniority.
585. The Committee recalls in this regard that it is important that both employers and trade unions bargain in good faith and make every effort to reach an agreement; moreover, genuine and constructive negotiations are a necessary component to establish and maintain a relationship of confidence between the parties [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 935]. The Committee considers that if the actions of the management as alleged by the complainant are found to be true, they would indicate an absence of bargaining in good faith on the part of the management, which would not be conducive to sound and harmonious relations between the management and the workers' representatives.
586. The Committee notes also that, following correspondence dated 9 May 2007 from trade union delegates complaining about the management of the enterprise, which they describe as non-transparent, and alleging violations of the Labour Code, the management of the enterprise notified the urban labour inspectorate of its intention to dismiss the workers. The Committee notes that authorization for the dismissals was given in letter No. 22/121/DPIT/178/IUT/MBK-OPJ/2007 of 23 May 2007 from the urban labour inspectorate, and that the nine trade union delegates were informed of their dismissal without prior notice on 28 May 2007.
587. As regards the alleged dismissals, the Committee recalls that one of the fundamental principles of freedom of association is that workers should enjoy adequate protection against all acts of anti-union discrimination in respect of their employment, such as dismissal, demotion, transfer or other prejudicial measures. This protection is particularly desirable in the case of trade union officials because, in order to be able to perform their trade union duties in full independence, they should have a guarantee that they will not be prejudiced on account of the mandate which they hold from their trade unions. The Committee has pointed out that one way of ensuring the protection of trade union officials is to provide that these officials may not be dismissed, either during their period of office or for a certain time thereafter except, of course, for serious misconduct [see **Digest**, *op. cit.*, paras 799, 801 and 804].
588. The Committee notes the statement to the effect that a meeting convened by the Ministry of Labour and Social Protection on 4 June 2007 led to the adoption of Ministerial Order No. 12/CAB/MIN/TPS/OY/RN/12/2007 cancelling the decision of the urban labour

*inspectorate on the grounds that the trade union delegates had acted in the exercise of their legitimate mandate and had not exceeded their prerogatives to seek the best living and working conditions. The Committee also notes that, despite the Ministerial Order in question, the enterprise has still not reinstated the dismissed delegates and, with the support of the FEC, has called into question the nature of the decision by the Minister of Labour and Social Protection.*

- 589.** *The Committee, while taking note of the Government's attempts to mediate, recalls that legislation should lay down explicitly remedies and penalties against acts of anti-union discrimination [see **Digest**, op. cit., para. 813]. The sanctions that are provided should be sufficiently dissuasive to prevent a recurrence of such acts. The Committee also recalls that workers who consider that they have been prejudiced because of their trade union activities should have access to means of redress which are expeditious, inexpensive and fully impartial [see **Digest**, op. cit., para. 820]. The Committee requests the Government and the complainant organization to report any action brought before the competent courts concerning the dismissal of the nine trade union delegates of the RAGA enterprise. The Committee also asks the Government to supply copies of any ruling handed down.*
- 590.** *In general, with regard to the serious allegations that have been made in this case, the Committee, while taking note of the swift action taken by the Government to settle the dispute, wishes to voice its concerns at a situation which appears not to have evolved for several months. The Committee urges the Government to inform it without delay of the situation of the nine trade union delegates dismissed from the RAGA enterprise and to take immediate measures to implement without delay the Ministerial Order requiring their reinstatement in their posts without loss of pay. The Committee also requests the Government to provide information on the current situation with regard to collective negotiations at the enterprise.*

### **The Committee's recommendations**

- 591.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee requests the Government and the complainant organization to report any action brought before the competent courts in connection with the dismissal of nine trade union delegates at the RAGA enterprise. They are also requested to provide, as appropriate, copies of any rulings handed down.*
  - (b) The Committee urges the Government to inform it without delay of the situation of the nine dismissed trade union delegates at the RAGA enterprise, and to take immediate measures to implement without delay the Ministerial Order requiring their reinstatement without loss of wages. The Committee also requests the Government to provide information on the current situation with regard to collective negotiations in the enterprise.*

CASE NO. 2569

REPORT IN WHICH THE COMMITTEE REQUESTS  
TO BE KEPT INFORMED OF DEVELOPMENTS

**Complaint against the Government of the Republic of Korea  
presented by**

- **Education International (EI) and**
- **the Korean Teachers and Education Workers Union (KTU)**

*Allegations: Absence of dialogue with the teachers' organization in the development and implementation of a system of teacher evaluation; prohibition of the right of assembly; denial of the right to strike; imposition of disciplinary sanctions against teachers who participated in union assemblies; and violation of freedom of expression*

592. The complaint is contained in a joint communication from Education International (EI) and its member organization, the Korean Teachers and Education Workers Union (KTU), dated 25 May 2007. The complainants submitted additional information in a communication dated 10 March 2008.
593. The Government sent its observations in communications dated 23 May and 20 August 2008.
594. The Republic of Korea has not ratified either the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), or the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). It has ratified the Workers' Representatives Convention, 1971 (No. 135).

**A. The complainants' allegations**

595. In a communication dated 25 May 2007, the EI and the KTU allege that the Government continues to reject opportunities for a meaningful dialogue with the KTU with regard to a new education policy; and that it continues to violate their freedom of association rights through the prohibition of the right of assembly and denial of the right to strike and violation of freedom of expression.

**Lack of social dialogue with the KTU  
in respect of education reform**

596. In their communication dated 25 May 2007, the EI and the KTU allege that the Government has refused to involve teachers and their representative professional organizations in the development and implementation of a teacher evaluation system. According to the complainants, the Government not only rejected collective bargaining but also opportunities for meaningful dialogue with the KTU before it introduced an important new education policy. About 230,000 teachers – of the 400,000 teachers working in the Republic of Korea – rejected the new policy in 2005. In response to the opposition, on 20 June 2005, the Ministry of Education and Human Resources Development (MOEHRD)

agreed to organize a “Special Council to Raise Educational Quality of Schools” with the participation of representatives of the Ministry, as well as representatives from three teachers’ organizations (including the KTU) and parents’ associations. The agreement included MOEHRD’s commitment not to introduce an evaluation system through the choosing of model schools. However, in spite of the agreement, on 20 October 2005, the MOEHRD held a press conference to announce enforcement of the teacher evaluation system regardless of the result of the public hearing to be held later in the same day. Ultimately, the MOEHRD unilaterally enforced the teacher evaluation system on 4 November 2005.

- 597.** More recently, in February 2007, without further communication with teachers’ organizations, a draft Bill to carry out an evaluation of teachers’ performance in 2008 was submitted at an extra session of the National Assembly. Although a number of political parties did not support the proposed legislation, on 13 April 2007, the MOEHRD submitted it again, unchanged and without consultation with the teachers’ associations, to a public hearing of the Education Committee of the National Assembly. In June 2007, the National Assembly began deliberations on amending the Teacher Union Act. The amendment focuses on the distribution of collective bargaining power to multiple teachers’ unions so that unions may combine their bargaining items. Currently, the KTU is denied bargaining right with the MOEHRD.

#### Prohibition of the right of assembly and denial of the right to strike

- 598.** On 20 October 2005, hundreds of KTU members protested against the Government’s decision to unilaterally impose the teacher evaluation system. The MOEHRD mobilized police squads to take protesters to police stations. Three teacher representatives were arrested and held for four months.
- 599.** In March 2006, the KTU elected new leaders and continued to protest against the teacher evaluation system. After failing to have a meaningful dialogue with the MOEHRD, the KTU decided to use the teacher annual leave provision to call for a protest rally on 22 November 2006. About 3,000 South Korean teachers took leave and rescheduled their classes in order to join the union assembly outside the Ministry building. The complainants state that, a day prior to the assembly, on 21 November 2006, the MOEHRD instructed school principals to reject teachers’ applications for annual leave, or requests to leave school earlier than usual, thus restricting the teachers’ right to assembly and freedom of collective expression.
- 600.** While the Teacher Union Act guarantees the right to organize and the Labour Union Act allows holding assemblies and meetings, the Teacher Union Act forbids the right to strike. Hence, under the law, unions must make their demands through other means. Article 15, item 4, of the Government Officials Public Service Regulations specifies that “administrative organizations should permit annual leave as far as there is no severe interference with the performance of the public service when such a request is submitted”. Thus, leaving school earlier than usual or taking an annual leave of absence to participate in a union assembly is permissible under the Teacher Union Act, because when such acts do not interfere with the normal operation of a school they cannot be considered a strike action. The complainants claim that there was no interference with the performance of the relevant public service in this case because the teachers who requested leave were substituted by their colleagues in order to avoid disrupting the students’ learning process. The complainants further allege interference of principals in the agreement between teachers to exchange classes.

**601.** Eventually, the teachers' requests for leave were rejected pursuant to the abovementioned instructions of the MOEHRD, according to which:

- (a) principals should take responsibility for actively developing "preventive activities", such as persuasion, to counter teachers who are expected to participate in an assembly;
- (b) principals should deny teachers' applications for annual leave or leaving school earlier than usual for the purpose of participating in an assembly (principals who allow it without justifiable reasons will be strictly punished);
- (c) principals should actively propagate the idea that collective actions are unlawful;
- (d) principals should draw up lists of teachers participating in the "annual leave rally" with the intent to impose "post-measures";
- (e) principals should post the letter of the MOEHRD and send it to teachers.

The MOEHRD's letter describes the KTU's "annual leave rally" as "an unlawful collective behaviour against the Government Officials Public Service Regulations" and states that "the Minister will strongly punish the participants of this rally, regardless of the extent of their participation".

**602.** On 21 November 2006, the MOEHRD issued a press release stating that "the rally was an illegal collective behaviour and a relic of authoritarianism infringing on students' right to learn". The MOEHRD and the Superintendents for the Seoul and Busan Metropolitan Offices of Education issued an appeal to the KTU stressing that: "it is not educational that teachers take collective action outside the school".

**603.** In their communication dated 20 May 2007, the EI and the KTU further allege that, following the 22 November 2006 rally, the MOEHRD announced that it would impose disciplinary measures on teachers based on the frequency of their participation in annual leaves of absence or for leaving school early with the purpose of joining union rallies carried out since 2000. The Ministry explicitly stated that the teachers who repeatedly attended annual leave rallies had been targeted for more severe disciplinary measures, such as pay cuts. The MOEHRD sent admonitory letters to the 1,856 participants of three or fewer assemblies since the year 2000 (including the rally in 2006) and applied disciplinary sanctions against 436 teachers who had participated in four or more assemblies since the same year. Of the 436 teachers disciplined, six were subject to one- to three-month salary deductions, 198 lost their annual salary bonus and were disadvantaged in their regular salary increase, 156 were punished with other disadvantages and changes, and 76 received admonitory letters. The disciplinary measures were imposed despite the Government's ratification of the Workers' Representatives Convention, 1971 (No. 135), and despite the Government Officials Act which provides that a request for a disciplinary punishment cannot be made more than two years after the cause for punishment occurred.

**604.** When the disciplinary committees of the district education offices convened on 25 January 2007, the 436 teachers were restricted in their right to respond to charges, as they were given only three minutes to provide their response, while article 9 of the Disciplinary Punishment Ordinance for the Public Educational Personnel and Staff states that "a suspected person should have a chance to make sufficient statements" and that "a decision of disciplinary punishment giving no chance of statement becomes invalid". In February 2007, the teachers punished with pay cuts argued the invalidity of the disciplinary procedures at the Appeals Commission of the MOEHRD, which planned to examine these requests in May 2007.

- 605.** In their subsequent communication dated 10 March 2008, the complainants indicate that 415 teachers were punished in May 2007. The KTU is aware of the punishments imposed on 248 teachers: the salaries of six teachers were reduced; 204 teachers were penalized in the yearly salary increases; 69 received warnings and disadvantages; and 136 received warnings. Out of 271 teachers who requested to annul the punishment, only three were accepted by the Government. The Government re-examined 47 cases and reduced the original disciplinary sanctions and rejected 198 other cases.
- 606.** In their communication dated 10 March 2008, the complainants further allege that, following the presidential election of 19 December 2007, the Provincial Offices of Education of several provinces attempted to force 125 disciplined teachers out of their schools from late December 2007 to mid-January 2008. The KTU succeeded in protecting them.

#### Violation of freedom of expression

- 607.** On 18 January 2007, two middle-school teachers and members of the KTU were arrested for allegedly violating the National Security Law. The charges, which carry a potential death penalty, are related to posters and information on North Korean politics that the teachers uploaded on the Internet. The unions submit that the two teachers were previously awarded for their contribution to peace education and that the information uploaded was easily accessible from other public sources. The two teachers were later released on bail with the determination of a trial date still pending. The complainants contend that the arrests constituted a violation of the teachers' freedom of expression.
- 608.** In their communication dated 10 March 2008, the complainants further allege that on 29 January 2008, the police arrested Mr Kim Hyeong-geun, a member of the KTU's Reunification Committee who has researched North Korean ideology and policies with an eye to promoting education for peace and mutual understanding between South and North Korean students. He was charged with violating the National Security Law and detained in a Seoul prison after the court declined review of the legality of his confinement. Prior to the arrest, in April 2007, the police searched Mr Kim's home, but he was not charged at the time. On 24 February 2008, the police also searched the house and office of Ms Choi Bokyong, who had promoted peace education in her class and in union education programmes.

#### B. The Government's reply

- 609.** In its communications of 23 May and 20 August 2008, the Government states that the allegations in this case concern the teachers' evaluation system pushed for by the Government. It disputes the complainants' allegations of a lack of social dialogue and attempts to restrain the lawful activities of teachers' unions during the development and implementation of the system. It considers that these allegations are completely different from the facts and are irrelevant to the principles of freedom of association.
- 610.** With regard to the allegation of lack of social dialogue with the teachers' associations on education reform, the Government explains that one great advantage of the education system in the Republic of Korea is that teachers can engage in educational activities, feeling secure in their jobs because their retirement age, pay and status are fully guaranteed by law. Yet, such a system has a big drawback: without a stimulus to encourage continuous self-development, it cannot ensure the improvement of teachers' professional expertise. An opinion survey in 2005 showed that 83 per cent of the population are in favour of the introduction of a teacher evaluation system. The Organisation for Economic Co-operation and Development (OECD) Policy Review Team for Teaching Personnel also recognized that the teaching personnel system in the Republic of Korea guarantees stable working

conditions, wages, etc., but pointed out that the current performance evaluation system does not provide a mechanism for promoting the expansion of teachers' expertise. It therefore recommended introducing a new teacher evaluation system. In light of this, the Korean Government began its work to introduce a teacher evaluation system with a view to enhancing trust in public education by motivating teachers to enhance their expertise and quality with their status guaranteed. The Government provides details on the features of the teacher evaluation system, which include a peer evaluation of elementary and middle-school, in-class activities, and a feedback on teaching and students' guidance through student and parent opinion surveys.

- 611.** The Government maintains that, in the process of introducing the teacher evaluation system, it involved various interested parties, including teachers and their representative organizations. According to the Government, the process, which began in the year 2000, partially consisted of the following activities: public opinion survey for the reform of the teaching personnel management system (July 2003–November 2004); gathering and hearing teachers' opinions through the cyber advisory group of teachers (June 2004); policy research on the reform of the teacher evaluation system, which included two regional debates and one public hearing organized by three academic societies to ensure the involvement of teachers' organizations and parents' groups in the process (August 2004–February 2005); consultation meetings with teachers' organizations (20 meetings during May 2004–May 2005); establishing a special consultative body to discuss the implementation of the evaluation system composed of seven representatives from three teachers' organizations, two parents' group and the Government (June–May 2005); collecting and hearing opinions on the institutionalization of the evaluation system with four teachers' organizations, including the KTU (August–September 2006); and public hearing on the direction of the policy of assessing teachers' skills development with the participation of teachers' organizations, including the KTU (October 2006). The Government admits that the KTU (with a membership of 80,000), unlike the other parties involved in the process, such as the Korean Federation of Teachers' Associations (KFTA) (the largest group of professional teachers, with a membership of 180,000), parents' groups and civic groups, opposed the teacher evaluation system. Therefore, the fact that the KTU's opposition did not prevail does not, in itself, support the claim that the process of introducing the teacher evaluation system was devoid of dialogue among the interested parties.
- 612.** In its recent communication, the Government indicates that the Bill on the teacher evaluation system was going to be presented at a plenary meeting of the National Assembly in March 2007, but it was put off under agreement between the ruling and opposition parties. The Bill was automatically scrapped as it failed to be brought up for discussion by February 2008, when the 17th Session of the National Assembly closed.
- 613.** The Government refutes the KTU's allegation that it is denied collective bargaining with the Ministry of Education and explains that, according to the current Teachers' Union Act, many teachers' unions can conduct collective bargaining with the Ministry of Education, Science and Technology after establishing a single bargaining channel. A variety of teachers' organizations operate in Korea. Among them are the KFTA, established in 1947, the KTU, established in 1999, the Korean Union of Teaching and Education Workers (KUTE), established in 1999 and with a membership of approximately 2,000, and the Korean Liberal Teachers' Association (KLTU), established in 2006 and with a membership of approximately 4,700. In September 2005, the KFTA and the KTU succeeded in establishing a single bargaining channel and had working-level talks in preparation for collective bargaining. They agreed to hold main bargaining talks in May 2006. However, just before this, the KLTU was set up and demanded to take part in the collective bargaining. Since then, the three unions have failed to come up with a single bargaining channel due to differences of opinions. As a consequence, the collective

bargaining process is temporarily halted. Therefore, it cannot be argued that bargaining with the Ministry of Education, Science and Technology was denied.

- 614.** The Government further states that, in the process of discussing whether or not to implement the teacher evaluation system, the KTU engaged in collective action to thwart the dialogue. On 20 October 2006, three KTU members, along with their 20 or so colleagues, broke into the place where a public hearing on the teacher evaluation system was due to take place, occupied the podium and committed violence, taking away the microphone and chanting slogans. In doing so, they interfered with the performance of official duties. Previously, on 14 and 19 July 2006, they held a rally without giving advance notice. During the rally, they occupied roads, causing severe traffic jams. On 22 October 2006, the three union members were arrested on charges of violation of the “Act on Punishment of Violation, etc.”, obstruction of performance of duties by officials, violation of the Assembly and Demonstration Act and traffic obstruction. They were released on bail on 28 December 2006. The cases were tried in the competent district court with due process respected. In the Court of First Instance, on 18 January 2007, all three were sentenced from seven to eight months of imprisonment with the benefit of a two-year sentence suspension. However, in the Court of Second Instance, the decision to defer the sentence was made for two trade unionists. The remaining unionist filed an appeal to the Supreme Court, which dismissed the appeal, confirming the sentence. The Government reiterates that the three KTU officials did not engage in legitimate union activities but rather in unlawful acts, such as violence, beyond the boundaries of the labour rights guaranteed by the Constitution.
- 615.** With regard to the alleged denial of the right to strike in the Teacher Union Act, the Government explains that, in the Republic of Korea, many teachers have the same status as public officials. Private-school teachers are subject to the same laws and regulations as national and public-school teachers. Accordingly, teachers have the duty to perform their job in good faith and are prohibited from leaving their workplace without permission and engaging in political movement. Hence, in principle, during working hours, teachers should not engage in union activities without the permission of their school principals. However, when engaging in union activities, teachers should not violate their obligations under the Government Officials Act and other related laws and regulations. In accordance with the above Act, teachers are considered to be public officials exercising authority in the name of the State. The Government Officials Act and the Teacher Union Act, while fully guaranteeing teachers’ right to organize and to collective bargaining, restrict the right to collective action. The restriction is justified in light of the nature of teachers’ work and expectations about their role in society: interruptions in education could have an enormous impact on the lives of the general public as well as the education of the students. In this respect, the Government points out that while there is no ILO Convention providing for the right to strike, the Committee’s position with regard to the public services is the following: “recognition of the principle of freedom of association in the case of public servants does not necessarily imply the right to strike” and that “the prohibition of the right to strike in the public service should be limited to public servants exercising authority in the name of the State”. The Government further emphasizes that, pursuant to Article 8 of Convention No. 87, “in exercising the rights provided for in this Convention, workers and employers and their respective organizations, like other persons or organized collectivities, shall respect the law of the land”.
- 616.** The Government also indicates that, at the time of the discussions on the enactment of the Teacher Union Act, even the KTU accepted the concern expressed by the population and took a favourable view on restricting the teachers’ right to collective action, which was ultimately reflected in the Act. The Government stresses that the same Act guarantees to teachers the right to organize, the right to conduct collective bargaining and the right to conclude collective agreements. In this regard, the teachers are exempt from civil and

criminal liabilities for legitimate union activities, and the employers are imposed a duty to engage in good faith collective bargaining with the teachers. Violations of this duty on the part of employers fall within the definition of “unfair labour practices” and are punished accordingly.

- 617.** The Government further contends that the teachers’ engagement in social dialogue is guaranteed through a legal framework already in place. In accordance with the Special Act on Improvement of Teachers, vocational organizations can exercise bargaining and negotiation rights in order to improve teachers’ working conditions and treatment and expand their welfare and expertise. It is also possible for teachers’ unions to present their opinions on education policies and related current issues through policy consultation meetings. In addition, in those cases where a dispute arises, the teachers’ unions can apply for mediation or arbitration to the Labour Relations Commission pursuant to the Teacher Union Act and can be involved at every stage to protect their interests. A remedy for unfair labour practice is also available in cases of disadvantageous treatment for having engaged in legitimate union activities.
- 618.** With regard to annual leave rallies in November 2006, the Government considers that education policies are a matter for the competent administrative agency. If teachers take collective action just because they have different opinions on a particular policy, it could interfere with the normal operation of schools and thus infringe upon students’ right to learn. Such collective action falls outside the range of legitimate union activities and cannot be justified.
- 619.** According to the relevant regulations, unless there is a special reason, teachers should take annual leave during vacations so as not to cause any loss of school days. In the present case, when many teachers took their annual leave simultaneously – following the KTU’s instruction to oppose the proposed teacher evaluation system – the competent government agency did not permit their leave because the collective use of leave was obviously expected to cause disruption to the normal operation of schools, undermine students’ right to learn and provoke a backlash from parents.
- 620.** In the process, the MOEHRD asked the KTU to refrain from such actions and instructed the Metropolitan and Provincial Offices of Education and schools at all levels to strictly manage the conduct of teachers to ensure that they did not participate. In an effort to prevent such collective activities, the MOEHRD sent teachers a letter in the name of the Deputy Prime Minister and requested the relevant authorities and schools to post the letter on their web sites.
- 621.** With regard to the imposition of disciplinary measures, the Government explains that those are intended to maintain order and establish discipline. Teachers become subject to disciplinary measures if they violate the Government Officials Act, breach or neglect their duties or commit any act undermining their dignity and status as a teacher. Given the relevant laws and regulations, the use of annual leave without permission to protest against the teacher evaluation system is a violation of the Government Officials Act and the Government Officials Public Service Regulations. To ensure the fairness of the disciplinary measures, the Government set criteria based on the frequency of participation in annual leave rallies without permission.
- 622.** As a result, a total of 421 of the KTU members became subject to disciplinary measures. Among them, 271 filed an appeal, of which 198 cases were dismissed, 23 turned down and 50 accepted (in 46 cases, disciplinary measures were cancelled and four were modified). With regard to the complainants’ statement that it is illegal to impose administrative measures based on the frequency of participation in rallies, including those for which the statute of limitations had expired, the Government maintains that the imposition was in

compliance with the Disciplinary Punishment Ordinance for the Public Educational Personnel and Staff, which provides that disciplinary authorities, when deciding on disciplinary action, should take into account the suspected offender's conduct, performance records, as well as achievements and signs of repentance. The case against the KTU members joining annual leave rallies went through several court trials and on 11 May 2007, the Supreme Court concluded the case by delivering a final verdict, acknowledging the legitimacy of the disciplinary measures.

- 623.** With regard to the allegation of violation of teachers' freedom of expression, the Government indicates that the two teachers mentioned in the complainants' first communication operated an Internet café for the Unification Committee of the Seoul Branch of the KTU from 2005 to 2006. They uploaded to the Internet contents admiring and advocating Kim Jung-il, the North Korean socialist regime and North Korea's plan for unification under a federal system extracted and edited from guidelines for revolutionary struggles in South Korea, speeches, editorials, theses, etc. on the web site of the Anti-Imperialist National Democratic Front. They also posted various propaganda materials, including calls for the abolition of the National Security Law. On 20 January 2007, they were arrested and three months later, on 20 April, released on bail. Their case is now pending before the Court of First Instance.
- 624.** With regard to the two individuals mentioned in the second communication, the Government indicates that Mr Kim Hyeong-yeun was arrested and sentenced to one year in jail with a two-year suspension of sentence for violating the National Security Law in 1996. In May 2005, he led 180 young middle school students to participate in a ceremony to pay tribute to patriots (Partisans) who died in a struggle to achieve unification against the South Korean Government. He also continued to provide education praising the revolutionary orthodoxy of North Korea. In April 2006, he posted on the Internet a "Report by Kim Young-nam on the 94th birthday of Kim Il-sung" and distributed many documents praising Kim Il-sung and North Korea's socialism. After an investigation involving a seizure and search in his home and school, he was arrested in January 2008 and released on bail in June 2008. As a result of the investigation, he was found to have committed offences and was therefore prosecuted. His first-instance trial is now under way. Ms Choi Bokyoung was sentenced to one year in prison with a two-year suspension of sentence for breaking into a building and violating the Assembly and Demonstration Act in 1997. Between August 2003 and February 2008, she posted documents emphasizing North Korea's view on unification and the superiority of North Korea's socialism on the website of the school where she was working. She was arrested without detention for committing such acts in June 2008 and is now under investigation.
- 625.** The Government considers that while the complainants argue that the acts committed by teachers are part of peace education, given Korea's unique realities, such as the division between North and South Korea and the military confrontation, providing ideologically biased education to young students could represent a grave danger to national security and freedom and is nothing other than a violation of the National Security Act, which has nothing to do with normal union activities. The two abovementioned persons were and are investigated by the competent authorities, such as the Public Prosecutor's Office and courts, by due process for violating the current laws.
- 626.** The Government once again stresses that the described acts have nothing to do with the protection and promotion of union members' interests or general labour issues but rather constitute political activities aimed at praising a country in military confrontation with South Korea. As long as such activities go against the current law, union members cannot avoid level liability. The Government maintains that all fundamental rights including the freedom of expression are not unconditionally guaranteed. According to article 37(2) of the Korean Constitution, fundamental rights can be restricted by law only when it is necessary

for national security, maintaining law and order or for public welfare. More specifically, the National Security Act restricts freedom of expression to the extent necessary to control activities that could endanger the existence and safety of the State, or the liberal democratic order. The Government considers that, in so far as there is a question of violation of the National Security Act, the punishment of the two teachers is not an issue for discussion at the Committee on Freedom of Association.

627. The Government concludes by expressing its will to continue making efforts in favour of the development of teachers' skills through continuous dialogue and consultation among interested parties, such as schoolteachers at all levels, parents, etc., and by introducing and implementing necessary systems. It understands that this process will no doubt need a sufficient level of social dialogue and the reaching of a national consensus.

### C. The Committee's conclusions

628. *The Committee notes that the complainants in this case, EI and its member organization, the KTU, allege the absence of dialogue with the teachers' organization in the development and implementation of a system of teacher evaluation; the prohibition of the right to assembly and the denial of the right to strike; and the violation of freedom of expression.*
629. *With regard to the first set of allegations, the complainants explain that the Government refused to involve teachers and their representative professional organizations in the development and implementation of a new teacher evaluation system and unilaterally imposed the new system in November 2005, despite the fact that the new policy was rejected by over half the teachers. More recently, in February 2007, a draft Bill to carry out an evaluation of teachers' performance was submitted to the National Assembly, without consultations with the associations of teachers.*
630. *The Government disputes the allegation of lack of social dialogue with respect to the development and implementation of the teacher evaluation system. It stresses the need for such a reform, recommended by the OECD and supported by the general public, and provides details on its features, and maintains that the process of introducing the teacher evaluation system involved various interested parties, including teachers and their representative organizations, parents' and other civic groups. The Government lists the consultation activities which were held in this regard. It further indicates that unlike the KTU (80,000 members), the Korean Federation of Teachers' Associations, the largest group of professional teachers (180,000 members), and the other parties to the consultations did not oppose the reform. The Government therefore considers that just because the KTU's position did not prevail does not support its claim that the process of introducing the teacher evaluation system was devoid of dialogue among interested parties.*
631. *The Committee notes that that the teacher evaluation system has already been in place since November 2005 and that, while the complainants submit that the new system was unilaterally imposed, the Government insists that all interested parties were involved in an extensive consultation process which began in 2000. The Committee has considered that, while the determination of the broad lines of educational policy is not a matter for collective bargaining between the competent authorities and teachers' organizations, although it may be normal to consult these organizations on such matters [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 922], matters touching upon employment terms and conditions fall within the scope of collective bargaining. The same would apply with regard to the teacher evaluation system. The Committee notes the Government's expression of will to continue making efforts in favour of the development of teachers' skills through continuous dialogue and*

consultation among interested parties, such as schoolteachers at all levels, parents, etc., and understanding that this process will no doubt need a sufficient level of social dialogue and the reaching of a national consensus. The Committee therefore expects that any future consultations with regard to the reform in the education sector, particularly those concerning the terms and conditions of teachers, as well as with regard to any legislation affecting teachers and their trade union rights, will take place in good faith, confidence and mutual respect, and that the parties will have sufficient time to express their views and discuss them in full with a view to reaching a suitable compromise.

- 632.** *The complainants further allege that teachers are denied the right of assembly and the right to strike. They explain in this respect that, in view of the prohibition of the right to strike under the Teacher Union Act, the only possibility open to teachers to express their dissatisfaction collectively is through participation in rallies, assemblies and protests organized during their annual leave. According to the complainants, such leave can be taken as long as it does not interfere with the normal operation of schools. In the present case, the complainants allege that in November 2006 leave of absence was denied to about 3,000 teachers who wished to participate in the union assembly to protest against the teacher evaluation system imposed by the Government. The complainants allege that teachers' requests for leave were rejected pursuant to the instructions of the MOEHRD, which described the KTU's annual leave rally as "unlawful collective behaviour against the Government Officials Public Service Regulations" and promised "to punish the participants of the rally, regardless of the extent of their participation".*
- 633.** *According to the complainants' first communication, the MOEHRD sent admonitory letters to the 1,856 participants of three or fewer assemblies since the year 2000 (including the rally in 2006) and applied disciplinary sanctions against 436 teachers who had participated in four or more assemblies during the same year. Of the 436 teachers disciplined, six were subject to one- to three-month salary deductions, 198 lost their annual salary bonus and were disadvantaged in their regular salary increase, 156 were punished with other disadvantages and changes, and 76 received admonitory letters. When the disciplinary committees of the district education offices convened on 25 January 2007, the 436 teachers were restricted in their right to respond to charges, as they were given only three minutes to provide their response, contrary to article 9 of the Disciplinary Punishment Ordinance for the Public Educational Personnel and Staff. In February 2007, the teachers punished with pay cuts argued the invalidity of the disciplinary procedures at the Appeals Commission of the MOEHRD, which examined these requests in May 2007. In their subsequent communication, the complainants indicate that 415 teachers were punished in May 2007. The KTU is aware of the punishments imposed on 248 teachers: the salaries of six teachers were reduced; 204 teachers were penalized in the yearly salary increases; 69 received warnings and disadvantages; and 136 received warnings. Out of 271 teachers who requested annulment of their punishment, only three were accepted by the Government. The Government re-examined 47 cases and reduced the original disciplinary sanctions and rejected 198 other cases.*
- 634.** *On the same issue, the complainants indicate that already in October 2005 hundreds of KTU members protested the Government's decision to unilaterally impose the teacher evaluation system. The MOEHRD mobilized police squads to take protesters to police stations. Three teacher representatives were arrested and held for four months.*
- 635.** *With regard to these allegations, the Government states that, on 20 October 2006, three KTU members, along with their 20 or so colleagues, broke into the place where a public hearing on the teacher evaluation system was due to take place, occupied the podium and committed violence, taking away the microphone and chanting slogans. In doing so, they interfered with the performance of official duties. Previously, on 14 and 19 July 2006, they held a rally without giving advance notice. During the rally, they occupied roads, causing*

severe traffic jams. On 22 October 2006, the three union members were arrested on charges of violation of the “Act on Punishment of Violation, etc.”, obstruction to the performance of duties by officials, violation of the Assembly and Demonstration Act and traffic obstruction. They were released on bail on 28 December 2006. The cases were tried in the competent district court with due process respected. In the Court of the First Instance, on 18 January 2007, all three were sentenced from seven to eight months of imprisonment with the benefit of a two-year suspended sentence. However, in the Court of the Second Instance, the decision to defer the sentence was made for two trade unionists. The remaining unionist filed an appeal to the Supreme Court, which dismissed the appeal, confirming the sentence. The Government reiterates that the three KTU officials did not engage in legitimate union activities but rather in unlawful acts, such as violence, beyond the boundaries of the labour rights guaranteed by the Constitution.

- 636.** *With regard to the alleged denial of the right to strike in the Teacher Union Act, the Government explains that, in the Republic of Korea, many teachers have the same status as public officials. Private-school teachers are subject to the same laws and regulations as national and public-school teachers. They have the duty to perform their job in good faith and are prohibited from leaving their workplace without permission and engaging in political movement. Hence, in principle, during working hours, teachers should not engage in union activities without permission of their school principals. However, when engaging in union activities, teachers should not violate their obligations under the Government Officials Act and other related laws and regulations. In accordance with the above Act, teachers are considered to be public officials exercising authority in the name of the State. The Government Officials Act and the Teacher Union Act, while fully guarantee teachers’ right to organize and to collective bargaining, restrict the right to collective action. The restriction is justified in light of the nature of the teachers’ work and expectations about their role in society: interruptions in education could have an enormous impact on the lives of the general public as well as the education of the students. In this respect, the Government points out that, while there is no ILO Convention providing for the right to strike, the Committee’s position with regard to the public services is the following: “recognition of the principle of freedom of association in the case of public servants does not necessarily imply the right to strike” and that “the prohibition of the right to strike in the public service should be limited to public servants exercising authority in the name of the State”. The Government further emphasises that pursuant to Article 8 of Convention No. 87, “in exercising the rights provided for in this Convention, workers and employers and their respective organizations, like other persons or organized collectivities, shall respect the law of the land”.*
- 637.** *With regard to rallies in November 2006, the Government firstly considers that, if teachers take collective action just because they have different opinions on a particular policy, it could interfere with the normal operation of schools and thus, infringe upon students’ right to learn. Such collective action falls outside the range of legitimate union activities and cannot be justified. Secondly, it explains that, according to the relevant regulations, unless there is a special reason, teachers should take annual leave during vacations so as not to cause any loss of school days. In the present case, when many teachers took their annual leave simultaneously, the competent government agency did not permit their leave because the collective use of leave was obviously expected to cause disruption to the normal operation of schools, undermine student’s right to learn, and provoke a backlash from parents. The Government confirms that the MOEHRD instructed the Metropolitan and Provincial Offices of Education and schools at all levels to manage strictly the conduct of teachers to ensure that they did not participate in rallies.*
- 638.** *With regard to the imposition of disciplinary measures, the Government explains that those are intended to maintain order and establish discipline. Teachers become subject to disciplinary measures if they violate the Government Officials Act, breach or neglect their*

*duties or commit any act undermining their dignity and status as a teacher regardless of relevance to their work. In the present case, the use of annual leave without permission to protest against the teacher evaluation system is a violation of the Government Officials Act and the Government Officials Public Service Regulations. To ensure the fairness of disciplinary measures, the Government set criteria based on the frequency of participation in annual leave rallies without permission. As a result, a total of 421 of the KTU members became subject to disciplinary measures. Among them, 271 filed an appeal, of which 198 cases were dismissed, 23 turned down and 50 accepted (in 46 cases, disciplinary measures were cancelled and four were modified). With regard to the complainants' statement that it is illegal to impose administrative measures based on the frequency of participation in rallies, including those for which the statute of limitations had expired, the Government states that the imposition of penalties was in compliance with the Disciplinary Punishment Ordinance for the Public Educational Personnel and Staff. The case against the KTU members joining annual leave rallies went through several court trials and on 11 May 2007, the Supreme Court concluded the case by delivering a final verdict, acknowledging the legitimacy of the disciplinary measures.*

- 639.** *The Committee notes that the main issue at hand is the prohibition of the right to collective action (protest, demonstrations and strikes) in the education sector as, under the national legislation, teachers in public and private sectors are considered to be public servants exercising the authority in the name of the State. At the outset, the Committee stresses that peaceful demonstration and protests organized to support trade unions' position in the search for solutions to problems posed by government policies, which have impact on their members, are legitimate trade union activities. With regard to the right to strike, specifically, the Committee recalls that it has had to deal with many cases over recent years involving restrictions on the freedom of action of teachers, including Cases Nos 1629 and 1865 concerning the Republic of Korea (see 286th and 346th Reports, respectively). The Committee had found that "workers in education are not covered by the definition of essential services or of the public service exercising the powers of public authority" and should therefore have the right to strike, except for school principals and deputy principals who exercise the prerogatives of the public authority and whose right to strike can be limited [see 277th Report, paras 285 and 289, as recalled in Case No. 1865, 346th Report, para. 772]. Furthermore, arguments that civil servants do not traditionally enjoy the right to strike because the State as their employer has a greater obligation of protection towards them have not persuaded the Committee to change its position on the right to strike of teachers [see **Digest**, op. cit., para. 589]. The Committee therefore urges the Government to take the necessary measures, in consultation with the social partners, in order to amend the national legislation so as to ensure that teachers in the public and private sector enjoy the right to demonstrations, public meetings and strikes to defend their occupational interests. It requests the Government to keep it informed in this respect.*
- 640.** *With regard to the penalties imposed on teachers for exercising their right to collective action, the Committee stresses that no one should be penalized for carrying out or attempting to carry out a legitimate strike [see **Digest**, op. cit., para. 660] or any other form of collective action. With regard to the three workers arrested on account of their participation in a collective action, while it is not clear whether the three trade unionists mentioned in the complaint are the same persons referred to by the Government in its reply, the Committee emphasizes that the peaceful exercise of trade union rights (strike and demonstration) by workers should not lead to arrests [see **Digest**, op. cit., para. 673] and imprisonment. In the present case, the Government states that on 22 October 2006 the three trade unionists "broke into the place where a public hearing on the teacher evaluation system was due to take place, committed violence by taking away the microphone and chanting slogans" and had previously participated in a rally during which they "occupied roads, causing severe traffic jams". The three trade unionists were arrested and spent time in jail. Taking into account that the legislation forbids teachers to*

*take collective actions and given that the Government limits itself to broadly stating that acts of violence were committed, it appears to the Committee that the persons in question were in fact punished for exercising their legitimate trade union activities.*

- 641.** *Furthermore, the Committee considers that sanctions for strike action should be possible only where the prohibitions in question are in conformity with the principles of freedom of association. In view of the fact that the restrictions imposed on teachers in the Republic of Korea with regard to their right to collective actions are not in conformity with freedom of association principles, the Committee requests the Government to take the necessary measures in order to fully compensate those who suffered material or other damages as a result of their participation in rallies. It requests the Government to keep it informed in this respect. The Committee further expects that no penal sanction will be imposed on trade unionists for the organization and participation in peaceful collective actions.*
- 642.** *Finally, with regard to the allegation of violation of freedom of expression, the complainants submit that, on 18 January 2007, two middle-school teachers and members of the KTU were arrested for allegedly violating the National Security Law. The charges, which carry a potential death penalty, are related to posters and information on North Korean politics that the teachers uploaded on the Internet. The unions submit that the two teachers were previously awarded for their contribution to peace education, and that the information uploaded was easily accessible from other public sources. The two teachers were later released on bail with the determination of a trial date still pending. On 29 January 2008, the police arrested Mr Kim Hyeong-geun, a member of the KTU's Reunification Committee who has researched North Korean ideology and policies with an eye to promoting education for peace and mutual understanding between South and North Korean students. He was charged with violation of the National Security Law and detained in a Seoul prison after the court denied review of the legality of his confinement. On 24 February 2008, the police also searched the house and office of Ms Choi Bokyong who had promoted peace education in her class and in union education programmes.*
- 643.** *With regard to the two teachers mentioned in the complainants' first communication, the Government indicates that the two teachers operated an Internet café for the Unification Committee of the Seoul Branch of the KTU from 2005 to 2006. They uploaded to the Internet contents admiring and advocating Kim Il-sung and Kim Jung-il, the North Korean socialist regime and North Korea's plan for unification under a federal system extracted and edited from guidelines for revolutionary struggles in South Korea, speeches, editorials, theses, etc., on the web site of the Anti-Imperialist National Democratic Front. They also posted various propaganda materials. On 20 January 2007, they were arrested and three months later, on 20 April, released on bail. Their case is now pending before the Court of the First Instance. The two other teachers, Mr Kim Hyeong-gun and Ms Choi Bokyong, were arrested on the same charges, for having provided education praising the revolutionary orthodoxy of North Korea's socialism. Mr Kim Hyeong-gun's first instance trial is now pending, while Ms Choi Bokyong is under investigation.*
- 644.** *The Government maintains that all fundamental rights including freedom of expression are not unconditionally guaranteed and can be restricted by law to maintain national security, law, order and public welfare. It stresses that the cases of these teachers are purely political in character and do not concern the exercise of trade union rights. It therefore considers that, in so far as there is a question of violation of the National Security Act, the punishment of the teachers is not an issue for discussion at the Committee on Freedom of Association.*
- 645.** *The Committee notes that the information provided by the complainants and the Government differs as to the nature and purpose of the activities for which the teachers were arrested in January 2007 and 2008. While the Committee is unable to verify this*

information, it recalls that the primary role of publications (and other means of dissemination of information, used by trade unions) should be to deal with matters essentially relating to the defence and furtherance of the interests of the unions' members in particular and with labour questions in general [see **Digest**, *op. cit.*, para. 170]. The Committee requests the complainant organizations to clarify the manner in which the acts of the accused teachers were related to their trade union activities. In the meantime, the Committee recalls the resolution of 1970 concerning trade union rights and their relation to civil liberties which places special emphasis on freedom of opinion and expression, which are essential for the normal exercise of trade union rights. Recalling that the 1970 resolution recognizes that the rights conferred upon workers' and employers' organizations must be based on respect for those civil liberties which have been enunciated in particular in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights and that the absence of these civil liberties removes all meaning from the concept of trade union rights, the Committee expects that any judgement relating to these teacher unionists accused of violating the National Security Act will fully respect the civil liberties set out in the Universal Declaration of Human Rights, including freedom of opinion and expression. The Committee requests the Government to keep it informed of the outcome of these cases and to forward the final judgements.

### **The Committee's recommendations**

**646. In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:**

- (a) The Committee expects that any future consultations with regard to the reform in the education sector, particularly those concerning the terms and conditions of teachers, as well as the legislation affecting teachers and their trade union rights will take place in good faith, confidence and mutual respect, and that the parties will have sufficient time to express their views and discuss them in full with a view to reaching a suitable compromise.**
- (b) The Committee urges the Government to take the necessary measures, in consultation with the social partners, in order to amend the national legislation so as to ensure that teachers in the public and private sector enjoy the right to demonstrations, public meetings and strikes to defend their occupational interests. It requests the Government to keep it informed in this respect.**
- (c) The Committee requests the Government to take the necessary measures in order to fully compensate those who suffered material and other damages as a result of their participation in rallies. It requests the Government to keep it informed in this respect.**
- (d) The Committee expects that no penal sanction will be imposed on trade unionists for the organization and participation in peaceful collective actions.**
- (e) The Committee requests the complainants to provide further information as to the nature of the acts committed by the four trade unionists accused of violating the National Security Act, and in particular how these acts were related to trade union activities, and expects that any judgement relating to these teacher unionists will fully respect the civil liberties set out in the**

*Universal Declaration of Human Rights, including freedom of opinion and expression. The Committee requests the Government to keep it informed of the outcome of these cases and to forward the final judgements.*

CASE NO. 2490

REPORT IN WHICH THE COMMITTEE REQUESTS  
TO BE KEPT INFORMED OF DEVELOPMENTS

**Complaint against the Government of Costa Rica  
presented by**

- the Rerum Novarum Confederation of Workers (CTRN)
  - the Trade Union Movement of Costa Rican Workers (CMTC)
  - the Costa Rican Confederation of Democratic Workers Rerum Novarum (CCTD-RN)
  - the General Workers' Confederation (CGT)
  - Juanito Mora Porrás Social Confederation (CS-JMP)
- supported by  
the International Trade Union Confederation (ITUC)**

*Allegations: Violations of the right to bargain collectively in the public sector in the light of judicial rulings*

647. The Committee last examined this case at its November 2007 meeting, when it presented an interim report to the Governing Body [see 348th Report, paras 402–439, approved by the Governing Body at its 300th Session in November 2007].
648. The Government sent further observations in a communication dated 20 February 2008.
649. Costa Rica has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. Prior examination of the case**

650. In its previous examination of the case at its November 2007 meeting, the Committee made the following recommendations regarding the issues pending [see 348th Report, para. 439]:
- (a) The Committee reiterates that additional legal and other guarantees are required to avoid the abusive use of the recourse of unconstitutionality against collective agreements in the public sector by the Office of the Ombudsperson and the Libertarian Party which inevitably leads to the social partners losing confidence in collective bargaining and requests the Government to keep it informed in that respect.
  - (b) The Committee requests the Government to continue to keep it informed of developments with regard to the measures and decisions adopted in relation to ensuring respect for the principle of collective bargaining in the public sector, including the bills mentioned in the conclusions (bill of ratification of Conventions Nos 151 and 154), as well as of the progress of the joint commission of the Higher Labour Council and the Legislative Assembly with the assistance of the ILO.

- (c) The Committee expects that the Constitutional Chamber of the Supreme Court will take fully into account Costa Rica's commitments arising from the ratification of Convention No. 98.
- (d) Lastly, the Committee regrets that the Government has not responded to the allegation regarding the criminal complaint made to the Office of the Attorney-General against union leaders for submitting a complaint to the ILO, in which their dismissal was sought. The Committee requests the Government to respond to this allegation without delay and recalls that no union leader should be subject to intimidation, reprisals or sanctions as a result of submitting complaints to the ILO.

## **B. The Government's reply**

- 651.** In its communication of 20 February 2008, the Government states that it notes the recommendation made by the Committee on Freedom of Association and states that the issue of collective bargaining in the public sector and the use of actions for unconstitutionality against collective agreements in this sector have been repeatedly submitted to the ILO's supervisory bodies, as well as to the Committee on Freedom of Association, especially within the follow-up to Case No. 2104.
- 652.** The mandate of the October 2006 high-level technical assistance mission covered the issue of restrictions to the right to bargain collectively in the public sector in the light of various rulings issued by the Constitutional Chamber of the Supreme Court, as well as the subjection of collective bargaining in the public sector to criteria of proportionality and rationality in accordance with the case law of the Constitutional Chamber, which has declared unconstitutional a number of clauses of collective agreements in the public sector.
- 653.** All of these proceedings are marked by numerous arguments to refute the accusations and statements made regarding this affair by the Government, which is why the Government requests that all the arguments it has put forward concerning the issue be taken into account.
- 654.** As to recommendations (b) and (c) of the 348th Report of the Committee on Freedom of Association, the Government states that it sent copies of the report to Mr Luis Paulino Mora Mora, President of the Supreme Court of Justice of the Judiciary, Mr Alexander Mora Mora, President of the Standing Committee on Judicial Affairs of the Legislative Assembly and Mr José Pablo Carvajal, Executive Director of the Higher Labour Council, in February 2008, in order to inform them of the Committee's observations so that they could give their opinions on the recommendations and report on progress made relating to the concerns expressed by this supervisory body. In this regard, the Government undertakes to keep the Committee informed of any responses made by the abovementioned national authorities.
- 655.** As to the progress made by the joint commission of the Higher Labour Council – Legislative Assembly (recommendation (b) of the Committee), the Government states that this issue is a priority; however, the Legislative Assembly is currently considering the approval of the implementation agenda for the free trade agreement with the United States (DR-CAFTA, Dominican Republic-Central American Free Trade Agreement). However, this has not prevented a study into a bill on collective bargaining in the public sector from being undertaken within the Higher Labour Council (a national tripartite body) in the context of the reform of working procedures.
- 656.** The Government sends a copy of official letter No. DMT-0173-08, of 19 February 2008 in order to paint a clearer picture of its intention to strengthen measures effectively guaranteeing the respect of the principle of collective bargaining in the public sector. In this letter, the Minister of Labour requests the Minister of the Presidency to speed up work

on those bills contributing to the strengthening of the right to collective bargaining in the public sector, including the bills of ratification for the abovementioned ILO Conventions Nos 151 and 154.

- 657.** Furthermore, the Government recalls that bills relating to the promotion of collective bargaining in the public sector were submitted and recommended for adoption to the Legislative Assembly: the reform of section 192 of the Constitution, the purpose of which is to legalize the right to conclude collective agreements in the public sector; the “bill on bargaining for collective agreements in the public sector” and the elevation to the status of law of the current Decree No. 29576-MTSS, governing dispute resolution and collective bargaining for public servants.
- 658.** In addition, in the light of the actions for unconstitutionality seeking the annulment of certain clauses in collective agreements, the Ministry of Labour and Social Security has presented appropriate legal assistance in defence of the right of collective bargaining in the public sector with regard to the legal proceedings that have taken place.
- 659.** In any case, in a follow-up to the recommendations of the October 2006 high-level mission and under the auspices of the ILO Subregional Office for Central America, located in Costa Rica, and its team of specialists, the Government refers to a seminar organized on 13 March 2008 on “Standards and case law on collective agreements in the public sector: From an international and domestic law perspective”.
- 660.** All the social and government partners involved in the effective application of the principles of freedom of association and collective bargaining were invited to participate in this activity, including the very highest authorities of the executive (heads of institutions and advisers to the bodies signatories to collective agreements, heads of bodies belonging to the Policy Committee on Collective Bargaining in the Public Sector), the Ombudsman General of the Republic, the Office of the Comptroller-General of the Republic, the Public Prosecutor-General of the Republic, the Minister of Finance, the Director-General of the Civil Service, the Regulator-General of Public Services, among others, including the technical officers of the Ministry of Labour and Social Security responsible for the issue in question. Furthermore, the heads of the legislative branch were invited (members of parliament accompanied by their advisers) and the judicial authorities, including judges of Chamber II and the Constitutional Chamber and their counsels, as well as the most representative organizations of the workers and the employers party to collective agreements in the public sector and recognized labour law experts, and authorities from institutes of higher education, among others.
- 661.** In accordance with the brief given by the ILO supervisory bodies to the Government, the aim of this seminar is to contribute to the dissemination of the principles of the international standards which govern collective bargaining in the public sector, the subject of much study and analysis in many forums within this international organization.
- 662.** The Government states that with regard to the criminal complaint made to the Office of the Attorney-General against union leaders for submitting a complaint to the ILO, it sent its response to the Committee on 9 August 2007 as a part of the last reply sent.
- 663.** In its reply, the Government showed that the complaint was an isolated incident, within the rule of law in Costa Rica, of a member of parliament exercising the right to make a complaint to the criminal courts. However, it is clear that the Government is not connected in any way to the complaint made by the member of the legislature. The outcome of the legal proceedings will depend entirely on the ruling of the competent legal body within the framework of the separation of powers essential to the rule of law, under which the

procedural guarantees in criminal cases (the Government refers to the relevant constitutional standards relating to due process) and trade union guarantees are recognized.

### C. The Committee's conclusions

**664.** *The Committee observes that in the present case the complainant organizations alleged: (1) the declaration as unconstitutional by the Constitutional Chamber of the Supreme Court of Justice of a considerable number of clauses of collective agreements concluded with public institutions and enterprises, relating to economic and social issues, which extended social and economic benefits established under the Labour Code and in legislation; (2) the lodging of a criminal complaint against trade union leaders for having submitted a complaint to the ILO.*

**665.** *The Committee notes the Government's latest reply which refers to measures already adopted by the national authorities regarding the issue in question, as well as to new measures. As to the measures previously adopted by the authorities, the Committee took note of these in its previous conclusions which are reproduced below in order to clarify the situation [see 348th Report, para.434]:*

*The Committee notes the Government's statements, according to which (1) the Government does not endorse the actions of the Office of the Ombudsperson nor of other political parties in challenging collective agreements, even if they are entitled to do so; (2) the Constitutional Chamber's decisions have not been drafted in full, only the operative paragraphs exist, but they suggest that voting was divided; (3) the Government's analysis process makes it clear that the full text of the rulings is required in order to avoid falling into speculation and subjective interpretations; (4) the Government has indicated the ILO's position and its principles to the Constitutional Chamber; and (5) the Government has demonstrated its will to ensure collective bargaining in the public sector as an institution. The Government attaches communications from the heads of enterprises and institutions affected by the annulment of particular clauses in their collective agreements. There is a particular unease emanating from these communications, especially since the agreements had been set before the Committee on Policies for Collective Bargaining in the public sector at the time in order to have technical support, although they do point out that they must abide by the Constitutional Chamber's rulings and the separation of powers principle. The Committee observes the Government's request that its statements and arguments made in previous cases also be included. The Committee summarizes the Government's previous statements in earlier cases as follows: (1) the Government possesses the will and commitment to resolve the problems; (2) it has requested the ILO's technical assistance in the hope that this will help to solve the problems mentioned; (3) the efforts of the Government (many of which were tripartite) regarding these problems included the presentation of several legislative proposals to the Legislative Assembly and their reactivation: a draft constitutional amendment concerning article 192, a bill on collective bargaining in the public sector, and the addition of paragraph 4 to article 112 of the General Law on Public Administration (the three initiatives are intended to strengthen collective bargaining in the public sector); bill on parliamentary approval of ILO Conventions Nos 151 and 154; the draft revision of various sections of the Labour Code, Act No. 2 of 26 August 1943 and Decree No. 832 of 4 November 1949; (4) the Government's efforts also include other types of initiatives, such as the intervention of third parties to defend collective agreements (coadyuvancia) in legal actions of unconstitutionality brought in order to annul specific clauses.*

**666.** *The Committee had also noted that, according to the report of the October 2006 high-level technical assistance mission, the bills in question would be examined by the Higher Labour Council (a tripartite body for dialogue) with the objective of studying them and providing them with new impetus, through consensus; the Higher Labour Council asked the Legislative Assembly to set up a joint commission, with the technical assistance of the ILO, in order to develop the plan for the reform of the working procedures [see 348th Report, para. 435].*

- 667.** *As to the Government's new measures, in the light of the previous examination of the case, the Committee notes the Government's statement that: (1) it has transmitted the report of the Committee on Freedom of Association to the President of the Supreme Court of Justice, the President of the Legislative Assembly's Standing Committee on Judicial Affairs and the Executive Director of the Higher Labour Council (a national tripartite body) in order to inform them of the Committee's observations so that they may report on progress made relating to the concerns expressed by the Committee; (2) the progress made by the joint commission of the Higher Labour Council – Legislative Assembly is a priority for the Government, however, the Legislative Assembly is currently considering the approval of the implementation agenda for the free trade agreement with the United States (DR-CAFTA, Dominican Republic-Central American Free Trade Agreement). However, this has not prevented a study from being undertaken within the Higher Labour Council (a national tripartite body) into a bill on collective bargaining in the public sector, in the context of the reform of working procedures; (3) on 19 February 2008 the Minister of Labour formally requested the Minister of the Presidency to speed up work on all bills contributing to the strengthening of the right to collective bargaining in the public sector, including the bills of ratification for the abovementioned ILO Conventions Nos 151 and 154; (4) in a follow-up to the recommendations of the high-level mission, and under the auspices of the ILO, a seminar was organized on 13 March 2008 on the issue of collective bargaining to which were invited, among others, the social partners, the heads and bodies of the various branches of government affected by the issue, including Supreme Court judges and members of parliament, as well as their assistants and advisers, in order to disseminate the principles of the ILO Conventions.*
- 668.** *The Committee appreciates the Government's efforts in promoting ratification of the ILO Conventions on collective bargaining and of the various bills relating to this issue, as well as the initiatives adopted by the various state authorities concerned and the social partners. The Committee notes that, according to the Government, the progress made by the joint commission of the Higher Labour Council – Legislative Assembly regarding the abovementioned bills on constitutional and legal reforms aimed at resolving the issue at hand regarding collective bargaining in the public sector has been blocked by discussion of the implementation agenda of the free trade agreement with the United States. The Committee regrets this delay. The Committee expects that the joint commission will take up its work again shortly and that it will be in a position to report on any developments in the near future.*
- 669.** *The Committee once again requests the Government to keep it informed of developments regarding the measures and decisions adopted, as well as developments concerning those bills relating to collective bargaining in the public sector (including those relating to the ratification of Conventions Nos 151 and 154) and expresses once again the expectation that the Constitutional Chamber of the Supreme Court of Justice will take into account fully the commitments made by Costa Rica when ratifying Convention No. 98, in particular with regard to collective bargaining in the public sector. The Committee reiterates that additional legal and other guarantees are required to avoid the abusive use of the recourse of unconstitutionality against collective agreements in the public sector by the Office of the Ombudsperson and the Libertarian Party which inevitably leads to the social partners losing confidence in collective bargaining, and requests the Government to continue to keep it informed in that respect, as well as of the progress of the joint commission of the Higher Labour Council and the Legislative Assembly with the technical assistance of the ILO.*
- 670.** *Finally, the allegation relating to the criminal complaint made by a member of parliament to the Office of the Attorney-General against union leaders for submitting a complaint to the ILO (as a part of which it was requested that the leaders be dismissed), the Committee notes the Government's statements to the effect that this was an isolated incident and that*

*the Government is not in any way connected to the complaint made by the member of the legislature, but that however he was exercising his right to make a complaint before the criminal courts, which must in turn act within the framework of the procedural guarantees enshrined in the Constitution and the trade union guarantees. The Committee deplores the criminal complaint made by the member of parliament and requests the Government to keep it informed of the outcome and to verify that no trade union leader is sanctioned for having submitted a complaint to the ILO.*

## **The Committee's recommendations**

**671. *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:***

- (a) *The Committee reiterates that additional legal and other guarantees are required to avoid the abusive use of the recourse of unconstitutionality against collective agreements in the public sector by the Office of the Ombudsperson and the Libertarian Party which inevitably leads to the social partners losing confidence in collective bargaining, and once again requests the Government to continue to keep it informed of developments regarding the measures and decisions adopted with regard to ensuring respect for the principle of collective bargaining in the public sector, including the bills mentioned in the conclusions (bill of ratification of Conventions Nos 151 and 154 and other projects of constitutional and legal reform), as well as of the progress of the joint commission of the Higher Labour Council and the Legislative Assembly with the assistance of the ILO.***
- (b) *The Committee expects that the joint commission will take up its work shortly and that it will be in a position to report on any developments in the near future.***
- (c) *The Committee again expresses its expectation that in the future the Constitutional Chamber of the Supreme Court of Justice will take into account fully the commitments made by Costa Rica when ratifying Convention No. 98.***
- (d) *The Committee deplores the criminal complaint made by the member of parliament for submitting a complaint to the ILO and requests the Government to keep it informed of the outcome and to verify that no trade union leader is sanctioned for having submitted a complaint to the ILO.***

CASE NO. 2604

DEFINITIVE REPORT

**Complaint against the Government of Costa Rica  
presented by  
— the National Medical Union (UMN) and  
— the General Confederation of Workers (CGT)**

***Allegations: Opening of disciplinary proceedings against two trade union officials for matters related to the use of trade union leave and refusal of the authorities to maintain the trade union leave of a trade union official on the same terms as previously enjoyed***

672. The complaints are contained in communications of the National Medical Union (UMN) and the General Confederation of Workers (CGT) dated 3 and 4 October 2007, respectively. The Government sent its observations in communications dated 12 February and 8 May 2008.
673. Costa Rica has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and also the Workers' Representatives Convention, 1971 (No. 135).

**A. The complainants' allegations**

674. In its communication dated 3 October 2007, the UMN alleges that it is clearly established in its by-laws that the executive board shall be composed of 11 members. As it is a national trade union which is devoted in general terms to the examination and solution of the socio-economic problems of the entire national medical profession, it is clear, therefore, that its executive board should include representatives of the principal institutions which employ doctors in Costa Rica, as is the case of the Costa Rican Social Security Fund, the Ministry of Health and the National Insurance Institute (INS).
675. On 30 January 2007, the Executive President of the INS was informed of the result of the election to the executive board of the UMN on 12 January 2007 in which Dr Sonia Román González, a staff member of the INS, was re-elected as organization and trade union affairs secretary of the UMN. The basic purpose of that communication was to request the Executive President of the INS to grant leave with pay to Dr Sonia Román González from 1 March 2007 to 28 February 2009 on Wednesday each week from 7 a.m. to 4 p.m. and if that day was a holiday, the meeting would take place on the previous day.
676. It should be emphasized that Dr Sonia Román González has held the post of organization and trade union affairs secretary of the UMN since 1 February 1996, i.e. for 11 years, and that she is the only doctor who currently holds a position in the national executive board of the UMN. Furthermore, never before had any Executive President or any other official of the INS refused leave to Dr Sonia Román González to participate freely in meetings of the executive board on Wednesdays from 7 a.m. to 4 p.m.
677. The position of organization and trade union affairs secretary, like the rest, is extremely important for the proper functioning, efficiency and achievement of the objectives set out in the statutes of the trade union. Indeed, article 34bis of the statutes provides that the secretary's functions are as follows:

Article 34bis. The functions of the organization and trade union affairs secretary are as follows:

- (a) To attend promptly meetings of the executive board and the general assembly.
- (b) To prepare at the request of the executive board annual organizational plans for its functions and those of the organs of the Medical Union generally.

- (c) To coordinate relations and serve as a link between the executive board and the branch executive committees, attending meetings of the latter when so requested.
- (d) To prepare an annual plan of visits to the respective branch committees.
- (e) To coordinate relations and, if necessary, joint plans of the Medical Union with other organizations.
- (f) To coordinate activities between the executive board of the Medical Union and the College of Physicians and Surgeons in drawing up plans and carrying out activities designed to improve the socio-economic conditions of health professionals.
- (g) To prepare in conjunction with the information and publications secretary and the education and training secretary plans for trade union actions, for submission to the executive board for approval.

**678.** The UMN adds that it is an arbitrary, absurd, illegal, discriminatory act in contravention of the enshrined rights of gender equality, the right to organize and access to executive office or representation of trade unions, in response to which the INS Executive President replied in the following terms:

... With reference to your letter, reference above, requesting leave with pay for two years to allow Doctor Sonia Román to attend meetings, once a week all day, as organization and trade union affairs secretary of that trade union, I have to inform you that it is not possible to agree to this request.

The work of doctors in our INS-Salud Medical Complex is essential in strengthening the INS and improving the service to patients, for which reason it is not feasible to do without the services of Doctor Román ...

**679.** Despite the foregoing and in an act of good faith by the UMN, the Executive President of the INS was asked for a meeting to discuss the leave in question. The INS president writes as follows:

... this office would be agreeable to allowing Doctor Sonia Román leave to attend meetings of your executive board from 3 p.m., bearing in mind that meetings of the executive board of the National Insurance Institute take place from 4 p.m. once a week, a framework which it seems reasonable to apply in a situation such as the one here.

**680.** The UMN replied on 27 March 2007 that the argument put forward was fallacious and that it considered it to be a mark of disrespect of the union, since it only allowed Dr Román to participate in one hour of the meetings of the executive board. It seriously prejudiced the execution, decision, resolution and conduct of the highly sensitive matters addressed by the union.

**681.** The fact of the matter is that here too we are faced with an evident and manifestly discriminatory act against gender equality, since as Dr Sonia Román González is the only female doctor on the executive board, her participation was now totally impaired. The UMN considers that this is a violation of the ILO Conventions on freedom of association ratified by Costa Rica.

**682.** In its communication of 4 October 2007, the CGT of Costa Rica alleges that the office of the General Secretary of the CGT has been occupied since its foundation by Mr Luis Alberto Salas Sarkís, General Secretary of the National Insurance Institute Staff Union (UPINS), which is a trade union with 1,200 members. The CGT adds that UPINS has not given up the direct challenge to the authorities of the INS and the Government of the day, which since 2006 has headed the move against the opening up of the insurance monopoly, approval of the Insurance Market Regulation Act, and more recently against the approval of the Free Trade Agreement with the United States and Central America and its implementation agenda.

- 683.** This clear position of UPINS against the opening up of the insurance monopoly has led its executive and especially its General Secretary, Mr Luis Salas Sarkís, to denounce constantly the measures taken by the president of the INS executive board and the general manager who, in the last two years, have used the press, especially the newspaper *La Nación*, which is one of the most widely circulated nationally, to attack the trade union and especially the General Secretary. Finally, the trade union again denounced the INS administration for the possible use of public funds to encourage a “yes” to the Free Trade Agreement with the United States in a referendum of the Agreement to be held on 7 October, a complaint which is currently before the INS audit department and the Supreme Election Tribunal.
- 684.** It is essential that the Committee on Freedom of Association should know the background to the INS strategy against the union. The facts reported below, the complainant continues, are a violation of ILO Conventions Nos 87 and 98, although it is claimed that they should be seen as mere disciplinary proceedings involving the dismissal of two members of the UPINS executive, one of them the General Secretary.
- 685.** The CGT explains that the current collective agreement governs dismissals for engaging in trade union activities. The articles relevant to the present case are the following:

Article 2(a). The interpretation of this agreement, as indicated in article 180(c) shall be formulated in writing and the parties shall undertake to process it and reply within a maximum of 15 working days.

When agreement is reached on these matters, a copy shall be sent to the Ministry of Labour for legal effect.

In the absence of an agreement, mandatory conciliation shall be convened in the Ministry of Labour which shall act as conciliator.

Article 3. The parties shall include in this agreement, to the extent applicable, all the provisions contained in the Labour Code and related laws, and Conventions of the International Labour Organization duly ratified by Costa Rica, and the benefits not contrary to public order currently enjoyed by employees of the Institute under labour or administrative practices recognized in the institutional framework.

Article 171. For the purposes of its trade union management, the Institute shall grant the trade union the following leave with pay:

- (a) To allow a worker in each agency or fire-fighting unit located outside the Central Valley to attend all general assemblies of the union, giving notice to the respective management at least two weeks in advance, with a maximum of two assemblies per year.
- (b) To allow representation of workers belonging to the union who work in the branches of the Institute in the Central Valley, not more than 10 per cent of the workforce in the branch concerned, to attend all general assemblies convened by UPINS from 3 p.m., with a maximum of two assemblies per year.
- (c) To allow members of the executive board to attend ordinary meetings, once a week, from 12 noon. When more than one member of the UPINS executive board works in the same branch, this leave may not be used simultaneously, but on different days, except as agreed between the parties.
- (d) One day each week to allow one of the members of the UPINS executive board to carry out trade union work, for which purpose the union must inform the corresponding branch management two days in advance.
- (e) Full-time leave during the period for which they were elected for three members of the executive board when they are administrative staff.

Article 172. The Institute shall grant annually 150 working days leave, in total, to allow workers designated by the UPINS executive board, to engage in studies of trade union interest, seminars or similar activities.

For the purposes of this leave, the terms of this collective agreement on the grant of leave with pay shall apply. UPINS must provide the management of the Institute with information on the studies to be carried out, for decision by the competent organ. The benefit contemplated in this article may be extended to the interests of the Institution. When the circumstances justify, the management may grant leave with pay to members of the UPINS executive board, based on the terms of this agreement.

Article 173. The Institute shall allow the holding of meetings and visits of trade union representatives to the various workplaces and shall provide them with facilities to assist them in their functions provided that this does not interfere with the work and activity of the institution.

**686.** The CGT indicates that the collective agreement does not have conciliation, mediation and arbitration or regulatory mechanisms for the grant of trade union leave which establish specific voluntary or compulsory procedures, for complaints of any inconsistency or alleged irregularity in the grant of such leave, thus the only rules which govern the procedure are those contemplated in the aforementioned articles.

**687.** The only provision related to the interpretation and application of the collective agreement is found in paragraph (c) of article 180 related to the functions of the bipartite body, the Labour Relations Advisory Board. It states as follows:

Article 180. The functions of the labour relations advisory board, in addition to those set out in other articles of this agreement, are as follows:

- (a) To recommend conciliatory solutions in individual or collective problems that arise between the Institute and its workers.
- (b) To hear and decide on labour questions which the Institute or the union submit to it such as:
  1. Dismissals.
  2. Appointments, promotions, exchanges, transfers of posts, etc. which may be in contravention of this agreement.
  3. All questions which by their nature may affect the good order of labour relations in the institution.
  4. Cases of administrative proceedings (raised by the human resources management), on conclusion of the investigation, shall be heard by the board, unless the worker does not so wish.
- (c) To consider and make recommendations on matters related to the interpretation and application of this agreement, and to make such reports as may be requested in that regard, within a maximum of fifteen working days. In the absence of agreement as to interpretation of this agreement, the procedure to be followed subsequently shall be that set out in article 2(a) of this agreement.
- (d) To provide an opportunity to submit new evidence, in defence of and discharge of the facts alleged against them, to workers affected by any labour matter.

**688.** The CGT indicates that in a document with the title “The truth, a practice you don’t know, Mr Luis Salas”, on 27 September 2005, the education secretary of the UPINS executive board circulated publicly to all INS staff and management a request to the UPINS General Secretary concerning a series of matters related to the internal functioning of the union. Among the various points, the INS management stated:

... 4. In relation to the information that I asked you for concerning trade union leave with pay granted to UPINS officials this year, it was abundantly clear that it was absolutely vital to find out what actually happened. Is it not true Mr Salas Sarkís that in a meeting of the executive board there was acceptance by a member of the executive board that you indeed provided him with this type of leave for activities external to the organization? Arguing that it was compensation for the personal and working time which that person had given to the

organization, can you do this Mr Luis Salas? Would you by this action be in breach of the Internal Control Act? That is all I need to know to make a formal complaint, but I have not been able to do so because you refused to provide me with the requested information.

- 689.** In a letter, ref. UP-148-2005, of 25 October 2006, Mr Luis Salas replied to Mr Willy Montero Bermúdez (INS director), attaching a list of all leave requested. He indicates in this respect: "... with respect to the supporting documents, we enclose those which have been found, because very often those who attend an activity are given the invitation to inform them of the details of the event and they do not return them".
- 690.** Under the umbrella of the so-called Internal Control Act, the INS management filed a complaint with the audit department of the INS. Under the Act, both the complainant and the content of the complaint are protected by the principle of confidentiality, thus the scope of the document is not known. However, in a letter ref. DA-2016-2006 of 12 September 2006, the audit department investigated the complaint to determine "... whether Ms Alicia Vargas Obando used leave granted to her for activities of trade union nature and institutional interest for personal activities". According to the first page of the final report of the INS audit department, the general objective of the study is "to provide the Administration with the necessary evidence to allow it, by an administrative proceeding, to determine the truth of the facts reported in the complaint concerning the apparent misuse of trade union leave under the umbrella of the collective agreement by Ms Alicia Vargas Obando".
- 691.** During the investigation, the INS audit department obtained access to the minutes of the ordinary meetings of the UPINS and the immigration service records relating to the women's secretary, Ms Alicia Vargas Obando, since without the express authorization of Ms Alicia Vargas Obando or any court order, representatives of the audit department requested the Directorate-General for Migration and Immigration for access to the certified register of entries and exits from the country. In addition, they had access to that official's leave and holiday record, and concluded that Ms Alicia Vargas Obando was travelling in Nicaragua on the dates when she was given leave for trade union activities. As part of the investigation process, the audit department interviewed Mr Willy Montero Bermúdez and Ms Patricia Monge Rojas who on that date were UPINS officials. Both stated that Mr Luis Salas, as General Secretary of UPINS, was the person who granted trade union leave to the official, Ms Alicia Vargas Obando. They also said that she used the leave to travel to Nicaragua to visit a boyfriend.
- 692.** In a letter ref. AU-0867-2006 of 29 September 2006, the audit department requested Mr Luis Salas Sarkís, the General Secretary of UPINS, for information related to the minutes of the meeting of the executive board which dealt with trade union leave granted to members of the board, and to provide explanations of the procedure used to grant leave and the person responsible for granting it. In addition, he was asked for details of the documents in support of that leave such as invitations, programmes of activities, reports submitted to the General Secretary, etc., all, as it stated "in order to verify the proper use of that leave with pay". As expressly indicated, at the date of the final audit report, the General Secretary of UPINS has not provided the requested information, in respect of which he had asked for an extension of the deadline, which, although allowed him, was not finally taken into account.
- 693.** Finally, the INS audit department concluded that the official, Ms Alicia Vargas Obando, had left the country on 30 July 2004 for Nicaragua, using the leave granted by UPINS under article 173 of the collective agreement in force at the time. In addition, on 28 September, she also left the country, under the provisions of article 171(d) and on 29 July 2005, under article 172. Thus if she had indeed been granted trade union leave in those three cases, she was "in violation of the provisions of the IN-UPINS collective agreement, articles 88(m) and 89(a) respectively".

- 694.** Although Mr Luis Salas Sarkís did not so state, based on the statement of Mr Willy Montero and Ms Patricia Monge, it was taken as proven that the General Secretary of UPINS knew of the purpose and use of the leave and despite that submitted to the management the authorizations for Ms Alicia Vargas Obando, who would use them for personal activities unrelated to management of the union or institutional interests. Finally, Mr Salas Sarkís was found to be in breach of articles 211(1) to 213 of the General Public Administration Act, article 110 of the National Finance and Budget Act and article 13 of the Internal Control Act. He was therefore accused of embezzlement under article 354 of the Criminal Code. As regards the collective agreement, he was accused of violating articles 88, 26 and 172. It was also recommended that a disciplinary panel should be formed to initiate the procedure to determine the administrative liability of Mr Salas Sarkís and Ms Alicia Vargas Obando. Although it makes no mention of the ILO Conventions or the provisions of the Labour Code on freedom of association, the audit report cites in its final part an extract of judgement No. 233-95 of the Constitutional Court (concerning the limitation of trade union rights) whereby the trade union assumes, it is understood, that trade union rights do not apply to the two officials.
- 695.** At a time when the results of the audit report had not yet been notified, the newspaper *La Nación* published on page 10A of 10 November 2006, a news item under the headline “INS employee made personal trips while on trade union leave”. In the article, which expressly quotes extracts from the audit report, it is stated that the official concerned and Mr Luis Salas Sarkís will be summoned to a disciplinary panel to determine their liability.
- 696.** Although the Internal Control Act prohibits public disclosure of any part of the report, it is clear that it was conveyed directly to the offices of the daily newspaper *La Nación* by the INS authorities, since on the date when the news item was published, neither UPINS nor the officials Ms Vargas Obando and Mr Salas Sarkís knew of it. On the contrary, it was precisely a well-known journalist who wrote the article and showed Mr Salas Sarkís the report telling him that disciplinary proceedings would begin immediately.
- 697.** Based on the results of the INS internal audit report, the manager, Mr Luis Ramírez Ramírez, appointed three lawyers, all civil servants in the legal department as members of a disciplinary panel charged with determining the liability of Ms Alicia Obando and Mr Luis Salas.
- 698.** Mr Luis Salas Sarkís submitted to claims of nullity: (1) alleging failure to honour the extension of the deadline initially granted for submission of the requested information about the leave periods, since the final report was submitted to the Executive President of the INS before the deadline expired; and (2) violation of the principle of confidentiality, by virtue of the access and publication by the newspaper *La Nación* of the content of the report. However, both claims for nullity were declared inadmissible. He also requested evidence to assist the judgement, requesting that Mr Freddy Sandí, a member of the UPINS honour and disciplinary tribunal should be called to give evidence, since he sought to show that the facts reported by the former INS executive were false and had never been brought to the attention of the union’s internal bodies. However, the disciplinary panel refused the request, deciding, based on the General Public Administration Act and various opinions of the National Audit Office, that Mr Luis Salas had submitted his statement out of time.

In accordance with article 309(1) of the General Public Administration Act, this disciplinary panel observes that the request of Mr Luis Salas Sarkís is out of time ... as when he requested it, on 13 June 2007, the opportunity had already lapsed since the hearing of evidence stage of the proceeding had already ended ... Thus, the request for evidence to assist the judgment, consisting of the statement of Mr Freddy Sandí filed by Mr Luis Salas Sarkís is refused on the grounds that it is out of time.

Likewise, the application, based on the fact that INS was already aware of the facts on 25 October 2005 when the then executive Mr Willy Montero published them in a communication which reached the Executive President of the institution, was declared time-barred.

- 699.** Mr Luis Salas Sarkís stated in his defence that he rejected the charges, because the leave had been used to allow the official Ms Alicia Vargas to gather and bring back information from Nicaragua, a country to which she travelled regularly. As evidence, he produced a note sent by the General Secretary of the “Enrique Schmidt Cuadra” Federation of Communications and Postal Workers who confirmed that Ms Alicia Vargas had met with them in Nicaragua on 30 July 2004 and 28 and 29 July 2005. In addition, he indicated that the information gathered by Ms Alicia Vargas concerned the Dominican Republic–Central America–United States Free Trade Agreement and other matters of trade union interest. He also produced a copy of a legal action against Mr Willy Montero Bermúdez for defamation. Finally, he indicated that the testimony of Ms Patricia Monge Rojas and Mr Willy Montero Bermúdez was self-serving because when they resigned they were at odds with Mr Sarkís and the other members of the executive of this organization because of their constant questioning of his work as General Secretary of UPINS and the other members of the board. He also reiterated his previous explanation, when he had clarified a material error made when replying to the audit department, specifically in letter ref. UP-123-2006 of 9 October 2006, in which he incorrectly stated that on 30 July 2004 the leave had been used by Ms Alicia Vargas to attend a formal meeting on the elimination of child labour with the CGT, when, in fact, it was to collect information in Nicaragua. As he stated, the error occurred in letter No. UPINS-0010-2006 of 23 January 2006, where leave was requested on that date but the reason was incorrectly stated, for which reason the material error was corrected.
- 700.** Ms Alicia Vargas who reiterated the trade union character of the three periods of leave granted also indicated that the INS manager, Mr Luis Angel Ramírez Ramírez, who had ordered the opening of the administrative proceedings and who acts as the appeal organ in the proceeding and the one who must finally decide it, lacked authority since prior to the start of the proceedings, as a member of the UPINS executive, she had filed a private criminal prosecution against him for defamation, which was heard in the First Circuit Criminal Court of San José and finally, Mr Angel Ramírez Ramírez was protected on grounds of challenge under paragraph (f) of article 55 of the Criminal Procedures Code and the Civil Procedures Code.
- 701.** During the investigation conducted by the disciplinary panel appointed by the INS authorities, Mr Willy Montero Bermúdez, Ms Patricia Monge Rojas (who at that time was not even an INS official) both former UPINS officials, Mr Rolando Salazar Porras, Deputy General Secretary, Ms Mayela Gómez Alfaro, former UPINS trade union relations secretary, Mr Edwin Granados Ríos, responsible for preparing the audit report and the accused, Mr Luis Salas Sarkís and Ms Alicia Vargas Obando were summoned to appear. During the hearing, the members of the disciplinary panel questioned Mr Luis Salas Sarkís on aspects such as what specific information on the Free Trade Agreement (FTA) had been gathered by the official Ms Alicia Vargas on her trip to Nicaragua, whether or not on the date she travelled the FTA had been approved in Nicaragua, whether or not that information had been known and discussed in the UPINS executive, whom the official had met in Nicaragua, whether she had any emotional relationship with anyone living in that country, how she collected the information in Nicaragua, where the meetings or interviews with trade union representatives in Nicaragua were held, who coordinated those meetings or interviews and since when, whether the UPINS had incurred any expense other than the leave for the trips made, where and how long the meeting lasted in which the official Ms Vargas gave him the information obtained on her trip to Nicaragua. In addition, he was asked whether the then official Ms Patricia Monge Rojas had informed him of any

telephone call by Ms Alicia Vargas on the use of leave for personal purposes, and whether Mr Willy Montero has confronted the official Ms Vargas at any meeting of the executive board.

**702.** In addition, in the statement by Mr Edwin Granados Ríos, who prepared the audit report, and stated that he had been surprised by the news item in the newspaper *La Nación*, he admitted that he had participated as a candidate in the elections to elect the UPINS executive board on several occasions, on a manifesto opposing Mr Luis Salas Sarkís.

**703.** For their part, the witnesses Mr Rolando Salazar Porrás and Ms Mayela Gómez Alfaro, both members of the UPINS executive board, contradicted in their statement that of Mr Willy Montero and Patricia Monge, indicating, moreover, the internal conflict in the union executive with the latter two. They also indicated the case of the witness Ms Gómez Alfaro, on internal matters of the organization such as:

1. Tell me whether or not it is true that when travel to official courses with an external invitation was approved and leave was requested under article 26, whether or not the union required a written report.

R. Yes.

2. If a member of the executive travelled on his own account aboard paying his own expenses for his personal affairs, should he submit a report?

R. No.

Finally, when Ms Mayela Gómez was asked if, during the time in which she was on the UPINS board, she had been aware that the institution had questioned some trade union leave, she replied that she had not (apparently that was the only occasion on which trade union leave had been questioned).

**704.** Finally, by decision No. 16-06 at 9 a.m. on 28 August 2007, the disciplinary panel in the administrative proceeding indicated that the evidence of Mr Willy Montero and Ms Patricia Monge Rojas (who were witnesses present at the statements by Ms Alicia Vargas Obando concerning the error attributed to Mr Luis Salas Sarkís) shows that the periods of leave granted by the latter to the executive Ms Alicia Vargas was not for her to collect information on the FTA in Nicaragua, but on the contrary, he granted them knowing that she would use them for matters unrelated to trade union business and unrelated to institutional interests. The decision states:

In this regard, this disciplinary panel does not believe that a trade union representative who travels to another country supposedly to obtain information of importance to the trade union to which she belongs on a subject as highly complex and broad as a free trade agreement should be asked to give only an oral report, since that breaks with the most basic rules of control. It does not escape the consideration of this disciplinary panel that logic dictates that when a person is charged with gathering information on any subject, let alone such a complex one, the normal thing is for the findings, and all the other reasons and justification for the travel, to be set out in writing so that those concerned, in this case the trade union, can have access at any time to that information. Thus the argument of Mr Luis Salas it is not logical let alone credible. This, combined with the incontrovertible fact that there is no documentation whatsoever which contains the information supposedly collected by Alicia Vargas in Nicaragua on her trips in July 2004 and July 2005, as acknowledged by both Mr Luis Salas and Mrs Alicia Vargas, is a clear indication that on her trips, the latter did not gather or bring back information on the Free Trade Agreement as Mr Luis Salas claims, let alone that he asked her to carry out research into the matter ...

Another indication found by this disciplinary panel is the significantly secretive way in which Mr Luis Salas and Mrs Alicia Vargas handled everything related to the latter's trips to Nicaragua in July 2004 and July 2005 using trade union leave. Evidence of this is that indicated by Mr Luis Salas on page 293, mentioning that Alicia Vargas passed on the

information obtained in Nicaragua during her trips in July 2004 and July 2005 only to him, with the objective, according to him, of discretion, given that on page 291 Mr Salas had already stated that the information supposedly brought back by Alicia was not discussed or known within the UPINS board.

This clandestine nature, secrecy and reserve with which the travel of Mrs Alicia Vargas Obando to Nicaragua in July 2004 and July 2005 took place, are clear and convincing evidence that Mrs Alicia Vargas did not use the leave periods on 30 July in the first instance, and 28 and 29 July in the second for matters of trade union or institutional interest but on strictly personal matters, and that Mr Luis Salas Sarkís granted her those periods of leave knowing that that would be the cause, given that the latter's solicitude throughout has been to justify his treatment of those leave periods with illogical and irrational arguments, and the evident lack of control and absence of accounting for and reporting of results by Alicia Vargas concerning the use of that leave to the UPINS board. Equally clear and convincing is the total lack of documentation to support the information supposedly collected by Mrs Vargas.

... In the light of the foregoing and in accordance with the evidence in the case, including the precise and consistent serious indications found, this disciplinary panel finds that Luis Salas Sarkís abused his position as General Secretary of the UPINS trade union by deception of the administration of the National Insurance Institute in submitting to the management of the National Insurance Institute trade union leave with pay paid by that institution for Mrs Alicia Vargas Obando, knowing that the leave would not be used for trade union business let alone matters of institutional interest, but for personal affairs.

- 705.** With regard to the trade union character of Mr Luis Salas' action, the disciplinary panel indicated that in interpreting the scope of ILO Convention No. 98, as indicated by the Committee on Freedom of Association, when a trade union official engages in culpable acts prejudicial to his employer (even when those acts have been committed in the exercise of his trade union office) he is liable to sanction including dismissal. Finally, it cites an extract of judgement No. 571-96 of the Constitutional Court, which states: "... in other words, although it is true that under trade unions rights, both trade union members and their representatives may not be subject to dismissal, transfer or any other decision which constitutes a deterioration in their conditions of work on the grounds of their trade union membership, this does not mean that by due process, which condition is satisfied in this case, they may not be dismissed on the grounds of justified dismissal laid down in labour legislation".
- 706.** According to the disciplinary panel, the action of Mr Luis Salas Sarkís constitutes loss of trust and thus he may be dismissed without any liability of the employer.
- 707.** Under the collective agreement, once the disciplinary panel recommends the sanction, the worker concerned may appeal to the Labour Relations Advisory Board. This board is a joint bipartite body which issues a final recommendation concerning the person who is liable to sanction.
- 708.** On 20 September 2007, the Labour Relations Advisory Board met to consider both proposed dismissals. On 27 September, by decision No. 9, using the same arguments as the members of the disciplinary panel, the employer's representative accepted its recommendation, reiterating the application for dismissal of both staff members without liability of the employer. Despite the fact that joint bipartite bodies are forums for negotiation and dialogue which seek to reconcile the positions of the employer and trade union, in the case of the trade unionists Mr Salas Sarkís and Ms Vargas Obando, the INS employer's representative on the advisory board opposed recommending an "alternative" sanction which would avoid the dismissal of the two staff members, and on the contrary, accepted each and every one of the judgements of the disciplinary panel, recommending the dismissal of both employees. For its part, the trade union representative distanced himself from the recommendation and rejected the report of the disciplinary panel, and insisted that the case be stayed:

The trade union party recommends rejecting the report of the disciplinary panel and ordering that the case should be stayed, because it had been proved that the leave periods were justified by activities of trade union interest, which is shown by the evidence of the Enrique Schmidt Federation. They further indicate that it is clear that the recommendation is not dismissal for just cause but a clear case of trade union persecution which violates trade union rights.

- 709.** As the Labour Relations Advisory Board does not have any procedure for breaking a deadlock or compulsory arbitration, it must send both recommendations to whoever makes the final decision, and precisely because both staff members challenged the INS general manager and the disciplinary panel admitted that challenge, the final decision fell to the executive board of the INS, which must take the decision in the following days.
- 710.** The UPINS trade union charter establishes a disciplinary regime to sanction offences by its members which states expressly:

*Chapter IV. Disciplinary regime*

Article 10. Members of the union who commit offences shall be sanctioned by the following disciplinary measures, according to the seriousness of the offence:

- (a) oral reprimand;
- (b) written reprimand;
- (c) suspension, up to one year, of trade union rights;
- (d) removal from office or tasks performed in the union;
- (e) permanent expulsion from the union.

There is an honour and disciplinary tribunal responsible for dealing with accusations of alleged offences committed by members of the union:

*Article 11. Honour and Disciplinary Tribunal*

The General Assembly at its regular session every two years must appoint an honour and disciplinary tribunal composed of three members who must possess the highest qualities of honour, discipline and integrity.

This tribunal is responsible for hearing disciplinary cases submitted for its consideration and, among other things, recommending the sanction applicable in the case, if appropriate, within a period of 30 days which may be extended to a maximum of 60 days and to request the executive to convene the assembly within not more than 15 days for submission of the examination and recommendations.

The members of the tribunal must have the willingness and time necessary to deal with matters within their competence.

Article 17. The application of the disciplinary measures set out in articles 12 and 214 of these Statutes shall be strictly a matter for consideration by the disciplinary panel and thus when a member of the executive board commits one of the offences indicated in this articles, the accusation shall be submitted to that body which shall refer the case to the Honour and Disciplinary Tribunal.

Article 18. To suspend, remove from office or expel a member of the union, the executive board through the general secretary shall convene the Honour and Disciplinary Tribunal to which it shall refer the accusation in question.

The Honour and Disciplinary Tribunal must summon the accused member to read him the charges against him, hear the defence by the accused and the witnesses he presents, issue a judgement acquitting or convicting the accused and draw up the necessary minute in the book established for such cases. On receiving the judgement, the executive board or the extraordinary general assembly convened for the purpose shall make a final decision. The judgement must be ready in 30 days.

It is interesting to note that the accuser, the former trade union official, Mr Willy Montero Bermúdez, when asked during his appearance before the executive board, said that he had not had recourse to the above tribunal because it could not be trusted:

12. Why did you not submit this accusation to the trade union ethical tribunal?

R. Because I feel that the ethical committee never reached a decision, or even meet. The chairman of the committee, Mr. Freddy Sandí said that he did not have time, and another reason is that the committee could not be trusted.

And on this point, as indicated above, while Mr Luis Salas Sarkís requested as evidence that Mr Freddy Sandí should be summoned to give evidence, the disciplinary panel decided that the application was inadmissible because it was time-barred.

**711.** The CGT considers that the alleged facts constitute clear interference in trade union activity, in violation of Conventions Nos 87, 98, 135 and 151 of the International Labour Organization.

## **B. The Government's reply**

**712.** In its communication dated 12 February 2008, the Government refers to the allegations concerning the disciplinary proceedings against two members of the executive board of the UPINS.

**713.** The Government indicates that the purpose of all administrative proceedings of this kind is to determine the truth of the matter (alleged trade union persecution of Mr Luis Salas Sarkís, General Secretary, and Ms Alicia Vargas Obando, women's secretary, both of UPINS) and the measures involved in the corresponding investigation. The Government submits the report of the Executive President of the INS and states that it accepts it as its own.

### ***Report of the Executive President of the INS***

**714.** According to this report, the INS administration has never used or in any way advocated practices seeking to curtail freedom of association of the trade union representatives of INS employees, and trade unionism in general and the provisions of collective agreements governing trade union leave to which members of UPINS are entitled are proof that the Institute has supported and protected trade union rights. Indeed, it has at all times respected all the guarantees and rights laid down in our legislation, and the ILO Conventions.

**715.** It is not true that the investigation carried out to determine the truth of the matter by opening an "administrative proceeding" is a strategy aimed against the workers' union and much less against Mr Salas Sarkís, but the result of the reasonable obligation of the administration to comply with the provisions of the Costa Rican law on this subject, namely, the General Public Administration Act, the Internal Control Act, the Corruption and Illicit Enrichment Act, and the very collective agreement which the complainant organization offers as evidence, and which must be applied in the face of the irregular acts committed, as duly shown, by both staff members. As evidence of this, the investigation is based on a factual report by the internal audit department of the institution, whose investigations are conducted with respect to the actions of any civil servant whether or not a trade union official.

**716.** The Constitutional Court has made it clear in this case that recourse to protection (*amparo*) against administrative proceedings for alleged trade union persecution is not, in general,

the proper route as since 1993 there has been an administrative procedure, the results of which can be challenged if necessary in the courts.

- 717.** Contrary to the assertions of the appellant, with respect to violation of due process, it should be noted that in accordance with the case law of the Constitutional Court, a correct understanding of the character and principles of due process requires that prior to the opening of an administrative proceeding, on occasion it is essential to carry out a series of preliminary inquiries, a prior investigation, in order not only to determine the person who may be guilty of the offence under investigation, but also to determine the need to continue with the formalities of the proceedings where appropriate. Thus it cannot be held to be in violation of the fundamental rights of the person covered by *amparo* that he has not been held formally as a party to the investigation, since it will be in the event that an administrative proceeding is actually commenced against him that due process must be respected and thus his right to defence.
- 718.** With respect to the complainant's disagreement in asserting that there was a lack of a clear, precise and justified accusation concerning the attributed facts, the Constitutional Court considered that it was clear from the copy of the initial report of the proceeding that there was an indication of the matters subject to that investigation and thus the administration had instituted disciplinary proceedings against him, in order to investigate the substance of the offences of which he was accused, which were stated verbatim as: "(1) submitting to the management of the INS trade union leave with pay paid by that institution for Ms Alicia Vargas Obando, knowing that the leave would not be used for trade union business or matters of institutional interest". The abovementioned judgement contains evidence of the manner, time and place of the facts attributed to the appellant, refers to the anomalies, which are made available to the appellant to exercise his right of defence, and provides such evidence of discharge as it considers appropriate. The determination of the circumstances of manner, time and place of the alleged conduct of the appellant are, precisely, the subject of the investigation, such that instead of depriving the appellant of a defence, the proceedings have the opposite effect, i.e. he participates actively in the investigation of the complaints.
- 719.** On the claim by the appellant that he requested the newspaper *La Nación* on 14 November 2006 to correct an item of news, which in his opinion infringed his rights, in that it published an article which was largely untrue on Friday, 10 November 2006, although without achieving a satisfactory outcome to his request, it should be mentioned that in a note "INS employee made personal trips while on trade union leave" the newspaper *La Nación* made representations. However, these referred to what was indicated in the internal audit report No. IA-070-2006 of the INS, for which reason the facts that were published were objective in character, and, moreover, it was not evident that the content was inexact or malicious nor that it caused injury to the appellant. Thus the appellant may do what is necessary at the opportune moment to exercise his rights of defence, such that it is necessary to reject the matter as far as this aspect is concerned without further consideration.
- 720.** In addition, both Mr Luis Salas and Ms. Alicia Vargas filed actions for *amparo* against the final decision handed down by the INS disciplinary board which approved their dismissal, and in the case of Ms Alicia Vargas Obando, the Constitutional Court again declared it inadmissible. The case of Mr Salas is pending in the Constitutional Court.
- 721.** As regards the malicious allegation by the complainant with regard to the intervention of the manager, Mr Luis Ramírez, in the administrative proceeding, it should be clarified that the manager did not interfere in the proceeding. Mr Ramírez formally barred himself from hearing matters related to the proceeding as shown in the documents submitted as evidence.

- 722.** The employer's side indicated to the Constitutional Court that it was true that Mr Luis Salas was an employee of the INS, but as an active member of the UPINS union, he was occupied full time in dealing with union matters as General Secretary, such that the assessment of his activities as a civil servant was only in that context.
- 723.** The employer's side is not aware of UPINS' participation in struggles at national level and states that it is absolutely false that there is any discomfort with its position with respect to the FTA. On the contrary, discussions have taken place in the INS concerning the CAFTA-DR in which efforts focused on implementing the plan for integrated competitiveness (PIC) the purpose of which is to strengthen the INS. This plan has never been opposed by the trade union because we are in full agreement on its purpose. The administration has always promoted the project, stating expressly in various forums that the INS would be strengthened irrespective of the opening or otherwise of the insurance market, because it was clearly necessary to convert the INS into a competitive public institution. The appellant's assertion concerning the unease of senior civil servants has no basis and they are subjective assessments which seek to distort the facts and deny the existence of proven disciplinary offences which led the Labour Relations Advisory Board to uphold the recommendation of dismissal of the disciplinary panel. It is not true that there is trade union persecution against him.
- 724.** Mr Salas' problems with the manager were public knowledge but have nothing whatsoever to do with this case. Indeed, as shown in the evidence, Mr Salas filed a challenge in the aforementioned proceedings so that the manager would not participate in it. This challenge was accepted by the disciplinary panel in a decision in session No. 8829, article III, of 30 March 2007.
- 725.** The allegation that this is a matter of trade union persecution is not true. The proceedings began with a complaint by the members of the UPINS executive board itself, who forced the internal audit department to carry out an investigation into the anomalous use of trade union leave by the UPINS General Secretary in favour of Ms Alicia Vargas. It was the internal audit department which ordered the investigation. From the findings of the disciplinary panel in the proceeding, it is clear that the matters reported by the internal audit were being investigated and that the sanction was recommended after finding that the offences were fully supported by the findings in the report. The appellant seeks to evade his disciplinary liability, sheltering behind trade union rights which are not applicable when extremely serious offences against the legal order are found to have been committed, which in this case also involved public funds.
- 726.** The Constitutional Court found that the principles of due process had not been violated in the proceedings. The offence was shown in reports, and the findings were consistent with the matters reported by members of the UPINS executive board, as set out in internal audit report No. IA-070-2006 and assessment of them by the disciplinary panel and which were confirmed by the labour relations board.
- 727.** It was shown comprehensively in documentary and testimonial evidence that the leave was granted for private activities, not related to trade union business of institutional interest, and the public purpose of that leave was not satisfied. It is evident that it violates the spirit and purpose of trade union leave and proves above all that the leave was not granted on the terms authorized by articles 172 or 173 of the collective agreement.
- 728.** In the case of the union official, the employer's side considers that while he was assisted by a right of trade union protection to ensure his security of tenure, the fact is that this right did not exempt him from imposition of the disciplinary sanctions applicable in law for violation of the legal order, when in the light of due process the commission of a disciplinary offence has been proved, as explained by the disciplinary panel.

- 729.** It is not true that the dismissal has already been enforced. It must be clarified that, as of today, no dismissal of the official has been decided, since the body competent to decide the sanction is the executive board, which must assess the arguments of the disciplinary panel and labour relations board to determine whether or not to impose the sanction of dismissal recommended by both bodies. The body responsible for taking the decision considered the matter for the first time on Monday, 8 October 2007. From 8 October 2007, the executive board would have one month to issue the final decision, which has not been issued to date. There is no state of lack of defence which would give rise to failure to respect the appellant's rights and it is absolutely untrue that the decisions of the disciplinary panel and the employer's side have no basis.
- 730.** As shown by the evidence presented, this is not a matter protected by trade union rights nor a matter of political differences as the appellant maliciously tried to suggest in order to evade his disciplinary responsibility.
- 731.** It is clearly shown in the proceedings that the offences alleged by the disciplinary panel were amply proved, since in fact the following was proved: in the case of the leave on 30 July 2004, the justification for the leave was nullified in order to make a visit to Nicaragua instead of attending an event of the CGT in Costa Rica. We must also point out that Mr Salas Sarkís approved this leave for Ms Vargas, being himself the representative of the CGT, and never reported her failure to attend the activity. On the contrary, during the proceedings he sought to conceal the offence by providing evidence, the falsity of which was demonstrated, by certifications of the Office of Migration and testimony of the parties, as well as the contradictions in his statement. Failure to comply with the legislation involving wrongful use of the leave was proved, as the immigration certificate showed that Ms Vargas was not in the country and the leave was granted for private purposes. As regards the leave on 28 and 29 July, despite the fact that the appellant indicates that he authorized the leave so that Ms Vargas could attend trade union activities on 28 and 29 July, this assertion was shown in the proceedings to be false, as the immigration document shows that Ms Vargas crossed the Peñas Blancas border on 30 July 2004 and 28 July 2005, thus she could not possibly have had the meeting she claims on that date, given that she was hours away from the place. Given that Ms Vargas and Mr Salas Sarkís himself say that the meeting was a lunch, that event could not have taken place because of her trip. In any case, the version that the meeting was a private lunch also contradicts the note of the abovementioned federation which claims that they were seminars (the subject of which it does not mention). Another contradiction is the fact that the supposed proof (which we do not recognize as it is merely a photocopy) says that the meetings were seminars, while the appellant alleges that they were to gather information on the FTA. In his testimony, the appellant states that he does not remember what kind of information it was. We must add that there are separate testimonies which indicate that Mr Salas knew that Ms Vargas regularly used trade union leave to visit her partner in Nicaragua and not only authorized that leave but also accepted that she did not even submit reports of her travel.
- 732.** For his part, the chairperson of the disciplinary panel in the administrative proceedings submitted a report to the Constitutional Court along the lines which have just been set out and according to which the internal audit department of the INS is independent of the administration of the Institute, as laid down in articles 21, 24 and 25 of the General Internal Audit Act. The internal audit department of the INS included Mr Salas Sarkís as one of the persons "possibly guilty" of the acts alleged in the report and issued instructions for the formation of a disciplinary panel to initiate the administrative proceeding on the merits in order to determine any potential administrative liability incumbent on the three civil servants, among them Mr Salas Sarkís. It found that the latter was aware of the purpose and unlawful use of the trade union leave with pay paid by the INS which he granted to Ms Alicia Vargas Obando. Despite that, he submitted the leave applications to

the administration of the INS. As can be appreciated, the opening and conduct of the administrative proceeding against Mr Luis Salas Sarkís was the result of irregularities determined in the first instance by the internal audit department, which forced the administration to act on the findings of the audit body under the Internal Control Act.

- 733.** In a document submitted on 2 March 2007, Mr Luis Salas Sarkís filed an application for nullity of the decision of INS manager Mr Luis Ramírez Ramírez of 8 January 2007 in which, among other things, he alleges that the latter must excuse himself and not make a decision due to the complaint that Mr Salas had filed against Mr Ramírez. This was the first time that Mr Salas alleged an impediment with respect to the manager hearing proceeding No. 16-06. Based on this application for nullity, the disciplinary panel, in a decision at 10.30 a.m. on 5 March 2007 suspended the private oral hearing which had previously been announced and referred the application for nullity to the management to resolve, thus it is not true that that body failed to admit this as Mr Salas indicated in his application for *amparo*.
- 734.** Also based on the foregoing, the executive board of the INS assumed the function of decision-making body in the administrative proceedings (instead of Mr Salas) and confirmed everything done by the disciplinary panel and the management in a final decision No. III of 30 March 2007 of this collegiate body.
- 735.** It should be reiterated that it was the internal audit department of the INS which in the first instance indicated Mr Salas Sarkís as possibly guilty of a disciplinary offence and gave instructions for the formation of a disciplinary panel to initiate an administrative proceeding to determine any responsibility of Mr Salas, thus there was no violation of the right to impartiality as alleged by Mr Salas in his appeal.
- 736.** Contrary to what Mr Salas claims, his offence was stated clearly, precisely and with supporting evidence, as is shown from the proceeding and the decision of the Constitutional Court.
- 737.** With respect to the proportionality of the sanction, this too is merely a matter of legality, thus the applicant cannot claim that it was heard in a summary proceeding such as the one before this Constitutional Court. However, it should be indicated that the proportionality between the offence committed and the recommended sanction is more than justified by the following arguments: as regards the graduated nature of the sanction, although it is true that article 90 of the collective agreement of the INS indicates that sanctions must be graduated, starting with an oral or written reprimand from the chief, it also states that in the case of a serious offence, the management may impose such sanction as it sees fit, without being subject to the progression indicated. With regard to time-barring, in this case it did not apply, as indicated in the decision on the application for exception from the time-bar filed by Mr Salas.
- 738.** Article 163 of the INS collective agreement, referring to members of the union, indicates that during their period of office, they may not be dismissed, except for just cause. Logically, this means that if the rule establishes the possibility of sanctioning a trade union member in order to establish his responsibility, an administrative proceeding must be held, otherwise we would be faced with an immunity not established in labour legislation.
- 739.** As regards the supposed violation of the right to impartiality during the proceeding, the appellant is not in the right, since in the face of the action of Mr Salas Sarkís requesting barring of the manager from the proceeding, this application was accepted by the executive board in its decision of 30 March 2007.

740. It is not true that the final decision issued by the disciplinary panel in the administrative proceeding and that given by the Labour Relations Advisory Board are inconsistent with the charges levelled. The appellant is wrong to state that there is an inconsistency because those decisions concern contraventions of legislation and regulations which were not alleged in the initial indictment.
741. It is logical that for the commission of an offence to exist, there must first be a law which defines that act as unlawful, thus the claim by the appellant that he could be charged with an offence without that implicitly meaning a violation of the law would be to decide contrary to the law.
742. As has been shown, under the decision issued by the disciplinary panel, the grounds set out are based on evidence gathered, with ample analysis of that evidence so as to allow a clear and precise conclusion concerning the responsibility of the appellant for the commission of the offence. Thus, it is not true that the principle was violated.
743. As regards establishing whether the application of a sanction is proportionate to the offence committed, a series of relevant aspects need to be considered and not just the offence pure and simple. Otherwise, the establishment and application of the sanction would be merely subjective. In the present case, the offence committed not only involves transgression of the law as such, but also loss to the public purse, in granting leave with pay, granting rights contemplated in the collective agreement for purposes other than those established therein.
744. Likewise, the appellant is not correct in claiming that the application of sanctions must be progressive, since what should prevail is the assessment of the abovementioned aspects, and the seriousness of the offence, and it would be incongruous if the administration was obliged to apply a progressive scale of sanctions for all types of offence, irrespective of their seriousness.
745. As regards the arguments put forward by Mr Luis Salas Sarkís, it is important to note that the time-bar of the power of administrative sanction is interrupted with continuous effect with the notification of the act of opening of the administrative disciplinary proceeding. Thus, it cannot be claimed, as the appellant seeks to do, that this power is time-barred during the course of the proceedings.
746. A report signed by the chairperson of the disciplinary panel in the proceedings contained a detailed chronology of the proceeding which shows that the time used to resolve it was in accordance with the law and the stages, and the time is reasonable. Furthermore, current legislation does not establish any particular time bar in relation to different offences but contains overall provisions on the time to initiate the administrative disciplinary proceedings once the administration is aware of the facts.
747. It is not true that the senior management was aware of the facts from 25 October 2005, since when the internal audit department was informed of the supposed offences as a consequence of the complaint submitted by the civil servant Mr Willy Montero, it being the case that it was only when the audit report was concluded that the administration had precise knowledge of the facts.
748. The appellant alleges that his rights were violated because the final decision was based on the testimony of two people who were members of the UPINS executive, and that they disliked him, insinuating in this way that their testimony lacked validity because it was a kind of “revenge”. However, from the documents making up the administrative proceeding, it cannot be inferred that Mr Salas was able to invalidate that testimony or show the “bad faith” of the witnesses.

749. On the contrary, the evidence reviewed in support of the final decision includes the statement of Mr Rolando Salazar Porras, the current Deputy General Secretary of UPINS, i.e. a colleague of the accused, who stated "... Luis told me that Alicia was going to Nicaragua for personal reasons and would take advantage of the trip to obtain information ...".
750. The decision on the appeal for *amparo* filed by Mr Luis Salas Sarkís against the final decision by the executive board of the Institute, in which his dismissal was approved in accordance with the proven facts against him, is still pending, and we will be happy to keep you informed in due course of progress in the case and its final outcome.
751. The Government states that respect for the guarantees and rights of due process for the workers involved was clear from all the foregoing, in accordance with the legal order and ratified Conventions of the International Labour Organization.
752. It should also be emphasized that, in accordance with the principle of the rule of law enshrined in the Constitution, civil servants are simply repositories of the authority and may not assume to themselves powers that the law does not grant them and must swear on oath to observe and apply the Constitution and the laws.
753. Furthermore, as additional evidence, it is important to take into account the report dated 12 December 2007 of the Director of the Directorate-General of Labour Affairs in the Ministry of Labour and Social Security, in which it is indicated that since the beginning of December 2007, room for dialogue between the parties involved in the dispute had been provided, aimed at finding a satisfactory solution to the problem, obviously within the applicable legal framework. To that end, the Director, in conjunction with the head of the labour relations department, Mr Alfonso Solórzano Rojas, held two meetings, separately with the parties, to examine options to achieve the described objective.
754. Based on the arguments of fact and law set out above, the Government requests the Committee on Freedom of Association to set aside in all its aspects case No. 2064 filed by the CGT, since the diligence of the competent authorities to act in accordance with the law, concerning the facts of the matter complained of, has been shown by the documentary evidence, without prejudice to the lack of active justification of the complainants to apply to this international body and that the legal personality of the said organization has lapsed.
755. In relation to the complaint submitted by the UMN, the Government states in its communication of 8 May 2008 that it is clear from their reading that the allegations are incomplete or inexact, and provide a fictitious account without any basis in fact and law.
756. In this regard, the report of 18 April 2008 submitted by the Executive President of the INS is accepted verbatim as its own. The following are the most pertinent extracts of that report.

The administration of the Institute has never used or endorsed in any way practices which seek to curtail the trade union freedoms of the trade union representatives of INS employees.

On the contrary, all the guarantees and rights established in our legislation and Conventions of the International Labour Organization have been respected.

The fact that previous managements or executive presidents have granted the requested leave does not make this a permanent obligation which binds the present or future administrations but which in the light of the responsibility of an entity which provides services such as the health of thousands of Costa Ricans, it must weigh responsibly the benefit of granting the leave against the possible detriment to the functions performed by Dr Román González as a health professional. We further point out that in Costa Rica the public

administration is governed by a series of principles such as the “rule of law” and the “duty of probity”, enshrined in article 11 of the General Civil Service Act and article 3 of the Anti-corruption and Illicit Enrichment Act, which provide as follows:

*Article 11 (General Civil Service Act)*

1. Administrative law must be interpreted in a way which best ensures the achievement of the public purpose for which it is intended, within due respect for the rights and interests of the individual.
2. It must be interpreted and incorporated taking into account other related legislation and the nature and value of the conduct and matters to which it refers.

*Article 3. Duty of probity*

Civil servants shall be required to behave in such a way as to satisfy the public interest. This duty shall be expressed, essentially, in identifying and meeting the priority needs of society, in an organized, lawful, efficient and continuous manner, in conditions of equality for the inhabitants of the Republic. In addition, they must show integrity and good faith in the exercise of the powers conferred on them by law, ensure that the decisions they make in the course of their duties are impartial and in accordance with the objectives of the institution in which they work and, finally, to manage public resources in accordance with the principles of legality, effectiveness, economy and efficiency, and accountability.

In this regard, each administration may have different ways of implementing measures which they consider appropriate to these obligations.

We recognize the importance of trade union organization and participation in the life of a country, and firmly support its development, but we must also have a duty to assess the potential detriment to the service performed by the civil servant, as clearly set out in article 2 of the Workers' Representatives Convention, 1971 (No. 135) of the ILO, which states:

1. Such facilities in the undertaking shall be afforded to workers' representatives as may be appropriate in order to enable them to carry out their functions promptly and efficiently.
- (...)
3. The granting of such facilities shall not impair the efficient operation of the undertaking concerned.

The Institute must ensure that the functioning of the institution is not affected by granting the abovementioned leave, to the detriment of care of persons who need health services and thus the public interest (duty of probity).

In the same vein and as already shown and evident from the documents which form part of the bundle of documents in this case, but which should be emphasized, the Costa Rican Constitutional Court has repeatedly indicated as follows:

... it is clear that although the civil servant is entitled to a determined time to perform the tasks relating to his representation, it is not an absolute and unrestricted right, but subject to the capacities that the enterprise or institution for which he works. This being so, this Court does not consider that any fundamental right of the appellant has been infringed, since the defendant authority in accordance with the conditions of the public services which it provides, did grant the appellant leave to attend trade union meetings, which does not necessarily mean that it must grant the time which the trade union unilaterally considered necessary. Judgement No. 2006-2967, 3.30 p.m., of 7 March 2006.

We may therefore conclude that my client has not infringed the trade union rights and freedoms of Dr Román González, as a product of alleged trade union persecution let alone presumed discrimination on grounds of gender, since it is clear that the Institute has granted the trade union leave in the form it considers most appropriate, after considering the harm to the effective functioning of the services she provides, although it was not in the form requested, but as indicated, both by the Constitutional Court and ILO Convention No. 135, this should not be considered an absolute and unrestricted right.

My client was agreeable to granting Dr. Román González the leave in accordance with the public service she provided, without it causing harm or detriment to the effective

functioning, in accordance, I repeat, with the provisions of ILO Convention No. 135 and the case law of the Constitutional Court.

During the hearing in the Ministry of Labour and Social Security, for the same reason that concerns us here, to the question posed to Dr Juan Gabriel Rodríguez Baltodano, who signed this complaint, whether he knew that in the INS freedom of association of any woman was curtailed, he emphatically replied that there was not.

Dr Rodríguez also said that he had been told orally “that Dr Sonia Román was considered as extremely valuable to the Institute and for that reason they wanted to exploit her to the maximum” (sic), adding that the expression “exploit her” did not mean in the pejorative sense, but she was the only female doctor with experience of occupational medicine.

During the same proceeding, Dr Román González herself volunteered the following: “... the review of letters to the boss and the review of all the CAJA-INS cases is totally invisible work and highly time-consuming, she told the chief medical officer orally, which defines whether I stayed in the CAJA-INS committee or labour consultancy ...”.

The foregoing statement by Dr Román herself proves that her work is quite broad and requires considerable time, which is why it is inferred that any absence on her part would be to the detriment of that work, to the point where she had to ask the chief medical officer to define which work she should be doing on Wednesdays.

On the other hand, also in the same proceeding, Dr Román indicated that on Wednesdays, precisely the day concerned, she did not have much work, and says that she reviews correspondence, if any, signers letters to the employer and uses the time to review letters and medical literature, and says that none of this work is so essential that it cannot be done another day.

The foregoing shows a huge contradiction in the Dr Román’s statements, as while on the one hand, she asks her chief medical officer to define her tasks because they require considerable time, and on the other she says that Wednesdays are almost holidays, suggesting a degree of convenience or complacency in her replies and seeking to persuade the responsible body that her absence would not prejudice the service.

Dr Román also indicates, in the same proceeding, that her trade union work during her absence in the period 2007-2009 can be carried on by the branch which was created the previous year, indicating that the branch was created to cover that situation (referring to the refusal of the requested leave).

However you look at it, the foregoing is false in the sense that the leave was requested from February 2007, the date on which she was re-elected to her office, and she states that the branch was created last year because of that situation, which is important.

As executive president, Dr Román was never refused trade union leave. What happened was a difference between what was requested by the complainant and what was granted.

It is established that the decision to grant Dr Román a time different from that requested was not any kind of trade union persecution or discrimination, but the paramount need of the National Insurance Institute to draw on the broad experience and excellent performance of that staff member in order to improve the service of INS-Salud, not only in direct patient care but also in carrying out a range of tasks which indirectly project a better image and service in one of the most important areas of the institution’s work, namely the health of thousands of Costa Ricans who constantly need our services.

It should be recalled that in the INS-Salud facilities, care is provided to thousands of patients affected by occupational accidents and traffic accidents, both areas which in the last years have suffered a considerable increase, such that the number of people injured as a result of such accidents has increased, requiring more attention from us.

As mentioned above, Dr Román, thanks to her long career and wide experience, as she herself said in her evidence, is a key cog in the service provided by INS-Salud, so that doing without her services during a difficult day means deterioration in the performance of the diverse tasks ancillary to direct patient care.

Furthermore, it has also been shown that the National Insurance Institute, represented by myself, has never violated the trade union rights of any other worker, nor those of Dr Román.

On the contrary, we have faithfully observed the legal obligations imposed, both the principle of the “rule of law” and the “principle of probity”.

It should be recalled that Dr Román is paid a salary from public funds, justified by the services she provides as a doctor, which means that 20 per cent of this salary, paid from public funds, is not devoted to the intended purpose of public interest.

Weekly leave of a whole day for a staff member of such importance in the provision of a health service is considered by this administration as excessive, since it significantly affects the public interest.

Logically, there would be no objection on the part of the administration if the meetings took place on Saturdays or outside INS-Salud working hours, or a reasonable time at the end of the afternoon, which would seem logical for an executive board meeting.

- 757.** The Government adds that as can be clearly seen from the above report, the INS has respected the guarantees and labour rights established in national law and the provisions of Conventions Nos 87, 98 and 135 of the International Labour Organization.
- 758.** It has also been shown that the decision to grant Dr Román a time slot other than that requested is not because of any kind of trade union persecution or discrimination, but the paramount need of the INS to draw on the broad experience and excellent performance of that staff member in order to improve the service of INS-Salud, not only in direct patient care but also in carrying out a range of tasks which indirectly project a better image and service in one of the most important areas of the institution’s work, namely the health of thousands of Costa Ricans.
- 759.** Furthermore, it should be mentioned that with a view to maintaining harmonious worker–employer relations, the Labour Affairs Directorate in the Ministry of Labour and Social Security, at the request of the Minister of Labour, assumed the task of convening, in October 2007, a conciliation meeting between officials of the INS and the UMN. However, the parties did not manage to reach satisfactory conciliation agreements.
- 760.** Based on the arguments of fact and law set out, the Government requests the Committee on Freedom of Association to set aside, in all its aspects, the complaint presented by the UMN, since the diligence of the competent authorities in acting in accordance with the law in relation to the facts of the complaint has been shown.

## **C. The Committee’s conclusions**

### ***Allegations of the National Medical Union (UMN)***

- 761.** *The Committee observes that in this case, the UMN alleges that the National Insurance Institute arbitrarily refused the trade union leave which had been enjoyed by the trade union official Ms Sonia Román González for 11 years, every Wednesday from 7 a.m. to 4 p.m. to participate in meetings of the UMN executive board, allowing her for the period March 2007 to February 2009 only to attend meetings of the said executive board from 3 p.m. According to the UMN, that seriously impaired trade union business.*
- 762.** *The Committee notes the Government’s statements according to which: (1) the grant of trade union leave by previous presidents of the INS did not make the situation permanent; (2) the management were obliged in their actions to observe the principle of the rule of law and the duty of probity to prevent any detriment to the care of persons needing health care services; (3) Convention No. 135 provides that the grant of facilities to workers’ representatives must not impair the efficient operation of the undertaking concerned; it is therefore not an absolute right but subject to the capacities of the enterprise or institution concerned and according to the Constitutional Court does not necessarily mean that the*

time determined by the trade union unilaterally should be granted; (4) there was no discrimination or trade union persecution since the time of leave granted was based on the need to draw on the broad experience and excellent performance of Dr Román in order to improve the service of INS-Salud, not only in direct patient care but also in carrying out a range of tasks which indirectly project a better image and service, against a background in recent years of a considerable increase in occupational and traffic accidents; (5) doing without the services of Dr Román during a difficult day means a deterioration in the performance of the diverse tasks ancillary to direct patient care; and (6) the Ministry of Labour convened a conciliation meeting of the parties in October 2007 but they did not succeed in reaching satisfactory conciliatory agreements.

- 763.** *The Committee points out that after 11 years of uninterrupted practice in the INS of trade union leave of one day per week for the trade union official, Dr Román, the new Executive President drastically reduced the number of hours. The Committee observes that the INS Executive President gives reasons linked to the effective functioning of the INS, the excellent professional performance of Dr Román and the increase in occupational and traffic accidents. The Committee regrets that the conciliation between the parties, attempted by the Ministry of Labour, did not lead to agreement.*
- 764.** *The Committee wishes to underline that the UMN is a national organization and that according to the allegations she is the only female doctor on the UMN executive board (which has 11 members for the whole country) and that her functions as organization and trade union affairs secretary are very broad, as set out in detail in the complaint. The Committee further observes that Convention No. 135, as the Government points out, relates the grant of facilities to workers' representatives with not impairing the efficient operation of the undertaking concerned. The Committee considers, however, that the good professional performance of a worker who is a trade union official should not be used as an argument to abruptly curtail the facilities she had been enjoying for many years. As regards the increase in the number of accidents invoked by the Government, the Committee thinks that consideration could perhaps be given to a reallocation of tasks between the workers of the entity concerned.*
- 765.** *In these circumstances, the Committee requests the Government to make further efforts to bring the parties together with a view to re-examining the extent of the hours of Dr Román's trade union leave, taking into account both the needs of the union and of a sustainable enterprise.*

### **Allegations of the General Confederation of Workers (CGT)**

- 766.** *The Committee observes that in its complaint the CGT alleges the opening of disciplinary proceedings with anti-trade union objectives against Mr Luis Salas Sarkis, General Secretary of the National Insurance Institute Staff Union (UPINS) and Ms Alicia Vargas Obando, women's secretary of the same organization, on the grounds of use of trade union leave by the latter and the authorization of that leave by the General Secretary. According to the allegations, the leave was granted in accordance with the collective agreement then in force in order that Ms Alicia Vargas Obando might obtain information in Nicaragua concerning the Free Trade Agreement with the United States (a burning issue in Costa Rica at the time of the alleged events, in particular in the social insurance sector). The CGT also alleges in great detail that the disciplinary proceedings did not respect the rules of due process (insufficient details of the offence, investigations prior to the administrative proceedings, breach of confidentiality, refusal of a testimony requested, challenge which did not succeed, etc.) and concerning the substance which did not duly take into account the provisions of the law and the collective agreement.*

767. *With regard to the alleged lack of respect for the rules and guarantees of due process relating to the trade union officials, the Committee notes the information provided by the Government and the INS, which clearly differs from the allegations. The Committee observes, however, that this matter was the subject of an appeal for amparo in the Constitutional Chamber of the Supreme Court of Justice and that this body declared the legal action submitted inadmissible (the Government is sending the judgements), thus the Committee will not dwell further on these allegations.*
768. *With regard to the question of violation of the confidentiality of the internal audit report which led to the opening of the administrative disciplinary proceeding, a point which the Constitutional Chamber considered, the Committee observes that according to the judgement, it was not proved that INS managers or internal auditors were responsible.*
769. *As regards the substance of the matter, the Committee observes that according to the complainant organization, the UPINS General Secretary submitted to the INS administration trade union leave for 30 July 2004 and 28 and 29 July 2005 to be granted to the UPINS women's secretary under the legal framework and the collective agreement for trade union purposes: to obtain information from a trade union source in Nicaragua on the Free Trade Agreement with the United States and, more particularly, with respect to the insurance sector in a context in which the UPINS was characterized by its radical opposition to the signing of the Free Trade Agreement between Costa Rica and the United States, a matter which had displeased the INS administration (which was also denounced by the trade union to the inspection authority and the Supreme Electoral Tribunal). The Committee observes that the Government and the INS deny any anti-trade union motives, indicate that the improper use of trade union leave was denounced by UPINS officials and maintain that the UPINS women's secretary used the leave for "personal reasons" quite unconnected with trade union business, in violation of the applicable legal provisions, and the General Secretary had been aware of the situation and accepted it. The Committee observes that at the end of the disciplinary proceeding by the internal audit department, the INS executive board examined the recommendation of the (bipartite) INS Labour Relations Advisory Board (opposed by the trade union party) and approved the dismissal of the women's secretary and the General Secretary of the UPINS. The Committee notes that the appeal against this decision filed by the women's secretary in the Constitutional Chamber of the Supreme Court of Justice was refused and observes that according to the Government, the UPINS General Secretary filed an appeal for amparo against his dismissal, which has not yet been decided.*
770. *The Committee will therefore confine its conclusions to the dismissal of the General Secretary of UPINS. In this respect, the Committee regrets that despite the fact that the alleged facts date from 2004 and 2005, there has still not been a final decision, and therefore recalls the importance in cases in which anti-trade union discrimination is alleged against trade unions of expediting proceedings rapidly, which is in the interests of all the parties involved.*
771. *The Committee notes the numerous arguments and evidence of the complainant trade union and the INS and the evidence produced to justify their conflicting positions on the question of the legality of the dismissal. The Committee considers that as the matter is before the highest legal authority in the country and to a large extent involves a matter of fact (namely whether the General Secretary was or was not aware of the real intentions of the women's secretary in relation to the trade union leave or whether the trade union leave which he granted had both personal (to visit her boyfriend) and trade union purposes, as maintained by a witness mentioned in the Government's reply), it is advisable to have the court judgement to hand before considering this allegation. This, moreover, because the Committee observes that in the present case there is also a question of law, which the*

*complainant organization implicitly raises, concerning the proportionality of the sanction in the case of an offence being proved.*

**772.** *The Committee appreciates the Government's efforts since the beginning of 2007 to convene meetings and create room for dialogue between the parties to find an appropriate solution. The Committee requests the Government to continue promoting dialogue between the parties and to inform it of the result of the appeal for amparo filed by the General Secretary of UPINS against his dismissal.*

**773.** *Lastly, the Committee notes the Government's statement that, according to a certificate of 12 February 2008 of the Ministry of Labour, the complainant organization, CGT, is registered but its legal personality has lapsed. The Committee indicates, however, that it understands that the allegations refer to matters prior to that lapse.*

### **The Committee's recommendations**

**774.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) In these circumstances, the Committee requests the Government to make further efforts to bring the parties together with a view to re-examining the extent of the hours of Dr Román's trade union leave, taking into account both the needs of the union and of a sustainable enterprise.*
- (b) With regard to UPINS, the Committee appreciates the Government's efforts since the beginning of 2007 to convene meetings and create room for dialogue between the parties to find an appropriate solution. The Committee requests the Government to continue promoting dialogue between the parties and to inform it of the result of the appeal for amparo filed by the General Secretary of UPINS against his dismissal in order to be able to examine this question with all the elements.*

CASE NO. 2450

INTERIM REPORT

### **Complaint against the Government of Djibouti presented by**

- the Djibouti Union of Workers (UDT)**
- the General Union of Djibouti Workers (UGTD) and**
- the International Confederation of Free Trade Unions (ICFTU)**

*Allegations: The complainant organizations allege that the Government refuses to take the necessary measures to reinstate union members dismissed in 1995 following a strike in protest against the consequences of a structural adjustment programme, despite having made a commitment in 2002 to reinstate them; continues to dismiss union officials unfairly and*

*to harass them; and has adopted a new Labour Code spelling the end of free and independent trade unionism. Their allegations also relate to the violent suppression of a strike and the barring from entry of an international trade union solidarity mission*

775. The Committee last examined this case at its November 2007 session [see 348th Report, paras 533–560]. The Djibouti Union of Workers (UDT) and the General Union of Djibouti Workers (UGTD) jointly sent additional information in a communication dated 10 January 2008.
776. Because of the seriousness of the allegations, at its May–June 2006 session, the Committee requested the Government to accept the visit of a direct contacts mission to the country [see 342nd Report, para. 436]. During its examination in June 2007 of the application by Djibouti of Convention No. 87, the Committee on the Application of Standards of the International Labour Conference welcomed the fact that the Government had accepted a direct contacts mission to clarify the situation with regard to the issues raised.
777. Once the Government had consented, at the June 2007 session of the International Labour Conference, to the visit of the mission, arrangements were made for the visit to take place in January 2008. The Director-General appointed Mr Yéro Dé, former Minister of Labour of Senegal, as his representative in conducting the mission, which took place in Djibouti from 21 to 25 January 2008. During the direct contacts mission, the representative of the Director-General was joined by Ms Karen Curtis, Deputy Director of the International Labour Standards Department, Ms Alice Ouedraogo, Director of the Subregional Office for East Africa in Addis Ababa, and Mr Chittarath Phouangsavath, legal expert from the International Labour Standards Department. The mission report is contained in an appendix to the present report.
778. As the Government did not respond to the latest information supplied by the complainant organizations, the Committee was twice obliged to postpone its examination of the case. At its meeting in June 2008 [see 350th Report, para. 10], the Committee launched an urgent appeal to the Government, indicating that, in accordance with the procedural rules set out in paragraph 17 of its 127th Report, approved by the Governing Body, it could present a report on the substance of the case at its next session, even if the requested observations or information had not been received in due time. To date, the Government has not sent any information.
779. Djibouti has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

## **A. Previous examination of the case**

780. During its previous examination of the case in November 2007, the Committee made the following recommendations [see 348th Report, para. 560]:
- (a) As regards the alleged refusal to reinstate the workers dismissed following a strike, the Committee requests the Government to keep it informed of the situation of the trade unionists who were to have been reinstated under the terms of the agreement of 8 July 2002, namely: Abdoufatah Hassan Ibrahim; Hachim Adawe Ladieh; Houssein Dirieh Gouled; Moussa Wais Ibrahim; Abdillahi Aden Ali; Habib Ahmed Doualeh; and Bouha Daoud Ahmed. The Committee requests the Government to ensure that all workers who

wish to be reinstated can be reinstated, without loss of wages or benefits, and that those who do not wish to be reinstated receive adequate compensation.

- (b) As regards the allegations of harassment and unfair dismissals of trade union officials, the Committee requests the Government promptly to launch an independent inquiry into these allegations and into the alleged pressure put on their friends and families and, if they are found to be true, immediately to take the necessary measures to put an end to such acts of discrimination and harassment and punish those responsible. In view of the alleged dismissal of Mr Hassan Cher Hared in September 2006, the Committee considers that this is a serious case and urges the Government to launch an inquiry without delay into this recent dismissal and, if it is found that the dismissal was based on anti-union grounds, to reinstate Mr Hassan Cher Hared and pay him any wage arrears owed to him, and to keep it informed of this matter.
- (c) As regards the intervention by the Government in strikes and trade union elections, arrests and detentions of trade union members and officials, the barring from entry of an international trade union solidarity mission, and the arrest and subsequent interrogation of the only member of the mission allowed to enter the country (an ILO official), the Committee urges the Government to reply promptly to the serious allegations made by the ICFTU.
- (d) As regards the allegation regarding the adoption of a new “antisocial” Labour Code that violates both international Conventions and the country’s own Constitution, the Committee requests the Government to modify sections 41, 42, 214 and 215 of the Labour Code and to keep it informed of any measure adopted to that end.
- (e) The Committee requests the Government to keep it informed of any new developments in connection with the holding of an on-the-spot direct contacts mission, and the measures taken to give effect to its recommendations.

## **B. New allegations**

**781.** In a communication dated 10 January 2008, the UDT and the UGTD wished to provide some clarification with regard to the issues that were still pending and which had been the subject of recommendations by the Committee. Regarding the list of dismissed workers who were to have been reinstated under the terms of the agreement of 8 July 2002, the complainant organizations indicate that some names were omitted from the list contained in the Committee’s recommendations. These were: Mr Adan Mohamed Abdou, Mr Kamil Diraneh Hared, Mr Souleiman Mohamed Ahmed, Mr Mohamed Doubad Waiss, Ms Mariam Hassan Ali and Mr Abdourachid. Regarding the reinstatement of Mr Adan Mohamed Abdou, Secretary-General of the UDT, and Mr Kamil Diraneh Hared, Secretary-General of the UGTD, the complainant organizations challenge the information provided by the Government in its communication of 27 March 2007, according to which these two individuals refused to be reinstated. The complainant organizations request the Government to provide evidence of this allegation and indicate that it has never been the intention of the authorities to reinstate these two individuals or the other dismissed union members, all of whom have been prohibited from occupying any post in Djibouti, either in the public or the private sector. Some union members have chosen as a result to go into exile to escape the constant violations of their trade union rights and those of their families.

**782.** With regard to the Labour Code, the complainant organizations indicate that it is inaccurate to say, as the Government has done, that the social partners, especially the UDT and the UGTD were consulted. They indicate, moreover, that even the Government-recognized UGTD denies having been fully consulted during the process of adopting the Labour Code. It can not be said, therefore, that a collective bargaining process was carried out in the context of this procedure.

### C. The Committee's conclusions

783. *The Committee deeply regrets that the Government has not provided information in response to the previous recommendations of the Committee and to the new allegations of the complainant organizations, even though it has been invited on several occasions, including by means of an urgent appeal, to submit its comments and observations on the follow-up to this case. The Committee urges the Government to be more cooperative in the future.*
784. *Under these circumstances, in accordance with the applicable rule of procedure [see 127th Report, para. 17, approved by the Governing Body at its 184th Session], the Committee is bound to submit a report on the substance of the case without the information it hoped to receive from the Government.*
785. *The Committee takes note of the report of the direct contacts mission which was conducted in January 2008 and thanks the mission for the information it gathered. This detailed information will assist the Committee in its examination of the issues raised in the complaints.*
786. *The Committee notes the spirit of cooperation shown by the Government towards the accomplishment of the direct contacts mission and the facilities that were made available to the mission. It expects that the Government will continue to show such willingness and that it will act on the commitments made during the mission.*
787. *With regard to its previous recommendations on the reinstatement of dismissed workers following a strike under the terms of the agreement of 8 July 2002, namely Abdoufatah Hassan Ibrahim; Hachim Adawe Ladieh; Houssein Dirieh Gouled; Moussa Wais Ibrahim; Abdillahi Aden Ali; Habib Ahmed Doualeh and Bouha Daoud Ahmed, the Committee notes that the complainant organizations indicated in a communication of 10 January 2008 that other individuals – who had not been reinstated to date – had been included in the 2002 agreement and should also be mentioned. These were: Mr Adan Mohamed Abdou, Mr Kamil Diraneh Hared, Mr Souleiman Mohamed Ahmed, Mr Mohamed Doubad Waiss, Ms Mariam Hassan Ali and Mr Abdourachid. Furthermore, the Committee notes, with regard to the reinstatement of Mr Adan Mohamed Abdou, Secretary-General of the UDT, and Mr Kamil Diraneh Hared, Secretary-General of the UGTD, that the complainant organizations contest the information provided by the Government, according to which these individuals had refused to be reinstated. The complainant organizations request the Government to provide evidence of this allegation and indicate that it has never been the intention of the authorities to reinstate these two individuals or the other dismissed union members, all of whom have been prevented from occupying any post in Djibouti, either in the public or the private sector, thereby forcing some union members to go into exile to escape the violations of their trade union rights and those of their families.*
788. *With regard to the list of individuals who have allegedly not yet been reinstated following their dismissal in 1995, including those mentioned by the UDT and the UGTD in their communication dated 10 January 2008, the Committee notes that this list has been subject to differences of opinion but that the Government has made a commitment before the mission to carry out the necessary checks into the situation of the workers on the basis of the list provided and to inform the Office accordingly. The Committee expects that in the very near future the Government will provide the necessary clarifications on the situation of the workers mentioned both in its previous recommendations and in the list provided by the complainant organizations, in accordance with the commitment it made before the direct contacts mission.*

**789.** *The Committee notes that, according to the complainant organizations interviewed by the direct contacts mission, under the agreement of 8 July 2002, signed through the mediation of an ILO mission, workers who wished to be reinstated had to make an individual request to that effect and that those who did not wish to be reinstated had to be compensated. However, the authorities had allegedly always rejected the principle of compensation and had furthermore imposed a condition for reinstatement, namely the relinquishment of trade union membership. This new condition imposed by the authorities was said to have been rejected by all concerned and therefore no progress had been made. With regard to this last point, the Committee emphasizes the importance it attaches to the principle that declarations of loyalty or other similar commitment should not be imposed as a condition for reinstatement, and it urges the Government to ensure that such declarations will not be requested in the future.*

**790.** *The Committee notes that, according to the different high-level authorities interviewed by the direct contacts mission, including the Prime Minister, the issue of the 1995 dismissals was settled through a mass reinstatement process in all but a few isolated cases. This reinstatement of dismissed workers was said to be the result of political goodwill and the Government has indicated that it is ready to rectify the situation if any cases are still pending. The Committee notes in particular, with regard to the issue of compensation and arrears of pay, that:*

- *the Government has made a commitment to reinstate all the dismissed workers in their original posts or, if such reinstatement is impossible, to find them other work, and to pay the retirement contributions for these individuals;*
- *with regard to the payment of compensation, the Government has indicated that it is not opposed to the principle, if the workers agree to be reinstated in their jobs. The departments of the Ministry of Employment and National Solidarity have been given the task of conducting and concluding negotiations on the issue of reinstatement, compensation and the payment of social security contributions.*

*The Committee expects that the Government will act promptly in following up on the commitments made before the direct contacts mission concerning the reinstatement of workers dismissed in 1995 who have not yet been reinstated, the payment of compensation to these workers and arrears payments. The Committee requests the Government to inform it without delay of the situation of the negotiations and of the progress made.*

**791.** *As regards the allegations relating to the adoption of a new “antisocial” Labour Code, the Committee requested the Government in its previous recommendations to amend sections 41, 42, 214 and 215 of the Labour Code. The Committee notes with interest that the Government has made a commitment to make the requested amendments and to this end would like to receive technical assistance and advice from the Office. The Committee trusts that the Government will take all the necessary measures to adopt without delay the requested amendments to the Labour Code, as discussed with the direct contacts mission, in order to give full effect to the international Conventions that it has ratified on freedom of association.*

**792.** *The Committee notes that, according to the information gathered by the direct contacts mission, the draft legislative amendments will be submitted to the National Council of Labour, Employment and Vocational Training (CNTEFP) for consideration. In this regard, the Committee notes that the mission cautioned against excessive delay in the establishment of this body and the consequent impact that such a delay would have on the adoption of the necessary legislative amendments, and in particular against any decision, especially in relation to the composition of the CNTEFP, which could be a source of further tension. The Committee, noting that the CNTEFP had not been established at the*

*time of the visit of the direct contacts mission, urged the Government to inform it as soon as possible about the establishment and composition of this body.*

- 793.** *As regards the allegations of harassment and unfair dismissals of trade union officials, the Committee had requested the Government to promptly launch an independent inquiry into these allegations and into the alleged pressure put on their friends and families and, if they were found to be true, immediately to take the necessary measures to put an end to such acts of discrimination and harassment and punish those responsible. Furthermore, in view of the alleged dismissal of Mr Hassan Cher Hared in September 2006, the Committee had considered it to be a serious case and had urged the Government to launch an inquiry without delay into that dismissal and, if it was found that the dismissal had been based on anti-union grounds, to reinstate Mr Hassan Cher Hared and pay him any wage arrears owed to him, and to keep it informed of the matter. The Committee urges the Government to provide without delay information on the current situation of Mr Hassan Cher Hared, including the results of any inquiry concerning his 2006 dismissal and the follow-up taken.*
- 794.** *As regards the allegations by the complainant organizations concerning the intervention by the Government in strikes and trade union elections, arrests and detention of trade union members and officials, the barring from entry of an international trade union solidarity mission, and the arrest and subsequent interrogation of the only member of the mission allowed to enter the country (an ILO official), the Committee took note of the observations made by the direct contacts mission on the exercise of freedom of association in Djibouti and its conclusions. The Committee notes with deep concern that, according to the information gathered by the direct contacts mission, the trade union situation in Djibouti has been characterized by a broadening gap for over a decade between certain workers' organizations, in particular the UDT and the UGTD, and the Government and that some allegations are still pending with regard to government interference in trade union activities and with regard to the discrimination and harassment that still persists against trade union leaders. The Committee firmly recalls that a free trade union movement can develop only under a regime which guarantees fundamental rights, including the right of trade unionists to hold meetings in trade union premises, freedom of opinion expressed through speech and the press and the right of detained trade unionists to enjoy the guarantees of normal judicial procedure at the earliest possible moment [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 37].*
- 795.** *The Committee notes that one of the outstanding issues raised by the direct contacts mission concerns the representation of Djibouti workers at the International Labour Conference. The Committee notes that this issue has been the subject of objections and discussions in the Credentials Committee of the Conference for several years. The Committee notes that the complainant organizations proposed that the UDT and the Government-recognized UGTD should participate at the International Labour Conference, but that the UDT representative should be appointed as titular member on the basis of his organization's representativeness. The Committee observes that the Government took note of the compromise solution proposed by the direct contacts mission following discussions to agree to include the UDT in Djibouti's delegation at the 2008 session of the Conference, pending a clear decision on the representativeness of the workers' organizations. Nevertheless, the Committee notes with concern that the appointment of the Djibouti Workers' delegation had once again been the subject of an objection at the 97th Session (June 2008) of the International Labour Conference. The Committee notes in particular that the objection lodged by the UDT and the UGTD was based on the fact that the Government had failed to honour its commitments by continuing to appoint at the Conference individuals who did not represent the unions. The UDT and the UGTD allege, however, that the Workers' technical adviser, namely Mr Mohamed Youssouf Mohamed, who was supposedly representing the UDT, had misused the organization's letterhead and*

*had used false signatures, on the instructions of the Government, and that the UDT had appointed some other representatives to the Conference, namely Mr Adan Mohamed Abdou, Secretary-General, and Mr Hassan Cher Hared, Secretary of International Relations, who were not accredited to the Conference as part of the Djibouti delegation. The Committee notes that, according to the explanations provided by the Government to the Committee, the nomination of the members of the Workers' delegation had been in line with the recommendation of the direct contacts mission to include the UDT in Djibouti's delegation for the 2008 session of the Conference, pending the organization of social elections. As for the nomination of the UDT representative in the Workers' delegation, it was indicated that the nomination was the result of a normal written consultation procedure and that the Government had merely taken note of the name communicated by the representative, as president of the UDT.*

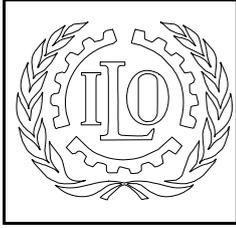
**796.** *The Committee observes that the Credentials Committee noted that it been given contradictory information about the capacity of the members of the UDT, its statute, the exact role of the Workers' technical adviser who was supposedly representing the UDT in the organization and on the conditions under which its Secretary-General, Mr Adan Mohamed Abdou might have been relieved of his functions. Noting the inclusion of the UDT in the Workers' delegation, the Credentials Committee regretted that the procedure used to nominate the Workers' representative had not taken place within a consultation process based on objective and verifiable criteria and in full independence. In addition, it indicated that, according to the information available to it, the representative of the UDT to the Conference had not been chosen independently and without interference by the Government. The consequence of this had been to propose to the Conference to invalidate the credentials of the representative in question. However, the Committee considered that the objection raised questions that went beyond those concerning exclusively the nomination of the Workers' delegation to the Conference. These questions reflected violations of the principle of freedom of association and interference of the Government in trade union matters. The Credentials Committee urged the Government to guarantee the implementation of a procedure based on objective and transparent criteria for the nomination of the Workers' representatives in future sessions of the Conference. It trusted that the nomination could be finally made in the spirit of cooperation between all the parties concerned, in a climate of confidence that fully respected the ability of the workers' organizations to act in total independence from the Government [see ILC, 97th Session, 2008, Provisional Record No. 4A, paras 25–37]. The Committee expresses its deep concern with regard to these circumstances, which once again highlight the seriousness of the situation relating to the trade union climate in Djibouti and endorses the conclusions of the Credentials Committee. The Committee urges the Government to indicate the measures taken to guarantee the implementation of objective and transparent criteria for the nomination of Workers' representatives at the International Labour Conference.*

**797.** *In general terms, the Committee urges the Government to give priority to promoting and safeguarding freedom of association and act promptly in following up on the specific commitments that it made before the direct contacts mission to resolve all the pending issues and therefore facilitate a transparent and sustainable social dialogue in Djibouti. Recalling that some of the events and disputes in this case date back to 1995, the Committee expects that the Government will inform it without delay of any progress made in this regard.*

## The Committee's recommendations

798. *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) With regard to the reinstatement of workers dismissed in 1995, following a strike, who have not yet been reinstated, the Committee expects that the Government will provide in the very near future the necessary clarifications on the situation of the workers mentioned in its previous recommendations as well as those whose names appear on the list provided by the complainant organizations, in accordance with the commitment it made before the direct contacts mission.*
- (b) The Committee expects that the Government will act promptly in following up on the commitments made before the direct contacts mission concerning the reinstatement of workers dismissed in 1995 who have not yet been reinstated, the payment of compensation to these workers and arrears payments. The Committee requests the Government to inform it without delay of the situation of the negotiations and of the progress made.*
- (c) The Committee expects that the Government will take all the necessary measures to adopt without delay the requested amendments to the Labour Code, as discussed with the direct contacts mission, specifically with regard to sections 41, 42, 214 and 215 of the Code, in order to give full effect to the international Conventions that it has ratified on freedom of association.*
- (d) Noting that the draft legislative amendments will be submitted to the National Council of Labour, Employment and Vocational Training for consideration, the Committee urges the Government to inform it as soon as possible about the establishment and composition of this body.*
- (e) The Committee urges the Government to provide without delay information on the current situation of Mr Hassan Cher Hared, including the results of any inquiry concerning his 2006 dismissal and the follow-up taken.*
- (f) The Committee urges the Government to indicate the measures taken to guarantee the implementation of objective and transparent criteria for the nomination of Workers' representatives at the International Labour Conference.*
- (g) In general terms, the Committee urges the Government to give priority to promoting and safeguarding freedom of association and act promptly following up on the specific commitments that it made before the direct contacts mission to resolve all the pending issues and therefore facilitate a transparent and sustainable social dialogue in Djibouti. Recalling that some of the events and disputes in this case date back to 1995, the Committee expects that the Government will inform it without delay of any progress made in this regard.*
- (h) The Committee calls the Governing Body's attention to this serious and urgent case.*



**International Labour Office  
Bureau international du Travail  
Oficina Internacional del Trabajo**

**Report on the direct contacts mission to Djibouti  
(21–25 January 2008)**

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## I. Introduction

### A. Background to the mission

1. The direct contacts mission followed up the discussion in the Committee on the Application of Standards at the 96th Session of the International Labour Conference (June 2007) on the application by Djibouti of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), which was ratified by Djibouti on 3 August 1978.
2. The Committee on the Application of Standards has examined the application by Djibouti of Convention No. 87 on several occasions: in 1999, 2000, 2001 and 2007. In June 2006, it examined the application of the Minimum Wage-Fixing Machinery Convention, 1928 (No. 26). In that regard, it emphasized the close interrelationship between the Convention's underlying principle of full consultation and direct participation of the social partners in the determination of the minimum wage and the overriding principles of freedom of association and collective bargaining. In June 2007, when it last examined the application of Convention No. 87, the Committee indicated its expectation that the process undertaken by the Government to review the Labour Code would begin without delay, in full and meaningful consultation with the social partners. Recalling that the rights of workers' and employers' organizations could only be exercised in a climate that was free from violence, pressure or threats of any kind against the officers and members of those organizations, the Committee urged the Government to ensure respect for that principle. In addition, the Committee welcomed the fact that the Government had accepted a direct contacts mission to clarify the situation with regard to the issues raised. In a communication of 11 October 2007, the Government confirmed its acceptance of the direct contacts mission, which visited Djibouti in January 2008.
3. In the same context, at its 95th Session (June 2006), the Credentials Committee of the International Labour Conference requested the Government of Djibouti to submit to the 96th Session of the Conference (June 2007), at the same time that it submitted its credentials for the delegation of Djibouti, a detailed report substantiated with relevant documentation on the procedure used to nominate the Workers' delegates and advisers. In June 2007, as part of the automatic monitoring process relating to the requested report, the Committee indicated that it deeply regretted the lack of cooperation of the government authorities, especially because the nomination of the Workers' delegation to the Conference was once again the subject of an objection regarding the legitimacy of the Worker representative to the Conference. Reiterating its request for the following session of the Conference, the Credentials Committee indicated its expectation that, with the assistance of the direct contacts mission to which it had just agreed, the Government would nominate the tripartite delegation of Djibouti to future sessions of the Conference in conformity with the requirements of article 3, paragraph 5, of the ILO Constitution.
4. In communications dated 4 August 2005 and 20 May 2006, the Djibouti Union of Workers (UDT) and the General Union of Djibouti Workers (UGTD) filed a complaint against the Government of Djibouti alleging violations of freedom of association (Case No. 2450). The International Confederation of Free Trade Unions (ICFTU) associated itself with this complaint. On the basis of the allegations relating to this case, additional information was received from the complainant organizations on 3 October 2006 and written replies were provided by the Government in January 2006 and March 2007. The Committee on Freedom of Association has twice examined this case (in May–June 2006 and November 2007) and reached interim conclusions at each of its sessions [see 342nd Report, para. 436, and 348th Report, para. 560, adopted by the Governing Body at its 296th and

300th Sessions, respectively]. At its session in May–June 2006, the Committee on Freedom of Association requested the Government to accept a direct contacts mission. At its November 2007 session, the Committee requested the Government to keep it informed of any new developments in connection with the direct contacts mission to the country and the measures taken to give effect to its recommendations.

## **B. Composition of the mission**

5. At the 96th Session of the International Labour Conference (June 2007), the Government of Djibouti agreed to receive the direct contacts mission. The mission visited Djibouti from 21 to 25 January 2008. It was led by Mr Yéro Dé, former Minister of Labour of Senegal, who was joined by Ms Karen Curtis, Deputy Director of the International Labour Standards Department, Ms Alice Ouedraogo, Director of the Subregional Office for East Africa in Addis Ababa (Ethiopia), and Mr Chittarath Phouangsavath, legal expert from the International Labour Standards Department.

## **C. Objectives of the mission**

6. The mission had a number of objectives. These included gathering as much detailed information as possible on the allegations concerning serious repressive measures and the arrest and harassment of trade union activists and officials and the use of dismissal and non-reinstatement as a punishment for strike action (Cases Nos 2450 and 2471 brought before the Committee on Freedom of Association); initiating talks on the provisions of the Labour Code and national legislation that are the subject of comments by the supervisory bodies, in particular the Committee of Experts on the Application of Conventions and Recommendations (CEACR); recalling the conclusions of the Credentials Committee of the International Labour Conference; and considering possible ways to resolve the difficulties that had arisen with regard to nominating the delegation of Djibouti. The mission was conducted in a spirit of mutual cooperation between the Government and the International Labour Office. From the point of view of the Office, identifying problems as objectively and accurately as possible would help it direct its technical assistance to the Government more effectively, in particular through its Subregional Office for East Africa in Addis Ababa.

## **D. Overview of mission activities**

7. During its visit, the mission had the opportunity to meet several members of the Government, including the Prime Minister, the Minister of Employment and National Solidarity and the Minister of Justice. It also had meetings with representatives of the inter-union association *Intersyndicale UDT/UGDT*, the Employers' Association of Djibouti (AED) and the UGTD. It also met representatives of the Autonomous Port of Djibouti. Meetings were also held with the Resident Coordinator of the United Nations Development Programme (UNDP) in Djibouti, who was joined by representatives of the resident agencies of the United Nations (UN) and the Head of the European Commission delegation to Djibouti. A complete list of interlocutors met by the mission is attached to this report (Appendix II). The full mission schedule is also attached (Appendix I).

## **E. Outline of the report**

8. In this report, the mission introduces first, each of the issues discussed at its meetings and the information it gathered from the participants. Second, it presents for each issue, the results achieved and its conclusions and recommendations.

## II. Issues discussed by the mission

9. All those interviewed by the mission noted that the climate of economic – and to some extent political – openness was conducive to the success of the mission. The *UNDP Resident Coordinator*, pointing out that Djibouti was a very young country, observed that there had been some positive developments in recent years; in particular, the Government had started to develop a social awareness. People now talked more readily about social inclusion. The *Head of the European Commission* delegation also noted that the mission had come at a good time, when the country was moving in the right direction, with a marked improvement in conditions and a clear willingness by the authorities to achieve progress in sharing wealth. The mission notes that, in addition to the meetings it held with the Minister of Employment and National Solidarity and the Minister of Justice, Prisons and Islamic Affairs, it also met the Prime Minister, which demonstrates the commitment at the highest level of government to the success of the mission.
10. In this part of the report, the mission would like to examine, on a topic-by-topic basis, each of the issues discussed. In addition, it will present the information it received during its meetings with regard to the trade union situation in Djibouti; the legislative framework relating to freedom of association; the allegations of serious repressive measures and the arrest and harassment of trade union activists and officials; the representation of Djibouti at the International Labour Conference; and the measures identified by those it met as warranting assistance from the Office.

### A. The trade union situation in Djibouti

11. The *Minister of Employment and National Solidarity* said at the outset that the history of the trade union movement in Djibouti was linked to the country's political history. With regard to freedom of association, he said that certain individuals, who had no connection with the trade union movement, had the title of "secretary-general for life", even though they did not have a mandate and their organizations had no registered office. The issue of freedom of association had arisen now only because certain individuals had given false information to the International Labour Office in an attempt to fan the flames of discontent in the country, including in cases that had no direct bearing on trade union matters. The Secretary-General of the UDT (*Mr Adan Mohamed Abdou*) was also the secretary-general of an opposition political party, even though the Labour Code did not allow an individual to hold both types of office at the same time; the claims of the UDT therefore had political overtones and should therefore not be taken into consideration. The Minister nevertheless spoke about maintaining regular contact with the UGTD. The *Minister of Justice, Prisons and Islamic Affairs* recalled that the history of the trade union movement was linked to the country's political history. Regarding the UDT and the UGTD, he said that the first internal problem had rapidly emerged in so far as the original union leadership had never agreed to new election even though, by law, their terms of office had to be renewed every three years. Between 1992 and 1999, the leadership of the two trade union confederations had remained unchanged and not stood for re-election. The problem had been compounded by the structural adjustment process that had taken place in the country in 1995. The Government had chosen to cut the wages of state employees rather than laying off 1,500 officials. This had led to strikes and the subsequent dismissal of striking workers. Several meetings had been held, including with international trade union organizations and the ILO, to resolve the issue of the dismissals. He explained that, in 1999, the 22 grass-roots unions had called on the Ministry of Employment to ensure the enforcement of their own statutes. It was in this context that the Government had intervened to organize the UDT and UGTD general assemblies. New officers had been elected and had worked closely with the Government. In 2002, when subsequent general assemblies were due to have been held, the former officers had gone on the offensive. Although the UGTD had

held its conference without incident, the UDT had been forcefully taken over by its former officers, who had regained control of the confederation. Since then, the Government had not worked with this confederation.

12. The *Intersyndicale UDT/UGTD* outlined the history of the trade union movement in Djibouti. The UGTD had initially been the country's only trade union confederation, a situation typical of African countries at that time. The UDT had been created only in 1992 as a result of a split within the UGTD, and the latter had subsequently been dissolved. In 1994, after the UDT had gained national and international recognition, the authorities had decided to re-establish the UGTD. In 1995, however, Djibouti had been obliged to adopt structural adjustment measures and, following a unilateral decision by the Government to cut wages by about 30–40 per cent, the UDT and the UGTD had decided to create the *Intersyndicale UDT/UGTD* and to challenge that unilateral decision by calling a protest strike. It was following the major strike of 1995 that many trade unionists had been dismissed. Since 1995, many international mediation missions – including a previous ILO direct contacts mission in 1998 – had visited Djibouti. The Government had repeatedly pledged to reinstate workers, but had not taken action. In 1999, although the new Minister of Labour had indicated that he was willing to resolve the issue, he had apparently rejected the reinstatement arrangements agreed upon in 1998 with the ILO direct contacts mission. Representatives of the *Intersyndicale UDT/UGTD* had nevertheless demonstrated their willingness to negotiate. However, instead of building on that opportunity to negotiate, the Government had organized conferences for the two trade union confederations. Even though the affiliated unions had all refused to participate, the conferences of both confederations had been held at the same venue on a single morning and the confederations' new officers had been announced in the media. The *Intersyndicale UDT/UGTD* described that move by the authorities as a real coup d'état.
13. The new officers had found it difficult to gain recognition at the national and international levels. They had been rejected from every forum (for example, the African Regional Meeting of the ILO in Abidjan, the Congress of the Organization for African Trade Union Unity (OATUU) in Johannesburg, and the Congress of the International Confederation of Arab Trade Unions (ICATU)). Furthermore, the Government had decided to impose the new leadership at the national level, hindering the operations of the original confederations (by confiscating post office boxes, interfering with bank accounts and carrying out arrests and acts of intimidation). According to the *Intersyndicale UDT/UGTD*, even though the "clone" of the UDT had ceased to exist, there was still a "clone" of the UGTD. In 2002, neither of the trade union confederations, nor their affiliated unions (such as the Postal Workers' Union), had been able to hold conferences to re-elect their officers. The then Minister of Labour had called on both confederations to declare their affiliated organizations, and this had been done in the presence of representatives of all affiliated organizations at the Ministry of the Interior. The authorities then provided assurance of police cooperation in the organization of the general assemblies. A representative of the ICFTU had also participated in the general assemblies. However, following a cabinet reshuffle, the new Minister of Labour contested the first UDT general assembly and had called for a second one to be held. The matter, which appeared to have become personal, was still pending. In addition, acts of intimidation, arrests and detention on grounds of "supplying information to a foreign power" continued to take place. With regard to the UGTD, this organization continued to exist, was recognized by the Government and accompanied the Djiboutian authorities at international meetings. However, that "clone" organization had not succeeded in affiliating to any international trade union organization.
14. The *representatives of the UDT* said that they were ready to hold a general assembly to re-elect the officers of the trade union organization and thus fulfil the legal obligations, provided that the climate was conducive to such action. The authorities, however, would prevent such a general assembly from being held. The impediment was not tangible but linked to the general climate of intimidation of trade unionists, who would not attend such

a general assembly at the present time for fear of reprisals. Some grass-roots unions (such as the Postal Workers' Union and the Union of Port Workers) faced similar difficulties when organizing their own general assemblies.

15. The *Intersyndicale UDT/UGTD* reported that it had no relationship with the public authorities although its affiliated unions had the right to operate at the enterprise level. Regarding the trade union situation of women, the *UDT* indicated that over 30 per cent of its members and eight of its officers were women. However, the pressures on women trade unionists and their families were such that the majority had decided to leave the trade union movement.
16. According to the *Intersyndicale UDT/UGTD*, the political argument used to justify the lack of social dialogue could not be sustained because the problems had started in 1995, while most union members had not joined political parties until 2002. Some trade unionists had been involved in setting up associations with the aim of improving the country's situation, not tarnishing its image. *Mr Adan Mohamed Abdou* (Secretary-General of the UDT) said that every discussion with the Government invariably led to the question of his political functions. He confirmed that he belonged to a political party: the Republican Alliance for Development (ARD). However, he claimed that he was no longer its secretary-general. He said that the ARD had issued an official communication outlining the new leadership of the party and that he was currently its first vice-president. The *Intersyndicale UDT/UGTD* stated that it had requested in vain since 1999 to meet the President of the Republic in order to lay new foundations for dialogue. It provided the mission with a copy of a communication it had sent to the President on the occasion of the recent establishment of the National Agency for Social Development, as an indication of its good will. The communication had also remained unanswered. According to the *Intersyndicale UDT/UGTD*, the President alone had the power to overcome the stalemate in social dialogue.
17. According to the *AED*, the regular meetings with trade union organizations involved dialogue with only one party, namely the government-recognized UGTD. That confederation was said to be particularly active in the banking sector. The *AED* added that the protests of the UDT were political in nature and were unrelated to union matters and that the dispute of 1995 which had been mentioned by the mission had involved a trade union that currently had no relations with the *AED*. The *AED* stated that it was in favour of strengthening the trade unions because it wanted to engage in an authentic dialogue.
18. The *UNDP Resident Coordinator* noted that the trade unions did not play a significant role in promoting job creation or in safeguarding workers' rights. The unions seemed to be less active than they had been previously, possibly also because there was no real tradition of protest among civil society in Djibouti.

## **B. Legislative framework relating to freedom of association**

19. In June 2007, the Conference Committee on the Application of Standards noted the concerns of the CEACR relating to the conformity of the new Labour Code with the provisions of Convention No. 87, especially with regard to the requirement of prior authorization for the establishment of a union and the restrictions relating to the election of certain persons to union offices. The Conference Committee welcomed the commitment made by the Government to revise the Labour Code in the light of the Convention and indicated its wish for the process to begin rapidly, in full and meaningful consultation with the social partners.

20. The *Minister of Employment and National Solidarity* said that the new Labour Code, which had been in force since 2006, gave a lot of importance to the social partners and afforded maximum protection to the rights of employees. To facilitate understanding, copies of both the old and the new labour codes and a comparative analysis of the two texts were supplied to the mission. The Minister added that all the social partners and the ILO had been consulted in the process of preparing the new Labour Code. He also mentioned his department's initiative with regard to the adoption of a decree establishing a National Council of Labour, Employment and Vocational Training (CNTEFP). Reaffirming what had been said by the representative of Djibouti to the Conference, he expressed the hope that the mission would help the Government identify the inconsistencies between national legislation and the Conventions, so that the situation could be rectified. He said that the solutions would be discussed within the CNTEFP. Each group (Government, Employers and Workers) would have six representatives on the Council, which would hold at least two plenary meetings per year. The Council's mandate would include addressing all the inconsistencies with the ILO Conventions. Meanwhile, the *UDT* said that it did not recognize the new Labour Code in so far as it considered that it had not been consulted during the process of its preparation. In addition, the Code – which represented a setback to the achievements of the former Labour Code – also posed a problem for employers, who were unable to implement it at the current time, particularly with regard to the introduction of the 48-hour working week. This was confirmed by the *AED*, which expressed concern about the implementation of the Labour Code at the end of the three-year transition period provided for in the law. Although that period was due to expire in a year, no collective agreement had yet been signed. The *AED* had taken the initiative to prepare and propose some agreements to the unions. The priority sectors for such agreements were public works, commercial establishments and banks.
21. The mission held a technical meeting with representatives of the Ministry of Employment and National Solidarity focusing on the issues raised by the CEACR with regard to the Labour Code and national regulations. To facilitate the discussion, the mission provided a copy of the latest comments by the CEACR on the application by Djibouti of Convention No. 87. The mission also considered the implementation of the Minimum Wage-Fixing Machinery Convention, 1928 (No. 26), which had been discussed by the Conference Committee on the Application of Standards in June 2006. The following issues were discussed:
- *Sections 41 and 42 of the Labour Code.* The CEACR requested the Government to amend these provisions so as to provide that the possibility of suspending the employment contract during a period of trade union office where such office is incompatible with the demands of work, is a matter for negotiation between the parties concerned, who must establish the relevant modalities. In any event, such suspension should not be automatic.
  - *Section 214 of the Labour Code.* The CEACR considered that section 214, in deeming any person with any prior conviction in a court of law to be unsuitable for trade union office, is formulated too broadly and would cover situations in which the nature of the conviction is not inherently such as to rule out the holding of trade union office. The Committee therefore requested the Government to amend section 214 of the Labour Code, in consultation with the social partners, so as to ensure that only court sentences for offences which by their nature were prejudicial to the integrity of the individual are deemed to be incompatible with the holding of trade union office.
  - *Section 215 of the Labour Code.* The CEACR noted that section 215 of the Labour Code, under which the decision of the Minister of Labour requires not only the deposition by the founders of the trade union of the relevant documents, but also a detailed report by the labour inspector, would appear to grant the administration more or less discretionary power in deciding whether or not an organization meets the

registration criteria. This situation could amount in practice to denying the right of workers and employers to establish organizations “without previous authorization”, in contravention of *Article 2 of Convention No. 87*. The CEACR therefore requested the Government, in consultation with the representative organizations of employers and workers, to amend section 215 of the Labour Code so as to guarantee the right to establish workers’ and employers’ organizations without previous authorization, to remove the provisions which give de facto discriminatory powers to the administration, and to ensure that the registration procedure is merely a formality.

- *Section 5 of the Associations Act*. The Committee referred to its previous comments and called for this section to be repealed, as it requires organizations to obtain authorization prior to their establishment as trade unions, in violation of *Article 2 of Convention No. 87*. During the discussion, the Government indicated that section 210 of the Labour Code addressed the concern of the CEACR with regard to this section.
- *Section 23 of Decree No. 83-099/PR/FP*. The CEACR noted that the provision conferred upon the President of the Republic broad powers to requisition public servants who were indispensable to the life of the nation and the proper operation of essential public services. It requested the Government to restrict the power of requisition to public servants who exercised authority in the name of the State or in essential services in the strict sense of the term.
- *Need to provide information on the legislative provisions relating to the application of the Minimum Wage-Fixing Machinery Convention, 1928 (No. 26)*. In its most recent comments (November–December 2007), the CEACR asked the Government to take the necessary steps to ensure that minimum wage rates determined by means of collective agreements were legally binding and could not be lowered, and that their non-observance would be subject to sanctions. The Committee also asked the Government to supply detailed information concerning the sectors or branches of economic activity and the different categories of workers covered by collective agreements, as well as the approximate number of workers whose remuneration was not regulated by collective agreement.

22. The discussions and clarifications enabled the representatives of the Ministry to see ways and means to correct the inconsistencies identified by the CEACR. The mission requested that, at a subsequent meeting to be held prior to its departure, the Ministry make specific proposals regarding legislative amendments.

### **C. Cases of unionists dismissed in 1995 and not yet reinstated**

23. The mission recalls that the dismissal of workers and trade union officials in 1995 following strike action has been the subject of several complaints to the Committee on Freedom of Association (Cases Nos 1851 and 2450) and that the Committee has always been in favour of their reinstatement [*see Case No. 1851, 304th Report of the Committee on Freedom of Association, para. 286, 307th Report, para. 272, and 324th Report, para. 536; see also Case No. 2450, 342nd Report of the Committee on Freedom of Association, para. 436, and 348th Report, para. 560*]. These issues have also been discussed in the Conference Committee on the Application of Standards [*see Report of the Committee on the Application of Standards, 89th Session of the International Labour Conference, Geneva, 2001, Part 2, pp. 32–35*]. In addition, the Office has conducted various missions in the country since 1996 in an attempt to settle this dispute.

24. In considering Case No. 1851, the Committee on Freedom of Association expressed in its conclusions regret that the Government had not provided specific and detailed information

with regard to the allegations that serious repressive measures had been taken against trade union activists and officials, and called for the release of the trade union officials who had been arrested for strike action and measures to lift immediately the severe penalties imposed on the striking union members in 1995, 1996 and 1997 and to reinstate in their posts the trade union officials and trade unionists dismissed or suspended for having participated in a strike. The Committee then requested the Government to accept the visit of a direct contacts mission to the country [see 307th Report of the Committee on Freedom of Association, Vol. LXXX, 1997, Series B, No. 2, para. 272]. Once the Government gave its consent, in August 1997, for such a mission to be conducted in early 1998, arrangements were made accordingly and the mission was carried out in January 1998. In its conclusions, the direct contacts mission had noted the severity of the problems, the solution of which lay in the re-establishment of a normal trade union climate in accordance with the principles guaranteed in ILO Convention No. 87. It had invited the Government as a whole, and the Minister of Labour in particular, to take, in agreement with the trade union organizations, the necessary action to respond to the following requests: (1) it asked the Minister of Labour to complete the timetable for meetings, the beginning of which had been decided upon at the end of the meeting held at the Ministry of Labour with the trade union organizations, in order jointly to examine the situation of the UGTD and UDT officials dismissed following the strikes and to take the necessary measures and to use all the legal means available to end or cancel the dismissals and to reinstate the officials as quickly as possible in their posts and duties, in conditions (timetable and conditions of return, etc.) negotiated with them. ... (4) As regards those in dialogue with the trade union organizations, the mission requested that everything be done to ensure that normal trade union life and activities could continue or resume at all levels and in all sectors of industrial activity, in respect of the principles of freedom of association and trade union pluralism. The same recommendation was made to the trade union organizations [see *Case No. 1851, 309th Report of the Committee on Freedom of Association, paras 224–251 and annex*].

25. In considering Case No. 2450, the Committee on Freedom of Association noted in its conclusions that, under the terms of the agreement concluded on 8 July 2002 between the Department of Labour and Relations with the Social Partners and the dismissed trade union officials, the Government had pledged to reinstate the dismissed trade unionists. It noted the information provided by the Government on the situation of Adan Mohamed Abdou and Kamil Diraneh Hared, who had reportedly refused offers of reinstatement. It furthermore requested the Government to keep it informed of the situation of the trade unionists who were due to be reinstated under the terms of the agreement of 8 July 2002, namely: *Abdoulfatah Hassan Ibrahim, Hachim Adawe Ladieh, Houssein Dirieh Gouled, Moussa Wais Ibrahim, Abdillahi Aden Ali, Habib Ahmed Doualeh and Bouha Daoud Ahmed*. The Committee requested the Government to ensure that all those workers who so wished were reinstated without loss of wages or benefits, and that those not wishing to be reinstated received adequate compensation [see Case No. 2450, 348th Report of the Committee on Freedom of Association, paras 533–560].
26. The mission provided those it met with background information on the dispute and recalled that the supervisory bodies had consistently requested the reinstatement of dismissed workers. It also recalled that the Government had repeatedly pledged to reinstate all dismissed workers, including through reinstatement agreements signed with trade union organizations concerned, although no follow-up action had been taken. At its first meeting with the Minister of Employment and National Solidarity, the mission noted that the chronology of successive cases examined by the ILO supervisory bodies revealed that relations between the Government and some social partners were extremely tense. The mission indicated that its main objective was to defuse the situation and to help find a solution that would be acceptable to all.

27. The *Minister of Employment and National Solidarity* said that his department was prepared to answer any questions concerning the reinstatement or status of the persons concerned. However, he said that he was astonished by the information on the Internet relating to cases of harassment or murder of trade unionists in Djibouti, and rejected such claims. The *Minister of Justice, Prisons and Islamic Affairs* said that the issue of the 1995 dismissals had been settled by the Government through a mass reinstatement process, in all but a few isolated cases. He observed that, generally speaking, the reinstatement of workers dismissed in 1995 had been the result of political good will and that the Ministry could intervene to ensure that the reinstatements had taken place, which was the case for the majority of the dismissed workers. In this regard, the Minister mentioned the case of the former president of the UDT (*Ahmed Djama Egueh*), whose reinstatement in his job at the airport had not been possible, but who was now employed in the Ministry of Finance. The Minister added that some unionists had left the country. He also said that, if cases were still pending, the Government was ready to rectify the situation. He noted that the isolated cases of dismissed workers who had not yet been reinstated included the case of the Secretary-General of the UDT (*Adan Mohamed Abdou*), who was both a trade union official and the leader of an opposition political party. The *Prime Minister* recalled the economic challenges and the ordeals that the country had faced recently. In that regard, he said that Djibouti did not have a culture of rejection, but rather had demonstrated its ability to forgive. With regard to the 1995 dismissals, the Prime Minister recalled that the vast majority of the dismissed workers had been reinstated. The few who had not yet been reinstated constituted one of those intractable groups that were often found in such circumstances.

28. Representatives of the *Intersyndicale UDT/UGTD* indicated that the reinstatement of the unionists dismissed in 1995 had become a political issue for the authorities. The unionists concerned were being treated as opponents. Regarding the agreements that had been reached, the *Intersyndicale UDT/UGTD* specified that, under the agreement of 8 July 2002, which had been signed through the mediation of an ILO mission, workers who wished to be reinstated had to make an individual request to that effect. Those who did not wish to be reinstated had to be compensated. Some had therefore filed a request for reinstatement. However, the authorities had always rejected the principle of compensation and had furthermore imposed a condition for reinstatement, namely the relinquishment of trade union membership. The new condition imposed by the authorities had been rejected by all concerned. Thus, no progress had been made and the commitments made by the authorities before the ILO and the social partners had not been honoured. The mission reviewed the list of persons who had allegedly not yet been reinstated after their dismissal in 1995. This list, which was based on information provided by the *Intersyndicale UDT/UGTD*, in particular in a communication dated 10 January 2008 relating to Case No. 2450 before the Committee on Freedom of Association, read as follows:

- *Abdoufathah Hassam Ibrahim*: Former Secretary-General of the Union of Primary School Teachers.
- *Hachim Addawe Ladieh*: Deceased in 2003.
- *Houssien Dirieh Gouled*: Member of the Railway Workers' Union, currently living in Djibouti.
- *Moussa Waiss Ibrahim*: Member of the Railway Workers' Union, currently living in Djibouti.
- *Abdillahi Aden Ali*: Member of the UGTD, he was dismissed from the Social Protection Body (OPS). He is currently living in Djibouti.

- *Habib Ahmed Doualeh*: Member of the UGTD and the Electricity Workers’ Union, currently living in Djibouti.
  - *Bouha Daoud Ahmed*: Member of the Sheraton Union, currently living in Djibouti.
  - *Adan Mohamed Abdou*: Claims that for 12 years he has been “verbally” forbidden from working in either the public or the private sectors.
  - *Kamil Diraneh Hared*: Secretary-General of the UGTD, present.
  - *Souleiman Mohamed Ahmed*: Secretary-General of the Secondary Teachers’ Union (SYNESED) and Deputy Secretary-General of the UDT, he worked in a private school (Champion School) but had to leave his job because of pressure on the school administration.
  - *Mohamed Doubad Waiss*: Member of the Postal Workers’ Union, currently living in exile in France.
  - *Mariam Hassan Ali*: Secretary-General of SYNESED, she has left the country.
  - *Abdourachid*: Teacher who is a member of the UDT; no information is available on his current situation.
- 29.** The *Secretary-General of the UGTD*, the organization recognized by the authorities, regretted the current deadlock situation, which he described as being a consequence of the 1995 dispute. He recalled that his organization had always campaigned for the reinstatement of the workers dismissed in 1995, with payment of due wages and benefits.
- 30.** Following its meetings with each of the parties concerned, the mission proposed, as a means of reaching a possible settlement, that a round table discussion be held with the unions, in the presence of the mission, with a view to reaching a common understanding between all partners as to how the dispute might be settled. According to the mission, this type of meeting, in the presence of a third party, might facilitate the task of the parties concerned and provide them with the opportunity to exchange views and find compromise solutions. The *Minister of Employment and National Solidarity* expressed his reservations about such a meeting. The *Intersyndicale UDT/UGTD* reiterated its willingness to sit down with the Government to discuss once again the reinstatement arrangements. The government-recognized *UGTD* indicated that it was strongly in favour of holding such a meeting so that all parties could openly discuss their grievances and state their positions, in an effort to overcome the situation that had paralysed the trade union movement in Djibouti for 12 years.
- 31.** At the wrap-up meeting with the Minister of Employment and National Solidarity, the mission noted, on the basis of the discussions that had been held with the various parties, that it should be possible to reach a compromise on the issue of reinstatements, including the question of arrears payments. It hoped that both sides would adopt an open-minded approach when discussing this matter. The mission reiterated that it would like a meeting on the matter to be held between the Government and unionists, at which it would be present. During its meeting with the Prime Minister, the mission referred to the generosity displayed by the Government in resolving previous, more serious, disputes, and expressed its confidence that, by building on that momentum, the same generosity would be shown towards the payment of compensation to workers who had been dismissed in 1995 and who had not yet been reinstated, and that a meeting would be held to settle this issue once and for all. The head of the mission indicated that the major changes expected in Djibouti should be brought about in the context of tripartite consultation and it was therefore necessary to resolve all the issues that had been pending since 1995. In response, the *Prime*

*Minister* stated that he was not opposed to the principle of paying compensation to the workers in question if they agreed to be reinstated in their jobs. The group of individuals in question would meet with experts from the Ministry of Employment and National Solidarity to settle this issue once and for all. He instructed the Secretary-General of the Ministry of Employment and National Solidarity to carry out the individual negotiations in this regard.

#### **D. Cases of workers at the Port of Djibouti dismissed in 2005**

32. The mission met the management of the Autonomous Port of Djibouti and representatives of the port workforce in order to discuss the allegations of attempts to obstruct the free exercise of trade union activities. The mission recalls that this question has been examined by the Committee on Freedom of Association (*Case No. 2471*). According to the allegations made by the complainant organization, the Union of Port Workers (UTP), on 24 September 2005, some 11 trade union leaders and activists were dismissed; following a solidarity strike the following day, some 170 workers were taken to a detention centre and 25 others were dismissed; 12 workers were held in custody for inciting unrest and unlawful assembly, but were released by order of a court on 2 October 2005; the correctional chamber of the Djibouti Court of Appeal arbitrarily sentenced the workers in question to terms of imprisonment of up to two months (suspended); three of them were found guilty of demonstrating illegally and obstructing freedom to work, and others were convicted of making threats and of assembly in a public place likely to disturb public order. The complainant organization also complains of “final warnings before dismissal” sent to 120 workers who had organized a collection in support of dismissed workers, and in general of harassment of workers by the police and courts. In its conclusions, the Committee on Freedom of Association expressed regret that, despite the time that had elapsed since the presentation of the complaint, the Government had not replied to the allegations of the complainant organization, despite the fact that it had been invited on several occasions to make comments and observations on the case, including by means of an urgent appeal. In its recommendations, the Committee requested the Government to institute an independent inquiry rapidly into the allegations of the wrongful dismissal of the 36 trade union leaders and activists at the Port of Djibouti. It requested the Government, if those allegations were shown to be well-founded, to take the necessary measures immediately to bring an end to those acts of discrimination and to punish those responsible and ensure the reinstatement of the workers without loss of pay. Where reinstatement was not possible, the Committee requested the Government to ensure that the workers concerned were given adequate compensation which would be a sufficient deterrent against anti-trade union dismissals [*see Case No. 2471, 344th Report of the Committee on Freedom of Association, para. 896*].
33. The mission visited the Autonomous Port of Djibouti, where it had a meeting with the port management. The *Human Resources Director* of the port stated that before the advent of the operator *DP World* the port had been facing financial difficulties and had been obliged to seek help from a partner, with due regard to the social legislation in force. In an effort to enable the port to recover, the trade unions had been asked to “play the game”. A plan of action had been established to solve the wages problem. The trade union enjoyed the use of premises paid for by the port, and membership dues had been deducted from wages at source (even in cases of workers who were not union members, despite warnings from the Ministry of Employment). Two workers who had been swindling other workers and causing social conflicts had been removed. They had then used the union as a refuge. The port management is seeking to improve dialogue with the workers and has set up a medical centre, a system for evacuating injured workers at the port’s expense, a training centre, death benefits, negotiated loans for workers, compensation in the event of floods, a very competitive minimum wage, and so on. However, the management has stated that it is

dealing with individuals who are incapable of engaging in dialogue. The situation, it is claimed, deteriorated during the events of 2005, which paralysed the port for one-and-a-half months. The management indicated that the port's reputation was at stake, and shipowners abandoning the port were unlikely to come back. Despite the management's willingness to negotiate, it came up against people who preferred to give priority to individual interests. Following the strike in 2005, some 11 workers had been dismissed for blocking the port and attempting to send messages to ships to dissuade them from entering the Port of Djibouti. They had been arrested for jeopardizing the national interest and placed in custody. In the view of the port's management, the strike was an illegal wildcat strike; however, at the request of the Ministry of Employment, the workers received compensation from the port. The port management nevertheless considered it important to prosecute those union members who had gone to bus stops to intimidate other workers wanting to get to work. A complaint was made against three union workers but was dismissed by the lower court and eventually withdrawn. The port authority decided to dismiss those who had prevented non-striking workers from working. The *representatives of the port management* stated that the matter of the port trade unionists was settled, as far as they were concerned, and that they had "paid dearly for social peace".

34. The *Secretary-General of the Ministry of Employment* explained that his Ministry had been instructed to mediate in that dispute, and had set out a number of specific claims. Negotiations had been conducted by the Prime Minister in person, but it had been clear that the invariable aim of the trade union had been to provoke strike action. On the day before the strike, certain individuals had sent messages to ships, embassies and international organizations. In spite of everything, the President had asked the Prime Minister to find a way of resolving the dispute. The individuals in question had received individual compensation, which in some cases had been generous. Copies of the agreements between the port management and dismissed workers were given to the mission.
35. The mission met with representatives of the UTP at a meeting with the *Intersyndicale UDT/UGTD*. The mission spoke to *Mr Ahmed Ali Aras*, Secretary-General of the UTP, and *Mr Mohamed Ali Ahmed*, the UTP's External Relations Secretary. They stated that, of the 36 portworkers who had been dismissed, two had since died and two women had been rapidly reinstated. They added that, 14 months after their dismissal, the other workers had been "obliged" to sign an agreement with the port management to obtain a lump-sum payment. In the terms under which the management had presented the offer, those who refused to sign would get nothing. All the workers had therefore signed, as most were in severe financial difficulties after several months without any income. Some had even been evicted from their homes. They had therefore signed an agreement with the port management in order to obtain the lump sum, but had also resolved to fight on through the courts and in other ways. However, those wishing to do that had come under pressure from the authorities and from their families. *Mr Mohamed Ali Ahmed* is the only one to have persisted with legal action, and his case is reported to be at the appeals stage. After the mission had read the agreements signed by the workers and the port management, under the terms of which the workers waived any claim against the Port of Djibouti, the *UTP* and the *Intersyndicale UDT/UGTD* recalled that the workers had been obliged to sign in order to get the compensation, and contested the validity of the agreements. The UTP has provided a copy of the communication dated 26 December 2006 contesting the validity in law of the agreements.
36. The mission asked those it met whether there was currently a trade union operating at the Port of Djibouti. The *representatives of the port management* stated that they knew of one union with the same name but had no relations with it. They also said that the absence of a trade union would not necessarily be regarded as a loss by the workforce, which had enjoyed a number of benefits agreed by the management. The *representatives of the UTP* stated that, currently, there was no active union at the Port of Djibouti. Workers who were union members or wished to join did not say so openly for fear of being dismissed. There

was therefore no union presence at the port. Trade union activities were largely prevented at the port because the only trade union was not even allowed to enter the port precincts. In addition, the elections for workforce delegates that had been planned the previous year had not taken place, although the term of office of the previous officials had expired at the end of 2007. According to the *UTP*, the dismissed workers were in a difficult situation because they could not find work. Employers would not hire workers who had been dismissed or were union members because they feared “trouble”.

37. The mission asked whether the union members could enter the port to discuss trade union issues with the workers. The *representatives of the port management* said that certain rules governed entry to the port: individuals wishing to enter the port had to have a job there, or have some specific reason for entering the port and notify the port security service, which would then decide whether the person could be admitted. The management explained that it would not object to a trade union entering the port on trade union business. The mission expressed regret at the absence of a trade union at the port, which meant that management had no social partner for a number of years.

## **E. Representation of Djibouti workers at the International Labour Conference**

38. The mission considered the question of representation of Djibouti workers at the International Labour Conference. It recalled that this question had again been the subject of an objection and a discussion in the Credentials Committee in June 2007. That Committee in its most recent conclusions noted that the Government had confined itself to sending copies of the communications exchanged between the Director of Labour, on the one hand, and the AED and the UGTD, on the other, in connection with the nomination of delegates to the Conference. The Credentials Committee deeply regretted the absence of cooperation from the government authorities, and requested the Government to submit a detailed report supported by relevant documentation concerning the procedure used to nominate Workers’ delegates and advisers, indicating the organizations that had been consulted and the criteria applied, the date and place of consultations, and the names of persons nominated by those organizations following the consultations.
39. The mission proposed holding discussions with the parties concerned and suggested how far the procedures for nominating the Workers’ delegation of Djibouti could be acceptable to everyone. In the view of the *Intersyndicale UDT/UGTD*, there was no question of doubt concerning the role of the UDT as a representative body and thus of its right to represent Djibouti workers at the International Labour Conference. The Government, however, chose to support the UGTD recognized by it, but regarded by the *Intersyndicale UDT/UGTD* as a government union. According to the *Intersyndicale UDT/UGTD*, one possible compromise might be to allow both the UDT and the government-recognized UGTD to participate, but given that the UDT was the most representative of the union organizations, its representative should have the status of regular delegate. The *Minister of Employment and National Solidarity* said that he was not in favour of allowing the UDT to attend the International Labour Conference because its representativeness had yet to be established. The mission had, as a compromise, asked the authorities to agree to include the UDT in the Djibouti delegation to the next session of the Conference, pending elections which would establish which of the workers’ organizations was the most representative. The Minister said that the mission’s request would be passed on to the Government.

## **F. Other matters**

40. During its meetings, the mission was able to touch on a number of related issues of importance which will need to be followed up.

**(1) Court cases still pending**

41. At a meeting with the *Minister of Justice, Prisons and Islamic Affairs*, the mission drew attention to the fact that a number of allegations concerned arrests, and sought clarification on the situation of the persons detained. These included the case of *Mr Mohamed Ali Ahmed* of the UTP, who informed the mission that his passport had been confiscated, and the cases of *Mr Djibril Ismael Igueh*, *Mr Adan Mohamed Abdou* and *Mr Hassan Cher Hared*, who had been charged with “supplying information to a foreign power”, and the judicial proceedings that had been initiated against them. As regards the confiscation of *Mr Mohamed Ali Ahmed’s* passport, the Minister requested that the necessary inquiries be made. With regard to the charges of “supplying information to a foreign power” brought against *Mr Djibril Ismael Igueh*, *Mr Adan Mohamed Abdou* and *Mr Hassan Cher Hared*, an offence punishable under sections 137 and 138 of the Penal Code, the Minister stated that the persons concerned had made statements that had “gone beyond the boundaries of trade union activity”, had “indulged in political propaganda” and had “insulted the Head of State”. However, after some inquiries had been made, the Minister said that the charges had been changed by the public prosecution authority to “publicly insulting the authorities”, an offence under section 432 of the Penal Code. He also indicated that the situation, for which time was needed, had been resolved but the case was still under judicial investigation and no court decision had been handed down. The Government had undertaken to check the facts and inform the Office accordingly. The mission noted that as long as the case remained under investigation, especially if it were for a long period, it was effectively a “sword of Damocles” hanging over the heads of the trade union members concerned and could restrict them in the exercise of their legitimate activities. Consequently the mission recommended that the authorities take the necessary steps to ensure that a definitive ruling was handed down without delay.

**(2) Social elections**

42. The mission asked whether organizing social elections might not be the most objective and transparent way of determining which organizations in Djibouti were the most representative. The *Intersyndicale UDT/UGTD* considered that representativeness in Djibouti was determined through the election of union delegates in enterprises: the number of delegates was a measure of representativeness. It also argued, however, that the authorities and enterprises that did not accept that it was the most representative organization, prevented elections of trade union delegates. The *UDT* claimed that it had 22 affiliated unions, of a total of 27 in Djibouti, but also complained of threats made by the authorities against those affiliated organizations. That situation, it was claimed, had prompted certain organizations to suspend their membership. Similarly, some unions were said to have been unable to re-elect their officers, in some cases since 2002. As was the case with the Dock Workers’ Union, which had recently held its general meeting, the relevant documents were filed with the authorities, as required by the Labour Code with regard to the renewal of trade union mandates, but no action had been taken, which meant that some unions had not elected new officers. That was the situation of, for example, the Refuse Collectors’ Union, the Drivers’ Union, and the Dock Workers’ Union (whose registration on 7 December 2007 has elicited no response). The *Intersyndicale UDT/UGTD* has stated its willingness to take part in social elections to determine representativeness on the condition that the ILO would act as observer and pre-empt any possibility of pressure from the authorities on the trade unionists, in particular the candidates. The *Secretary-General of the Ministry of Employment* stated that the National Council of Labour, Employment and Vocational Training would undoubtedly be the appropriate body for settling most trade union disputes, but also noted that, if the *UDT* were absent from the process, there would be no resolution. He wondered whether the timing was right for social elections as a way of determining rapidly which workers’ organizations should be

represented on the Council and said that, in order to hold such elections, the grass-roots unions needed to prepare.

### (3) *ILO technical assistance*

43. The fact that the Director of the ILO's Addis Ababa Subregional Office, which covers Djibouti, was a member of the mission demonstrated that the Office is willing and able to provide technical assistance in the implementation of the different recommendations which the mission might make and in any other activities pertaining to the ILO's remit. In that respect, the mission held a working meeting with management staff of the National Department of Labour on possible ways of developing projects aimed at strengthening labour administration. During the discussions, the *Director of Labour* spoke in favour of promoting the ILO's fundamental Conventions, and reiterated his Government's interest in the **Programme to support the implementation of the ILO Declaration on Fundamental Principles and Rights at Work (PAMODEC)**. He recalled that he had received a letter from the Director-General of the ILO asking for discussions on this with the mission. From the perspective of developing social dialogue, he also wanted to have the support of the **Programme for the promotion of social dialogue in French-speaking countries of Africa (PRODIAF)**. The mission received copies of documents on the different points raised during the discussions. The *Director of Labour* expressed regret at the absence of the ILO in recent years and said he hoped to see it play a more prominent role. The *Director of the ILO Subregional Office in Addis Ababa* noted the overall convergence of the country's needs and the assistance projects in Djibouti actually planned by her Office. She indicated her intention to carry out a multidisciplinary mission to Djibouti in the coming weeks to discuss in greater depth the matter of assistance from the Office. She recalled that assistance from the Office would be channelled through a Decent Work Country Programme which would be developed in consultation with the Government and the social partners.
44. The *government-recognized UGTD* expressed incomprehension at what in its view was the exclusive relationship between the ILO and the UDT, despite the fact that the UGTD was a representative and active organization at the national level. A member of the UGTD severely criticized the ILO for taking the side of individuals over the years to the detriment of workers and unions like the UGTD, who wanted their competencies strengthened in order to be able to defend the interests of Djibouti workers. The mission took note of the wish for training expressed by the UGTD and said it would inform the competent department at the ILO (*ACTRAV*). The *Director of the ILO Subregional Office in Addis Ababa* said that she was willing to support all the ILO's constituents, and future activities and training in Djibouti would involve the UGTD. She stated that the *ACTRAV* specialist would visit Djibouti to discuss the UGTD's requirements in greater detail. The head of the mission recalled that participation in the common activities of workers would require an effort from everyone to sit down at the same table; that effort was essential if progress was to be made.
45. During discussions with the resident UN agencies, the *Director of the ILO Subregional Office in Addis Ababa* set out the mission's objectives and the prospects of collaboration between the Office and the resident agencies. The head of the mission noted that the major changes and initiatives that had been reported would require the participation of the social partners. He noted the need for a stronger civil society, and the concerns about freedom of expression, which had a direct bearing on freedom of association. The mission noted that certain aspects of technical assistance referred to by the Resident Coordinator pertained to the mandate of the ILO. The mission also noted that, during its discussion with the *Head of the European Commission delegation*, the latter had indicated the possibility of European Union support in all activities to strengthen civil society, including with regard to trade unions.

### III. Results, conclusions and recommendations of the mission

46. Before presenting its conclusions and recommendations, the mission wishes to thank the Djibouti authorities for the welcome, organization and cooperation it enjoyed throughout its visit to Djibouti; this greatly facilitated its work. It would especially like to thank *His Excellency Mohamed-Siad Douala*, Ambassador and Permanent Representative of Djibouti in Geneva, and *Mr Djama Mahamoud Ali*, Adviser to the Permanent Representative, for their help in the preparatory work for the mission, and *Mr Ali Yacoub Mahamoud*, Secretary-General of the Ministry of Employment and National Solidarity, and *Mr Guedi Absieh Houssein*, National Director of Labour and Relations with the Social Partners, for their unfailing support.
47. The direct contacts mission enjoyed the full cooperation of all those concerned, including the resident development partners, all of whom provided as much detailed information as possible and shared their comments and views. The mission is most grateful to them. The mission would also like to thank the Government for the spirit of cooperation it showed by enabling it to meet the Minister of Employment and National Solidarity on two occasions and, at its request, the Minister of Justice and the Prime Minister.

#### A. Exercise of freedom of association

48. The Government appeared to be somewhat irritated by the fact that it is required on a regular basis to provide answers to international forums with regard to violations of rights and principles of freedom of association, when it considers that there is no case to answer.
49. An analysis and comparison of the accounts provided by the Government and by representatives of the *Intersyndicale UDT/UGTD*, the UGTD and the AED, however, makes it clear that the Government and the AED currently have no relations with the *Intersyndicale UDT/UGTD*.
50. To explain its position, the Government presents different arguments at different times. Initially, the Government appeared to be critical of the representatives of the UDT and the UGTD for having failed to convene general assemblies to re-elect their officers in the belief that they are “secretary-generals for life”. In this regard, and on the basis of various statements, the mission notes that:
- Between 1992 and 1999, neither the UDT nor the UGTD held a general assembly.
  - In 1999, the Government, in accordance with its mandate and at the request of 22 grass-roots unions, convened general assemblies for both the UDT and the UGTD. The circumstances in which these conferences were held and in which the new officers were appointed are viewed very differently by the Government and by the leaders of the *Intersyndicale UDT/UGTD*.
  - The Government worked with the officers who were appointed at the two 1999 conferences, considering them to be lawful and legitimate, despite the protests of the former union leaders and the refusal of various international organizations and meetings to recognize the representativeness of the new officers.
  - In 2002, at the UDT conference, which was held with the agreement of the Government and in the presence of a representative of the ICFTU, the former leaders regained control of the trade union confederation. The Government has since refused to treat the UDT as a social partner with which it should engage in dialogue.

51. The reasoning of the Government appears to have changed from 2002 onwards. It maintains, without providing clear evidence, that the former leaders staged a forceful takeover. The mission notes, however, that no complaint has been brought to its attention by the main parties concerned, namely the members of the trade union confederation. It notes on the contrary, that the officers elected in 1999 have stayed on and continue to work with the UDT leadership. In addition, the Government highlights the political affiliation of the UDT leaders, notably that of the Secretary-General, *Mr Adan Mohamed Abdou*, who confirms that he belongs to a political party, the Republican Alliance for Development (ARD), that he used to be its secretary-general, and that he resigned from this position and is currently the first vice-president. In support of its claims, the Government refers to the provisions of the new Labour Code of 2006, which prohibits individuals from holding union office and party political office at the same time. Under section 214 of the Labour Code, “individuals responsible for the management or administration of any trade union are prohibited ... from occupying positions in which they are responsible for the management or administration of a political party”. The mission is of the view that the question of the compatibility of this provision, as drafted, with the international labour Conventions ratified by Djibouti should be left to the ILO’s supervisory bodies, in particular the Committee of Experts on the Application of Conventions and Recommendations.
52. The mission notes that the protest strike of 1995, which was considered to be lawful and legitimate, and the subsequent dismissals and sanctions mark a turning point in the deterioration of relations between the Government and the trade union confederations, the UDT and its secretary-general, but also the *Intersyndicale UDT/UGTD*. According to the mission, many factors served to widen the gap between the Government and the *Intersyndicale UDT/UGTD* from that point onwards: the organization by the Government of the UDT and UGTD general assemblies in 1999, bypassing the union leaders; the refusal of the authorities to work, to date, with the former leaders of the UDT, who resumed control of the confederation in 2002 at a general assembly that was, according to the trade unionists, accepted by the authorities and which took place in the presence of a representative of the ICFTU; the virtual disappearance of the Union of Port Workers since the 2005 strike, which was followed by dismissals and compensation measures; and the misunderstandings, suspicion and bitterness that can arise when people have or express different political opinions in a fledgling democracy where the spirit of open debate and tolerance have yet to take root.
53. Nevertheless, the mission firmly believes, on the basis of the statements made by almost all the parties concerned, that there is a way to resolve the issues that have been pending since 1995.

## **B. Reinstatement of workers dismissed following the 1995 strike**

54. Regarding the reinstatement of workers dismissed following the 1995 strike, two facts remain constant: first, that the reinstatement of all the dismissed workers in their original posts (or the offer of equivalent posts if reinstatement is not possible) is not being questioned; and second, although most of the workers have now been reinstated, some workers have not yet been reinstated.
55. The mission notes that the list of dismissed workers who have yet to be reinstated is subject to debate. The Government did not comment immediately on the list prepared by the *Intersyndicale UDT/UGTD*, a copy of which it received from the mission. It considers that, generally speaking, the only cases that remain are “isolated” and involve “intractable groups”, in other words “people who do not wish to be reinstated or who are no longer in the country”. The Government nevertheless agreed with the mission to carry out the

necessary checks into the situation of several workers, on the basis of the list provided by the mission, and that it would inform the Office accordingly.

56. In addition, the mission notes that the question of compensation and arrears of pay for workers who have not yet been reinstated remains unresolved. While it was in Djibouti, the mission attempted to reconcile the parties and to find a compromise that would be acceptable to all. The mission notes the Government's commitment to reinstate the dismissed workers in their original posts or, if such reinstatement is not possible, in another service. It also notes that the Government is prepared to pay the social security contributions for the retirement of these individuals. The mission notes that the Government, through its *Prime Minister*, is not opposed in principle to the payment of compensation, on condition that the workers agree to be reinstated. In this regard, the mission appreciates the good will of the *Prime Minister* and the clear mandate he has given to the *Secretary-General of the Ministry of Employment and National Solidarity* to conduct and conclude negotiations on the issue of reinstatement, compensation and the payment of social security contributions. The mission held several meetings with the leaders of the *Intersyndicale UDT/UGTD* who, taking into account the time that has elapsed (1995–2008), seemed willing to reach an acceptable compromise with regard to back pay and compensation arrangements. The mission expects that, on the basis of the commitments made by all those concerned, it will be possible to resolve this issue and that tangible and rapid progress will be made over the course of the year, ideally before the 97th Session of the International Labour Conference (May–June 2008).

### C. Court cases still pending

57. The mission requested a meeting with the *Minister of Justice, Prisons and Islamic Affairs* to discuss allegations relating to the arrest of trade unionists. The mission notes the commitment of the Minister to carry out the necessary checks and to inform the Office accordingly. With regard to the charges against certain unionists of “supplying information to a foreign power”, which were subsequently reclassified by a decision of the public prosecution authority to “publicly insulting the authorities”, the mission notes that the case is still under investigation and that no decision has yet been handed down. The mission recommends that the Government take all necessary measures to ensure that this matter is resolved swiftly and definitively.

### D. Social dialogue at the Port of Djibouti

58. The mission has taken note of the procedures followed in this dispute and of the documents submitted. It has also taken note of the copies of the agreements reached between the Port of Djibouti and *Mr Ahmed Abdi Walieh, Ms Samira Hassan Mohamed, Mr Youssouf Houmed Mohamed, Mr Abdourahman Bouh Iltireh, Mr Koulmieh Houssein Ahmed, Mr Djibril Houssein Waliyeh, Mr Wahib Ahmed Dini, Mr Ibrahim Moussa Sultan, Mr Kamil Mohamed Ali, Mr Yacin Ahmed Robleh, Mr Mohamed Ahmed Mohamed, Mr Mohamed Abdillahi Omar, Mr Mohamed Ali Ahmed, Mr Mohamed Abdillahi Dirieh, Mr Moustapha Abchir Egueh, Mr Moustapha Moussa Houssein, Mr Ali Abraham Darar and Mr Ali Ibrahim Chireh*. In the agreements, these individuals accept compensation in return for withdrawing all present and future action of a criminal, social, civil and commercial nature and agree not to bring the Port of Djibouti to court. For its part, the Port of Djibouti agrees to withdraw any pending complaint and not to initiate court proceedings. This is a compromise settlement in the form of a lump-sum, all-inclusive and one-off payment which, under section 2052 of the Civil Code, has the status of *res judicata* and cannot be subject to appeal on grounds of legal error or damage.

59. The mission would like to recall the need to remove any discriminatory measure that might prevent the dismissed workers from working within the port area in enterprises providing port services, or elsewhere.

## E. Improvements to the legal framework

60. The mission notes that the Government has demonstrated a certain openness to the issue of the legislative amendments requested by the ILO's supervisory bodies. Indeed, the Government has not only provided details of some of the amendments that it intends to introduce, but it also indicated that it is very much in favour of the technical assistance and the advice that the Office could provide in this regard.
61. At a technical meeting held at the end of the visit, the Government made a commitment to amend the provisions that have been the subject of comments by the supervisory bodies.
- *Section 41 of the Labour Code.* A proposal for alternative wording will be sent to the ILO for comments.
  - *Section 42.* The reference to trade unions will be deleted from paragraph 8.
  - *Sections 214 and 215.* The Government has undertaken a commitment to amend these sections so as to bring them into line with Convention No. 87 and requests the ILO to assist it with the drafting. It committed to reducing the time required for the registration of a trade union to 30 days.
  - *Section 23 of Decree No. 83-099/PR/FP of 10 September 1983.* A list of essential services will be drawn up in consultation with the social partners.
62. The mission notes that these draft legislative amendments will be submitted, for an opinion, to the National Council of Labour, Employment and Vocational Training (CNTEFP). It notes that the CNTEFP has not yet been established to date and wishes to advise the Government against excessive delays in this regard and especially against any rise of a new blockage. The mission notes that section 277, paragraph 1, of the Labour Code provides that the CNTEFP is composed “in equal numbers of representatives of the most representative national workers’ and employers’ organizations”. The mission noted during its discussions, however, that the issue of the representativeness of workers’ organizations in Djibouti is viewed very differently by the Government and by the social partners (the *Intersyndicale UDT/UGTD*, the UGTD and the AED). In addition, the mission notes that Decree No. 2008-0023/PR/MESN of 20 January 2008 (a copy of which it received), relating to the organization and operation of the CNTEFP, contains a provision that might allow the Minister of Employment and National Solidarity to select members who represent workers’ organizations on a discretionary basis: section 2, paragraph 4, of the Decree provides that “In the event that no organization can be regarded as the most representative, the Minister of Employment and National Solidarity shall be responsible for directly appointing the relevant Council members”.
63. The mission is of the opinion that, in the current context, given that the representative nature of workers’ organizations has not yet been clearly and objectively determined, no representative of trade union activity in Djibouti should be excluded from the work of the CNTEFP. Accordingly, the mission urges the Government to allow the *Intersyndicale UDT/UGTD* as the representative of the most representative workers’ organizations, on an equal footing with the UGTD to participate actively in the work of the CNTEFP and therefore to allow it to express its views in a forum of open and constructive dialogue.

## F. Representation of Djibouti workers at the International Labour Conference

64. The mission notes that no satisfactory solution to this question has been found. Although the Minister of Employment and National Solidarity considers that the UDT is not representative, the leaders of the UDT believe that their confederation is the most representative one and should therefore carry the mandate of a titular Workers' delegate.
65. The mission is not convinced that all the elements needed to organize transparent and fair social elections are currently in place in Djibouti, to allow for such elections to be held peacefully before the 97th Session of the International Labour Conference (May–June 2008). The mission is of the opinion that ILO technical assistance would be useful to facilitate the holding of such elections as long as all trade union structures are able to operate freely.
66. The mission did its utmost to ensure that the Government understood the expectations of the Credentials Committee with regard to preparing a detailed report explaining the procedure used to nominate the Workers' delegation of Djibouti. The mission proposed a compromise solution to accommodate the current diversity of opinions, namely that the UDT be included in the Djibouti delegation at the 2008 session of the Conference in order to include both the confederations that represent the country's workers pending the results of elections which will determine the most representative workers' organization(s). In any event, the trade union confederations (UDT and UGTD) should form part of the delegation of Djibouti to the Conference in 2008. The mission notes the statement by the Minister of Employment and National Solidarity that this proposal will be forwarded to the Government.

## G. ILO technical assistance

67. In order to help the Government of Djibouti and the workers' and employers' organizations carry out the necessary reforms, the Office is prepared to provide technical assistance in implementing the mission's various recommendations and any other activities that pertain to the ILO's remit. This technical assistance will primarily be provided under the guidance of the Subregional Office of the ILO in Addis Ababa in coordination with the relevant technical departments at headquarters. It is understood that this assistance will be provided to all the tripartite constituents in Djibouti without exception and will be coordinated when appropriate with the assistance provided by the UN agencies in Djibouti and by bilateral or multilateral donors such as the European Union.

\* \* \*

68. In conclusion, the direct contacts mission wishes to emphasize the need to resolve without delay the current situation in Djibouti, where bipartite and tripartite social dialogue has come to a standstill. Accordingly, the mission recommends that the Government recognize the right of the UDT and the *Intersyndicale UDT/UGTD* to fully exercise their legitimate trade union activities, in accordance with national legislation and the principles of international labour standards. The mission has advised all those concerned to adopt a forward-looking spirit of compromise, but considers however that the Government has a great responsibility in this regard and an important role to play in driving this new process forward. A major and symbolic first step would be to settle the question of the reinstatement of the workers dismissed in 1995, their compensation and the payment of their social security contributions. In this regard, the mission trusts that those government authorities which have made concrete commitments will begin negotiations without delay. Lastly, the mission believes that the Government should, in a spirit of openness, initiate genuine concertation between all the social partners, regardless of its perception of them,

with a view to holding fair and transparent social elections in a climate of confidence. The mission trusts that all those concerned will agree that the best social dialogue is one that is inclusive – not exclusive – and one which aims to resolve all pending issues in a spirit of cooperation, sincerity and good will.

Mr Yéro Dé  
9 April 2008

## Appendix I

### Timetable of meetings of the direct contacts mission (21–25 January 2008)

Date and time	Meeting	Contact
<b>Monday 21 January 2008</b>		
4 p.m.	Minister of Employment and National Solidarity	
5 p.m.	Technical meeting with representatives of the Ministry of Employment and National Solidarity	
<b>Tuesday 22 January 2008</b>		
9 a.m.	Djibouti Port Authority	
11 a.m.	UNDP Resident Coordinator and other resident UN agencies	
3 p.m.	Intersyndicale UDT/UGTD and Union of Port Workers	
<b>Wednesday 23 January 2008</b>		
10 a.m.	Department of Labour/Management of the National Agency for Employment and Vocational Training	
12 noon	European Commission delegation	
3 p.m.	Employers' Association of Djibouti (AED)	
5 p.m.	General Union of Djibouti Workers (UGTD)	
7 p.m.	Working meeting with the Secretary-General of the Ministry of Employment and National Solidarity	
8 p.m.	Intersyndicale UDT/UGTD	
<b>Thursday 24 January 2008</b>		
9 a.m.	Minister of Justice, Prisons and Islamic Affairs	
11 a.m.	Minister of Employment and National Solidarity	
1 p.m.	Prime Minister	

## Appendix II

### List of interlocutors

#### **I. Government**

Office of the Prime Minister

*Mr Dileita Mohamed Dileita*, Prime Minister

Minister of Employment and National Solidarity

*Mr Houmed Mohamed Dini*, Minister

*Mr Ali Yacoub Mahamoud*, Secretary-General of the Ministry

*Mr Guedi Absieh Houssein*, National Director of Labour and Relations with the Social Partners

*Mr Ali Mohamed Kamil*, Director-General of the National Agency for Employment, Vocational Training and Labour Market Integration (ANEFIP)

*Mr Charmarke Idriss Ali*, Director of the National Institute of Public Administration

*Ms Aicha Hassa-Mohamed*, Chief of the Office of Labour, Labour Regulations and Freedom of Association

*Ms Adwa Seif Kayad*, Chief of the International Relations Unit

*Ms Koina Omar Dahelo*, Acting Labour and Social Legislation Inspector

Ministry of Justice

*Mr Mohamed Barkat Abdillahi*, Minister

#### **II. Representative employers' organization**

Employers' Association of Djibouti (AED)

*Mr Hamodou Hassan Ibrahim*, President

*Mr Jean-Philippe Delarue*, Vice- President

*Mr Luc Beiso*

*Mr Nicolas Guedj*

#### **III. Representative workers' organizations**

Intersyndicale UDT/UGTD

*Mr Adan Mohamed Abdou*, Secretary-General (UDT)

*Mr Kamil Dirane Hared*, Secretary-General (UGTD)

*Mr Farah Abdillahi Miguil*, Secretary-General for Communication (UDT)

*Mr Abdoulrazack Hared Farah*, Legal Affairs Secretary (UDT), Secretary-General of the Djibouti Telecom Staff Union

*Mr Abdillahi Aden Ali*, Treasurer (UGTD)

*Mr Anouar Mohamed Ali*, Secretary-General of the Djibouti Electricity Workers' Union

*Mr Ali Mohamed Kamil*, Secretary-General of the Union of Workers in the Construction and Public Works Sector (SP-BTP)

*Mr Aouad Ibrahim Arnahoud*, National Printing Union

*Mr Habib Ahmed Doale*, former Secretary-General of the Djibouti Electricity Workers' Union

#### Union of Port Workers (UTP)

*Mr Ahmed Ali Aras*, Secretary-General

*Mr Ali Ibrahim Darar*, Deputy Secretary-General

*Mr Mohamed Ahmed Mohamed*, Legal Affairs Secretary

*Mr Mohamed Ali Mohamed*, External Relations Secretary

#### General Union of Djibouti Workers (UGTD)

*Mr Ado Sikie Dirieh*, Secretary-General

*Mr Hassan Ali Doualeh*, Deputy First Secretary

*Mr Mohamed Moussa Idriss*, Administrative Secretary

*Mr Said Ahmed Egueh*, Financial Secretary

*Mr Issé Ibrahim Chirdon*, Press Secretary

*Mr Mohamed Ahmed Egueh*, Deputy Information Secretary

*Mr Youssouf Houssein Robleh*, Deputy Information Secretary

*Mr Said Yonis Waléri*, Coordination Secretary

*Ms Asli Aden Hadi*, Secretary for Women's Affairs

*Mr Idriss Ali Batoun*, External Relations Secretary

*Mr Kaneh Ali Robleh*, Records Secretary

*Mr Djibril Egueh Illueh*, Secretary for Cultural Affairs and Sports

*Mr Seck Abdo Daoud*, Adviser to the Union's Officers

*Mr Mahdi Med Hassan*, Documentation Secretary

*Mr Saade Hassan Ibrahim*, Legal Affairs Secretary

*Mr Mohamed Waiss Olieh*, Auditor

*Mr Alow Mohamed Abdallaha*, Secretary-General of the Djibouti Telecom Union (STDT)

#### **IV. Port of Djibouti**

*Mr Aden Ahmed Douale*, Government representative

*Ms Dekka Y. Mohamed*, Chief of the Legal Department

#### **V. United Nations agencies and European Union representation**

##### UN agencies

*Mr Sunil Saigal*, UNDP Resident Representative and Resident Coordinator of the UN system's operational activities in Djibouti

*Ms Aicha Ibrahim Djama*, UNFPA

*Dr Mostafa Tyane*, WHO

*Mr Benoît Thiry*, WFP

*Dr Aloys Kamuragiye*, UNICEF

Representative of UNHCR

##### European Commission delegation to Djibouti

*Mr Joaquin Gonzalez-Ducay*, Head of Mission

CASE NO. 2571

INTERIM REPORT

**Complaint against the Government of El Salvador  
presented by**

- **the Trade Union Confederation of El Salvador Workers (CSTS)**
- **the Trade Union Federation of Food, Beverage, Hotel, Restaurant and Agro-Industry Workers of El Salvador (FESTSSABHRA) and**
- **the General Trade Union of Workers in the Fishing and Allied Industries (SGTIPAC)**

*Allegations: anti-union dismissals, acts of intimidation against trade unionists in the Calvoconservas El Salvador SA de CV company, and establishment of a trade union made up of the company's heads and trusted staff*

**799.** The complaint is contained in a communication dated 12 June 2007, presented by the Trade Union Confederation of El Salvador Workers (CSTS), the Trade Union Federation of Food, Beverage, Hotel, Restaurant and Agro-Industry Workers of El Salvador (FESTSSABHRA), and the General Trade Union of Workers in the Fishing and Allied Industries (SGTIPAC). FESTSSABHRA and SGTIPAC presented new allegations in communications dated 18 July 2007 and 26 March 2008. The Government sent its observations in communications dated 20 and 29 August 2008.

**800.** El Salvador has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. The complainants' allegations**

**801.** In their communication dated 12 June 2007, the CSTS, the FESTSSABHRA (the El Salvador affiliate of the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF)) and the SGTIPAC made an official complaint against the Government of El Salvador on account of the violation of the freedom of association of the workers of the company Calvoconservas El Salvador SA de CV, a member of the consortium known as "Grupo CALVO El Salvador", consisting in the dismissal of trade union officials and trade unionists and in general, the implementation of a campaign of anti-union intimidation against workers that has included the use of armed vigilantes, the National Civil Police and proposals to the workers in favour of the establishment of an employer-controlled trade union by the company's managers.

**802.** The complainant organizations explain that, on Sunday, 4 February 2007, the "Calvoconservas El Salvador SA de CV branch" of the SGTIPAC was formed in the port city of La Unión, El Salvador. The said union is an industry union, entitling it, under El Salvador's legislation, to set up branches in "companies concerned with the same industrial, commercial, services, social or other comparable activities". The said union branch was officially recognized by the Ministry of Labour and Social Security on 1 March 2007.

- 803.** The complainant organizations allege that Ms Berta Aurelia Menjivar, partner of Mariano Alexander Guerrero, Secretary-General of the Calvoconservas El Salvador SA de CV branch (both founders of the said union branch), was summoned on 9 February 2007 by the head of human resources, who informed her that she was being dismissed on account of having had three letters of warning. The worker in question stated that that could not be possible since she had not been informed of those warnings and had received only one such letter. That being the case, she refused all attempts by the head of human resources to get her to sign any document.
- 804.** In response to a request to that effect, the Ministry of Labour conducted a special inspection on 24 February 2007, in the course of which it was established that Ms Berta Aurelia Menjivar “was one of the best workers in the packaging area”, according to her own supervisor, who added that “at no time has there been any report or request to the effect that Ms Berta Aurelia Menjivar be dismissed”. These statements, which were placed on record, contradict the company’s arguments to the effect that the worker in question was justifiably dismissed. Later on in the same record, it is established that Calvoconservas, “by dismissing the worker Ms Berta Aurelia Menjivar, a founder member of the Calvoconservas SA de CV branch” of SGTIPAC, infringed the provisions of article 47 of the Constitution of the Republic, section 248 of the Labour Code, which protects the founder members of trade unions against dismissal for a period of up to 60 days. Further to the said inspection, the company was ordered to pay the worker her unpaid wages, including those she had failed to receive on account of her dismissal, and it was recommended that she be reinstated in her post. On 1 March, the Ministry of Labour ascertained, in the course of a follow-up inspection, that the company had failed to remedy any of the aforementioned infringements. The worker subsequently brought her case before the courts, where it is currently at the submission of evidence stage.
- 805.** The complainants further allege that, on 9 September 2003, Mr Joaquín Reyes joined the company Luis Calvo Sanz El Salvador SA de CV as a stevedore. As from October 2006, he also held the post of relations secretary in the SGTIPAC, within the general (national) executive committee of that industrial union.
- 806.** He worked in these conditions for Luis Calvo Sanz SA de CV until he was transferred to Calvo Consignataria Centroamericana SA de CV, where he worked continuously and without interruption until 15 March 2007, when he was verbally dismissed by his supervisor, who said that he had problems with him on account of his trade union affiliation, that he could no longer enter the workplace, and that that order had come from the chief supervisor in the unloading area of Calvo Consignataria Centroamericana SA de CV.
- 807.** In addition, the complainant organizations state that Mr Roberto Carlos Hernández, having taken up employment with Calvoconservas El Salvador SA de CV, was subsequently, on 25 March 2007, elected to the post of relations and welfare secretary in the Calvoconservas El Salvador SA de CV branch of SGTIPAC.
- 808.** However, on turning up for work as usual on 29 March 2007, he found himself confronted with a list of individuals who had been dismissed and who no longer had the right to enter the workplace but were instructed merely to make their way to the office of human resources. Having done so, he was informed by the resources manager that his dismissal was in response to a supervisor’s report to the effect that he was a rebel, in reply to which he argued that his personal file contained no warning letters and that the real reason for the report was that he had recently been elected to serve as a union official. On 10 April 2007, the trade unionist in question submitted a request for a special inspection to the Ministry of Labour and, subsequently, on 4 May 2007, submitted a request concerning the same case to the labour courts of San Salvador. The case is currently before San Salvador’s labour court No. 4. By way of an aggravating factor in this case, on 28 May 2007, i.e. two months

after the illegal dismissal of this union official, the lawyer working for Calvoconservas El Salvador presented the civil court of La Unión with a request for an individual labour judgement against the official Mr Roberto Carlos Hernández, asking the judge to authorize the latter's dismissal without employer's liability.

- 809.** The complainants also allege that the lawyer for Calvoconservas El Salvador presented the civil court of La Unión, on 28 May 2007, with a request for an individual labour judgement in order to terminate the contract, without employer's liability, of union official Mr José Antonio Valladares Torres, organizational and statistical secretary of the Calvoconservas El Salvador SA de CV branch of SGTIPAC, on the alleged grounds that he was absent from his work on four days during the month of November 2006, one day in December 2006, one day in February 2007, one day in March 2007 and two non-consecutive days in April 2007. Despite the fact that the union official has documentation which proves a failure to apply the procedures of section 50 of the Labour Code, governing causes for dismissal without managerial responsibility, it is clear that the intention is to decapitate the executive committee of SGTIPAC in Calvoconservas El Salvador by a variety of means. It is worth noting that the lawyer for Calvoconservas El Salvador attempted to lodge the request for initiation of the said legal proceedings with a retroactive date of 16 April 2007, but that the court declared his request admissible on the date of its submission, namely 28 May 2007.
- 810.** The complainant organizations state that on 2 May 2007, during the course of a visit to El Salvador by IUF's Latin American Regional Office, the IUF representative, Mr Carlos Amorín, accompanied by Mr Alfredo Osorio (the then Secretary-General of the FESTSSABHRA), Mr Atilio Jaimes (the then disputes secretary of the CSTS) and with the same post in FESTSSABHRA), Mr Alexander Reyes (secretary-general of the executive committee of SGTIPAC) and Mr Gilberto García (member of the Centre for Labour Studies and Support (CEAL)), presented himself at the Calvoconservas plant, located in the coastal city of La Unión, with the intention of holding talks with representatives of that transnational, as had previously been announced.
- 811.** Indeed, on 19 April 2007, the union officials Mr Osorio and Mr Jaimes had informed the legal representative of the Calvo Group, Mr Miguel Angel Peñalva, of the forthcoming visit to El Salvador, including La Unión, by IUF's Latin American Regional Office and had requested that a meeting be held between 29 April and 3 May for the purpose of discussing the recent dismissals of union officials at the Calvoconservas plant. Mr Peñalva had replied that although it would not be possible for him to be there for the visit since he would be travelling, the management maintained an open-door policy and was always ready to meet with the union. Having been thus assured, the said delegation arrived at the gates of the plant on the morning of 2 May, from where they telephoned to request a meeting with the plant's director, Mr Antonio Huevo, who was not present on the company's premises. Mr Alfredo Osorio, who was handling arrangements, then made contact with Mr Raúl Parada, the manager of Calvo Consignataria, who asked for a few minutes to consult with Mr Peñalva, who, supposedly, was out of the country.
- 812.** Shortly thereafter, Mr Osorio received a call from Mr Parada informing him that he had been unable to find Mr Peñalva and would therefore not receive the delegation. While this telephone conversation was taking place, a van belonging to the local police force arrived and parked beside the trade unionists. The police officers requested Mr Alexander Reyes – whom they knew since he also lived in La Unión – to approach the vehicle. All the members of the delegation then entered into a discussion with the officers, who said that they had been called by the Calvo company and informed that “a demonstration was taking place at the entrance to the plant”.

- 813.** Subsequently, on 10 May 2007, fresh approaches were made to get the company to receive the secretary-general of Comisiones Obreras de Euskadi (Basque Workers' Commissions), Mr Josu Onaindi, who is also a member of the national executive of the Spanish confederation. An attempt was made to secure an interview with Mr Miguel Angel Peñalva, the person in charge of the Calvo Group in El Salvador. Despite the fact that, following a written request and several telephone conversations with his assistant at the main headquarters of the Calvo Group in San Salvador, an assurance had been given to the branch that a member of Comisiones Obreras could be received on 10 May 2007 at the plant, or even that Mr Peñalva could receive the said member on 18 May at the company's headquarters in the capital, neither of those options materialized when the time came, and it was stated that Mr Peñalva was travelling outside the country and had left no one in charge of receiving the delegation from Comisiones Obreras. According to his assistant, Mr Peñalva left the curious message that he would be discussing the matter of the dismissals relating to the Calvoconservas branch of SGTIPAC with the Spanish trade unions.
- 814.** The complainants refer, moreover, to acts of anti-union intimidation within the Calvoconservas El Salvador plant as from the time at which the SGTIPAC branch was established therein. In the first instance, armed guards were stationed inside the plant with the aim of intimidating the workers in their very place of work. SGTIPAC has spoken out against this practice since, in addition to being intimidating, it is clearly a risky business to locate an armed individual within a working environment. Things have even reached the point at which the armed guards travel in the staff transfer buses, calling on workers not to join the union. All the managers of the abovementioned company use words such as "terrorists", "troublemakers" and "rebels" to refer to the SGTIPAC leaders. At the same time, they have been urging workers to establish a trade union that does not make problems for the company, in what amounts to a clear violation of freedom of association inasmuch as workers are being called upon to join an employer-controlled union.
- 815.** In its communication of 18 July 2007, FESTSSABHRA reports the establishment, in that same month, of the Union of Workers of the Company Calvoconservas El Salvador, abbreviated STECESSACV. The following employer's representatives took part in the setting up of that union: Mr Fernando Torres (chief of unloading), Ms Dora Lilian Escobar Cruz (chief of processes), Ms Cristela Vides (chief of processes), Mr Henry Aguilera (chief of packaging processes), Ms Rocío Escobar (chief of human resources payments). Other managerial staff also took part, such as the chief of the maintenance store and chief of canning. The aforementioned chiefs have used their hierarchical position within the company to compel workers, especially on the day shift, to sign documents attesting to their willingness to support or join the said union, when in reality those signatures were obtained under coercion. The fact is that the workers who signed the abovementioned documents did so without being allowed to have access to the entire content thereof or to have a copy. Most of them state, moreover, that they did so out of a fear of reprisals on the part of their supervisors in the event of their refusal. In the present case, the trusted employees and employer's representatives are the promoters and indeed officials of the STECESSACV union, in violation of section 225 of the Labour Code. It is obvious that the said actions are aimed at establishing an employer-controlled union organization and that its promoters, sheltering behind the hierarchy principle, are coercing the workers to join it, with the latter facing a fair risk of reprisals from their own supervisors should they fail to do so. For these reasons, the Labour Inspectorate has been requested to conduct a special inspection. Nevertheless, the Ministry of Labour has recognized the said union as a legal entity.
- 816.** The complainant organizations add that the company is engaging in intimidation against unionized workers through a company that has been contracted to subject them to polygraph tests in connection with the alleged sabotage of a fork-lift truck and conveyor belt, during which they are asked questions about their union membership and about their

opinions with regard to trade unionists and their activities. The complainants point out that the alleged sabotage occurred in areas that are different to those in which the members in question are employed. For all these reasons, the union has requested the Ministry of Labour to conduct a special inspection.

**817.** In its communication of 26 March 2008, SGTIPAC alleges that the aforementioned company-controlled union has negotiated the collective agreement, which was registered with the Ministry of Labour on 31 January 2008. SGTIPAC has requested the Ministry to cancel the registration.

## **B. The Government's reply**

**818.** In its communication of 20 August 2007, the Government states that, as can be seen from the inspection record, the Secretariat of Labour and Social Insurance, through the General Labour Inspection Directorate, carried out the ordinary procedure for an unplanned inspection, to the effect that whenever the Conservas Calvo SA de CV workers have sought legal help, the Labour Inspectorate, through its Special Unit on Gender and the Prevention of Discrimination in Respect of Employment, has always responded to their requests in an efficient manner.

**819.** In exercising their functions, the inspectors from the said unit have had no more in the way of powers or constraints than those laid down in the International Labour Organization's Labour Inspection Convention, 1947 (No. 81), or those contained in the Act on the Structure and Functions of the Labour and Social Welfare Sector.

**820.** It is important to keep the foregoing very much in mind when analysing this case, since despite the fact that Calvoconservas SA de CV has justified the dismissals of the union officials Ms Berta Aurelia Menjivar, Mr Joaquín Reyes and Mr Roberto Carlos Hernández on the grounds of disobedience vis-à-vis the orders of their supervisors and of being bad workers, the labour inspectors have described those dismissals as infringements of the labour legislation in force, under the terms of article 47 of the Constitution of the Republic and section 248 of the Labour Code.

**821.** The Government adds that in the course of conducting the inspections, interviews were held with workers from the plant and workmates of those dismissed, all of whom denied the existence within the company of acts of harassment or individual pressure on the part of the employer's representatives, or of any intimidating or anti-union comments that could be considered discriminatory.

**822.** When the respective follow-up inspections were carried out, it was noted that the infringements that the company had been found to have committed in regard to the unlawful dismissal of the union officials, as well as the arrears of unpaid salaries for reasons attributable to the employer, had not been remedied, at which point the inspection measures gave way to the procedure for imposition of the corresponding fine.

**823.** In its communication of 29 August 2007, the Government refers to the allegations relating to a new trade union within the company.

**824.** With regard to the recognition of the Union of Workers of the Variable Capital Company Calvoconservas El Salvador (STECESSACV) as a legal entity, the Government states that no procedure has been violated since the Secretariat of Labour and Social Insurance, through the Department of Social Organizations, has done nothing other than follow the procedure laid down in the Labour Code, no formal flaws or infringements of the laws having been observed therein or in the information submitted.

- 825.** With respect to the application of the polygraph test to Calvoconservas SA de CV workers, the Government indicates that on 18 July 2007 a labour inspection was carried out during the course of which it was indeed noted that a group of 18 workers had been given the said test. The employer's representatives stated that in June 2007 cases of sabotage within the company had been reported, consisting in damage to a fork-lift truck through the pouring of salt into its petrol tank and in the placing of metal parts on a conveyor belt leading to the mill. It was these acts of sabotage which made it necessary for the management to perform the polygraph test on those workers engaged in the packaging and maintenance departments and responsible for shelving, water purification and fish supplies.
- 826.** The Government adds that the workers interviewed (18) stated that the polygraph test had not been obligatory but, on the contrary, voluntary, and that they were unaware of acts of intimidation or discrimination for belonging to a trade union organization.
- 827.** Despite the workers having stated that they voluntarily undertook the polygraph test, the Labour Inspectorate noted in the record of the inspection in question that it warned the company against performing polygraph tests on its workers in the future and urged the company to enter into an open dialogue with the workers' representatives in the interests of settling any disagreement and creating a harmonious labour environment.

### **C. The Committee's conclusions**

- 828.** *The Committee notes that in this case the complainant organizations have presented the following allegations: (1) the anti-union dismissal of Ms Berta Aurelia Menjivar (founder member of the union branch — within Calvoconservas El Salvador SA de CV — of the SGTIPAC, Mr Joaquín Reyes (member of SGTIPAC and former official thereof), Mr Roberto Carlos Hernández (official of the SGTIPAC branch) and Mr José Antonio Valladares Torres (official of the SGTIPAC branch); (2) the refusal by the company's management to receive officials from IUF and other organizations (2 and 10 May 2007); (3) the intimidation of members and workers by armed guards within the company and by the company's management (including the carrying out, through another company, of polygraph tests on workers in relation to a reported sabotage and with questions in regard to the union membership of workers and their opinion concerning the activities of the union officials); (4) the establishment within the company of a trade union with the participation of trusted staff and various company heads, with coercion of the workers to get them to join or support the said union, as well as the granting by the Ministry of Labour of the status of legal entity to the union and registration of the collective agreement between it and the company.*
- 829.** *As regards the allegation relating to the anti-union dismissal of Ms Berta Aurelia Menjivar (founder member of the union branch), Mr Joaquín Reyes and Mr Roberto Carlos Hernández (union officials) and the non-payment of the salaries to which they are entitled, the Committee notes that, according to the Government: (1) on the occasion of the visit of the Labour Inspectorate, the company cited disobedience vis-à-vis orders from the supervisors and that they were bad workers, but the Labour Inspectorate found that the company had infringed the labour legislation in regard to the protection of union founders and officials and by failing to pay salaries due following unlawful dismissal; (2) the company failed to remedy the infringements indicated by the Labour Inspectorate, at which point the latter's inspection measures gave way to the procedure for imposition of the fine foreseen under the corresponding legislation. The Committee requests the Government to inform it of the outcome of the procedure for imposition of a fine initiated against the company, and to continue recommending to the company that it reinstate those dismissed (this recommendation stems from the Labour Inspectorate records transmitted by the complainant organizations).*

- 830.** *As regards the allegations of intimidation against trade unionists and acts of coercion (presence of armed guards within the plant; use by the company of words such as terrorist and troublemaker when referring to the union officials), the Committee takes note of the Government's statements to the effect that, during the inspections conducted within the company by the Labour Inspectorate, the workers unanimously denied the existence of acts of harassment or individual pressure on the part of the employer's representatives, or of any intimidating or anti-union comments. The Committee requests the Government to respond specifically to the allegation concerning the stationing within the plant of armed guards who call on the workers not to join SGTIPAC.*
- 831.** *As regards the allegation relating to the subjection of workers to polygraph tests in connection with alleged sabotage, with questions being put to the workers regarding their union membership and their opinion regarding the union officials and their activities, the Committee takes note of the Government's statement that: (1) on 18 July 2007, a labour inspection was carried out in the course of which it was noted that a group of 18 workers had indeed undergone the aforementioned test. The employer's representatives stated that in June 2007 cases of sabotage within the company had been reported, consisting in damage to a fork-lift truck through the pouring of salt into its petrol tank and the placing of metal parts on a conveyor belt leading to the mill; (2) it was these acts of sabotage which made it necessary for the management to perform the polygraph test on those workers engaged in the packaging and maintenance departments and responsible for shelving, water purification and fish supplies; (3) the (18) workers interviewed by the Labour Inspectorate stated that the polygraph test had not been obligatory but, on the contrary, voluntary, and that (as is indicated in the previous paragraph) they were unaware of acts of intimidation or discrimination for belonging to a trade union organization; (4) despite the workers having stated that they voluntarily undertook the polygraph test, the Labour Inspectorate noted in the record of the inspection in question that it warned the company against performing polygraph tests on its workers in the future and urged the company to enter into an open dialogue with the workers' representatives in the interests of settling any disagreement and creating a harmonious labour environment. In view of these explanations, the Committee will not pursue its examination of the allegations relating to the polygraph tests.*
- 832.** *The Committee notes with regret, moreover, that the Government has not replied to the allegation relating to the refusal by the management to receive foreign union officials, particularly from IUF and Comisiones Obreras de España, despite having indicated or suggested that it would do so. The Committee requests the Government to ascertain the facts of the matter and, if it turns out that the company acted in the manner reported by the complainant organizations, that it inform the company that such an attitude does not lead to harmonious labour relations based on mutual respect and dialogue.*
- 833.** *With regard to the alleged recognition as a legal entity of a union (Union of Workers of Calvoconservas El Salvador SA de CV) within the company, comprising company heads and trusted individuals, as well as coercion and intimidation in an attempt to get workers to join it and the negotiation of a collective agreement between that union and the company, the Committee takes note of the Government's statement that the granting by the Ministry of Labour of legal entity status was done in pursuance of the legal procedure laid down in the Labour Code, in the absence of any observed formal flaws or infringements of the relevant legislation. The Committee notes that the Labour Inspectorate, as the Government states, was informed by the workers that they were unaware of acts of intimidation on the part of the company.*
- 834.** *The Committee regrets that the Government has made no mention of the alleged presence of company heads and trusted staff in the establishment of the aforementioned union or of*

*the negotiation by it of a collective agreement. The Committee requests the Government to carry out an investigation without delay and to keep it informed in that regard.*

### **The Committee's recommendations**

**835. *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:***

- (a) As regards the alleged anti-union dismissal of Ms Berta Aurelia Menjivar (founder member of the trade union branch), Mr Joaquín Reyes (union member and former official), Mr José Antonio Valladares Torres and Mr Roberto Carlos Hernández (union officials) and the non-payment of the salaries to which they are entitled, the Committee requests the Government to inform it of the outcome of the procedure for the imposition of a fine initiated by the Labour Inspectorate against the company, and to continue to recommend to the company that it reinstate those dismissed.*
- (b) With regard to the allegations of intimidation against trade unionists, the Committee requests the Government to reply specifically to the allegation concerning the stationing within the plant of armed guards who call on the workers not to join SGTIPAC.*
- (c) The Committee notes with regret that the Government has not replied to the allegation concerning the management's refusal to receive foreign trade union officials, in particular from IUF and Comisiones Obreras de España, despite having indicated or suggested that it would do so. The Committee requests the Government to ascertain the facts of the matter and, if it turns out that the company acted in the manner reported by the complainant organizations, to inform the company that such an attitude does not lead to harmonious labour relations based on mutual respect and dialogue.*
- (d) As regards the alleged recognition as a legal entity of a union (Union of Workers of Calvoconservas El Salvador SA de CV) within the company, comprising company heads and trusted individuals, as well as the negotiation of a collective agreement between that union and the company, the Committee regrets that the Government has made no reference either to the alleged presence of company heads and trusted staff within the said union or to the negotiation of the collective agreement by that union. The Committee requests the Government to carry out an investigation into the alleged facts without delay and to keep it informed in that regard.*

CASE NO. 2538

INTERIM REPORT

**Complaint against the Government of Ecuador  
presented by  
the Ecuadorian Confederation of Free Trade Union Organizations (CEOSL)**

*Allegations: The complainant organization alleges that the authorities of the Foundation for Science and Technology (FUNDACYT) requested that the ministerial agreement approving and granting legal personality to the FUNDACYT trade union be annulled and declared invalid; that the FUNDACYT authorities have not responded to its request to negotiate a collective agreement and that, in retaliation, ten workers were dismissed without compensation. It further alleges that the FUNDACYT authorities are urging the workers to give up their membership of the workers' organization*

**836.** The Committee examined this case at its November 2007 meeting and submitted an interim report to the Governing Body [see 348th Report, paras 585–619, approved by the Governing Body at its 300th Session (November 2007)]. The Government sent new observations in communications dated 9 December 2007 and 14 April 2008.

**837.** Ecuador has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. Previous examination of the case**

**838.** In its previous examination of the case in November 2007 [see 348th Report, paras 585–619], the Committee formulated the following recommendations regarding the allegations that remained pending:

With regard to the allegations relating to the dismissal of ten FUNDACYT workers, without compensation, following the request to negotiate a collective agreement and the allegations that the FUNDACYT authorities are urging workers to give up their membership of the trade union, the Committee requests the Government to provide information as soon as possible on: (1) the result of the judicial proceedings under way relating to the dismissal of the trade union officials, Ms María Isabel Cevallos Simancas and Mr Norman Ricardo Quintana Ramírez; (2) the other eight dismissals; and (3) the reason why the officials and members of the FUNDACYT trade union gave up their membership.

**B. The Government's reply**

**839.** In its communication dated 9 December 2007, the Government states that the Ministry of Labour and Employment has proceeded legally and in due form with the administrative proceedings under way in relation to this case.

**840.** In its communication dated 14 April 2008, the Government states, with regard to the judicial proceedings relating to the dismissal of trade union official Mr Norman Ricardo Quintana Ramírez, that his appeal has been rejected (the Government attached a copy of

the ruling stating that the allegation of summary dismissal was not convincingly proven). With regard to the judicial proceedings relating to the dismissal of trade union official Ms María Isabel Cevallos Simancas, the Government states that, through the ruling of 27 April 2007, the proceedings were annulled because of a violation of the Code of Civil Procedure. Furthermore, the Government states that she has submitted a letter dropping the appeal and that the judge summoned the parties to the final hearing on 3 April 2008.

- 841.** With regard to the allegations regarding the other eight dismissed FUNDACYT workers, the Government indicates that it cannot provide information if the names of the persons in question are not specified.
- 842.** With regard to the request for information on the reasons that prompted all the officials and members of the FUNDACYT trade union to give up their membership, the Government states that, having reviewed the file at the Regional Labour Directorate on the FUNDACYT trade union, it observed that there are two official statements addressed to the Regional Labour Director, signed by Jenny Cedeño, Sandra Argotty Pfeil and Monserrat Ivonne Cadena Barsallo and dated 7 and 9 August 2006, to the effect that “I hereby declare that even though I was present at the meeting on 18 July 2006, the date on which some workers held a meeting to establish the FUNDACYT trade union, and signed up, I do not wish to continue being a member of the trade union. I am informing you, the Director, for all pertinent purposes”. According to the Government, the text of these documents makes it clear that the workers whose names appear in the aforementioned statements freely and voluntarily decided not to be members of the trade union. Finally, the Government indicates that, apart from the statements, the file does not contain any other document attesting to the alleged situation, and therefore all that remains to be said is that individuals may join a union or give up their membership of a union (or of any other organization) at their discretion if they so choose.

### C. The Committee’s conclusions

- 843.** *The Committee observes that the allegations that had remained pending following the examination of this case in November 2007 related to the dismissal without compensation of ten FUNDACYT workers (including two trade union officials) following a request to negotiate a collective agreement, and to claims that the authorities were urging workers to give up their trade union membership. In this respect, the Committee requested the Government to provide information on: (1) the result of the judicial proceedings under way relating to the dismissal of the trade union officials Ms María Isabel Cevallos Simancas and Mr Norman Ricardo Quintana Ramírez; (2) the other eight dismissals; and (3) the reason why the officials and members of the FUNDACYT trade union gave up their membership.*
- 844.** *With regard to the judicial proceedings relating to the dismissal of trade union official Mr Norman Ricardo Quintana Ramírez, the Committee notes the Government’s statements to the effect that the appeal has been rejected and that the ruling (a copy of which is attached to the Government’s reply) states that the alleged summary dismissal has not been convincingly proven. Under these circumstances, the Committee will not pursue its examination of this allegation.*
- 845.** *With regard to the judicial proceedings relating to the dismissal of trade union official Ms María Isabel Cevallos Simancas, the Committee notes the Government’s statements to the effect that: (1) through the ruling of 27 April 2007, the judicial authority annulled the proceedings because of a violation of the provisions of the Code of Civil Procedure; (2) the trade union official submitted a letter dropping the appeal; and (3) the judge summoned the parties to the final hearing on 3 April 2008. In these circumstances, the*

*Committee requests the Government to keep it informed of the final outcome of the judicial proceedings.*

- 846.** *With regard to the allegation relating to the other eight dismissed FUNDACYT workers, the Committee notes that the Government states that it cannot provide information on this without the names of the workers in question. In this respect, the Committee invites the complainant to communicate the full names of the eight workers who were dismissed after establishing the FUNDACYT trade union.*
- 847.** *With regard to the reason why the officials and members of the FUNDACYT trade union gave up their membership, the Committee notes the Government's statements to the effect that: (1) having examined the file at the Regional Labour Directorate on the FUNDACYT trade union, it notes that there are two official statements addressed to the Regional Labour Director, signed by Jenny Cedeño, Sandra Argotty Pfeil and Monserrat Ivonne Cadena Barsallo and dated 7 and 9 August 2006, to the effect that: "I hereby declare that even though I was present at the meeting on 18 July 2006, the date on which some workers held a meeting to establish the FUNDACYT trade union, and signed up, I do not wish to continue being a member of the trade union. I am informing you, the Director, for all pertinent purposes"; (2) the text of these statements makes it clear that the workers whose names appear in them freely and voluntarily decided not to be members of the trade union; and (3) apart from the statements, the file does not contain any other document attesting to the alleged situation, and therefore all that remains to be said is that individuals may join a union or give up membership of a trade union (or any other organization) at their discretion, if they so choose. Under these circumstances, observing that, according to the information provided by the complainant and, at the time, by the Government, all the officials and members of the FUNDACYT trade union gave up their membership on the same dates and through identical submissions, the Committee requests the Government to take the necessary measures so that a further investigation is carried out in an effort to determine the reason why they gave up their membership. The Committee requests the Government to keep it informed of the outcome of that investigation.*

### **The Committee's recommendations**

- 848.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee requests the Government to keep it informed of the final outcome of the judicial proceedings under way relating to the FUNDACYT trade union official Ms María Isabel Cevallos Simancas.*
  - (b) The Committee invites the complainant organization to communicate the full names of the eight workers who were dismissed after establishing a FUNDACYT trade union.*
  - (c) The Committee requests the Government to take the necessary measures so that a further investigation is carried out in an effort to determine the reasons why all the officials and members of the FUNDACYT trade union gave up their membership, and to keep it informed of the outcome of that investigation.*

CASE NO. 2203

INTERIM REPORT

**Complaint against the Government of Guatemala  
presented by  
the Trade Union of Workers of Guatemala (UNSI TRAGUA)**

*Allegations: Assaults and acts of intimidation against trade unionists in a number of enterprises and public institutions; destruction of the headquarters of the trade union at the General Property Registry; raiding and ransacking of the headquarters of the trade union at the company Industrias Acrílicas de Centroamérica SA (ACRILASA) and burning of documents; and the employers' refusal to comply with judicial orders for the reinstatement of trade union members*

849. The Committee examined the substance of this case on four occasions (see 330th, 336th, 342nd and 348th Reports), the last of which was at its November 2007 meeting when it submitted an interim report to the Governing Body [see 348th Report, paras 696–710, approved by the Governing Body at its 300th Session]. The Government sent new observations in communications dated 2 January, 10 March and 3 September 2008.

850. Guatemala has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. Previous examination of the case**

851. At its November 2007 meeting, the Committee made the following interim recommendations relating to the allegations presented by the complainant organization [see 348th Report, para. 710]:

- (a) The Committee once again urges the Government to take the necessary steps to send its observations on all the pending allegations without delay.
- (b) With regard to the allegations concerning assaults, death threats and acts of intimidation against trade unionists, as well as attacks on union headquarters, the Committee deeply regrets that, despite the seriousness of the matter, the Government has not sent its observations, and strongly requests the Government to refer these cases as a matter of urgency to the Special Prosecutor for Offences against Trade Unionists and to keep it informed in this regard.
- (c) With regard to the allegations concerning employer interference in union elections at the General Property Registry, which was confirmed by the Labour Inspectorate, the Committee requests the Government to take the necessary measures without delay to sanction the entity responsible to provide for adequate compensation for the damages suffered and to ensure that similar acts do not occur in future. The Committee requests the Government to keep it informed in this regard.
- (d) With regard to the allegations concerning the dismissal of trade unionists at the company Industrias Acrílicas de Centroamérica SA and the violation of the collective agreement, the Committee once again urges the Government to send without delay any judicial

decisions that are handed down on the dismissal of trade unionists, including the members of the executive committee, and on the violation of the collective agreement, as well as its observations on the allegations of pressure on union leaders and members to resign from their jobs or from the union.

- (e) With regard to the allegations relating to the Municipality of El Tumbador concerning the reinstatement proceedings ordered by the judicial authority, the dismissal of union officials César Augusto León Reyes, José Marcos Cabrera, Víctor Hugo López Martínez, Cornelio Cipriano Salic Orozco, Romeo Rafael Bartolón Martínez and César Adolfo Castillo Barrios, and the request for measures to ensure that all wages owed to union leader Mr Gramajo are paid without delay, the Committee requests the Government to send information without delay on the proceedings still pending and to take the necessary measures to ensure that all wages owed to Mr Gramajo are paid without delay.
- (f) With regard to the allegation concerning the dismissal of union leader Fletcher Alburez by the Ministry of Public Health in April 2001, the Committee requests the complainant organization to indicate whether Mr Alburez actually initiated ordinary reinstatement proceedings.
- (g) With regard to the alleged unilateral imposition by the Supreme Electoral Tribunal of an organization manual (dealing with matters related to employees' duties, posts and salary levels) and acts of anti-union discrimination in the application of the said manual, as well as the Tribunal's refusal to meet union leaders and negotiate a collective agreement, the Committee once again requests the Government to meet the parties in order to find a solution to the problems that have arisen and to send its observations on the matter.

## B. The Government's reply

**852.** In its communications of 2 January and 10 March 2008, the Government states that it is more than willing to continue to make strong efforts, as can be seen from the information it sends regularly, and that it intends to set up a tripartite commission to undertake the independent investigations suggested. The Government adds that, in order to give an up to date picture of developments, it is sending partial information on the follow-up to various proceedings, given that most of the cases are still before the courts on appeal or subject to applications for *amparo* (protection of constitutional rights), with the outcome pending because the State of Guatemala guarantees that due process must be followed in all cases and the parties involved must enjoy all the guarantees of the right to defence.

**853.** The Government refers to an allegation relating to attacks on union headquarters, in particular the alleged raiding at the headquarters of the trade union at the company Industrias Acrílicas de Centroamérica SA (ACRILASA) and burning of documents. The Government states that, following a request for information made to the Office of the Special Investigator into Crimes against Journalists and Trade Unionists, it was shown that there were no related complaints in its archives and requests that more information, such as the names of the complainants and the date of the complaint, be provided. The Government respectfully requests the Committee on Freedom of Association to request the complainant organization to provide information additional to that which has already been submitted.

**854.** In its communication of 3 September 2008, the Government refers to allegations related to the Supreme Electoral Tribunal (unilateral imposition of an organization manual) and states that the judicial authority declared null and void the abovementioned measure at the first and second instance and that a Conciliation Tribunal has been set up.

## C. The Committee's conclusions

**855.** *Noting that the Government has stated that it intends to establish a tripartite committee to carry out independent investigations in relation to this case and that certain questions are*

before the national tribunals, the Committee deeply regrets that the Government's reply refers particularly to only two of the various pending issues in this case, despite the fact that many of the cases involve serious allegations referring to events which took place years ago, including acts of violence against trade unionists, acts of anti-union discrimination and interference. The Committee regrets the lack of government cooperation so far regarding the present case, and once again urges it to take the necessary steps without delay to send its observations regarding all the pending recommendations and to implement the objective to which the Government has referred of setting up a tripartite commission to undertake the independent investigations recommended by the Committee on Freedom of Association.

- 856.** *As to the allegations relating to attacks on union headquarters, in particular the alleged raid on the headquarters of the trade union at the company ACRILASA and burning of documents, the Committee notes that, according to the Government, the Office of the Special Investigator into Crimes against Journalists and Trade Unionists has stated that there are no complaints in its archives relating to the allegations, and therefore, the complainant organization must provide more details, such as the names of the complainants and the date of the complaint. The Committee recalls that the allegation in question was presented by the Guatemalan organization UNSITRAGUA in 2002, and the organization stated that it had begun a criminal action against a representative of the enterprise [see 330th Report, para. 797]. The Committee also observes that UNSITRAGUA is a member of the National Tripartite Committee, which regularly meets at the Ministry of Labour. Under these circumstances, the Committee invites the Government to enter into contact with UNSITRAGUA in order to provide a detailed reply regarding the case relating to the alleged raid on the headquarters of the trade union at the company ACRILASA and burning of documents.*
- 857.** *On the other hand, the Committee regrets that the complainant organization has not transmitted the information requested of it with regard the dismissal of the trade union leader Mr Fletcher Alburez and once again urges that it do so.*
- 858.** *The Committee notes the Government's statements on the allegations relative to the Supreme Electoral Tribunal and in particular those relating to the organizational manual imposed unilaterally upon the workers and used in order to commit acts of anti-union discrimination. The Committee notes in particular that a Conciliation Tribunal has been set up and requests the Government to keep it informed without delay in this respect. The Committee reiterates its previous recommendations on the refusal of the Supreme Electoral Tribunal to meet the union leaders in order to negotiate a collective agreement and requests the Government to implement them as a matter of urgency.*
- 859.** *As to the other allegations, given the Government's failure to reply, the Committee reiterates its previous recommendations and urges it to send full and detailed information in this regard.*

## **The Committee's recommendations**

- 860.** *In the light of its foregoing interim conclusions, the Committee requests the Governing Body to approve the following recommendations:*
- (a) The Committee once again urges the Government to take the necessary steps to send without delay full and detailed information regarding all the pending recommendations and to implement the objective to which the Government has referred of setting up a tripartite commission to undertake the independent investigations suggested.*

- (b) *With regard to the allegations concerning assaults, death threats and acts of intimidation against trade unionists, as well as attacks on union headquarters, the Committee deeply regrets that, despite the seriousness of the matter, the Government has not sent full observations, and strongly requests the Government to refer these cases as a matter of urgency to the Special Prosecutor for Offences against Trade Unionists and to keep it informed in this regard. The Committee invites the Government to enter into contact with UNSITRAGUA with a view to providing a detailed reply regarding the case relating to the alleged raid, in 2002, on the headquarters of the trade union at the company ACRILASA and burning of documents.*
- (c) *With regard to the allegations concerning employer interference in union elections at the General Property Registry, which was confirmed by the Labour Inspectorate, the Committee once again requests the Government to take the necessary measures without delay to sanction the entity responsible, to provide for adequate compensation for the damages suffered and to ensure that similar acts do not occur in future. The Committee requests the Government to keep it informed in this regard.*
- (d) *With regard to the allegations concerning the dismissal of trade unionists at the company ACRILASA and the violation of the collective agreement, the Committee once again urges the Government to send without delay any judicial decisions that are handed down on the dismissal of trade unionists, including the members of the executive committee, and on the violation of the collective agreement, as well as its observations on the allegations of pressure on union leaders and members to resign from their jobs or from the union.*
- (e) *With regard to the allegations relating to the Municipality of El Tumbador concerning the reinstatement proceedings ordered by the judicial authority, the dismissal of union officials César Augusto León Reyes, José Marcos Cabrera, Víctor Hugo López Martínez, Cornelio Cipriano Salic Orozco, Romeo Rafael Bartolón Martínez and César Adolfo Castillo Barrios, and the request for measures to ensure that all wages owed to union leader Mr Gramajo are paid without delay, the Committee requests the Government to send information without delay on the proceedings still pending and to take the necessary measures to ensure that all wages owed to Mr Gramajo are paid without delay.*
- (f) *With regard to the allegation concerning the dismissal of union leader Mr Fletcher Alburez by the Ministry of Health in April 2001, the Committee urges the complainant organization to indicate whether Mr Alburez actually initiated ordinary reinstatement proceedings.*
- (g) *With regard to the alleged unilateral imposition by the Supreme Electoral Tribunal of an organization manual (dealing with matters related to employees' duties, posts and salary levels) and acts of anti-union discrimination in the application of the said manual, the Committee requests the Government to keep it informed without delay of the results of the Conciliation Tribunal which has been recently set up to deal with these issues. As for the alleged refusal of the Tribunal to meet the union leaders in*

*order to negotiate a collective agreement, the Committee one again requests the Government as a matter of urgency to meet the parties in order to find a solution to the problems that have arisen and to send its observations on the matter.*

CASE NO. 2295

REPORT IN WHICH THE COMMITTEE REQUESTS  
TO BE KEPT INFORMED OF DEVELOPMENTS

**Complaint against the Government of Guatemala  
presented by  
the Trade Union of Workers of Guatemala (UNSITRAGUA)**

*Allegations: The complainant organization's allegations concern failure to comply with orders for the reinstatement of dismissed trade unionists and anti-union dismissals*

**861.** The Committee last examined this case at its November 2007 meeting and submitted an interim report to the Governing Body [see 348th Report, paras 711–723]. The Government sent its observations in communications dated 9 January and 4 February 2008.

**862.** Guatemala has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. Previous examination of the case**

**863.** At its November 2007 meeting the Committee made the following interim recommendations regarding the allegations presented by the complainant organization [see 348th Report, para. 723]:

- (a) The Committee expects that the 29 workers belonging to the Workers' Trade Union of Golán SA who were dismissed will be reinstated in the very near future, in accordance with the judicial rulings to that effect. The Committee requests the Government to keep it informed in this respect.
- (b) Regarding the alleged dismissal of 50 workers, recruited on an occasional basis for the sugar cane harvest, from the Palo Gordo Agricultural, Industrial and Refining Company SA, the Committee urges the Government to inform it without delay whether the dismissed workers initiated court proceedings, and to inform it of the outcome of any such proceedings.

**B. The Government's reply**

**864.** In its communication dated 9 January 2008, the Government states that of the workers of the Palo Gordo Agricultural, Industrial and Refining Company SA who, according to the allegations, were dismissed during the sugar cane harvest, 23 have failed to bring any court action or make any complaint to the labour inspectorate. The Government states that the enterprise gave them severance pay on the day of dismissal.

865. In its communication dated 4 February 2008, the Government states that the Justice of the Peace of the municipality of Villa Canales in the department of Guatemala stated that, of the 25 workers who lodged complaints against the enterprise Golán SA, 14 attempted to withdraw their complaints, indicating that they were no longer interested in pursuing the case. However, it should be pointed out that the court rejected the withdrawals as inadmissible, given that the labour judge's order to reinstate the workers had been disregarded and the action could therefore not be dropped or withdrawn. Likewise, all the workers concerned were notified of the rulings and judgements issued by this court so that they might be kept up to date regarding the judgements; none of them, however, has appeared during the case, nor have they presented themselves before the court to follow up the case.
866. As regards the non-compliance of the representatives of the enterprise Golán SA, the judge stated that, on 7 May 2007, a public hearing was held, during which Mr Marco Antonio Ramos Pontaza was acquitted. The case of three representatives found to be in contempt of court for failure to appear before the judge is still ongoing. They were formally summoned but their whereabouts are unknown and they no longer work for the enterprise.

### C. The Committee's conclusions

867. *The Committee notes that the present complaint refers to the dismissal of workers belonging to the Workers' Trade Union of Golán SA whose reinstatement has been repeatedly ordered by the judicial authority since 2001 [see 336th Report, para. 470] and to the dismissal in November 2003 of workers belonging to the trade union by the Palo Gordo Agricultural, Industrial and Refining Company SA [see 334th Report, para. 588].*
868. *The Committee notes that, according to the judicial authority's report, transmitted by the Government: (1) the number of workers at the enterprise Golán SA who took legal action against their dismissal is 25, of whom 14 attempted to withdraw their complaints (a move rejected by the judicial authority); (2) all the workers were notified of the legal rulings but failed to appear before the court to follow up the case; (3) there is a case ongoing against three representatives of the enterprise, who have been found in contempt of court and whose whereabouts are unknown (they no longer work for the enterprise), for non-compliance with the reinstatement order issued at the time by the judicial authority.*
869. *The Committee notes the lack of interest on the part of the dismissed workers in continuing with the case in order to obtain reinstatement. Nevertheless, the Committee must emphasize that the allegations refer to dismissals carried out in 2001 and to successive reinstatement orders repeatedly issued by the judicial authority but disregarded in practice, as can be seen from previous examinations of the case. Under these circumstances, the Committee cannot fail to note that the anti-union discrimination protection system has failed in a case that dates back to 2001. It draws the Government's attention to the fact that the basic regulations that exist in the national legislation prohibiting acts of anti-union discrimination are inadequate when they are not accompanied by procedures to ensure that effective protection against such acts is guaranteed, and that the Government is responsible for preventing all acts of anti-union discrimination and must ensure that complaints of anti-union discrimination are examined in the framework of national procedures which should be prompt, impartial and considered as such by the parties concerned [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, paras 817 and 818]. The Committee requests the Government to keep it informed regarding the case against three former representatives of the enterprise Golán SA concerning non-compliance with judicial reinstatement orders. The Committee observes that, independently of this process, there is an obligation on the part of the company to reinstate the dismissed workers in application of repeated judicial orders.*

- 870.** *As regards the dismissal in 2003 of workers belonging to the trade union during the sugar cane harvest by the Palo Gordo Agricultural, Industrial and Refining Company SA, the Committee notes that, according to the Government, the workers dismissed lodged no complaints with the labour inspectorate, and made no claims before the judicial authority; furthermore, on the day of their dismissal they received severance pay. Given the length of time that has passed and the fact that the workers did not lodge complaints and accepted the severance pay, the Committee will not pursue its examination of this allegation.*
- 871.** *In general, the Committee expresses its deep concern at the excessive slowness in administering justice and requests the Government, in consultation with the most representative organizations of workers and employers, to take the necessary measures without delay to remedy the current situation of slowness, as a lengthy delay in concluding proceedings concerning the reinstatement of dismissed trade unionists is tantamount to a denial of justice and therefore of trade union rights.*

### **The Committee's recommendations**

- 872.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *The Committee expresses its deep concern at the excessive slowness in administering justice and requests the Government, in consultation with the most representative organizations of workers and employers, to take the necessary measures without delay to remedy the current situation of slowness, as a lengthy delay in concluding the proceedings concerning the reinstatement of dismissed trade unionists is tantamount to a denial of justice.*
- (b) *The Committee requests the Government to keep it informed regarding the case against three former representatives of the enterprise Golán SA concerning non-compliance with judicial reinstatement orders. The Committee observes that, independently of this process, there is an obligation on the part of the company to reinstate the dismissed workers in application of repeated judicial orders.*

CASE NO. 2445

INTERIM REPORT

### **Complaints against the Government of Guatemala presented by**

- **the World Confederation of Labour (WCL) and**
- **the General Confederation of Workers of Guatemala (CGTG)**

*Allegations: Murders, threats and acts of violence against trade unionists and their families; anti-union dismissals and refusal by private enterprises or public institutions to comply with judicial reinstatement orders; harassment of trade unionists*

873. The Committee examined this case at its November 2007 meeting and presented an interim report to the Governing Body [see 348th Report of the Committee, paras 755–787, approved by the Governing Body at its 300th Session (November 2007)]. The Government sent new observations in communications dated 2, 24 and 28 January 2008.
874. Guatemala has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

#### A. Previous examination of the case

875. In its previous examination of the case the Committee made the following recommendations on the allegations that remained pending [see 348th Report, para. 787]:

- (a) Recalling that freedom of association can only be exercised in conditions in which fundamental human rights, and in particular those relating to human life and personal safety, are respected, the Committee once again deplores the murder of the trade union officials Rolando Raquec and Luis Quinteros Chinchilla, and the attempt against the life of the trade unionist Marcos Alvarez Tzoc and the trade union official Imelda López de Sandoval, once again requests the Government to inform it as a matter of urgency of developments in the inquiries and proceedings currently under way, and expects that those responsible will be severely punished.
- (b) The Committee once again requests the Government immediately to take all the necessary measures to safeguard the lives of the wife and children of the murdered trade unionist Rolando Raquec, given the death threats which, according to the allegations, they have received.
- (c) With regard to the allegations of death threats against the Secretary-General of the Trade Union Association of Itinerant Vendors of Antigua, the Committee hopes that the proceedings in question relating to the threats and assaults will be concluded in the near future and requests the Government to keep it informed in this regard.
- (d) The Committee once again requests the Government to communicate the outcome of the inquiries carried out by the national police and the Prosecutor-General for Human Rights into the allegation concerning the selective surveillance and theft of laptop equipment belonging to José E. Pinzón, Secretary-General of the CGTG.
- (e) With regard to the alleged non-payment of benefits ordered by the judicial authority to trade unionists in the municipality of Cuyotenango Suchitepéquez, the Committee requests the Government to ensure that the payment has now been made.
- (f) With regard to the alleged dismissal of trade unionists at the El Arco Estate (municipality of Puerto Barrios), the Committee notes the Government's statements according to which the proceedings initiated by the dismissed workers at the Clermont Estate in the municipality of Río Bravo, who had obtained a judicial reinstatement order, and the application to the judicial authority by the employer for authorization to dismiss trade unionists at the Los Angeles Estate (municipality of Puerto Barrios) are currently before the Chamber of Amparo of the Supreme Court of Justice. The Committee requests the Government to inform it of the outcome of these proceedings and sincerely expects that they will be concluded without further delay.
- (g) With regard to the alleged dismissal of workers at the El Tesoro Estate (municipality of Samayac) for having submitted lists of claims during negotiations on a collective agreement, despite a judicial reinstatement order, the Committee requests the trade union to which these trade unionists belong to request the competent legal authority to implement the reinstatement order.
- (h) The Committee observes with regret that the Government has not provided any information on the allegations relating to: (1) the workers dismissed for having tried to set up a trade union in the municipality of San Miguel Pochuta; (2) the refusal of the municipality of Cuyotenango Suchitepéquez to grant the trade union leave provided for

by law; (3) the non-payment of wages and other benefits ordered by the judicial authority to trade unionists in the municipality of Livingston; and (4) the absence of measures by the authorities to promote collective bargaining between the El Carmen Estate and the trade union. The Committee urges the Government to send the requested information without delay.

- (i) With regard to the allegations relating to the abusive investigation conducted by the department of human resources against Ms Imelda López de Sandoval, Secretary-General of USTAC, the Committee urges the Government to instruct the General Directorate of Civil Aviation without delay to delete from its staff database any information of a private nature relating to this trade unionist.
- (j) With regard to the alleged threats against the employees of the General Directorate of Civil Aviation who participated in a protest in front of the building against the constant abuse by the administration (according to the allegations, the General Directorate's chief maintenance officer threatened that they would be reported and subsequently dismissed if they were five minutes late back to work, and then took photographs of them) and with regard to the intimidation by security officers against the members outside the room where the union's general assembly was to be held, the Committee regrets that the Government has not sent its observations and urges it to do so without delay.
- (k) The Committee once again reminds the Government that the ILO's technical assistance is at its disposal and that the Government must ensure an adequate and efficient system of protection against acts of anti-union discrimination, which should include sufficiently dissuasive sanctions and prompt means of redress emphasizing reinstatement as an effective means of redress.

## B. The Government's reply

**876.** In its communication dated 2 January 2008, the Government thanks the Committee for reminding it that the technical assistance of the Office is at its disposal. It formally requests that such technical assistance be provided, and trusts that this will be done shortly.

**877.** In its communications of 24 and 28 January 2008, the Government refers to the alleged dismissals carried out by the municipality of San Miguel Pochuta (Chinaltenango) and states that the Labour Inspectorate carried out an inquiry which revealed that 20 workers were dismissed for setting up a trade union. As this was a measure taken unilaterally on the part of the employer, the dismissed workers took administrative and legal action with a view to obtaining reinstatement. The legal authority ordered that they be reinstated and fined the employer. The workers were then reinstated.

**878.** As to the allegation relating to death threats against the Secretary-General of the Trade Union Association of Itinerant Vendors of Antigua, the Government states that the District Prosecutor of the Government Prosecutor's Office of the Department of Sacatepéquez referred the complaint to the local Justice of the Peace, in order that the latter might proceed with the misdemeanours procedure (*procedimiento de faltas*). The Justice of the Peace in question stated that, before the complaint could be examined, the victims (complainants) would have to appear in person to confirm their complaint, providing full information on the three persons involved (given that no addresses had been provided for the purpose of issuing summonses) if the misdemeanours procedure were to proceed. The Government requests the Committee on Freedom of Association to request the complainant organization to inform the complainants that they must appear before the Justice of the Peace in order to confirm the complaint and to establish the liability of those accused of threatening them.

**879.** As to the alleged failure to pay trade unionists the legal benefits ordered by the judicial authority, the Ministry of Labour and Social Welfare carried out an inspection in the municipality of Cuyotenango, Suchitepéquez, through the General Labour Inspectorate, with the active involvement of the employer and workers. The workers reported that steps

were taken to begin implementing the judicial ruling regarding the payment of the benefits owed but, faced with non-compliance, the judge ordered that prosecution proceedings be initiated. The conflicting parties, however, agreed on an out-of-court settlement, which was accepted by the labour judge. As to the refusal to grant trade union leave, the labour inspector appointed to deal with the complaint, acting within his remit, invited the parties to come to agreements that would resolve the issue. The employer expressed a desire to cooperate and maintain contact with the trade union's Secretary-General with a view to granting trade union leave in a way that would be mutually beneficial. The labour inspector states that, in cases of non-compliance with the agreements made, the party concerned is entitled to go before the judicial authority.

### **C. The Committee's conclusions**

- 880.** *The Committee notes that the pending issues relating to the present case refer to murders or acts of violence against trade unionists, anti-union dismissals, non-payment of salaries and benefits ordered by the judicial authority, obstacles to collective bargaining, refusal to grant trade union leave, and acts of harassment against trade unionists. The Committee notes that the Government has accepted and hopes shortly to receive technical assistance from the ILO. The Committee trusts that the object of this assistance will be to ensure promptly an adequate and efficient system of protection against acts of anti-union discrimination, which should include sufficiently dissuasive sanctions and prompt means of redress, beginning with the implementation, without delay, of the judicial reinstatement orders.*
- 881.** *The Committee notes with interest the information provided by the Government to the effect that: (1) the judicial reinstatement orders for the 20 workers who had set up a trade union in the municipality of San Miguel Pochuta have been implemented, and, furthermore, the employer has been fined; (2) during a recent labour inspection, the municipality of Cuyotenango expressed a desire to cooperate with the trade union in order to reach a settlement concerning trade union leave; furthermore, the municipality and the trade union reached an out-of-court settlement regarding the issue of the non-payment of legal benefits to the trade unionists.*
- 882.** *On the other hand, as to the death threats against the Secretary-General of the Trade Union Association of Itinerant Vendors of Antigua, the Committee notes that the Government requests the complainant organizations to take steps to ensure that the trade union leader in question appears before the Justice of the Peace of Sacatepéquez in order to confirm the complaint and allow the misdemeanours procedure to proceed. The Committee requests the complainant organizations to contact the Secretary-General of the trade union for that purpose. The Committee hopes that the proceedings in question relating to the threats and assaults will be concluded in the near future, and requests the Government to keep it informed in this regard.*
- 883.** *The Committee notes with regret that the Government has not sent the requested information on the other pending issues in spite of the lengthy period of time that has passed since the presentation of the allegations and their serious nature, given that they refer to the murder or attempted murder of trade unionists. The Committee urges the Government to transmit all the information without delay, and reiterates the recommendations which it formulated during the previous examination of this case.*

### **The Committee's recommendations**

- 884.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) *The Committee regrets that the Government has only sent information regarding a small number of the allegations presented.*
- (b) *Recalling that freedom of association can only be exercised in conditions in which fundamental human rights, and in particular those relating to human life and personal safety, are respected, the Committee once again deplors the murder of the trade union officials Rolando Raquec and Luis Quinteros Chinchilla, and the attempt against the life of the trade unionist Marcos Alvarez Tzoc and the trade union official Imelda López de Sandoval, once again strongly requests the Government to inform it as a matter of urgency of developments in the inquiries and proceedings currently under way, and expects that those responsible will be severely punished.*
- (c) *The Committee once again strongly requests the Government immediately to take all the necessary measures to safeguard the lives of the wife and children of the murdered trade unionist Rolando Raquec, given the death threats which, according to the allegations, they have received.*
- (d) *With regard to the allegations of death threats against the Secretary-General of the Trade Union Association of Itinerant Vendors of Antigua, the Committee requests the complainant organizations to inform the trade unionists of the need to confirm the legal complaint lodged with the judicial authority and hopes that the ongoing proceedings relating to the threats and assaults will be concluded in the near future and requests the Government to keep it informed in this regard.*
- (e) *The Committee once again requests the Government to communicate the outcome of the inquiries carried out by the national police and the Prosecutor General for Human Rights into the allegation concerning the selective surveillance and theft of laptop equipment belonging to José E. Pinzón, Secretary-General of the CGTG.*
- (f) *With regard to the alleged dismissal of trade unionists at the El Arco Estate (municipality of Puerto Barrios), the Committee notes the Government's statements according to which the proceedings initiated by the dismissed workers at the Clermont Estate in the municipality of Río Bravo, who had obtained a judicial reinstatement order, and the application to the judicial authority by the employer for authorization to dismiss trade unionists at the Los Angeles Estate (municipality of Puerto Barrios) were before the Chamber of Constitutional Protection (Amparo) of the Supreme Court of Justice. The Committee again requests the Government to inform it of the outcome of these proceedings, and expects that they will be concluded without further delay.*
- (g) *With regard to the alleged dismissal of workers at the El Tesoro Estate (municipality of Samayac) for submitting lists of claims during negotiations on a collective agreement, despite a judicial reinstatement order, the Committee again requests the trade union to which these trade unionists belong to request the competent legal authority to implement the reinstatement order.*

- (h) *The Committee notes with regret that the Government has not provided any information on the allegations relating to: (1) the non-payment of wages and other benefits ordered by the judicial authority to trade unionists in the municipality of Livingston; and (2) the absence of measures by the authorities to promote collective bargaining between the El Carmen Estate and the trade union. The Committee urges the Government to send the requested information without delay.*
- (i) *With regard to the allegations relating to the abusive investigation conducted by the Department of Human Resources against Ms Imelda López de Sandoval, Secretary-General of USTAC, the Committee urges the Government to instruct the General Directorate of Civil Aviation without delay to delete from its staff database any information of a private nature relating to this trade unionist.*
- (j) *With regard to the alleged threats against the employees of the General Directorate of Civil Aviation who participated in a protest in front of the building against the constant abuse by the administration (according to the allegations, the General Directorate's chief maintenance officer threatened that they would be reported and subsequently dismissed, if they were five minutes late back to work, and then took photographs of them) and with regard to the intimidation by security officers against the members outside the room where the union's general assembly was to be held, the Committee regrets that the Government has not sent its observations and urges it to do so without delay.*
- (k) *The Committee notes that the Government has accepted and hopes shortly to obtain technical assistance from the ILO. The Committee expects that the object of this assistance will be to ensure promptly an adequate and efficient system of protection against acts of anti-union discrimination, which should include sufficiently dissuasive sanctions and prompt means of redress, beginning with the implementation, without delay, of the judicial reinstatement orders.*
- (l) *The Committee calls the Governing Body's attention to this serious and urgent case.*

CASE No. 2540

REPORT IN WHICH THE COMMITTEE REQUESTS  
TO BE KEPT INFORMED OF DEVELOPMENTS

**Complaint against the Government of Guatemala  
presented by**

- **the International Trade Union Confederation (ITUC)**
- **the International Transport Workers' Federation (ITF) and**
- **the Trade Union of Workers of Guatemala (UNSI TRAGUA)**

***Allegations: Murder of a portworkers' trade union official and death threats against trade unionists; anti-dialogue attitude of the company***

- 885.** The Committee examined this case at its meeting in November 2007 and presented an interim report to the Governing Body [see 348th Report, paras. 788–821, approved by the Governing Body at its 300th Session (November 2007)].
- 886.** The Government subsequently sent new observations in a communication dated 10 December 2007.
- 887.** Guatemala has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. Previous examination of the case**

- 888.** At its November 2007 meeting, the Committee made the following recommendations on the matters that remained pending [see 348th Report, para. 821]:
- The Committee strongly condemns the murder of trade union official Mr Pedro Zamora and the death threats and other acts of intimidation against the five remaining officials of the trade union STEPQ, and urges the Government to do everything within its power to step up the current investigation and the measures to arrest the suspected perpetrators of the murder of trade union official Mr Pedro Zamora, and to ensure that investigations are also carried out into the death threats received by this trade union official and the five remaining members of the executive committee and their families. The Committee asks the Government to keep it informed in this regard and emphasizes the importance of resolving these crimes without delay and identifying and punishing the guilty parties. The Committee also asks the Government to indicate how the complaint regarding threats and intimidation, filed by the trade union with the Office of the Attorney-General prior to the murder of trade union official Mr Pedro Zamora, was followed up. Lastly, the Committee asks the Government to take all the necessary steps to protect the members of STEPQ's executive committee who are being threatened and to keep it informed in this respect.
  - The Committee requests the Government to respond to the allegation that the Puerto Quetzal Harbour Company favours a particular group of workers so that it might replace the leadership of STEPQ or acquire enough power to claim the right to negotiate the next collective agreement.

- 889.** In a communication dated 16 October 2007, the Government reported that the action taken by the Office of the Attorney-General had allowed for an identification of the potential suspects in the murder of trade union official Pedro Zamora, and that the judicial authority had issued the corresponding arrest warrants in order to initiate the appropriate procedure [see 348th Report, para. 807].

**B. The Government's reply**

- 890.** In a communication dated 10 December 2007, the Government refers to the alleged threats against the executive committee of the Workers' Trade Union of the Puerto Quetzal Harbour Company and to the Committee's request regarding the follow-up to the complaint of threats and intimidation, filed by the trade union prior to the murder of trade union official Pedro Zamora.

891. The Government indicates that the Municipal Prosecution Service of the Port of San José, Escuintla, states that on 17 April 2006 it received a complaint from the District Prosecutor's Office of the Department of Escuintla, submitted on 13 February 2006 by Pedro Zamora Alvarez, at that time secretary-general of the executive committee of the Workers' Trade Union of the Puerto Quetzal Harbour Company, and an investigation was initiated into the issuing of threats; the complainant Pedro Zamora was summoned (prior to his murder), but did not attend; both he and the executive committee of the trade union concerned were later summoned again, but the only person to attend, on 19 May 2006, was Lázaro Noé Reyes (who at that time was serving as secretary for organization of the trade union in question), who explained that the trade union and the management of the Puerto Quetzal Harbour Company had reached a satisfactory understanding and that consequently there was currently no need to pursue the complaint.

### C. The Committee's conclusions

892. *The Committee recalls that the complainant organizations had made the following serious allegations: (1) the murder of the portworkers' trade union official Pedro Zamora and the injuring of one of his children while the murder was being committed; (2) Pedro Zamora and his family had received death threats and been stalked and intimidated (before his death), as had the five other members of the executive committee of the portworkers' trade union and their families; according to the complainants, the formal complaint regarding threats and intimidation which had been lodged by the trade union with the Office of the Attorney-General one year prior to these events had not resulted in any action being taken; and (3) the setting up of a pro-management group of workers to replace the leadership of the portworkers' trade union or to acquire enough power to claim the right to negotiate the next collective agreement.*

893. *The Committee regrets that the Government has sent limited information and, in particular, that it has sent no new information on developments in the criminal proceedings relating to the murder of trade union official Pedro Zamora. The Committee must therefore once again deeply deplore the murder of this trade union official and it urges the Government to do everything within its power to step up the current investigation and actions to arrest, prosecute and punish the perpetrators of the murder of trade union official Pedro Zamora and of the injury caused to one of his children (in October 2007, the Government indicated that the potential suspects had been identified). The Committee urges the Government to keep it informed in this regard. The Committee therefore once again urges the Government to take all necessary steps to protect the members of STEPQ's executive committee who are being threatened and to keep it informed in this respect.*

894. *Observing that in recent years it has had to examine recurring allegations of violence against trade unionists and trade union officials, the Committee once again draws the Government's attention to the principle whereby a genuinely free and independent trade union movement cannot develop in a climate of violence and uncertainty; freedom of association can only be exercised in conditions in which fundamental rights, and in particular those relating to human life and personal safety, are fully respected and guaranteed; the rights of workers' and employers' organizations can only be exercised in a climate that is free from violence, pressure or threats of any kind against the leaders and members of these organizations, and it is for governments to ensure that this principle is respected [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, paras 43–45 and 52]. Moreover, the Committee recalls that the absence of judgements against the guilty parties creates, in practice, a situation of impunity, which reinforces the climate of violence and insecurity, and which is extremely damaging to the exercise of trade union rights.*

- 895.** *With regard to the death threats against the trade union official Pedro Zamora and his family (before the official's death) and against the five remaining members of the executive committee and their families, the Committee notes the Government's explanations about the reasons why protection was not arranged for Pedro Zamora and the five remaining members of the executive committee of the trade union. The Committee notes in particular that, according to the Government, neither Pedro Zamora nor the members of the executive committee attended the summons at the Prosecutor's Office and that when summoned a second time, only one representative of the trade union committee attended, who said that the issue of the threats that had been denounced was currently of little relevance given that the trade union and the management of the Puerto Quetzal Harbour Company had reached a satisfactory understanding. In view of this explanation by the Government, and in the absence of any additional information from the complainant, the Committee will not pursue its examination of this allegation.*
- 896.** *Lastly, the Committee regrets that the Government failed to send its observations on the allegation that the Puerto Quetzal Harbour Company favours a particular group of workers so that it might replace the leadership of STEPQ or acquire enough power to claim the right to negotiate the next collective agreement. The Committee requests the Government to promote collective bargaining between the trade union and the enterprise.*

### **The Committee's recommendations**

- 897.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee regrets that the Government has sent limited information and, in particular that it has sent no new information on developments in the criminal proceedings relating to the murder of the trade union official Pedro Zamora. The Committee must therefore once again express its profound regret at the murder of this trade union official and the injury caused to one of his children and urges the Government to do everything within its power to step up the current investigation and actions to arrest, prosecute and punish the perpetrators of the murder of trade union official Pedro Zamora. The Committee urges the Government to keep it informed in this regard. The Committee also urges the Government once again to take all necessary steps to protect the members of STEPQ's executive committee who are being threatened and to keep it informed in this respect.*
  - (b) Observing that in recent years it has had to examine recurring allegations of violence against trade union officials and members, the Committee once again calls the Government's attention to the principle whereby a genuinely free and independent trade union movement cannot develop in a climate of violence and uncertainty; freedom of association can only be exercised in conditions in which fundamental rights, and in particular those relating to human life and personal safety, are fully respected and guaranteed.*
  - (c) The Committee emphasizes that the rights of workers' and employers' organizations can only be exercised in a climate that is free from violence, pressure or threats of any kind against the leaders and members of these organizations, and it is for governments to ensure that this principle is respected. Moreover, the Committee recalls that the absence of judgements against the guilty parties creates, in practice, a situation of impunity, which*

*reinforces the climate of violence and insecurity, and which is extremely damaging to the exercise of trade union rights.*

- (d) *Lastly, the Committee regrets that the Government has not sent its observations on the allegation that the Puerto Quetzal Harbour Company favours a particular group of workers so that it might replace the leadership of STEPQ or acquire enough power to claim the right to negotiate the next collective agreement. The Committee requests the Government to promote collective bargaining between the trade union and the enterprise.*
- (e) *The Committee calls the Governing Body's attention to this serious and urgent case.*

CASE NO. 2568

REPORT IN WHICH THE COMMITTEE REQUESTS  
TO BE KEPT INFORMED OF DEVELOPMENTS

**Complaint against the Government of Guatemala  
presented by  
— the National Federation of Workers (FENATRA) and  
— the Latin American Central of Workers (CLAT)**

***Allegations: Dismissals and threats following the establishment of a committee to form a trade union and bargain collectively at the enterprise Agroindustrias Albay Arrocera de Guatemala SA***

898. The complaint is contained in a communication from the National Federation of Workers (FENATRA) of 28 May 2007 and a communication from the Latin American Central of Workers (CLAT) dated 11 June 2007. The Government sent its observations in a communication dated 3 August 2007.
899. Guatemala has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. The complainants' allegations**

900. In its communication of 28 May 2007, the FENATRA alleges that eight workers from the enterprise Agroindustrias Albay Arrocera de Guatemala SA formed an ad hoc committee with a view to establishing a trade union and bargaining collectively with the company, and that on 9 May 2007 they initiated collective dispute proceedings on the grounds that the company was not complying with legal standards in respect of the minimum wage, social security and occupational safety, and was not paying the required labour benefits. On 11 May 2007, the judge ruled that there should be no reprisals against the workers concerned. FENATRA adds that the company's response was to dismiss the workers concerned, and from 24 May 2007 onwards did not allow them to enter company premises and failed to pay them their final week's wages. FENATRA also refers to a complaint made to the labour inspectorate by seven workers, according to which the company had

denied them access to the workplace, and yet another complaint made to the Human Rights Ombudsman by a woman worker (a member of the ad hoc committee) alleging that threats were made by the company owner to force her to quit her job, as otherwise “something might happen to her family”.

901. In its communication dated 11 June 2007, the CLAT presented a complaint to the Committee on Freedom of Association relating essentially to the same allegations as those made by FENATRA, and requested the reinstatement in their posts of Emerilda Yanes, Marta Azucena Vélez, Angela Folgar and the five remaining members of the union executive.

## **B. The Government’s reply**

902. In its communication of 3 August 2007, the Government states that the Second Labour and Social Security Court reported that it had given a ruling which stipulated, among other things, that the representatives of the workers’ coalition behind the action against the company had to show convincingly the number of workers supporting the movement, and set a deadline for them to do so; in the event that they failed to do so, the measures ordered in their favour by the court would be annulled. As they failed to meet these requirements, the court on 21 June 2007 annulled the various measures it had ordered in favour of the workers.

903. The Government adds that the judicial authority, in a related subsidiary collective dispute concerning the women workers Graciela Elizabeth Pérez García, Mauricia Morales Ochoa, Marta Azucena Véliz García, Wendy Roxana Donis Folgar, Zaida Amapola Morataya Luna, Angela Rosa de María Folgar Martínez, Everilda Yanes Lémus and Claudia Janethe Salguero Caballeros, initiated reinstatement proceedings and finally, because the defendant had failed to follow due procedure, ordered immediate reinstatement of the workers concerned. That has not been implemented because the enterprise had appealed.

## **C. The Committee’s conclusions**

904. *The Committee notes that this case refers to the dismissal of eight women workers at the company Agroindustrias Albay Arrocera de Guatemala SA following the establishment of an ad hoc committee to set up a trade union and bargain collectively, and to the contravention of the court order of 9 May 2007 prohibiting reprisals such as dismissal (according to the complainants, the company owner had threatened the workers to force them to quit their jobs).*

905. *The Committee notes the Government’s statements to the effect that, in the absence of any solid evidence from the ad hoc committee regarding the number of workers who support it, the judge on 21 June 2007 annulled the measures that had been ordered in its favour. The Committee notes that, according to the Government, the court ordered the reinstatement of the eight workers, although reinstatement did not actually take place because they had brought an action against the company.*

906. *The Committee regrets that, although the dismissals of the workers who had formed a committee to set up a union occurred in May 2007, the Government is unable to say whether or not a final ruling on the case has been handed down (see communication of August 2007), and states that the company appealed against the court order to reinstate the eight dismissed workers.*

907. *The Committee recalls in this regard that measures taken against workers because they attempt to constitute organizations or to reconstitute organizations of workers outside the official trade union organization would be incompatible with the principle that workers*

should have the right to establish and join organizations of their own choosing without previous authorization [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 338]. The Committee is bound to emphasize in this case that respect for the principles of freedom of association clearly requires that workers who consider that they have been prejudiced because of their trade union activities should have access to means of redress which are expeditious, inexpensive and fully impartial [see **Digest**, *op. cit.*, para. 820].

**908.** *Under these circumstances, and taking into account the time which has, to its regret, passed since May 2007, the Committee requests the Government to explain the basis for the reinstatement ruling and take any measures in its power to ensure that the company concerned complies with the judicial decision in favour of the eight women workers, pending a final ruling on the matter which should be consistent with the rights conferred by Conventions Nos 87 and 98. The Committee also requests the Government to ensure that the dismissed workers are paid their wages for the days actually worked, and to inform it of the action taken in response to the complaint brought before the Human Rights Ombudsman concerning alleged threats by the company owner against workers to force them out of their jobs.*

### **The Committee's recommendations**

**909.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) Taking into account the considerable time that has passed since the trade unionists were dismissed in May 2007, the Committee requests the Government to explain the basis for the reinstatement ruling and take any measures in its power to ensure that the company concerned complies with the judicial decision in favour of the eight women workers in question, pending a final ruling on the matter which should be consistent with the rights conferred by Conventions Nos 87 and 98. The Committee also requests the Government to ensure that the dismissed workers are paid their wages for the days actually worked, and to inform it of the action taken in response to the complaint brought before the Human Rights Ombudsman concerning alleged threats by the company owner against workers to force them to quit their jobs.*
- (b) The Committee requests the Government to keep it informed of developments.*

CASE NO. 2566

REPORT IN WHICH THE COMMITTEE REQUESTS  
TO BE KEPT INFORMED OF DEVELOPMENTS

**Complaint against the Government of  
the Islamic Republic of Iran  
presented by  
the International Trade Union Confederation (ITUC)**

***Allegations: The complainant organization alleges the continued repression of teachers and the obstruction of their exercise of legitimate trade union activities, including the arrest and detention of teachers following protest demonstrations***

- 910.** The complaint is contained in a communication dated 25 May 2007. The complainant submitted additional information in communications dated 29 January and 28 February 2008.
- 911.** The Government submitted its observations in a communication dated 14 May 2008.
- 912.** The Islamic Republic of Iran has not ratified either the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), or the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

### **A. The complainant's allegations**

- 913.** In its communication of 25 May 2007, the complainant states that in the last few years separate teachers' groups have been formed, many of which are registered with the Interior Ministry as authorized teachers' organizations. In order to coordinate their activities, 34 of these organizations had recently come together as the Coordinating Council of Cultural Workers' Associations (hereafter referred to as the "CCCWA"). The first declaration of the CCCWA was published on 4 February 2007. The most active of the groups within the CCCWA is the Teachers Trade Association of Iran (Kanoone Senfiye Moallepiane Iran, hereafter referred to as "ITTA"), which is led by Superintendent Ali Akbar Baghani and spokesperson Beheshti Langroodi and has numerous affiliates nationwide. Another group is the Teachers Association of Iran (Sazmane Moallemaneh Iran, hereafter referred to as "TAI"), led by Mr Alireza Hashemi.
- 914.** Since the Republic's inception, teachers have fought for the right to pay equal to other government workers, regular pay raises, and the right to form unions. On 22 January 2002, teachers in Kennanshah protested for the "restoration of our dignity, help with our financial situation and livelihoods, and the right to form a union", and on 23 January 2002 teachers in Isfahan protested for "their livelihoods, and the rights to form a labour association". These early protests were repressed, however; one example of this occurred on 26 January 2002, when numerous teachers were arrested after protests. This incident was referred to in the first declaration of the CCCWA, published on 4 February 2007.
- 915.** More recently, teachers' protests began in January 2007 and grew successively larger and larger, eventually encompassing some 12,000 teachers from across the country by mid-March 2007. On 23 January 2007, the ITTA demonstrated from 13.00 to 17.00 in front of the Parliament in Tehran to protest the Council of Guardians' possible rejection of the Pay Parity Bill, which is widely viewed as the teachers' best hope for achieving a living wage. The ITTA warned that if the Government repealed the Bill, the teachers would go on strike; a protest of academics from Tehran and other townships was also held. The Government did not respond to this protest, and the teachers' demands went unanswered. The second protest occurred on 5 February 2007, and about 1,500 teachers from across the country participated. Teachers' associations announced that if the Parliament did not pass the Pay Parity Bill teachers' protests would continue, and sit-ins at schools would be staged on 19 and 20 February 2007. These protests were also ignored by government officials.

**916.** On 3 March 2007, about 10,000 teachers protested in front of the Parliament, but their demands were once again ignored. Some parliament spokesmen admonished the teachers, claiming they were being “impatient”. On 4 March 2007, the ITTA announced that teachers would be on strike on 6 March 2007 unless the Pay Parity Bill was enacted. On 6 March 2007, several thousand teachers gathered for the second time that week in front of Parliament. This time, the military and security forces were present. The teachers also protested in front of the Departments of Education in townships and cities including Gilan, Isfahan, Harnadan, Kennanshah, Kurdistan, Shiraz, Ardabil, Astaueyeli Ashrafieb, Pakdasht, Khomeinishahr, Dezftif, and Khorasan. On 7 March 2007, the ITTA announced that the teachers would strike on 8 March 2007 if the Pay Parity Bill was not passed.

### ***First arrests***

**917.** At around midnight on 7 March 2007, plain-clothes agents from the Security and Intelligence Ministry visited the homes of more than 20 teachers’ union leaders, including ITTA Superintendent Ali Akbar Baghani, ITTA spokesperson Mr Beheshti Langroodi, Alireza Hashemi, the Superintendent of the TAI, and Mohammad Davari and Ali Poursoleiman, members of the CCCWA. They were arrested, without warrants and without being charged, and were taken to undisclosed locations. The largest protest yet of the teachers in front of Parliament was then held on 8 March 2007, in time for the proceedings of Parliament, which was about to address the Pay Parity Bill. Military and security forces had closed surrounding bus stops and metro stops and severed all means of communication, including cellular phones and Internet cafes. Nevertheless, thousands of teachers staged protests in favour of the passage of the Pay Parity Bill. All of the arrestees were eventually released in the early morning of 8 March 2007.

### ***Further threats and arrests***

**918.** The protests of 8 March 2007 resulted in promises by parliamentary leaders to meet with the teachers’ representatives in the presence of the Education Minister. A meeting was scheduled for 13 March 2007. Up to this point, the Education Ministry had remained completely silent on the matter of the teachers’ protests, and the Government had been completely unresponsive to the teachers’ demands. However, the Government stated that the meeting in Parliament could only take place on condition that all further protests cease and the teachers return to their classrooms. Therefore, on 12 March 2007, Superintendent Baghani announced that all further protests would be on hold pending the meeting with the parliamentary leaders. The teachers’ groups selected a delegation of 12 representatives to attend the meeting, which took place inside the parliament building. Contrary to what had been announced, the teachers’ representatives were met by only two Members of Parliament, who did all the talking. There was no one from the Ministry of Education and only one representative from the Planning and Budget Organization, who remained silent throughout the entire meeting. However, there were three representatives from the Security and Intelligence Ministry present, as well as three representatives from the military forces, giving the clear impression that the Government wished to strong-arm the teachers into silence. Additionally, the Speaker of Parliament Mr Koohkan stated: “We do not understand the word ‘discussion’. Your pressure has no effect on our decision-making. Whether you are present or absent, it makes no difference in our minds.”

**919.** On the evening of 12 March 2007, in the City of Kermanshah, the Head of the Kermanshah ITTA Mr Sadeghi, who was to participate in the meeting with Parliament, was arrested on unknown charges. When other members of the Kermanshah ITTA went to the authorities to inquire about his arrest, two more teachers, Mr Heshmati and Mr Tavakoli, were also detained. Academics in Kermanshah protested in front of the Department of Education on 13 March 2007, demanding the teacher activists’ release.

**Expansion of arrests**

920. After the breakdown in communications between the Government and the teachers' groups, another gathering was scheduled for 14 March 2007 in which the academics were to hear the results of the parliamentary meeting. By daybreak, hundreds of security, intelligence and military men were out in force, stopping buses with protesters on board and threatening to arrest them all. At the Parliament, approximately 50 to 60 protesters were arrested including Mr Baghani and Mr Beheshti Langroodi. Pedestrians in the area were all assumed to be protesters and were not allowed to step on the sidewalks; when groups of teachers dared to do so, the anti-riot guards immediately assaulted them with clubs and fists.
921. As the number of arrests grew, teachers were first held in a vacant lot at a nearby dilapidated school and later transferred to the basement of a government building. The military forces had tight control over most of the parliamentary area and stopped anyone they assumed was a teacher or anyone engaging in conversation. As the arrests and beatings proceeded, the crowd transferred their protest in fear from Baharestan Circle, where the Parliament is located, to the Education Ministry. There, the armed forces captured more teachers, beat them, and held them at the Hotel Mannar across the street from the Education Ministry until they were transferred by bus to prisons.
922. Approximately 300 teachers and academics were arrested. The Government did not provide the names of those arrested, and did not allow the detainees to communicate with their attorneys or families. As teachers from across the country had travelled to Tehran to participate in the demonstration, it was not clear exactly how many people were in captivity. Among those arrested were the heads of several teachers' trade union associations and the CCCWA, including Ali Akbar Baghani, Mahmoud Beheshti Langroodi, and Alireza Hashemi. Others arrested include Mohammad Davari, Ali Poursoleiman, Mr Gashghavi, Bodaghi, Noorollah Akbari, Akbar Parvareshi, Mohammad Reza Khakbazan, Mahmoud Bagheri, Ahmad Borati, Akram Hassani, Zahra Shad, Fereshteh Sabbaghi, Narges Pilehforoush, and four superintendents from the Young Adult Schools named Taheri, Gharjavand, Mohammad Beigi and Sajjad Khaksari, and a reporter for the newsletter the *Teachers' Pen*, who was reporting on the situation. Of all those arrested, about 50 teachers, including the heads of the teachers' associations, were transferred by bus to the Intelligence Offices on Vahdatah Eslami Street and then taken to the Evin Prison. Some of the female teachers who had been arrested were released on their husbands' recognizance.
923. Throughout the arrests some parliamentarians made efforts to free the imprisoned teachers. On 19 March 2007, the Head of the Judiciary, Ayatollah Shahroodi, stated that protesting in a civilized manner is a civil right, and the teachers should have never been arrested. He asked all prosecutors to release the teachers. Despite his ruling 14 of the leaders of the teachers' unions remained in jail for 16 days, including over the most important holiday in the Islamic Republic of Iran, Norouz – the Iranian New Year and the nation's most important holiday, running from 21 March through 3 April 2007. To avoid further protests against the mass arrests, the Government declared that all schools in Tehran would close early for the Norouz holiday, from 16 March through 4 April 2007.

**Crackdown on teacher protests escalates**

924. In spite of government repression the CCCWA met on 30 March 2007, just one day after its leadership was released from jail. They issued a declaration the same day, stating that the teachers remained open to dialogue with the Government, but saw the Government as responsible for the arrests of teachers who were simply exercising their basic rights. They also restated their demand for the passage of the Pay Parity Bill, and the free exercise of

their freedom of association rights. In the absence of just responses to their demands to end discrimination among government workers and the enactment of the Pay Parity Bill in its full form, they announced that on 15, 16, and 29 April 2007 they would be present in their schools but would refrain from attending classes. They also announced that on 2 May 2007 they would gather in protest from 9.00 to 12.00 in front of all departments of education in the townships as well as the centres of the provinces. Additionally, on 8 May 2007 from 13.00 to 17.00 teachers from across the country were to gather in front of the Parliament in a widespread protest. Instead of responding to the teachers' demands, on 7 April 2007 law-enforcement and security forces in the city of Hamedan surrounded the office of the Hamedan ITTA while its members were holding a meeting. They arrested a minimum of 30 people and took them to undisclosed locations by bus. The security forces also arrested a minimum of 15 others in their homes, including all members of the Board of Directors of the Teachers' Trade Association of Hamedan.

- 925.** The names of the known arrestees of the Teachers' Trade Association of Hamedan are as follows: Nader Ghadimi, Iraj Ansari, Yousef Refahiyat, Alireza Sajjadi, Mohammad Rafli, Alireza Vafai, Mohammad Paknahad, Ali Zarei, Alireza Moradi, Ali Ahmadvand, Ali Behnam Arzandeh, Hadi Gholami, Hamidreza Jabbari, Jaharigir Jaafari, Majid Forouzanfar, AH Armand, Mahmood Jalilian, Jaafar Mahmoodi, Ali Sadeghi, Jalal Naderi, Mr Pirtaj, Mr Ashtari, Mr Faridian, Javad Moradi, Mr Ghalandari, Nader Soleimani, Ali Najafi, Mr Eskandari, Mr Ghaderi, Zabihollah Rezai, Reza Sadeghi, Hossein Kashi, Mohammadreza Sayyadi, Salman Soltani, Hadi Oroumandi, Hossein Gholami, Neeraat Haratian, Mahmood Mahzoon, and Seyd Ali Hosseini.
- 926.** On 9 and 10 April 2007, academics in Hamedan protested in front of the Ministry of Education to show support for their arrested colleagues and demand their release. Some teachers were released but some active members of the Teachers' Association of Hamedan are still in prison, their numbers ranging from nine to 15, including Ali Sadeghi, Mahmoodi, Ansari, Forouzanfar and Refahiyat. The lack of clarity and discrepancy in the numbers of arrestees are due to teachers being rearrested, not having attorneys, and the total unresponsiveness of military personnel and the Education Ministry in Hamedan. Additionally, the locations where people are being detained are mostly unidentified and spread apart. The Security and Intelligence Deputy Governor of Hamedan Province declared the Teachers' Trade Association of Hamedan to be illegal because it was in possession of 5,000 leaflets describing the hours and location of particular strikes; however according to Article 3 of ILO Convention No. 87, workers have the right to strike in pursuit of their legitimate labour interests.
- 927.** On Sunday, 15 April 2007, of the nine teachers remaining in prison five were released, namely: Jalilian, Forouzanfar, Sadeghi, Nader, and Najafi. Mr Ghadimi, Refahiyat, Zarei and Gholami remained in prison. After his release, Mr Najafi reported that while under arrest the Hamedani teachers were questioned while blindfolded and handcuffed, and then housed with drug addicts in a dark cell in conditions so unhygienic they were unable to use the facilities.
- 928.** In Tehran, on 8 April 2007, security and intelligence ministry forces went to the homes of dozens of ITTA activists with warrants and searched their homes. They presented the teachers with summonses to the courthouse, and warned that if they did not appear they would be issued warrants for their arrest. On the evening of 11 April 2007, the defence attorney for three writers of the *Teachers' Pen* – Mohammad Taghi Falahi, Seyd Mahmood Bagheri, and Montajabi (who are also defendants in the case of the March 2007 protests in front of Parliament) – stated that she and her clients presented themselves to the Revolutionary Court for questioning after being served one of these summons. Authorities did not permit her to attend the questioning session, and after nightfall they told the men they would have to spend the night in the courthouse because questioning was not over.

One hour later, the men telephoned their families to state that they had been transferred to Evin Prison. That same evening, agents went to the homes of teachers who write for the *Teachers' Pen* and confiscated all of their equipment and computers. On 14 April 2007 three more teachers from the Teachers' Trade Association, Mr Hamid Pourvosough, Mohammad Reza Rezai, and Alireza Akbar Nabi, were also summoned for questioning by the courts, detained, and transferred to Evin Prison. Another teacher from Karaj, Mr Assad, had also been summoned that past week. In a separate incident in Ghoochan on the evening of 11 April 2007, security forces warned a number of teachers not to participate in the announced strikes of 15 and 16 April 2007. These coordinated events marked the beginning of a new wave of heightened suppression of teacher protests. On 15 April 2007, two teachers in Marand were reported to have been summoned and detained.

- 929.** On 15 April 2007, teachers in Eslamshahr were asked by the authorities to leave the school premises while staging a sit-in strike. They were also informed that all striking teachers would be completely stripped of their status and position beginning 17 April 2007. The authorities encouraged the parent-teacher association to file formal complaints against the teachers to the judiciary, and secret security forces were present throughout the township so that they could question the teachers directly and report the names of striking teachers to the Security and Intelligence Ministry. The authorities said that teachers whose names came up in relation to the sit-in would from then on be deprived of all overtime work, that the Security Department would prevent these individuals from ever teaching class, and that, in accordance with a declaration by the Education Ministry, the above-named teachers could not continue their own studies in universities nor receive any services. Also, they stated that school principals who did not submit the names of striking teachers would be replaced the following day. On Monday, 16 April 2007, Ali Akbar Baghani was rearrested in his school. At 9.30 a.m., three plain-clothes agents arrived at the Roshd Middle School in Region 7 of Tehran. Two of them stayed in the schoolyard while one went directly to Mr Baghani's room, presented a warrant, arrested Mr Baghani and took him to an undisclosed location.
- 930.** On the same day, Mr Mokhtar Asadi, a member of the Teachers' Association, was also arrested; on 16 April 2007, he was summoned to appear before the primary council of the Education Department for the counties of Tehran. Mr Asadi, who occasionally took part in the union actions, said in a recent interview that his union bore no animosity towards the state authority, but would not be intimidated or relent pursuing its aims. At the primary council meeting Mr Asadi was questioned on his union membership and whether he took part in the teachers' protests. He was then suspended from his teaching position effective 21 May 2007. Mr Asadi, believing the Council's decision to be based on his trade union membership and activities, lodged an appeal against it. At least 12 teachers who took part in the protests had been temporarily (about three months) suspended from their jobs because of their trade union activities. The names of the suspended teachers are: Ghafar Dindar, Teimour Hassanpour (Ghale Hassan Khan district), Hadi Azimi (Shahriar district), Mohsen Ramshak, Ghorban Ali Nik Eish, Mohammad Reza Sanjabi and Ali Mohammad (the first district of Robatkarim), who belong to the Teachers' Association in Iran, and Nader Ghadimi, Yousef Refahiat, Yousef Zareie and Hadi Gholami, who belong to the Teachers' Trade Union of Hamedan.
- 931.** The teachers scheduled more protest actions for 29 April 2007 (on which a number of teachers stayed out of the classrooms) and 2 May (Teachers' Day). All trade union activities on Teachers' Day were prohibited by order of the Iran Ministry of the Interior; the authorities also banned the teachers' weekly *Ghلام (Pen)* and ordered newspapers not to publish any news of the protests. To intimidate the strikers, the Education Ministry asked heads of schools for the names of teachers who were absent from work during strikes. Nevertheless, thousands of teachers across the country protested in front of the various Education Departments and in front of the Ministry of Education in Tehran,

demanding that the trade unionists' temporary suspension orders be cancelled. Some of the ensuing police abuses and arrests reported had, as of 8 May 2007, yet to be confirmed.

### ***International trade union requests for social dialogue***

- 932.** Education International (EI) and the complainant have made many attempts in the past few months to remind the Government of the Islamic Republic of Iran that teachers have a right to engage in labour activities. On 9 March 2007, EI wrote a letter to the Iranian President condemning the arrests of the teachers' union leaders and demanding that the Government open a social dialogue with the teachers. It also urged the Government to respect the right of workers' organizations to organize their activities and to hold meetings and public protests related to their conditions of work and economic and social policy.
- 933.** EI wrote another letter of protest to Iranian President Mahmoud Ahmadinejad on 16 March 2007 to condemn the harsh repression of teachers and remind him to open social dialogue with the teachers and respect their right to labour activities. On 19 March 2007 the complainant also wrote to President Ahmadinejad demanding the immediate and unconditional release of all individuals arrested at the teachers' protests across the country. The complainant called on the Government to negotiate with the teachers' organizations on the improvement of their working conditions, to stop any discrimination they endure as public servants, and to enable them to earn a living wage on a par with other government workers. They also asked the Iranian Government to respect and protect the right of workers to hold meetings, public protests, and dialogue that relate to their working conditions.
- 934.** On 21 March 2007, as a result of the EI's request for the ILO's intervention, the Workers' group of the ILO Governing Body and EI met an Iranian delegation to discuss the teacher crisis in the Islamic Republic of Iran. The Iranian delegation, led by the Deputy Minister for Employment and Human Resources, stated that their Government did not want teachers to be imprisoned; EI requested the delegation to contact Tehran and urge the release of all teachers and trade unionists currently in prison for the start of the Islamic Republic of Iran's New Year celebrations on that day (21 March 2007). EI further requested the delegation to obtain replies from the office of the President of the Islamic Republic of Iran to the letters sent by EI dated 9 and 16 March 2007, and the ILO Workers' group insisted that the Islamic Republic of Iran should ratify Conventions Nos 87 and 98 on freedom of association and the right to organize. The Government has not responded to recent appeals by the ITUC and EI.
- 935.** On 19 April 2007, EI wrote another letter of protest to President Ahmadinejad condemning the arrest of more members of the various teachers' associations on 7 and 15 April, in connection with legitimate and peaceful teacher demonstrations for a decent living wage. The complainant indicates that the Government is escalating its military and security approach to the teachers' activities and cracking down on their freedom of association rights with a heightened ferocity, whereas the teacher associations, under the umbrella organization "Co-ordinating Council of All-Iran Teachers' Trade Organizations" have vowed to continue with their actions until all their demands are met. The complainant indicates that it fears a major crackdown on the teachers is possible.

### ***Striking teachers brought on criminal charges***

- 936.** In its communication of 29 January 2008, the complainant states that on 28 May 2007 the last imprisoned teacher, Mr Mojtaba Abtahi, was released on \$40,000 bail from Evin Prison. However all the once-detained teachers continue to face prosecution. On 29 May,

*Rooz Online*, an Iranian online newspaper, reported that the Education Minister had opened security files on at least 226 teachers and ordered that they be sanctioned with anywhere from three months' temporary suspension to a permanent ban on teaching; additionally 39 teachers have been banned from teaching. On 31 July 2007, ITTA posted on its website a list of 86 teachers who have received dismissal, suspension and/or detention orders, following the teachers' demonstration in front of the Parliament in Tehran on 2 May 2007.

- 937.** On 26 September 2007, nine members of the ITTA of Hamedan were put on trial in the 106th branch of the Revolutionary Court of Hamedan Province. This was their second trial for "disturbing social order", "issuing announcements", and "holding illegal gatherings". The teachers defended themselves on the basis of article 27 of the Constitution, and reminded the authorities that the ITTA Hamedan is a registered entity that can legally pursue labour activities. Some of these nine people have also received disciplinary sentences from the Administrative Disciplinary Board: to date, Yousef Zareie is exiled for 36 months to Ham; Nader Ghadimi is exiled for 60 months to northern Khorasan; Hadi Gholami is suspended for 12 months and Yousef Refahiyat has had his pay reduced by two grades. The Revolutionary Court also issued pay cuts ranging from 10,000 to 200,000 toumans to over 700 regular teachers who were identified as having participated in labour protests.
- 938.** On 6 October 2007, Ali Asghar Montajabi, member of the ITTA Central Council was handed down a suspended sentence of four years' imprisonment by the 15th branch of the Revolutionary Court on the charge of "gathering and conspiring to disturb national security" (in accordance with section 610 of the Penal Code). ITTA member Mohammad Tachi Falahi was also convicted of the same charge and given a suspended sentence of three years' imprisonment.
- 939.** On 17 October, Mohammad Khaksari, editor-in-chief of the *Teachers' Pen*, was summoned by the court to pay the highest bail of any of the teachers so far: \$100,000. On 23 October 2007, teachers from Tehran, all members or leaders of the ITTA, were heavily sentenced by the Revolutionary Court of Iran as follows:
- |   |  |
|---|--|
| Ali Akbar Baghani, Superintendent of ITTA | five years' suspended prison sentence  |
| Mahmood Beheshti, spokesperson ITTA       | four years' suspended prison sentence  |
| Noorollah Akbari                          | five years' suspended prison sentence  |
| Hamid Pourvosough                         | four years' suspended prison sentence  |
| Mohammad Taghi Fallahi                    | four years' suspended prison sentence  |
| Ali Safar Montajabi                       | four years' suspended prison sentence  |
| Karim Ghashghavi                          | four years' suspended prison sentence  |
| Mohammadreza Rezai                        | three years' suspended prison sentence   |
| Alireza Akbari                            | two years' suspended prison sentence   |
| Rassoul Bodaghi                           | two years' suspended prison sentence   |
| Alireza Hashemi                           | three years' prison to be served immediately                                   |
| Mohammad Davari                           | five years' prison to be served immediately, exchangeable only for a cash fine |
- 940.** The following sentences were issued by the Mashad Revolutionary Court to teachers from Khorasan:

Hadi Lotfi	four months' suspended prison sentence for three years, exchangeable in exchange for \$1,000 fine
Hassan Rajabi	four months' suspended prison sentence for three years, exchangeable for \$1,000 fine (he was also banned from all official positions for four years)
Iraj Towbihai Najafabadi	Reduction of one grade in pay for two years (reviewable)
Professor Khastar	Early retirement with reduction of one grade in pay as ordered by the Administrative Infractions Board of the Education Department

**941.** On 14 December 2007, nine teachers were convicted in the 106th criminal court of Hamedan and sent to jail for 91 days: Yousef Zareie, Majid Fourouzanfar, Jalal Naderi, Yousef Refahiyat, Hadi Gholami, Nader Ghadimi, Ali Najafi, Mahmood Jalilian, Ali Sadeghi, the Head of the Kermanshah ITTA.

**942.** On July 2007, Mohammad Khaksari, editor-in-chief of the *Teachers' Pen*, was an invited guest to the Fifth Education International World Congress, held in Berlin from 22 to 26 July 2007. Representing the ITTA, Mr Khaksari addressed the EI Congress participants on the working conditions and rights of teachers in the Islamic Republic of Iran. Upon his return at the Imam Khomeini's airport in Tehran, on 27 July 2007, Mr Khaksari was detained and taken away by the presidential guard. Mr Khaksari was questioned about such matters as "the people who helped him", the broadcasting agency he met or was interviewed by, and the nature of the EI Congress. Mr Khaksari was released, but the security agents confiscated his passport and EI Congress documents.

**943.** In its letter to EI, the ITTA stated that the EI Congress

... provided a golden opportunity for training the Iranian teachers' community. For too many years, Iranian teachers have seen themselves as separate from other workers. This Congress gave Mr Khaksari a chance to realize that teachers are workers entitled to the same ILO fundamental rights protections as other workers. The Congress also gave the Iranian teachers an opportunity to see in action democratic union principles such as elections and debates on resolutions. This will enable the ITTA and its 40 affiliated groups the ability to further empower themselves through democratic, unified action.

The ITTA had also distributed and posted reports of the EI Congress on media and Internet sites across all human rights' and workers' groups in the Islamic Republic of Iran.

**944.** On 7 September 2007 Mr Khaksari was reported missing in Shahrreza, in the Province of Isfahan, south of Tehran; according to witnesses he was forced into a car by plain-clothes police officers. In a separate incident in Shahrreza, the leader of the local teachers' union, Hamid Ramati, was taken from his house in handcuffs by a dozen armed men claiming to be agents from the Islamic Republic of Iran's Ministry of Intelligence.

**945.** On 5 October 2007, to celebrate World Teachers' Day the ITTA formally applied for membership in EI. Later, the apartments of ITTA Superintendent Mr Baghani and Mr Khaksari were raided; their computers and EI membership application documents were stolen. On 30 November 2007, an ITTA representative indicated that as a result of the Government's intimidation many teachers appeared afraid of joining Education International.

**946.** In its communication of 28 February 2008, the complainant encloses an updated list of the sentences imposed on 165 teachers who had peacefully marched in February, March, and

May 2007 in support of improved working conditions and dialogue with the Government. Most were charged with “gathering and conspiring and acting against the national security by participating in illegal gatherings and speaking out against the authorities by providing information to the enemies and opposition groups and propaganda against the Islamic Republic of Iran”. The teachers concerned have either been dismissed, made to retire, exiled or suffered pay cuts following decisions by the Disciplinary Board of the Education Ministry. Some teachers have even been sentenced to suspended prison terms (ranging from one to five years) by the Revolutionary Courts, and most had also suffered periods of detention in solitary confinement. (The list of teachers is attached as an annex.)

- 947.** As the list indicates, ITTA Superintendent Ali Akbar Baghani was detained for 30 days, suspended from service for three months, condemned to two years in exile and sentenced to a suspended prison term of five years. ITTA spokesperson Beheshti Langroodi was detained twice (for 31 and 17 days in solitary confinement, respectively) and sentenced to a suspended prison term of four years. CCCWA members Mohammad Davari and Ali Poursoleiman were both condemned to three months’ suspension of service and two years in exile following 19 days of detention in solitary confinement; Mohammad Davari was also sentenced to three years in prison. TAI leader Alireza Hashemi was detained for 16 days in solitary confinement, suspended from service for three months, exiled for two years and sentenced to three years in prison. Mohammad Khaksari, editor-in-chief of the *Teachers’ Pen*, was only detained for one day but had to pay \$100,000 bail.
- 948.** The complainant alleges that the Interior Ministry also issued a statement in February 2008 prohibiting teacher associations from carrying out legitimate union activities, and that security forces have prevented the ITTA’s Coordinating Council from holding meetings. Finally the complainant indicates that ITTA members preparing for the March 2008 council session face threats and pressure. On 16 February 2008 Ali Nazari, a founding member of the ITTA in Mazandaran, invited ITTA’s members to gather in Sari, the capital city of Mazandaran, as well as to visit Hamid Rahmati, an ITTA member who had been sent to exile in a village nearby. On the same day Ali Nazari was summoned to the Intelligence Department in Mazandaran to provide an explanation of the meeting and was kept under interrogation for four hours.
- 949.** In a communication dated 26 August 2008, the complainant states that Farzad Kamangar, a 33-year old member of the Kurdistan Teachers Trade Association, is at risk of execution following a ruling issued on 25 February 2008 by the Tehran Revolutionary Court. Mr Kamangar was accused of being a terrorist through his alleged affiliation to the Kurdistan Workers’ Party, PKK. According to his lawyer, Khalil Bahramian, there is no evidence to justify the judgement that Mr Kamangar has “endangered national security” or is “*moharebeh*” (in “enmity with God”). Farzad Kamangar’s trial was not in accordance with article 168 of the Iranian Constitution, which provides that “Political and press offences will be tried openly and in the presence of a jury in courts of justice”. In this case, only one judge reviewed the case within five minutes, and the defendant was not allowed to speak. Nevertheless, the death penalty was confirmed by the Supreme Court of Iran on 11 July 2008.
- 950.** The complainant indicates that prior to his arrest, Farzad Kamangar worked for 12 years as a teacher in the city of Kamyaran, where he was an activist of the local teachers’ association in charge of the public relations of the union. He was also a human rights activist, a board member of a local environmentalist group, and also wrote for the monthly journal *Royan*, a publication of the Department of Education of Kamyaran. Mr Kamangar was arrested in July 2006 shortly after he arrived in Tehran to be with his brother during his medical treatment. The authorities originally investigated Farzad Kamangar in relation to two people he rode with during his trip to Tehran. Since then, he was held in various detention centres: in Sanandaj in Kurdistan, in Kermanshah, in the Rajaiashahr prison in Karaj and in the Evin prison in Tehran. In a letter he wrote while in the Sanandaj prison in

November 2007, Farzad alleges ill-treatment and severe torture by the prison authorities on different occasions during his detention, to force him to confess to the charges against him. For several months he was kept in solitary confinement and was not allowed any contact with family and lawyer; Amnesty International reported that “as a result of this torture, [Mr Kamangar’s] arms and legs have started to tremble involuntarily”.

- 951.** Pervasive intimidation and harassment of the Iranian trade unionists and human rights activists who show solidarity with Farzad Kamangar have been reported. On 21 July 2008, a support committee, the “Save Farzad Committee”, composed of members of the Teachers’ Trade Association, former colleagues of Mr Kamangar and human rights attorneys, including Shirin Ebadi, was established to defend the civil rights of Farzad Kamangar and to undertake legal actions to have his death sentence commuted. On the same day three teacher unionists, who were also members of the committee, were arrested and taken to the Intelligence Detention Centre in Sanandaj. One of the teachers, Ahmad Ghorbani, was released on bail after two weeks’ detention. The other two, Hassan Ghorbani and Kaveh Rostami, were released on 14 August each on \$22,000 bail. Farzad’s supporters and their family members are regularly intimidated through phone calls by the Ministry of Intelligence and National Security. Mohammad Khaksari, who was invited to the last EI Congress in Berlin in 2007 as a representative of the ITTA, is also an active member of the “Save Farzad Committee” and is among those who are being harassed by the Ministry of Intelligence.
- 952.** Several appendices are attached to the complainant’s 26 August 2008 communication, including: a letter from the ITTA protesting Mr Kamangar’s conviction; a statement by Farzad Kamangar in which he testifies to having been subject, in prison, to torture on a regular basis, periods of solitary confinement, and beatings so severe they left him unable to walk afterwards; and statements from EI, Amnesty International and Human Rights Watch, respectively, calling for the revocation of Mr Kamangar’s death sentence.

## **B. The Government’s reply**

- 953.** In its communication of 14 May 2008, the Government states that teachers have played an important role in Iranian society, having contributed from their ranks hundreds of senior officials, including presidents and prime ministers, since the culmination of the Islamic Revolution of 1970. In the years since the Revolution no complaints had ever been filed by Iranian teachers, either with national courts or international bodies. Teachers, with the exception of a small minority, had trusted the Government to ensure decent work and decent wages for them. Moreover, the submission of the present complaint was unexpected, given that on 21 March 2007 a constructive meeting had been held between a government group comprised of the Deputy Minister for Human Resource Development, two advisers to the Minister of Labour and a Member of Parliament, on the one hand, and a delegation of ITUC officials, headed by Sir Leroy Trotman and including Ms Anna Biondi Bird, Mr Tom Etty and Mr Bob Harris from EI.
- 954.** In keeping with the promise made to Mr Harris at the said meeting, in a letter of 27 March 2007 the Government had submitted its replies to the questions posed by Mr Van Leeuwen, Secretary General of EI, as well as to other matters the EI had raised in its 9 March 2007 letter addressed to His Excellency President Ahmadinejad. The contents of the Government’s communication were to have been presented to EI’s General Assembly.
- 955.** The Government maintains that the recent measures it had adopted vis-à-vis the organizations referred to in the complaint were not intended to suppress their legitimate trade union activities, but were rather meant to counter what was apparently an organized infringement of existing national laws. According to information received from the Ministry of the Interior, which is responsible for the registration and verification of trade

unions, the registration of the CCCWA was not approved. As concerns the TAI, it had decided to register not as a trade union but rather as a political party, and was so registered on 30 December 2000. The term of office of the TAI's Board of Directors had since expired and, in keeping with the ruling of the Commission of Article 10 of the Political Parties (hereafter the "Article 10 Commission"), which monitors the proper implementation of the constitutions of political parties and addresses complaints lodged against the latter for violations of their articles of association, the TAI is legally obliged to hold a new election of directors in order to resume its activities.

- 956.** The Government indicates that thus far nine teachers' associations had been registered with the Ministry of the Interior, of which several had allowed their registration to expire. A list of the names and registration expiry dates of the nine aforementioned teachers' associations, which includes the ITTA, is included in the Government's communication. The Government further maintains that it has merely established the legal framework for the free activity of trade unions, so as to extend to them the legal, social and financial support stipulated in the nation's Constitution and facilitate their political activities. Its role was therefore not aimed at curtailing organizations' activities, but rather ensuring the respect and protection of their rights and freeing them from the competitions that frequently arose within them.
- 957.** With respect to the ITTA, the Government states that that organization was established and registered as a political party in November 2000, with an initial three-year period of registration validity. Subsequently, and due to what the Article 10 Commission had deemed to constitute "constant infringement upon the relevant political party laws, in particular the non-observance of paragraph 2 of article 16 of the Political Parties Act (PPA)", the ITTA had lost its validity. Article 16 of the ITTA's articles of association stipulates that the organization's General Assembly shall elect the members of the Board of Directors for a period of two years, that members of the Board may be re-elected, and that the Board shall invite the General Assembly to hold elections and communicate the results to the Ministry of the Interior. The ITTA had apparently lost its validity by failing to comply with its own articles, and the Article 10 Commission – by means of Notice No. 43/12500, dated 24 April 2007 – had requested that the ITTA suspend its activities until it renewed its registration; a case concerning the ITTA's status was pending before the Article 10 Commission.
- 958.** The Government states that associations of teachers, like those of other workers, are subject to the provisions of law pertaining to political parties. Under the PPA, organizations may not: engage in acts that may eventually endanger national sovereignty; engage in espionage; collaborate with foreign agents, at any level or in any manner that may endanger the freedom, sovereignty, national unity or interests of the Islamic Republic of Iran; receive any foreign support, be it financial or otherwise; violate the legitimate freedom of others; commit slander or defamation; endanger national integrity; campaign against the State; violate the basic principles of Islam and the Islamic Republic of Iran; disseminate subversive publications; and keep arms illegally. Violations of the PPA are set out in article 16 of that law, and article 17 specifies the disciplinary actions that may be brought against parties infringing upon the law's provisions. Such measures include the suspension of an organization's license, and its dissolution upon an unbiased hearing by a competent court. According to rulings handed down by the judiciary, moreover, congregating in front of Parliament and the Ministry of Education, disrupting traffic in the downtown area of the capital for consecutive days (at a time when teachers' representatives had been freely negotiating with parliamentarians and government officials) all constituted clear violations of the PPA.
- 959.** With respect to the January 2007 protest organized by the ITTA, the Government contends that it recognizes the right to protest against or express opinions on national policies and laws which may potentially jeopardize the interests of some groups, assuming the exercise

of those rights is undertaken in a reasonable and peaceful manner. Various provisions of the PPA, including paragraphs 6, 16 and 28 of that law, guarantee these rights to associations duly registered with the Ministry of the Interior. However, demonstrations, assemblies and public speeches require prior coordination with that Ministry, and once permission is obtained organizations are expected to avoid actions detrimental to civil liberties, national security and state sovereignty. Article 29 of the PPA also requires organizations to inform the Article 10 Commission of any assemblies and public speeches. By calling for an illegal demonstration in front of Parliament and the Ministry of Education, the ITTA had violated the abovementioned regulations as well as its own articles of association. The Government further states that the protests against the non-approval of the Pay Parity Bill, which were held when the matter was being discussed in Parliament, exerted unnecessary pressure on the authorities and were taken as a political campaign, rather than a union demand, by some elements in Government.

- 960.** According to the Government, the protests against the potential non-adoption of the Pay Parity Bill were rooted, in part, in a misunderstanding of the process by which laws were approved by Parliament. Under the existing procedure, bills were presented to Parliament, and upon the latter's approval were then referred to the Council of Guardians of the Constitution to ensure its compliance with the nation's Constitution and the Sharia (Islamic code of law). Such laws were then either endorsed by the Council of Guardians or referred back to Parliament for re-examination and possible modification. In the latter case, the Bill in question was not repealed; when Parliament insisted upon the approval of a bill that the Council of Guardians was reluctant to approve, the said Bill was referred to the Expediency Council, where representatives from Parliament, the Assembly of Elites and the Council of Guardians discussed the Bill to reach consensus on its approval or rejection. As regards the Pay Parity Bill, it had received unanimous final approval and the relevant governmental organizations were in the process of formulating regulations for its enforcement. The Government adds that the Pay Parity Bill called for a sharp increase in public servants' salaries and adequate studies should therefore have been carried out to examine its viability. Moreover the observations of the Council of Guardians also had to be incorporated with respect to the budgetary resources required by the Bill. Some teachers' associations had therefore acted too hastily in demanding that the Bill immediately be passed. The Pay Parity Bill's subsequent approval furthermore proves that they had pursued the wrong means of action and might well have obtained the same result without triggering strong protests, nationwide campaigns and constant demonstrations before Parliament and other government buildings.
- 961.** The Government refutes the allegations that it had ignored the teachers' demands and refused to discuss the Pay Parity Bill with their representatives. It maintains that ITTA representatives had been received, that negotiations with them had taken place at the highest levels. Furthermore a "teachers' faction" comprising 90 MP teachers, or nearly a third of all parliamentarians, had been formed to vigilantly monitor the interests of teachers across the nation. These acts, particularly when viewed in light of the approval of the Bill concerned, were indicative of the Government's goodwill and intention to provide decent working conditions to teachers while maintaining constant dialogue with teachers' representatives. The Government further contends that any complaints arising out of the Pay Parity Bill should be withdrawn by the complainant.
- 962.** Having attached great importance to, and being constitutionally obliged to provide free education for all its citizens, the Government maintains that it has perhaps the largest number of teachers in the Middle East and West Asia regions, most of whom were recruited on a fixed-term contract basis. Forty thousand of the nearly 80,000 teachers comprising the current service were recruited by the Ministry of Education within the last year, following constructive collective negotiations between teachers' trade unions, Parliament and the Government, the Ministry of Education had altogether recruited nearly

1 million staff, representing the largest portion of the public service. On 13 March 2007 Mr Farshidi, the outgoing Minister of Education, had announced that the enforcement of the Pay Parity Bill had been placed at the top of his ministry's agenda. A pledge to quadruple teachers' wages had been made, and his ministry's budget had been increased by 50 per cent. The Government indicates that according to the provisions of the Uniform Payment of Wages Act wages are calculated on the basis of such factors as academic degree, experience and working conditions, and skill requirements. The Government has consistently strived to ensure better living conditions for teachers through such initiatives as granting permanent contracts to teachers employed under short-term ones and facilitating the pursuit of advanced academic degrees.

- 963.** According to the Government, the fact that numerous teachers' organizations had been formed over the past two decades, with no evidence that the said organizations had been suppressed in any manner, demonstrates the falsehood of the complainant's allegations. Furthermore, in meetings held with the ILO in June 2007, Member of Parliament Mr Abbaspour, the then Deputy Director of Labour, Mr Marvi and Member of Parliament Mr Papi all affirmed that the Government was seriously addressing wages and freedom of association issues, with respect not only to teachers but to all public sector workers.
- 964.** The Government states that the right to establish unions is enshrined in article 26 of the Constitution and that the principle of the right to organize is ensured in both law and practice. Organizations have the right to lodge complaints against the Government in courts of law, although no complaints of the denial of the right to organize have been lodged thus far with the police, disciplinary or judicial authorities. Additionally, article 15 of the Law pertaining to Activities of the Parties, Populations, Trade and Political Unions, Islamic Societies or the Recognized Religious Minorities requires trade unions to inform the Article 10 Commission of any changes in their boards of directors or articles of association. This same legal provision also sets out the conditions under which organizations' permits may be withdrawn, ensures their right against arbitrary interpretation of the existing regulations in decisions affecting their rights, and provides for the right to refer complaints to the courts, which shall hear complaints within three months of their receipt.
- 965.** The Government indicates that in March 2007 representatives of over 30 teachers' associations met with the Speaker of Parliament and four members of Parliament's Executive Board. In the said meeting the Speaker, while acknowledging the representatives' demands, asked for their patience as the Government was not in a position to immediately quadruple the wages of all teachers. He further stated that this increase would be achieved following a short-term timetable; the stated wage raise was realized a few weeks later. Currently, 95 per cent of the Ministry of Education's budget – and 40 per cent of the total expenditure on public staff wages – is allocated to teachers. In respect of the March 2007 demonstrations the Government adds that the police took no repressive measures against the demonstrators, as the mass actions were not regarded as a threat to national security or criminal in nature. However, minor clashes between the police and demonstrators were reported when the latter were being peacefully dispersed.
- 966.** The Government maintains that the allegation of government unresponsiveness to the teachers' demands is untrue. Many statements by various government officials were made during the protests: for instance, on 8 March 2007 the Iranian Students' News Agency (ISNA) reported that President Ahmadinejad enumerated some of the measures taken by his cabinet to improve teachers' living conditions, including increased allocations to the education budget, a plan to gradually increase teachers wages, and modifications to the Bill concerning the Management of National Services in order to ensure social justice for and the welfare of all classes of people, especially teachers. President Ahmadinejad also stated that the Housing Bill, presented by the Government to Parliament, aimed to solve the housing challenges faced by teachers. On 4 March 2007, 20 Members of Parliament met

with teachers who had gathered in front of Parliament. Furthermore, representatives of the Management and Planning Organization of the Education Ministry met with six TAI representatives to discuss a solution to the teachers' demands; the Government representatives were Mr Haji Babaei, a member of Parliament's Board and the Chairman of its Teachers' Faction; Mr Ali Abaspour Tehranifard, Chairman of Parliament's Education and Research Division, and three other Members of Parliament. Mr Tehranifard in particular has stated that parliamentarians have always supported the teachers and have approved many laws to ensure a better living condition for them; he further expressed doubt as to whether those demonstrators chanting "vitriolic and slanderous slogans against Government" were, in fact, real teachers and not members of subversive groups.

- 967.** With respect to the allegations of the conviction of TAI leader Alireza Hashemi, the Government indicates that once Branch No. 36 of the Appellate Court handed down a verdict in Hashemi's case his attorney, Ms Farideh Gheirat, was able to discuss his case as well as those of the other arrested teachers with the Minister of Education, demonstrating the Government's commitment to ongoing dialogue with the teachers. As concerns the arrest of over 20 trade union leaders on 7 March 2007, the Government states that, in view of the teachers' continued hostile actions, a few teachers were summoned to court and given mild suspended penalties. Almost all of them were shortly released through the intervention of the then Minister of Education, and all have returned to teaching in their classrooms. The Government maintains that the arrests were intended to assist those seeking to voice their legitimate trade union demands peacefully and legally. According to irrefutable evidence, quite a few non-teacher dissidents were responsible for creating disorder among the demonstrating teachers. Teachers were advised not to be influenced by these subversive elements who, as in previous cases, intended to transform the teachers' legitimate trade union claims into fully-fledged social tumult and unrest; in order to prevent the spread of unrest and safeguard national security some demonstrators who had intended to disrupt the educational system were temporarily arrested with legal warrants. Of the latter, five were determined by the judiciary to be non-teachers. As stated in the Government's March 2007 letter to EI, the Head of the Judiciary and the Speaker of Parliament both called for the immediate release of all those arrested, and the General Prosecutor of Tehran was given the order to release the teachers by decree of the Supreme Chief of the Judiciary.
- 968.** As concerns the arrest of approximately 300 teachers on 14 March 2007, the Government states that the number of persons arrested was 200, and most were released almost immediately; a few of them, however, are to appear before the court on charges of social disturbance. Twenty persons were arrested on 8 March, and 6 others on 9 March 2007. Based on reports from the judicial authorities, 40 were arrested on 7 March 2007 on charges of having attended an illegal gathering – they were required to appear before the courts, and would receive very light penalties, if any at all.
- 969.** In respect of the 7 April 2007 arrests of approximately 45 persons in Hamedan, the Government indicates that the General Prosecutor's Office in Hamedan was informed that the Hamedan ITTA intended to instigate a closure of all schools in the province. Given the previous attempts by the ITTA to shut down public education and agitate students and their parents, the General Prosecutor instructed the police to seize the Hamedan ITTA's publications. When the police, carrying legal warrants, went to the ITTA office and asked for the submission of the provocative leaflets, those present in the ITTA office refused to do so as the police warrants were not sealed; the police subsequently returned with judicial warrants, duly signed and sealed, but were met with resistance and were forced to arrest several teachers. Among those arrested, 23 were released the following day, nine others were released on 9 and 10 April and five more on 16 April 2007. Charges were brought against nine of the arrested persons – Yousef Zarei, Yousef Refahiat, Hadi Gholami, Nader Ghadimi, Majid Forouzanfar, Jalal Naderi, Ali Najafi, Mahmoud Jalilian, and Ali Sadequi

– and were heard in Branch No. 106 of the Public Criminal Court of Hamedan on 25 September 2007.

- 970.** As concerns the search of the homes of dozens of ITTA activists, the questioning and detention of several writers for the *Teachers' Pen* and the confiscation of some writers' equipment and computers in April 2007, the Government states that the judiciary is an independent body, and that all citizens and entities are entitled to refer complaints against the Government's decisions to it. Court decisions are binding and fully respected, even if they overturn decisions made by high-ranking officials. The Government adds that the teachers questioned were simply invited to explain the situation; these measures were meant to prevent any violent confrontation and should not be negatively interpreted.
- 971.** The Government contends that the allegation that the authorities encouraged the parent-teacher association to file formal complaints against teachers is baseless. In the first half of 2007 over 4,000 schools were closed due to teachers' demonstrations, yet not a single parent had filed a complaint against a teacher.
- 972.** As concerns the suspension of Mokhtar Asadi from his teaching position as of 21 May 2007, the Government states that he had been suspended for a period of three months starting from 20 April 2007 for having violated disciplinary and workplace laws and was subsequently transferred to a neighbouring province by decree of the Administrative Penalties Board of the Education Office.
- 973.** The Government maintains that all the individuals mentioned in the complaint who were brought before the courts on charges were prosecuted for organizing secret meetings and forming illegal groups, cooperating with opposition groups and conspiring against national security. The accusations against them were dealt with in competent courts, and the individuals concerned enjoyed the rights to defence counsel and of appeal.
- 974.** The Government reiterates that the right of workers to freely join and form organizations of their own choosing is protected by national legislation, including the PPA. Furthermore the Ministry of Labour and Social Affairs (MLSA) has given priority to the promotion of organizations of the social partners, and MLSA statistics indicate that the number of workers' associations grew from 3,037 in 2005 to 3,837 in 2007. The Government adds that teachers' representatives may freely visit government bodies and Parliament, which has developed a reputation as a "teachers' house" following the victory of a majority of the teachers in the last elections. Nevertheless, of the 40 national teachers' associations, only 20 sent representatives to accompany Mr Baghani to a 26 November 2007 meeting with parliamentarians, which suggests either an unwillingness to engage in dialogue or the associations' failure to unanimously agree on their objectives. The four topics on the meeting agenda were: (1) the examination of the Education Ministry's 2008 annual budget; (2) the enforcement of the Bill concerning Managing National Services; (3) bringing an end to the pending cases against trade union activists; and (4) teachers' trade associations and the upcoming parliamentary elections. The last topic was deemed irrelevant to the associations' articles of associations and was therefore not discussed.
- 975.** With respect to the EI letter of 19 April 2007, addressed to President Ahmadinejad and condemning the 7 and 15 April arrests in connection with legitimate and peaceful teacher demonstrations for a decent living wage, the Government states that it was being blamed on the basis of unverified information, and without proper consideration of the reasons that justified the measures it had taken. The demonstrations referred to by the complainant were not peaceful and could potentially have caused severe social unrest throughout the nation. The Government maintains that although it recognizes the freedom of association rights of trade unions, the latter must also demonstrate greater flexibility with respect to the challenges faced by the nation during its transition to an open, market-based economy.

Unless compromise is achieved between the Government and the social partners, giving effect to the principle of tripartism would be virtually impossible.

### C. The Committee's conclusions

976. *The Committee notes that the present case involves allegations of the violation of several freedom of association rights in the context of a series of demonstrations concerning teachers' salaries. The allegations are summarized as follows:*

- *Teachers' protests began in January 2007 and grew successively larger, eventually encompassing some 12,000 teachers from across the country by mid-March 2007. On 23 January 2007, the ITTA demonstrated in front of the Parliament to protest the Council of Guardians' possible rejection of the Pay Parity Bill, which was widely viewed as the teachers' best hope for achieving a living wage.*
- *A protest involving approximately 1,500 teachers was held on 5 February 2007. On 3 March 2007 roughly 10,000 teachers rallied in front of the Parliament in support of the enactment of the Pay Parity Bill. Another rally was held on 6 March involving several thousand teachers, and on 7 March 2007 the ITTA announced that a strike would be called on 8 March 2007 if the Pay Parity Bill was not passed into law.*
- *At around midnight of 7 March 2007, plain-clothes agents from the Security and Intelligence Ministry visited the homes of and arrested more than 20 teachers' union leaders, including directors of the ITTA, the TAI and the CCCWA. The trade unionists were arrested without warrants, taken to undisclosed locations, and released in the early morning of 8 March 2007.*
- *Following another protest on 8 March 2007, a delegation of 12 teachers' union representatives met with representatives of Parliament on 13 March 2007. However, the Government contingent comprised only two members of Parliament and no representatives from the Ministry of Education, whereas three representatives each from the Security and Intelligence Ministry and the military forces were present at the meeting. The parties failed to reach agreement on improvements to teachers' salaries; additionally the Speaker of Parliament, Mr Koohkan, was reported to have told the teachers' delegation that "We do not understand the word 'discussion'. Your pressure has no effect on our decision-making".*
- *After the breakdown in communications between the Government and the teachers' groups, another gathering was scheduled for 14 March 2007. By daybreak, hundreds of security, intelligence and military men were out in force, stopping buses with protesters on board and threatening to arrest them all. In front of the Parliament, approximately 50 to 60 protesters were arrested and the anti-riot guards immediately assaulted teachers with clubs and fists. Arrested teachers were first held in a vacant lot at a nearby school and later transferred to the basement of a government building. As the arrests and beatings proceeded, the crowd transferred their protest in fear from the Parliament to the Education Ministry. There, the armed forces captured more teachers, beat them, and held them at the Hotel Mannar across the street until they were transferred by bus to prisons. Approximately 300 teachers and academics were arrested, including the heads of several teachers' trade union associations and the CCCWA. Furthermore 14 teachers' union leaders remained in jail for 16 days.*
- *On 30 March 2007 the CCCWA issued a declaration stating that the teachers remained open to dialogue with the Government, but saw the Government as responsible for the arrests of teachers who were simply exercising their basic rights. They restated their demands for the passage of the Pay Parity Bill and the free*

*exercise of their freedom of association rights. In the absence of just responses to their demands for the enactment of the Pay Parity Bill in its full form, they announced that on 15, 16, and 29 April 2007 they would be present in their schools but would refrain from attending classes. They also announced that on 2 May 2007 they would gather in protest in front of all departments of education in the townships as well as the centres of the provinces. On 7 April 2007 law enforcement and security forces in the city of Hamedan surrounded the office of the Hamedan ITTA while its members were holding a meeting. They arrested a minimum of 30 people and took them to undisclosed locations by bus. The security forces also arrested a minimum of 15 others in their homes, including all members of the Board of Directors of the Teachers' Trade Association of Hamedan.*

- *On 9 and 10 April 2007, academics in Hamedan protested in front of the Ministry of Education to show support for their arrested colleagues and demand their release. At the time, some teachers had been released but others remained in detention in separate and undisclosed locations; due to the authorities' lack of responsiveness and the subsequent rearrest of some of those previously arrested it was difficult to establish how many trade unionists remained in detention. Shortly after the Hamedan protests the Security and Intelligence Deputy Governor of Hamedan Province declared the Teachers' Trade Association of Hamedan to be illegal as it was in possession of 5,000 leaflets describing the hours and location of particular strikes.*
- *On 15 April 2007, of the nine teachers remaining in prison five were released. One reported that while under arrest the Hamedani teachers were questioned while blindfolded and handcuffed, and then housed with drug addicts in a dark cell in conditions so unhygienic they were unable to use the facilities.*
- *On 8 April 2007 security and intelligence ministry forces searched the homes of dozens of ITTA activists with warrants. They presented the teachers with summonses to the courthouse, and warned that if they did not appear they would be issued warrants for their arrest. On the evening of 11 April 2007, the defence attorney for three writers of the Teachers' Pen stated that she and her clients presented themselves to the Revolutionary Court for questioning after being served one of these summons. Authorities did not permit her to attend the questioning session, and after nightfall they told the writers they would have to spend the night in the courthouse because questioning was not over. One hour later, the men telephoned their families to state that they had been transferred to Evin Prison. That same evening, agents went to the homes of teachers who wrote for the Teachers' Pen and confiscated all of their equipment and computers. On 14 April 2007 three more teachers from the Teachers' Trade Association were also summoned for questioning by the courts, detained, and transferred to Evin Prison. Another teacher from Karaj had also been summoned that past week, and in Ghoochan on the evening of 11 April 2007 security forces warned a number of teachers not to participate in the announced strikes of 15 and 16 April 2007. The complainant alleges that these coordinated events marked the beginning of a new wave of suppression of teacher protests.*
- *On 15 April 2007, teachers in Eslamshahr were asked by the authorities to leave the school premises while staging a sit-in strike. They were also informed that all striking teachers would be completely stripped of their status and position beginning 17 April 2007. The authorities encouraged the parent-teacher association to file formal complaints against the teachers to the judiciary, and secret security forces were present throughout the township so that they could question the teachers directly and report the names of striking teachers to the Security and Intelligence Ministry. The authorities said that teachers whose names came up in relation to the sit-in would from then on be deprived of all overtime work, that the Security Department would prevent these individuals from ever teaching class, and that, in accordance with a*

*declaration by the Education Ministry, the above-named teachers could not continue their own studies in universities nor receive any services. Also, they stated that school principals who did not submit the names of striking teachers would be replaced the following day. On Monday, 16 April 2007, ITTA leader Ali Akbar Baghani was rearrested in his school.*

- *On the same day Mr Mokhtar Asadi, a member of the Teachers' Association, was also arrested and then summoned to appear before the primary council of the Education Department for the counties of Tehran. Mr Asadi was questioned on his union membership and whether he took part in the teachers' protests. He was then suspended from his teaching position effective 21 May 2007. At least 12 teachers who took part in the protests had been temporarily (about three months) suspended from their jobs because of their trade union activities.*
- *The teachers' unions scheduled more protest actions for 29 April 2007 and 2 May (Teachers' Day). All trade union activities on Teachers' Day were prohibited by order of the Iran Ministry of the Interior; the authorities also banned the Teachers' Pen and ordered newspapers not to publish any news of the protests. To intimidate the strikers, the Education Ministry asked heads of schools for the names of teachers who were absent from work during strikes. Nevertheless, thousands of teachers across the country protested in front of the various education departments and in front of the Ministry of Education in Tehran, demanding that the trade unionists' temporary suspension orders be cancelled.*
- *On 28 May 2007 the last imprisoned teacher, Mr Mojtaba Abtahi, was released on \$40,000 bail from Evin Prison. However all the once-detained teachers continued to face prosecution. On 29 May, Rooz Online, an Iranian online newspaper, reported that the Education Minister had opened security files on at least 226 teachers and ordered that they be sanctioned with anywhere from three months' temporary suspension to a permanent ban on teaching; additionally 39 teachers have been banned from teaching. On 31 July 2007, ITTA posted on its web site a list of 86 teachers who have received dismissal, suspension or detention orders following the teachers' demonstration in front of the Parliament in Tehran on 2 May 2007.*
- *Mohammad Khaksari, editor-in-chief of the Teachers' Pen, was an invited guest to the Fifth Education International World Congress, held in Berlin from 22 to 26 July 2007. Representing the ITTA, Mr Khaksari addressed the EI Congress participants on the working conditions and rights of teachers in the Islamic Republic of Iran. Upon his return to Tehran, on 27 July 2007, Mr Khaksari was detained and taken away by the presidential guard. Mr Khaksari was questioned about such matters as "the people who helped him", the broadcasting agency he met or was interviewed by, and the nature of the EI congress. Mr Khaksari was released, but the security agents confiscated his passport and EI Congress documents.*
- *On 7 September 2007 Mr Khaksari was reported missing in Shahrreza, in the province of Isfahan, south of Tehran; according to witnesses he was forced into a car by plain-clothes police officers. In a separate incident in Shahrreza, the leader of the local teachers' union, Hamid Ramati, was taken from his house in handcuffs by a dozen armed men claiming to be agents from the Islamic Republic of Iran's Ministry of Intelligence.*
- *On 5 October 2007, to celebrate World Teachers' Day the ITTA formally applied for membership in EI. Later, the apartments of ITTA Superintendent Mr Baghani and Mr Khaksari were raided; their computers and EI membership application documents were stolen. On 30 November 2007, an ITTA representative indicated that as a result of the Government's intimidation many teachers appeared afraid of joining EI.*

- *On 26 September 2007, nine members of the ITTA of Hamedan were put on trial in the 106th branch of the Revolutionary Court of Hamedan Province. This was their second trial for “disturbing social order”, “issuing announcements”, and “holding illegal gatherings”. The teachers defended themselves on the basis of article 27 of the Constitution, and reminded the authorities that the ITTA Hamedan is a registered entity that can legally pursue labour activities. Some of these nine people have also received disciplinary sentences from the Administrative Disciplinary Board: to date, Yousef Zareie is exiled for 36 months to Ham; Nader Ghadimi is exiled for 60 months to northern Khorasan; Hadi Gholami is suspended for 12 months and Yousef Refahiyat has had his pay reduced by two grades. The Revolutionary Court also issued pay cuts ranging from 10,000 to 200,000 tomans to over 700 regular teachers who were identified as having participated in labour protests.*
- *On 6 October 2007 ITTA Central Council member, Ali Asghar Montajabi, was given a suspended sentence of four years’ imprisonment by the 15th branch of the Revolutionary Court on the charge of “gathering and conspiring to disturb national security” (in accordance with section 610 of the Penal Code). ITTA member Mohammad Tachi Falahi was also convicted of the same charge and given a suspended sentence of three years’ imprisonment.*
- *On 17 October 2007, Mohammad Khaksari, editor-in-chief of the Teachers’ Pen, was summoned by the court to pay the highest bail of any of the teachers so far: \$100,000. On 23 October 2007 12 teachers from Tehran, all members or leaders of the ITTA, were sentenced to prison terms ranging from two to five years sentenced by the Revolutionary Court of the Islamic Republic of Iran. All of their sentences were suspended, save those of Alireza Hashemi, whose prison term of three years was to be served immediately, and Mohammad Davari, whose sentence of five years’ imprisonment was also to be served immediately but was exchangeable for a cash fine.*
- *Around November 2007, the following sentences were issued by the Mashad Revolutionary Court to teachers from Khorasan: Hadi Lotfi – four months’ suspended prison sentence for three years, exchangeable in exchange for \$1,000 fine; Hassan Rajabi – four months’ suspended prison sentence for three years, exchangeable for \$1,000 fine (he was also banned from all official positions for four years); Iradj Towbihai Najafabadi – Reduction of one grade in pay for two years (reviewable); Professor Khastar – Early retirement with reduction of one grade in pay as ordered by the Administrative Infractions Board of the Education Department.*
- *On 14 December 2007, nine teachers were convicted in the 106th Criminal Court of Hamedan and sent to jail for 91 days.*
- *As of 28 February 2008, 165 teachers who had peacefully marched in February, March, and May 2007 in support of improved working conditions and dialogue with the Government were convicted on criminal charges. Most were charged with “gathering and conspiring and acting against the national security by participating in illegal gatherings and speaking out against the authorities by providing information to the enemies and opposition groups and propaganda against the Islamic Republic of Iran”. The teachers concerned have either been dismissed, made to retire, exiled or suffered pay cuts following decisions by the Disciplinary Board of the Education Ministry. Some teachers have even been sentenced to suspended prison terms (ranging from one to five years) by the Revolutionary Courts, and most had also suffered periods of detention in solitary confinement. (The list of teachers is attached as an annex).*

- *As indicated in the annex, ITTA Superintendent Ali Akbar Baghani was detained for 30 days, suspended from service for three months, condemned to two years in exile and sentenced to a suspended prison term of five years. ITTA spokesperson Beheshti Langroodi was detained twice (for 31 and 17 days in solitary confinement, respectively) and sentenced to a suspended prison term of four years. CCCWA members Mohammad Davari and Ali Poursoleiman were both condemned to three months' suspension of service and 2 years in exile following 19 days of detention in solitary confinement; Mohammad Davari was also sentenced to three years in prison. TAI leader Alireza Hashemi was detained for 16 days in solitary confinement, suspended from service for three months, exiled for two years and sentenced to three years in prison. Mohammad Khaksari, editor-in-chief of the Teachers' Pen, was only detained for one day but had to pay \$100,000 bail.*
- *In February 2008 the Interior Ministry issued a statement prohibiting teacher associations from carrying out legitimate union activities, and security forces had prevented the ITTA's Coordinating Council from holding meetings.*

**977.** *The Committee takes note of the Government's indications with respect to the registration status of several of the organizations referred to in the complaint. According to the Government, the CCCWA's registration was not approved by the Ministry of the Interior. The TAI and the ITTA moreover were registered not technically as trade unions but rather as political parties in December and November 2000, respectively. The Article 10 Commission, which monitors the proper implementation of political parties' constitutions, had ruled that the TAI was legally obliged to hold a new election of directors in order to resume its activities, as the term of office of its Board of Directors had expired. As for the ITTA, it had lost its validity by failing to comply with its own articles of association. On 24 April 2007, the Article 10 Commission requested that the ITTA suspend its activities until it renewed its registration; a case concerning the ITTA's status was pending before the said Commission.*

**978.** *The Committee observes, firstly, that a discrepancy appears to exist between the complainant's allegations – which maintain that many teachers' groups had been registered with the Ministry of the Interior as authorized teachers' associations, without specific mention of the CCCWA, the TAI or the ITTA – and the Government's indications above. The Committee also notes that the Government's information appears to be contradictory, in so far as the ITTA is included in the list of teachers' associations registered with the Ministry of the Interior, and provides no explanation as to why the CCCWA's registration was denied by the Ministry of the Interior.*

**979.** *As concerns the registration of organizations, the Committee recalls that in another case before it concerning the Islamic Republic of Iran it had referred to a number of legislative provisions it considered to be contrary to freedom of association principles, and had requested the Government to amend the existing legislative framework so as to ensure that employers' and workers' organizations may exercise their freedom of association rights freely and without interference by the public authorities [see Case No. 2567, 350th Report, paras 1108–1166]. The Committee further observes that traditionally workers' organizations in the Islamic Republic of Iran have chosen to register themselves either in the Ministry of the Interior or in the Ministry of Labour, without any consequence as to the role that they play as workers' organizations in the defence of the occupational interests of their members. It further recalls that the fact that an organization has not been officially recognized does not justify the rejection of allegations when it is clear from the complaints that this organization has at least a de facto existence [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 35 of the annex]. With reference to the abovementioned principle, the Committee considers that the*

CCCWA, the TAI and the ITTA have, by virtue of their activities on behalf of their members, demonstrated a de facto existence as workers' organizations.

980. The Committee observes that the violations of trade union rights alleged by the complainant relate, for the most part, to the rallies and strikes organized by the teachers' unions in support of the passage of the Pay Parity Bill, as well as to the issuance of a trade union publication (Teachers' Pen) and international trade union activities. With regard to the rallies and strikes organized by the teachers' unions, the Committee firstly recalls that freedom of association implies not only the right of workers and employers to form freely organizations of their own choosing, but also the right for the organizations themselves to pursue lawful activities – including peaceful demonstrations – for the defence of their occupational interests. Moreover, the Committee has always recognized the right to strike by workers and their organizations as a legitimate means of defending their economic and social interests [see *Digest*, op. cit., paras 495 and 521].

981. As concerns the serious allegations of the arrest and detention of trade unionists on several occasions between March and May 2007, which were often undertaken without legal warrant and attended by acts of violence on the part of security forces, the Committee notes the Government's indications, particularly the following:

- On 7 March 2007, a few teachers were summoned to court and given mild suspended penalties due to their continued hostile actions. Almost all of them were shortly released through the intervention of the then Minister of Education. These arrests were targeted at subversive elements within the teachers' movement who intended to use the teachers' legitimate claims in order to spread social unrest. Forty others were also arrested on charges of having attended an illegal gathering; they were required to appear before the courts and would receive very light penalties, if any at all.
- Twenty persons were arrested on 8 March, and six others on 9 March 2007. On 14 March 2007 approximately 200 persons were arrested. Most were released almost immediately; a few of them, however, are to appear before the court on charges of social disturbance.
- On 7 April 2007 approximately 45 persons were arrested with warrants in Hamedan for intending to initiate a closure of all schools in the province. All of them were released within approximately one week of the arrests, and charges were brought against nine of them, which were heard in Branch No. 106 of the Public Criminal Court of Hamedan on 25 September 2007.

982. The Committee deplors the fact that the Government, as in other cases before the Committee concerning the arrest and detention of trade unionists for engaging in demonstrations [see, e.g., Case No. 2508, 350th Report, para. 1104] provides little specific information respecting these allegations: indeed, as in that case the Government's reply amounts to little more than general statements that the arrests were targeted at "subversive elements", or made in cases of "social disturbance", and that those arrested would be treated leniently. From the Government's reply the Committee further observes that warrants were apparently issued only with respect to the 7 April 2007 arrests, and that acts of violence, though generally denied by the Government, did occur in the context of minor clashes between the police and demonstrators in March 2007. In these circumstances, the Committee is compelled to recall that the arrest and detention of trade unionists without any charges being brought or court warrants being issued constitutes a serious violation of trade union rights [see *Digest*, op. cit., para. 69]. Furthermore, the authorities should resort to the use of force only in situations where law and order is seriously threatened. The intervention of the forces of order should be in due proportion to the danger to law and order that the authorities are attempting to control and governments should take measures to ensure that the competent authorities receive adequate

instructions so as to eliminate the danger entailed by the use of excessive violence when controlling demonstrations which might result in a disturbance of the peace [see **Digest**, *op. cit.*, para. 140]. Accordingly, the Committee requests the Government to take the necessary measures to ensure that trade unionists may exercise their freedom of association rights, including the right to peaceful assembly, without fear of intervention by the authorities. It further requests the Government to ensure that the competent authorities receive adequate instructions so as to eliminate the danger entailed by the use of excessive violence when controlling demonstrations.

**983.** *The Committee expresses deep concern over the fact that the Government provides no reply to the allegation that, during their period of detention, several trade unionists had been blindfolded, handcuffed and housed in unhygienic conditions. The Committee considers that detained trade unionists, like all other persons, should enjoy the guarantees enunciated in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, according to which all persons deprived of their liberty must be treated with humanity and with respect for the inherent dignity of the human person [see **Digest**, *op. cit.*, para. 54]. It therefore requests the Government to undertake an independent inquiry into these allegations of ill-treatment and, if they are proven true, to compensate the concerned parties for any damages suffered as a result of the said treatment.*

**984.** *The Committee notes with grave concern the allegation of the conviction of 165 teachers who had participated in the March–May 2007 protests, mostly on grounds of “gathering and conspiring and acting against the National Security by participating in illegal gatherings and speaking out against the authorities by providing information to the enemies and opposition groups and propaganda against the Islamic Republic of Iran”. It further notes with concern that, of those convicted, several were handed down especially severe sentences: 12 teachers from Tehran received suspended prison sentences of periods from two to five years in length in October 2007, and in November 2007 four teachers from Khorasan received punishments ranging from suspended prison sentences, of four months in length, to forced retirement with a reduction of one pay grade. The Committee observes in this connection that, according to the Government, several individuals had been convicted in relation to the arrests of 14 March and 7 April 2007. The Government further contends that all charged persons mentioned in the complaint were prosecuted on grounds of organizing secret meetings, forming illegal groups, cooperating with opposition groups, or conspiring against national security, and that they all enjoyed the right to defence counsel and to appeal their convictions. Given the lack of more detailed and specific information respecting these serious allegations, however, the Committee is bound to recall that in cases where the complainants alleged that trade union leaders or workers had been arrested for trade union activities, and the Government’s replies amounted to general denials of the allegation or were simply to the effect that the arrests were made for subversive activities, for reasons of internal security or for common law crimes, the Committee has followed the rule that the Government concerned should be requested to submit further and as precise information as possible concerning the arrests, particularly in connection with the legal or judicial proceedings instituted as a result thereof and the result of such proceedings, in order to be able to make a proper examination of the allegations [see **Digest**, *op. cit.*, para. 111]. Furthermore, in view of the prosecution of many other trade unionists on similar charges of “propaganda against the State” and “acting against national security” in other cases concerning the Islamic Republic of Iran presently before the Committee [see, e.g., Case No. 2508, 346th Report paras 1130–1191], the Committee considers that the situation obtaining in the country may be characterized by regular violations of civil liberties and a systematic use of the criminal law to punish trade unionists for engaging in legitimate trade union activities. In these circumstances, the Committee urges the Government to ensure that the charges against all the trade unionists relating to their participation in the March–May 2007*

*protests are immediately dropped, that their sentences are annulled, and that they are fully compensated for any damages suffered as a result of the convictions.*

- 985.** *The Committee notes with grave concern the serious allegations concerning trade unionist Farzad Kamangar. According to these allegations Mr Kamangar has been detained in various prisons since July 2006, and on 25 February 2008 was found guilty by the Tehran Revolutionary Court of endangering national security and being “moharebeh” (in “enmity with God”) for his alleged affiliation with the Kurdistan Workers’ Party, or PKK. Procedural irregularities attended the trial: Mr Kamangar was not allowed to testify in his defence, and the lone presiding judge spent only five minutes reviewing the case; nevertheless his death sentence was confirmed by the Supreme Court on 11 July 2008. Mr Kamangar, furthermore, has been subject to regular torture and severe beatings throughout his detention. The Committee observes with deep concern that the allegations concerning Mr Kamangar possess many elements in common with the criminal prosecutions of trade unionists discussed above – most notably in that he was convicted on grounds of endangering national security, in a trial marked by the absence of full guarantees of due process of law. In view of the extremely serious nature of these allegations, moreover, the Committee urges the Government to immediately stay the execution of the death sentence, annul Mr Kamangar’s conviction, and secure his release from detention. It also requests the Government to undertake an independent inquiry into the allegations of torture inflicted upon Mr Kamangar during his detention and, if proven true, to compensate him for any damages suffered as a result of the said treatment. Further noting the allegation that several members of the “Save Farzad Committee” established to demonstrate solidarity with Mr Kamangar have been arrested, detained, and subject to threats and intimidation, the Committee requests the Government to take the necessary steps to ensure that trade unionists may exercise their freedom of association rights, including the right to engage in peaceful expressions of solidarity, without fear of intervention by the authorities.*
- 986.** *As concerns the penalties of suspension, for periods ranging from two months’ suspension to a life ban from teaching for the participants in the April 2007 sit-in strike and other protest actions, the Committee deeply regrets that the Government provides no reply to this allegation, apart from stating that one individual – Mokhtar Asadi – had been suspended for violating disciplinary and workplace laws. The Committee recalls in this regard that no person should be prejudiced in employment by reason of trade union membership or legitimate trade union activities, whether past or present. Furthermore, protection against anti-union discrimination should cover not only hiring and dismissal, but also any discriminatory measures during employment, in particular transfers, downgrading and other acts that are prejudicial to the worker [see **Digest**, *op. cit.*, paras 770 and 781]. The Committee requests the Government to initiate an independent inquiry into the allegations of discriminatory suspension and, if they are proven true, to lift the suspensions and any other prejudicial measures and compensate the parties concerned for any damages, including back pay, incurred as a result of their imposition.*
- 987.** *The Committee deeply regrets the Government’s failure to reply to the allegations of raids on trade unionists’ residences on 11 April and 5 October 2007. It notes that the former involved the confiscation of computers and materials belonging to writers of the ITTA publication Teachers’ Pen, while in the course of the latter raid materials and EI application documents were seized. Observing further that the authorities had banned the Teachers’ Pen and prohibited the newspapers from publishing news of the protests, the Committee recalls that the publication and distribution of news and information of general or special interest to trade unions and their members constitute legitimate trade union activity, and the application of measures designed to control publication and means of information may involve serious interference by administrative authorities with this activity. It requests the Government to take the necessary measures, including the lifting of the bans on the Teachers’ Pen and the publication of news concerning protests or other*

labour-related activities, to ensure the right of trade unions to issue publications and express its opinions to the press. In respect of the October 2007 raid on trade unionists' residences, the Committee recalls that a workers' organization should have the right to join the federation and confederation of its own choosing, subject to the rules of the organizations concerned and without any previous authorization [see *Digest*, op. cit., para. 722]. Also noting the allegation that Mr Khaksari had been detained and questioned with regard to his participation in the July 2007 EI World Congress, and that his passport had been confiscated, the Committee requests the Government to ensure the return of Mr Khaksari's passport, as well as the right of workers' organizations to join the federation and confederation of their own choosing – including the right to participate in international trade union meeting – free from interference by the authorities. The Committee furthermore requests the Government to initiate an independent inquiry into the confiscation of trade unionists' property during both raids and, if the confiscations are found to be in violation of freedom of association principles, to fully compensate the parties concerned for any losses incurred.

**988.** *The Committee is compelled to express its deep concern with the seriousness of the trade union climate in the Islamic Republic of Iran and calls the Governing Body's special attention to the situation. It once again requests the Government to accept a direct contacts mission in respect of the matters currently pending before the Committee.*

### **The Committee's recommendations**

**989.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) The Committee requests the Government to amend the existing legislative framework so as to ensure that employers' and workers' organizations may exercise their freedom of association rights freely and without interference by the public authorities.*
- (b) The Committee requests the Government to take the necessary measures to ensure that trade unionists may exercise their freedom of association rights, including the right to peaceful assembly, without fear of intervention by the authorities. It further requests the Government to ensure that the competent authorities receive adequate instructions so as to eliminate the danger entailed by the use of excessive violence when controlling demonstrations.*
- (c) The Committee requests the Government to undertake an independent inquiry into the allegations of ill-treatment endured by trade unionists in the course of their detention and, if they are proven true, to compensate the concerned parties for any damages suffered.*
- (d) The Committee urges the Government to ensure that the charges against all the trade unionists relating to their participation in the March–May 2007 protests are immediately dropped, that their sentences are annulled, and that they are fully compensated for any damages suffered as a result of the convictions.*
- (e) The Committee urges the Government to immediately stay the execution of Farzad Kamangar's death sentence, annul his conviction and secure his release from detention. It also requests the Government to undertake an independent inquiry into the allegations of torture inflicted upon*

*Mr Kamangar during his detention and, if proven true, to compensate him for any damages suffered as a result of the said treatment. Further noting the allegation that several members of the “Save Farzad Committee” established to demonstrate solidarity with Mr Kamangar have been arrested, detained, and subject to threats and intimidation, the Committee requests the Government to take the necessary steps to ensure that trade unionists may exercise their freedom of association rights, including the right to engage in peaceful expressions of solidarity, without fear of intervention by the authorities.*

- (f) The Committee requests the Government to initiate an independent inquiry into the allegations of discriminatory suspension and, if they are proven true, to lift the suspensions and any other prejudicial measures and compensate the parties concerned for any damages, including backpay, incurred as a result of their imposition.*
- (g) The Committee requests the Government to take the necessary measures, including the lifting of the bans on the Teachers’ Pen and the publication of news concerning protests or other labour-related activities, to ensure the right of trade unions to issue publications and express its opinions to the press. It further requests the Government to ensure the return of Mr Khaksari’s passport, as well as the exercise of the right of workers’ organizations to join the federation and confederation of their own choosing – including the right to participate in international trade union meetings – free from interference by the authorities. The Committee furthermore requests the Government to initiate an independent inquiry into the confiscation of trade unionists’ property during the April and October 2007 raids on trade unionists’ residences and, if the confiscations are found to be in violation of freedom of association principles, to fully compensate the parties concerned for any losses incurred.*
- (h) The Committee expresses its deep concern with the seriousness of the trade union climate in the Islamic Republic of Iran and calls the Governing Body’s special attention to the situation. It once again requests the Government to accept a direct contacts mission in respect of the matters currently pending before the Committee.*

## Annex

	Name	City of service	Sentence	Bail for release
1.	Hamid Mojiri	Khomini Shahr	Three years' exile to Yazd	–
2.	Sayed Mojtaba Abtahi	Khomini Shahr	Early retirement/30 days' detention/one grade diminished	\$40,000
3.	Abdolrasoul Emadi	Khomini Shahr	Three years' exile to Arak	–
4.	Ms Dibaji	Khomini Shahr	Early retirement	–
5.	Satar Zareie	Khomini Shahr	Two years' exile to Semnan Province	–
6.	Norolah Barkhordar	Khomini Shahr	Three years' exile to Kohgilviah va Boyerahmad	–
7.	Naser Jazinie	Khomini Shahr	Two years in exile to Ghom	–
8.	Ms Sherafat	Khomini Shahr	Punishment and record in her file	–
9.	Esmail Akbari	Khomini Shahr	Three years in exile	–
10.	Hadi Mirzaiee	Tehran	52 days' detention in solitary confinement Three-year suspended prison and \$10,000 cash fine	\$60,000 (2003)
11.	Mahmoud Beheshti	Tehran	Twice detention: 31 and 17 days' detention in solitary confinement Four-year suspended prison	\$50,000 and \$30,000
12.	Aliakbar Baghani	Tehran	30 days' detention/three months' suspension from service/two years in exile Five-year suspended prison	\$30,000
13.	Mohammad Khaksari	Tehran	One-day detention Two-year suspended prison	\$100,000
14.	Mahmoud Dehghan	Tehran	Eight days' detention	Personal security deposit
15.	Khatoun Badpar	Tehran	One-day detention	Personal security deposit
16.	Alireza Akbari Nabi	Tehran	26 days' detention in solitary confinement/two-year suspended prison	\$30,000
17.	Hamid Pourvosough	Tehran	26 days' detention in solitary confinement/three months' suspension from service/three-year suspended prison sentence	\$30,000
18.	Mohammadreza Rezaiee	Tehran	26 days' detention in solitary confinement/three months' suspension from service/three-year suspended prison	\$30,000
19.	Asgar Zati	Tehran	40 days' detention/two-year suspended prison	\$70,000 (2003)
20.	Karim Ghashghavi	Tehran	16 days' detention/three-year suspended prison	\$30,000

	<b>Name</b>	<b>City of service</b>	<b>Sentence</b>	<b>Bail for release</b>
21.	Mohammadtaghi Falahi	Tehran	29 days' detention/three-year suspended prison	\$30,000
22.	Mahmoud Bagheri	Tehran	33 days' detention in solitary confinement	\$30,000
23.	Alisafar Montajabi	Tehran	26 days' detention/four-year suspended prison	\$30,000
24.	Mrs Soraya Darabi	Tehran	Ten days' detention	\$40,000
25.	Rasoul Bodaghi	Tehran	16 days' detention in solitary confinement/deduction of four days' salary/one grade was diminished for two years/two-year suspended prison	\$30,000
26.	Mohsen Kamali	Tehran	16 days' detention in solitary confinement	\$30,000
27.	Mirakbar Raieszadeh	Tehran	14 days' detention	\$80,000
28.	Norolah Akbari	Tehran	19 days' detention in solitary confinement/five-year suspended prison	\$30,000
29.	Mohammad Davari	Tehran	19 days' detention in solitary confinement/three months' suspension from service/sentenced to three-year prison/two years exile	\$30,000
30.	Ali Poursoleiman	Tehran	19 days' detention in solitary confinement/three months' suspension from service/two years in exile	\$30,000
31.	Reza Abdi	Tehran	Six days' detention	3rd person security deposit
32.	Saieed Tadayoni	Tehran	Detention	3rd person security deposit
33.	Ms Tayebah Mirzaiee	Tehran	Detention	3rd person security deposit
34.	Nader Ahangari	Tehran	Detention	3rd person security deposit
35.	Asghar Ghanbari	Tehran	Detention	3rd person security deposit
36.	Abdolhamid Mansouri	Tehran	Detention	3rd person security deposit
37.	Akbar Akbari	Tehran	Detention	3rd person security deposit
38.	Alireza Hashemi	Tehran	16 days' detention in solitary confinement/three months' suspension from service/three-year final prison sentence/two-year exile	\$30,000
39.	Yousef Mostafalou	Tehran	Three months' suspension from service	–
40.	Esmail Rasoulkhani	Robat Karim	Detention	3rd person security deposit
41.	Hosein Rameshkr	Robat Karim	Three days' detention/three months' suspension from service	3rd person security deposit
42.	Ghorbanali Nikaysh	Robat Karim	Three months' suspension from service	–
43.	Mohammad Reza Sanjabie	Robat Karim	Three months' suspension from service	–

	<b>Name</b>	<b>City of service</b>	<b>Sentence</b>	<b>Bail for release</b>
44.	John Hosein Didar Amin	Ghale Hasankhan	Three months' suspension from service	–
45.	Taimour Hassanpour	Ghale Hasankhan	Three months' suspension from service	–
46.	Golmostafa Ghahremanl	Karaj	Detention	3rd person security deposit
47.	Reza Abdi	Karaj	14-day detention	\$40,000
48.	Mokhtar Asadi	Karaj	Three years' exile/two months' suspension from service	–
49.	Nader Ghadimi	Hamedan	Ten days' detention/five-year exile/91 days' prison sentence	3rd person security deposit
50.	Yousef Refahiat	Hamedan Ten	Ten days' detention/two grades were diminished for one year/91 days' prison sentence	3rd person security deposit
51.	Ali Najafi	Hamedan	Ten days' detentlon/91 days' prison sentence	3rd person security deposit
52.	Hadi Gholami	Hamedan	Ten days' detention/one year suspension from service/91 days' prison sentence	3rd person security deposit
53.	Yousef Zareiee	Hamedan	Nine days' detention/three years' exile/91 days' prison sentence, served	3rd person security deposit
54.	Ali Sadeghi	Hamedan	Eight days' detention/91 days' prison finalized sentence	–
55.	Jalal Naderi	Hamedan	Eight days' detention/91 days' prison sentence, served	–
56.	Mahmoud Jalilian	Hamedan	Eight days' detention/91 days' prison sentence, served	–
57.	Majid Forouzanfar	Hamedan	Eight days' detention/91 days' prison sentence, served	3rd person security deposit
58.	Iraj Ansari	Hamedan	Three days' detention/three months' suspension from service	3rd person security deposit
59.	Nasrolah Dousti	Hamedan	Eight months' suspension from service	3rd person security deposit
60.	Ghalandar Razan	Hamedan	Written punishment recorded in the file	–
61.	Ahmadvad	Hamedan	Written punishment recorded in the file	–
62.	Razan Moradi	Hamedan	Two months' suspension from service	–
63.	Mahmoud Hekmati	Hamedan	Four months' suspension from service	–
64.	Rzan Mohammadi	Hamedan	Four months' suspension from service	–
65.	Amir Asadian	Hamedan	Diminished the position from teaching to office assistant	–
66.	Bahman Goudarzzadeh	Isfahan	Two years' exile to Maimeh	–
67.	Mostafa Sepehnia	Isfahan	Early retirement/reduced one grade	–
68.	Kazem Yousefi Zamanabad	Isfahan	Reduced one grade for two years	–

	<b>Name</b>	<b>City of service</b>	<b>Sentence</b>	<b>Bail for release</b>
69.	Yadolah Shabani	Isfahan	One-day detention	\$100,000
70.	Said Aboutalebi	Isfahan	Reduced one grade for one year	–
71.	Abdolkarim Noukandi	Isfahan	Written punishment and recorded in the file	–
72.	Morteza Siahkari	Isfahan		
73.	Kadijeh Ganji	Isfahan		
74.	Hamid Rahmati	Shahreza	Two days' detention/two-year exile	–
75.	Gholamreza Shirvani	Felaverjan	Detention	3rd person security deposit
76.	Hemat Shabani	Kermanshah	Detention	3rd person security deposit
77.	Abas Mousavi Moradi	4 dangeh Sari	Detention	3rd person security deposit
78.	Gholamali Abasi	Ardabil	Three days' detention	3rd person security deposit
79.	Arsalan Ahmadzadeh	Ardabil	Three days' detention	3rd person security deposit
80.	Saied Fathi	Ardabil	Three days' detention	3rd person security deposit
81.	Hadi Lotfinia	Khorasan	Four days' detention/four-month prison sentence or \$1,000 fine	\$50,000
82.	Iraj Najaf Abadi	Khorasan	Seven days' detention/reduced one grade for two years	\$80,000
83.	Hasan Rajabi	Khorasan	Eight days' detention/four-month prison sentence or \$1,000 fine	\$150,000
84.	Mahmoud Delasamroui	Khorasan	Deduction 1/10 salary for one year	–
85.	Hassan Naghed	Khorasan	Deduction 1/10 salary for six months	–
86.	Gholamreza Ahmadi	Torbat e Haydariieh	Two days' detention/three months' suspension from service	3rd person security deposit
87.	Ms Hayedh Shahidi	Torbat e Haydariieh	Reduced one grade for one year	
88.	Sayed Hashem Khastar	Khorasan	Three-year suspended prison sentence/imposed early retirement/reduced one grade	\$250,000
89.	Ali Heshmati	Kermanshah	11 days' detention	3rd person security deposit
90.	Mohammad Tavakoli	Kermanshah	Two detentions: 11 days and 27 days	3rd person security deposit/\$50,000
91.	Ali Sadeghi	Kermanshah	Two detentions: seven days and 11 days	\$30,000/3rd person security deposit
92.	Asadolah Hayrani	Kermanshah	Seven days' detention	3rd person security deposit

	<b>Name</b>	<b>City of service</b>	<b>Sentence</b>	<b>Bail for release</b>
93.	Jahandar Lorestani	Kermanshah	Five days' detention	3rd person security deposit
94.	Kumars Lorestani	Kermanshah	Seven days' detention	3rd person security deposit
95.	Payman Noudinian	Sanandaj	Two years' exile/two months' suspension from service	–
96.	Farzad Asadpour	Sanandaj	Three-year exile to Baneh	–
97.	Eskandar Lotfi	Sanandaj	Three years' exile	–
98.	Loghman Sedaghat	Baneh	Dismissed (service-based teacher with seven years' experience)	–
99.	Siamak Moradi	Baneh	Dismissed (service-based teacher with four years' experience)	–
100.	Mohammad Ali Shirazi	Yazd	14 days' detention/two years' exile	–
101.	Mohammad Javad Hesamifar	Yazd	14 days' detention/two years' exile	\$10,000 (2003)
102.	Ahmad Changizi	Yazd	14 days' detention/two years' exile	\$14,000 (2003)
103.	Mansour Mirzaiee	Yazd	Two detentions: 14 days and 26 days/two years' exile	\$14,000 and \$80,000
104.	Ramezanali Nejati	Yazd	Sentenced to \$140 in cash fine and two years' exile	\$14,000 (2003)
105.	Aliakbar Chkhmagh	Yazd	Sentenced to \$140 in cash fine and two years' exile	\$14,000 (2003)
106.	Ali Moghimee	Yazd	Sentenced to \$140 in cash fine and two years' exile	\$14,000 (2003)
107.	Mohammad Ali Shahedi	Yazd	Sentenced to \$140 in cash fine and two years' exile	\$14,000 (2003)
108.	Gholamreza Dashan	Tabriz	Three months' suspension from service	–
109.	Hasan Kharatian	Tabriz	Deducted two months' salary	–
110.	Tofigh Mortezapour	Tabriz	Waiting for order	–
111.	Godarz Shafieeyan	Mamasani/Fars	One-day detention/deducted one-day salary	–
112.	Taimour Bagheri Koudakani	Rasht	Four days' detention in solitary confinement in 2004/six days' detention in general ward in 2007/prohibited from teaching	–
113.	Anoush Arefi	Rasht	Four days' detention in solitary confinement in 2004 and six days' detention in general ward in 2007	–
114.	Yadolah Baharestani	Rasht	Four days' detention in solitary confinement in 2004 and six days' detention in general ward in 2007	–
115.	Amadeh Younes	Rasht	Four days' detention in solitary confinement in 2004 and six days' detention in general ward in 2007	–

	<b>Name</b>	<b>City of service</b>	<b>Sentence</b>	<b>Bail for release</b>
116.	Hamidreza Haghghi	Rasht	Four days' detention in solitary confinement in 2004 and six days' detention in general ward in 2007	–
117.	Mohammadali Naghavi	Rasht	Detention for eight hours and interrogated	–
118.	Masoud Fayaz Sandi	Rasht	Dismissed from management position	
119.	Housein Pour	Rasht	Dismissed from management position	–
120.	Hosein Zekri	Astaneh	Four days' detention in solitary confinement in 2004 and six days' detention in general ward 2007	–
121.	Mohammad Javad Saiedi Hojati	Lahijan	Four days' detention in solitary confinement in 2004 and six days' detention in general ward in 2007	
122.	Mahmoud Sedighipour	Roudsar	Four days' detention in solitary confinement in 2004 and six days' detention in general ward in 2007	–
123.	Siavoush Lahouti	Roudsar	Four days' detention in solitary confinement in 2004 and six days' detention in general ward in 2007	–
124.	Sahranavard	Kouchesfehan	Detention for eight hours and interrogated	
125.	40 teachers	Hamedan	Each of them was in detention for a couple of days	3rd person security deposit

CASE NO. 2616

REPORT IN WHICH THE COMMITTEE REQUESTS  
TO BE KEPT INFORMED OF DEVELOPMENTS

**Complaint against the Government of Mauritius  
presented by**  
— **the National Trade Unions Confederation (NTUC)**  
— **the Mauritius Labour Congress (MLC) and**  
— **the Mauritius Trade Union Congress (MTUC)**  
**supported by**  
**the International Trade Union Confederation (ITUC)**

*Allegations: The complainant organizations  
allege the use of repressive measures against the  
trade union movement, including criminal  
prosecutions, in violation of the right to strike  
and engage in protests*

990. The complaint is contained in a communication submitted by the National Trade Unions Confederation (NTUC), the Mauritius Labour Congress (MLC) and the Mauritius Trade Union Congress (MTUC) dated 3 December 2007. The MTUC submitted additional information in a communication of 19 December 2007. The International Trade Union Confederation (ITUC) affiliated itself with and provided additional information in support of the complaint in a communication of 1 February 2008.
991. The Government submitted its observations in communications dated 21 May and 11 August 2008.
992. Mauritius has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

#### **A. The complainants' allegations**

993. In their communications of 3 and 19 December 2007, the complainants assert that they have always been law-abiding, while remaining active in the pursuit of safeguarding the rights of their members and workers in general. Until recently they have not been impeded in their activities, but the situation has changed dramatically and peaceful marches and demonstrations have become the object of criminal prosecutions against trade union leaders.
994. The complainants state that the Minister of Finance, in his budget speech for the 2006–07 period, announced the closure of the Police Mechanical Workshop (PMW), a government department. The announcement came as a shock to the workshop employees, as there had been no prior mention of the closure or consultation on the issue. A peaceful demonstration was held on 19 June 2006 in support of workers opposed to the closure of the PMW; Toolsyraj Benydin and Radhakrishna Sadien, Secretary-General of the NTUC and President of the MTUC, respectively, participated in the protest. On 19 November 2007, Benydin and Sadien appeared before the Intermediate Court and were charged with the

following violations of the Public Gathering Act 1991 (hereafter the PGA) for their participation in the 19 June 2006 protest:

- (1) Holding a public gathering without giving written notice to the Commissioner of Police.
- (2) Holding a public gathering on a day on which the Assembly meets and sits.
- (3) Failing to comply with a direction given by a police officer.

**995.** On the same day, a prohibition order was also issued, on the motion of the Prosecutor representing the Government, stipulating that the two men would not be allowed to leave Mauritius without prior authorization from the Supreme Court that is specific to the authorized destination. The relevant procedures additionally require that applications for international travel be submitted three months in advance. According to the complainants, only after the two leaders provided a surety of 25,000 rupees were they allowed to proceed to Ghana to attend the Unification Congress of the African Regional Organisation (AFRO) and the Democratic Organisation of African Workers Trade Unions (DOAWTU), in late November 2007; they were required to surrender their passports to the police upon returning to Mauritius on 1 December 2007.

**996.** According to the complainants, the PGA contains the following restrictions on freedom of association:

- (1) Sections 2 and 3 require written notice to the Commissioner of Police not less than seven days before a public meeting or procession takes place; public meetings and processions are defined as comprising 12 or more persons in a public place.
- (2) Section 4 enables the Commissioner of Police to prevent the gathering on certain grounds and impose certain conditions.
- (3) Section 5 enables the police to put an end to gatherings on certain grounds.
- (4) Sections 7 and 8 impose restrictions on permissible places and days for the holding of a gathering.
- (5) Section 18 imposes penalties of a fine not exceeding 2,000 rupees and imprisonment for a term not exceeding two years.

**997.** The complainants allege that the requirement of 7 days' notice under the PGA restricts the holding of spontaneous gatherings on urgent and pressing issues, and that having all gatherings of 12 or more persons fall under the provisions of the PGA – and thereby permitting them to be declared illegal or sanctioned – is a violation of freedom of association. Additionally, the penalties for violations of the PGA are excessively high.

**998.** The complainants further indicate that additional prosecutions under the PGA are being pursued. Mr Benydin and Mr Sadien were again summoned to court, along with three others for their participation in a 7 June 2006 protest against the closure of the Development Works Corporation (DWC), a parastatal body. The MTUC's 19 December 2007 communication attaches the following supporting documents:

- (1) A copy of the PGA.
- (2) Excerpts of court documents relating to the abovementioned proceedings under the PGA. The said documents include a record of the charges brought against Mr Benydin and Mr Sadien in connection with the 19 June 2006 protest, as well as a

record of the charges brought against Mr Benydin and Mr Sadien as well as Deepak Benydin, Reaz Chuttoo and Faizal Aly Beegun in connection with a 7 June 2006 protest against the closure of the DWC.

- (3) Copies of pages from Mr Sadien's passport, including a page in which it is indicated, in handwriting, that the said passport is restricted to travel only to certain countries and may not be renewed or extended without prior reference to the passport officer concerned.

**999.** In its 1 February 2008 communication the ITUC, referring to the 7 June 2006 protest against the closure of the DWC, indicates that Mr Benydin, Mr Sadien and three other trade unionists – Deepak Benydin, Reaz Chuttoo and Faizal Aly Beegun – were summoned to the Intermediate Court on 18 December 2007 and charged with violations of the PGA for their participation in the abovementioned protest. At the time of the protest, in which about 50 trade unionists participated, a trade union delegation was received by the Chief Adviser to the Prime Minister and a series of meetings took place later concerning the DWC's closure; the participants were given no indication that the demonstration was considered unlawful or would lead to prosecution. The ITUC states that the five trade unionists' court hearing was scheduled for 29 January 2008 and further indicates that the unions believe, in view of the two pending court cases, that the proceedings are part of a government campaign against the trade union movement and that more legal actions against them are being prepared.

**1000.** The ITUC adds that in order to leave the country, Mr Benydin and Mr Sadien must seek permission from the authorities and have their travel plans approved. Moreover, their passports were still being retained by the Government, and were only issued to them when they have had to travel abroad; the two leaders have now been able to take copies of their passports, with handwritten inscriptions in them, specifying exactly where and for how long they are allowed to be abroad. Copies of the two men's passports are attached to the communication, including copies of pages in which it is indicated, in handwriting, that the passports are restricted to travel only to certain countries and may not be renewed or extended without prior reference to the passport officer concerned.

## **B. The Government's reply**

**1001.** In its communication of 21 May 2008, the Government states that in a budget speech delivered on 9 June 2006, the Deputy Prime Minister and Minister of Finance announced the Government's intention to close both the DWC and the PMW. The DWC was considered inefficient and to have outlived its purpose, while the PMW's closure was intended to put an end to abusive practices in the management of the vehicle fleet of all government departments, in particular the police. According to the Government, it had announced that a humane approach would be taken and that the workers would be supported in the following ways:

- (1) The Government would fully meet its obligations under the terms of the workers' employment contracts.
- (2) A special unit in the Ministry of Labour, Industrial Relations and Employment would assist the workers to shift to productive activity, in line with the Government's policy of protecting workers instead of jobs.
- (3) Redeployment of the workers affected.
- (4) Workers with a pensionable age profile would be pensioned off.

- (5) Assistance would be made available through the Empowerment Programme for training those who could be placed in other jobs.
- (6) Those workers wishing to start a business and, in particular, to set up construction companies would be given all necessary support, in line with the Government's policy of diversifying the base of enterprises eligible for government contracts; additionally those choosing to establish such businesses would be able to obtain DWC equipment on favourable terms.
- 1002.** The Government states that Radhakrishna Sadien, Toolsiraj Benydin, Deepak Benydin, Reaz Chuttoo and Faizal Aly Beegun, without waiting for any consultation to take place, took part in an unlawful gathering on 7 June 2006 to protest the closure of the DWC. Radhakrishna Sadien and Toolsiraj Benydin also took part in another unlawful meeting on 19 June 2006 to protest against the Government's decision to close the PMW. In both protests the organizers failed to give written notice to the Commissioner of Police, as required under section 3(1) of the PGA; additionally the 19 June 2006 protest fell on a day in which the National Assembly was meeting and therefore required, under section 8(1) of the PGA, the authorization of the Commissioner of Police, which was not received. The Government adds that Mr Sadien also acted in contravention of section 5 of the PGA by failing to comply with the direction of an assistant commissioner of police to put an end to the gathering.
- 1003.** According to the Government, the holding of the two protests was likely to endanger public order and security. The protest concerning the DWC was held in front of the Prime Minister's Office, along a main street adjacent to the National Assembly; it obstructed the free passage of motor vehicles from 3 p.m. to 4 p.m. and disrupted normal activities in the neighbourhood. The protest over the closure of the PMW was held in front of the main entrance to the police headquarters along a busy street, from 10.55 a.m. to 11.30 a.m., thus causing inconvenience to persons visiting the police headquarters compound.
- 1004.** Following the protests, Radhakrishna Sadien, Toolsiraj Benydin, Deepak Benydin, Reaz Chuttoo and Faizal Aly Beegun were charged with holding a public gathering on 7 June 2006 without giving notice to the Commissioner of Police, in violation of section 3(1) of the PGA. Mr Sadien and Mr T. Benydin were charged with holding a public gathering on a day (19 June 2006) on which the National Assembly met, in violation of section 8(1) of the PGA. In relation to the 19 June 2006 protest, Mr Sadien was also charged with failing to comply with a direction given by a police officer, in breach of section 5 of the PGA.
- 1005.** The charges relating to the 19 June 2006 protest were heard by the Magistrate of the Intermediate Court and, in a judgement delivered on 11 April 2008, Mr Sadien and Mr T. Benydin were found guilty on both counts and each fined 1,000 rupees, plus an additional 500 rupees as costs. In so holding, the magistrate dismissed the submission made by the counsel for the accused, to the effect that sections 3, 5 and 8 of the PGA violate section 13 of the Constitution; Mr Sadien and Mr T. Benydin have appealed the judgement. The case concerning the protest of 7 June 2006 had been postponed to 2 June 2008.
- 1006.** As concerns the withholding of passports, the Government indicates that the five trade unionists were prohibited from leaving the country once charges were brought against them. The prohibition is in line with section 14 of the Passport Regulations (Government Notice No. 22 of 1969), which provides that it shall be lawful for the passport officer to withhold or withdraw the passport of a person against whom criminal proceedings had been instituted. Nevertheless, on the basis of orders from the Intermediate Court, several of the trade unionists were allowed to travel abroad. Mr Sadien travelled to South Africa twice and Singapore once between December 2007 and February 2008; Mr T. Benydin

travelled to South Africa, France and the United Kingdom from December 2007 to January 2008. Additionally Mr Beegun visited the United Arab Emirates in December 2007.

- 1007.** The Government states that the purpose of notification as required by section 3(1) of the PGA is to allow the Commissioner of Police to take appropriate measures to prevent public disorder, damage to property, or disruption of life by imposing conditions on the holding of the gathering. The police, however, do not arbitrarily refuse permission to hold public meetings. The Supreme Court, in *Bizlall v. Commissioner of Police* (a copy of which is attached to the Government's communication), has stated that "when the commissioner receives a notice of an intended gathering, he must first and foremost start on the premise that the gathering can take place and then proceed to impose conditions which he would invariably do. The general rule would be to allow a gathering to be held. It is only if the imposing of conditions would not suffice to prevent public disorder, damage to property or disruption of the life of the community that the Commissioner would be entitled, and even then on a reasonable belief, to prohibit a gathering".
- 1008.** The Government indicates that out of 261 applications for public gatherings made in 2007, only seven were not approved. In six of those cases, the application failed to fulfil the requirements of submitting written notice as set out in section 3 of the PGA; in the other case the owner of the proposed location had protested due to the risk of a fire occurring. None of the cases concerned trade union activity. Finally, the Government states that its laws and practices conform to the principles concerning the right to strike, as set out in paragraphs 141 and 143–146 of the *Digest of decisions and principles of the Freedom of Association Committee*, fifth edition (2006).
- 1009.** In its communication of 11 August 2008, the Government states that the cases of the five trade union leaders pending before the Intermediate Court have been discontinued by the Director of Public Prosecution on 2 June 2008 for humanitarian reasons. Additionally, the Intermediate Court has also ordered the prohibition against departure order to lapse.

### C. The Committee's conclusions

- 1010.** *The Committee notes that the present case involves allegations of legislation and repressive measures – including the use of criminal prosecutions – that are intended to prevent trade unionists from exercising their right to participate in strikes and demonstrations. With respect to the legislation, the Committee notes that sections 2 and 3 of the PGA require, for the holding of public gatherings (defined as public meetings or processions comprising 12 or more persons), the submission of written notice to the Commissioner of Police at least seven days before the planned date. Section 4 of the PGA empowers the Commissioner of Police to impose conditions upon or prohibit public gatherings for the purpose of preventing public disorder, damage to property or disruption of the life of the community, while section 5 permits police officers to disperse a gathering on reasonable grounds for believing it to be prejudicial to public safety or public order.*
- 1011.** *As concerns the right to assembly, the Committee recalls at the outset that workers should enjoy the right to peaceful demonstration to defend their occupational interests. The Committee also recalls, however, that the requirement of administrative permission to hold public meetings and demonstrations is not objectionable per se from the standpoint of the principles of freedom of association. The maintenance of public order is not incompatible with the right to hold demonstrations so long as the authorities responsible for public order reach agreement with the organizers of a demonstration concerning the place where it will be held and the manner in which it will take place. Furthermore, trade unions must conform to the general provisions applicable to all public meetings and must respect the reasonable limits which may be fixed by the authorities to avoid disturbances in public places [see *Digest of decisions and principles of the Freedom of Association Committee*,*

*fifth edition, 2006, paras 133, 141 and 144]. In light of the abovementioned principles, and furthermore in view of the Government's indication that out of 261 applications submitted under the PGA only 7 cases were not approved, none of which concerned trade union activity, the Committee considers that the requirement of written notice and the authorities' powers to limit public gatherings set out in sections 3 to 6 of the PGA do not contravene freedom of association principles.*

- 1012.** *The Committee notes that section 7 of the PGA prohibits public gatherings in any public garden within the area of a local authority, without the written permission of the mayor or chairperson, and that section 8 prohibits public gatherings in Port Louis on days on which the Assembly meets (the Assembly is located in Port Louis, the nation's capital), except with the written permission of the Commissioner of Police. The Committee further notes that section 18 provides for a fine of up to 2,000 rupees and imprisonment for a maximum of two years for violations of the PGA. As concerns the restrictions on the time and place for holding public gatherings, the Committee recalls that while purely political strikes do not fall within the scope of the principles of freedom of association, trade unions should be able to have recourse to protest strikes, in particular where aimed at criticizing a government's economic and social policies. With regard to the penalty of imprisonment set out in section 18 of the PGA, the Committee recalls that penal sanctions should only be imposed as regards strikes where there are violations of strike prohibitions which are themselves in conformity with the principles of freedom of association. All penalties in respect of illegitimate actions linked to strikes should be proportionate to the offence or fault committed and the authorities should not have recourse to measures of imprisonment for the mere fact of organizing or participating in a peaceful strike [see **Digest**, *op. cit.*, paras 529 and 668]. The Committee considers that the requirement of written permission provided for in sections 7 and 8 of the PGA, by the very nature of the gatherings they target – gatherings located in public gardens near local authorities and public gatherings inside the capital on days when the Assembly is in session, respectively – may unduly interfere with the right of trade unions to engage in protest strikes, particularly those intended to express criticism of the Government's economic and social policies as set out in the abovementioned principle. The Committee also considers that the penalty of imprisonment should only be resorted to when a protest or gathering ceases to be peaceful. It accordingly requests the Government to review the Public Gathering Act, in full consultation with the social partners concerned, with a view to amending sections 7, 8 and 18 so as to ensure that any restrictions on public demonstrations are not such as to impede in practice the legitimate exercise of protest action in relation to the Government's social and economic policy. In this respect, the Committee recalls that trade unions must conform to the general provisions applicable to all public meetings and must respect the reasonable limits which may be fixed by the authorities to avoid disturbances in public places, while permission to hold public meetings and demonstrations, which is an important trade union right, should not be arbitrarily refused [see **Digest**, *op.cit.*, paras 142 and 144].*
- 1013.** *As concerns the prosecutions of the trade unionists under the PGA, the Committee notes that NTUC Secretary-General Toolsyraj Benydin and MTUC President Radhakrishna Sadien participated in a 19 June 2006 demonstration over the closure of the PMW. The two men were summoned to the Intermediate Court on 19 November 2007 and charged, for their participation in the abovementioned protest, with violating sections 3, 5, and 8 of the PGA. They were found guilty of the charges on 11 April 2008 and fined 1,000 rupees, plus an additional 500 rupees as costs; the two men have since appealed the decision. A prohibition order was also issued stipulating that the two men would not be allowed to leave Mauritius without prior authorization from the Supreme Court, on the basis of applications to be submitted three months in advance. The Committee further notes that only after Mr Benydin and Mr Sadien provided a surety of 25,000 rupees were they allowed to proceed to Ghana to attend the Unification Congress of the AFRO and the DOAWTU, in late November 2007, and were also required to surrender their passports to*

the police upon returning to Mauritius on 1 December 2007. The Committee additionally notes that Mr Benydin and Mr Sadien, along with three other trade unionists – Deepak Benydin, Reaz Chuttoo and Faizal Aly Beegun – were summoned to the Intermediate Court on 18 December 2007, charged with violating sections 3, 5 and 8 of the PGA for their participation in a 7 June 2006 protest against the closure of the DWC, and had their passports confiscated. The complainants indicate in this respect that the protest participants were given no indication that the demonstration was considered unlawful or would lead to prosecution, despite the numerous meetings held with the Government at the time of the protest.

- 1014.** *Observing that the prosecutions of the abovementioned individuals commenced in November and December 2007, nearly a year and a half after the concerned parties' participation in the relevant protests, the Committee considers that the information provided by the complainants leads one to query whether the protest action had any significant impact on public order at the time, or whether the prosecutions were indeed made with the aim of repressing the trade union movement in the country, as alleged by the complainants. While noting with interest that the case against the five trade unionists has since been discontinued, and that the Intermediate Court has ordered the prohibition on travel orders to lapse, the Committee observes that the case against Toolsyraj Benydin and Radhakrishna Sadien, the Secretary-General of the NTUC and President of the MTUC, respectively, is still on appeal. In light of the concerns raised above as to the excessive delay between the time of the protests and the issuing of the summonses, as well as the purely administrative nature of the charges brought, the Committee requests the Government to facilitate a speedy resolution of the case pending on appeal and – in light of the discontinuation of the case against the five trade unionists – raise to the competent authorities the possibility of giving a favourable review to this matter. The Committee expects that the discontinuation of these cases will give rise to a more sound and constructive industrial relations climate in the country.*

## **The Committee's recommendations**

- 1015.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) Observing that section 7 of the Public Gathering Act (PGA) prohibits public gatherings in any public garden within the area of a local authority without the written permission of the mayor or chairperson, that section 8 prohibits public gatherings in Port Louis on days on which the Assembly meets without the written permission of the Commissioner of Police, and that section 18 provides for a fine of up to 2,000 rupees and imprisonment for a maximum of two years for violations of the PGA, the Committee requests the Government to review the Public Gathering Act, in full consultation with the social partners concerned, with a view to amending sections 7, 8 and 18 so as to ensure that any restrictions on public demonstrations are not such as to impede in practice the legitimate exercise of protest action in relation to the Government's social and economic policy.*
  - (b) The Committee requests the Government to facilitate a speedy resolution of the case concerning Toolsyraj Benydin and Radhakrishna Sadien that is pending on appeal and – in light of the discontinuation of the latter case against Benydin, Sadien and three other trade unionists – raise to the competent authorities the possibility of giving a favourable review to this matter. The Committee expects that the discontinuation of these cases will*

*give rise to a more sound and constructive industrial relations climate in the country.*

CASE NO. 2268

REPORT IN WHICH THE COMMITTEE REQUESTS  
TO BE KEPT INFORMED OF DEVELOPMENTS

**Complaint against the Government of Myanmar  
presented by  
the International Trade Union Confederation (ITUC)**

*Allegations: (1) Allegations relating to legislative issues: unclear legislative framework covering freedom of association; serious discrepancies between legislation and Convention No. 87; repressive texts, in particular military orders and decrees, detrimental to freedom of association and which contribute to a climate of denial of fundamental freedoms and to annihilate and destroy any form of labour organization; (2) allegations relating to factual issues: total lack of legally registered workers' organizations; systematic practice of repression by public authorities of any form of labour organization; the Federation of Trade Unions of Burma (FTUB) cannot function freely and independently on the Myanmar territory and its General Secretary has to face criminal prosecution because of his legitimate trade union activities; murder, detention and torture of trade unionists; continuing repression of seafarers for the exercise of their trade union rights; arrest and dismissal of workers in connection with collective labour protests and claims, in particular at the Unique Garment Factory, the Myanmar Texcamp Industrial Ltd and the Myanmar Yes Garment Factory; intervention of the army in labour disputes*

**1016.** The Committee has already examined the substance of this case on three occasions, most recently at its March 2006 meeting, where it presented an interim report to the Governing Body [see 340th Report, paras 1064–1112, approved by the Governing Body at its 295th Session].

**1017.** The Government submitted new observations respecting this case in a communication dated 20 September 2006.

**1018.** Myanmar has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), but has not ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

#### **A. Previous examination of the case**

**1019.** In its previous examination of the case, the Committee made the following recommendations [see 340th Report, para. 1112]:

- (a) The Committee once again urges the Government in the strongest of terms to enact legislation guaranteeing freedom of association to all workers, including seafarers, and employers; to abolish existing legislation, including Orders Nos 2/88 and 6/88 so as not to undermine the guarantees relating to freedom of association and collective bargaining; to explicitly protect workers' and employers' organizations from any interference by the authorities, including the army; and to ensure that any such legislation so adopted is made public and its contents widely diffused. The Committee once again urges the Government to take advantage in good faith of the technical assistance of the Office so as to remedy the legislative situation and to bring it into line with Convention No. 87 and collective bargaining principles. It requests the Government to keep it informed of all developments in this respect.
- (b) The Committee once again urges the Government to issue instructions to its civil and military agents as a matter of urgency so as to ensure that the authorities fully refrain from any act preventing the free operation of all forms of organization of collective representation of workers, freely chosen by them to defend and promote their economic and social interests, including seafarers' organizations and organizations which operate in exile and which cannot be recognized in the prevailing legislative context of Myanmar. The Committee requests the Government to keep it informed of all measures taken in this regard.
- (c) The Committee once again urges the Government to institute an independent inquiry into the alleged murder of Saw Mya Than, to be carried out by a panel of experts considered to be impartial by all the parties concerned. The Committee requests the Government to keep it informed of measures taken in this respect.
- (d) As regards the case of high treason brought against the General Secretary of the FTUB, the Committee will examine the legal documents provided by the Government as soon as a translation is available, along with any comments or observations made by the complainant in this case.
- (e) The Committee once again deeply deplores that the Government refuses to consider the release of Myo Aung Thant and strongly urges the Government to take the necessary steps to ensure his immediate release from prison and to keep it informed in this respect.
- (f) The Committee once again requests the Government to adopt legislative measures which fully guarantee the right of seafarers to establish and join organizations of their own choosing and afford them adequate guarantees against acts of anti-union discrimination. It further requests the Government to issue appropriate instructions without delay so as to ensure that the SECD authorities immediately refrain from all acts of anti-union discrimination against seafarers who engage in trade union action and immediately revise the text of the model agreement concerning Myanmar seafarers (in particular, sections B.2, C.1, E.2, E.3 and E.9) so as to bring it into conformity with Convention No. 87 and collective bargaining principles. The Committee requests the Government to keep it informed of all developments in this respect.
- (g) The Committee once again recalls that a disputes resolution process that exists within a system with a total absence of freedom of association in law and practice cannot possibly fulfil the requirements of Convention No. 87 and urges the Government to take all necessary measures to ensure the freely chosen representation of employees and employers in cases conciliated by the various disputes resolution committees operating in the country, and to keep it informed in this respect.

- (h) The Committee requests the Government to further investigate the dismissals of Min Than Win and Aung Myo Win from the Motorcar tyre factory and if it is found that the dismissals were due to legitimate trade union activities, to take the appropriate steps with a view to the workers' reinstatement or if reinstatement is not possible, the payment of adequate compensation so as to constitute sufficiently dissuasive sanctions. The Committee requests to be kept informed in this respect.
- (i) The Committee requests the Government to inquire into the specific part of the production of the Unique Garment Factory which was stopped in July 2001 and the exact criteria for the selection of the 77 night shiftworkers who were retrenched; if it is found that the dismissals were due to legitimate trade union activities, the Committee requests the Government to take the appropriate steps with a view to the workers' reinstatement or if reinstatement is not possible, the payment of adequate compensation so as to constitute sufficiently dissuasive sanctions. The Committee requests to be kept informed in this respect.
- (j) The Committee requests the Government to conduct an inquiry into the exact part of the production of the Myanmar Texcamp Industrial Ltd. which was stopped and the criteria for the selection of the 340 workers who were retrenched in August 2003; if it is found that the dismissals were due to legitimate trade union activities, the Committee requests the Government to take the appropriate steps with a view to the workers' reinstatement or if reinstatement is not possible, the payment of adequate compensation so as to constitute sufficiently dissuasive sanctions. The Committee requests to be kept informed in this respect.
- (k) With regard to the filing of complaints against the Yes Garment Factory on the same day by both Mg Zin Min Thu and Min Min Htwe along with five other workers, the Committee requests the Government once again to establish an impartial investigation into this matter, in particular as regards the substance of the complaints filed by Mg Zin Min Thu and Min Min Htwe along with five other workers, the substance of the agreement reached on the basis of these complaints, and the specific reasons for which Mg Zin Min Thu was dismissed; if it is found that the dismissal of Mg Zin Min Thu was due to legitimate trade union activities, the Committee requests the Government to take appropriate steps with a view to his reinstatement or if reinstatement is not possible, the payment of adequate compensation so as to constitute sufficiently dissuasive sanctions. The Committee requests to be kept informed in this respect.
- (l) The Committee once again urges the Government in the strongest terms to undertake real steps towards ensuring respect for freedom of association in law and in practice in Myanmar in the very near future and reminds the Government that it may avail itself of the technical assistance of the Office in this respect.

## **B. The Government's new observations**

**1020.** The Government submitted further information in response to the Committee's recommendations in a communication dated 20 September 2006.

### ***Legislative issues***

**1021.** With regard to the issues raised in point (a) of the Committee's recommendations, the Government reiterates its previous assertions that workers are well protected by the existing legislation, and that new labour laws would only be adopted following the implementation of the 7 Step Road Map for the emergence of a peaceful, modern, developed and discipline-flourishing democratic nation.

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**Factual issues****Lack of legally registered workers' organizations**

- 1022.** With regard to the issues raised in point (b) of the Committee's recommendations, the Government indicates that organizations operating in exile do so not because it is impossible to gain recognition within the country, but rather because they have been formed by persons who had fled the country in order to pursue destructive activities.

**Death of Saw Mya Than**

- 1023.** With regard to the issue raised in point (c) of the Committee's recommendations, the Government states that it has already replied to this matter; it reiterates that Saw Mya Than was not murdered but accidentally killed in a mine, and that Saw Mya Than's family have accepted the compensation provided to them.

**Conviction of the General Secretary of the FTUB**

- 1024.** With regard to the issues raised in point (d) of the Committee's recommendations, the Government indicates that the Federation of Trade Unions of Burma (FTUB) General Secretary, Maung Maung (alternatively known as Pyithit Nyunt Wai), was declared a terrorist on the basis of firm evidence. In this connection, the Government attaches a copy of a 12 April 2006 announcement issued by the Ministry of Home Affairs indicating that, according to the confession of an individual named Saya Ya, Maung Maung was a follower of Dr Sein Win of the National Coalition Government of the Union of Burma (NCGUB) and received aid from the international community to form the FTUB to commit terrorist acts. The announcement further describes Maung Maung as "skillful in detonating bombs with the use of a computer" and declares him, Dr Sein Win, and their respective organizations to be terrorists.

**Imprisonment of Myo Aung Thant**

- 1025.** With regard to the issues raised in point (e) of the Committee's recommendations, the Government states that Khin Kyaw has been released. As concerns Myo Aung Thant, however, the Government indicates that he was not tried for his trade union activities, but rather for high treason. The Government further denies the allegation that his conviction relied upon a confession obtained under torture.

**Freedom of association rights of seafarers**

- 1026.** With regard to the issues raised in point (f) of the Committee's recommendations, the Government states that article IV of the Constitution of the Myanmar Overseas Seafarers' Association (MOSA) would be amended and that a copy of the text, once amended, would be forwarded. Furthermore, the Department of Marine Administration is preparing to amend sections B2, C1, E2, E3 and E9 of the model agreement between the Seaman Employment Control Division (SECD) and shipping companies. The abovementioned sections would be amended as follows:

*Section B2*

This agreement may be extended by mutual agreement for a further period of six months at the discretion of the Company and written application by the seamen, not later than two months before the expiry in which case, officers' ratings will be entitled to 10% of basic wages as Extension Allowance with effect from the date of completion of initial agreement, irrespective of whoever requests an extension.

*Section C1*

The wages of each Seafarer shall be calculated in accordance with this agreement and the attached Wage Skill and the only deductions from such wages shall be proper deduction as recorded in the Special Agreement and this Collective Agreement and deductions authorized by the Seafarers himself. The Seafarers shall be entitled to payment in cash in US Dollars of his net wages after such deductions at the end of each calendar month.

*Section E2*

The Seamen agree to carry out all works on board as required by the Company, the Charterers and the Master, including cargo hold cleaning, cargo hold repairs, ballast and fuel oil tanks cleaning, cargo lashing, transshipment /shifting of cargo, etc. .... They shall be paid for such extra work in accordance with the rate mutually agreed between seamen and charter parties or company.

*Section E3*

Each Seafarer shall be entitled to work, train and live in an environment free from harassment and bullying whether sexually, mentally or otherwise motivate. Grievances aboard the ship shall be settled through the organizational system on board. Any grievance, that is impossible to be settled aboard the ship, SECD and the Company shall hold a consultation to settle the matter.

*Section E9*

The Company reserves the right to discharge any of the Seamen at any port due to insobriety, misconduct, neglect of duty, insubordination of a criminal act, failure to rejoin and unruly behavior detrimental to maintaining discipline on board, his repatriation expenses will be deducted from balance of his wages and savings. The Company will advice SECD and MOSA with full particulars of such cases duly supported by extracts from official ship's log book and other evidence.

- 1027.** The Government further states that it is unnecessary to issue instructions to the SECD authorities, as requested in point (f) of the Committee's recommendations.

Response concerning alleged labour unrest and dismissals of workers

(a) *Motorcar Tyre Factory*

- 1028.** With regard to the issue raised in point (h) of the Committee's recommendations, the Government indicates that Min Than Win and Aung Myo Min were not dismissed due to their trade union activities. The two persons were dismissed for unauthorized absence from work and conviction for theft, respectively.

(b) *Unique Garment Factory*

- 1029.** With regard to the issue raised in point (i) of the Committee's recommendations, the Government reiterates that the 77 workers concerned were dismissed due to unexpected problems which led to a stoppage in production. The Government attaches a copy of a previously sent agreement, dated 10 July 2001, according to which the workers concerned agreed to their retrenchment with compensation, and further reiterates that the Unique Garment Factory was closed on 31 August 2003.

(c) *Myanmar Texcamp Industrial Ltd*

- 1030.** With regard to the issue raised in point (j) of the Committee's recommendations, the Government indicates that the employer concerned, in enacting retrenchments due to a reduction in production, had chosen to retrench unskilled and non-service workers while retaining skilled and service workers.

**(d) Myanmar Yes Garment Factory**

**1031.** With regard to the issue raised in point (k) of the Committee's recommendations, the Government indicates that Maung Zin Min Thu was not dismissed on account of his trade union activities, but for having breached provisions of his employment agreement. His employer had nevertheless agreed to pay him compensation and the Township Worker's Supervisory Committee (TWSC) is currently trying to contact him in order to provide him with the said amount.

**C. The Committee's conclusions**

**1032.** *The Committee recalls that this case concerns the absence of freedom of association both in law and in practice in Myanmar. It includes allegations regarding legislative issues, in particular, the absence of a legislative basis for freedom of association in Myanmar, as well as factual allegations concerning the total absence of recognized workers' organizations, opposition by the authorities to the organized collective representation of seafarers and to the exiled FTUB, the arrest, imprisonment and death of trade unionists, and threats against, and dismissals and arrests of, workers who pursue labour grievances.*

**Legislative issues**

**1033.** *The Committee recalls that its previous recommendations on this issue concerned the need to both elaborate legislation guaranteeing freedom of association, and to ensure that existing legislation which impedes freedom of association would not be applied. It further recalls that considerable concern over the lack of conformity of Myanmar legislation with Convention No. 87 had been expressed, for a number of years, by the Committee of Experts and the Conference Committee on the Application of Standards. The Committee therefore deeply regrets that the Government, in reply to these recommendations, confines itself to repeating its previous indication that labour laws would only be adopted following the implementation of the 7 Step Road Map, and within the framework of the new Constitution. In the meantime, the right to organize remains subject to severe measures of repression both in law and in practice. In view of the above, the Committee is bound to deplore once again the fact that despite its previous detailed requests for legislative measures guaranteeing freedom of association to all workers in Myanmar, there has been no progress in this regard, and no indication that suggests the Government is considering, in good faith, steps to provide for a legal basis for freedom of association as urged by the Committee. The Committee must also once again recall that this persistent failure to take any measures to remedy the legislative situation constitutes a serious and ongoing breach, by the Government, of its obligations flowing from its voluntary ratification of Convention No. 87.*

**1034.** *The Committee therefore once again urges the Government in the strongest of terms to enact legislation guaranteeing freedom of association to all workers, including seafarers, and employers; to abolish existing legislation, including Orders Nos 2/88 and 6/88 so as not to undermine the guarantees relating to freedom of association and collective bargaining; to explicitly protect workers' and employers' organizations from any interference by the authorities, including the army; and to ensure that any such legislation so adopted is made public and its contents widely diffused. The Committee once again urges the Government to take advantage in good faith of the technical assistance of the Office so as to remedy the legislative situation and to bring it into line with Convention No. 87 and collective bargaining principles. It requests the Government to keep it informed of all developments in this respect.*

**Factual issues**

## Myanmar Overseas Seafarers' Association

- 1035.** *In its previous recommendations, the Committee had requested the Government to refrain from any act preventing the free operation of any form of organization of collective representation of workers, freely chosen by them to defend and promote their economic and social interests, including seafarers' organizations and organizations which operate in exile and which cannot be recognized in the prevailing legislative context of Myanmar. The Committee had further requested the Government to issue instructions to that effect to its civil and military agents as a matter of urgency and to keep it informed of all measures taken in this regard.*
- 1036.** *The Committee notes with deep regret that the Government provides no information in this regard, apart from stating that organizations operate in exile not because it is impossible to gain recognition within the country, but rather because they have been formed by persons who had fled the country in order to pursue destructive activities. Recalling from a previous examination of the case, the Government's own submission that no trade unions exist in Myanmar that conform with the requirements of Convention No. 87 [see 337th Report, para. 1089], the Committee once again urges the Government to issue instructions to its civil and military agents as a matter of urgency so as to ensure that the authorities fully refrain from any act preventing the free operation of all forms of organization of collective representation of workers, freely chosen by them to defend and promote their economic and social interests, including seafarers' organizations and organizations which operate in exile and which cannot be recognized in the prevailing legislative context of Myanmar. The Committee requests the Government to keep it informed of all measures taken in this regard.*

## Death of Saw Mya Than

- 1037.** *The Committee recalls that in its previous recommendations, it had requested the Government to convene as a matter of urgency an independent and impartial panel of experts to investigate the death of Saw Mya Than, who was an FTUB member and an official of the Kawthoolei Education Workers' Union (KEWU), allegedly murdered by the army in retaliation for a rebels' attack. In this regard the Committee deeply regrets that the Government provides no new information in this respect, and has once again limited its reply to a repetition of its earlier comments. The Committee emphasizes once again that serious cases such as the alleged murder of a trade unionist require the institution of independent judicial inquiries in order to shed full light, at the earliest date, on the facts and the circumstances in which such actions occurred and in this way, to the extent possible, determine where responsibilities lie, punish the guilty parties and prevent the repetition of similar events. It also recalls that the rights of workers' and employers' organizations can only be exercised in a climate that is free from violence, pressure or threats of any kind against the leaders and members of these organizations, and it is for governments to ensure that this principle is respected [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 44 and 48]. The Committee therefore once again urges the Government to institute an independent inquiry into the alleged murder of Saw Mya Than, to be carried out by a panel of experts considered to be impartial by all the parties concerned. The Committee requests the Government to keep it informed of measures taken in this respect.*

## Criminal charges against the General Secretary of the FTUB

- 1038.** *The Committee recalls that in its previous recommendations, it had expressed deep concern at the paucity and nature of the evidence provided by the Government in order to*

prove that the criminal charges brought against the General Secretary of the FTUB, Maung Maung, were unrelated to his trade union activities, and had requested the Government to provide copies of the decision which found the General Secretary guilty of high treason under section 122 of the Penal Code, and any documentation relating to the case filed against him under the Public Preservation Law 1947. The Committee notes, from an unofficial translation of the legal documents submitted by the Government, that Maung Maung was apparently convicted in absentia of high treason on the basis of the testimony of one witness for the prosecution, who testified that Maung Maung had conspired with others to carry out destructive acts in Myanmar. The Committee observes that it is unable, from the documentation provided, to determine the sufficiency of the evidence on which Maung Maung's conviction was based. It must, nevertheless, recall that ever since its first examination of this case in 2004 it has been called upon to examine allegations of arrests, detentions and trials of workers exercising basic activities in the defence of workers' interests, and that on each occasion, and within a context where there exists no legal and practical framework to ensure freedom of association, the Government has accused these individuals of terrorist acts and unlawful association with the FTUB. The Committee recalls its recommendation relating to workers' organizations, including the legalization of the FTUB, in this regard [see 337th Report, para. 1112] and requests the Government to ensure that workers' organizations may function freely within the country and that all those working for such organizations, including Maung Maung, will be able to exercise trade union activities free from harassment and intimidation.

#### Imprisonment of Myo Aung Thant

**1039.** *In its previous recommendations, the Committee deplored the Government's refusal to consider the release of Myo Aung Thant and strongly urged the Government to take the necessary steps to ensure his immediate release from prison and to keep it informed in this respect. The Committee deeply regrets that the Government provides no additional information concerning this matter, other than to flatly deny that Myo Aung Thant's conviction rested on a confession obtained through torture. Noting, moreover, that the Government has not replied to the allegations that Myo Aung Thant was persecuted because of his trade union involvement, and that his trial was unfair and devoid of basic guarantees of due process, the Committee once again recalls that the detention of trade union leaders or members for reasons connected with their activities in defence of the interests of workers constitutes a serious interference with civil liberties in general and with trade union rights in particular. A genuinely free and independent trade union movement can only develop where fundamental human rights are respected [see **Digest**, *op. cit.*, paras 33 and 64]. Moreover, detained trade unionists, like anyone else, should benefit from normal judicial proceedings and have the right to due process, in particular the right to be informed of the charges brought against them, the right to have adequate time and facilities for the preparation of their defence and to communicate freely with counsel of their own choosing, and the right to a prompt trial by an impartial and independent judicial authority [see **Digest**, *op. cit.*, para 102]. The Committee once again deeply deplores the Government's refusal to consider the release of Myo Aung Thant and strongly urges the Government to take the necessary steps to ensure his immediate release from prison and to keep it informed in this respect.*

#### Freedom of association rights of seafarers

**1040.** *In its previous recommendations, the Committee had requested the Government to adopt legislative measures which fully guarantee the right of seafarers to establish and join organizations of their own choosing and afford them adequate guarantees against acts of anti-union discrimination. It further requested the Government to issue appropriate instructions without delay so as to ensure that the Seaman Employment Control Division (SECD) authorities immediately refrain from all acts of anti-union discrimination against*

*seafarers who engage in trade union action and immediately revise the text of the model agreement between the SECD and shipping companies concerning Myanmar seafarers (in particular sections B.2, C.1, E.2, E.3 and E.9) so as to bring it into conformity with Convention No. 87 and collective bargaining principles.*

- 1041.** *In this connection, the Committee notes the Government's indication that the Department of Marine Administration is preparing to amend the model agreement. The Committee further notes that the proposed amendment to section C.1 states, "the wages of each seafarer shall be calculated in accordance with this agreement and the attached Wage Skill and the only deductions from such wages shall be proper deductions as recorded in the Special Agreement and this Collective Agreement, and deductions authorized by the seafarer himself. The seafarers shall be entitled to payment in cash in US dollars of his net wages after such deductions at the end of each calendar month". The proposed amendment to section B.2 provides that "this agreement may be extended by mutual agreement for a further period of six months at the discretion of the Company and written application by the seamen, not later than two months before the expiry in which case, officers' ratings will be entitled to 10 per cent of basic wages as Extension Allowance with effect from the date of completion of initial agreement, irrespective of whoever requests an extension". The proposed amendment to section E.2 states, "the Seamen agree to carry out all works on board as required by the Company, the Charterers and the Master, including cargo hold cleaning, cargo hold repairs, ballast and fuel oil tanks cleaning, cargo lashing, transshipment/shifting of cargo, etc. ... they shall be paid for such extra work in accordance with the rate mutually agreed between seamen and the charter parties or the company". The Committee notes that the proposed amendment to section E.3, which provides for complaints and grievances, states that "each seafarer shall be entitled to work, train and live in an environment free from harassment and bullying whether sexually, mentally or otherwise motivated. Grievances aboard the ship shall be settled through the organizational system on board. [For] any grievance that is impossible to be settled aboard the ship, the SECD and the Company shall hold a consultation to settle the matter". Section E.9 adds that "The Company reserves the right to discharge any of the Seamen at any port due to insobriety, misconduct, neglect of duty, insubordination of a criminal act, failure to rejoin and unruly behavior detrimental to maintaining discipline on board, his repatriation expenses will be deducted from the balance of his wages and savings. The Company will advise the SECD and MOSA with full particulars of such cases duly supported by extracts from the official ship's log book and other evidence."*
- 1042.** *The Committee observes that the proposed amendments to the previously highlighted sections of the model agreement do not substantially alter the provisions of these sections, and that it still is not clear whether the overtime pay referred to in section E.2 can actually be bargained collectively through a legitimate and freely chosen representative of the workers. Even with the proposed amendments, these sections of the model agreement would appear to continue to: (1) exclude the possibility of introducing improvements to the terms and conditions of employment of seafarers through negotiations or the conclusion of a collective agreement; (2) prevent trade unions from representing Myanmar seafarers in case of grievance; and (3) not afford guarantees against acts of anti-union discrimination and retaliation in case seafarers engage in trade union activity. Moreover, the Committee notes with deep regret that the Government provides no indication that it has considered measures to enact legislation relating to seafarers' right to organize while maintaining that it is unnecessary to issue instructions to the SECD authorities to refrain from all acts of anti-union discrimination against seafarers who engage in trade union action, as the Committee had previously recommended. In these circumstances, the Committee is bound to once again deplore the fact that virtually no steps have been taken to guarantee genuine freedom of association to seafarers so as to enable them to defend their occupational interests, notably through collective bargaining. The Committee therefore once again requests the Government to adopt legislative measures which fully guarantee the right of*

*seafarers to establish and join organizations of their own choosing and afford them adequate guarantees against acts of anti-union discrimination. It further requests the Government to issue appropriate instructions without delay so as to ensure that the SECD authorities immediately refrain from all acts of anti-union discrimination against seafarers who engage in trade union action and immediately revise the text of the model agreement concerning Myanmar seafarers so as to bring it into conformity with Convention No. 87 and collective bargaining principles. The Committee requests the Government to keep it informed of all developments in this respect.*

#### Disputes resolution mechanisms

**1043.** *In its previous recommendations, the Committee had urged the Government to take all necessary measures to ensure the freely chosen representation of employees and employers in cases conciliated by the various disputes resolution committees operating in the country, and to keep it informed in this respect. Noting with deep regret that the Government provides no new information respecting this matter, the Committee once again recalls that a disputes resolution process that exists within a system with a total absence of freedom of association in law and practice cannot possibly fulfil the requirements of Convention No. 87 and urges the Government to take all necessary measures so as to ensure the freely chosen representation of employees and employers in cases conciliated by the various disputes resolution committees operating in the country, and to keep it informed in this respect.*

#### Motorcar Tyre Factory

**1044.** *The Committee recalls from its previous examination of this case that factory workers had allegedly been dismissed, arrested or threatened for pursuing their labour grievances in four instances, namely the Motorcar Tyre Factory and three garment factories in the Hlaing That Ya industrial zone. It further recalls that according to the Government two of the dismissed workers, Min Than Win and Aung Myo Win, were dismissed due to their own conduct (absence without permission for over 21 days and conviction for theft, respectively) and that given these grounds, their reinstatement or the payment of compensation was not possible. While having noted this information, the Committee also noted that the conduct of these two workers should normally be reflected in public records, for instance, the absentee records of the company and the court decision which convicted Aung Myo Win. It therefore requested the Government to investigate this matter further and, if it was found that the dismissals were due to legitimate trade union activities, to take the appropriate steps with a view to the workers' reinstatement or if reinstatement is not possible, the payment of adequate compensation so as to constitute sufficiently dissuasive sanctions. The Committee notes with deep regret that the Government limits itself to repeating that Min Than Win and Aung Myo Win were dismissed for an unauthorized absence from work and a conviction for theft, respectively, without providing any additional information supporting the position that these dismissals had nothing to do with their trade union activities. It once again requests the Government to investigate this matter further and, if it is found that the dismissals were due to legitimate trade union activities, to take the appropriate steps with a view to the workers' reinstatement or, if reinstatement is not possible, the payment of adequate compensation so as to constitute sufficiently dissuasive sanctions.*

#### Unique Garment Factory

**1045.** *With respect to the Unique Garment Factory, the Committee recalls that the allegations concerned the alleged dismissal of workers involved in a workers' movement in November 2001 in relation to overtime. Although the factory closed on 31 August 2003 (at which point all 272 workers were laid off) the Committee had taken note of the case of 77 night*

*shiftworkers who had been dismissed two years earlier, on 10 July 2001, during their probationary period following a dispute. The Committee further recalls that the Government had provided a copy of an agreement dated 10 July 2001, according to which the workers agreed to their retrenchment with compensation because of unexpected problems which led to the stoppage of part of the production. Observing that the Government had not indicated the exact criteria for the selection of the workers who were dismissed, the Committee therefore requested the Government to inquire into the specific part of the production of the Unique Garment Factory which was stopped in July 2001 and the exact criteria for the selection of the 77 night shiftworkers who were retrenched. In this respect, the Committee notes with deep regret that the Government largely confines itself to repeating previously-sent information. Further noting that the Government simply maintains that the workers concerned were not retrenched for engaging in trade union activities, the Committee can only deplore the lack of any indications, on the Government's part, to suggest that it has inquired into the criteria for the selection of the workers who were retrenched. In these circumstances the Committee once again requests the Government to inquire into the specific part of the production of the Unique Garment Factory which was stopped in July 2001 and the exact criteria for the selection of the 77 night shiftworkers who were retrenched; if it is found that the dismissals were due to legitimate trade union activities, the Committee requests the Government to take the appropriate steps with a view to ensuring the payment of adequate compensation so as to constitute sufficient dissuasive sanctions. The Committee requests to be kept informed in this respect.*

#### Myanmar Texcamp Industrial Ltd

**1046.** *The Committee recalls that this matter concerns a dispute at the factory that apparently arose on 5 July 2003 and involved 300 workers, and the subsequent stoppage of certain parts of Texcamp's production due, according to the Government, to economic sanctions, which led to the dismissal of 340 out of 581 workers, on 1 August 2003, with due compensation paid. It further recalls that the Government had attached a copy of an agreement signed between the employer and 340 retrenched workers on 1 August 2003, indicating that part of the production would be stopped because of unexpected problems and compensation would be given to 340 workers, who agreed to their retrenchment. Observing that the Government provided no information as to the specific criteria on the basis of which 340 workers were selected for retrenchment, the Committee requested the Government to conduct an inquiry in this regard and, if it was found that the dismissals were due to legitimate trade union activities, to take the appropriate steps with a view to the workers' reinstatement or, if reinstatement was not possible, the payment of adequate compensation so as to constitute sufficiently dissuasive sanctions. The Committee notes, in respect of this matter, the Government's indication that the employer concerned, in enacting retrenchments due to a reduction in production, had chosen to retrench unskilled and non-service workers while retaining skilled and service workers. Noting, however, that the Government has not provided any information or documentation relating to the criteria used by the employer concerned in retrenching its work force, the Committee requests the Government to provide full information, including official company documents where available, demonstrating that the retrenchment was in no way carried out in retaliation for trade union activities.*

#### Myanmar Yes Garment Factory

**1047.** *With regard to the Myanmar Yes Garment Factory, the Committee recalls that this matter concerns a dispute of 16 September 2002 which had apparently resulted in an agreement concluded under the Township Workers' Supervisory Committee (TWSC). The dispute had apparently commenced with the dismissal of Maung Zin Min Thu for disciplinary reasons on 16 September 2002; on the same day, he had apparently "organized" five other*

workers to submit a complaint, in respect of which an agreement was reached under the authority of the TWSC with which all workers were satisfied. The Government had previously indicated that Maung Zin Min Thu did not attend those negotiations, nor had he since been to the factory to receive his dismissal compensation. Noting that the Government had not provided any information as to whether an impartial investigation had taken place into the dismissal of Maung Zin Min Thu and the specific reasons which led to his dismissal, the Committee had requested the Government to once again establish an impartial investigation into this matter, in particular as regards the substance of the complaints filed by Maung Zin Min Thu and Min Min Htwe along with five other workers, the substance of the agreement reached on the basis of these complaints, and the specific reasons for which Maung Zin Min Thu was dismissed. The Committee further requested the Government, if it was found that the dismissal of Maung Zin Min Thu was due to legitimate trade union activities, to take appropriate steps with a view to his reinstatement or, if reinstatement was not possible, the payment of adequate compensation so as to constitute sufficiently dissuasive sanctions.

**1048.** *The Committee notes the Government's indication that Maung Zin Min Thu was not dismissed on account of his trade union activities, but for having breached provisions of his employment agreement. The Government adds that the employer had nevertheless agreed to pay him compensation and the TWSC was trying to contact him in order to provide him with the said amount. While noting these indications, the Committee can only deplore that the Government, as in its replies to the matters involving the Motorcar Tyre Factory, the Unique Garment Factory and the Myanmar Texcamp Industrial Ltd, once again confines itself to statements of a perfunctory nature while providing no indication that it has undertaken an investigation into the reasons for the dismissals of the parties concerned. It once again urges the Government to establish an impartial investigation into this matter, in particular as regards the substance of the complaints filed by Maung Zin Min Thu and Min Min Htwe along with five other workers, the substance of the agreement reached on the basis of these complaints, and the specific reasons for which Maung Zin Min Thu was dismissed. If it is found that the dismissal of Maung Zin Min Thu was due to legitimate trade union activities, the Committee urges the Government to take appropriate steps with a view to his reinstatement or, if reinstatement is not possible, the payment of adequate compensation so as to constitute sufficiently dissuasive sanctions.*

**1049.** *As a final and overall point, the Committee once again observes with deep concern the paucity and obscure nature of the information provided by the Government which renders any in-depth examination of the complaint virtually impossible. The Committee observes that most of the information submitted by the Government fails to address the substance of the Committee's recommendations and elucidate the matters brought before it. The Committee deeply regrets that very little can be gleaned from the Government's reply to indicate that it intends to take any steps to implement the Committee's recommendations in this very serious and urgent case. The Committee deplores once again the fact that the Government has felt it appropriate to put the blame for workers' dismissals on the imposition of economic sanctions aimed at combating practices of forced labour in Myanmar. The Committee once again urges the Government in the strongest terms to undertake real and concrete steps towards ensuring respect for freedom of association in law and in practice in Myanmar in the very near future.*

## **The Committee's recommendations**

**1050.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*

*(a) The Committee once again urges the Government in the strongest of terms to enact legislation guaranteeing freedom of association to all workers,*

*including seafarers and employers; to abolish existing legislation, including Orders Nos 2/88 and 6/88 so as not to undermine the guarantees relating to freedom of association and collective bargaining; to explicitly protect workers' and employers' organizations from any interference by the authorities, including the army; and to ensure that any such legislation so adopted is made public and its contents widely diffused. The Committee once again urges the Government to take advantage in good faith of the technical assistance of the Office so as to remedy the legislative situation and to bring it into line with Convention No. 87 and collective bargaining principles. It requests the Government to keep it informed of all developments in this respect.*

- (b) The Committee once again urges the Government to issue instructions to its civil and military agents as a matter of urgency so as to ensure that the authorities fully refrain from any act preventing the free operation of all forms of organization of collective representation of workers, freely chosen by them to defend and promote their economic and social interests, including seafarers' organizations and organizations which operate in exile and which cannot be recognized in the prevailing legislative context of Myanmar. It further requests the Government to ensure that all those working for such organizations can exercise trade union activities free from harassment and intimidation. The Committee requests the Government to keep it informed of all measures taken in this regard.*
- (c) The Committee once again urges the Government to institute an independent inquiry into the alleged murder of Saw Mya Than, to be carried out by a panel of experts considered to be impartial by all the parties concerned. The Committee requests the Government to keep it informed of measures taken in this respect.*
- (d) The Committee once again deeply deplores the Government's refusal to consider the release of Myo Aung Thant and strongly urges the Government to take the necessary steps to ensure his immediate release from prison and to keep it informed in this respect.*
- (e) The Committee once again requests the Government to adopt legislative measures which fully guarantee the right of seafarers to establish and join organizations of their own choosing and afford them adequate guarantees against acts of anti-union discrimination. It further requests the Government to issue appropriate instructions without delay so as to ensure that the SECD authorities immediately refrain from all acts of anti-union discrimination against seafarers who engage in trade union action and immediately revise the text of the model agreement concerning Myanmar seafarers so as to bring it into conformity with Convention No. 87 and collective bargaining principles. The Committee requests the Government to keep it informed of all developments in this respect.*
- (f) The Committee once again recalls that a disputes resolution process that exists within a system with a total absence of freedom of association in law and practice cannot possibly fulfil the requirements of Convention No. 87 and urges the Government to take all necessary measures so as to ensure the*

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*freely chosen representation of employees and employers in cases conciliated by the various disputes resolution committees operating in the country, and to keep it informed in this respect.*

- (g) The Committee once again requests the Government to further investigate the dismissals of Min Than Win and Aung Myo Win from the Motorcar Tyre Factory and if it is found that the dismissals were due to legitimate trade union activities, to take the appropriate steps with a view to the workers' reinstatement or, if reinstatement is not possible, the payment of adequate compensation so as to constitute sufficiently dissuasive sanctions. The Committee requests to be kept informed in this respect.*
- (h) The Committee once again requests the Government to inquire into the specific part of the production of the Unique Garment Factory which was stopped in July 2001 and the exact criteria for the selection of the 77 night shiftworkers who were retrenched; if it is found that the dismissals were due to legitimate trade union activities, the Committee requests the Government to take the appropriate steps with a view to ensuring the payment of adequate compensation so as to constitute sufficiently dissuasive sanctions. The Committee requests to be kept informed in this respect.*
- (i) The Committee requests the Government to provide full information, including official company documents where available, on the Myanmar Texcamp Industrial Ltd's decision to retain skilled and service workers over unskilled and non-service workers in undertaking its retrenchment of 340 employees.*
- (j) With regard to the filing of complaints against the Yes Garment Factory on the same day by both Maung Zin Min Thu and Min Min Htwe along with five other workers, the Committee requests the Government once again to establish an impartial investigation into this matter, in particular as regards the substance of the complaints filed by Maung Zin Min Thu and Min Min Htwe along with five other workers, the substance of the agreement reached on the basis of these complaints, and the specific reasons for which Maung Zin Min Thu was dismissed; if it is found that the dismissal of Maung Zin Min Thu was due to legitimate trade union activities, the Committee requests the Government to take appropriate steps with a view to his reinstatement or, if reinstatement is not possible, the payment of adequate compensation so as to constitute sufficiently dissuasive sanctions. The Committee requests to be kept informed in this respect.*
- (k) The Committee once again urges the Government in the strongest terms to undertake real and concrete steps towards ensuring respect for freedom of association in law and in practice in Myanmar in the very near future.*
- (l) The Committee calls the Governing Body's attention to this serious and urgent case.*

CASE NO. 2613

INTERIM REPORT

**Complaint against the Government of Nicaragua  
presented by  
the Central Workers' Confederation of Nicaragua (CTN)**

***Allegations: The complaint organization alleges numerous dismissals and transfers of trade union officials and members, and the exclusion of trade unions affiliated to the CTN from a collective bargaining process***

- 1051.** The complaint is contained in a communication of the Central Workers' Confederation of Nicaragua (CTN) of 23 October 2007.
- 1052.** The Government sent its observations in a communication of 10 April 2008.
- 1053.** Nicaragua has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. The complainant's allegations**

- 1054.** In its communication of 23 October 2007, the CTN states that despite all the constitutional and legal provisions and agreements which guarantee trade union rights, senior government officials in public institutions and state enterprises have systematically and flagrantly violated them, denying workers and their organizations the right to trade union freedom, collective bargaining and employment. According to the CTN, there is interference in the functioning of democratic trade unions, illegal mass dismissals without due process, including of trade union officials, and promotion of the formation of workers' organizations dominated by the authorities in order to place them under their control. In addition, collective agreements are being concluded with regressive clauses, in express violation of constitutional and legal provisions, and collective agreements. Specifically, the CTN alleges the following violations of trade union rights.

**Nicaraguan Social Security Institute (INSS)**

- 1055.** The CTN alleges that by order of the former CEO, a retired army officer, the contracts of employment of 48 members and ten officials of the Workers' and Employees' Union of the Nicaraguan Social Security Institute (STEINSS) affiliated to the CTN were terminated, namely: Isabel Vanessa River Ubeda (General Secretary), Sergio Juan Ramón Quiroz (Organization and Propaganda Secretary), Karla Esperanza Molina Saavedra (Minutes Secretary), Moisés Ruiz Romero (Labour Affairs Secretary), Alvin Alaniz González (Occupational Safety and Health Secretary), Karla del Rosario Alvarado Paíz (Auditor), Ivette Pilarte (Spokesperson), Martha Calderón (Sectional), Fruto Plazaola (Sectional) and Luis Pérez Mairena (Sectional).
- 1056.** The CTN reports that on 19 and 27 March and 13 April 2007, all these trade union officials and the majority of the dismissed employees, all union members, filed a formal claim for reinstatement and payment of unpaid wages in Labour Courts Nos One and Two. In reply to the claim, the CEO of the institution applied for an exception of lack of legal capacity,

which was accepted by the industrial judicial authorities without any justification, as well, moreover, as failing to decide the matter in accordance with the provisions of article 321 of the Labour Code: “Any exception alleged without any justification in order to delay the proceedings shall be immediately refused and without recourse”. They did not order hearing of evidence of the claims, despite the fact that article 46 of the Labour Code establishes a mandatory period of 30 days for deciding the claim. The trade union officials appealed *amparo* in chambers one and two of the Managua Court of Appeal, whose judges ordered the INSS CEO to annul the appealed actions, but the president refused to obey the order, thus, as is the practice of the current government authorities, violating the provisions of article 167 of the Constitution “Orders and decisions of the courts and judges are binding on State authorities, organizations and the natural and legal persons concerned”.

### ***The Nicaraguan Aqueduct and Sewer Company of Esteli***

**1057.** The CTN alleges that, by order of the CEO, the contracts of employment of Mr Fidel Castillo Lago (Minutes Secretary), official of the “Genaro Lazo” Union and 15 other members were terminated.

### ***The Nicaraguan Aqueduct and Sewer Company of Matagalpa***

**1058.** The CTN alleges that, by order of the CEO, the contracts of employment of 25 affiliated workers and five officials of the Enacal-Dar Matagalpa Democratic Trade Union, Juan Alberto García Blandón (General Secretary), Alejandro Martínez Rizo (Minutes Secretary), Buenaventura Polanco Sáenz (Treasurer), Salvador Montoya Herrera (Disputes Secretary) and Nahum Castro Aráuz (Organization Secretary) were terminated.

### ***The Nicaraguan Aqueduct and Sewer Company of Granada***

**1059.** The CTN alleges that, by order of the CEO, the contracts of employment of 34 employees, including eight officials of the Eastern Services Territorial Unit Workers’ Union (UTSO) of the Nicaraguan Aqueduct and Sewer Company, José Morales Mena (General Secretary), Gustavo Morales Chamorro (Disputes Secretary), Edgard Estrada Mejía (Organization and Propaganda Secretary), Luis René Castillo Morales (Treasurer), Dario López Cruz (Occupational Safety and Health Secretary), Martín Ernesto Martínez Guerra (Auditor), Ayabeth Martín Barrios Delgado (First Spokesperson) and Félix Mejía Duval (Federation Organization and Propaganda Secretary) were terminated.

**1060.** The CTN adds that, by order of the CEO, the contracts of employment of 29 employees, including nine officials of the Enacal Granada Workers’ Departmental Democratic Union, Manuel Salvador Juarro (General Secretary), Ricardo Ramos Laguna (Disputes Secretary), María Auxiliadora Castillo Hernández (Minutes Secretary), Alvaro José Toruño Velis (Education, Culture and Sport Secretary), Miguel Martínez López (Occupational Safety and Health Secretary), Andrés Maldonado Cisneros (Auditor), Auxiliadora Arias Madrigal (First Spokesperson), Lesbia del Carmen Ruiz Pérez (Second Spokesperson) and Mario José Gutiérrez Jaime (Federation Treasurer) were terminated. On 6 June 2007, 63 workers of the Enacal Company in Granada filed a formal claim for reinstatement in the same post and with identical conditions of work, payment of unpaid wages as well as social security contributions and benefits established by law and collective agreement before the judge in the Granada District Civil and Industrial Court. This claim was filed in accordance with the requirements laid down in article 307 of the Labour Code. In responding to the claim, the CEO of the company applied for the exception of lack of legal capacity on the grounds that

her name is Ruth Herrera Montoya and not Ruth Selma Herrera Montoya. The result of this exception was an action which violates the provisions of articles 266 and 321 of the Labour Code, since in official documents she signed in the way she was addressed by the workers, but it happened that the judicial authority allowed the violation of the aforesaid articles.

### ***The Nicaraguan Aqueduct and Sewer Company of Carazo***

**1061.** The CTN alleges that, by order of the CEO, the contracts of employment of 31 employees including five officials of the Enacal Carazo Workers' Departmental Democratic Union, Carlos Alonso Avellán Matus (General Secretary), Nicolás Antonio Conrado López (Disputes Secretary), Lorgia Marina García Pérez (Treasurer), José Jirón Medrano (Safety and Health Secretary) and Manuel Cruz García (Auditor) were terminated. On 11 June 2007, the 31 workers of Enacal Carazo filed a formal claim of reinstatement in the same post and with identical conditions of work, payment of unpaid wages as well as social security payments and benefits established by law and collective agreement before the judge in the Jinotepe District Civil and Industrial Court. This claim was filed in accordance with the requirements laid down in article 307 of the Labour Code. In responding to the claim, the CEO of the company submitted the exception of lack of legal capacity mentioned in the previous paragraph.

### ***The Nicaraguan Aqueduct and Sewer Company of Diriamba***

**1062.** By order of the CEO, the contract of employment of the General Secretary of the Enacal Diriamba Workers' Union, Mr Léster Francisco Ortiz, was terminated.

### ***The Nicaraguan Aqueduct and Sewer Company of Jugalpa***

**1063.** By order of the CEO, the contracts of employment of eight employees including Diriamba Workers' Union official, Mr Kester Geovani Bermúdez, were terminated.

### ***National Technological Institute (INATEC)***

**1064.** By order of the executive director, the transfer of Mr Ricardo Alvarez Berríos (General Secretary) and Ms Gloria Paredes Sánchez (Training Secretary) both of the Workers' Technical and Professional Staff Union of the INATEC was ordered, as a reprisal for demanding compliance with the collective agreement, thereby violating their right to security of tenure established by law. Under the legislation, the Departmental Labour Inspectorate, Service Sector of the Ministry of Labour, declared the transfers null and void and without any legal effect whatsoever, but the institute authorities refuse to comply with that decision.

### ***Directorate-General of Revenues (DGI)***

**1065.** The CTN states that at the end of July 2006, the authorities of the DGI and the trade unions there signed a new collective agreement, in which clause 1 provides as follows:

Clause 1. (Mutual Recognition). The institution named the "Directorate General of Revenues" recognizes the following trade unions: Democratic Workers' Union of the Directorate General of Revenues (SEDDGI), the Public Workers' and Employees' Union in

the Directorate General of Revenues, Leon Department Revenue Office (SITEPDGI-ARL), the Public Employees' Union in the DGI Granada (SEPGRA-DGI), the Independent Workers' Union of the Directorate General of Revenues (SITRADGI) and the Workers' Union in the Rivas Department Revenue Office of the Directorate General of Revenues (SITRARDI-DGI), as representative of the public employees and/or staff affiliated and non-affiliated to the trade unions which seek to represent them in the defence of their rights and socio-economic and labour interests and undertakes to negotiate with these organizations on individual and collective agreements, claims and disputes as the case may be. For their part, the trade unions SEDDGI, SITEPDGI-ARL, SEPGRA-DGI SITRADGI and SITRARDI-DGI shall recognize that the Directorate General of Revenues is responsible for the organization and planning necessary to allow it to exercise fully the management, fulfilment, compliance and monitoring of its functions. The foregoing shall be in conformity with the provisions of the Constitution of Nicaragua, the Civil Service and Administrative Service Act and its regulations, the current Labour Code, the Act on Acquired Rights and Conventions of the International Labour Organization ratified by Nicaragua and the collective agreement. Neither party shall be subject to any limitations other than those laid down in law and those which derive from the present collective agreement.

- 1066.** The CTN alleges that, despite this, the new authorities of the institution signed a collective agreement with trade unions formed in 2007 which are under its control with the acquiescence of the authorities of the Ministry of Labour, in flagrant breach of the abovementioned clause and the relevant provisions of national legislation and ILO Conventions. This act was appealed to the administrative authority, both to the Departmental Labour Inspectorate, Service Sector, and then to the Collective Bargaining and Individual Conciliation Directorate, since the former refused the list of demands submitted on 29 June 2007, pursuant to paragraph (h) of article 373 of the Labour Code (when a trade union proposes a collective dispute of an economic or social character, it must submit to the relevant Departmental Labour Inspectorate a list of demands, an original and three copies, which contains, according to paragraph (h), the application for the list to be considered) and the latter concerning the conclusion of an agreement with regressive clauses without the participation of all the trade unions, which were not notified of the new agreement proposed by the Union of United Workers in Reconciliation (SNTUR-DGI-UNE) and the Tax Office Staff Union (SINTRACAF-UNE). The CTN states that it has the following affiliated unions in the DGI: (a) the Independent Workers' Union of the Directorate-General of Revenues (SITRADGI); (b) the Public Employees' Union in the Directorate-General of Revenues of Granada (SEPGRA-DGI); and (c) the Employees' and Workers' Union of the Masaya Revenue Office of the Directorate-General of Revenues (SIERMA-DGI).
- 1067.** Furthermore, the CTN alleges that the Director-General of Revenues, in breach of article 87 of the Constitution and articles 231 and 232 of the Labour Code, said that, as far as he was concerned, trade union office was not an obstacle to termination of the contract of employment of trade union officials, and he therefore ordered the dismissal of Ms Maura de Jesús Vivas Ramos, spokesperson of the SEPGRA-DGI, invoking for that purpose article 111 of Act No. 476, the Civil Service and Administrative Staff Act, which does not rank higher than the Constitution and the Labour Code.

## **B. The Government's reply**

- 1068.** In its communication of 10 April 2008, the Government states that the cases of the trade union officials were being heard, at the option of the parties, some by administrative proceedings in the Ministry of Labour and others in the industrial courts, in accordance with the procedures and processes laid down in Nicaraguan legislation for parties in dispute. Specifically, it states the following.

***Dismissals of officials of the Workers' and Employees' Union of the Nicaraguan Social Security Institute (STEINSS), affiliated to the CTN***

- 1069.** With regard to the dismissals of INSS trade union officials, the departmental labour inspectorate, service sector, stated that there was an initial complaint by the workers on 21 January 2007 in relation to which a special inspection was carried out. However, the complainant (the workers' side) withdrew the complaint. On 28 February 2007, the workers made a written submission in which they complained of the transfers and breach of trade union immunity as a result of which the inspectorate concerned issued three summons to the parties (employer and workers) with the aim of resolving the situation alleged by the workers concerned. The employer did not attend.
- 1070.** A special inspection was carried out which found evidence of the transfer of 32 workers, as a result of which on 28 March 2007, an order was made declaring null and void the transfers of the following trade union officials: Isabel Vanessa Rivera Ubeda, Sergio Quiroz, Karla Molina, Alvin Alanís González. This order was appealed by the employer and the decision at second instance No. 197-07 upheld the order made by the Departmental Labour Inspectorate, Service Sector. On 11 April, a complaint was received from the trade union officials as a result of which a special inspection was ordered, which concluded:

The Human Resources Director of the INSS stated that the workers Isabel Vanessa Rivera Ubeda, Alvin Alanís González, Moisés Ruiz Romero, Karla Esperanza Saavedra, Sergio Juan Ramón Quiroz, Ivette Pilarte Centeno, Ercilia Aguilera Centeno, Magda del Carmen Reyes López, Giany Castillo Torres, Karla del Rosario Alvarado Paíz, Fabricio José Sevilla, Allan Antonio González Torres, Frutos José Plazaola Cubillo, Jazmín del Sagrario Carvallo Soto, Margarita del Carmen Sánchez Méndez, Vilma Isabel Munguía Guillen, Rolando Delgado Miranda, Fátima del Rosario Pérez Canales, María de la Concepción Sarria Ruiz, Josman Octavio Solís Núñez and Carlos Alvarez Alemán claimed through their representative reinstatement and payment of unpaid wages in the Managua District Second Industrial Court.

- 1071.** Subsequently, information was requested from the office of the INSS CEO, which provided the following information: "As a result of the administrative and structural reorganization of the institution, duly approved by the relevant authorities, the Medical Supervision area of the General Health Administration was completely closed down, changing the character from a supervisory function exercised by doctors to a function of social care carried out by social workers duly recruited by the institution". Based on compliance with the procedure set out in the Civil Service and Administrative Staff Act, Act No. 476, and based on article 111 of Act No. 476, which states verbatim: "Institutional restructuring and reorganization. When programmes of institutional restructuring or reorganization give rise to the termination of staff or employees, the effects of the abolition shall be established in the corresponding Human Resources adjustment programmes or plans formulated by the Government and approved by the governing body concerning established rights of staff and employees under the present Act. Public servants affected by these programmes shall be compensated in accordance with the provisions of the present Act and the respective collective agreement."
- 1072.** The Government indicates that the termination of the contracts of employment of the following medical supervisors, Isabel Vanessa Rivera Ubeda, Alvin Alanís González, Moisés Ruiz Romero, Karla Esperanza Saavedra, Sergio Juan Ramón Quiroz, Ivette Pilarte Centeno, Ercilia Aguilera Centeno, Magda del Carmen Reyes López, Giany Castillo Torres, Karla del Rosario Alvarado Paíz, Fabricio José Sevilla, Allan Antonio González Torres, Frutos José Plazaola Cubillo, Jazmín del Sagrario Carvallo Soto, Margarita del Carmen Sánchez Méndez, Vilma Isabel Munguía Guillen, Rolando Delgado Miranda,

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Fátima del Rosario Pérez Canales, María de la Concepción Sarria Ruiz, Josman Octavio Solís Núñez and Carlos Alvarez Alemán, took effect on 15 March 2007.

- 1073.** The Government adds that on 19 March 2007, the abovementioned medical supervisors filed a claim for reinstatement and payment of wages due in the Office for the Allocation of Cases of the Judicial Power. The case was allocated to the Managua District Second Industrial Court. At the present time, the case is still active, pending the decision of the judge in the case. On 16 April 2007, some of the claimants, namely Isabel Vanessa Rivera Ubeda, Margarita del Carmen Sánchez Méndez and Ercilia Elizabeth Aguilera Centena, withdrew their legal action. To date, the following workers, all former members of STEINSS have settled their claims: Isabel Vanessa Rivera Ubeda, Sergio Juan Ramón Quiroz, Karla Esperanza Saavedra, Moisés Ruiz Romero, Karla del Rosario Alvarado Paíz, Ivette Pilarte Centeno and Frutos José Plazaola Cubillo.

### ***ENACAL-Esteli***

- 1074.** With regard to the termination of the contract of employment of Mr Fidel Castillo Lagos, official of the “Genaro Lazo” Union, the Government reports that on 12 June 2007, a claim was filed in the District Civil and Industrial Court, by operation of law against ENACAL-Esteli. The case is in progress.

### ***ENACAL-Matagalpa***

- 1075.** Information was requested from the office of the ENACAL CEO, which reported that Juan Alberto García Blandón, Alejandro Martínez Rizo, Buena Ventura Polanco Sáenz, Salvador Montoya Herrera and Nahúm Castro Aráuz had accepted payments in final settlement. ENACAL has not been notified of any claim lodged by the abovementioned persons.

### ***ENACAL-Granada and ENACAL-Carazo***

- 1076.** Under decision No. 094-07 of the Inspectorate General of Labour of 11 May 2007, it was established that the Inspectorate General of Labour was competent under articles 244 and 249 of the Labour Code to hear and decide the application by the legal attorney of ENACAL, who on 9 May 2007 requested the Inspectorate to pronounce the illegality of the strike conducted by the workers of the Carazo and Granada divisions. The reports of the special inspections carried out by the Inspectorate General of Labour in this matter showed that the workers of the Carazo and Granada divisions had gone on strike without first exhausting the legal procedures, and had defaulted on their labour obligations by arbitrarily suspending their work, in relation to a claim of non-compliance with the collective agreement and negotiation of a new list of demands.
- 1077.** The Government refers to the following decision of the labour inspectorate: “Irrespective of the reasons given by the workers of the ENACAL Carazo and Granada departments for demanding improvements in their social and labour rights, these do not allow or legitimize them in holding a collective stoppage of work, even though article 83 of the Constitution recognizes the labour right to complain against non-compliance with agreements of a social and labour character (article 381 of the Labour Code) and negotiation of lists of demands (article 373 and following of the Labour Code) and there are procedures, including for the exercise of the right to strike, article 244 of the Labour Code provides that clearly defined criteria must be satisfied and, in this case, it is clear that the workers of the departments concerned did not follow the correct procedure. This situation obliges the authority to declare the strike held by the workers of the Carazo and Granada departments illegal under the provisions of article 244 and following of the Labour Code. Thus in the

light of these considerations, article 83 of the Constitution of Nicaragua, articles 224, 245, 247, 248 and 249 of the Labour Code, the Inspectorate General decides: (1) that the application by the Legal Attorney of ENACAL that the strike be held to be illegal is justified. In consequence, the Inspectorate General of Labour declares the strike by the workers of the Carazo and Granada departmental divisions of ENACAL to be illegal; and (2) the striking workers must return to work within 48 hours, failing which the employer may deem the contracts of employment of those who continue with the illegal action to be terminated.”

- 1078.** The Government states that the dismissal of the striking workers at ENACAL Granada and Carazo was not because they were trade unionists or exercising a trade union right (which right is protected by labour law), but for breach of labour legislation and the decision given by the Inspectorate General of Labour. The Government adds that on 7 June 2007, certain ENACAL (Granada) workers filed a claim for reinstatement in the District Civil and Industrial Court by operation of law in the department of Granada and that on 11 June 2007, ENACAL (Carazo) workers filed a legal appeal in Jinotepe.

### **ENACAL-Diriamba**

- 1079.** With regard to the termination of the contract of employment of Mr Lester Francisco Ortiz, Secretary of the ENACAL-Diriamba Workers’ Union, the official in question withdrew his action on 7 November 2007, whereupon the Jinotepe District Civil and Industrial Court, in an order made on 18 December 2007, decided to accept the withdrawal application submitted by Mr Ortiz and to have the proceedings stayed. Mr Ortiz accepted a payment in final settlement. The foregoing is consistent with the information requested from, and provided by, the office of the ENACAL CEO.

### **ENACAL-Jugalpa**

- 1080.** As regards the situation of Mr Kester Giovanni Bermúdez, official of the Chontales Department Independent ENACAL Workers’ Union, on 18 March 2007 he received payment in final settlement of the social benefits to which he was entitled to his entire satisfaction. The foregoing is consistent with the information requested from, and provided by, the office of the ENACAL CEO.

### ***Refusal of the application by the Managua Department Inspectorate, Service Sector, submitted by the Independent Workers’ Union of the Directorate General of Revenues (SITRADGI) and dismissal of Ms Maura de Jesús Vivas Ramos, official of the Public Employees’ Union in the Directorate-General of Revenues of Granada (SEPGRA-DGI)***

- 1081.** With regard to the refusal by the Managua Department Labour Inspectorate, Service Sector of the list of claims of 29 June 2007, under paragraph 4 of article 373, submitted by the SITRADGI, the Government indicates that the Managua Department Labour Inspectorate, Service Sector refused the application because it had already been negotiated bilaterally with other trade unions and the DGI. On 29 July 2007, the SITRADGI submitted to the Department Labour Inspectorate, Service Sector a request to negotiate a list of claims when it had already signed a new list of claims. The legal basis for refusing the list of claims in question was that a new collective agreement had already been signed.

- 1082.** Furthermore, the Directorate of Collective Bargaining and Conciliation received the collective agreement of the DGI on 2 July 2007 for registration and filing, it having been negotiated directly and in accordance with articles 371 and 372 of the Labour Code by the following trade unions: the SNTUR-DGI-UNE and the SINTRACAF-UNE. The agreement was revised and certain rectifications were formulated. It was resubmitted on 20 July 2007 and was signed by the Director of Collective Bargaining and Conciliation on 3 August 2007 for registration.
- 1083.** On 13 July 2007, the SITRADGI and the SIERMA-DGI submitted a document complaining that the trade unions which negotiated the new collective agreement were not represented in the previous collective agreement and that they did not request to join it and thus the new agreement should not be registered in the Directorate of Collective Bargaining and Conciliation. In this respect, an order was made on 31 July 2007 which refused the application. Subsequently, a written submission was received on 9 August 2007 from the following trade unions: the SITRADGI, the SIERMA-DGI and the SEPGRA-DGI which sent a communication to the ILO, requesting to join the collective agreement and withdraw the lists of demands submitted to the Ministry of Labour. The agreement was signed by all the trade unions mentioned in this report.
- 1084.** With regard to the termination of the contract of employment of the trade union official, Ms Maura de Jesús Vivas Ramos, who is spokesperson of the SEPGRA-DGI, a decision in favour of the worker was given by the Inspectorate General of Labour on 9 January 2008.

### **National Technological Institute (INATEC)**

- 1085.** With regard to this case, the Departmental Labour Inspectorate, Service Sector reported that on 30 July 2007, an order was made which in its conclusion states: “the transfers of the workers and trade union officials Gloria del Carmen Paredes and Ricardo Ramón Alvarez Berrios are declared null and void” and this order was upheld on appeal on 18 September 2007. In addition, the executive management of INATEC has stated that Mr Ricardo Ramón Alvarez Berrios and Ms Gloria del Carmen Paredes are working actively in their posts and with full respect for their labour and trade union rights.

### **C. The Committee's conclusions**

- 1086.** *The Committee observes that in this case the complainant organization alleges numerous dismissals of trade union officials and members, and the exclusion of trade unions from a collective bargaining process in various public institutions and state enterprises.*

### **Nicaraguan Social Security Institute (INSS)**

- 1087.** *As regards the allegation concerning the dismissal of ten officials (Isabel Vanessa River Ubeda, Sergio Juan Ramón Quiroz, Karla Esperanza Molina Saavedra, Moisés Ruiz Romero, Alvin Alanis González, Karla del Rosario Alvarado Paíz, Ivette Pilarte, Martha Calderón, Fruto Plazaola and Luis Pérez Mairena) and 48 members of STEINSS, the Committee notes that the Government reports that: (1) in relation to the dismissals of the trade union officials, the Departmental Labour Inspectorate Service Sector stated that there was an initial complaint by the workers on 21 January 2007 in relation to which a special inspection was carried out. However, the complainant (the workers' side) withdrew the complaint. On 28 February 2007, the workers filed a written submission in which they complained of the transfers and breach of trade union rights as a result of which the Inspectorate concerned issued three summonses to the parties (employer and workers) with the aim of resolving the situation alleged by the workers concerned. The employer did not attend; (2) information was requested from the office of the INSS CEO, which provided*

the following information: “As a result of the administrative and structural reorganization of the institution, duly approved by the relevant authorities, the medical supervision area of the general health administration was completely closed down, changing the character from a supervisory function exercised by doctors to a function of social care carried out by social workers duly recruited by the institution”; (3) the measure adopted was based on article 111 of the Civil Service and Administrative Staff Act, Act No. 476, which states verbatim: “Institutional restructuring and reorganization. When programmes of institutional restructuring or reorganization give rise to the termination of staff or employees, the effects of the abolition shall be established in the corresponding human resources adjustment programmes or plans formulated by the Government and approved by the Governing Body concerning established rights of staff and employees under the present Act. Public servants affected by these programmes shall be compensated in accordance with the provisions of the present Act and the respective collective agreement”; (4) on 15 March 2007 the contracts of employment of 21 medical supervisors were terminated (the names provided by the Government include almost all the trade union officials mentioned by the complainant organization); (5) on 19 March 2007, the medical supervisors mentioned by the Government filed a claim for reinstatement and payment of wages due with the judicial authority and a decision in the case is still pending; (6) on 16 April 2007, the dismissed workers Isabel Vanessa Rivera Ubeda (trade union official), Margarita del Carmen Sánchez Méndez and Ercilia Elizabeth Aguilera Centena, withdrew their legal action; and (7) to date, the following dismissed workers, all former members of STEINSS have settled their claims: Isabel Vanessa Rivera Ubeda, Sergio Juan Ramón Quiroz, Karla Esperanza Saavedra, Moisés Ruiz Romero, Karla del Rosario Alvarado Paíz, Ivette Pilarte Centeno and Frutos José Plazaola Cubillo.

- 1088.** *In this respect the Committee recalls that on numerous occasions it pointed out that it can examine allegations concerning economic rationalization programmes and restructuring processes, whether or not they imply redundancies or the transfer of enterprises or services from the public to the private sector, only in so far as they might have given rise to acts of discrimination or interference against trade unions. In any case, the Committee can only regret that in the rationalization and staff-reduction process, the government did not consult or try to reach an agreement with the trade union organizations and also the Committee has emphasized that it is important that governments consult with trade union organizations to discuss the consequences of restructuring programmes on the employment and working conditions of employees [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 1079 and 1081]. In these circumstances, the Committee requests the Government to inform it whether STEINSS was consulted about the restructuring which took place and which according to the allegations prejudiced the trade union officials and members. In addition, observing that according to the Government, three workers withdrew their legal actions and seven settled their claims, the Committee, while noting that according to the Government the restructuring was carried out within the framework of the law, requests it to inform it of the result of the ongoing legal appeals relating to the remaining trade union officials and workers who were dismissed.*

### **The Nicaraguan Aqueduct and Sewer Company of Estelí – ENACAL-Estelí**

- 1089.** *As regards the allegation relating to the termination of the contract of employment of Mr Fidel Castillo Lago (Minutes Secretary), official of the “Genaro Lazo” Union and 15 members, the Committee notes that the Government reports that on 12 June 2007 the trade union official in question filed a claim against the company which is still in progress. In this respect, the Committee requests the Government to inform it of the result of the judicial process initiated by the trade union official, Mr Fidel Castillo Lago, and to send its observations relating to the alleged dismissal of 15 members of the trade union.*

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**The Nicaraguan Aqueduct and Sewer Company of Granada and the Nicaraguan Aqueduct and Sewer Company of Carazo**

- 1090.** *With regard to the allegations relating to the dismissal of eight officials of UTSO, nine officials of the Enacal Granada Workers' Departmental Democratic Union and five officials of the Enacal Carazo Workers' Departmental Democratic Union, the Committee notes that the Government reports that: (1) under decision No. 094-07 of the Inspectorate General of Labour of 11 May 2007, it was established that the Inspectorate General of Labour was competent under articles 244 and 249 of the Labour Code to hear and decide the application by ENACAL which on 9 May 2007 requested the Inspectorate to pronounce the illegality of the strike conducted by the workers of the Carazo and Granada departmental branches; (2) the reports of the special inspections carried out by the Inspectorate General of Labour in this matter showed that the workers of the Carazo and Granada branches had gone on strike without first exhausting the legal procedures, and had defaulted on their labour obligations by arbitrarily suspending their work, in relation to a claim of non-compliance with the collective agreement and the negotiation of a new list of demands; (3) irrespective of the reasons given by the workers of the ENACAL Carazo and Granada departmental branches for demanding improvements in their social and labour rights, these do not allow or legitimize them in holding a collective stoppage of work without respecting the procedures nor fulfilling the requirements clearly set out in the legislation; (4) faced with that situation, the Inspectorate General of Labour decided to allow the application by ENACAL for declaration of the strike as illegal and ordered the striking workers to return to work within 48 hours, failing which the employer might deem the contracts of employment of those who continue with the illegal act to be terminated; (5) the dismissal of the striking workers at ENACAL Granada and Carazo was not because they were trade unionists or exercising a trade union right (which right is protected by labour law), but for breach of labour legislation and the decision rendered by the Inspectorate General of Labour; (6) on 7 June 2007, certain ENACAL (Granada) workers filed a claim for reinstatement in the District Civil and Industrial Court in the department of Granada; and (7) on 11 June 2007, ENACAL (Carazo) workers filed a legal appeal in Jinotepe.*
- 1091.** *In this respect, the Committee observes that the Government has not indicated with sufficient precision the legal requirements which the trade unions apparently failed to respect (confining itself to stating that the legal procedures had not been exhausted). Furthermore, the Committee emphasizes that responsibility for declaring a strike illegal should not lie with the government, but with an independent body which has the confidence of the parties involved [see **Digest**, op. cit. para. 628].*
- 1092.** *In these circumstances, the Committee requests the Government: (1) to take measures, including of a legislative character if necessary, so that in future a body independent of the parties and in which they have confidence is responsible for declaring a strike illegal; (2) to inform it more precisely concerning the legal requirements that the organizations did not respect and which led to the strike being declared illegal and the subsequent dismissal of the trade union officials in order to be able to pronounce itself in full knowledge of the facts; and (3) to inform it of the result of the legal claims filed by certain ENACAL-Granada and ENACAL-Carazo workers. The Committee further requests the Government to inform it whether the trade union officials mentioned by name by the complainant organization have initiated legal actions relating to their dismissal.*

**The Nicaraguan Aqueduct and Sewer Company of Matagalpa**

1093. *As regards the allegations relating to the dismissal of five officials (mentioned by name by the complainant organization) and 25 members of the ENACAL-DAR Matagalpa Democratic Trade Union, the Committee notes that, according to the Government, the company indicated that the five trade union officials mentioned by the organization had accepted payments in final settlement and the company had not been notified of any legal claim lodged by those workers. In this respect, the Committee requests the Government to confirm that the five trade union officials and the 25 trade union members who were dismissed have not initiated legal actions relating to their dismissal.*

**The Nicaraguan Aqueduct and Sewer Company of Jugalpa**

1094. *As regards the allegation relating to the dismissal of Mr Kester Giovanni Bermúdez, official of the Chontales Department Independent ENACAL Workers Union and eight other workers, the Committee notes that the Government reports that he received payment of his final settlement. In this respect, the Committee requests the Government to indicate whether Kester Giovanni Bermúdez and the other eight workers whose dismissal was alleged have begun legal actions relating to their dismissal.*

**The Nicaraguan aqueduct and sewer company of Diriamba**

1095. *As regards the allegation concerning the termination of the contract of employment of the Secretary of the ENACAL-Diriamba Workers' Union, Mr Lester Francisco Ortiz, the Committee notes that the Government reports that the official in question withdrew the action which he had initiated, that the Jinotepe District Civil and Industrial Court ordered the proceedings to be stayed and that Mr Ortiz accepted a payment in final settlement, according to the office of the company's CEO. In these circumstances, the Committee will not proceed with the examination of this allegation.*

**Directorate-General of Revenues (DGI)**

1096. *As regards the allegation that the DGI signed a collective agreement with trade unions controlled by it, excluding other trade unions which were recognized by a collective agreement concluded in 2006, and rejected a list of demands submitted by those unions, the Committee notes that the Government reports that on 9 August 2007, the trade unions represented by the complainant organization asked to join the collective agreement concluded between the DGI, the SINTUR-DGI-UNE, the SINTRACAF-UNE and the SITRADGI and withdrew the list of demands submitted to the Ministry of Labour. The Committee also notes that the agreement was signed by all the trade union organizations mentioned by the complainant organization. In these circumstances, the Committee will not proceed with the examination of this allegation.*
1097. *With regard to the allegation that, in breach of national legislation on trade union rights, the DGI ordered the dismissal of Ms Maura de Jesús Vivas Ramos, spokesperson of the SEPGRA-DGI, the Committee notes that the Government reports that a decision in favour of the worker was given by the Inspectorate General of Labour on 9 January 2008. In these circumstances, the Committee requests the Government to inform it whether by virtue of the decision of the Inspectorate General of Labour, reported by the Government, the*

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*trade union official Ms Maura de Jesús Vivas Ramos has been reinstated in her post with payment of wages due.*

### **The Committee's recommendations**

**1098. *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:***

- (a) As regards the allegation concerning the dismissal of ten officials and 48 members of STEINSS, the Committee requests the Government to inform it: (1) whether the union was consulted about the restructuring which took place in the Institute and which prejudiced the trade union officials and members; and (2) the result of the ongoing legal appeals relating to the dismissals of the trade union officials and members who did not withdraw their legal actions.*
- (b) The Committee requests the Government to inform it of the result of the judicial process initiated by the trade union official, Mr Fidel Castillo Lago, Minutes Secretary of the "Genaro Lazo" Union of the Nicaraguan Aqueduct and Sewer Company of Estelí – ENACAL-Estelí and to send its observations relating to the alleged dismissal of 15 other members.*
- (c) With regard to the allegations relating to the dismissal of eight officials of the UTSO, nine officials of the Enacal Granada Workers' Departmental Democratic Union and five officials of the Enacal Carazo Workers' Departmental Democratic Union, the Committee requests the Government: (1) to take measures, including of a legislative character if necessary, so that in future a body independent of the parties and in which they have confidence is responsible for declaring a strike illegal; (2) to inform it more precisely concerning the legal requirements that the organizations did not respect and which led to the strike being declared illegal and the subsequent dismissal of the trade union officials in order to be able to pronounce itself in full knowledge of the facts; and (3) to inform it of the result of the legal claims filed by certain ENACAL-Granada and ENACAL-Carazo workers. The Committee further requests the Government to inform it whether the trade union officials mentioned by name by the complainant organization have initiated legal actions relating to their dismissal.*
- (d) As regards the allegations relating to the dismissal of five officials and 25 members of the ENACAL-DAR Democratic Trade Union, the Committee requests the Government to confirm that all the trade union officials and members concerned have not initiated legal actions.*
- (e) As regards the allegation relating to the dismissal of Mr Kester Giovanni Bermúdez, official of the Chontales Department Independent ENACAL Workers' Union and eight other workers of the Nicaraguan Aqueduct and Sewer Company of Jugalpa, the Committee requests the Government to indicate whether legal actions have been commenced in this respect.*
- (f) The Committee requests the Government to inform it whether by virtue of the decision of the Inspectorate General of Labour, reported by the Government,*

*the trade union official Ms Maura de Jesús Vivas Ramos has been reinstated in her post in the DGI with payment of wages due.*

CASE NO. 2576

INTERIM REPORT

**Complaint against the Government of Panama**

**presented by**

— **the National Union of Security Agency Employees (UNTAS) and**

— **Union Network International (UNI)**

***Allegations: Acts of anti-union discrimination and interference by the company and the authorities; assaults and threats against trade unionists***

**1099.** The complaint is contained in a communication from the National Union of Security Agency Employees (UNTAS) and Union Network International (UNI) dated 27 June 2007.

**1100.** The Government sent its observations in communications dated 19 December 2007 and 7 May 2008.

**1101.** Panama has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. The complainants' allegations**

**1102.** In their communication of 27 June 2007, the UNTAS and UNI allege the following violations of trade union rights by the Group 4 Securicor company, the largest employer in the private security sector:

- it transferred workers under the pretext of corporate restructuring, with the intent and effect of weakening the union and undermining collective bargaining;
- it dismissed and disciplined trade unionists who had participated in peaceful protests seeking to assert their rights under the law;
- it provided financial, material and legal support to the criminal elements who violently attacked and robbed trade union leaders;
- it instigated and materially supported a conflict within the union, going as far as to foster the emergence of a pro-employer faction;
- it deducted and then withheld union dues, undermining the stability and morale of the duly elected union leadership;
- it threatened trade union members who participated in peaceful demonstrations with criminal sanctions and civil suits.

- 1103.** With respect to the transfer of workers, the complainant organizations explain that Group 4 Securicor's Panamanian operations are handled by two subsidiaries, G4S SA and G4S Valores. Until 16 August 2006, G4S SA employed over 100 workers and G4S Valores some 580. The UNTAS, which represented workers at G4S Valores, had for over six years been seeking to negotiate increases in wages and other benefits with the employer. Just days before the commencement of the negotiations which had finally been scheduled, the employer requested the transfer of 380 workers from G4S Valores to G4S SA. Union members have cited repeated remarks by members of the management to the effect that the transfer was designed to weaken the union. However, regardless of the intention, it is to be noted that, under Panama's legislation, no corporate restructuring or transfer of workers may affect the exercise of freedom of association or functioning of the union, and all other existing rights and relations must remain unaltered. Despite this, the salary cheques show that the workers, with the transfer, lost all recognition of their length of service, even though most of them had been with Group 4 Securicor for a period of eight to 25 years. The act of depriving these workers of their acquired rights has occurred against the background of an anti-union campaign. The UNTAS challenged the transfers and other violations of the Labour Code in an appeal brought before the Ministry of Labour and Labour Development (MITRADEL) on 29 August 2006. The appeal went to compulsory conciliation and it proved impossible to reach a mutually satisfactory solution by 6 September 2006, the date of the final meeting. The matter is currently blocked in the MITRADEL.
- 1104.** As regards the dismissals in response to peaceful protests against the impact of the transfers on the workers' rights, the complainants allege that the UNTAS organized a protest which began on 6 October 2006 with a work slowdown and that Group 4 Securicor sought to have the protest declared unlawful, portraying it as a "de facto work stoppage" or unlawful strike and calling for it to be characterized as such by the judicial authority, while also claiming, falsely, that material damage had been caused.
- 1105.** On 17 October 2006, before any judicial decision had been handed down, the company dismissed dozens of workers. On 24 October, the Labour Tribunal dismissed the idea of there having been a strike or of any unlawfulness in that regard. The company appealed and the High Court allowed the company's argument that there had been a "de facto work stoppage", that this should result in the sanctions foreseen in the case of unlawful strikes, and that there could be no legal protection for anyone having damaged property or prevented persons or vehicles from accessing the workplace. On the basis of the High Court's decision, the company requested that the trade union immunity of the union leaders be suspended, but without success. Nevertheless, the company has not allowed the union leaders Mr Cubilla (General Secretary), Mr Roberto Adamson and Mr Arcelio Aguilar to engage in shift work and has not provided them with a uniform.
- 1106.** On 13 November 2007, the UNTAS lodged an appeal with the Supreme Court of Justice against the various measures taken by the company and the description of the protest as a "de facto work stoppage"; however, the said court has not yet given a decision on the matter.
- 1107.** As regards the company's participation in violent assaults against demonstrating trade unionists, on 16 February 2007 at 3 a.m. there were eight assailants (including the drivers of vehicles who were arrested by the police and in whose vehicles items belonging to the trade unionists were found); two of them belonged to the company; a third was carrying a firearm and had threateningly ordered the trade unionists to leave the property and forced them to hand over all their money; one trade unionist was beaten and had to be hospitalized. One of the assailants told the police that he was acting on the orders of someone high up in the company. Nevertheless, despite requests to that end by the UNTAS, there has been no police investigation into the part played by the company's

management in the aforementioned assaults, and the persons arrested were detained for only a short time and appear not to be the subject of any further investigation.

- 1108.** The company has interfered in the union's internal affairs, providing facilities and financial support to nine dissidents within the UNTAS and failing to hand over the union dues. The dissidents requested the labour inspectorate to be present at an UNTAS "election" on 26 March 2007 (despite the unlawfulness of that initiative and the formal opposition thereto on the part of the General Secretary). Very few people took part in the unlawful election but, despite all the foregoing, it was certified by the Government.
- 1109.** The complainant organizations request the Committee on Freedom of Association to call on the Government of Panama to commit Group 4 Securicor and the UNTAS, as well as UNI, to enter into constructive dialogue aimed at bringing about a lasting solution to these problems. The Panamanian Government's full cooperation with the Committee in this case, coupled, on the broader level, with a demonstrated willingness to participate in comprehensive international dialogue on such matters, would help to bring about a more viable and sustainable remedying of the aforementioned violations by enabling the UNTAS to secure a more comprehensive set of trade union rights, including in cases where the Government lacks the ability and proven willingness to give adequate effect to the relevant legislation vis-à-vis the company.

## **B. The Government's reply**

- 1110.** In its communication of 17 December 2007, the Government recalls that the allegations made by the UNTAS relate specifically to: (1) the transfer of workers with the aim of weakening the union and undermining collective bargaining; (2) the dismissal of trade unionists who had participated in peaceful protests in an attempt to assert their rights; (3) the provision of financial and material support to the persons who attacked and robbed trade union officials; (4) the company's instigation of and support for the establishment of a union; (5) the deduction and subsequent withholding of trade union dues; and (6) the threatening with criminal sanctions and civil suits of trade union members participating in peaceful demonstrations.
- 1111.** In this respect, the Government explains that items 1, 2, 3, 4 and 6 fall within the sole jurisdiction of the MITRADEL. For the rest, the Panamanian State provides for measures for the protection and fostering of trade unionism, while not intervening in internal affairs, through technical and economic assistance, trade union immunity and sanctions for unfair practices. In this regard (unfair practices), the UNTAS had the right to file the corresponding complaints, either through the criminal justice system or through the special labour courts, but not through the MITRADEL. The special labour courts have the necessary competence to handle the case in question. Articles 379 to 389 of the Labour Code, which relate to such matters, provide as follows:

*Article 379.* The Panamanian State, through the Ministry of Labour and Social Welfare, shall foster the establishment of trade unions in those activities or locations where they do not exist, respecting the right of workers to establish the type and number of trade unions they consider appropriate.

The Ministry shall likewise promote the affiliation of workers in existing trade unions, leaving them absolutely free to join the union of their choice.

*Article 380.* The Ministry of Labour and Social Welfare shall provide social organizations with the necessary technical and economic assistance to enable them to organize programmes, courses, labour education and trade union training seminars, and congresses. The economic assistance to be provided by the State to social organizations for the aforementioned purposes shall be channelled through duly constituted central workers' organizations, independent federations and independent national unions, having regard to the number of

affiliated workers. Where economic support for the holding of congresses is concerned, such assistance shall be regulated by the Ministry of Labour and Social Welfare by executive decree.

*Article 381.* Trade union immunity shall be extended to:

1. The members of trade unions in the process of being established.
2. The members of the executive committees of trade unions, federations and confederations or central workers' organizations, subject to the provisions of articles 369 and 382.
3. Substitute members of executive committees.
4. Trade union representatives.

*Article 382.* In the case referred to in article 381(3) above, where a trade union has over 200 members it may appoint substitutes in equal or lesser number to the titular executive committee members, and all of them shall enjoy trade union immunity. Where a union has less than 200 members, it may appoint one substitute for each titular executive committee member, but trade union immunity shall be extended only to five substitutes, to be identified on the basis of those having obtained the highest number of votes in the respective election. In the event that a substitute is subsequently replaced, his or her immunity shall be transferred to the replacement substitute.

Substitutes within the executive committees of federations, confederations and central workers' organizations shall in all cases enjoy trade union immunity.

*Article 383.* A worker covered by trade union immunity may not be dismissed without prior authorization from the labour tribunals based on a just cause provided for in the legislation. Any dismissal effected in defiance of the provisions of this article shall constitute a violation of trade union immunity.

Trade union immunity shall also be deemed to have been violated in the event of the unilateral alteration of a worker's working conditions or of his or her transfer to another establishment or work centre, where such transfer does not form part of his or her obligations, or, if it does, where it prevents or hampers the exercise of the worker's union functions, in which case the prior judicial authorization shall likewise be required.

*Article 384.* The duration of trade union immunity is subject to the following rules:

1. For the members of a trade union in the process of establishment, immunity shall last for a period of up to three months following the date of acceptance of that union's registration.
2. For titular executive committee members and any substitutes to whom immunity applies, as well as for trade union representatives, immunity shall last for a period of up to one year following the cessation of their functions.
3. Trade union immunity shall be recognized as from the time at which a worker's name appears in an electoral roll, provided the electoral roll is communicated to the employer or Labour Inspectorate; in all events, protection may only be granted for a maximum of the one month preceding the elections.
4. Those candidates who are elected shall continue to enjoy trade union immunity, including in the period preceding the assumption of their duties, while those who were not elected shall continue to enjoy immunity for a period of one month following confirmation of the election results.
5. In the event that the communication referred to in paragraph 3 of this article is not effected, trade union immunity shall be extended to the trade union officials and representatives as from the date of their election.

*Article 385.* Workers, or their representatives, in the process of organizing a trade union may, for the purpose of obtaining trade union immunity, notify the Regional or General Directorate of Labour, in writing, of the group's intention to work towards the establishment of the union, providing to that end a statement of the names and particulars of each member of the group and details of the company, establishment or business in which they are employed. Any group wishing to submit such a communication must comprise more than 20 workers.

The union shall be deemed to be in the process of establishment only as from the point in time at which the notification referred to in this article is submitted, and its members shall enjoy trade union immunity for a period of up to thirty working days thereafter, if during that period they have not formalized the request for registration of the union, in accordance with article 352. Once the request for registration has been formalized, the workers shall continue to enjoy trade union immunity in accordance with the provisions of articles 381(1) and 384(1).

In the event that objections are raised to the request for registration of the union, the immunity shall be valid throughout the period granted for the purpose of overcoming those objections. Once the objections have been overcome, the trade union immunity of the members of the union in the process of establishment shall be governed by the rules laid down in articles 381 and 384.

*Article 386.* Following the submission of the communication referred to in the previous article, or the request for registration of the union, any interested worker may inform the Regional or General Directorate of Labour of his or her affiliation to the union in the process of establishment, as from which moment he or she shall enjoy trade union immunity.

In the event that those organizing the trade union do not submit the communication referred to in the previous article, the trade union shall be considered to be in the process of establishment as from the time of submission of the request for registration.

*Article 387.* The labour authorities shall notify the employer or employers of the submission of the communication referred to in the previous articles, or of the request for registration formulated by the workers. The labour authority's failure to provide such notification shall not, however, affect the granting of trade union immunity, this being without prejudice to any sanctions that may be applicable in respect of the official in question.

*Article 388.* The following shall be considered unfair practices vis-à-vis trade unionism and workers' rights:

1. The drawing up of blacklists.
2. The ill-treatment of workers.
3. Dismissals, sanctions, reprisals, transfers, worsening of working conditions or acts of discrimination as a response to individual or collective demands, the fact of organizing or belonging to a trade union, or the fact of having participated in a strike or signed a list of claims.
4. The dismissal of one or more workers known to be under the protection of trade union immunity.
5. Acts of interference on the part of employers for the purpose of fostering the organization or control of workers' unions, or to bring about resignation from or non-affiliation to a union.
6. Providing or offering to a workers' social organization sums of money other than those provided for under the law or under a collective labour agreement, subject to the proviso, in the latter case, that such sums are intended for housing programmes or other works of direct benefit to the workers.
7. The dismissal or worsening of the working conditions of a number of permanently unionized workers in such a way as to modify, to the latter's detriment, the ratio of unionized to non-unionized staff, or the proportion of staff belonging to another union, within the company, unless the company provides the labour tribunals with prior justification for the causes of such dismissals or modification of said ratios. This rule shall apply even in the event that such dismissals are not effected simultaneously.

In the case foreseen in paragraph 7 of this article, workers who have been dismissed shall have the right to reinstatement with payment of their arrears of salary; however, this shall apply solely to workers whose dismissal took effect no earlier than three months prior to the date on which the claim is made. Any disputes arising out of the application of this sub-item shall be dealt with through an abbreviated procedure.

*Article 389.* Any infringements of the rules laid down in this section shall be sanctioned by fines ranging from one hundred to two thousand balboas, according to the gravity of the circumstances. Such fines shall be successively doubled each time the employer in question

repeats the infringement, and shall be imposed by the administrative authorities or labour tribunals.

- 1112.** With respect to item 5, concerning the deduction and subsequent withholding from the union of trade union dues, the Government states that the ILO indicates that workers and employers, without distinction whatsoever, shall have the right to establish and to join organizations without previous authorization (ILO Convention No. 87, Article 2).
- 1113.** The right of employers and workers to join trade unions is recognized under the national law. Legal status is acquired through registration (article 68 of the Political Constitution of the Republic of Panama). They may establish and join unions of workers and employers without authorization (section 335 of the Labour Code). The aforementioned article and section provide as follows:

*Political Constitution of the Republic*

*Article 68.* The right to organize is guaranteed to employers, employees and professionals of all categories for the purposes of their economic and social activity.

The Executive shall have a non-extendable period of thirty days within which to allow or reject the registration of a trade union.

The Act shall regulate all matters relating to the Executive's recognition of trade unions, whose legal status shall be determined by their registration.

The Executive shall be able to dissolve a trade union only in the event that it constantly departs from its purposes and where this is declared to be the case by the competent tribunal in the form of a final ruling.

The executive bodies of such associations shall be made up solely of Panamanians.

*Labour Code*

*Section 335.* Trade unions may be established without the need for authorization, and may be joined, by employers, workers, professionals and employees, regardless of the trade, profession or activity in which they are engaged.

It is important to emphasize that the State does not establish trade unions, and that what it is doing when it grants them legal status is to recognize a pre-existing reality. A union's legal status gives it the legal basis for acting as a grouping which represents the interests of its members.

- 1114.** The ILO states that organizations shall have the right to draw up their constitutions and rules, elect their representatives, organize their administration and activities and formulate their programmes. The authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof (Convention No. 87, Article 3).
- 1115.** Under the national law, the request for registration shall be processed free of charge and on ordinary paper (section 351 of the Labour Code). Requirements for registration: a request signed by the President or General Secretary; submission to the MITRADEL together with a certified copy of the constituent act, statutes and report of the corresponding meeting (section 352 of the Labour Code). The said sections read as follows:

*Section 351.* The registration of a trade union, federation, confederation or central workers' organization in the corresponding registers of the Ministry of Labour and Social Welfare shall determine its legal status. The formalities for the registration of a social organization shall be carried out on ordinary paper and shall not be subject to any charge.

*Section 352.* Acceptance of registration shall take place within a non-extendable period of fifteen calendar days, counted as from the date on which the Ministry receives the request for registration, in respect of which the following requirements shall apply:

1. The request must be signed by the president or general secretary of the trade union in the process of being established, or of the federation, confederation or central workers' organization in question.
2. It must be submitted to the General Directorate of Labour, either direct or through the labour authorities or highest political authority of the locality in question.
3. It must be accompanied by a certified copy of the constituent act and approved statutes, as well as of the minutes of the meeting or meetings in the course of which such approval was decided.

The constituent act shall be signed by the founder members of the trade union, or by persons mandated to that effect in the event of one or more founder members being unable to sign, and shall indicate the type of union, its legal address, number of members, and the first and family names and personal identity card number of each member of its executive body.

The Ministry of Labour and Social Welfare shall, within the fifteen-day period to which this article refers, check the personal identity card details recorded in the constituent act, of at least the minimum number of members required under section 344.

In the case of federations, confederations or central workers' organizations, the constituent act shall be signed by the representatives of the respective founder organizations and shall indicate their address, the name and address of all the member organizations and the first and family names and personal identity card number of each member of its executive body.

The aforementioned documentation shall be submitted in triplicate. One copy shall be returned to those concerned, duly certified as to the fact of its submission, including the date and time thereof. One copy shall remain in the registration office, and the remaining copy shall be used for processing purposes.

**1116.** The ILO states that workers' and employers' organizations shall not be liable to be dissolved by administrative authority (Convention No. 87, Article 4). Under the national law, the executive may not dissolve a trade union unless it has departed from its purposes and this has been declared to be the case by a competent tribunal in the form of a final ruling (article 68 of the Political Constitution of the Republic of Panama, the text of which is transcribed above). Such cases are dealt with through an abbreviated procedure in the labour courts of the judicial organ (section 393 of the Labour Code). This section provides as follows:

*Section 393.* The fining or dissolution of a social organization shall be effected through an abbreviated procedure, and may be requested by:

1. The Ministry of Labour and Social Welfare, in the case of a fine.
2. The Ministry of Labour and Social Welfare, in the cases referred to in sub-items 1 and 2 of the previous section.
3. The Ministry of Labour and Social Welfare, in the case foreseen in sub-item 3 of the previous section, provided a request to that end is submitted to it by a federation, confederation or central workers' organization.

**1117.** The Government states, with reference to the foregoing, that the Ministry of Labour handles any labour conflicts that are reported to it, in conformity with the Political Constitution of the Republic, the national standards, as well as the laws and the ILO Conventions that Panama has ratified.

**1118.** The Government gives its assurance that the actions of the national Government in this case have been in conformity with the procedures laid down in the national legislation, with respect for the international instruments it has ratified, making it difficult to understand how there can be reports of violations of the complainants' union rights.

**1119.** In its communication of 7 May 2008, the Government states, in relation to Case No. 2576, that, on the basis of the investigation carried out by the Ministry of Labour's General

Directorate of Labour, where the negotiation of a collective agreement or series of claims pertaining to a violation of the law is concerned, this may not be varied or altered under any circumstances by the Ministry, in accordance with the relevant provisions of the Labour Code. For the purposes of the matter under discussion, ILO Conventions Nos 87 and 98 are instruments forming part of the Labour Code and which the national Government respects and endeavours to apply in full, in consensus with the social partners.

- 1120.** More specifically, the Government states that, on 6 June 2006, the UNTAS presented a series of claims against the company G4S Valores and G4S SA alleging violation of the labour act and collective labour agreement. In response to those claims, the General Directorate of Labour of the MITRADEL initiated the corresponding procedure in accordance with the relevant legislation. Subsequently, with the conflict on the negotiating table, it was jointly agreed to put on record, on 6 September 2006, that the trade union had withdrawn its series of claims alleging violation of the labour act and collective agreement, and that the conflict was thus at an end.
- 1121.** Prior to the withdrawal of the series of claims in question, the company, on 31 August 2006, requested that the case be set aside owing to the fact that the union had abandoned the negotiations. In response to that request, the General Directorate of Labour, in its note No. 744-DGT-06 of 5 September 2006, stated that: “Even though the conciliation process has formally concluded, the Ministry, in its role as conciliator, continues to call on the parties in the interests of identifying solutions to those points of conflict that remain unresolved ...”
- 1122.** On 16 June 2006, the UNTAS once again presented a series of claims against G4S Valores with a view to the negotiation of a new collective agreement. In this respect, the General Directorate of Labour stated the following in one of the paragraphs of its note No. 516-DGT-06 of 20 June 2006: “during the period of validity of collective labour agreements, lists of claims aimed at introducing direct or indirect modifications or new clauses into the collective agreement shall not be accepted. The General or Regional Directorate of Labour is empowered to reject outright any such list deemed irreceivable under the terms of this provision”.
- 1123.** In the same context, on 23 September 2006 the UNTAS once again presented its series of claims against G4S Valores alleging violation of the act and collective agreement. On that same day, the General Directorate of Labour informed the union, by its note No. 810-DGT-06, that it was unable to initiate a procedure in response to the claims submitted, on account of the fact that: “it is contradictory for a dispute to be declared terminated or concluded and for there nevertheless to be reports of violations when there has not even been a reasonable amount of time for the occurrence of violations, agreements or legal obligations”.
- 1124.** Finally, on 9 October 2006, the union once again put forward the same dispute with the aforementioned company. In response to this, the General Directorate of Labour, by its note No. 833 of 17 October 2006, returned the document in question on the basis of the timing aspect, informing the union as follows in its communication:

By Note No. 810-DGT-06, we wrote to you explaining that we were unable to initiate a procedure in response to the claims you submitted on the afternoon of 6 September 2006.

Although you refused to receive that communication, it is noted that on 9 October at 13.00 hours you signed the note in question by way of acknowledgement of receipt, and then, only a matter of minutes later, at 13.50 hours, submitted a new series of claims alleging violations of the Labour Code and collective agreement.

In this regard, we would inform you that it is unacceptable to report violations when insufficient time has elapsed for any agreements to have been breached. We would also

observe that the decision to submit the list of complaints was taken in the course of an assembly allegedly held on 30 September 2006, when the procedure in respect of the claims submitted on 6 September 2006 was still in progress. Finally, we note that the document which contains or should contain the names and signatures of the workers supporting the list of claims appears to have been altered in the upper margin, thereby potentially undermining its authenticity.

In the light of the above considerations, we hereby return to you the claims documentation submitted on 9 October 2006.

**1125.** The actions of the national Government and Ministry of Labour in this case have been in conformity with the procedures laid down in the national labour legislation, with respect for the international instruments ratified, making it difficult to understand how there can be reports of violations of the complainants' union rights.

**1126.** From the documentation sent by the Government it emerges that, on 6 September 2006, the UNTAS and the company held a meeting and agreed on the withdrawal of the union's list of claims and the ending of the strike.

### **C. The Committee's conclusions**

**1127.** *The Committee observes that the complaint relates to: (1) allegations relating to the year 2006 and concerning the unlawful transfer, within the context of corporate restructuring, of 380 workers belonging to the Group 4 Securicor company a matter of days before collective bargaining was due to begin with the complainant union, the UNTAS, with the loss of a number of acquired rights; and the dismissal of dozens of workers following peaceful protests in October 2006, even before the judicial authority had ruled on the lawfulness or otherwise of the action (the judicial authority considered there to have been a "de facto work stoppage", but the Supreme Court of Justice currently has before it an appeal against that decision); (2)(a) allegations relating to the year 2007 to the effect that the company had ordered two of its workers to attack demonstrating trade unionists, at 3 a.m. on 16 February 2007, with the aim of forcing them to leave the company's property; according to the complainant union, there were eight assailants (two of whom were arrested and subsequently released) who seized money and belongings from the trade unionists, who were also threatened with a firearm by one of the assailants; one of the trade unionists was beaten and had to be hospitalized; (b) financial support provided by the company to a very small group of dissidents within the union who organized so-called elections which were certified by the Government; and (c) the failure (on the part of the company) to hand over to the union the trade union dues.*

**1128.** *The Committee takes note of the Government's extensive reply containing numerous extracts from the legislation in force but which does not, however, provide sufficient clarifications on the majority of the allegations.*

**1129.** *As regards the alleged transfer of 380 workers with the loss of a number of acquired rights in August 2006, prior to the commencement of negotiations with the company on the restructuring, the Committee notes the Government's information that the parties came to an agreement on 6 September 2006 whereby the strike was ended and the UNTAS union withdrew its list of complaints. The Committee has no information as to whether – or not, as the complainant organizations allege – the aforementioned August 2006 transfers were preceded by consultations or negotiations. However, inasmuch as the parties came to an agreement in September 2006 whereby the strike was ended, the Committee will not pursue its examination of these allegations.*

**1130.** *As regards the allegations concerning the dismissal of dozens of workers following peaceful protests organized by the UNTAS as from 6 September 2006, with a slowdown in*

*the pace of work, the Committee observes that according to the allegations the judicial authority did not accede to the company's request for a suspension of the trade union immunity of the union officials Mr Cubilla, Mr Adamson and Mr Aguilar, and that the company allegedly prevented those officials from working their shifts. The Committee has received no observations from the Government in respect of these three officials, other than a reference to the legal provisions governing trade union immunity (which facilitate the submission of judicial complaints); it requests the Government to ensure that they have been able to return to their posts of work under normal conditions and that it keep the Committee informed in that regard. As regards the other dismissals of trade unionists allegedly associated with the aforementioned peaceful protest, the Committee observes that the Government confines itself to stating that the matter of the dismissals falls within the sole competence of the Ministry of Labour, that the legislation provides for measures designed to protect trade union immunity against unfair practices and dismissals which alter the proportion of unionized workers (section 388(7) of the Labour Code), and that the union was entitled to file judicial complaints. The Committee requests the Government to provide it with a copy, as soon as it is handed down, of the judgement of the Supreme Court of Justice, as referred to by the complainant organizations, in regard to the various measures taken by the company and the question of whether the workers held a "de facto work stoppage", and that the Government provide it with specific information in regard to the alleged anti-union nature of the dozens of dismissals that occurred during the restructuring, affecting (judging by the allegations) a large number of trade unionists and thereby weakening the union, and that it likewise provide it with any judgement which the courts may have handed down in relation to those dismissals. The Committee requests the Government to keep it informed in this respect.*

- 1131.** *As regards the alleged failure by the company to hand over to the union the dues paid by its members (allegations relating to 2007), the Committee notes that the Government makes no specific reference to this matter but mentions legal provisions relating to the right to organize and to the registration and dissolution of trade unions. The Committee requests the Government to provide it with detailed information on the aforementioned allegation and to ensure that the relevant legislation in regard to check-off facilities for union members' dues is complied with by the company.*
- 1132.** *As regards the other matters, namely the alleged: (1) violent assault on and robbery of trade unionists exercising their right to protest, by individuals having received orders from the company management to get rid of them, resulting in one worker having to be hospitalized; (2) financial support from the company for the creation of a trade union; and (3) threats of civil and penal sanctions against trade unionists having participated in peaceful demonstrations, the Committee observes that the Government once again confines itself to stating that these are issues falling solely within the competence of the Ministry of Labour, that the legislation provides for measures for affording protection against unfair practices and acts of interference on the part of employers, and that the union had the right to file judicial complaints. The Committee requests the Government to send it specific information on these allegations, which in and of themselves would have called for an investigation on the part of the labour inspectorate, and, in the hope that it will receive such detailed information without delay, requests the Government to take the necessary steps to transmit it. The Committee points out that the complainant organizations refer to the unlawful certification (recognition) of the trade union elections conducted by a very small group of dissidents, and to the granting by the company of financial support to nine of them. Thus, in the absence of specific information from the Government in that regard, it is not known whether the union's new executive committee has dislodged the one which submitted the complaint to the Committee. The Committee requests the Government to provide it with clarification in that respect. Moreover, the Committee requests the Government to indicate whether the trade union organizations affected and the dismissed trade union leaders have instituted additional judicial action.*

**1133.** *As regards the request by the complainant organizations for the union to be able to participate in a constructive and comprehensive dialogue with the company, the Committee has already taken note of the Government's explanations regarding the series of claims filed by the UNTAS union on 6 June 2006, and of the withdrawal of those claims on 6 September 2006 by common agreement of the parties (the company and the union); it also notes that, according to the Government, the Ministry of Labour had previously, in June, rejected those claims in accordance with the legislation, since a collective agreement was in force. The Committee observes that the Government states that on 9 October 2006 the series of claims was resubmitted and that the Ministry of Labour refused to receive it on account of doubts as to the authenticity of the signatures and of its having been submitted on 9 October 2006, only minutes after the union having been informed that its request of 6 September 2006 could not be processed. The Committee invites the Government to provide it with information on any measures taken as from November 2006 to give effect to the union's request for the implementation of collective bargaining.*

### **The Committee's recommendations**

**1134.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) The Committee requests the Government to ensure that the union officials Mr Cubilla, Mr Adamson and Mr Aguilar have returned to their posts of work under normal conditions and that it keep the Committee informed in that regard.*
- (b) The Committee requests the Government to send it: (1) the judgement of the Supreme Court of Justice in regard to the various measures taken by the Group 4 Securicor company and the question of whether the workers held a "de facto work stoppage"; (2) specific information in regard to the alleged anti-union nature of the dozens of dismissals that occurred during the restructuring of the Group 4 Securicor company with a view, according to the allegations, of weakening the union, as well as any judgement which the courts may have handed down in relation to those dismissals; and (3) information on whether the trade union organizations affected and the dismissed trade union leaders have instituted additional judicial action.*
- (c) The Committee requests the Government to ensure that the relevant legislation in regard to check-off facilities for union members' dues is complied with by the company.*
- (d) The Committee requests the Government to take the necessary steps to send its specific observations concerning the allegations relating to: (1) the violent assault on and robbery of trade unionists exercising their right to protest in front of the company by individuals allegedly having received orders from the management to get rid of them, resulting in one worker having to be hospitalized; (2) the financial support provided by the company for the creation of a trade union; and (3) the threats of civil and penal sanctions against trade unionists having participated in peaceful demonstrations.*
- (e) The Committee requests the Government to provide clarifications in regard to the alleged certification (recognition) of the trade union elections*

*involving a very small group of dissidents from the union, to whom the company allegedly provided financial support, and to inform it whether the executive committee resulting from those elections has dislodged the one which filed the present case.*

- (f) *The Committee invites the Government to provide it with information on any measures taken as from November 2006 to give effect to the union's request for the implementation of collective bargaining.*

CASE NO. 2628

DEFINITIVE REPORT

**Complaint against the Government of the Netherlands  
presented by**

- **the employers' organization Altro Via (Algemene trendsettende ondernemersvereniging via internet aanmelding) and**
- **the workers' organization LBV (Landelijke Bedrijfsorganisatie Verkeer)**

*Allegations: Denial of freedom of association and the right to organize of new and smaller unions and employers' organizations; governmental interference with the formation of collective labour agreements; restriction of the right to bargain collectively*

- 1135.** The complaint is contained in joint communications from the employers' organization Altro Via, and the workers' organization LBV, dated 22 February 2008 and 18 March 2008.
- 1136.** The Government sent its observations in a communication dated 23 May 2008.
- 1137.** The Netherlands has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Collective Bargaining Convention, 1981 (No. 154).

**A. The complainants' allegations**

- 1138.** In its communication dated 22 February 2008, Altro Via (an employers' organization) and LBV (a workers' organization) allege that a government decree, which entered into force on 1 January 2007, modified the Reference Framework for Declaring Collective Labour Agreements to be Generally Binding, and thereby denied the freedom of association and collective bargaining rights of new and smaller unions and employers' organizations.
- 1139.** The complainants state that the January 2007 decree was the outcome of a questionnaire sent by the Ministry of Social Affairs and Employment to unions and employers' organizations – members of the Labour Foundation, the Government's advisory body on social affairs. Third parties, i.e. non-members of the Labour Foundation, including Altro Via and LBV, protested against the decree by sending a letter to the Ministry where they argued that seeking advice from the Labour Foundation amounted to asking the monopolists to search for arguments to strengthen their monopoly.

- 1140.** By way of the legislative history, the complainants explain that the collective bargaining process in the Netherlands is governed by the 1927 Collective Labour Agreements Act (hereinafter, the CLA Act), and the 1937 Collective Labour Agreements Declaration of Universally Binding and Non-binding Status Act (hereinafter, the AVV Act). According to the legislation, any social party can be engaged in voluntary collective bargaining and conclude a collective agreement. The signed collective agreement is sent to the Ministry of Social Affairs and Employment, which then declares a collective agreement legally binding for the social partners and the workers of the companies which are members of the employers' organizations. Parties, who have already concluded a legally effective collective agreement before an order declaring the universally binding status is issued, may apply to the Minister for an exemption from the order. According to the complainants, at least since the 1990s, the Minister has adhered to the policy of granting an exemption where an employer or subsector is already bound to a company or a subsector collective agreement, as the case may be. Previously, the Minister refused to grant an exemption only where one of the contracting parties was not an independent trade union. Under the new January 2007 decree, when the exemption is refused, the Minister can declare void a collective agreement between a smaller workers' union and a smaller employers' organization if he or she concludes that the "specific characteristics" of the smaller organizations are the same as those of the companies to which a national collective agreement would apply. This is also the case when the collective agreement between the smaller organizations is contracted and relied upon before the universally binding agreement is finalized.
- 1141.** According to the complainants, the collective agreement between Altro Via and LBV is a case in point. A collective agreement for the road transport sector covering 40 companies was concluded between the complainants for January 2007–December 2008. The agreement was sent to the Minister of Social Affairs and Employment, who declared it legally binding on the parties on 3 May 2007. Some companies and workers have relied upon this agreement since April 2003, when the Minister exempted over ten collective agreements concluded between Altro Via and LBV from the universally applicable agreement. On 25 July 2007, when an application for declaring a national collective agreement universally binding, Altro Via and LBV applied for an exemption. However, on 10 October 2007, the Minister refused to grant an exemption and justified the refusal on grounds that the activities of the companies to which the collective agreement between Altro Via and LBV applied were no different from the companies that were to apply the national binding collective agreement. In practice, that meant that members of Altro Via had to apply the national collective agreement as from 10 October 2007. On 20 November 2007, the complainants petitioned the Minister of Social Affairs and Employment to reconsider his decision not to grant an exemption. On 22 February 2008, the Minister declared the complainants' objections unfounded and denied the petition. The complainants transmit a copy of this decision.
- 1142.** The complainants maintain that the Minister's refusal to grant an exemption violates Convention No. 87. According to the complainants, the "specific characteristics" clause of the AVV Act, as amended by the January 2007 decree, denies the right of new and smaller unions and employers' organizations to freely conclude collective agreements. The denial undermines the main purpose for the existence of these organizations and threatens to ultimately lead to their dissolution. The complainants also claim that the decree violates Convention No. 98 and Convention No. 154, in so far as it hampers the development of machinery for voluntary negotiations between employers' and workers' organizations. At least, the encouragement and promotion is limited to the established unions and employers' organizations. According to the complainants, instead of complying with its duty to promote and encourage voluntary negotiations, the Government issues measures that discourage the creation of collective agreements.

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**B. The Government's reply**

- 1143.** In its communication of 23 May 2008, the Government maintains that the regulations and procedure in the Netherlands are not contrary to ILO Conventions Nos 87, 98 and 154.
- 1144.** By way of factual background, the Government states that Altro Via and LBV have concluded a legally effective collective agreement with 40 road transport businesses under its scope. Other (larger) employers' and employees' organizations have also concluded a legally effective collective agreement for the same sector with approximately 6,500 businesses under its scope. The larger employees' and employers' organizations applied for an order declaring their collective agreement universally binding. When the order was granted their collective agreement became binding for all employers and employees in that branch of the industry, including those in the 40 businesses associated with Altro Via and LBV. Altro Via and LBV requested an exemption from the order declaring universally binding status so that their own collective agreement could continue to apply to the businesses associated with them. The request was rejected because the specific characteristics of the businesses concerned did not differ significantly from those of the remaining business in that branch of the industry.
- 1145.** The Government states that in the Netherlands, freedom of association is a fundamental right under the Constitution. Furthermore, Dutch legislation and regulations contain no provisions which specifically regulate the right of employers and employees to associate or which restrain this right in any way. Organizations are free to adopt a certain legal form and regulate their own internal affairs. Only where employees' or employers' organizations wish to act as party to a collective agreement, two requirements apply: full legal capacity and the authority pursuant to their constitution to conclude collective agreements. Determining the content of and concluding collective agreements is also a matter for employees and employers alone. Only when parties to a collective agreement apply for an order declaring the universally binding status of its provisions, do the authorities have a role to play. The order declaring universally binding status, whereby the scope of the provisions of the collective agreement is extended to unorganized employers and employees, has been applicable in the Netherlands since 1937 and is intended to counter distortion of competition as to the terms and conditions of employment by employers and employees who are not bound by the collective agreement. This provides support and protection to collective consultation and promotes balanced employment relationships and harmony.
- 1146.** Under the CLA Act a collective agreement is an agreement entered into by one or more employers, or one or more associations of employers with full legal capacity and one or more associations of employees with full legal capacity. A collective agreement mainly regulates the terms and conditions of employment which must be observed in contracts of employment. The collective agreement is binding on every person who during its term is or becomes a member of the employers' or employees' associations that have entered into the agreement. Another important provision is that an employer bound by a collective agreement is also bound to comply with the provisions of the collective agreement in employment relationships with employees who, because they are not members of the employees' association or associations concerned, are not directly bound by the collective agreement.
- 1147.** Pursuant to the AVV Act, the Minister of Social Affairs and Employment is authorized to declare a collective agreement universally binding if it applies to the majority of persons employed in a certain branch of the industry. The collective agreement's provisions are then binding on all employers and employees in that branch of the industry, including those who were not originally bound by the collective agreement. Interested parties may raise objections to the application for universally binding status, which are then taken into

account in the decision-making process. Furthermore, parties who have concluded another legally effective collective agreement, before an order declaring the universally binding status is issued, may submit an application for exemption from the order to the Minister of Social Affairs and Employment.

- 1148.** Concerning the granting of an exemption, the Government explains that, as far as possible, parties to a collective agreement should themselves regulate exclusions for businesses and subsectors. This can be done directly by excluding certain businesses and subsectors from the agreement, or indirectly through defining the scope of the agreement. In so far as exclusions are not regulated by the parties of the collective agreement, the Minister of Social Affairs and Employment can use his or her authority to grant an exemption to certain businesses or subsectors. An exemption is granted by the Minister, if due to compelling arguments, the application of the provisions of a collective agreement that is to be declared universally binding for a branch of the industry, cannot reasonably be required of certain businesses or subsectors. Compelling arguments exist in particular if the specific characteristics of the business or subsector differ on essential points from those to which the universally binding agreement is to apply. It is also required that the parties applying for an exemption have themselves concluded a legally effective collective agreement, and that they are independent with respect to each other. The rationale behind this latter requirement is to prevent employees' organizations from being placed under pressure to conclude a separate collective agreement by which they would fall outside the scope of the provisions of the universally binding collective agreement in that branch of the industry.
- 1149.** The Government further maintains that the regulations are in compliance with ILO Collective Agreements Recommendation No. 91 of 29 June 1951, which recognizes the possibility of extending the application of the provisions of a collective agreement beyond the original parties, if certain requirements are met. In order to be eligible for an order declaring universally binding status it is required that the provisions of the collective agreement apply to a significant majority of the persons employed in a certain branch of industry; the request must be submitted by one or more parties to the collective agreement; and interested parties can put forward objections which are then taken into account in the decision-making process.
- 1150.** It is inherent to the application of these rules that provisions of a collective agreement which apply to the majority of persons employed in a certain branch of the industry will also apply to employers and employees not belonging to that majority. In the situation where another collective agreement is concluded for the latter group of employers and employees, this will mean that not all the provisions of that collective agreement will retain their effectiveness. To what extent this will be the case depends on the contents of the two collective agreements. If the collective agreement the provisions of which are declared universally binding contains minimum provisions, the provisions of the other collective agreement will continue to be effective in so far as they are more favourable. If, however, the collective agreement the provisions of which are declared universally binding contains more favourable conditions than the other collective agreement, the order declaring universally binding status will result in these more favourable conditions applying across the board for all employers and employees in the branch of the industry.
- 1151.** The Government maintains that the application of regulations concerning universally binding agreements does not prejudice the right to collective negotiations of employers' and employees' organizations, other than the organizations, party to the collective agreement, the provisions of which are declared universally binding. According to the Government, during the course of time, employers' and workers' organizations, within the same branch of industry, have successfully concluded separate collective agreements.

**1152.** According to the Government, the January 2007 decree changes the procedure for granting the exemption, but does not undermine its nature or efficacy. Prior to January 2007, the exemption was granted more or less automatically in those cases where the applicants were already bound by a collective agreement by the time the order for universally binding status was issued. The Government claims that developments in domestic case law gave rise to the view that a decision open to objection and appeal, such as the one to grant an exemption, should not be automatic but based on certain guidelines. As of 1 January 2007, exclusion is granted only where clearly specific characteristics of the subsector or undertaking render the application of the universally binding collective agreement to that undertaking or subsector unreasonable. As explained, and contrary to the complainants' allegations, this criterion does not breach the collective bargaining rights of the smaller workers' and employers' organizations.

### **C. The Committee's conclusions**

**1153.** *The Committee notes that this case concerns the issue of extension of collective agreements. From the information submitted by the complainants, Altro Via (an employers' organization) and LBV (a workers' organization), and the Government, the Committee understands that according to the legislation in force, the 1927 Collective Labour Agreements Act (CLA Act), and the 1937 Collective Labour Agreements Declaration of Universally Binding and Non-binding Status Act (AVV Act), any social party can be engaged in voluntary collective bargaining and conclude a collective agreement. Once signed, collective agreements are sent to the Ministry of Social Affairs and Employment, which then declares a collective agreement legally binding. The Minister of Social Affairs and Employment is authorized to declare a collective agreement universally binding if it applies to the majority of persons employed in a certain branch of the industry. However, parties who have concluded another legally effective collective agreement, before an order declaring the universally binding status is issued, may submit an application for exemption from the order to the Minister of Social Affairs and Employment. Prior to January 2007, the exemption was granted more or less automatically in those cases where the applicants were already bound by a collective agreement by the time the order for universally binding status was issued with regard to another collective agreement and when independence of a trade union, party to the collective agreement, was established. Following the amendments of January 2007 of the AVV Act, exclusion is granted only where clearly specific characteristics of the subsector or undertaking render the application of the universally binding collective agreement to that undertaking or subsector unreasonable.*

**1154.** *The collective agreement between Altro Via and LBV is a case in point. The factual information submitted thereon by the complainants is not disputed by the Government. Altro Via and LBV have concluded a legally effective collective agreement with 40 road transport businesses under its scope. Other (larger) employers' and employees' organizations have also concluded a legally effective collective agreement for the same sector with approximately 6,500 businesses under its scope and applied for an order declaring their collective agreement universally binding. When this collective agreement became binding for all employers and employees in that branch of the industry, including those in the 40 businesses associated with Altro Via and LBV, the two latter organizations requested an exemption from the order declaring universally binding status so that their own collective agreement could continue to apply to the businesses associated with them. The request was rejected because the specific characteristics of the businesses concerned did not significantly differ from those of the other businesses in that branch of the industry.*

**1155.** *According to the complainants, the "specific characteristics" clause of the AVV Act, as amended by the January 2007 decree, denies the right of new and smaller unions and employers' organizations to freely conclude collective agreements and is therefore not in*

conformity with Conventions Nos 87, 98 and 154. The denial undermines the main purpose for the existence of these organizations and threatens to ultimately lead to their dissolution. The complainants also indicate that the amendments to the AVV Act were adopted taking into account only the opinion of those workers' and employers' organizations, which are represented at the Labour Foundation, the Government's advisory body on social affairs.

- 1156.** *The Government maintains, however, that the procedure described above does not prejudice the right of workers' and employers' organizations to bargain collectively and is in compliance with ILO Recommendation No. 91, which recognizes the possibility of extending the application of the provisions of a collective agreement beyond the original parties. In order to be eligible for an order declaring universally binding status it is required that the provisions of the collective agreement apply to a significant majority of the persons employed in a certain branch of industry; the request must be submitted by one or more parties to the collective agreement; and interested parties can put forward objections which are then taken into account in the decision-making process.*
- 1157.** *Concerning the granting of an exemption, the Government explains that, as far as possible, parties to a collective agreement should themselves regulate exclusions for businesses and subsectors by either explicitly excluding them from the agreement, or through defining the scope of the agreement. In so far as exclusions are not regulated by the parties of the collective agreement, the Minister of Social Affairs and Employment can grant an exemption upon request, if due to compelling arguments, the application of the provisions of a collective agreement that is to be declared universally binding for a branch of the industry, cannot reasonably be required of certain businesses or subsectors. Compelling arguments exist in particular if the specific characteristics of the business or subsector differ on essential points from those to which the universally binding agreement is to apply. It is also required that the parties applying for an exemption have themselves concluded a legally effective collective agreement, and that they are independent with respect to each other. The rationale behind this latter requirement is to prevent employees' organizations from being placed under pressure to conclude a separate collective agreement by which they would fall outside the scope of the provisions of the universally binding collective agreement in that branch of the industry. It is inherent to the application of these rules that provisions of a collective agreement which apply to the majority of persons employed in a certain branch of the industry will also apply to employers and employees not belonging to that majority. In the situation where another collective agreement is concluded for the latter group of employers and employees, this will mean that not all the provisions of that collective agreement will retain their effectiveness. To what extent this will be the case depends on the contents of the two collective agreements. If the collective agreement the provisions of which are declared universally binding contains minimum provisions, the provisions of the other collective agreement will continue to be effective in so far as they are more favourable. If, however, the collective agreement the provisions of which are declared universally binding contains more favourable conditions than the other collective agreement, the order declaring universally binding status will result in these more favourable conditions applying across the board for all employers and employees in the branch of the industry.*
- 1158.** *The Committee notes the explanations provided by the parties. It recalls that the specific question of the extension of collective agreements is addressed in the Collective Agreements Recommendation, 1951 (No. 91). According to Paragraph 5 of the Recommendation:*
- (1) *Where appropriate, having regard to established collective bargaining practice, measures, to be determined by national laws or regulations and suited to the conditions of each country, should be taken to extend the application of all or certain*

*stipulations of a collective agreement to all the employers and workers included within the industrial and territorial scope of the agreement.*

- (2) *National laws or regulations may make the extension of a collective agreement subject to the following, among other, conditions:*
- (a) *that the collective agreement already covers a number of the employers and workers concerned which is, in the opinion of the competent authority, sufficiently representative;*
  - (b) *that, as a general rule, the request for extension of the agreement shall be made by one or more organisations of workers or employers who are parties to the agreement;*
  - (c) *that, prior to the extension of the agreement, the employers and workers to whom the agreement would be made applicable by its extension should be given an opportunity to submit their observations.*

**1159.** *The Committee considers that the system which has been in place in the Netherlands since 1937 is in conformity with the principles and conditions enunciated in the Recommendation. It notes, in addition, that the system had never been criticized by the Committee of Experts on the Application of Conventions and Recommendations.*

**1160.** *The Committee recalls that in previous cases concerning the issue of extension of collective agreements, it had considered that the extension of an agreement to an entire sector of activity contrary to the views of the organization representing most of the workers in a category covered by the extended agreement was liable to limit the right of free collective bargaining of that majority organization and that this system made it possible to extend agreements containing provisions which might result in a worsening of conditions of work of the category of workers concerned [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 1053]. The present case, however, raises a different issue and concerns the right of smaller (not majority) trade unions and employers' organizations representing particular enterprises or subsectors not only to negotiate their own collective agreements, but also be excluded from the industry level/national agreements which may be declared applicable erga omnes. The Committee notes that according to the system, as amended in January 2007, such organizations continue to enjoy this right either by being excluded by a specific provision in the extended agreement or by the Minister of Social Affairs and Employment, upon a request of an interested party. In the latter case, specific characteristics of an enterprise or subsector would permit the exclusion from the extended agreement. In such cases, the collective agreements negotiated between smaller trade unions and employers' organizations would be applicable. Moreover, from the explanations provided by the Government, more favourable provisions contained in such collective agreements would remain in force even if another collective agreement has been declared universally applicable and exclusion has not been granted. In these conditions, the Committee concludes that the changes introduced to the AVV Act in January 2007 are not in violation of the principles of freedom of association and collective bargaining and therefore considers that this case calls for no further examination.*

### **The Committee's recommendation**

**1161.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to decide that the present case does not call for further examination.*

CASE NO. 2594

INTERIM REPORT

**Complaint against the Government of Peru  
presented by  
the Latin American Central of Workers (CLAT)**

***Allegations: The complainant organization alleges dismissals, threats of dismissal and other acts of intimidation following the establishment of a trade union at Panamericana Televisión SA (now called Panam Contenidos SA)***

- 1162.** The complaint is contained in a communication from the Latin American Central of Workers (CLAT) dated 17 September 2007.
- 1163.** The Government sent its observations in a communication dated 3 March 2008.
- 1164.** Peru has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. The complainant's allegations**

- 1165.** In its communication dated 17 September 2007, the CLAT states that it is submitting a complaint because Convention No. 87, which has been ratified by Peru, has been violated by Panamericana Televisión SA (now called Panam Contenidos SA). Specifically, it states that, since the appointment of the receiver of Panamericana Televisión SA (which has now adopted the corporate name Panam Contenidos SA) in February 2003, labour standards and laws have been violated: workers' wages are not being paid and summary dismissals are being carried out. The complainant alleges that since the arrival of the new management an anti-labour policy has been applied and trade unionists have been harassed. This has led to delays in paying wages: the majority of staff have not been paid for an average of five-and-a-half months, six bonuses prior to 2005, as well as unused leave in 2006, overtime, and pay for special assignments, such as elections and independence day were not paid. Furthermore, the management stopped paying social security and pension fund contributions, even though it continued to deduct these from workers' wages, and never provided workers with payslips; they were made to sign only a simple receipt which remained in the hands of the management. According to the complainant, the company verbally acknowledged its debt, offering to pay it off with products, appliances and services, or loans in urgent cases, which, however, did not materialize.
- 1166.** The complainant indicates that, in 2005, the workers, confronted with so many labour problems, decided to establish a new trade union, and asked Ms María Vilca Peralta, Ms Ana María Sihuay and Ms Carmen Mora to assume the leadership of the project. The complainant alleges that having the workers organized in a trade union did not suit the company and led to the dismissal of those who had taken on the challenge of setting up the trade union. The complainant states that, on 27 April 2006, the workers in question appealed to the Ministry of Labour and Employment Promotion, which ordered an inspection. The Deputy Director of Guidance and the inspectors, far from protecting the workers' rights, questioned their statements and consistently showed a passive and

complacent attitude towards the company. In July 2006, another inspection of Panamericana Televisión SA was carried out. According to the workers, they were threatened on that occasion with dismissal by the company's lawyers if they reported irregularities. Some of them, through fear of being dismissed, kept quiet about what was really happening in the company. Time passed and nothing happened. More than a year has now passed and nothing is known of the assessment carried out by the Ministry of Labour and Employment Promotion. No authority from the Ministry has commented on the matter.

- 1167.** The complainant indicates that the workers initiated judicial proceedings, requesting payment of the various arrears owed to them. According to the complainant, the legal representative of Panamericana Televisión S.A, in order to avoid making any payments, signed an agreement with Panam Contenidos SA to transfer control of the finances of both companies to the latter; the arrears owed to the workers of Panamericana Televisión SA thus cannot be paid because Panam Contenidos SA controls the accounts. By creating new accounts in the banking system, Panamericana Televisión SA left itself without funds.
- 1168.** The complainant alleges that on Friday, 23 December 2005, the workers held a peaceful protest in Arequipa Avenue. In response, the TV channel's management tried to identify the organizers of the protest, started monitoring electronic mails and telephone conversations, and began questioning people at work. The failure to pay continued and, on 26 April 2006, the press workers carried out another peaceful protest outside the channel's headquarters. In response, the company accused 16 employees, more than half of whom were on the payroll, of being the instigators and organizers of the complaints against the company and leaders of the attempt to set up a trade union. The following day, in retaliation, the company decided to scare the workers by forcing them to take leave. They never returned to normality at work; they were verbally abused by the head of human resources, who described them as "terrorists and unionists" and threatened to refer the complaints to the Cono Norte court. All this occurred in the presence of the police.
- 1169.** The complainant adds that the Press Director prohibited the workers in question from entering the building on Arequipa Avenue. He also forbade the press staff to talk to any of the workers on pain of suspension without pay (which he enforced in one case). Finally, he removed their names from the payroll at a time when the company was continuing to give assurances that they were only on leave. Although they were owed arrears of wages, no one from that moment on assumed responsibility for paying them what they were owed because they were not listed on any payroll, having been dismissed illegally without any compensation.
- 1170.** The complainant alleges that, on 5 June 2006, the company, without any explanation, summarily dismissed María Vilca Peralta (producer of "Buenos Días Perú"), Fanny Quino (editor of "24 Horas"), Liliana Sierra (web page editor), Guillermo Noriega (coordinator of "Buenos Días Perú"), Eveling Kahn (news presenter) and Laura Chahud (news service reporter). Likewise, Carmen Mora (producer of "24 Horas Mediodía"), Ana María Sihuay (editor of "24 Horas Mediodía"), Enrique Canturin (microwave technician), Carlos Mego (news cameraman) and Rafael Saavedra (archives chief) were redeployed to posts unrelated to their professions, which constitutes psychological and moral abuse.
- 1171.** The complainant adds that, in the hope of finding a solution faced with such egregiously bad management, the workers who had taken on the leadership of the trade union sent a letter, dated 31 January 2007, to the presiding judge of the High Court of Lima Norte, requesting that he demand a detailed report into how the complaints against Panamericana Televisión SA were being handled, and an investigation into the dozens of complaints from all over the country of summary dismissal under the present management. Letters were also sent on 20 February 2007, through the Presidential Office, to the president of the

Congress, the chairpersons of the congressional Labour and Human Rights Committees, among others. No reply has been received to date.

**1172.** Finally, the complainant states that, faced with various ploys, the workers once again had to resort to direct action to get their wages paid. This time they carried out a strike and, as a result, the most important news programmes, “24 Horas” and “Buenos Días Perú”, did not go on the air. This happened on Thursday 23 August 2007, exactly one year and four months after the summary dismissal on 26 April 2006. On this last occasion, the press director of Canal 5 accepted that the workers had not been paid and stated that it was understandable and fair that the workers should ask to be paid what they are owed.

## **B. The Government’s reply**

**1173.** In its communication dated 3 March 2008, the Government states that according to information provided by the Regional Labour Directorate of the Ministry of Labour and Employment Promotion, a total of 69 inspection visits have been planned for the company, which now operates under the name of Panam Contenidos SA. Those inspections have been hindered by the employer and the authorities have been forced to request the support of the police in accordance with legislation.

**1174.** The Government adds that under the terms of section 46 of Supreme Decree No. 019-2006-TR (the regulations of the Labour Inspection Act), any unfounded refusal to allow inspections, or attempts to prevent inspection supervisors, labour inspectors, assistant inspectors or officially appointed experts or technicians responsible for carrying out an inspection, from entering into or remaining in a place of work or specific areas thereof, are serious offences. Fines have accordingly been imposed on the company Panam Contenidos SA. Furthermore, the enforcement department of the Regional Labour Directorate has brought eight separate actions against the company for failing to pay fines.

## **C. The Committee’s conclusions**

**1175.** *The Committee observes that, in the present case, the complainant states that since the appointment of the receiver of Panam Contenidos SA (formerly Panamericana Televisión SA) in February 2003, an anti-labour and anti-union policy has been applied; confronted with so many labour problems, the workers decided to establish a trade union in 2005 and asked Ms María Vilca Peralta, Ms Ana María Sihuay and Ms Carmen Mora to assume the leadership of the trade union. The complainant alleges that: (1) in December 2005 and April 2006, the workers held peaceful protests in Arequipa Avenue and outside the channel’s headquarters; the company’s management tried to identify the organizers of the protests and, to that end, monitored electronic mail and telephone conversations; finally, 16 workers were identified as the instigators and it was decided to scare them using various methods; (2) because they had organized a trade union, the company dismissed María Vilca Peralta, Fanny Quino, Liliana Sierra, Laura Chahud and Guillermo Noriega, and transferred the following employees to posts unrelated to their professions: Carmen Mora, Ana María Sihuay, Enrique Canturín, Carlos Mego and Rafael Saavedra; and (3) as a result of a request from the workers to the Ministry of Labour and Employment Promotion, an inspection of the company was carried out, but the inspectors showed a passive and complacent attitude towards the company and, prior to an inspection in July 2006, the company threatened with dismissal any workers who reported irregularities.*

**1176.** *The Committee notes the Government’s statements to the effect that: (1) the Regional Labour Directorate of the Ministry of Labour and Employment Promotion provided information that, to date, a total of 69 inspection visits have been planned for the company*

*in question, as those inspections have been hindered by the employer, the National Inspections Directorate has been forced to request the support of the police in accordance with the legislation; (2) according to section 46 of Supreme Decree No. 019-2006-TR (the regulations of the Labour Inspection Act), any unfounded refusal to allow inspections, and any attempts to prevent inspection supervisors, labour inspectors, assistant inspectors, or officially appointed experts or technicians responsible for carrying out an inspection, from entering or remaining in a place of work or specific areas thereof, are serious offences, and Panam Contenidos SA has accordingly been fined; and (3) the enforcement department of the Regional Labour Directorate has brought eight separate actions against the company for failing to pay the fines.*

- 1177.** *In this respect, the Committee observes that the Government has not sent its observations in relation to the alleged anti-union dismissals and transfers following the establishment of a trade union in Panam Contenidos SA. Instead it has limited itself to providing information on the difficulties encountered in carrying out inspections of the company. The Committee recalls that anti-union discrimination is one of the most serious violations of freedom of association, as it may jeopardize the very existence of trade unions, and that no person should be dismissed or prejudiced in employment by reason of trade union membership or legitimate trade union activities, and it is important to forbid and penalize in practice all acts of anti-union discrimination in respect of employment [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, paras 769 and 771].*
- 1178.** *The Committee regrets the time that has passed since the alleged dismissals and transfers took place, apparently without any possibility of investigating whether the allegations are true or adopting measures to redress the situation, if necessary. The Committee further regrets the uncooperative attitude of the company, which, according to the Government, has prevented labour inspections from being carried out. In these circumstances, the Committee urges the Government to take measures, without delay, so that an investigation takes place at the enterprise with regard to the alleged dismissals, transfers and other anti-union acts that have reportedly been carried out since the establishment of the trade union, and to inform it of the outcome of that investigation. Furthermore, the Committee requests the Government, if the allegations in question are shown to be valid, to take the necessary measures needed to ensure that the workers who were dismissed and redeployed for anti-union reasons are reinstated in their posts and paid the wages and other benefits owed to them.*

### **The Committee's recommendation**

- 1179.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendation:*

***The Committee urges the Government to take measures without delay so that an investigation takes place at Panam Contenidos SA with regard to the alleged dismissals, transfers and other anti-union acts that have reportedly been carried out since the establishment of the trade union, and to inform it of the outcome of that investigation. Furthermore, the Committee requests the Government, if the allegations in question are shown to be valid, to take the necessary measures to ensure that the workers who were dismissed and redeployed for anti-union reasons are reinstated in their posts and paid the wages and other benefits owed to them.***

CASE NO. 2528

INTERIM REPORT

**Complaint against the Government of the Philippines  
presented by  
the Kilusang Mayo Uno Labor Center (KMU)**

***Allegations: the complainants allege killings, grave threats, continuous harassment and intimidation and other forms of violence inflicted on leaders, members, organizers, union supporters/labour advocates of trade unions and informal workers' organizations who actively pursue their legitimate demands at the local and national levels***

- 1180.** The Committee already examined the substance of this case at its May–June 2007 meeting, when it presented an interim report to the Governing Body [346th Report, paras 1429–1462 approved by the Governing Body at its 299th Session (June 2007)].
- 1181.** The Government provided its observations in communications dated 31 August 2007, and 9 and 16 January 2008.
- 1182.** The Philippines has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. Previous examination of the case**

- 1183.** At its June 2007 session, in the light of the Committee's interim conclusions, the Governing Body approved the following recommendations:
- (a) The Committee deplors the gravity of the allegations made in this case and the fact that more than a decade after the filing of the last complaint on similar allegations, inadequate progress has been made by the Government with regard to putting an end to killings, abductions, disappearances and other serious human rights violations which can only reinforce a climate of violence and insecurity and have an extremely damaging effect on the exercise of trade union rights.
  - (b) The Committee requests the Government to:
    - (i) keep it informed of the progress of the investigation to be carried out by the special joint fact-finding body concerning the killings of trade union leaders and members and, in particular, steps taken to investigate the murders alleged by the complainant which are listed in Appendix I. The Committee firmly trusts that the investigation and trials will proceed without delay and in full independence, so that all responsible parties may be identified and punished before the competent courts as soon as possible and a climate of impunity be avoided;
    - (ii) establish an independent judicial inquiry and proceedings before the competent courts as soon as possible with regard to the allegations of abductions and disappearances of trade union leaders and members which are listed in Appendix II with a view to shedding full light onto the relevant facts and circumstances, and to determine where responsibilities lie, punish the guilty parties and prevent the repetition of similar events;

- (iii) keep it informed of progress made in this respect.
- (c) Noting that the Government is under a responsibility to take all necessary measures to have the guilty parties identified and punished – in particular by ensuring that witnesses, who are crucial for the successful identification and prosecution of suspects, are effectively protected – and to successfully prevent the repetition of human rights violations, the Committee requests the Government to take all necessary measures without delay to ensure full implementation of the recommendations of the Melo Commission with regard to: (i) the reinforcement of the Witness Protection Program; (ii) legislation to require police and military forces and other government officials to maintain strict chain-of-command responsibility with respect to extrajudicial killings and other offences committed by personnel under their command, control or authority; and (iii) orientation and training of the armed forces.
- (d) Deeply regretting the involvement of the army and police in ending the strike in the Hacienda Luisita incident which claimed the lives of at least seven trade union leaders and members and led to the injury of 70 others, the Committee requests the Government to take all necessary measures so as to have an independent investigation carried out into this incident, with a view to identifying and punishing those responsible without further delay. It also requests the Government to give adequate instructions to the law enforcement authorities so as to eliminate the danger entailed by the use of excessive violence when controlling demonstrations. The Committee requests to be kept informed in this respect.
- (e) Expressing concern at the prolonged presence of the army inside workplaces which is liable to have an intimidating effect on the workers wishing to engage in trade union activities and to create an atmosphere of mistrust which is hardly conducive to harmonious industrial relations, the Committee requests the Government to take measures, including the issuance of appropriate instructions, to bring to an end prolonged military presence inside workplaces.
- (f) The Committee requests the Government to give appropriate instructions so as to ensure that any emergency measures aimed at national security do not prevent in any way the exercise of legitimate trade union rights and activities, including strikes, by all trade unions irrespective of their philosophical or political orientation, in a climate of complete security. The Committee requests to be kept informed in this respect.
- (g) The Committee requests the Government to give specific instructions without delay so as to ensure the strict observance of due process guarantees in the context of any surveillance and interrogation operations by the army and police in a way that guarantees that the rights of workers' organizations can be exercised in a climate that is free from violence, pressure or threats of any kind against the leaders and members of these organizations. The Committee requests to be kept informed in this respect.
- (h) The Committee requests the Government to provide its comments in respect of the allegations of harassment and intimidation of trade union leaders and members affiliated to the KMU.
- (i) The Committee requests the Government to communicate the texts of any judgements handed down in the cases of Crispin Beltran, long-time KMU leader, as well as five members of the NNFSW who were arrested, and to ensure that all relevant information is gathered in an independent manner so as to shed full light on their situation and the circumstances surrounding their arrest. Should it be determined by the court that they were arrested in relation to their trade union activities, the Committee requests the Government to take the necessary measures to ensure that they are immediately released.

## B. The Government's reply

**1184.** In its communications dated 31 August 2007 and 9 and 16 January 2008, the Government indicates at the outset, that it wishes to draw the Committee's attention to the fact that, as recent developments show, there is practically an undeclared war being waged in the Philippines. The Armed Forces of the Philippines is presently engaged in a battle with the bandit Abu Sayyaf Group – that has joined forces with the international terrorist group

Jema'ah Islamiyah – in the country's southern provinces of Basilan and Jolo. This conflict has ripple effects on the whole country particularly in the island of Mindanao. Separately from but in tandem with this conflict is the threat of attacks from breakaway groups of the Moro Islamic Liberation Front (MILF) and Moro National Liberation Front (MA/LP). The recent examples of how grave these problems have become is the recent kidnapping of Fr Bossi (an Italian missionary from Milan), and the killing of 56 Philippine soldiers (with many more gravely wounded) all in a span of one month. Also, the Communist Party of the Philippines – National People's Army (CPP–NPA) continues to attack military and police units all over the country. CPP–NPA Chairperson Jose Ma. Sison was recently arrested in the Netherlands for two counts of murder – killings which heretofore have been labelled as extrajudicial killings imputed on the Government. It is under this environment that the allegations of killings of trade unionists were made by the KMU, the labour group closely identified with the CPP–NPA.

- 1185.** The Government highlights the distinction that should be made between legitimate trade union activities entitled to lawful protection and the commission of crimes against the State that the State has the right to prevent. The current war against communist insurgents is a six-decade rebellion by those who wish to seize power from the Government. The war has been waged on many fronts and labour is the most prominent of them because the communist movement is rooted in the labour movement. Thus, the Philippine Government has been faced with the dilemma of handling people wearing two hats, one of them illegitimate utilized purely for revolutionary ends. To be sure, the Government cannot vacillate in dealing with those who have stepped beyond the line of legitimacy.
- 1186.** The Government adds that, to state its position clearly, the Philippine police and the military pursue only trade unionists committing rebellion and not trade unionists exercising trade union rights. Where a trade unionist crosses the dividing line between rebellion and legitimate trade union activity, then there should be no question about the legitimacy of the police or military action, provided the action was done in accordance with the Constitution and the laws.
- 1187.** The Government also invites the Committee's attention to the fact that Karapatan's outline or listing of the cases of supposed extrajudicial killings of trade unionists and media practitioners – upon which the KMU's complaint is partly based – is not strictly accurate. At least five of the supposed 836 victims are actually alive. Also, many of the cases in fact involve private crimes that do not relate at all to trade union rights and advocacies.
- 1188.** The Government also provides an update on the status of some of the 39 murders and nine incidents of enforced disappearances listed in Appendices I and II of the Committee's previous examination of this case. With regard to steps taken to investigate the 39 murders, the Government indicates that three cases have been attributed to the police, army or local officials and criminal proceedings are pending. Specifically, a policeman has been charged with the murder of Angelito Mabansag, two army privates have been charged with the murder of Ricardo Ramos, President of Central Azucarera de Tarlac Labor Union (CATLU; one of the unions in the Hacienda Luisita incident); and a Barangay Captain as well as two Barangay tanods have been accused with the murder of Dante Teotino. Furthermore, a criminal case was brought against police and army officers for the murder of Samuel Bandilla and the injury of Engr. Bernardo Devaras but was dismissed by the Prosecutor for insufficiency of evidence; the dismissal was later confirmed by the Department of Justice.
- 1189.** In seven cases, the suspects identified were not related to the army or the police (Rommel Arcilla, Melita Carvajal, Mario Fernandez, Abelardo Ladera, Jimmy Legaspi, Rolando Mariano y Thalla, Ramon Namuro, Victoria Samonte and Albert Teredano). Criminal proceedings are pending in four of these cases against those accused of the murder of

Jimmy Legaspi, Rolando Mariano y Thalla, Ramon Namuro and Rommel Arcilla. Those suspected of the murder of Mario Fernandez and Albert Teredano were killed in shoot-outs linked to crime syndicates. Furthermore, proceedings for determination of the propriety of filing a criminal case in court against the suspected killer of Abelardo Ladera is pending before the Office of the Prosecutor.

- 1190.** In six cases, the relatives of the victims or eye witnesses refused to testify or declared that they did not wish to pursue the matter; thus, the investigation has not advanced (Felipe Lapa, Edwin Bargamento, Manuel Batolina, Ronnie Almoete, Federico de Leon, Dionesio Halim).
- 1191.** In ten cases, the investigation is still under way (Jessie Alcantara, Nilo Bayas, Ryan Cabrigas, Florante Collantes y Ballon, Engr. Dalmacio Cepeda, Noel Daray, Samuel Dote, Diosdado Fortuna, Benedicto Gabon, Erol Sending y Chavez). With regard to Diosdado Fortuna, President of the Union at Nestlé, Cabuayo, an update prepared by the Presidential Human Rights Committee (annexed by the Government to its reply), indicates that the case of Diosdado Fortuna has been archived. According to the Government, there is no indication as to the perpetrators despite the fact that the police has formed an ad hoc investigation unit, the issue is followed up by the Presidential Human Rights Committee and the Commission on Human Rights has launched its own investigation.
- 1192.** On the nine incidents of enforced disappearances, the Government provides the following information: (i) on Rogelio Concepcion, who was allegedly abducted by elements of the 24th Infantry Division on 6 March 2006, the Government indicates that the case is being monitored by the Presidential Human Rights Committee; (ii) on the alleged assault, torture and abduction of Virgilio and Teresita Calilap, Bernabe Mendiola and Oscar Leuterio on 17 April 2006, the Government indicates that they were probably abducted by communist terrorists and not the army and that the DOLE Regional Office No. III reported that they have returned home although the police has no record of their return as they never bothered to check in with the police authorities; (iii) with regard to Emerito Gonzales Lipio and William Aguilar who were allegedly abducted on 3 July 2006, the Government indicates that they were not abducted but arrested along with five other individuals. Four of the seven arrested individuals had been caught carrying illegal explosives. Aguilar and Lipio were later released.
- 1193.** On the Hacienda Luisita victims, the Government recalls that according to the allegations, one of the victims – Jessie Valdez – was shot in the thigh during the dispersal at Hacienda Luisita, but the military, instead of bringing him to the hospital, brought him to a military camp where he died of blood loss. It indicates that investigation of the Hacienda Luisita incident disclosed that the ranks of the rallyists had been infiltrated. Of the seven casualties, one is listed in the Order of Battle of the Tarlac PNP as a member of the CPP/NPA; three of them were found positive for gunpowder burns based on conducted paraffin tests by the PNP crime laboratory. Of the 110 persons arrested at the scene, only seven were workers of Hacienda Luisita. Of the 36 PNP personnel involved in the dispersal operation who were subjected to paraffin tests, nine were found positive for powder burns and have been recommended to be charged by the NBI for multiple homicide. The Presidential Human Rights Committee (PHRC, a cabinet-level committee under the Office of the President) is presently monitoring the progress of the case and inquiring into the specific case of Jessie Valdez.
- 1194.** The Government adds that the Department of Labor is closely coordinating with law enforcement agencies – specifically, Task Force Usig of the Philippine National Police – and the Department’s own regional offices on the status of the other cases of alleged murders and abductions or enforced disappearances. Updates shall be transmitted on these

cases as soon as they are available. The Philippine Government is continuously stepping up on efforts to solve all these cases.

- 1195.** All branches of the Philippine Government are in fact involved in finding solutions to the issue. Quite recently and in an unprecedented move, the Supreme Court hosted a multi-sector summit on extrajudicial killings and enforced disappearances with representatives from all sectors of society as participants. The Government attaches the Summary of Recommendations of the National Consultative Summit on Extrajudicial Killings and Enforced Disappearances: Searching for solutions (National Consultative Summit), which took place on 16–17 July 2007 in Manilla. It further indicates that a significant part of the agenda – as it relates to the High Court – was the proposal to address whatever insufficiencies there may be in the present procedural rule on habeas corpus, with the end in view of providing more protection and safeguards to the people’s constitutional rights. The latest report is that the Supreme Court is ready to announce its rule for the compulsory production of data, as a companion measure to the habeas corpus remedy, to ensure that investigations will succeed. These moves are in addition to the High Court’s earlier designation of special courts to hear and decide – with special priority and dispatch – cases of extrajudicial killings.
- 1196.** Some other concerns are being addressed by the recently convened 14th Congress. There are now pending bills or legislative proposals to amend the Witness Protection, Security and Benefit Act and/or to provide stiffer penalties for extrajudicial killings – a proposed bill entitled An Act Qualifying Salvaging or Extrajudicial Killing by Any Public Officer, Person in Authority or Agent of a Person in Authority as a Heinous Crime, Imposing the Death Penalty Therefore.
- 1197.** The Government also attaches the High Court’s decision in the case of Crispin Beltran so as to clearly show that his arrest is unrelated, in any manner whatsoever, with his role as a trade union leader. For the Committee’s information, Beltran is now beyond being a trade union leader; he is a politician who acts more in the political arena rather than on the labour front.
- 1198.** The Government assures the Committee that a healthy environment or atmosphere for trade unionism presently pervades in the country. There is a relative industrial peace with only three strikes declared since January 2007; for every 93 notices of strikes/lockouts filed, only one materialized into an actual work stoppage. Work normalization rate is at 100 per cent since all these strike cases have been settled or resolved. The Government acknowledges that the current labour relations situation is not as perfect or as ideal as it or the Committee would want it to be, but it definitely is not as bad as the complainant KMU wants to portray or impress on the Committee. The successes achieved so far with the ILO’s help in promoting labour relations peace and decent work are gains the Government is very proud of. It hopes these will not be negated by taking as established truths and acting on unsubstantiated imputations and reports of government excesses, and by refusing to acknowledge the current environment under which the Philippine Government operates.

### **C. The Committee’s conclusions**

- 1199.** *The Committee acknowledges the information provided by the Government.*
- 1200.** *The Committee recalls that the present case concerns the following allegations: (i) summary killings of 39 trade union leaders, members, union organizers and supporters and informal workers from 2001 to 2006; (ii) nine incidents of abduction and enforced disappearances of trade union leaders, members, union organizers and supporters and informal workers committed by elements of the military and police from January 2001 to June 2006; (iii) harassment, intimidation and grave threats by the military and police*

forces against trade union leaders, members, union organizers and supporters and informal workers; (iv) militarization of workplaces in strike-bound companies or where a labour dispute exists and where existing unions or unions being organized are considered progressive or militant, by means of establishing military detachments and/or deployment of police and military elements under the pretext of counter-insurgency operations; and (v) arrest and detention of and subsequent filing of criminal charges against trade union leaders, members, union organizers and supporters and informal workers due to their involvement and active participation in legitimate economic and political activities of trade unions and informal workers' associations.

- 1201.** *The Committee once again recalls that this is the third complaint filed before it with regard to very serious allegations of murders, abductions, disappearances, attacks on picket lines and illegal arrests in the Philippines [Case No. 1572, 292nd Report, paras 297–312 and Case No. 1444, 279th Report, paras 544–562]. During the previous examination of this case, the Committee deplored the gravity of the allegations and the fact that more than a decade after the filing of the last complaint on similar allegations, inadequate progress had been made by the Government with regard to putting an end to killings, abductions, disappearances and other serious human rights violations which could only reinforce a climate of violence and insecurity and have an extremely damaging effect on the exercise of trade union rights [346th Report, para. 1437].*
- 1202.** *The Committee notes the general observations made by the Government with regard to this case, in particular as regards the distinction between legitimate trade union activities entitled to lawful protection and the commission of crimes against the State, which the State has the right to prevent. The Government emphasizes that an undeclared war is being waged in the Philippines by various groups. The Communist Party of the Philippines – National People's Army (CPP–NPA) continues to attack military and police units all over the country. CPP–NPA Chairperson Jose Ma. Sison was recently arrested in the Netherlands for two counts of murder – killings which heretofore had been labelled as “extrajudicial” killings imputed on the Government. It is under this environment that the allegations of killings of trade unionists were made by the complainant KMU, the labour group closely identified with the CPP–NPA. The Government adds that the current war against communist insurgents is a six-decade rebellion by those who wish to seize power from the Government; the war has been waged on many fronts and labour is the most prominent of them, because the communist movement is rooted in the labour movement. Thus, the Government has been faced with the dilemma of handling people wearing two hats, one of them illegitimate utilized purely for revolutionary ends. The Government indicates that, to state its position clearly, the Philippine police and the military pursue only trade unionists committing rebellion and not trade unionists exercising trade union rights. Where a trade unionist crosses the dividing line between rebellion and legitimate trade union activity, then there should be no question about the legitimacy of the police or military action, provided the action was done in accordance with the Constitution and the laws.*
- 1203.** *The Committee wishes to emphasize that the right to life is a fundamental prerequisite for the exercise of the rights contained in Convention No. 87 [**Digest of Decisions and Principles of the Freedom of Association Committee**, para. 42] ratified by the Philippines. A climate of violence, such as that surrounding the murder or disappearance of trade union leaders, or one in which the premises and property of workers and employers are attacked, constitutes a serious obstacle to the exercise of trade union rights; such acts require severe measures to be taken by the authorities. [**Digest**, op. cit., para. 46]. The Committee has on numerous occasions emphasized that the killing, disappearance or serious injury of trade union leaders and trade unionists requires the institution of independent judicial inquiries in order to shed full light, at the earliest date, on the facts and the circumstances in which such actions occurred and in this way, to the extent*

possible, determine where responsibilities lie, punish the guilty parties and prevent the repetition of similar events [**Digest**, op. cit., para. 48]. It has also underlined that facts imputable to individuals bring into play the State's responsibility owing to the State's obligation to prevent violations of human rights. Consequently, governments should endeavour to meet their obligations regarding the respect of individual rights and freedoms, as well as their obligation to guarantee the right to life of trade unionists [**Digest**, op. cit., para. 47].

**1204.** *The Committee emphasizes that persons engaged in trade union activities, or holding trade union office, cannot claim immunity in respect of the criminal law. It recalls that governments have a duty to defend a social climate where respect for the law reigns as the only way of guaranteeing respect for and protection of individuals and that all appropriate measures should be taken to guarantee that, irrespective of trade union affiliation, trade union rights can be exercised in normal conditions with respect for basic human rights and in a climate free of violence, pressure, fear and threats of any kind [**Digest**, op. cit., paras 34 and 35]. While duly taking into account the Government's affirmation that "the Philippine police and the military pursue only trade unionists committing rebellion and not trade unionists exercising trade union rights", the Committee recalls the findings of the Independent Commission to Address Media and Activist Killings (Melo Commission) of 22 January 2007, to the effect that "there is certainly evidence pointing the finger of suspicion at some elements and personalities in the armed forces" as well as its recommendation for a "strong political condemnation of the killings by the Government and the President in particular". The Committee also takes note of the report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions of 16 April 2008, according to which: "[t]he military is in a state of denial concerning the numerous extrajudicial executions in which its soldiers are implicated" [doc. A/HRC/8/3/Add 2, page 2 and para. 28] as well as the recommendation of the UN Special Rapporteur that "[a]s Commander-in-Chief of the armed forces, the President must take concrete steps to put an end to those aspects of counterinsurgency operations which have led to the targeting and execution of many individuals working with civil society organizations" [doc. A/HRC/8/3/Add.2, para. 67].*

**1205.** *The Committee recalls that the Committee of Experts on the Application of Conventions and Recommendations has emphasized that the freedom of association Conventions do not contain any provision permitting derogation from the obligations arising under the Convention, or any suspension of their application, based on a plea that an emergency exists [**Digest**, op. cit., para. 193]. All appropriate measures should therefore be taken to guarantee that, irrespective of trade union affiliation, trade union rights can be exercised in normal conditions with respect for basic human rights and in a climate free of violence, pressure, fear and threats of any kind [**Digest**, op. cit., para. 35]. Workers should have the right, without distinction whatsoever, in particular without discrimination on the basis of political opinion, to join the organization of their own choosing. They should have the right to establish the organizations that they consider necessary in a climate of complete security irrespective of whether or not they support the social and economic model of the Government, including the political model of the country [**Digest**, op. cit., paras 212 and 213].*

### **Extrajudicial killings**

**1206.** *The Committee recalls that during the previous examination of this case, it requested the Government to keep it informed of the progress of the investigation to be carried out by the special joint fact-finding body. The Committee had also expressed reservations with regard to the fact that the parties responsible for the establishment of this body included the Department of National Defence, while the Melo Commission had called for an*

investigation conducted by a body or agency independent from the armed forces [paras 1436–1438].

- 1207.** *The Committee notes that there is no information in the Government’s report on the establishment or activities of the joint fact-finding body. From the information available in the annex to the Government’s reply, the Committee notes that the Task Force USIG of the Philippine National Police (PNP) was apparently set up by order of the Interior and Local Government Secretary on 13 May 2006 in order to “investigate incidents of slain militant members and media personalities”. By mid-July 2007 it had before it 116 cases of “slain militant members”. These 116 cases had been selected, inter alia, from the 836 victims reported by Karapatan, an organization allied to the KMU activist community. These allegations of 836 victims were found to be “bloated and misleading”; 529 cases reported by Karapatan had been “excluded” from investigation by USIG as the killings were due to motives irrelevant to the militants’ activities (inter alia, eight were linked to a “Labor Dispute” and ten concerned an “agrarian related/land dispute”; moreover, five alleged victims – not concerned by the present complaint – were actually alive despite allegations to the contrary).*
- 1208.** *Thus, of the 116 cases of “slain militant members” pending before USIG by mid-July 2007, 61 were under investigation: five of them were believed to have been perpetrated by the CPP/NPA and seven were allegedly linked to the military or military assets. Furthermore, 55 other cases (47 per cent of all 116 cases) had been “filed”: 24 had been perpetrated by the CPP/NPA (22 suspects at large, one arrested and one killed); six cases involved military elements as suspects (one surrendered, one arrested and one “settled”).*
- 1209.** *With regard to steps taken to investigate the 39 murders retained in this complaint, the Committee notes that according to the Government, ten cases have been attributed to the police, army or local officials and criminal proceedings are pending. Specifically, a policeman has been charged with the murder of Angelito Mabansag, two army privates have been charged with the murder of Ricardo Ramos, President of Central Azucarera de Tarlac Labor Union (CATLU; one of the unions in the Hacienda Luisita incident); and a Barangay Captain as well as two Barangay tanods have been accused with the murder of Dante Teotino. Furthermore, nine police officers have been recommended to be charged by the NBI for multiple homicide in connection with the deaths of seven workers during the Hacienda Luisita incident (see below). Finally, a criminal case was brought (not clear whether by the authorities or the victim’s family) against police and army officers for the murder of Samuel Bandilla and the injury of Engr. Bernardo Devaras but was dismissed by the Prosecutor for insufficiency of evidence; the dismissal was later confirmed by the Department of Justice.*
- 1210.** *The Committee also notes that in seven cases, the suspects identified were not related to the army or the police (Rommel Arcilla, Melita Carvajal, Mario Fernandez, Abelardo Ladera, Jimmy Legaspi, Rolando Mariano y Thalla, Ramon Namuro, Victoria Samonte and Albert Teredano). Criminal proceedings are pending in four of these cases against those accused of the murder of Rommel Arcilla, Jimmy Legaspi, Rolando Mariano y Thalla and Ramon Namuro. Those suspected of the murder of Mario Fernandez and Albert Teredano were killed in shoot-outs linked to crime syndicates. Furthermore, proceedings for determination of the propriety of filing a criminal case in court against the suspected killer of Abelardo Ladera is pending before the Office of the Prosecutor.*
- 1211.** *The Committee also notes that in six cases, the relatives of the victims or eye witnesses refused to testify or declared that they did not wish to pursue the matter; thus, the investigation has not advanced (Ronnie Almoete, Edwin Bargamento, Manuel Batolina, Dionesio Halim, Felipe Lapa and Federico de Leon).*

- 1212.** *In ten cases, the Government is confined to noting that the investigation is still under way (Jessie Alcantara, Nilo Bayas, Ryan Cabrigas, Florante Collantes y Ballon, Engr. Dalmacio Cepeda, Noel Daray, Samuel Dote, Diosdado Fortuna, Benedicto Gabon, Erol Sending y Chavez). With regard to Diosdado Fortuna, President of the Union at Nestlé, Cabuayo, the Committee notes from the table prepared by the Presidential Human Rights Committee (annexed by the Government to its reply), that the case of Diosdado Fortuna has been archived. The Committee notes that according to the Government, there is no indication as to the perpetrators despite the fact that the police has formed an ad hoc investigation unit, the issue is followed up by the Presidential Human Rights Committee and the Commission on Human Rights has launched its own investigation.*
- 1213.** *The Committee finally notes that no information has been provided on Ronald Andrada, Nemita Labordio, Antonio Pantonial and Albert Terredaño.*
- 1214.** *While noting with interest the progress made by USIG in investigating incidents of alleged extrajudicial killings, the Committee cannot but regret that the information brought to its attention does not refer to any conviction pronounced so far for these acts of extreme gravity, despite the fact that the incidents date as far back as 2001. Moreover, the Committee notes that suspects have been identified in 17 out of 39 individual cases brought to its attention and that in only seven cases have proceedings been instituted before the courts. In addition to this, only in 42 out of 116 cases before USIG, have the suspects been apparently identified and again, no conviction seems to have been pronounced so far by the competent courts. The Committee once again recalls that justice delayed is justice denied [*Digest*, op. cit., para. 105]. The absence of judgements against the guilty parties creates, in practice, a situation of impunity, which reinforces the climate of violence and insecurity, and which is extremely damaging to the exercise of trade union rights [*Digest*, op. cit., para. 52]. The Committee notes that the USIG itself acknowledges the difficulties which prevent the successful conclusion of the investigations, in particular, the weakness of the Witness Protection Program, the lack of police training and limited investigation facilities and resources. The Committee will return to these issues below.*
- 1215.** *The Committee once again recalls that the killing, disappearance or serious injury of trade union leaders and trade unionists requires the institution of independent judicial inquiries in order to shed full light, at the earliest date, on the facts and the circumstances in which such actions occurred and in this way, to the extent possible, determine where responsibilities lie, punish the guilty parties and prevent the repetition of similar events [*Digest*, op. cit., para. 48]. It urges the Government to take all necessary measures so as to ensure that the investigation and judicial examination of all acts of extrajudicial killings advance successfully and without delay. In particular, the Committee requests the Government to send further information on the steps taken to fully investigate the 39 extrajudicial killings alleged by the complainant, so that all responsible parties may be identified and punished before the competent courts as soon as possible and a climate of impunity be avoided. The Committee hopes that the recommendations made by the UN Special Rapporteur will be taken into account in this framework, and requests to be kept informed of developments.*
- 1216.** *The Committee also urges the Government to provide without delay additional information and clarifications on: further progress made by USIG in investigating complaints of killings and identifying the suspects; the methods of work of USIG and in particular, the definition of cases of “slain militant members” which are considered by USIG as falling within its competence; what is meant by “filed” and “settled” cases; the process followed once the investigation is concluded with a view to bringing the accused to justice; the activities of other bodies currently in charge of investigating killings; the rate of successful prosecutions and the sentences pronounced.*

## **Abductions and enforced disappearances**

1217. *With regard to the Committee's request for an independent judicial inquiry and proceedings before the competent courts with a view to shedding full light onto the allegations of abductions and disappearances of trade union leaders and members listed by the complainant, the Committee notes with regret that apart from scant information on three incidents, the Government's reply makes no reference to any steps aimed at an independent judicial inquiry and proceedings before the competent courts.*
1218. *The Committee notes that the Government provides the following information on three of the nine incidents brought to its attention: (i) on Rogelio Concepcion, who was allegedly abducted by elements of the 24th Infantry Division on 6 March 2006, the Government indicates that the case is being monitored by the Presidential Human Rights Committee; (ii) on the alleged assault, torture and abduction of Virgilio and Teresita Calilap, Bernabe Mendiola and Oscar Leuterio on 17 April 2006, the Government indicates that they were probably abducted by communist terrorists and not the army and that the DOLE Regional Office No. III reported that they have returned home although the police has no record of their return as they never bothered to check in with the police authorities; (iii) with regard to Emerito Gonzales Lipio and William Aguilar who were allegedly abducted on 3 July 2006, the Government indicates that they were not abducted but arrested along with five other individuals. Four of the seven arrested individuals had been caught carrying illegal explosives. Aguilar and Lipio were later released. Noting that, apparently, no charges were brought against Aguilar and Lipio, the Committee recalls that the arrest of trade unionists against whom no charge is brought involves restrictions on freedom of association, and governments should adopt measures for issuing appropriate instructions to prevent the danger involved for trade union activities by such arrests [**Digest**, op. cit., para. 70].*
1219. *The Committee also notes that no information is provided in the Government's replies with regard to the following alleged incidents: Rafael Tarroza (abducted on 8 January 2006; allegedly interrogated and threatened by the military and returned to his family after six hours, having told the military that he would cooperate); Armando Leabres (abducted on 10 January 2006, found dead); Francis Noel Desacula (abducted on 29 September 2006, missing); Robin Solano and Ricardo Valmocina (abducted on 1 February 2006, missing); Ronald Intal (abducted on 3 April 2006, missing); Leopoldo Ancheta (abducted on 24 June 2006, missing).*
1220. *The Committee recalls that during the previous examination of this case it expressed concern at the fact that the mandate of the Melo Commission is limited to extrajudicial killings, so that allegations of abductions and disappearances remain unexplored despite their extreme gravity [346th Report, para. 1442]. The Committee emphasizes that the killing, disappearance or serious injury of trade union leaders and trade unionists requires the institution of independent judicial inquiries in order to shed full light, at the earliest date, on the facts and the circumstances in which such actions occurred and in this way, to the extent possible, determine where responsibilities lie, punish the guilty parties and prevent the repetition of similar events [**Digest**, op. cit., para. 48]. The Committee also emphasizes once again that the absence of judgements against the guilty parties creates in practice a situation of impunity which reinforces the climate of violence and insecurity, and which is extremely damaging to the exercise of trade union rights [**Digest**, op. cit., para. 52]. The Committee therefore once again urges the Government to institute an independent inquiry and proceedings before the competent courts as soon as possible with regard to the allegations of abductions and enforced disappearances of trade union leaders and members with a view to shedding full light onto the relevant facts and circumstances, and to determine where responsibilities lie, punish the guilty parties and*

*prevent the repetition of similar events. The Committee requests to be kept informed in this respect.*

### **Other recommendations of the Melo Commission**

- 1221.** *The Committee recalls that during the previous examination of this case it had requested the Government to take all measures to ensure the implementation of the recommendations of the Melo Commission concerning: (i) the reinforcement of the Witness Protection Program; (ii) legislation to require police and military forces and other government officials to maintain strict chain-of-command responsibility with respect to extrajudicial killings and other offences committed by personnel under their command, control or authority; and (iii) orientation and training of the armed forces.*
- 1222.** *On the issue of the reinforcement of the Witness Protection Program, the Committee recalls from above that according to the Government, in six of the individual cases of killings raised in this complaint, the relatives of the victims or eye witnesses refused to testify or declared that they did not wish to pursue the matter. The Committee also notes from the information in the annex of the Government's reply, that the USIG identifies as a major "gap" which prevents investigations from advancing the "[r]eluctance of the family of the victim and witnesses to cooperate in the conduct of investigation for fear of reprisal" and the "[l]imited coverage, facilities and resources in the implementation of the government Witness Protection Program (WPP)". It further observes the following statement by the UN Special Rapporteur also referred to in the information provided by the USIG: "witnesses are uniquely vulnerable when the forces accused of killings are all too often those, or are linked to those, who are charged with ensuring their security. The present message is that if you want to preserve your life expectancy, don't act as a witness in a criminal prosecution for the killing" [document A/HRC/8/3/Add.2, para. 52]. It also takes note of the specific recommendations made by the UN Special Rapporteur so that "[t]he witness protection program [is] reformed and fully implemented" [document A/HRC/8/3/Add.2 para, 71].*
- 1223.** *In this regard, the Committee also notes the Summary of Recommendations of the National Consultative Summit on Extrajudicial Killings and Enforced Disappearances: Searching for solutions (National Consultative Summit), which took place on 16–17 July 2007 in Manila. The Committee notes that the Summit, which had been convened by the Supreme Court, recommended among other things, to review the Witness Protection Program so as to "re-focus on its primary objective of providing security and protection to its witnesses". It is also recommended that "non-governmental organizations (NGOs) be allowed to institute and implement their own witness protection programs" and that the government be allowed "to share the burden with the NGOs and solve the problem of witnesses who are reluctant to avail of the government program because the suspected perpetrators themselves are from the government".*
- 1224.** *The Committee notes that according to the Government, bills or legislative proposals are now pending to amend the Witness Protection, Security and Benefit Act. Noting once again that the Government is under a responsibility to take all necessary measures to have the guilty parties identified and punished – in particular by ensuring that witnesses, who are crucial for the successful identification and prosecution of suspects, are effectively protected – and to successfully prevent the recurrence of human rights violations, the Committee requests the Government to keep it informed of steps taken to amend the Witness Protection, Security and Benefit Act and in general, to strengthen the Witness Protection Program. The Committee hopes that the recommendations made by all parties, including the Melo Commission, the National Consultative Summit and the UN Special Rapporteur, will be taken into account in this process.*

- 1225.** *On the issues of maintaining strict chain-of-command responsibility with respect to extrajudicial killings and other offences and ensuring the orientation and training of the armed forces, the Committee regrets that the Government's reply does not contain any substantial information in this regard. The Committee observes that the UN Special Rapporteur recommended that "[t]he necessary measures should be taken to ensure that the principle of command responsibility, as it is understood in international law, is a basis for criminal liability within the domestic legal order" [doc. A/HRC/8/3/Add.2, para. 67]. The Committee also notes that the National Consultative Summit emphasized the need to "devise ways of implementing the doctrine of command responsibility ... for the commission of humanitarian abuses"; it also went beyond the question of the orientation and training of the armed forces by calling for "an information campaign for ordinary citizens so as to promote moral and ethical values that place a premium on tolerance and respect for the rule of law, consistent with the demands of a pluralistic society".*
- 1226.** *The Committee considers that in light of the findings of the Melo Commission (see above) and the UN Special Rapporteur it is of the utmost importance to take immediate measures so as to raise full awareness within the army ranks of the principles according to which workers should have the right to establish the organizations that they consider necessary in a climate of complete security irrespective of whether or not they support the social and economic model of the Government, including the political model of the country; a climate of violence, coercion and threats of any type aimed at trade union leaders and their families does not encourage the free exercise and full enjoyment of the rights and freedoms set out in Conventions Nos 87 and 98. All States have the undeniable duty to promote and defend a social climate where respect of the law reigns as the only way of guaranteeing respect for and protection of life [Digest, op. cit., paras 213 and 58].*
- 1227.** *The Committee therefore once again requests the Government to take all measures with a view to ensuring full implementation of the recommendations of the Melo Commission on the adoption of legislation to require police and military forces and other government officials to maintain strict chain-of-command responsibility with respect to extrajudicial killings and other offences committed by personnel under their command, control or authority. The Committee requests to be kept informed of developments in this respect. The Committee also requests the Government to take all necessary measures without delay to ensure that the armed forces receive adequate instructions, orientation and training conducive to promoting a social climate where respect of the law reigns as the only way of guaranteeing respect for and protection of the right to life. The Committee hopes that the recommendations made by all parties, including the Melo Commission, the National Consultative Summit and the UN Special Rapporteur, will be taken into account in this regard and requests to be kept informed of developments.*
- 1228.** *The Committee notes that in addition to the issue of training and orientation of the armed forces, the materials provided from the USIG have emphasized the need for police training with a view to conducting more effective investigations. In addition to this, the USIG refers to "[l]imited investigation facilities and resources (forensic mobility and communication equipment) which hamper the investigation process". The lack of sufficient forensic facilities and an over-reliance on intimidated witnesses who do not come forward in the end was further signalled by the UN Special Rapporteur [doc. A/HRC/8/3/Add.2, para. 55] and referred to by the USIG.*
- 1229.** *The Committee also notes the recommendations of the National Consultative Summit according to which, the PNP should "conduct trainings on preliminary investigation procedures which would address concerns regarding the dismissal of cases as a result of improper procedures adopted by police authorities;" and "there should be greater cooperation between the police investigators and the prosecutors in order to expedite the prosecution of cases".*

- 1230.** *The Committee requests the Government to take all necessary measures to ensure that the police receive the training and facilities necessary to ensure that extrajudicial killings can be effectively and swiftly investigated and elucidated and that the responsible parties are identified, brought to justice and punished. The Committee requests to be kept informed of developments in this respect.*
- 1231.** *The Committee finally notes the other recommendations of the National Consultative Summit addressed to the courts, the executive and the legislature. In particular, the Committee recalls among a wide range of recommendations, the need “to study carefully the possibility of creating a new crime where the victim or the offended party is a journalist, judge, media, militant who is killed or kidnapped in the course of the performance of his duties or the conduct of his profession. Extrajudicial killings and kidnappings are at present not penalized in the Revised Penal Code (RPC), or in any law for that matter” . Moreover, it notes “that the Supreme Court [should] adopt a rule allowing persons threatened with extrajudicial killings to apply for a protection order directing the NBI or Police to provide them security”; and that “judges should be given security personnel to ensure their safety”. Furthermore, it was suggested that the courts address the gaps in chain-of-command responsibility by creating a disputable presumption of knowledge by the superior of the acts of the subordinate and eliminating the presumption of regularity in the performance of official duties in the prosecution of cases involving extrajudicial killings and forced disappearances; according to the text, “the proposal is an attempt to shift the burden of proof on the Government in order to strengthen the prosecution of such cases especially in instances when government refuses to furnish the concerned parties with vital documents”. The Committee notes from the Government’s reply that the Supreme Court is ready to announce its rule for the compulsory production of data, as a companion measure to the habeas corpus remedy, to ensure that investigations will succeed. Finally, it notes that the National Consultative Summit proposed the creation of “[a]n independent and impartial body [which] should exercise oversight functions to ensure investigations are conducted by the police and other investigative agencies in accordance with international standards”.*
- 1232.** *The Committee notes with interest that the initiatives taken and proposals made at the national level can be conducive to innovative and effective ways of combating the problem of extrajudicial killings, abductions and enforced disappearances. The Committee requests the Government to keep it informed of the further measures taken with a view to maintaining an ongoing, open and constructive dialogue on the basis of the recommendations of the National Consultative Summit and the Melo Commission, with the participation of all interested parties, so as to identify and implement further ways of combating the problem of extrajudicial killings, abductions and enforced disappearances.*

### **Hacienda Luisita incident**

- 1233.** *With regard to its request for an independent investigation carried out into the Hacienda Luisita incident which claimed the lives of at least seven trade union leaders and members (Jhaivie Basilio, Adriano Caballero, Jun David, Jesus Laza, Jaime Pastidio, Juancho Sanchez, and Jessie Valdez) and led to the injury of 70 others, and instructions to be given to the law enforcement authorities so as to eliminate the danger entailed by the use of excessive violence when controlling demonstrations, the Committee notes from the Government’s reply, that of the 36 PNP personnel involved in the dispersal operation nine have been recommended to be charged by the NBI for multiple homicide because they were found positive for powder burns following a paraffin test. The Committee further notes that the Presidential Human Rights Committee, a cabinet-level committee under the Office of the President, is presently monitoring the progress of the case and inquiring into the specific case of Jessie Valdez who allegedly died of blood loss (shot in the thigh) because the military, instead of bringing him to the hospital, brought him to a military*

camp. The Committee also recalls from above, that a process is pending against two army privates with regard to the death of Ricardo Ramos, President of Central Azucarera de Tarlac Labor Union (CATLU), one of the unions in the Hacienda Luisita incident.

- 1234.** *While noting that nine police officers have been identified as suspects in connection with the Hacienda Luisita incident and recommended to be charged for multiple homicide, the Committee observes that it has no information as to the institution of judicial proceedings for this incident which dates back to 2004. It also notes with regret that the Government provides no information as to measures taken to implement the Committee's previous recommendation for instructions to the law enforcement authorities so as to eliminate the danger entailed by the use of excessive violence when controlling demonstrations.*
- 1235.** *While taking due note of the Government's indication that "the ranks of the rallyists had been infiltrated" and that "of the seven casualties one is listed in the Order of Battle of the Tarlac PNP as a member of the CPP/NPA; three of them were found positive for gunpowder burns based on conducted paraffin tests by the PNP Crime Laboratory", the Committee also wishes to recall from the previous examination of this case that the House of Representatives Committees on Human Rights and Labor and Employment have stated that "[t]here was undoubtedly, excessive use of force against the workers" and concluded that:*

*[a]fter careful deliberation and review of the testimonies of the witnesses and all the parties invited by the Committees and examination of all documents submitted in the course of the congressional inquiry, the Committees have arrived at the conclusion that human rights violations were committed against the striking workers of Hacienda Luisita by the elements of the Philippine National Police and the Armed Forces of the Philippines, including the officers and the staff of the Department of Labor and Employment. Hence, it is imperative that the officers concerned be held responsible directly or by reason of command responsibility for the said acts after proper investigation has been concluded [346th Report, para. 1448].*

- 1236.** *The Committee once again recalls that the authorities should resort to the use of force only in situations where law and order is seriously threatened. The intervention of the forces of order should be in due proportion to the danger to law and order that the authorities are attempting to control and governments should take measures to ensure that the competent authorities receive adequate instructions so as to eliminate the danger entailed by the use of excessive violence when controlling demonstrations which might result in a disturbance of the peace. In cases in which the dispersal of public meetings by the police has involved loss of life or serious injury, the Committee has attached special importance to the circumstances being fully investigated immediately through an independent inquiry and to a regular legal procedure being followed to determine the justification for the action taken by the police and to determine responsibilities [Digest, op. cit., paras 140 and 49]. The Committee therefore once again requests the Government to take all necessary measures so that the judicial proceedings on this case advance without further delay with a view to identifying and punishing those responsible. Furthermore, it once again urges the Government to give adequate instructions to the law enforcement authorities so as to eliminate the danger entailed by the use of excessive violence when controlling demonstrations. The Committee requests to be kept informed in this respect.*

### **Arrest of Crispin Beltran and five NFSW members**

- 1237.** *With regard to the arrest and imprisonment of Crispin Beltran, long-time KMU leader, as well as five members of the NFSW, the Committee takes note of the decision of the Supreme Court provided by the Government. It notes that the Supreme Court voided the charges against Crispin Beltran and the five members of the NFSW by ruling that "The*

*Inquest Proceedings against Beltran for Rebellion is Void” and that “There is No Probable Cause to Indict Beltran for Rebellion”. On the other accused, the Court found that “The Preliminary Investigation was Tainted With Irregularities”. The Court also stated that it “find[s] merit in petitioners’ doubt on respondent prosecutors’ impartiality”. The Committee understands that the accused were thereafter released. The Committee also notes from publicly available information that Crispin Beltran died of an accident on 20 May 2008.*

### **Requests to which the Government has not responded**

**1238.** *The Committee notes with regret that the Government does not provide any specific answer to its previous requests with regard to allegations concerning: harassment, intimidation and grave threats by the military and police forces against trade union leaders, members, organizers and union supporters and informal workers; militarization of workplaces in strike-bound companies or where a labour dispute exists and where existing unions or unions being organized are considered progressive or militant, by means of establishing military detachments and/or deployment of police and military elements under the pretext of counter-insurgency operations; and arrest and detention of and subsequent filing of criminal charges against trade union leaders, members, organizers and union supporters and informal workers due to their involvement and active participation in legitimate economic and political activities of trade unions and informal workers’ associations.*

**1239.** *In these circumstances, the Committee reiterates its previous requests concerning: (i) the adoption of measures, including the issuance of appropriate instructions, to bring to an end prolonged military presence inside workplaces which is liable to have an intimidating effect on the workers wishing to engage in legitimate trade union activities and to create an atmosphere of mistrust which is hardly conducive to harmonious industrial relations; (ii) the issuance of instructions to ensure that any emergency measures aimed at national security do not prevent in any way the exercise of legitimate trade union rights and activities, including strikes, by all trade unions irrespective of their philosophical or political orientation, in a climate of complete security; (iii) the issuance of instructions to ensure the strict observance of due process guarantees in the context of any surveillance and interrogation operations by the army and police in a way that guarantees that the legitimate rights of workers’ organizations can be exercised in a climate that is free from violence, pressure or threats of any kind against the leaders and members of these organizations; (iv) the communication of the Government’s observations in respect of the allegations of harassment and intimidation of trade union leaders and members affiliated to the KMU. The Committee urges the Government to reply to these requests without further delay.*

### **The Committee’s recommendations**

**1240.** *In the light of its foregoing interim conclusions, and having regard to the obligation that activities by governments and trade unions be legitimate activities, the Committee invites the Governing Body to approve the following recommendations:*

*(a) The Committee requests the Government to take all necessary measures so as to ensure that the investigation and judicial examination of all acts of extrajudicial killings advance successfully and without delay. In particular, the Committee requests the Government to send further information on the steps taken to fully investigate the 39 extrajudicial killings alleged by the*

*complainant, so that all responsible parties may be identified and punished before the competent courts as soon as possible and a climate of impunity be avoided. The Committee hopes that the recommendations made by the UN Special Rapporteur on extrajudicial, summary or arbitrary executions will be taken into account in this framework and requests to be kept informed of developments.*

- (b) The Committee also requests the Government to provide additional information and clarifications on: further progress made by the Task Force USIG of the Philippine National Police in investigating complaints of killings and identifying the suspects; the methods of work of USIG and in particular, the definition of cases of “slain militant members” which are considered by USIG as falling within its competence; what is meant by “filed” and “settled” cases; the process followed once the investigation is concluded with a view to bringing the accused to justice; the activities of other bodies currently in charge of investigating killings; the rate of successful prosecutions and the sentences pronounced.*
- (c) The Committee once again urges the Government to institute an independent inquiry and proceedings before the competent courts as soon as possible with regard to the allegations of abductions and enforced disappearances of trade union leaders and members with a view to shedding full light onto the relevant facts and circumstances, and to determine where responsibilities lie, punish the guilty parties and prevent the repetition of similar events. The Committee requests to be kept informed in this respect.*
- (d) Noting once again that the Government is under a responsibility to take all necessary measures to have the guilty parties identified and punished – in particular by ensuring that witnesses, who are crucial for the successful identification and prosecution of suspects, are effectively protected – and to successfully prevent the recurrence of human rights violations, the Committee requests the Government to keep it informed of steps taken to amend the Witness Protection, Security and Benefit Act and in general, to strengthen the Witness Protection Program. The Committee hopes that the extensive recommendations made by all parties, including the Melo Commission, the National Consultative Summit on Extrajudicial Killings and Enforced Disappearances and the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, will be taken into account in this process.*
- (e) The Committee once again requests the Government to take all measures with a view to ensuring full implementation of the recommendations of the Melo Commission on the adoption of legislation to require police and military forces and other government officials to maintain strict chain-of-command responsibility with respect to extrajudicial killings and other offences committed by personnel under their command, control or authority. The Committee requests to be kept informed of developments in this respect.*
- (f) The Committee requests the Government to take all necessary measures without delay to ensure that the armed forces receive adequate instructions, orientation and training conducive to promoting a social climate where*

*respect of the law reigns as the only way of guaranteeing respect for and protection of the right to life. The Committee hopes that the recommendations made by all parties, including the Melo Commission, the National Consultative Summit on Extrajudicial Killings and Enforced Disappearances and the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, will be taken into account in this regard and requests to be kept informed of developments.*

- (g) The Committee requests the Government to take all necessary measures to ensure that the police receive the training and facilities necessary to ensure that extrajudicial killings can be effectively and swiftly investigated and elucidated and that the responsible parties are identified, brought to justice and punished. The Committee requests to be kept informed of developments in this respect.*
- (h) Noting with interest the initiatives taken and proposals made at the national level to combat the problem of extrajudicial killings, abductions and enforced disappearances, the Committee requests the Government to keep it informed of the further measures taken with a view to maintaining an ongoing, open and constructive dialogue on the basis of the recommendations of the National Consultative Summit on Extrajudicial Killings and Enforced Disappearances and the Melo Commission, with the participation of all interested parties, so as to identify and implement further ways of combating the problem of extrajudicial killings, abductions and enforced disappearances.*
- (i) With regard to the Hacienda Luisita incident, which claimed the lives of at least seven trade union leaders and members and led to the injury of 70 others, the Committee once again requests the Government to take all necessary measures so that the judicial proceedings on this case advance without further delay with a view to identifying and punishing those responsible. Furthermore, it once again urges the Government to give adequate instructions to the law enforcement authorities so as to eliminate the danger entailed by the use of excessive violence when controlling demonstrations. The Committee requests to be kept informed in this respect.*
- (j) The Committee reiterates its previous requests concerning:*

  - (i) the adoption of measures, including the issuance of appropriate instructions, to bring to an end prolonged military presence inside workplaces which is liable to have an intimidating effect on the workers wishing to engage in legitimate trade union activities and to create an atmosphere of mistrust which is hardly conducive to harmonious industrial relations;*
  - (ii) the issuance of instructions to ensure that any emergency measures aimed at national security do not prevent in any way the exercise of legitimate trade union rights and activities, including strikes, by all trade unions irrespective of their philosophical or political orientation, in a climate of complete security;*

*(iii) the issuance of instructions to ensure the strict observance of due process guarantees in the context of any surveillance and interrogation operations by the army and police in a way that guarantees that the legitimate rights of workers' organizations can be exercised in a climate that is free from violence, pressure or threats of any kind against the leaders and members of these organizations;*

*(iv) the communication of the Government's observations in respect of the allegations of harassment and intimidation of trade union leaders and members affiliated to the KMU.*

*The Committee urges the Government to reply to these requests without further delay.*

*(k) The Committee calls the Governing Body's attention to this serious and urgent case.*

CASES NOS 2611 AND 2632

REPORT IN WHICH THE COMMITTEE REQUESTS  
TO BE KEPT INFORMED OF DEVELOPMENTS

**Complaint against the Government of Romania  
presented by**  
— the National Education Federation (FEN) and  
— the union LEGIS–CCR

*Allegations: The National Education Federation (FEN) alleges that the Government has drawn up draft legislation restricting the range of issues that can be dealt with through collective bargaining and the level of bargaining. The union LEGIS–CCR alleges that the Court of Audit refused to sign a collective agreement that had been negotiated*

**1241.** The complaints are contained in communications from the union LEGIS–CCR dated 13 October and 30 November 2007, and from the National Education Federation (FEN) dated 15 February and 18 March 2008.

**1242.** The Government supplied its observations in communications dated 13 December 2007 and 16 January, 8 April and 9 May 2008.

**1243.** Romania has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Collective Bargaining Convention, 1981 (No. 154).

## A. The complainants' allegations

### *Allegations by the FEN*

- 1244.** In communications dated 15 February and 18 March 2007, the FEN states that it is a representative organization within the education sector. The complainant also indicates that it is a partner in continuous social dialogue with the Ministry of Education, Research and Youth, and with the Government, specifically, the Ministry of Labour, the Family and Equal Opportunities.
- 1245.** According to the complainant, the Government applies a policy of unwavering refusal to engage in social dialogue, and refuses to meet its obligations to hold meaningful consultations with the trade unions. The principles of collective rights and continuous social dialogue are violated all the time, and the role of the trade unions has been weakened at all levels, especially by the central and regional authorities. More often than not, trade unions are heard only after they have lodged protests or initiated legal action. This attitude is, according to the complainant, absurd and likely to be prejudicial to employees and to trade unions.
- 1246.** In the view of the FEN, the most serious fault lies in the Government's intention to amend section 12(1) and (2) of Act No. 130/1996 concerning collective labour agreements. According to section 12 in its current wording:
- (1) Collective labour agreements can also be concluded by employees of public institutions. Such contracts do not allow negotiation of clauses concerning conditions for granting entitlements or the basic levels thereof as established by law.
  - (2) Collective labour agreements for employees in budget sector institutions can be concluded at the level of the enterprise, senior management, or local public services, ... or at the local department level.
- 1247.** It is claimed that the Government, under the pretext that the wording of the Act is not clear and allows excessive scope for interpretation, has proposed a modification of the text as follows: "Collective labour agreements can also be concluded by employees of institutions and public authorities. Such contracts do not allow negotiation of clauses concerning conditions for granting entitlements or the basic levels thereof as established by law in respect of: basic salary, pay increases, allowances, bonuses, and other staff entitlements."
- 1248.** According to the complainant, the Government's intention to clarify the wording of the law in question is in fact a disguised attempt to silence the trade unions by legalistic means. This would reduce trade unions' rights as regards wage negotiations for employees of budget sector institutions. Given that national and international law promotes collective bargaining, the proposed amendment to Act No. 130/1996 would, if it came into force, be a de facto denial of that right and of the role and prerogatives of the trade unions.
- 1249.** The complainant adds that the proposed amendment to Act No. 130/1996 would be contrary to the Constitution of Romania, which in article 45, paragraph 1, guarantees the fundamental right to collective bargaining. In addition, it would contravene articles 1(5) and 11(1) of the Constitution, as well as the following provisions: section 34(1) of the Decree concerning physical and legal persons (No. 31/30 of 1954); sections 5, 217–221 and 236 of the Labour Code; sections 1, 27 and 28 of Act No. 54/2004 and section 3 of Act. No. 130/1996.

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***Allegations made by the LEGIS–CCR***

- 1250.** In its communications of 13 October and 30 November 2007, the LEGIS–CCR describes itself as a representative workers’ organization operating at Romania’s Court of Audit. The complaint concerns violation of the trade union rights guaranteed by article 41 of the Romanian Constitution and by Conventions Nos 87, 98 and 154, which Romania has ratified.
- 1251.** The complainant states that the Court of Audit is a public institution and the salaries of its employees are paid out of the state budget. Staff are recruited on the basis of individual contracts of employment without limit of time. The maximum number of posts at the Court of Audit is approved by annual budget legislation. For the years 2007 and 2008, the Court of Audit had provided for a total of 1,438 posts broken down as follows: (i) 18 posts for senior public posts; (ii) 1,341 posts for contractual staff; and (iii) 79 civil servants.
- 1252.** The complainant notes that during the past 15 years, no President of the Court of Audit has initiated talks with a view to a collective agreement. It thus claims to have initiated the very first talks for this purpose, in accordance with section 3(6) of Act No. 130/1966, registered with the President’s Office under reference No. 2604/DDS/06.12.2006.
- 1253.** The complainant regrets, however, that the institution’s management agreed to meet with them only in order to prevent a protest meeting due to be held on 9 January 2007. The minutes of that meeting were registered under reference No. 365/DDS/08.02.2007. The management agreed to talks in principle with a view to signing the first collective labour agreement involving the Court of Audit.
- 1254.** The complainant alleges that the Court of Audit drew up a draft collective agreement on the basis of which written exchanges and talks with the union took place over a period of three months, from 9 January to 26 March 2007. There was at that time no difference in the respective positions of the parties to the agreement. The complainant adds that this is attested by the recordings of meetings that took place between 23 and 26 March 2007. A copy of the recordings was sent to the complainant by the Court of Audit. The complainant, however, reports that since that date, the management has refused to sign the contract that was agreed after negotiations between the parties.
- 1255.** The complainant adds that it asked the Court of Audit to sign the collective agreement that had been negotiated in numerous letters between March and July 2007. Six months after the start of talks, however, the President of the Court of Audit is reported to have informed the complainant that he did not intend to sign the collective agreement on the grounds that although he was required to negotiate, he was not obliged to sign the resulting agreement. He noted also that the workers in question had been hired by a “budget sector institution” and that according to the Act on collective labour agreements, such agreements “could be” concluded in budget sector institutions, which meant that there was no obligation to do so even after negotiations had concluded with no apparent differences between the parties. In the view of the complainant, the position adopted by the Court of Audit is not consistent with article 41 of the country’s Constitution.
- 1256.** The complainant states that it appealed to the Ministry of Labour in May 2007 to seek a settlement through conciliation. There has been no response. Similarly the complainant asked the President of the Court of Audit to agree to arbitration or mediation to settle the dispute; this request, too, has been ignored.
- 1257.** The complainant alleges that its trade union rights were infringed in the sense that it engaged in collective talks with the management of the Court of Audit for ten months when the latter clearly had no intention of signing any agreement once negotiations were

concluded. Freedom of association is also said to have been violated because the management refused: (i) to respect the complainant's constitutional right to have a collective labour agreement following negotiations (article 41 of the Constitution); (ii) to grant at least the entitlements provided for under the terms of the applicable national collective agreement, in accordance with section 24 of the Labour Code Act No. 53/2003; and (iii) to accept the offer of conciliation or mediation by the Ministry of Labour to resolve the dispute.

**1258.** The complainant reports the measures that have been taken to inform various national authorities of the violations of its rights, including the Ministry of Labour, the People's Advocate, Parliament (Senate and Chamber of Deputies) and the President of the Republic. These efforts have been to no avail. The complainant indicates in particular that it has lodged an application for mediation (No. 2480/23.05.2007) with the Ministry of Labour. It explains that although the Ministry of Labour issued a summons to the Court of Audit with a view to settling the dispute, the President of the Court of Audit failed to appear and sent two representatives who had no authority to negotiate or sign any agreement on behalf of the Court. There was therefore no opportunity to negotiate a settlement to the dispute at the level of the Ministry. The complainant supplies a copy of the minutes in an annex to its complaint.

## **B. The Government's reply**

### ***Allegations of the FEN***

**1259.** As regards the allegations of the FEN concerning the draft amendment to Act No. 130/1996, the Government states in a communication dated 8 April 2008, that collective bargaining will henceforth be in accordance with the Act in question as subsequently republished, amended and extended. Section 12 of the Act stipulates that collective labour contracts can also be concluded for employees of budget sector institutions. Current legislation makes it impossible to negotiate through such contracts any provisions regarding entitlements that are fixed by law. Furthermore, application in practice has shown that the general nature of these provisions leads to problems of interpretation, and it was thus necessary for the legislator to provide clarification.

**1260.** According to the Government, the draft law to amend Act No. 130/1996 does not violate the right to collective bargaining or weaken the role and prerogatives of trade unions in this area. The amendment to section 12, concerning the object of the law, contains a detailed and specific list of the entitlements which are fixed by law and not subject to collective negotiation. The text of section 12 is modified only in respect of the list of provisions which cannot be negotiated. The Government adds that, given that in the budget sector "basic salaries, wage increases, allowances and bonuses, as well as other entitlements", are fixed by law, the Ministry of Education is of the view that the allegations made by the FEN regarding the proposed amendment to Act No. 130/1996 are without foundation. Lastly, it emphasizes that the allegations concern a draft text which is being examined by the social partners, will be drawn up in the form of a law, and must in addition be debated in Parliament before it can be finally adopted.

### ***Allegations of the LEGIS-CCR***

**1261.** In communications dated 13 December 2007 and 16 January 2008, the Government supplies its observations on the allegations of the LEGIS-CCR considering the collective talks in the Court of Audit. It states, first, that from the point of view of law, section 12(1) of Act No. 130/1996 as amended concerning collective labour agreements provides that such agreements can also be concluded for budget sector institutions. The Act does not,

however, allow negotiation of provisions on rights and entitlements that are fixed by law, and it is thus not possible to conclude collective agreements on such provisions.

**1262.** Similar provisions are contained in Act No. 188/1999 concerning the Public Service Regulations. Section 72(1) stipulates that: "... public authorities and institutions can once a year conclude, in accordance with the law, agreements with representative unions of public servants or their representatives, comprising provisions in the following areas only:

- (a) the establishment and allocation of funds for improving conditions at work;
- (b) the daily work programme;
- (c) vocational training; and
- (d) other measures as provided for by law concerning the protection of persons elected to trade union office."

**1263.** The Government explains that with regard to the salary entitlements of employees with individual employment contracts at the Court of Audit, the applicable law is the Emergency Government Ordinance No. 24/2000 concerning the system for fixing basic salaries for contractual staff in the budget sector and salaried staff, in accordance with Annexes II and III of Act No. 154/1998 on the system for fixing basic salaries in the budget sector and remuneration for persons occupying senior public posts. The salary entitlements of civil servants at the Court of Audit are covered by the Government Ordinance No. 6/24 January 2007 concerning measures to regulate salary and other entitlements of civil servants until the entry into force of the Act concerning the unified system of salaries and other allowances for civil servants, as well as the pay increase awarded to public officials in 2007.

**1264.** The Government draws the conclusion that while contractual staff and established officials of the Court of Audit can conclude collective labour agreements, they cannot negotiate provisions regarding entitlements that are fixed by law.

**1265.** The Government emphasizes in addition that its conclusions are consonant with the terms of Convention No. 154, which Romania has ratified. Article 1, paragraph 3, of the Convention stipulates that as regards the public service, special modalities of application of the Convention may be fixed by national laws or regulations or national practice.

**1266.** Secondly, as regards social dialogue, the Government explains that the documents filed by the complainant do not suggest that the employer, namely the Court of Audit, agreed to the provisions negotiated during the meetings of 23 and 26 March 2007. The Government explains that if the complainant is able to show on the basis of these documents that the employer accepted the clauses in question, and that there is no difference of views in that respect, as it claims, it would be able to apply to the Department of Labour and Social Protection of the Ministry of Labour to register the collective labour agreement in accordance with section 26(2)(b) of Act No. 130/1996 as republished, according to which "Collective labour agreements shall be registered without the signatures of all the representatives of the parties if ... (b) certain representative organizations of employers or workers have participated in talks, reached agreement on the provisions negotiated but refuse to sign the agreement, a situation resulting from the documents deposited by the parties."

**1267.** The Government adds that it would appear from the data supplied by the Department of Labour and Social Protection that on 23 May 2007, the complainant sought conciliation in connection with a conflict of interest. That took place on 25 May 2007, at the headquarters

of the Department of Labour. The conciliation was unsuccessful because the parties failed to reach an agreement, according to the record of the meeting (reference No. 3783/43/23.05.2007).

### C. The Committee's conclusions

**1268.** *The Committee recalls that the allegations made by the complainants concern various infringements of collective bargaining and the conclusion of collective labour agreements in the public administration.*

#### **Allegations of the FEN**

**1269.** *The Committee notes that the FEN alleges that the Government has drawn up draft legislation restricting both the range of issues that could be agreed through collective bargaining and the level of negotiation. The Committee notes that according to section 12(1) of Act No. 130/1996 concerning collective labour agreements, "Collective labour agreements can also be concluded by employees of budget sector institutions. Such agreements do not allow negotiation of clauses concerning conditions for entitlements or the basic levels thereof that are fixed by law."*

**1270.** *The Committee notes, in the light of the allegations made by the complainant and of the Government's reply, that an amendment to the above provision is being drawn up. According to the complainant, the amended text would read as follows: "Collective labour agreements can also be concluded by employees of public institutions. Such contracts do not allow negotiation of clauses concerning conditions for granting entitlements or the basic levels thereof as established by law in respect of: basic salary, pay increases, compensation, allowances, bonuses, and other staff entitlements."*

**1271.** *The Committee notes that according to the Government, the proposed amendment to Act No. 130/1996 does not infringe the right to collective bargaining or weaken the role and prerogatives of the trade unions. It states that the amendment concerns a detailed and specific list of entitlements which are fixed by law and which consequently cannot be negotiated in collective labour agreements. The Government maintains that the change to the text of section 12 of Act No. 130/1996 would involve a list of those provisions which cannot be negotiated, and that, in view of the fact that in the budget sector "base salaries, pay increases, allowances, bonuses and other staff entitlements" are fixed by law, the allegations made by the FEN concerning the proposed amendment to Act No. 130/1996 are without foundation.*

**1272.** *As this case concerns a teachers' organization, the Committee recalls the principle of free and voluntary negotiation expressed in Article 4 of Convention No. 98, and emphasizes that action by the public authorities to promote and develop collective bargaining on conditions of work and employment in the public administration are fundamental principles of both Conventions Nos 98 and 154, which Romania has ratified. In the Committee's opinion, teachers do not carry out tasks specific to officials in the state administration; indeed, this type of activity is also carried out in the private sector. In these circumstances, it is important that teachers with civil servant status should enjoy the guarantees provided for under Convention No. 98 [see **Digest of decisions and principles of the Freedom of Association Committee**, para. 901].*

**1273.** *As regards the Government's stated position that due account must be taken of the fact that in the budget sector, "base salaries, pay increases, allowances, bonuses and other staff entitlements" are fixed by law, which it claims justify exclusions from the scope of collective bargaining in respect of these issues, the Committee considers that this*

*approach is contrary to the principles of the collective bargaining Conventions ratified by the Government, which encourage and promote the development and use of collective bargaining machinery on terms and conditions of employment. The Committee, in recognition of the fact that the special characteristics of the public service require some flexibility in the application of the principle of autonomy of partners to collective bargaining, takes the view that the Government could adopt legislative provisions which allow Parliament or the competent budgetary authority to set upper and lower limits for wage negotiations or to establish an overall “budgetary package” within which the parties may negotiate monetary or standard-setting clauses (for example: reduction of working hours or other arrangements, varying wage increases according to levels of remuneration, fixing a timetable for readjustment provisions). Such measures would leave a significant role to collective bargaining and meet with the agreement of the parties concerned. The Committee recalls nevertheless that it is essential that workers and their organizations be able to participate fully and meaningfully in designing this overall bargaining framework, which implies in particular that they must have access to all the financial, budgetary and other data enabling them to assess the situation on the basis of the facts [see inter alia, *Digest*, op. cit., para. 1038].*

- 1274.** *In the light of the foregoing considerations, the Committee requests the Government to take any necessary measures to amend section 12(1) of Act No. 130/1996 so that it no longer excludes from the scope of collective negotiations base salaries, pay increases, allowances, bonuses, and other entitlements of public service employees. Furthermore, the Committee considers that any modification to section 12(1) of Act No. 130/1996 that would have the effect of extending the range of provisions excluded from the scope of collective bargaining on conditions of work and employment of public service employees would be contrary to the principle of developing and using collective negotiations as set out in the Conventions ratified by the Government. The Committee trusts that in any process of amending Act No. 130/1996, the Government will take account of the principles referred to here above and of its recommendations on the possibility of fixing upper and lower wage limits and an overall budgetary package within which the parties may negotiate monetary clauses. In any event, if the country’s laws or Constitution require that any agreements concluded be subject to a budgetary decision by Parliament, the system should in practice ensure full respect for provisions that have been freely negotiated. The Committee requests the Government to keep it informed of any developments in that regard.*

### **Allegations of the LEGIS–CCR**

- 1275.** *The Committee notes the allegation by the union LEGIS–CCR that the management of the Court of Audit refused to sign a collective agreement after ten months of talks. According to the complainant, the reason given for the refusal was the fact that the institution’s management was obliged only to negotiate the collective agreement, not to sign it once it had been negotiated, given that the workers concerned are hired by a “budget sector institution” and the Act on collective agreements provides only that such collective agreements “may be concluded” with budget sector institutions. Consequently the view of the management of the Court of Audit is that it is not obligatory to conclude collective labour agreements, even if negotiations have been concluded with no apparent differences of view between the parties.*
- 1276.** *The Committee notes the allegations that trade union rights were violated by the refusal of the management of the Court of Audit vis-à-vis the complainant: (i) to respect the complainant organization’s constitutional right to have a collective labour agreement once negotiations were concluded (article 41 of the Constitution); (ii) to allow the minimum rights provided for in the collective labour agreement applicable at the national level, under the terms of section 24 of the Labour Code Act No. 53/2003; and (iii) to accept conciliation or mediation by the Ministry of Labour in settling the dispute.*

1277. *The Committee notes that, in its reply, the Government states that the salaries of Court of Audit employees are fixed by law. It explains also that contractual staff as well as established public officials of the Court of Audit can conclude collective labour contracts or collective agreements but cannot negotiate those provisions concerning entitlements that are fixed by law. The Committee also notes that according to the Government, its position is consonant with Article 1, paragraph 3, of Convention No. 154, according to which as regards the public service, special modalities of application of the Convention may be fixed by national laws or regulations or national practice. The Committee recalls in this regard that such special modalities should nevertheless not be of such a kind as to entirely negate the principle of promoting collective bargaining in the public administration or render meaningless the subject matter of such collective bargaining, in accordance with Article 5 of the Convention.*
1278. *The Committee notes that the Government refers to Act No. 188/1999 concerning the Public Service Regulations, in particular section 72(1) according to which: "... public authorities and institutions can once a year conclude, in accordance with the law, agreements with representative unions of public servants or their representatives, comprising the following measures only: (a) the establishment and allocation of funds for improving conditions at work; (b) the daily work programme; (c) vocational training; and (d) other measures as provided for by law concerning the protection of persons elected to trade union office." The Committee once again refers to the conclusions it reached previously concerning the limitation of the scope of negotiation of collective labour contracts in the public service, namely, that such limitations in general are contrary to the principles of the collective bargaining Conventions ratified by the Government, in particular Convention No. 154, which encourage and promote the development and use of collective bargaining machinery on terms and conditions of employment. The Committee therefore requests the Government to take the necessary steps to amend Act No. 188/1999 so as not to restrict the scope of subjects for negotiation in the public administration, in particular those normally pertaining to conditions of work or employment. The Committee encourages the Government to rectify this situation, in particular by drawing up with the social partners guidelines on collective negotiations, and thus to define the scope of collective bargaining, in accordance with Conventions Nos 98 and 154 which it has ratified. In any event, if legislation requires that agreements concluded be subject to a budgetary decision by Parliament, the system should in practice ensure full respect for provisions that have been negotiated freely.*
1279. *The Committee recalls also that the special characteristics of the public service require some flexibility in the application of the principle of autonomy of partners to collective bargaining, and one possible response to this would be to adopt legislative provisions which allow Parliament or the competent budgetary authority to set upper and lower limits for wage negotiations or to establish an overall "budgetary package" within which the parties may negotiate monetary or standard-setting clauses (for example, reduction of working hours or other arrangements, varying wage increases according to levels of remuneration, fixing a timetable for readjustment provisions) [see **Digest**, op. cit., para 1038].*
1280. *The Committee notes the Government's statement to the effect that the documents filed by the complainant do not suggest that the employer, namely the Court of Audit, agreed to the provisions negotiated during the meetings of 23 and 26 March 2007. The Committee also notes that according to the Government, if the complainant is able to show on the basis of these documents that the employer accepted the provisions in question, and that there is thus no difference of opinion in that respect, as it claims, it would be able to apply to the Department of Labour and Social Protection of the Ministry of Labour to register the collective labour agreement in accordance with section 26(2)(b) of Act No. 130/1996 as republished, according to which "Collective labour agreements shall be registered without*

*the signatures of all the representatives of the parties if ... (b) certain representative organizations of employers or workers have participated in talks, reached agreement on the provisions negotiated but refuse to sign the agreement, a situation resulting from the documents deposited by the parties.”*

- 1281.** *Furthermore, the Committee notes the Government’s statements to the effect that the data supplied by the Department of Labour and Social Security suggest that on 23 May 2007, the complainant sought conciliation to resolve a conflict of interests and this took place on 25 May 2007 at the headquarters of the Department of Labour. It was unsuccessful, as the parties failed to reach agreement, according to the record of the meeting (reference No. 3783/43/23.05.2007). The Committee notes that according to the complainant the conciliation failed because the President of the Court of Audit failed to attend the meeting and sent two representatives who lacked the authority to negotiate or sign an agreement on behalf of the institution.*
- 1282.** *The Committee notes in this case that it does not have any information on any agreement between the parties. It notes also, however, that quite apart from possible considerations of the legality of the refusal to sign an agreement that had been freely negotiated, such an action is not conducive to the development of normal and sound industrial relations. In that regard the Committee recalls the importance which it attaches to the obligation to negotiate in good faith for the maintenance of the harmonious development of labour relations; that it is important that both employers and trade unions bargain in good faith and make every effort to reach an agreement; that genuine and constructive negotiations are a necessary component to establish and maintain a relationship of confidence between the parties; and lastly, that agreements should be binding on the parties [see **Digest**, *op. cit.*, paras 934, 935 and 939]. The Committee therefore requests the Government to take all the measures necessary to settle the dispute concerning the agreement negotiated between the trade union LEGIS–CCR and the management of the Court of Audit, as quickly as possible and in accordance with the established procedures; and to promote collective bargaining within the institution in question. The Committee trusts that the Government will keep it fully informed of any new developments in this respect.*

## **The Committee’s recommendations**

- 1283.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations.*
- (a) The Committee requests the Government to take any necessary measures to amend section 12(1) of Act No. 130/1996 so that it no longer excludes from the scope of collective negotiations base salaries, pay increases, allowances, bonuses and other entitlements of public service employees. In any event, if the country’s laws or Constitution require that agreements concluded be subject to a budgetary decision by Parliament, the system should in practice ensure full respect for provisions that have been freely negotiated.*
- (b) Recalling that any change in legislation that could have the effect of extending the range of provisions excluded from collective negotiations on conditions of work and employment of public service employees would be contrary to the principles of developing and using collective bargaining as set out in the Conventions ratified by the Government, the Committee trusts that the Government, in any process of amendment to Act No. 130/1996, will take account of this and of the principles referred to in its conclusions. The*

*Committee requests the Government to keep it informed of any developments in this regard.*

- (c) *The Committee requests the Government to take the necessary measures to amend Act No. 188/1999 so that it does not restrict the range of matters that can be negotiated in the public administration, in particular those that normally pertain to conditions of work and employment. The Committee encourages the Government to rectify this situation by drawing up with the social partners guidelines on collective negotiations and thus to define the scope of collective bargaining, in accordance with Conventions Nos 98 and 154 which it has ratified. In any event, if legislation requires that agreements concluded be subject to a budgetary decision by Parliament, the system should in practice ensure full respect for provisions that have been negotiated freely.*
- (d) *The Committee consequently requests the Government to take all the measures necessary to settle the dispute concerning the agreement negotiated between the trade union LEGIS-CCR and the management of the Court of Audit, as quickly as possible and in accordance with the established procedures; and to promote collective bargaining within the institution in question. The Committee trusts that the Government will keep it fully informed of any new developments in this respect.*

CASE No. 2618

REPORT IN WHICH THE COMMITTEE REQUESTS  
TO BE KEPT INFORMED OF DEVELOPMENTS

**Complaint against the Government of Rwanda  
presented by  
the Inter-union of Workers of Rwanda (ITR)**

*Allegations: The complainant complains of difficulties encountered by trade unions in carrying out their activities at certain enterprises, and of the facilities and advantages granted by the authorities to one trade union association to the detriment of others*

**1284.** The complaint is contained in a communication dated 17 November 2007 from the Inter-union of Workers of Rwanda (ITR), which comprises the following trade unions: the Congress of Labour and Fraternity in Rwanda (COTRAF-RWANDA), the National Council of Free Trade Unions (COSYLI), the UMURIMO Association of Christian Trade Unions (ASC-UMURIMO) and the Independent Rwandan Confederation of Trade Unions and Workers' Associations (CRISAT).

**1285.** The Government sent its observations in a communication dated 19 May 2008.

1286. Rwanda has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Workers' Representatives Convention, 1971 (No. 135).

#### A. The complainant's allegations

1287. In a communication dated 19 November 2007, the ITR complains of the difficulties encountered by certain trade union associations in carrying out their activities at various enterprises, and of the advantages and favours granted by the authorities to one trade union association to the detriment of others, together with the authorities' refusal to sign a memorandum of understanding with trade union organizations after it had been negotiated.
1288. According to the complainants, several factors demonstrate the difficulties faced by all trade union associations, with one exception, in freely carrying out their activities without obstruction or interference. The complainant alleges that the authorities effectively favour the Confederation of Trade Unions of Rwanda (CESTRAR) to the detriment of other representative organizations, by granting it favours such as the use, since 1985, of public buildings situated in Kigali city centre (Gasabo district, Kacyiru sector, plot No. 1713, close to social security, presidential and ministerial buildings), and by inviting it, as sole consultation partner among the trade unions, to meetings such as those dealing with the adoption of the Poverty Reduction Strategy Paper (PRSP) and seminars organized by the International Labour Office, including the subregional seminars on international labour standards and action against child labour organized in August 2007 in Burundi (to which the Ministry invited only a CESTRAR representative, Ms Olive Ninkubwimana. The complainants also cite numerous attempts on the part of the Government to designate unilaterally a representative of CESTRAR as the Workers' delegate to the International Labour Conference. The complainants refer, in this connection, to the objection presented by the ITR to the Credentials Committee of the 96th Session of the International Labour Conference (June 2007) regarding the nomination of the Workers' delegate.
1289. The complainants further complain of delays in the procedure for registering CRISAT's statutes, particularly with regard to their publication in the *Official Journal*, by which, under the law, the trade union organization would be accorded legal personality. After the statutes were deposited in September 2005 and a letter sent to the Minister of Public Service and Labour in March 2006 regarding the delay in registration, the Minister was content to justify this delay on the grounds of the delays entailed by reforms being made to public administration and the Labour Code. He also stated that CRISAT's statutes would only be published once these reforms had been completed. Copies of exchanges of letters on this matter have been provided by the complainants, who are surprised to have received such a response from the Government and request that registration be undertaken simply in accordance with the law in force.
1290. The complainants also state that a certain number of employers have created obstacles to the activities of trade union associations. As examples, they cite the following cases: the refusal by the enterprise Sulfo Rwanda to give COTRAF-RWANDA and COSYLI the opportunity to organize trade union meetings on working days while CESTRAR was authorized to do so; the enterprise Bralirwa's authorization for COTRAF-RWANDA and COSYLI to hold meetings with workers only outside working hours; the refusal by the enterprises Kabuye Sugar, British American Tobacco, Rwandex and Rwanda Motor to authorize trade union meetings of COTRAF-RWANDA and COSYLI, whose requests went unanswered; the refusal by the enterprise Utexrwa to authorize COTRAF-RWANDA and COSYLI to hold meetings with a view to nominating candidates for election as staff representatives, while CESTRAR was authorized to do so, without any move by the Ministry for Public Service and Labour to intervene to censure such anti-union

discrimination. Copies of correspondence concerning these events have been supplied by the complainants.

**1291.** Lastly, according to the complainants, the Ministry of Public Service and Labour and CESTRAR have collaborated in refusing to sign an agreement of understanding dated 30 March 2007, although it had been drawn up and agreed with other trade union associations in the presence of representatives of the International Labour Office and the African Regional Organization of the International Trade Union Confederation (ITUC–Africa). A copy of the agreement, signed by COTRAF–RWANDA, ASC–UMURIMO, COSYLI and CRISAT, has been supplied by the complainants.

## **B. The Government’s reply**

**1292.** In a communication dated 19 May 2008, the Government states at the outset that the information given by the ITR does not correspond to reality, that the rights to freedom of association and expression are guaranteed by the Constitution, and that the ratification of ILO Conventions Nos 87 and 98 reflects the will of the Government to promote those rights.

**1293.** The Government explains, by way of introduction, that there is a certain discrepancy between the number of members declared by trade unions and their actual number of members, and that this fact was mentioned in a report on the functioning of trade unions commissioned by the Ministry of Public Service and Labour and endorsed by all the organizations except CRISAT and ASC–UMURIMO. On the basis of the report, the Government states that “Rwandan trade unions operate with no real basis”. Legal loopholes allow certain confederations composed of phantom trade unions with no members at enterprises to request legal personality. The Government states that it is working on a new legal framework to eliminate such loopholes. This process in part explains the delay in registering CRISAT’s statutes, but the Government gives assurances that all steps have been taken to allow CRISAT to obtain legal personality.

**1294.** With regard to the allegations of special favours granted by the authorities to CESTRAR, the Government states that all work-related employers’ and workers’ organizations participate in formulating policies and laws on labour and employment. This participation is carried out through dialogue structures such as the Economic and Social Council. Consultations are also under way with all partners to make the National Labour Council operational. The Government explains that according to the law, no trade union association may now be dependent on a political party, and CESTRAR, which has been independent since its statutes were amended in 1992, was therefore designated by civil society to sit on the Economic and Social Council.

**1295.** With regard to the nomination of the Workers’ delegate to the International Labour Conference, the Government states that, as is the case with the nomination of the Employers’ delegate, the process involves consultations between the representative organizations held at the request of the ministry responsible for these appointments. The same procedure is followed for any meeting requiring the nomination of representatives of the social partners and involves, for the workers, consultation with CESTRAR, COTRAF–RWANDA and COSYLI. The Government recognizes that ASC–UMURIMO and CRISAT are not consulted, and justifies this on the grounds of internal conflicts within ASC–UMURIMO and by the fact that CRISAT has not yet been registered.

**1296.** Concerning the allegations of difficulties encountered in the process of organizing elections at enterprises, the Government emphasizes that CESTRAR, COTRAF–RWANDA and COSYLI, together with the Rwanda Private Sector Federation representing employers, are closely involved in the election process, in particular through the creation

of an election steering committee comprising all parties. The Government states that, as regards the allegations relating to difficulties encountered during elections at Utexrwa, COTRAF–RWANDA and COSYLI requested workers to abstain from voting so as not to give votes to CESTRAR, which was then left as the sole candidate.

- 1297.** The Government further states that, given the difficulties encountered by trade unions in reaching workers at certain enterprises, it has taken the initiative of drawing up a circular letter addressed to employers on the exercise of trade union rights at enterprises, which complements the relevant provisions of the Labour Code (No. 651/19.18/32/2006 of 27 November 2006).
- 1298.** With regard to cases of attempts to obstruct trade union activities at certain enterprises named by the complainant, the Government emphasizes that, as regards Sulfo Rwanda, the enterprise is entirely within its rights to authorize trade union meetings only on Saturday, which is also a working day for the enterprise in question. Furthermore, the Government states that it has not been informed of refusals by the other enterprises mentioned by the complainant to authorize the meetings requested by COTRAF–RWANDA and COSYLI. The Government states that, if necessary, it would have intervened to uphold the law.
- 1299.** Lastly, with regard to the agreement of 30 March 2007 negotiated between the Ministry of Public Service and Labour and the main trade union associations which the Government, together with CESTRAR, subsequently refused to sign, the Government explains that CESTRAR asked to consult its executive committee before signing, which was what then occurred. The Government expresses surprise at the statements of other trade union associations, which it considers to be contrary to the spirit of the agreement. A copy of the agreement signed by all the trade union associations, including CESTRAR, has been supplied by the Government.

### **C. The Committee's conclusions**

- 1300.** *The Committee observes that, in the present case, the allegations made by the ITR relate to difficulties encountered by trade union associations in carrying out their activities at various enterprises, advantages granted by the authorities and favouritism displayed with regard to one trade union association to the detriment of other associations, and the authorities' refusal to sign an agreement of understanding between trade union organizations and the Ministry of Public Service and Labour.*
- 1301.** *The Committee takes note of the allegations concerning the delay in registering the statutes of CRISAT, in particular the information that, at least six months after they were deposited with the authorities, they have not yet been published in the Official Journal. Under law, this failure to publish means that the trade union organization has no legal personality. The Committee notes that, according to information provided by the complainants, CRISAT's statutes were deposited in September 2005; a communication sent by CRISAT to the Ministry of Public Service and Labour in February 2006 drew attention to the delay in registration and requested that the dossier be followed up; and a letter from the Secretary of State for Labour dated 3 March 2006 stated that the delay in examining the dossier was due to public administration reforms and the revision of the Labour Code. It also stated that CRISAT's statutes would only be published once these reforms were complete, but that, in the meantime, the organization should carry out its activities regardless.*
- 1302.** *The Committee observes that the procedure for registering CRISAT's statutes was still not completed more than six months after they had been deposited, and that two years elapsed without any change in the situation, until the present complaint was brought before the Committee. The Committee notes that, in its reply to CRISAT, the Government confines*

itself to stating that the dossier will be examined once the reforms under way are completed and that this situation should not prevent the trade union from pursuing its activities. Although the Committee further notes that CRISAT participated in negotiating the memorandum of understanding of 30 March 2007 and signed it, it nevertheless observes that, in its reply regarding this case, the Government uses the fact that CRISAT has not yet been registered to justify its non-participation in certain consultations, notably those held for the purpose of nominating the Workers' delegate to the International Labour Conference. While it considers that the right to recognition through legal registration is an essential facet of the right to organize, since that is the first step that workers' or employers' organizations must take in order to be able to function efficiently and represent their members adequately, the Committee also recalls that a long registration procedure constitutes a serious obstacle to the establishment of organizations and amounts to a denial of the right of workers to establish organizations without previous authorization [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 295 and 307].

- 1303.** *Deploring the particularly long delay in the process of registering CRISAT's statutes, which were deposited as long ago as September 2005, the Committee is surprised that the procedure for registering the statutes of a trade union organization, entered into in accordance with the instruments in force and resulting in legal personality for the organization, may be made conditional upon administrative reforms being completed. The Committee regrets that such a delay on the Government's part may also lead to the organization in question being denied participation in certain consultation processes. Consequently, the Committee requests the Government to take all the necessary steps to register CRISAT's statutes, which in law would accord the organization legal personality, as soon as possible and to keep it informed in this regard.*
- 1304.** *With regard to the allegations of special favours granted to CESTRAR by the authorities, the Committee notes that, according to the complainants, the matter concerns the use since 1985 of public buildings situated in the city centre, and CESTRAR's participation as sole consultation partner in meetings such as those dealing with the adoption of the PRSP and seminars organized by the International Labour Office. The Committee notes that, in its reply, the Government confines itself to stating that all representative employers' and workers' organizations participate in formulating policies and laws on labour and employment through dialogue structures such as the Economic and Social Council. It further states that consultations are also under way with all partners to make the National Labour Council operational. The Government also refers to a report it commissioned on the functioning of the trade unions, stating that there is a certain discrepancy between the numbers of members declared by trade unions and the actual numbers. On the basis of this report, which was endorsed by all the organizations except CRISAT and ASC-UMURIMO, the Government states that "Rwandan trade unions operate with no real basis" and that legal loopholes allow certain confederations composed of phantom trade unions with no members at enterprises to request legal personality. The Committee takes note of the Government's statement that the reforms under way are intended to produce a new legal framework to eliminate these loopholes.*
- 1305.** *The Committee draws the Government's attention to the fact that, by favouring or according favourable treatment to a given organization as compared with others, a government may be able to influence the choice of workers as to the organization which they intend to join. A government which deliberately acts in this manner violates the principle laid down in Convention No. 87 that the public authorities shall refrain from any interference which would restrict the rights provided for in the Convention or impede their lawful exercise. In addition, more specifically, the fact that a government is able to offer the use of premises to a particular organization, or to evict a given organization from premises which it has been occupying in order to offer them to another organization, may,*

even if this is not intended, lead to the favourable or unfavourable treatment of a particular trade union as compared with others, and thereby constitute an act of discrimination [see **Digest**, *op. cit.*, para. 345]. The Committee hopes that the Government will take due account of the principles recalled above.

- 1306.** *With regard to the matter of the representativeness of trade unions, as raised by the Government in response to the complainant's allegations concerning the exclusive participation of CESTRAR in national consultation meetings, the Committee recalls that, while it allows that certain preferential treatment may be granted to the most representative organizations, particularly priority in representation for the purposes of collective bargaining and consultation, the determination of the most representative organization must be based on objective, pre-established and precise criteria so as to avoid any possibility of bias or abuse. Therefore, this distinction should not have the effect of depriving those trade unions that are not recognized as being amongst the most representative of the essential means for defending the occupational interests of their members or of the right to organize their administration and activities. Consequently, the Committee requests the Government to indicate whether objective, pre-established and precise criteria exist to determine the representativeness of trade union organizations in Rwanda and to justify granting CESTRAR priority in representing trade union organizations in national meetings and forums. The Committee hopes that, once the representativeness of trade union organizations has been determined, in so far as the Government wishes to grant certain rights and advantages to those organizations recognized as the most representative, it will do so according to the principles recalled above and that these organizations will be treated equally. The Committee also hopes that rights and advantages will only be granted to the most representative organizations where this distinction does not have the effect of depriving those trade unions that are not recognized as being amongst the most representative of the essential means for defending the occupational interests of their members or of the right to organize their administration and activities. Moreover, the Committee requests the Government to keep it informed with regard to the legal reforms that it states are to be undertaken to amend the law with regard to the registration and representation of trade union organizations.*
- 1307.** *Concerning the allegations relating to the nomination of the Workers' delegate to the International Labour Conference from among the ranks of CESTRAR, the Committee notes that the ITR presented an objection to the Credentials Committee of the 96th Session of the International Labour Conference (June 2007). The Committee underlines in this regard that the Credentials Committee noted the lack of response from the Government, but considered that the objection did not contain sufficient elements to allow it to examine the case [see Second report of the Credentials Committee, 96th Session of the International Labour Conference, Geneva, 2007]. The Committee also takes note of the Government's reply, according to which, as is the case for the nomination of the Employers' delegate, nomination of the Workers' delegate involves consultations between representative organizations, namely CESTRAR, COTRAF-RWANDA and COSYLI, at the request of the ministry responsible for these appointments. While recalling that the matter of representation at the Conference falls within the purview of the Conference's Credentials Committee, the Committee reaffirms the special importance it attaches to the right of representatives of workers' organizations, and to the right of employers' organizations, to attend and participate in meetings of the ILO [see **Digest**, *op. cit.*, para. 766]. The Committee considers that determining the most representative organizations in Rwanda according to objective, pre-established and precise criteria could contribute to solving the difficulties that have arisen.*
- 1308.** *With regard to the allegations that the Ministry of Public Service and Labour and CESTRAR colluded in refusing to sign a memorandum of understanding dated 30 March 2007 and drawn up with other trade union associations in the presence of representatives*

of the International Labour Office and ITUC–Africa, the Committee notes that it has received from the complainant a copy of the said agreement signed by COTRAF–RWANDA, ASC–UMURIMO, COSYLI and CRISAT. The Committee further notes that the copy of the agreement sent to it by the Government contains, in addition to the other signatures, that of CESTRAR. The Committee likewise notes the Government’s explanations that CESTRAR asked to consult its executive committee before adding its signature. The Committee considers, however, that, despite the Government’s statement that it initiated the agreement in question, it gives no indication of the current status of the agreement. The Committee invites the Government to indicate whether the agreement of 30 March 2007 between Rwanda’s trade union organizations and the Ministry of Public Service and Labour has entered into force and whether any specific steps have been taken to give effect to its provisions.

- 1309.** *With regard to the complainants’ allegations that numerous employers have created obstacles to the activities of trade union associations, the Committee notes that the allegations concern the refusal by the enterprise Sulfo Rwanda to allow COTRAF–RWANDA and COSYLI the opportunity to organize trade union meetings on working days while CESTRAR was authorized to do so; the enterprise Bralirwa’s authorization for COTRAF–RWANDA and COSYLI to hold meetings with workers only outside working hours; the refusal by the enterprises Kabuye Sugar, British American Tobacco, Rwandex and Rwanda Motor to authorize trade union meetings of COTRAF–RWANDA and COSYLI; and the refusal by the enterprise Utexrwa to authorize COTRAF–RWANDA and COSYLI to hold meetings with a view to nominating candidates for election as staff representatives, while CESTRAR was authorized to do so. Furthermore, the complainants state that the Ministry of Public Service and Labour has refrained from imposing any sanctions in respect of such acts of anti-union discrimination.*
- 1310.** *The Committee notes that, in its reply, the Government emphasizes, as regards Sulfo Rwanda, that the enterprise is entirely within its rights to authorize trade union meetings only on Saturday, which is also a working day for the enterprise in question, and, with regard to the elections at Utexrwa, that COTRAF–RWANDA and COSYLI did not present any candidates and requested workers to abstain from voting so as not to give votes to CESTRAR. The Committee also takes note of the statement that CESTRAR, COTRAF–RWANDA and COSYLI, together with the Rwanda Private Sector Federation representing employers, are closely involved in the process of electing representatives at enterprise level, in particular through the creation of a steering committee. Lastly, the Committee takes note of the Government’s statement that it has taken the initiative of sending a circular letter to employers explaining the exercise of trade union rights at enterprises (No. 651/19.18/32/2006 of 27 November 2006), together with the statement that it has not been informed of refusals by the other enterprises mentioned by the complainants to authorize the meetings requested by COTRAF–RWANDA and COSYLI.*
- 1311.** *The Committee wishes first to remind the Government that the Workers’ Representatives Convention, 1971 (No. 135), which it has ratified, calls on member States to supply such facilities in the undertaking as may be appropriate in order to enable workers’ representatives to carry out their functions promptly and efficiently, and in such a manner as not to impair the efficient operation of the undertaking concerned. The Committee also recalls the principle that the Government should guarantee the access of trade union representatives to workplaces, with due respect for the rights of property and management, so that trade unions can communicate with workers in order to apprise them of the potential advantages of unionization. Lastly, for the right to organize to be meaningful, the relevant workers’ organizations should be able to further and defend the interests of their members, by enjoying such facilities as may be necessary for the proper exercise of their functions as workers’ representatives, including access to the workplace of trade union members [see **Digest**, op. cit., paras 1098, 1103 and 1106]. The Committee also considers*

that, if necessary, workers' organizations and employers could reach agreements so that access to workplaces, during and outside working hours, can be granted to workers' organizations without impairing the functioning of the establishment or service. In conclusion, the Committee requests the Government to take all necessary measures to guarantee trade union organizations, without distinction, the benefit of all the necessary facilities for the free exercise of their functions as workers' representatives, in particular access to workplaces, in accordance with the above principles, and to take action regarding any failure to respect this principle. The Government is also requested to take all the necessary steps to ensure full respect for freedom of association, including the right of workers to elect their representatives in full freedom, without interference or intervention by employers. Lastly, the Government is requested to provide a copy of circular letter No. 651/19.18/32/2006 of 27 November 2006.

## **The Committee's recommendations**

**1312. In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:**

- (a) The Committee requests the Government to take all the necessary steps to register CRISAT's statutes, which in law would accord the organization legal personality, as soon as possible, and to keep it informed in this regard.**
- (b) The Committee trusts that the Government will take due account in future of the principles concerning favours and advantages granted to particular organizations.**
- (c) The Committee requests the Government to indicate whether objective, pre-established and precise criteria exist to determine the representativeness of trade union organizations in Rwanda and to justify granting CESTRAR priority in representing trade union organizations in national meetings and forums. Moreover, the Committee requests the Government to keep it informed with regard to the legal reforms that it states are to be undertaken to amend the law with regard to registration and representation of trade union organizations.**
- (d) The Committee invites the Government to indicate whether the agreement of 30 March 2007 between Rwanda's trade union organizations and the Ministry of Public Service and Labour has entered into force and whether any specific steps have been taken to give effect to its provisions.**
- (e) The Committee requests the Government to take all necessary measures to guarantee trade union organizations, without distinction, the benefit of all the necessary facilities for the free exercise of their functions as workers' representatives, in particular access to workplaces, and to take action regarding any failure to respect this principle. The Government is also requested to take all the necessary steps to ensure full respect for freedom of association, including the right of workers to elect their representatives in full freedom, without interference or intervention by employers.**
- (f) The Government is requested to provide a copy of circular letter No. 651/19.18/32/2006 of 27 November 2006.**

**Complaint against the Government of Chad**  
presented by  
— the Organization of African Trade Union Unity (OATUU) and  
— the International Trade Union Confederation (ITUC)  
supported by  
**Public Services International (PSI)**

*Allegations: Adoption of a decree refusing official recognition of an inter-union association and petition to the administrative courts for the dissolution of that association, storming of the Labour Exchange by the security forces and occupation of union premises for several days preventing workers from gaining access, confiscation of the passport of Mr Djibrine Assali, Secretary-General of the Union of Trade Unions of Chad (UST), preventing him from attending the International Labour Conference, and adoption of an act broadening the concept of essential services to include public service activities that would not be considered essential in the strict sense of the term by the Committee on Freedom of Association*

- 1313.** The complaint is contained in communications dated 10 and 23 July 2007 from the Organization of African Trade Union Unity (OATUU) and the International Trade Union Confederation (ITUC). In a communication dated 24 July 2007, Public Services International (PSI) associated itself with the complaint.
- 1314.** In the absence of a response from the Government, the Committee has had to defer its consideration of the case on two occasions. At its June 2008 session [see 350th Report, para. 10], the Committee issued an urgent appeal to the Government indicating that, in accordance with the procedural rule set out in paragraph 17 of its 127th Report approved by the Governing Body, it could present a report on the substance of the case at its next session, even if the observations or information had not been received in due time. To date, the Government has not sent any information.
- 1315.** Chad has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Workers' Representatives Convention, 1971 (No. 135), and the Labour Relations (Public Service) Convention, 1978 (No. 151).

## A. The complainants' allegations

- 1316.** In a communication dated 10 July 2007, the OATUU indicated that one of its affiliated organizations, the Union of Trade Unions of Chad (UST), had established an inter-union association with four other unions in Chad with a view to engaging in collective bargaining with the authorities, in accordance with the provisions of ILO Conventions Nos 87 and 98. However, in the light of the Government's refusal to hold talks and negotiate, the trade unions staged a strike on 2 May 2007. Consequently, the Government filed a petition with the administrative chamber of the Supreme Court of Chad for the suspension of the activities of the inter-union association and its dissolution. In a statement of defence dated 2 July 2007 to the administrative court (a copy of which is provided by the complainant), the inter-union association requested the court to declare itself incompetent to hear the case. However, even before the court had taken a decision, the Government adopted Decree No. 019/PR/PM/MFPT/SG/DTSS/2007 of 4 July 2007 (a copy of which is also provided by the complainant) refusing recognition of the inter-union association on the grounds that it lacked legal status.
- 1317.** According to the complainant, this decree constitutes a flagrant violation of Convention No. 87 in so far as establishing an inter-union group is the only way that trade unions and their members in countries where there are multiple unions can act collectively to defend their interests. The OATUU points out that such inter-union associations have been established in several countries in Africa.
- 1318.** In a communication dated 23 July 2007, the ITUC indicates that a strike notice was filed on 19 March 2007 by the inter-union association comprising the UST (an organization affiliated to the ITUC), the Union of Teachers of Chad (SET), the Union of Lecturers and Researchers (Synecs), the National Union of Primary School Teachers of Chad (SNIT) and the Independent Union of Public Officials of Chad (SAAAT). It called for a review of the public service pay scale, a rise in the minimum wage and an increase in retirement benefits and family allowances to reflect the cost of living. This notice led to the staging of an indefinite strike in the public sector from 2 May 2007. Following some proposals by the Government, which fell short of the expectations of all but one of the inter-union association's member organizations (which suspended its strike action), the negotiations were interrupted and the strike went ahead.
- 1319.** The ITUC indicates that multiple violations of Conventions Nos 87 and 98 have been observed since that time. Workers involved in the strike were allegedly pressured by the authorities, who made the resumption of negotiations conditional upon the lifting of the strike. Mr Djibrine Assali, Secretary-General of the UST, had his passport confiscated on 27 May 2007 while preparing to board a flight to Geneva to attend the International Labour Conference. According to the ITUC, despite the ILO's involvement in his petition, Mr Assali has apparently not yet been given back his passport. In addition, the ITUC objects to the fact that, on 5 June 2007, the security forces (police and gendarmerie) stormed the Labour Exchange and barricaded its entrance and occupied the head office of the SET for approximately ten days, making it impossible for workers to gain access to the building. The ITUC indicates that it has repeatedly alerted the authorities to its concern over the deterioration of trade union rights in Chad.
- 1320.** The ITUC also objects to Decree No. 019/PR/PM/MFPT/SG/DTSS/2007 of 4 July 2007 "refusing official recognition of the inter-union association in the absence of legal status" which was adopted by the Government on the grounds that there was no receipt to prove that the statutes of the inter-union association and the list of its officials had been filed at a prefecture and also on the grounds that trade union groupings that fail to comply with the conditions and procedures under sections 294–302 of the Labour Code are not recognized. The complainant organization recalls however that the inter-union association is not an

organization in itself but rather a “claims platform” comprising a national trade union confederation (the UST) and several trade unions representing professional sectors, all of which have been duly registered. The organization also recalls that, in an increasing number of countries, trade unions are grouping together under single umbrella associations such as the inter-union association of Chad which do not need to have their own legal status to exercise freedom of association in view of the fact that their component organizations are already registered.

- 1321.** The ITUC also indicates that a petition for the suspension of the activities of the inter-union association and its dissolution was filed on 26 June 2007 by the interregional labour inspector for the northern zone. However, according to the complainant, the inspector did not have the authority to file such a petition. The ITUC, referring to the UST’s defence statement dated 2 July 2007, considers furthermore that the administrative chamber of the Supreme Court has no jurisdiction over this case either. In the statement, the inter-union association points out that, under sections 299, 300 and 314 of the Labour Code, the competent authority is the social chamber of the Court of Appeal. Moreover, sections 69, 70 and 71 of Organic Law No. 60/PR/98 of 7 August 1998 on the organization and operation of the Supreme Court clearly determine which matters fall within the jurisdiction of the administrative court and make no mention of the matter in question. The inter-union association recalls furthermore that it is an ad hoc group composed of legally recognized trade unions, all of which have legal status. It does not claim to be a supraorganization or an organization in itself and the agreement to establish it, which was signed by the trade unions, can in no way be compared to the statutes of a union, which have to be filed under section 299 of the Labour Code. In conclusion, the inter-union association considers that the sole aim of the Government’s action is to prevent the trade unions that have signed up to the claims platform of the inter-union association from carrying out their legitimate activities and that these unions reserve the right to take action against the Government for violating section 306 of the Labour Code.
- 1322.** The ITUC indicates furthermore that these anti-union measures compound a legal situation that it considers to be in violation of the principles of Convention No. 87. The complainant states in particular that, during a strike in 2006, the Government drafted a bill regulating the right to strike in the public sector which contravenes several aspects of Convention No. 87. As a result of pressure from the unions, the text was not adopted. However, the complainant organization points out that the bill was once again brought up for discussion and was adopted on 9 May 2007 (Act No. 008/PR/2007). This act allegedly broadens the concept of essential services to include activities that are not essential in the strict sense of the term.
- 1323.** The complainant organization provides the list of public services deemed essential under section 19 of the act in question: air traffic control services; hospital services; water and electricity services; firefighting services; post and telecommunications services; television services; broadcasting services; the key services of the Ministry of Foreign Affairs and African Integration; the services of inter-prefectoral labour inspectorates; financial management services; slaughterhouse services; and the services provided by the Farcha Laboratory. Referring to the *Digest* of the Committee, the complainant organization points out that only some of the services listed should be deemed essential.

## **B. The Committee’s conclusions**

- 1324.** *The Committee deeply regrets that, despite the time that has elapsed since the presentation of the complaint, the Government has not replied to the serious allegations of the complainant organizations, despite the fact that it has been invited on several occasions, including by means of an urgent appeal, to present its comments and observations on the case. The Committee urges the Government to be more cooperative in the future.*

1325. *Under these circumstances, in accordance with the applicable rule of procedure [see 127th Report, para. 17, approved by the Governing Body at its 184th Session], the Committee is bound to submit a report on the substance of the case without the information that it hoped to receive from the Government.*
1326. *The Committee reminds the Government that the purpose of the whole procedure established by the International Labour Organization for examining allegations of violations of freedom of association is to ensure respect for trade union rights in law and practice. The Committee is confident that, while this procedure protects governments against unreasonable accusations, governments must on their side recognize the importance of formulating for objective examination detailed replies concerning the allegations brought against them [see First Report of the Committee, para. 31].*
1327. *The Committee notes that the present case concerns the adoption of a decree refusing official recognition of an inter-union association and the petition to the administrative courts to dissolve that association, the storming of the Labour Exchange by the security forces and the occupation of union premises for several days making it impossible for workers to gain access, the confiscation of the passport of Mr Djibrine Assali, Secretary-General of the Union of Trade Unions of Chad, preventing him from attending the International Labour Conference, and the adoption of an act broadening the concept of essential services to include public service activities that would not be considered essential in the strict sense of the term by the Committee on Freedom of Association.*
1328. *The Committee is particularly concerned by the seriousness of the allegations in this case. The Committee notes the information provided by the complainant organizations, indicating that the UST established an inter-union association with four other trade unions in Chad, namely the SET, the Synecs, the SNIT and the SAAAT. This inter-union association was established for the purpose of engaging in collective bargaining with the authorities. It called for the review of the public service pay scale, a rise in the minimum wage and an increase in retirement benefits and family allowances to reflect the cost of living. However, given the Government's refusal to engage in any form of dialogue, the inter-union association issued a strike notice on 19 March 2007. This notice led to the staging of an indefinite strike in the public sector from 2 May 2007. Following some proposals by the Government, which fell short of the expectations of all but one of the inter-union association's members (which suspended its strike action), the negotiations were interrupted and the strike went ahead.*
1329. *The Committee notes with concern the allegations regarding the various incidents and measures that followed the launching of the strike. In general, the Committee notes the allegations that the workers involved in the strike had been pressured by the authorities, who furthermore made the resumption of negotiations conditional upon the lifting of the strike. The Committee wishes to firmly point out that the right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 522]. The Government should moreover ensure freedom from any influence or pressure which might affect the exercise of this right in practice. The Committee urges the Government to send its observations in this regard.*
1330. *Furthermore, the Committee notes with deep concern the information that the authorities confiscated the passport of Mr Djibrine Assali, Secretary-General of the UST, while he was preparing to board a flight to Geneva on 27 May 2007 to attend the International Labour Conference, and that the document has not yet been returned to him. In this regard, the Committee notes that the matter was examined by the Credentials Committee at the 96th Session (June 2007) of the International Labour Conference [see Provisional*

Record No. 4C, paras 123–127]. The Committee observes that, according to the information provided by the Government to the Credentials Committee, Mr Assali's passport had been confiscated because, for unknown reasons, he had presented at the airport his service passport with a mission order from his own organization instead of the official mission order issued by the Government, which was mandatory in this case. The Government indicated furthermore that the official mission order had been issued to him and that Mr Assali could recover his passport from the police. The Credentials Committee also indicated that it had requested both the Government representatives and the secretariat of the Committee to inform Mr Assali that he was free to travel to Geneva, but that Mr Assali had explained that his passport had not yet been returned and that his expenses, although approved, had not been paid to him, upon a specific order of the Minister. The Committee notes that the Credentials Committee had expressed its puzzlement in respect of the contradictory information provided regarding the freedom of movement of Mr Assali.

- 1331.** *The Committee draws the Government's attention to the importance which it attaches to the principle set out in the Universal Declaration of Human Rights that everyone has the right to leave any country, including his own, and to return to his country. The Committee strongly reiterates the special importance it attaches to the right of workers' and employers' representatives to attend and to participate in meetings of international workers' and employers' organizations and of the ILO. It is therefore important that no delegate to any organ or Conference of the ILO, and no member of the Governing Body, should in any way be hindered, prevented or deterred from carrying out their functions or from fulfilling their mandate [see **Digest**, op. cit., paras 122, 761 and 766]. The Committee urges the Government to provide an explanation with regard to the confiscation of the passport of Mr Assali, Secretary-General of the UST, to take all the necessary measures to return the document to him and to ensure that he is able to exercise full freedom of movement in carrying out his mandate as a trade union official.*
- 1332.** *The Committee also notes with concern the allegations that, on 5 June 2007, the security forces stormed the Labour Exchange and barricaded its entrance, and occupied the head office of the SET for approximately ten days, blocking workers' access to the building. First, the Committee wishes to recall that, in cases of strike movements, the authorities should resort to the use of force only in grave situations where law and order is seriously threatened [see **Digest**, op. cit., para. 644]. The Committee recalls that the inviolability of trade union premises is a civil liberty which is essential to the exercise of trade union rights and that the occupation of trade union premises by the security forces, without a court warrant authorizing such occupation, is a serious interference by the authorities in trade union activities. The Committee also recalls that activities, such as attacks carried out against trade union premises and threats against trade unionists, create among trade unionists a climate of fear which is extremely prejudicial to the exercise of trade union activities and that the authorities, when informed of such matters, should carry out an immediate investigation to determine who is responsible and punish the guilty parties [see **Digest**, op. cit., paras 178, 179 and 184]. Accordingly, the Committee urges the Government to carry out an investigation and to explain without delay the intervention of the security forces at the Labour Exchange on 5 June 2007 and the occupation for approximately ten days of the head office of the SET, making it impossible for workers to access the premises.*
- 1333.** *The Committee also notes that the complainant organizations object to Decree No. 019/PR/PM/MFPT/SG/DTSS/2007 of 4 July 2007 "refusing official recognition of the inter-union association in the absence of legal status" which was adopted by the Government on the grounds that there was no receipt to prove that the statutes of the inter-union association and the list of its officials had been filed at a prefecture and also on the grounds that trade union groupings that fail to comply with the conditions and*

procedures under sections 294–302 of the Labour Code are not recognized. Furthermore, the Committee notes that a petition to suspend the activities of and dissolve the inter-union association was brought on 26 June 2007 by the interregional labour inspector for the northern zone before the administrative chamber of the Supreme Court but that the ministerial decree had been adopted even before any decision had been made. The Committee also notes that, according to the complainants, the inspector did not have the authority to file such a petition and that the administrative chamber of the Supreme Court has no jurisdiction over cases of this nature, an authority which is reserved under sections 299, 300 and 314 of the Labour Code for the social chamber of the Court of Appeal.

- 1334.** *The Committee notes that, according to the complainant organizations, the inter-union association is not an organization in itself but rather a “claims platform” consisting of a national trade union confederation (the UST) and several trade unions representing professional sectors, all of which have been duly registered in accordance with the law. The Committee also notes the allegation that this decree is a flagrant violation of Convention No. 87 in so far as establishing an inter-union group is the only way that trade unions and their members in countries where there are multiple unions can act collectively to defend their interests. Furthermore, in an increasing number of countries – particularly in Africa – trade unions are grouping together under single umbrella associations which do not need to have their own legal status to exercise freedom of association in view of the fact that their component organizations are already registered. Also, the Committee notes the points made in the statement of defence of 2 July 2007 in which the inter-union association recalls that it is an ad hoc group composed of legally recognized trade unions, all of which have legal status. The inter-union association does not claim to be a supraorganization or an organization in itself and it indicates that the agreement to establish it, which was signed by the trade unions, can in no way be compared to the statutes of a union, which must be filed under section 299 of the Labour Code. In conclusion, the inter-union association considers that the sole aim of the Government’s action is to prevent the trade unions that have signed up to the claims platform of the inter-union association from carrying out their legitimate activities and that these unions reserve the right to take action against the Government for violating section 306 of the Labour Code.*
- 1335.** *In this regard, the Committee observes that the action of the Government is prejudicial to the development of normal and healthy labour relations because such conduct is likely to violate the freedom of each representative organization to organize freely its own activities and its own programme of action, in accordance with its own statutes. The Committee also wishes to recall the importance of the principle that trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and working conditions of those whom the trade unions represent. The public authorities should refrain from any interference which would restrict this right or impede the lawful exercise thereof. Any such interference would appear to infringe the principle that workers’ and employers’ organizations should have the right to organize their activities and to formulate their programmes [see **Digest**, op. cit., para. 881]. The Committee expects that the Government will in the future ensure full respect for the principles recalled above relating to the freedom of action of representative organizations and collective bargaining and requests it to ensure that trade unions will not in any way be restricted with regard to the measures that they may decide to undertake jointly to defend the interests of workers.*
- 1336.** *The Committee notes the allegations that Act No. 008/PR/2007 of 9 May 2007 regulating the right to strike in the public service in Chad broadens the concept of essential services to include activities that are not essential in the strict sense of the term. The Committee observes that, according to section 18 of the act in question, a copy of which is provided by*

the complainant organizations, “a compulsory minimum service is guaranteed in the context of essential public service activities, the interruption of which would endanger the life, personal safety or health of the whole or part of the population”. Furthermore, section 19 of the act contains a list of public services that are deemed essential, namely: air traffic control services; hospital services; water and electricity services; firefighting services; post and telecommunications services; television services; broadcasting services; the key services of the Ministry of Foreign Affairs and African Integration; the services of inter-prefectoral labour inspectorates; financial management services; slaughterhouse services; and the services provided by the Farcha Laboratory. The Committee observes that the complainant organizations consider that only certain services listed in section 19 of the act should be considered essential. First, the Committee would like to recall that the right to strike may be restricted or prohibited: (1) in the public service only for public servants exercising authority in the name of the State; or (2) in essential services in the strict sense of the term (that is, services the interruption of which would endanger the life, personal safety or health of the whole or part of the population. Second, the Committee has repeatedly pointed out that the following services may be considered to be essential services: the hospital sector; electricity services; water supply services; telephone services; firefighting services; and air traffic control services. On the other hand, the Committee has also indicated that the following services do not constitute essential services in the strict sense of the term: radio and television; banks; and postal services [see *Digest*, op. cit., paras 576, 582, 585 and 587]. Consequently, the Committee requests the Government to take the necessary measures to review, in consultation with the social partners concerned and in the light of the principles recalled above, its legislation relating to the determination of essential services. The Committee draws the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of this case.

**1337.** *In the light of the foregoing, the Committee reiterates its deep concern concerning the serious allegations in this case and the absence of any reply from the Government. The Committee urges it to provide its observations without delay so as to enable the objective consideration of each of the issues raised.*

### **The Committee’s recommendations**

**1338.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) The Committee expresses its deep concern at the particularly serious nature of the allegations in this case and the absence of any reply from the Government. The Committee urges the Government to provide its observations without delay so as to enable the objective consideration of each of the issues raised.*
- (b) The Committee urges the Government to provide an explanation with regard to the confiscation of the passport of Mr Assali, Secretary-General of the UST, to take all the necessary measures to return the document to him and to ensure that he is able to exercise full freedom of movement in carrying out his mandate as a trade union official.*
- (c) The Committee urges the Government to carry out an investigation and to explain without delay the intervention of the security forces at the Labour Exchange on 5 June 2007 and the occupation for about ten days of the head office of the SET, making it impossible for workers to gain access to the building.*

- (d) *The Committee expects that the Government will in the future ensure full respect for the principles recalled above relating to the freedom of action of representative organizations and collective bargaining and requests it to ensure that trade unions will not in any way be restricted with regard to the measures that they may decide to undertake jointly to defend the interests of workers.*
- (e) *The Committee requests the Government to take the necessary measures to review, in consultation with the social partners concerned, its legislation relating to the determination of essential services. The Committee draws the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of this case.*
- (f) *The Committee draws the Governing Body's attention to this serious and urgent case.*

CASE No. 2598

REPORT IN WHICH THE COMMITTEE REQUESTS  
TO BE KEPT INFORMED OF DEVELOPMENTS

**Complaint against the Government of Togo  
presented by  
the Workers' Trade Union Confederation of Togo (CSTT)  
with the support of  
the International Trade Union Confederation (ITUC)**

***Allegations: Intervention by security forces to prevent a protest march and a trade union meeting from going ahead; occupation of trade union confederation premises; failure by the State to meet its commitments under an agreement signed with the social partners***

- 1339.** This complaint is contained in a communication from the Workers' Trade Union Confederation of Togo (CSTT) dated 27 September 2007. The International Trade Union Confederation (ITUC) associated itself with the complaint lodged by the complainant organization in a communication dated 28 September 2007.
- 1340.** The Government having failed to respond, the Committee was forced to postpone its examination of the case on two occasions. At its June 2008 meeting [see 350th Report, para. 10], the Committee made an urgent appeal to the Government stating that, in accordance with the procedural rules set out in paragraph 17 of its 127th Report, approved by the Governing Body, it may present a report on the substance of the case at its next meeting, even if the Government's observations or information have not been received in due time. To date, the Government has not sent any information.
- 1341.** Togo has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. The complainant organization's allegations**

1342. In its communication dated 27 September 2007, the CSTT states that the national economic and social situation has deteriorated over the past decade, and has been marked in particular by a fall in workers' purchasing power. The Government is said to have remained indifferent to this situation, despite the numerous appeals made by the trade union movement. According to the complainant organization, the Government finally agreed to discuss the situation with the social partners, through a process of "social dialogue and tripartite cooperation" between 30 January and 7 April 2006. Following these discussions, the stakeholders, that is to say, the Government, the National Employers' Council (CNP) and the trade union organizations, signed a tripartite social agreement protocol on 11 May 2006. The complainant organization states that the workers trusted that all the stakeholders would act in good faith in meeting their commitments. However, it notes that the Government failed to honour any of its commitments. It was only following a threat of strike action (made in November 2006) that the Government put in place a social dialogue structure, the National Social Dialogue Council (CNDS), which was provided for in the agreement protocol, and organized the General Conference on the Civil Service.
1343. The complainant organization regrets that the Government has failed to follow up these measures, and honours its commitments only when it is in its own interests to do so. In the light of this, the complainant organization decided to organize a protest march, to be held on 8 September 2007, with the aim of mobilizing the workers and warning the Government. The march was to be followed by a meeting with the aim of informing workers from all sectors about the situation and to call on the Government to respect the commitments it made when signing the agreement protocol of 11 May 2006, as well as to implement the conclusions adopted at the end of the General Conference on the Civil Service in November 2006.
1344. The organization states that it kept the competent authorities informed on a regular basis with regard to the organization of the march and the holding of the meeting, in accordance with the legislation in force. It also states that it was not notified of any ban.
1345. The complainant organization states that, on the morning of the day of the planned march and meeting, security forces occupied the organization's head office, from which the march was due to set off, as well as Place Anani Santos (the location chosen for the meeting). The organization also states that the marchers were denied access to these locations.
1346. The complainant organization alleges a serious violation of the principles of freedom of association contained in ILO Conventions Nos 87 and 98, as well as the violation of the national Constitution and Labour Code.

**B. The Committee's conclusions**

1347. *The Committee regrets that, despite the time that has elapsed since the complaint was lodged, the Government has, to date, failed to respond to the allegations of the complainant organizations, although it has been invited on several occasions, including by means of an urgent appeal, to submit its comments and observations on the case. The Committee urges the Government to be more cooperative in the future.*
1348. *Under these circumstances, in accordance with the applicable rule of procedure [see 127th Report, para. 17, approved by the Governing Body at its 184th Session], the Committee finds itself obliged to submit a report on the substance of the case without the information it had hoped to receive from the Government.*

1349. *The Committee recalls that the purpose of the whole procedure instituted by the International Labour Organization for the examination of allegations of violations of freedom of association is to promote respect for those rights in law and in fact. The Committee remains confident that, if the procedure protects governments against unreasonable accusations, governments on their side should recognize the importance of presenting, so as to allow objective examination, detailed replies to the allegations made against them [see First Report of the Committee, para. 31].*
1350. *The Committee notes that the present case involves the intervention of security forces to prevent a protest march and a trade union meeting from going ahead, the occupation of the premises of a trade union confederation and the State's failure to honour its commitments under an agreement signed with the social partners.*
1351. *The Committee notes that a tripartite social agreement protocol was signed on 11 May 2006 between the Government and the social partners following discussions entered into as a result of pressure brought to bear by the trade union organizations. The Committee notes that, according to the complainant organization, the Government has, to date, met its commitments only when it has been in its own interests to do so.*
1352. *The Committee notes that, faced with apathy on the part of the Government, the complainant organization decided in a general assembly to organize a protest march with the aim of mobilizing the workers and warning the Government; this was planned for 8 September 2007. The complainant organization also planned to follow up the march with a trade union meeting in Place Anani Santos in Lomé. The complainant organization states, furthermore, that it kept the competent authorities informed and that at no time was it informed that the march or the trade union meeting had been banned. The Committee notes that, early on during the day of the planned march and trade union meeting, the security forces occupied and took control of the organization's premises as well as the location chosen for the trade union meeting. The complainant organization adds that participants were denied access to those locations.*
1353. *The Committee notes with regret that the Government has failed to respond to the complainant organization's allegations regarding the occupation of the CSTT's premises, as well as the intervention of the security forces with a view to preventing a protest march and a trade union meeting from going ahead. The Committee is particularly concerned at the gravity of the allegations in the present case. It recalls that the right to organize public meetings constitutes an important aspect of trade union rights and that, in this regard, the authorities should resort to the use of force only in situations where law and order is seriously threatened. The intervention of the forces of order should be in due proportion to the danger to law and order that the authorities are attempting to control, and governments should take measures to ensure that the competent authorities receive adequate instructions so as to eliminate the danger entailed by the use of excessive violence when controlling demonstrations which might result in a disturbance of the peace [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 140].*
1354. *The Committee also emphatically recalls that the inviolability of trade union premises is a civil liberty which is essential to the exercise of trade union rights and that the occupation of trade union premises by the security forces, without a court warrant authorizing such occupation, is a serious interference by the authorities in trade union activities [see **Digest**, op. cit., paras. 178 and 179].*
1355. *Finally, the Committee draws the Government's attention to the fact that mutual respect for the commitment undertaken in collective agreements is an important element of the*

*right to bargain collectively and should be upheld in order to establish labour relations on stable and firm ground [see **Digest**, op. cit., para 940].*

**1356.** *In the light of the foregoing, the Committee reiterates its concerns regarding the serious allegations involved in this case. The Committee requests the Government to take the necessary measures to ensure that an independent inquiry is undertaken concerning the allegations relating to the intervention of the security forces on 8 September 2007 with the aim of preventing a protest march and a trade union meeting from going ahead, as well as the occupation of the CSTT's premises, and, should these allegations prove to be true, to take any measures necessary to punish those responsible and to issue appropriate instructions in order to ensure that such practices are not repeated in the future. The Committee requests the Government to keep it duly informed in this regard.*

**1357.** *Furthermore, the Committee requests the Government to provide information regarding progress made in implementing the tripartite social agreement protocol of 11 May 2006 and the conclusions of the General Conference on the Civil Service. The Committee expects that the Government will engage in a full and meaningful social dialogue with all the social partners concerned, in a timely fashion, in order to ensure the implementation of an agreement freely entered into by the parties.*

### **The Committee's recommendations**

**1358.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*

*(a) Reiterating its concerns regarding the serious allegations involved in the present case, the Committee requests the Government to take the necessary measures to ensure that an independent inquiry is undertaken concerning the allegations relating to the intervention of the security forces on 8 September 2007 with the aim of preventing a protest march and a trade union meeting from going ahead, as well as the occupation of the CSTT's premises, and, should these allegations prove to be true, to take any measures necessary to punish those responsible and to issue appropriate instructions in order to ensure that such practices are not repeated in the future. The Committee requests the Government to keep it duly informed in this regard.*

*(b) Furthermore, the Committee requests the Government to provide information regarding progress made in implementing the tripartite social agreement protocol of 11 May 2006 and the conclusions of the General Conference on the Civil Service. The Committee expects that the Government will engage in a full and meaningful social dialogue with all the social partners concerned, in a timely fashion, in order to ensure the implementation of an agreement freely entered into by the parties.*

CASE No. 2605

REPORT IN WHICH THE COMMITTEE REQUESTS  
TO BE KEPT INFORMED OF DEVELOPMENTS

**Complaint against the Government of Ukraine  
presented by  
the International Organisation of Employers (IOE)**

***Allegations: The complainant alleges that the Ukrainian authorities refused to register the amendments to the statutes of the Federation of Employers of Ukraine (FEU)***

- 1359.** The complaint is submitted by the International Organisation of Employers (IOE), on behalf of the Federation of Employers of Ukraine (FEU), in a communication dated 16 October 2007. The FEU supplied additional information in a communications dated 3 April and 17 July 2008.
- 1360.** The Government sent its observations in communications dated 17 March and 12 June 2008.
- 1361.** Ukraine has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. The complainant's allegations**

- 1362.** In its communication of 16 October 2007, the IOE alleges infringement by the Ukrainian authorities of the right of employers' organizations to draw up their constitutions and to organize their administration without interference by public authorities. In particular, the complainant submits, that on 7 June 2007, the third Congress of the FEU adopted amendments to its statutes, prepared on the basis of an accepted practice and after a wide consultation with the FEU members. The Congress was convened by the acting Chairperson, with the support of the secretariat, as the appointed Chairperson had to leave the organization in order to take up the post of the Minister of Economy of Ukraine. The Congress was attended by 88 per cent (96 persons) of the total number of elected delegates and changes were unanimously adopted.
- 1363.** The main changes in the FEU statutes were the following: the position of Chairperson was abolished and replaced by the post of the FEU Board Chairperson and under condition that this person could not be a member of the Government or have a position on a board of a political party; appointment of a Director-General who would head the FEU secretariat and be accountable to the Board; opening of a direct membership to companies (previously, only associations could be members); and strengthening the power of the FEU Board.
- 1364.** In accordance with the Law on Public Association and the Law on Employers' Organizations, on 25 June 2007, the FEU submitted a request to the Ministry of Justice to register its newly amended statutes.
- 1365.** After consideration of the documents, on 18 July 2007, the Ministry of Justice issued Order No. 518/5 on Refusal to Register Amendments to the Statutes of the Federation of

Employers of Ukraine. According to the complainant, the Ministry's legal opinion on the refusal to register the amendments lacked the assessment of compliance of the FEU statutes with the legislation and failed to point out which amendments would be contrary to the law in force. Instead, it contained characterization of secondary aspects that had little, if anything, to do with the legal grounds for refusal and were built on non-existent facts and distorted information. The complainant further stresses that the Ministry failed to take into account what is to be considered the main reason behind the newly introduced changes: the fact that on 21 March 2007, Mr Kinakh, who at the time was the FEU Chairperson, was appointed the Minister of Economy of Ukraine and that, pursuant to the Law on Cabinet Ministers of Ukraine and the Law on Employers' Organization, Mr Kinakh no longer had the right to remain the FEU Chairperson. Therefore, on 26 March 2007, at the session of the FEU Board, Mr Kinakh stepped down from his post of the FEU Chairperson. The refusal to register the amendments had serious consequences for the internal governance and functioning of the FEU. Therefore, on 30 August 2007, the FEU filed a claim with the Kiev District Administrative Court.

**1366.** In a communication dated 3 April 2008, the FEU indicates that, on 7 March 2008, pursuant to the decision of the Kiev Administrative Appeals Court of 28 February 2008, the Ministry of Justice registered the amendments to the statutes. However, Mr Kinakh, who is a party to this case, appealed the decision to the Supreme Court.

**1367.** In a communication dated 17 July 2008, the FEU informs that the Supreme Administrative Court suspended the execution of the decision of the Kiev District Administrative Court of 22 November 2007, pending completion of any appeal proceedings. However, taking into account that, at that time, the amendments had already been registered, any decision to cancel the registration can only be taken by a decision on the merits. The FEU is therefore awaiting for the case to be heard by the Supreme Administrative Court.

## **B. The Government's reply**

**1368.** In its communication dated 17 March 2008, the Government confirms that the amendments to the FEU's statutes were registered on 7 March 2008, in accordance with the Law on Public Associations and the Law on Employers' Organizations and pursuant to the decisions of the Kiev District Administrative Court of 22 November 2007 and the Kiev Administrative Appeals Court of 28 February 2008.

**1369.** In a communication dated 12 June 2008, the Government indicates that, by its ruling of 12 May 2008, the Supreme Administrative Court suspended the execution of the decision of the Kiev District Administrative Court of 22 November 2007, pending completion of any appeal proceedings.

## **C. The Committee's conclusions**

**1370.** *The Committee notes that the present case concerns the allegation of refusal to register amendments to the statutes of the FEU, unanimously adopted by the delegates of the Congress of the Federation.*

**1371.** *The Committee notes the information subsequently submitted by the FEU as well as by the Government, according to which, following the decision of 22 November 2007 of the Kiev District Administrative Court and the decision of 28 February 2008 of the Kiev Administrative Appeals Court, the amendments in question were registered on 7 March 2008, in accordance with the Law on Public Associations and the Law on Employers' Organizations.*

**1372.** *The Committee further notes however from the Government's communication dated 12 June that, on 12 May 2008, the Supreme Administrative Court suspended the execution of the decision of the Kiev District Administrative Court pending completion of appeal proceedings. The Committee further notes that the amendments to the statutes remain registered pending the final decision of the Supreme Administrative Court. Recalling that Article 3 of Convention No. 87 guarantees employers' organizations the right to draw up their constitutions and rules and that amendments to the organization's constitutive documents are to be debated and adopted by the members of the organization [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 455], the Committee expects that the Supreme Administrative Court will confirm the decisions of the lower courts ordering the registration of the amendments to the statutes of the FEU to avoid any further impediment to the functioning of the FEU. The Committee requests the Government to keep it informed in this respect and to transmit a copy of the decision taken by the Court.*

### **The Committee's recommendations**

**1373.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) The Committee expects that the Government and its judicial authorities will give full effect to its obligations under ratified Convention No. 87 to ensure the freedom of association of workers' and employers' organizations.*
- (b) The Committee expects that the Supreme Administrative Court of Ukraine will confirm the decisions of the lower courts ordering the registration of the amendments to the statutes of the FEU to avoid any further impediment to the functioning of the FEU. The Committee requests the Government to keep it informed in this respect and to transmit a copy of the decision taken by the Court.*

Geneva, 14 November 2008.

*(Signed)* Professor van der Heijden  
Chairperson

<i>Points for decision:</i>	Paragraph 203;	Paragraph 646;	Paragraph 1015;
	Paragraph 231;	Paragraph 671;	Paragraph 1050;
	Paragraph 241;	Paragraph 774;	Paragraph 1098;
	Paragraph 254;	Paragraph 798;	Paragraph 1134;
	Paragraph 294;	Paragraph 835;	Paragraph 1161;
	Paragraph 380;	Paragraph 848;	Paragraph 1179;
	Paragraph 425;	Paragraph 860;	Paragraph 1240;
	Paragraph 472;	Paragraph 872;	Paragraph 1283;
	Paragraph 503;	Paragraph 884;	Paragraph 1312;
	Paragraph 547;	Paragraph 897;	Paragraph 1338;
	Paragraph 574;	Paragraph 909;	Paragraph 1358;
	Paragraph 591;	Paragraph 989;	Paragraph 1373.