



## EIGHTH 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 16, 17 and 24 March 2006, under the chairmanship of Professor Paul van der Heijden.
2. The members of South African, Argentinian, Guatemalan, Japanese, Mexican and Bolivarian Republic of Venezuelan nationality were not present during the examination of the cases relating to South Africa (Case No. 2406), Argentina (Cases Nos. 2377, 2414 and 2417), Guatemala (Cases Nos. 2241, 2259, 2339, 2397 and 2413), Japan (Cases Nos. 2177 and 2183), Mexico (Case No. 2393) and the Bolivarian Republic of Venezuela (Cases Nos. 2411 and 2428), respectively.

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3. Currently, there are 122 cases before the Committee, in which complaints have been submitted to the governments concerned for their observations. At its present meeting, the Committee examined 37 cases on the merits, reaching definitive conclusions in 28 cases and interim conclusions in nine 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. 1787 (Colombia), 2268 (Myanmar), 2412 (Nepal) and the follow-up to the Commission of Inquiry recommendations in the article 26 complaint against the Government of Belarus 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. 2452 (Peru), 2454 (Serbia and Montenegro), 2456 (Argentina), 2457 (France), 2458 (Argentina), 2459 (Argentina), 2460 (United States), 2461 (Argentina), 2462 (Chile), 2463 (Argentina), 2464 (Barbados), 2465 (Chile), 2466 (Thailand), 2467 (Canada), 2468 (Cambodia), 2469 (Colombia), 2470 (Brazil), 2471 (Djibouti), 2472 (Indonesia), 2473 (United Kingdom/Jersey), 2474 (Poland), 2475 (France) and 2476 (Cameroon), since it is awaiting information and observations from the governments concerned. All these cases relate to complaints submitted to 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. 2248 (Peru), 2265 (Switzerland), 2313 (Zimbabwe), 2348 (Iraq), 2373 (Argentina), 2425 (Burundi), 2426 (Burundi), 2430 (Canada), 2432 (Nigeria), 2436 (Denmark), 2437 (United Kingdom), 2438 (Argentina), 2440 (Argentina) and 2449 (Eritrea).

## Observations requested from complainants

7. The Committee is still awaiting observations or information from the complainant in the following case: No. 2292 (United States).

## Partial information received from governments

8. In Cases Nos. 2203 (Guatemala), 2279 (Peru), 2295 (Guatemala), 2298 (Guatemala), 2317 (Republic of Moldova), 2319 (Japan), 2323 (Islamic Republic of Iran), 2341 (Guatemala), 2355 (Colombia), 2361 (Guatemala), 2362 (Colombia), 2384 (Colombia), 2392 (Chile), 2396 (El Salvador), 2435 (El Salvador), 2440 (Argentina) and 2445 (Guatemala), 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

9. As regards Cases Nos. 2254 (Bolivarian Republic of Venezuela), 2337 (Chile), 2356 (Colombia), 2366 (Turkey), 2372 (Panama), 2388 (Ukraine), 2390 (Guatemala), 2408 (Cape Verde), 2422 (Bolivarian Republic of Venezuela), 2323 (El Salvador), 2427 (Brazil), 2434 (Colombia), 2441 (Indonesia), 2442 (Mexico), 2443 (Cambodia), 2444 (Mexico), 2446 (Mexico), 2447 (Malta), 2448 (Colombia), 2450 (Djibouti), 2451 (Indonesia), 2453 (Iraq), 2455 (Morocco), 2457 (France) and 2472 (Indonesia), the Committee has received the governments' observations and intends to examine the substance of these cases at its next meeting.

## Urgent appeals

10. As regards Cases Nos. 2262 (Cambodia), 2318 (Cambodia), 2321 (Haiti), 2365 (Zimbabwe), 2420 (Argentina) and 2421 (Guatemala), 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.

## Receivability of complaints

11. With regard to the matters raised in a communication dated 8 August 2005 by the Revolutionary Confederation of Workers and Peasants (CROC), the receivability of which had been challenged by the Government of Mexico, the Committee now notes a communication from the complainant organization dated 9 November 2005 whereby it indicates that the Chamber of Deputies and the Senate have rendered invalid the legislation which was to enter into force and which the complainant organization had criticized in its earlier communication in question. Under these circumstances, the Committee considers that there is no longer any need to examine the question of the receivability of the complainant organization's communication.

12. With regard to Case No. 2409 (Costa Rica), given that the Government has raised questions on its admissibility, the Committee decided that the Office will request information on certain points from the complainant organization.

### **Article 26 complaint**

13. 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**

14. The Committee draws the legislative aspects of the following cases to the attention of the Committee of Experts on the Application of Conventions and Recommendations: Hungary (Case No. 2118), Algeria (Case No. 2153), Canada (Cases Nos. 2314 and 2333), Bangladesh (Cases Nos. 2327 and 2371) and Serbia and Montenegro (Case No. 2415).

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

#### ***Case No. 2153 (Algeria)***

15. This case was last examined by the Committee at its March 2005 meeting and concerns allegations of obstacles to the establishment of trade union organizations and a trade union confederation and to the exercise of trade union rights, anti-union dismissals, anti-union harassment by the public authorities and the arbitrary arrest and detention of union members [see 336th Report, paras. 145-178]. On that occasion, the Committee made the following recommendations:
- (a) The Committee urges the Government to maintain an attitude of total neutrality with regard to the dispute between the various factions within the SNAPAP, and to provide it with a copy of the judgement on the case as soon as it is handed out.
  - (b) The Committee once again requests the Government to take the necessary legislative or other steps to enable the representativeness of trade union organizations to be determined without the identities of their members being revealed – for instance, by means of a secret ballot.
  - (c) The Committee requests the Government to take the necessary steps, if requested by the UNFP, the UNFJ and the UFPC, to determine the representativeness of these organizations through a procedure that complies with the principles outlined above and, if they are deemed representative, to grant them all the rights that accompany trade union status.
  - (d) The Committee requests the Government to amend without delay the legislative provisions preventing workers' organizations from forming federations and confederations of their own choosing, irrespective of the sector to which they belong. It urges the Government to consult the social partners without delay in order to remove all the difficulties which might arise in practice from the interpretation of certain legislative provisions on the formation of federations and confederations and particularly, in this case, which might hinder the recognition of the Algerian Confederation of Independent Trade Unions (CASA). The Committee requests to be kept informed of measures taken in this respect.

- (e) The Committee requests the Government and the complainant organization to indicate whether any judicial appeal has been lodged against the decision of the joint committee and, if this is the case, to keep it informed of the outcome of this procedure.
- (f) The Committee requests the Government to provide it with a copy of the judgement concerning Messrs. El Hachemi Belkhir, Mohamed Benahmed, Rabeh Mebarki, Mokhtar Mesbah, Benchâa Benatia, Mohamed Bekhil and Djeloul Amar Behida, as soon as that judgement has been passed.
- (g) The Committee requests the Government to provide it with the judgement concerning Mr. Khaled Mokhtari as soon as that judgement has been passed.

**16.** The Government provided information concerning the above recommendations in two communications dated 23 December 2005 and 6 March 2006.

- In respect of recommendation (a) the Government states that, on 13 June 2005, the Court of El Harrach passed a judgement ordering the previous leadership of the SNAPAP, chaired by Mr. Rachid Malaoui, to vacate the union offices in favour of the new union leadership, chaired by Mr. Belkacem Felfoul, which had been elected at the congress of 25 and 26 May 2004. In its communication dated 6 March 2006, the Government indicates that the Algiers Court of Appeal upheld the judgement of the Court of El Harrach. A letter by Mr. Felfoul rejecting the complainant's allegations concerning the legitimacy of his election to the leadership of SNAPAP, is annexed to the communication.
- With regard to recommendation (b), the Government reiterates that the criteria for assessing the representativeness of trade union organizations are prescribed, by Act No. 90-14 of 2 June 1990 concerning the conditions for the exercise of trade union rights. In this regard, it states: "Mr. Rachid Malaoui has to this day failed to present evidence proving the representativeness of the faction that he claims to represent within the trade union organization, including, as stated in the Committee's recommendation, by means of a secret ballot".
- In respect of recommendation (c), the Government observes that none of the organizations mentioned has submitted the registration documents required under the aforementioned Act of 2 June 1990.
- As regards recommendation (d), the Government repeats its reservations, expressed several times before, regarding the registration of the CASA. It further states that the founding members of the CASA have not resubmitted their documents taking account of the Government's observations.
- In respect of recommendation (e), the Government states that the case of the seven workers dismissed from the Prefecture of Oran is currently before the court and that it will provide a copy of the judgement as soon as it has been given.
- As concerns recommendation (f), the Government states that the workers concerned have won their case in the Administrative Chamber of the Court of Oran and have been reinstated in their posts.
- Finally, in respect of recommendation (g) concerning the situation of Mr. Khaled Mokhtari, the Government has provided the Committee with a copy of the judgement pronounced by the Court of Sidi Bel Abbes overturning the prison sentence and requiring only the payment of a fine.

**17.** In communications dated 8, 16 and 27 February 2006, the complainant organization notes that, on 5 February 2006, the Algiers Court of Appeal upheld the judgement of the Court of El Harrach. It however considered the actions of the Government (i.e. the payment of

the subsidies aimed at financing complaints against the SNAPAP faction led by Mr. Rachid Malaoui, and at influencing judicial decisions) to be contrary to recommendation (a) of the Committee.

18. *The Committee takes note of this information. In particular, it notes the judgement passed with regard to the internal conflict between the two factions of the SNAPAP confirmed by the Algiers Court of Appeal on 5 February 2006. The Committee requests the Government to indicate whether appellate proceedings have been filed against the judgement of the Algiers Court of Appeal and, if so, to provide it with a copy of the relevant decision as soon as it is issued. The Committee also requests the Government to provide its observation on the complainant's allegations concerning the payment of subsidies aimed at financing complaints against one of the SNAPAP factions. It also notes the judgement given in the case of Mr. Khaled Mokhtari and trusts that, in future, the authorities concerned will not impose penalties on union members carrying out legitimate activities. In respect of the situation of the seven workers dismissed from the Prefecture of Oran, the Committee notes that proceedings are still in progress and requests the Government to keep it informed regarding the decision reached on this matter. Finally, in respect of recommendation (f), the Committee notes with interest the Government's statement that the workers involved have won their case in the Administrative Chamber of the Court of Oran and have been reinstated in their posts.*
19. *Moreover, the Committee notes that several of its recommendations have yet to be implemented:*
- *as concerns recommendation (b), the Committee recalls that the authority's practice of requiring a list of the names of all members of an organization with a copy of their membership cards does not comply with the criteria for representativeness established by the Committee. The Committee can only refer back to its previous conclusions regarding the danger of reprisals and anti-union discrimination inherent in a requirement of this type. It once again urges the Government to take the necessary steps to ensure that decisions enabling the determination of the representativeness of a particular organization can be taken without the identities of their members being revealed;*
  - *in respect of recommendation (d), the Committee notes that the Government's reply does not take account of the Committee's previous conclusions regarding the failure of national legislation to comply with Article 5 of Convention No. 87 (prohibition on forming associations grouping together certain sectors). The Committee urges the Government to take the necessary steps to amend these legal provisions promptly in order to allow workers' organizations to form federations and confederations of their own choosing, irrespective of the sector to which they belong, and to keep it informed of the measures taken in this regard.*
20. *The Committee draws the legislative aspects of this case to the attention of the Committee of Experts on the Application of Conventions and Recommendations.*

### **Bangladesh (Case No. 2188)**

21. During its last examination of the case at its June 2005 meeting [see 337th Report, paras. 23-26], the Committee had: (a) expressed its strong hope that the Appellate Division would issue a judgement in conformity with freedom of association principles confirming the High Court decision reinstating Ms. Taposhi Bhattacharjee in her job with full benefits, and requested the Government to keep it informed in this regard and to provide it with a copy of the decision of the Appellate Division once it is issued; and (b) in respect of the warnings issued to the ten union officials, the Committee noted that it had not been

provided with any further details and had once again requested the Government to give appropriate directions to the management of Shahid Sorwardi Hospital so that these warnings are withdrawn and to keep it informed in this respect.

22. In a communication dated 17 June 2005, the Public Services International (PSI) confirmed that Taposhi Bhattacharjee had now received 11 months back pay but the disciplinary action process is still going on, she is being denied travel to attend PSI activities abroad and she fears threats on her life. In addition, the complainant submitted information concerning the present situation of trade union leaders of the Bangladesh Diploma Nurses Association (BDNA) in an appended list, including Manimala Biswas, Akikara Akter, Kohinur Begum, Khadabox Sarker, Delwara Chowdhury, Jasmin Uddin, Provati Das, against whom disciplinary proceedings have been started and were not withdrawn, and Sabina Yaesmin and Md. Sazzad Hossain who were transferred by the Directorate of Nursing Services in order to victimize the trade unions leaders.
23. In its communication of 31 August 2005, the Government once again states that Tapashi Bhattacharjee was reinstated in service in accordance with the decision of the High Court and that she is now availing all benefits of service according to the government rules. The Government further indicated that the appeal (civil Appellate No. 53 of 2003) was heard in part but in the midst of the hearing, the Advocate on Record had to be replaced. A new Advocate on Record was appointed on 23 July 2005 so as to continue the proceedings.
24. *The Committee takes note of the information that Taposhi Bhattacharjee had now received 11 months' back pay, was reinstated in service in accordance with the decision of the High Court and that she is now availing all benefits of service according to the government rules. The Committee also takes note that the appeal of the Government is still pending before the High Court (Appellate Division). The Committee deeply regrets that over two years have elapsed since the High Court decided that Ms. Bhattacharjee was dismissed without any lawful authority and yet the appeal made against this decision by the Government has yet to be concluded. While welcoming the fact that Ms. Bhattacharjee has been reinstated pending the decision of the Court, the Committee considers that the longstanding threat that hovers over her employment status in this respect may seriously infringe upon her exercise of legitimate trade union activities. The Committee must recall in this respect that justice delayed is justice denied [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 56]. Given that it is the Government itself that has initiated the appeal of the High Court judgement, the Committee requests it to consider instituting an independent investigation into the dismissal of Ms. Bhattacharjee, in light of the conclusions drawn by the High Court in this matter, and envisage dropping its appeal against her reinstatement. In the meantime, the Committee reiterates its firm hope that the Appellate Division will issue a judgement in conformity with freedom of association principles confirming the High Court decision reinstating her in her job with full benefits. The Committee requests the Government to keep it informed of any steps taken in respect of this matter and to provide it with a copy of the decision of the Appellate Division once it is issued.*
25. *The Committee deeply regrets that since its examination of this case in 2002, the Government has not furnished any information in respect of the warnings issued to ten union officials of the BDNA executive committee and the Committee's recommendation that the Government give appropriate directions to the management of Shahid Sorwardi Hospital so that these warnings are withdrawn. The Committee trusts that the Government will provide it with full information on the measures taken in this regard without delay.*
26. *As regards the complainant's latest allegations, recalling 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 [see Digest, op. cit., para. 724], the Committee urges the Government immediately to conduct an independent inquiry into the reasons for the disciplinary proceedings brought against Manimala Biswas, Akikara Akter, Kohinur Begum, Khadabox Sarker, Delwara Chowdhury, Jasmin Uddin, Provati Das, seven trade union leaders of the BDNA, and if it is found that they are related to the trade union activities of these leaders, to ensure that they are withdrawn without delay. The Committee furthermore requests the Government to inquire into the reasons for the transfer of Sabina Yaesmin and Md. Sazzad Hossain and if it is found that they were imposed due to their trade union activities, to take appropriate measures to redress this anti-union discrimination and to keep it informed in this respect.*

### **Bangladesh (Case No. 2327)**

27. The Committee last examined this case at its June 2005 meeting [see 337th Report, paras. 183-213] and on this occasion made the following recommendations:

- (a) The Committee urges the Government to review the EPZ Workers' Associations and Industrial Relations Act, without delay in the light of its conclusions set forth above, so as to ensure meaningful respect for the freedom of association of EPZ workers in the very near future, and to keep it informed of all measures taken in this regard. In particular, the Committee requests the Government to take all necessary measures to:
  - (i) amend section 13(1) so as to expedite the recognition of the right to organize to EPZ workers, in view of the blanket denial of the right to organize until 31 October 2006, which it deplors;
  - (ii) amend section 11(2) so as to ensure that workers' representation and welfare committees may continue to function beyond 31 October 2006 in industrial units where a workers' association has not been formed and that their continuance is not subject to the employer's approval, while ensuring that the establishment and functioning of workers' organizations are not undermined;
  - (iii) amend section 24 so as to ensure that workers in industrial units established after the commencement of the Act may form workers' associations from the beginning of their contractual relationship;
  - (iv) repeal section 25(1) so as to ensure that there exists the effective possibility of establishing more than one workers' association in an industrial unit, if the workers choose to do so;
  - (v) amend the legislation, in consultation with the workers' and employers' organizations concerned, so as to avoid the obstacles that can be created by the minimum membership and referendum requirements to the formation of workers' organizations in export processing zones;
  - (vi) amend section 17(2) so as to eliminate the need for approval of the constitution drafting committee by the executive chairperson of the authority;
  - (vii) repeal section 16 so that workers shall not be barred from establishing organizations simply because their attempt to establish a workers' association may have failed;
  - (viii) repeal the whole of section 35 so as to ensure that the issue of deregistration of workers' associations is governed solely by the constitutions of the associations and so that workers in industrial units in EPZs are not deprived of their right to organize for any period of time following the deregistration of a workers' association;
  - (ix) repeal sections 36(1)(c), (e)-(h) and 42(1)(a) so as to ensure that the extremely serious consequence of cancellation of a workers' association is restricted to the seriousness of the violation committed;

- (x) amend section 18(2) so as to ensure that workers' associations in EPZs are not required to obtain prior authorization to receive financial assistance in respect of their trade union activities;
  - (xi) amend section 88(1) and (2) so as to expedite the recognition of industrial action in EPZs before 31 October 2008;
  - (xii) amend section 54(3) and (4) so as to ensure that industrial action in EPZs may only be restricted in accordance with the principle of providing for a negotiated minimum service so as to effectively ensure the safe functioning of machinery within the EPZs or to avoid an acute national crisis endangering the normal living conditions of the population;
  - (xiii) amend section 32(1) so as to ensure that the formation of federations is not conditional on an excessively high requirement concerning member associations;
  - (xiv) amend section 32(3) so as to ensure that federations formed in EPZs have the right to form and join confederations at a regional or national level; and
  - (xv) ensure that the elections to be held under the provisions of the Act are conducted without any interference from the public authorities, including the BEPZA and its executive chairperson.
- (b) The Committee requests the Government to clarify the impact of section 13(3) of the Act on newly formed organizations after October 2008 and, if this provision would result in the limitation of workers' associations to a trial period, to ensure its immediate repeal.
  - (c) The Committee reminds the Government that it may avail itself of the technical assistance of the Office, if it so desires.
  - (d) The Committee draws the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of the case.

**28.** In its communication dated 5 September 2005, the Government recalled the detailed history behind the adoption of the EPZ Workers' Associations and Industrial Relations Act and indicated that a sound industrial relations and uninterrupted production environment exists in the EPZs of Bangladesh at present. It also stated that the allegations made by the Bangladesh Independent Garment Workers Federation (BIGUF) (which according to the Government is an affiliate body of the Solidarity Centre, AFL-CIO) to the ILO through the ITGLWF are in contradiction with the agreed report submitted on 11 May 2004 by the Solidarity Centre of AFL-CIO Dhaka. The Government added that it is on the basis of the agreed report that the EPZ Workers' Associations and Industrial Relations Act was drafted and passed by Parliament on 18 July 2004.

**29.** The Government further indicated that, after the implementation of the law, it has seen an important progression of EPZ industrial relations. It added that the conveners of the Workers' Representation and Welfare Committee (WRWC) have expressed their satisfaction over the functioning of the elected committees to deal with the labour problems.

**30.** In addition, the Government indicated that as per law, the WRWC elections began on 12 December 2004 and, since 20 August 2005, 174 out of 176 WRWC elections (99 per cent) have been held. Of them, 164 have been given registration (94 per cent). The United States Embassy, Dhaka, and the AFL-CIO, Dhaka, monitored the WRWC elections. Under the law, general workers can participate in the various activities of the company through WRWCs. The Government added that 12 training programmes were organized for newly elected WRWC members and human resource managers of the enterprises and two discussion meetings were held with the investors on the implementation of the law. The Government stated that the WRWC members admitted that the elections were held free and fair. According to the Government, 45 counsellors have been appointed and posted in different industries, covering different zones, under a technical assistance project financed



by the World Bank. They are working for the immediate implementation of the EPZ Workers' Associations and Industrial Relations Act.

31. Finally, the Government stated that from the second phase of the law, workers' associations (WAs) will enjoy full freedom of association and collective bargaining rights.
32. *The Committee notes the information provided by the Government. It notes with interest that, since 20 August 2005, 174 out of 176 WRWC elections (99 per cent) were held and that 164 WRWCs have been given registration (94 per cent). The Committee further notes the information provided by the Government that 12 training programmes were organized for newly elected WRWC members and human resource managers of the enterprises and two discussion meetings were held with the investors on the implementation of the law. Finally it notes that 45 counsellors have been appointed and posted in different industries covering different zones under a technical assistance project financed by the World Bank with a view to the immediate implementation of the EPZ Workers' Associations and Industrial Relations Act.*
33. *The Committee must, however, recall that, when it last examined this case, it had expressed its concern that the EPZ Workers' Associations and Industrial Relations Act, while taking certain steps to provide greater freedom of association to EPZ workers, contained numerous and significant restrictions and delays in relation to the right to organize in EPZs. The Committee regrets that no revision of the Act appears to have even been contemplated by the Government as requested by the Committee in its previous recommendations. Therefore, the Committee must once again request the Government to take the necessary steps to review the EPZ Workers' Associations and Industrial Relations Act so as to ensure full and meaningful respect for the freedom of association of EPZ workers in the very near future. The Committee recalls that the technical assistance of the Office is available in this respect, should the Government so desire.*
34. *The Committee draws the legislative aspects of this case to the attention of the Committee of Experts on the Application of Conventions and Recommendations.*

### **Case No. 2371 (Bangladesh)**

35. The Committee last examined this case at its June 2005 meeting [see 337th Report, paras. 214-240] and on this occasion made the following recommendations:
  - (a) The Committee once again urges the Government, in consultation with the workers' and employers' organizations concerned, to amend the legislation so as to avoid the obstacles that can be created by the minimum membership requirement to the formation of workers' organizations.
  - (b) The Committee urges the Government to take the necessary steps immediately so that the Immaculate (Pvt.) Ltd. Sramik Union is registered promptly. The Committee requests the Government to keep it informed of all progress made in this regard.
  - (c) The Committee requests the Government to convene an independent inquiry to thoroughly and promptly consider the allegation that seven members of the union were dismissed by the company upon it learning that a union was being established and to ensure that appropriate measures are taken in response to any conclusions reached in relation to these allegations of anti-union discrimination. The Committee requests the Government to ensure that, if it appears in the independent inquiry that the dismissals did occur as a result of involvement by the workers concerned in the establishment of a union, those workers will be reinstated in their jobs, without loss of pay. If the independent inquiry finds that reinstatement is not possible, the Committee requests the Government to ensure that adequate compensation so as to constitute sufficiently dissuasive sanctions is paid to the workers. The Committee requests the Government to keep it informed of any developments in this regard.

36. In its communication, dated 2 October 2005, the Government provided information on the above recommendations. In particular, the Government indicated, with regard to recommendation (a) above, that considering the socio-political and industrial economic situation in Bangladesh, a minimum requirement of 30 per cent membership of the total workers to form a union in that establishment is justified. Consequently, the Government states that no amendment for this purpose is needed.
37. The Government further indicated, with regard to recommendation (b) above, that the appeal (No. 01 of 2004) filed by the union before the First Labour Court, Dhaka, regarding the refusal of registration, is still pending. The next hearing date is fixed for 11 October 2005 and the Government states that the judgement of the Court will be transmitted as soon as it is handed down.
38. With regard to recommendation (c) above, the Government stated that national legislation includes protection against anti-union discrimination. The Government indicated that under the provision of section 25(1) of the Employment of Labour (Standing Orders) Act, 1915, a worker has the possibility to go before the Court for redress if he or she has been terminated for trade union activities. Moreover, under section 25 – Grievance procedure – of the Employment of Labour (Standing Orders) Act, 1965, any individual worker, including a person who has been dismissed and intends to seek redress thereof can submit a grievance to the employer and, if the worker is dissatisfied with the decision, he or she has the possibility to make a complaint before the Labour Court.
39. *The Committee notes the information provided by the Government. With regard to the recommendation made under (a) above, the Committee deeply regrets that the Government merely maintains its position that a 30 per cent minimum membership requirement for the formation of a union is justified in light of the national context. The Committee strongly urges the Government once again to take measures to consult with the workers' and employers' organizations concerned with a view to amending the IRO so as to avoid the obstacles that can be created by the minimum membership requirement to the formation of workers' organizations. The Committee draws this aspect of the case to the attention of the Committee of Experts on the Application of Conventions and Recommendations.*
40. *With regard to its recommendation that the Government take immediate steps to ensure the prompt registration of the union, the Committee regrets that the Government provides no information as to measures taken in this regard and merely refers to the appeal filed by the union in this regard which is still pending before the First Labour Court, Dhaka. Given the concerns raised by the Committee in respect of the obstacles posed to the formation of workers' organizations by the minimum membership regulation, the Committee urges the Government once again to take steps immediately for the prompt registration of the union.*
41. *Finally, the Committee notes that the Government has provided no information as to the steps taken to convene an independent inquiry to thoroughly and promptly consider the allegation that seven members of the union were dismissed by the company upon it learning that a union was being established and to ensure that appropriate measures are taken in response to any conclusions reached in relation to these allegations of anti-union discrimination. The Committee urges the Government to rapidly convene an independent inquiry into these serious allegations of anti-union discrimination and to keep it informed of the progress made in this regard.*

### **Case No. 2156 (Brazil)**

42. At its meeting in November 2004, the Committee requested the Government to send it a copy of the ruling handed down regarding the murder of the trade union leader Carlos Alberto Oliveira Santos [see 335th Report, paras. 28-30].

43. In a communication dated 12 September 2005, the Government states that in the course of judicial proceedings on 29 April 2005, the Attorney-General's Office presented the final charges against the defendants, who stand accused of doubly aggravated murder.
44. *The Committee takes note of this information and requests the Government to send a copy of the ruling eventually handed down regarding the murder of the trade union leader Carlos Alberto Oliveira Santos.*

**Cases Nos. 2166, 2173, 2180 and 2196  
(Canada/British Columbia)**

45. The Committee last examined this case, which concerns violations of freedom of association principles on collective bargaining in respect of public employees through several pieces of legislation in the health (Bills Nos. 2, 15 and 29) and education (Bills Nos. 18, 27 and 28), at its March 2004 meeting [see 333rd Report, paras. 23-30]. On that occasion, it recalled the following recommendations:
- (a) As regards the education sector, the Committee had recommended that the Government: repeal Bill No. 18; adopt a flexible approach, eventually amending Bill No. 27 to give the parties an opportunity to vary by agreement the working conditions unilaterally imposed by the legislation; and include in the mandate of the commission established under Bill No. 27, the issues raised in connection with Bill No. 28 [330th Report, para. 305(a)(i)-(iv)].
  - (b) As regards the health and social services sector, the Committee had recommended that the Government: amend the legislation to ensure that workers enjoy adequate compensation measures for the limitation placed on their right to strike; adopt a flexible approach, eventually amending Bill No. 15 to give the parties an opportunity to vary by agreement the working conditions unilaterally imposed by the legislation; and hold full and detailed consultations with representative organizations, with the help of a neutral and independent facilitator, to review the collective bargaining issues raised in connection with Bill No. 29 [330th Report, para. 305(b)(i)-(iii)].
  - (c) The Committee had further requested the Government in future: to respect the autonomy of bargaining partners in reaching negotiated agreements and refrain from having recourse to legislatively imposed settlements; and to hold meaningful consultations with representative organizations when workers' right of freedom of association and collective bargaining may be affected. Finally, the Committee requested the Government to provide it with judicial decisions concerning pending court challenges in connection with the complaints, and to keep it informed of all developments [330th Report, para. 305(c)-(f)].
46. Furthermore, the Committee had noted the information provided by the Government to the effect that, to give effect to Bill No. 27, the Minister of Labour had appointed an individual to consult with interested parties and to recommend terms of reference for the review commission, and that based on its report, the Minister had appointed, in December 2003, a commissioner who would consult with groups in the education sector and review procedures in other jurisdictions to recommend procedures for a new collective bargaining arrangement. The Committee had also noted that the Government had provided a copy of a judgement of the BC Supreme Court upholding the constitutionality of Bill No. 29, and that the health sector unions had obtained leave to appeal to the BC Court of Appeal but had not taken further steps in this respect. Lastly, the Committee had requested the Government to keep it informed of steps taken to implement the recommendations made when it examined the merits of these complaints at its March 2003 session, and to continue to keep it informed on the conclusions of the review commission established under Bill No. 27, and on the outcome of judiciary proceedings filed in connection with the complaints.

47. In its communication of 4 March 2005 regarding Case No. 2324 as well as Cases Nos. 2166, 2173 and 2180, the National Union of Public and General Employees (NUPGE) informs the Committee on Freedom of Association that it wrote to the province's Minister of Labour on 18 October 2004 asking that the Government take action to implement the recommendations of the ILO Governing Body. On 2 February 2005, the Deputy Minister replied that the Government had noted the ILO recommendation but was not planning to amend or repeal the legislation. According to the complainant, the Government had demonstrated disregard for the ILO, the rulings of its Governing Body and its investigative and conciliation procedures.
48. *The Committee notes the information provided by the NUPGE. In particular, it notes the Government's answer to the complainant organization that it is not planning to amend or repeal the legislation.*
49. *The Committee deeply regrets the fact that the Government has so far failed to communicate any follow-up information on the measures taken to give effect to the Committee's recommendations. The Committee is particularly concerned about this situation in view of the fact that the Government has in the meantime intervened once again through retroactive legislation in the collective bargaining process [see Case No. 2324, 336th Report, paras. 233-284]. The Committee recalls 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 of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 10]. The Committee therefore urges once again the Government to provide information without further delay on the steps taken with regard to the Committee's recommendations mentioned above. The Committee regrettably is bound to remind the federal Government of Canada that the principles of freedom of association should be fully implemented throughout its territory.*

### **Case No. 2215 (Chile)**

50. The Committee last examined this case at its meeting in June 2005, and on that occasion requested the Government to communicate the text of the final ruling given concerning the dismissal of the trade union official Mr. Yapur Ruiz and to take all measures in its power to ensure that he was reinstated until such time as a decision was given on the latest legal action after the successive judicial decisions ordering his reinstatement [see 337th Report, paras. 33-37].
51. In a communication dated 15 September 2005, the Government states that Mr. Yapur Ruiz has been reinstated, in accordance with the judicial ruling.
52. *The Committee notes this information with interest.*

### **Case No. 2217 (Chile)**

53. The Committee examined this case at its meeting in June 2005 [see 337th Report, paras. 38-48], and on that occasion:
- (a) As regards the allegations of acts of intimidation and violence by the police during a gathering of striking workers outside the company's buildings on 1 and 2 May 2000 (resulting in workers being injured and detained), the Committee noted that the Government had written to the Governor of the Province of Quillota and was waiting for a reply. The Committee requested the Government to send the Governor's report on those matters as soon as he received it.

- (b) With regard to the dismissal of workers enjoying trade union immunity at Electroerosión Japax Chile S.A., the Committee noted the Government's statement that the court had admitted the judicial proceedings concerning anti-union practices against union official, Mr. Jorge Murua Saavedra, and had ordered his reinstatement, imposed heavy fines on the enterprise for unfair practices in collective bargaining and placed it on the list of enterprises found guilty of anti-union practices. The Committee requested the Government to keep it informed of the effective reinstatement of Mr. Saavedra.
54. In its communication of 15 September 2005, the Government states with regard to the judicial hearing at which the reinstatement of the trade union leader Jorge Murua Saavedra was ordered, that the company refused to comply with the order handed down in 2002 and that consequently the court issued a warrant for the arrest of the company's legal representative (as the representative was not found, a warning fine was imposed). The Government states, lastly, that the legal counsel dealing with the case, together with the union, is examining strategies for enforcing the ruling.
55. *The Committee takes note of this information. The Committee regrets that, despite the time that has elapsed since the ruling ordering the reinstatement of the union leader Jorge Murua Saavedra in the company, Electroerosión Japax Chile S.A., this has not been given effect. Under these circumstances, the Committee expresses the hope that the trade union leader in question will be reinstated in his post in the near future, and requests the Government to keep it informed in this regard. At the same time, the Committee requests the Government to communicate the information that has been requested concerning the alleged acts of intimidation and violence by the police against striking workers on 1 and 2 May 2000 during a gathering in front of the company, Sopravel S.A. (which resulted in a number of people being injured and detained).*

### **Case No. 1955 (Colombia)**

56. The Committee notes that, in a communication dated 8 June 2005, the Trade Union of Workers of the Bogotá Telecommunications Enterprise (SINTRATELEFONOS) presented new allegations as a part of the follow-up to the present case which was first examined in June 2003 [see 331st Report, paras. 15-19].
57. The complainant organization alleges that it was opposed to the Government's privatization policies, in particular the plan to float the Telecommunications Enterprise of Bogotá on the Stock Exchange, implemented between 12 and 20 May 2003. The complainant organization adds that, in solidarity with the workers of TELECOM, which went into liquidation on 12 June 2003, the workers of SINTRATELEFONOS took part in various types of protest. The complainant organization states that the enterprise investigated and identified those workers having participated in the protests and proceeded, on 13 August 2003, to terminate the employment contracts of 35 trade union activists belonging to SINTRATELEFONOS.
58. The complainant organization also alleges that the Government turned down the registration request lodged by the Union of Workers of the Public Domestic and Telecommunications Services Economic Sector (UNITRASTEL) on 14 August 2003.
59. In its communication of 8 November 2005, the Government states that trade union organizations may freely express their opinions and dissent against state public policies. As to the democratization of shares, referred to by the complainant organization as floatation on the stock exchange, the Government states that this process was carried out strictly within the rules laid down. The Government adds that privatization does not per se restrict

the right and freedom of association, as its purpose is to offer the community an improved service.

60. As to the allegations concerning the repression of the protest carried out in solidarity with the TELECOM workers, the Government reiterates that the Political Constitution of the Colombian State protects the right to protest, whenever such protests do not affect public order, the physical and moral well-being of persons, or the activities of enterprises or establishments.
61. As to the allegations that the enterprise gathered detailed information on the names of SINTRATELEFONOS members who had participated in the various protests held in solidarity with TELECOM, the Government states that, according to the enterprise, it has no record of any such surveillance activity having been undertaken during the protest against the privatization of TELECOM with a view to establishing whether any of its workers participated.
62. As to the allegations concerning the unilateral termination of 35 workers' employment contracts by the enterprise, the Government states that the decision was based on the power conferred by the law upon the employer to unilaterally terminate employment contracts, as stated in article 64 of the Substantive Labour Code, as amended by article 28 of Law No. 789 of 2002 and clause 19 of the collective labour agreement. The Government adds that the *tutela* (protection) appeals lodged by the workers were rejected in the first and second instances but that the Constitutional Court, through ruling T-764 of 22 July 2005, overturned the aforementioned decisions, accepted the right to *tutela* and ordered that the workers be reinstated, an order with which the enterprise complied. In effect, 33 workers were reinstated and the other two taken back on, as of May 2004, following a separate agreement (the Government provides copies of the abovementioned decisions and of the communications concerning the reinstatements). As to wages and social benefits for the time period between dismissal and compliance with the *tutela* judgement, the Government states that these issues are a matter for the ordinary labour courts.
63. As to the refusal by the Ministry of Social Protection to include the trade union organization UNITRASTEL in the trade union register, the Government states that this refusal was based on the fact that the organization did not fulfil the requirements for registration as it was made up of employees and workers from different branches of the state and private sectors. The ruling refusing registration was challenged and, as a result, the decision not to register the trade union was upheld.
64. *The Committee notes the new allegations concerning the dismissal of 35 workers of the Telecommunications Enterprise of Bogotá due to their participation in a protest in solidarity with those affected by the privatization of TELECOM and the Government's observations stating that these workers had been reinstated following a ruling of the Constitutional Court.*
65. *As to the refusal to register UNITRASTEL, a trade union organization of an industrial nature, owing to the fact that it was made up of employees and workers from different branches of the state and private sectors, the Committee recalls that, in accordance with Article 2 of Convention No. 87, workers have the right to establish organizations of their own choosing. The Committee recalls that, although it is admissible for first-level organizations of public servants to be limited to that category of workers, this restriction should not be extended to cover higher level trade union organizations. The Committee thus requests the Government to take measures to guarantee the full application of this principle by proceeding to recognize UNITRASTEL.*

**Case No. 2097 (Colombia)**

66. At its June 2005 meeting, the Committee requested the Government to indicate whether it had initiated an administrative inquiry into the allegations presented by the National Trade Union of Workers of AVINCO S.A. (SINTRAVI) concerning the enterprise AVINCO S.A. (pressure put on workers to conclude a collective agreement outside the union and consequent withdrawal of non-statutory services for unionized workers; the pressure put on workers to leave the union) [see 337th Report of the Committee, paras. 53-55].
67. In its communication dated 14 September 2005, the Government states that, through resolution No. 0156 of 17 May 2005, the territorial directorate of Antioquia decided not to impose penalties on the enterprise AVINCO S.A. for failing to prove that no pressure had been put on workers to conclude a collective agreement outside the union. In effect, the statements made by the members called on to testify show that they left the trade union and concluded the collective agreement of their own free will. Moreover, as to non-statutory services, the inquiry revealed that such services were not included in the collective agreement. The abovementioned decision is final as no appeal has been lodged against it (the Government includes a copy of the decision and the writ of execution).
68. *The Committee notes this information and recalls that with regard to the conclusion of collective agreements, when examining similar allegations linked to other complaints presented against the Government of Colombia, it stressed that “the principles of collective bargaining must be respected taking into account the provisions of Article 4 of Convention No. 98” and that “collective agreements should not be used to undermine the position of the trade unions” [see 324th Report, Case No. 1973, 325th Report, Case No. 2068 (Colombia)) and 332nd Report, Case No. 2046 (Colombia)].*

**Case No. 2237 (Colombia)**

69. The Committee last examined this case at its meeting in November 2004 [see the 335th Report, paras. 66-76]. On that occasion:
- with regard to the disparity in wages paid to different workers employed in the same departments at the Hilazas Vanylon Enterprise S.A., the Committee requested the Government to ensure that workers at the enterprise were not discriminated against with regard to wages because of their trade union membership, and to keep it informed of any steps taken in that respect;
  - with regard to the allegation regarding the conclusion of service contracts with workers' cooperatives at the enterprises mentioned by the complainant (Fabricato Tejicondor, Coltejer and Textiles Rionegro, Riotex, Leonisa, Everfit-Indulana), thereby obstructing freedom of association, the right to present lists of claims and the right to strike, the Committee recalled that the notion of “worker” means not only salaried worker but also independent or autonomous worker, and considered that workers associated in cooperatives should have the right to establish and join trade union organizations of their own choosing. The Committee requested the Government to take the necessary measures to amend the legislation accordingly, and to keep it informed of developments;
  - with regard to the allegations regarding the establishment of a single collective agreement within the enterprise Fabricato Tejicondor, the Committee noted that according to the Government, the main trade union is SINDELHATO, to which more than 50 per cent of the workforce belongs, while the unions SINALTRADIHITEXTO and SINTRATEXTIL have much fewer members;

- with regard to the allegation that within the enterprise Riotex, part of the Fabricato group, unionized workers had not benefited from the 7.49 per cent rise since 16 July 2003, the Committee requested the Government to carry out an inquiry into the matter and, should the allegation be substantiated, to ensure that unionized workers be paid the appropriate sum owed and to keep the Committee informed in that respect.

70. In a communication dated 28 March 2005, the Government sent confirmation from the Bello Circuit Labour Court that two court cases were under way, having been initiated by SINALTRADIHITEXTO against Textiles Fabricato Tejicondor and SINDELHATO for failure to implement the collective agreement between the company and SINALTRADIHITEXTO, refusal to discuss a list of conditions with the trade union and refusal to grant trade union leave, among other things.

71. *The Committee takes note of the Government's information. The Committee nevertheless regrets that, despite the time that has elapsed since the last examination of the case, the Government has not sent any information concerning the questions referred to above. The Committee accordingly requests the Government to send information without delay on developments in the case, in particular with regard to the allegation that in the enterprise Riotex, part of the Fabricato group, unionized members have not benefited from the 7.49 per cent increase since 16 July 2003.*

### **Case No. 2297 (Colombia)**

72. The Committee last examined this case at its June 2005 meeting [see 337th Report, paras. 56-60]. On that occasion, the Committee requested the Government to inform it whether any legal action had been taken as a consequence of anti-union discrimination following the dismissals and transfers alleged to have taken place during the process of restructuring at the General Directorate of Taxation Support of the Ministry of Finance and Public Credit.

73. In communications dated 3 June and 30 September 2005, the Trade Union of Communications Workers (USTC) and the Single Confederation of Workers (CUT), Antioquia executive board, submitted information concerning allegations that had already been examined by the Committee. No new elements were included in that information. In its communication of 17 January 2006, the Government refers to the allegations that have already been examined.

74. *In these conditions, whilst observing that the Government has not submitted the information requested in June 2005, the Committee requests once again that the Government inform it whether any legal action has been taken for anti-union discrimination following the dismissals and transfers alleged to have taken place during the process of restructuring at the General Directorate of Taxation Support of the Ministry of Finance and Public Credit.*

### **Case No. 2084 (Costa Rica)**

75. At its March 2005 meeting, the Committee requested the Government to transmit the decision handed down relating to the dismissal of trade union official Mario Alberto Zamora Cruz [see 336th Report, para. 30], having noted the Government's statement that an appeal had been filed with the labour tribunal against the decision of the Civil Service Tribunal, dated 26 August 2003, that the dismissal of Mario Alberto Zamora Cruz was justified and did not give rise to any liability on the part of the State.



76. In its communications of 19 May, 3 August, 12 September and 11 November 2005, the Government states that it requested the Minister of Justice to provide the information requested by the Committee and to transmit it as soon as possible. The Government states that on 21 June 2005, the Minister of Justice stated that the case of trade union official Mario Alberto Zamora Cruz was still pending, awaiting a decision concerning the appeal to the labour tribunal, given that the appeal regarding constitutionality was lodged by the Office of the Attorney-General of the Republic and questioned the actions of the judicial tribunals as a higher court, leading, among other things, to the suspension of all appeal processes by the labour tribunal until the Constitutional Chamber could issue a statement in this respect. The abovementioned appeal regarding constitutionality was recently resolved, but the full text of the ruling is still not available.
77. *The Committee notes this information and requests the Government to transmit the ruling handed down by the labour tribunal. The Committee hopes that the process in question will be concluded rapidly.*

### **Case No. 2104 (Costa Rica)**

78. At its March 2005 meeting, the Committee requested the Government to keep it informed of any developments with regard to: (1) the proceedings concerning trade union official Luis Enrique Chacón, the Ministry of Public Education and the Public University of Costa Rica; and (2) the initiatives by the authorities to guarantee fully collective bargaining in the public sector (the Government had informed it that the draft instruments of adoption of ILO Conventions Nos. 151 and 154 had been tabled before the Legislative Assembly).
79. In its communications of 19 May, 3 August, 12 September and 11 November 2004, the Government reiterates the information previously provided and points out that it is expecting a report from the Ministry of Public Education on these issues and will forward it to the Committee as soon as it receives it. The Government recalls that the Ministry of Education was acquitted in the first instance of the proceedings for unfair labour practices and violation of freedom of association.
80. *The Committee notes this information and reiterates its previous recommendations. It expresses the hope that the proceedings in question will be brought to a prompt conclusion.*

### **Case No. 2208 (El Salvador)**

81. At its June 2005 meeting, the Committee expressed the hope that the four trade union officials of the trade union of the Lido S.A. enterprise who remained dismissed would be reinstated in the company in the near future and requested the Government to keep it informed of developments concerning the alleged refusal of the company to meet with the trade union or to reactivate the joint committee provided for under the terms of the collective agreement. The enterprise had stated, through the Government, that it had a positive attitude and displayed good will [see 337th Report, para. 65].
82. In its communication of 26 August 2005, the Government states that on 12 July 2005 the parties agreed to hold a meeting of the joint committee to deal with the issue of reinstating the four trade union officials.
83. *The Committee notes this information with interest and requests the Government to inform it whether the enterprise has reinstated the four trade union officials who remained dismissed.*

**Case No. 2214 (El Salvador)**

84. At its March 2005 meeting, the Committee made the following recommendations [see 336th Report, para. 404]:

The Committee requests the Government: (i) to keep it informed of any court decision regarding the refusal of the ISSS to recognize the coalition of the STISSS and SIMETRISSS for the purpose of reviewing the arbitration award; any decision by the Attorney-General's office concerning the alleged eviction of the union from its premises; and (ii) to carry out an independent investigation into the alleged conversion of permanent contracts to short-term contracts to the detriment of trade union members, and to keep it informed of developments in this respect.

85. In its communication of 26 August 2005, the Government states that the outcome of the administrative proceedings initiated by the coalition of the Trade Union of Workers of the Salvadoran Social Security Institute (STISSS) and the Union of Doctors and Workers of the Salvadoran Social Security Institute (SIMETRISSS) against the decision of the General Labour Director not to allow the review of the arbitration award is still pending, awaiting the decision of the Division of Administrative Law of the Supreme Court of Justice. The Committee will be informed of the outcome of the proceedings once the Division has handed down its ruling. With regard to the decision of the Office of the Attorney-General of the Republic regarding the allegation concerning the eviction of STISSS from its premises, the Government will request that the Office of the Attorney-General of the Republic provide it with a report which will be communicated to the Committee. As to the alleged change of permanent contracts to short-term temporary contracts to the detriment of the members of the trade union, the Government explains that, in the wake of the 2003 strike which involved the STISSS and SIMETRISSS trade unions, the Salvadoran Social Security Institute authorities (ISSS) and the two abovementioned trade unions concluded an "agreement for the resolution of the health conflict and the beginning of the comprehensive reform process", which set out, among other things, the ISSS' obligation to reinstate all those workers who had participated in the abovementioned strike in their posts under the same conditions. Once the agreement was signed, the ISSS was unable to fully comply with its obligations, given that the posts of the workers concerned had already been filled by other workers and doctors. This meant that the workers could only be reinstated through the conclusion of individual employment contracts for an indefinite period. Furthermore, in order to settle payment of the wages of workers and doctors not drawn during the strike, the agreement contained a reference to the existence of a parallel short-term contract (three months) for provision of services during periods additional to those covered by the contract for an indefinite period. This provision has now disappeared, along with Clause 35 of the arbitration award which served as a foundation for a collective agreement, registered with the General Labour Directorate on 4 May of this year, establishing that any person contracted by the ISSS is held to be a public employee, without guaranteed job security being adversely affected.

86. *The Committee notes this information. The Committee awaits: (1) the ruling of the judicial authority on the refusal by the ISSS to accept the coalition of the STISSS and SIMETRISSS trade unions with regard to reviewing the arbitration award; and (2) the decision of the Office of the Attorney-General of the Republic concerning the alleged eviction of the trade union from its premises.*

**Case No. 2299 (El Salvador)**

87. At its June 2005 meeting, the Committee stressed the fact that the denial of legal personality to the Private Security Services Industry Workers' Trade Union of El Salvador (SITRASEPRIES) was a serious violation of freedom of association and it urged the

Government to recognize this trade union without delay and to keep it informed in this regard. Likewise, the Committee requested the Government to keep it informed of any new legal ruling handed down relating to the accusation of alleged robbery against trade union official, José Alirio Pérez Cañenguez, and to ensure that the 17 trade union officials dismissed received compensation (these officials had agreed on a settlement regarding compensation). Finally, as regards the alleged death threats against five officials of the Union of Textiles and Related Industry Workers of El Salvador (STITAS) by one of the owners of the J.R.C. Manufacturing S.A. of C.V. company, the Committee requests the Government, as a matter of urgency, to take measures to ensure that the competent authorities carry out an inquiry into the matter and, if the allegations are shown to be true, to punish those responsible [see 337th Report, paras. 71-73].

88. In its communication of 26 August 2005, the Government states that the accusation against Mr. José Alirio Pérez Cañenguez was provisionally put aside in the absence of sufficient evidence and this trade union official, along with the other officials, received compensation. As to the Committee's request regarding SITRASEPRIES, the Government states that, administrative avenues having been exhausted with the declaration of the inadmissibility of the appeal against the decision declaring the request for legal personality by the trade union to be groundless, the sole legal means by which the Ministry of Labour could grant legal personality to the trade union would be for the complainant to make use of the existing legal mechanisms contained in the legal system to effectively demonstrate that the decision of the Ministry contravened labour legislation. The Government states that it will keep the Committee informed of any legal ruling regarding this matter. As to the alleged threats, the Government refers to its observations of 17 May 2004.
89. *The Committee notes this information. With regard to the denial of legal personality to SITRASEPRIES, the Committee recalls that it had already pointed out that, in accordance with the principles of freedom of association, only the armed forces and the police can be excluded from the right to establish trade unions and all other workers, including private security agents, should freely be able to establish trade union organizations of their own choosing. Consequently, as it did at its March 2004 and June 2005 meetings, the Committee urges the Government to take the measures necessary to ensure that legal personality is granted to SITRASEPRIES without delay. Finally, the Committee requests the Government again to transmit the observations of 17 May 2004 regarding the alleged death threats against five officials of the STITAS trade union, as these observations have not been received.*

### **Case No. 2227 (United States)**

90. The Committee last examined this case at its meeting in November 2004 and on this occasion, the Committee took note of the comments made by the complainant organization and requested the Government to transmit its observations thereon. Recalling its conclusion that the remedial measures left to the NLRB in cases of illegal dismissals of undocumented workers were inadequate to ensure effective protection against acts of anti-union discrimination, the Committee regretted that the Government had not provided any information on measures taken to explore possible solutions, in full consultation with the social partners concerned, aimed at redressing this inadequacy. It therefore requested the Government to keep it informed of any measures taken or envisaged in this respect [see 335th Report, paras. 82-87].
91. In communications dated 20 September and 2 November 2005, the Government provided information concerning a recent appellate court decision that further supports the Government's conclusion that United States courts have continued to interpret narrowly the US Supreme Court's decision in *Hoffman*. That appellate court in *Majlinger v. Cassino Contracting Corporation, 2005*, a case concerning recovery for lost wages that resulted

from an injury to an undocumented worker, held that the trial court applied *Hoffman* in a way that was inconsistent with the vast majority of federal and state courts, which have consistently given *Hoffman* a narrow interpretation. In reversing the trial court's decision, the appellate court concluded that *Hoffman*: "is not so broad as to require a ruling that a New York court's award of lost wages to an undocumented alien is pre-empted by the Immigration Reform and Control Act (IRCA) or the policy underlying it. Furthermore, our own analysis of the pre-emption issue leaves us firmly convinced that requiring defendants to pay the same damages to all plaintiffs regardless of their immigration status not only does not interfere with, but actually advances, the immigration policy of the United States, as reflected in the applicable federal statutes". According to the Government, this appellate decision is yet another example of the limited scope given to the *Hoffman* decision by US courts. Although the lower courts have addressed, and will continue to address, the *Hoffman* decision's application to several different areas of law, these cases do not support the AFL-CIO's conclusion that *Hoffman* puts immigrant workers' rights "highly at risk". Moreover, according to the Government, in the area of freedom of association, the AFL-CIO did not cite a single case that dealt directly with freedom of association issues. The Government once again stated that the *Hoffman* decision does not preclude undocumented workers from recovering lost wages for work already performed, and does not prevent the NLRB from enforcing the NLRA where there has been a violation involving undocumented workers. In cases where courts have relied on the decision to deny compensation, the denial of such remedies has been limited to compensation for periods where the undocumented workers would not have been legally entitled to work, and the decisions have been based on the necessary enforcement of US immigration law and have been narrowly drawn to achieve this objective. Finally, the Government stated that the United States continues to vigorously enforce the laws so as to protect all workers, including undocumented workers, from discrimination for union activities.

92. Moreover, since the United States last reported on Case No. 2227, US federal agencies have continued to adhere to their post-*Hoffman* commitments to enforce US labour laws regardless of a worker's immigration status. The United States agencies also continue to engage in outreach and education efforts to inform workers and employers about their rights and responsibilities under applicable statutes. A joint declaration between the Department of Labor of the United States and the Ministry of Foreign Affairs of the United Mexican States concerning workplace laws and regulations applicable to Mexican workers in the United States was signed in July 2004, as well as two Letters of Agreement.
93. Similarly, the National Labor Relations Board (NLRB) continues to treat all statutory employees as protected from unfair labour practices and entitled to vote in NLRB elections, without regard to their immigration status. At the same time, the NLRB's field offices engage in regular outreach programmes to interested individuals and groups. These programmes have included discussion of the *Hoffman* decision, and have provided significant consultation opportunities with the NLRB for organizations representing workers and employers, local bar associations, law schools and associations of labour relations professionals, and other interested groups.
94. In addition, the US Government enforces protections for foreign workers beyond efforts to prevent anti-union discrimination. For example, the Department of Labor's Wage and Hour Division (WHD) continues to pursue compliance with critical labour protections in low-wage industries that often employ immigrant workers and those with a history of chronic violations. In 2005, the WHD announced that it would expand these efforts to include "new economy" workers in the computer and call-centre industries.
95. Finally, the Government underlines that governmental agencies provide employers' and workers' organizations the opportunity to participate in the administrative process of creating rules and regulations, including formulation, amendment, and repeal, through

public notice and comment periods required by the Administrative Procedure Act (APA). The agencies are required by the APA to fully consider the comments of the interested organizations. Additionally, both employers' and workers' organizations have the opportunity to participate extensively in the legislative process by lobbying Congress concerning labour matters of interest to them. This may include testifying on legislation, submitting written proposals and comments, and meeting with legislators.

96. *The Committee notes the information provided by the Government, including the appellate court's decision in Majlinger. The Committee requests the Government to indicate whether this judgement has been appealed and, if so, to keep it informed of the final judgment in this matter.*
97. *Regarding the measures taken to explore possible solutions, in full consultation with the social partners concerned, to redress the inadequacy created by the Hoffman case, the Committee regrets that the Government merely refers to general avenues available to workers' and employers' organizations to participate in the administrative process of creating rules and regulations and for submitting legislative proposals and requests to keep it informed of any development in this respect, including measures taken by the various governmental agencies.*

### **Cases Nos. 2017 and 2050 (Guatemala)**

98. The Committee last examined these cases at its June 2005 meeting [see 337th Report, paras. 77-79]. On that occasion:
- (a) with respect to the allegations concerning the Banco de Crédito Hipotecario Nacional (anti-union dismissals and suspensions), the Committee recalled that the Government had provided information about action being taken by the negotiating committee in respect of these allegations and requested the Government to keep it informed of the progress made by that committee;
  - (b) with respect to the allegations relating to the Tampont S.A. company (dismissals due to the company's closure), the Committee requested the Government to inform it of the final results of the legal proceedings under way;
  - (c) with regard to the dispute at the La Aurora National Zoological Park, the Committee noted that the judicial authority had confirmed the arbitrator's decision which had been appealed by the company. It also noted that the arbitrator's decision was at that time in the implementation phase, waiting for the joint commission, established in accordance with the arbitrator's decision, to issue the respective report; the Committee requested the Government to keep it informed of the report of the joint commission mentioned;
  - (d) with regard to the dismissals from the La Exacta and/or San Juan El Horizonte farm, in respect of which reinstatement had been ordered, the Committee requested the Government to keep it informed of the reinstatement proceedings under way;
  - (e) with regard to the murder of Mr. Baudillo Amado Cermeño Ramírez in December 2001, the Committee requested the Government to send it the ruling handed down in that respect;
  - (f) with regard to the allegations concerning the kidnapping of and assaults and threats against the trade unionist of the Santa María de Lourdes farm, Mr. Walter Oswaldo Apen Ruiz, and his family, the Committee requested the Government to send its

observations and to ensure that the safety of the trade union member, which had been threatened, was guaranteed; and

- (g) with regard to the allegations relating to the murder of trade union members Efraín Recinos, Basilio Guzmán, Diego Orozco and José García Gonzáles, the injuries to 11 workers and the detention of 45 workers of the La Exacta and/or San Juan El Horizonte farm, the Committee urged the Government to send information in this respect without delay.

**99.** In communications dated 20 July and 31 August 2005, the Government made the following observations:

- with regard to the allegations relating to the Timport S.A. company (in respect of which the Committee had requested the Government to inform it concerning the legal proceedings under way to protect the money owed to UNSITRAGUA members who were dismissed because of the company's closure), efforts are being made to resolve this case in the courts. The parties have been asked to appoint representatives to form the conciliation tribunal so that the proceedings can continue; however, they have as yet failed to do so and show a lack of interest in resolving the dispute. *The Committee notes this information and requests the Government to keep it informed of the outcome of the judicial proceedings concerning the alleged acts;*
- with respect to the dispute at the La Aurora National Zoological Park, the joint commission set up pursuant to the arbitrator's decision has already fulfilled its commitments; however, the Third Court identified a number of flaws in the provisions of the collective agreement on working conditions. The Government also states that the judicial authority had ordered those flaws to be corrected and that once they have been corrected, the agreement in question can be definitively approved and concluded. *The Committee takes note of this information.*

**100.** *Lastly, the Committee regrets that the Government has not communicated the observations requested on the other pending issues. Under these circumstances, the Committee asks the Government to send without delay the requested information on the allegations concerning murder, acts of violence, detention of trade union members and acts of anti-union discrimination at the Banco de Crédito Hipotecario Nacional, the Timport S.A. company and the La Exacta and/or San Juan El Horizonte farm.*

### **Case No. 2118 (Hungary)**

**101.** The Committee last examined this case, concerning the hindrance to trade union activities and the violation of the right to bargain collectively, at its June 2005 meeting. It had then concluded that section 33 of the Labour Code was in conflict with Convention No. 87 in that, in the absence of direct or indirect support of 50 per cent of the workers of an employer, no collective agreement could be reached by a trade union, even on behalf of its own members. It requested once again the Government to lower the minimum threshold requirements for recognition as a bargaining agent, by amending section 33 of the Labour Code, and to ensure that if no trade union could reach this threshold, collective bargaining rights would be granted to all trade unions, at least on behalf of their own members. It requested to be kept informed of all new developments in this respect.

**102.** In a communication dated 2 November 2005, the Government explained, among other things, that section 33 of its Labour Code does not restrict collective bargaining rights because it provides the opportunity of individual or joint collective bargaining for trade unions or representative trade unions. Paragraphs 2 to 4 of section 33 require that candidates should have the majority support of the unit's employees, due to the fact that

only one collective agreement can be concluded by the employer (paragraph 1 of section 33). The Government explains that, if no trade union or joint trade unions can reach 50 per cent of the votes, the negotiations may be held for the conclusion of the collective agreement, however, it may be concluded only upon the consent of the employees affected (paragraph 6 of section 33).

- 103.** *The Committee takes due note of the comments made by the Government and refers the legislative aspects of this case to the Committee of Experts on the Application of Conventions and Recommendations.*

### **Case No. 2236 (Indonesia)**

- 104.** The Committee last examined this case, which concerns allegations of anti-union discrimination by the Bridgestone Tyre Indonesia Company against four union officers suspended without pay, pending the outcome of dismissal procedures initiated by the company, at its March 2005 meeting [see 336th Report, paras. 68-78]. On that occasion, the Committee: (i) once again strongly regretted the Government's failure to take the necessary steps so as to give precedence to the anti-union discrimination procedures over the dismissal procedures concerning the four trade union officers. The Committee insisted that the appropriate steps be taken in this respect, all the more since the procedure on the alleged anti-union discrimination had reached a stalemate while the dismissal procedures, although they had not yet resulted in final decisions and formal dismissal notifications, were following their course; (ii) requested the Government to take, as a matter of priority, the necessary measures so that workers who consider that they have been subject to anti-union discrimination, in violation of section 28 of Act No. 21/2000, can have access to means of redress which are expeditious, inexpensive and fully impartial and to keep it informed in this respect; (iii) urged the Government to take the necessary measures to expedite the procedure for the examination of specific allegations of anti-union discrimination concerning the four trade union officers. The Committee expected that the procedure would be completed in the near future in a fully impartial manner. If the allegations were found to be justified, but the workers had already received formal notification of their dismissals, the Committee once again requested that the Government ensure, in cooperation with the employer concerned, that the workers concerned would be reinstated or, if reinstatement was not possible, that they would be paid adequate compensation; (iv) requested the Government to provide copies of the remaining decisions of the National Administrative High Court, the decisions of the Supreme Court in respect of the dismissals as well as of any decision reached with due reasons on the allegations of anti-union discrimination.

- 105.** In communications dated 15 and 20 June 2005, the complainant organization underlined that the Government had failed to implement the recommendations of the Committee, three years after the fact, especially with regard to the need to give precedence to the proceedings concerning anti-union discrimination over the proceedings concerning the dismissals. With respect to the dismissal proceedings, the complainant indicates that it does not consider the National Administrative High Court, which ruled that two trade union officers should be dismissed without severance pay, as impartial. The complainant appealed to the Supreme Court against this decision and the case is still pending. With respect to the anti-union discrimination proceedings, the complainant indicated that the fact that there has been no result after three years of efforts by the Department of Manpower and Transmigration, the police and the Attorney-General to make the former director-president of the company to come to Indonesia so as to follow the judicial process, gives a strong and clear advantage to the employer's side during the trial. The complainant also expressed doubts about the real intentions of the authorities in this respect, given the links between the former director-president and foreign investors in Indonesia. Regarding the trade union activities in the company, the complainant stated that although a new

chairman of the union was nominated (Juli Setio Rahajjo), and although the working relations have not yet been stopped, the management of the company still refuses negotiations and there is no collective agreement for the period 2005-07, leading to a deterioration of the terms and conditions of employment in the company.

- 106.** In communications of 1 September and 31 October 2005, the Government indicated, with respect to the dismissal proceedings and their link to the proceedings concerning the alleged anti-union discrimination, that both proceedings have been processed simultaneously based on the available facts and evidence in order to accelerate the settlement of the case. Regarding the dismissals in particular, the Government stated that the Supreme Court's decision is still pending on this issue. It underlined that it did not have any intention to give precedence to employment termination before completing the complaint against infringement of freedom of association.
- 107.** Regarding the proceedings on the alleged acts of anti-union discrimination, the Government stated that this process took a long period of time due to differences of opinion on the issue of infringement of freedom of association among the competent institutions, i.e. the labour inspectors, the police and the Attorney-General. After an in-depth analysis, the Attorney-General's Office finally decided, on 24 March 2004, that the examination of the case was completed and ready to be handed over to the court. However, the trial has been hampered by the absence of the former president-director of the company, designated by the Government as "the suspect", who returned to his home country. The Government reiterated that efforts are still under way to have him appear before the court (requesting the police department to bring the suspect to Indonesia, discussing with the police and informing them of the suspect's address in his country, to be used in cooperation with the international police (Interpol)). Furthermore, the Government facilitated meetings between the employer and the respective workers in order to achieve a win-win solution, especially in terms of agreeable severance pay. Finally, with regard to the Committee's suggestion to ensure the workers' reinstatement or payment of compensation if the allegations of anti-union discrimination are confirmed, the Government indicates that it took note of this suggestion while waiting for the settlement of the case in line with prevailing laws and regulations. In a communication dated 10 March 2006, the Government indicated that the Ministry of Manpower and Transmigration (MOMT) and the Central Committee for Labour Dispute Settlement sent communications to the Supreme Court requesting it to give priority consideration to the review of the decisions of the State Administrative High Court. The MOMT together with the Supreme Court are carrying out intensive official coordination to keep the trial process going on.
- 108.** *The Committee notes that, according to the complainant, the Government has failed to implement the Committee's recommendations, especially with regard to the need to give precedence to the proceedings concerning anti-union discrimination over the proceedings concerning the dismissals. The complainant also expressed doubts concerning the impartiality of the National Administrative High Court which ruled on 21 October 2004 that two trade union officials should be dismissed without severance pay and informed the Committee that it took the matter to the Supreme Court where it is now pending. The Committee takes note of the statement made by the Government that it does not intend to give precedence to employment termination before the complaint of freedom of association infringements may be examined, and that the dismissal procedures are pending before the Supreme Court and have not yet resulted in final decisions and formal dismissal notifications. The Government requested the Supreme Court to give priority consideration to the review of the decisions of the State Administrative High Court and is carrying out official coordination in the framework of the trial. The Committee also notes, with regret however, that according to the Government, both procedures have gone ahead simultaneously. Thus, the dismissal procedure is at the final instance, whereas the*



*procedure on anti-union discrimination has only just recently been referred to the court and its examination has been hampered, according to the Government, by the absence of the former director-president of the company. The Committee urges the Government to ensure that no decision may be rendered or enforced on the issue of dismissal before the question of anti-union discrimination may be fully examined and elucidated. The Committee requests the Government to keep it informed of developments in this respect and to communicate the text of the decision of the Supreme Court as soon as it is handed down.*

- 109.** *With respect to the general need to ensure appropriate means of redress against anti-union discrimination, the Committee regrets to note that the Government has not provided any information in this respect. The Committee once again requests the Government to take the necessary measures so that workers who consider that they have been subject to anti-union discrimination, in violation of section 28 of Act No. 21/2000, can have access to means of redress which, in addition to being speedy, should not only be impartial but also be seen to be such by the parties concerned.*
- 110.** *With respect to the examination of the allegations of anti-union discrimination against the four trade union officers, the Committee notes that according to the Government, after an in-depth analysis, the Attorney-General finally decided on 24 March 2004, that the examination of the case was completed and ready to be handed over to the court. However, the court proceedings have been hampered according to the Government, by the absence of the former director-president of the company and efforts made to bring him to Indonesia so as to attend the court proceedings have not produced any results. The Committee finally notes that efforts to facilitate meetings between the parties in order to find an agreeable solution in terms of severance pay have also not produced any result.*
- 111.** *The Committee observes that the physical presence of the former director-president of the company in the court proceedings concerning anti-union discrimination is not the only available way to ensure that sufficient information and evidence is obtained to elucidate the facts of this case. In addition, the Committee recalls that a number of years have elapsed since the complaint of anti-union discrimination against these four trade union officers was made and justice delayed is justice denied.*
- 112.** *The Committee therefore reiterates its previous recommendation that the Government ensure that the proceedings for the examination of allegations of anti-union discrimination against the four trade union officers be completed without further delay and in a fully impartial manner and so that they do not suffer any injustice by the fact that the former director-president has left the country. If the allegations are found to be true, but the workers have already received formal notification of their dismissals, the Committee once again urges the Government to ensure, in cooperation with the employer concerned, that the workers concerned are reinstated or, if reinstatement is not possible, that they are paid adequate compensation taking into account the damage caused and the need to avoid repetition of such acts in the future. The Committee requests to be kept informed in this respect.*
- 113.** *The Committee notes that, according to the complainant's allegations, the company refuses to negotiate with the new executive committee of the union and, as a result, no collective agreement was signed for the period 2005-07. The Committee requests the Government to take all necessary measures to promote and encourage negotiations in the Bridgestone Tyre Indonesia Company with a view to the conclusion of a new collective agreement and to keep it informed of measures taken in this respect.*

**Case No. 2336 (Indonesia)**

- 114.** The Committee examined this case, which concerns several freedom of association violations at the Jaya Bersama Company such as its refusal to recognize the plant-level trade union affiliated to the Federation of Construction, Informal and General Workers (F-KUI), the anti-union dismissals of 11 trade union members, including all the officials, and acts of intimidation against employees, at its March 2005 meeting [see 336th Report, paras. 498-539]. The Committee made the following recommendations:
- (a) The Committee requests the Government to take the necessary steps to ensure that the company recognizes the F-KUI plant-level trade union and engages in collective bargaining concerning the terms and conditions of employment of the workers in good faith, and to keep it informed in this regard, including by providing details of any negotiations undertaken in the company.
  - (b) The Committee requests the Government to amend the legislation and to take the necessary steps to ensure that allegations of anti-union discrimination are examined in the framework of national procedures which are prompt, impartial and considered as such by the parties concerned, and to keep it informed in this regard, including by forwarding copies of any decisions taken in relation to this particular matter.
  - (c) Noting the repeal of Act No. 22/1957 and Act No. 12/1964, by Act No. 2/2004, the Committee requests the Government to provide clarification of the procedure relating to the dismissal of trade union officials in Indonesia.
  - (d) The Committee expects that if the allegations of anti-union discrimination are found to be justified within the framework of national procedures, the 11 workers will be reinstated in their posts without loss of pay. If the court were to decide that, although the allegations of anti-union discrimination were justified, reinstatement was not possible, the Committee expects the court to order appropriate redress, taking into account both the damage incurred by the 11 workers and the need to prevent the repetition of such situations in the future, through the imposition of adequate compensation. The Committee requests to be kept informed in this respect.
- 115.** In communications dated 1 September and 1 November 2005, the Government states that the investigation carried out by the labour inspectorate showed that there was no infringement of freedom of association in the company. Although the labour inspectorate found that various other labour laws had been infringed, there were no indications that the company had obstructed the establishment of the trade union. The Government underlines that, in fact, a company trade union was registered in July 2003, and the company has never complained of its establishment. The Government adds that the company had not yet applied the collective labour agreement. Concerning the dismissal of the 11 trade union members and officials, the Government maintains that these dismissals were not due to their trade union activities. Indeed, the Government states that the dismissals were in line with paragraphs 150 and 172 of Act No. 13/2003 and that the decision of the Committee for Labour Dispute Settlement, which states that the company is allowed to dismiss the 11 workers by giving them severance pay, had become legally binding as the parties failed to lodge an appeal. The Government also indicates that dismissals are not treated differently when it comes to trade union officials as long as their dismissal is not due to their trade union activities.
- 116.** In a communication dated 10 March 2006, the Government indicated that the P.D. Jaya Bersama Company had not yet responded to the decision of the Central Committee for Labour Dispute Settlement concerning the severance pay granted to the 11 terminated workers. After an investigation by labour inspectors concerning the implementation of the decision (report No. 1706/1.712.51 dated 2 March 2005), subpoenas were delivered to seven persons requiring them to appear in court as witnesses on the issue of the payment of the severance pay. However, they failed to appear and allow the issue to be investigated. Thus, the labour inspector is not yet able to proceed with the case on the basis of

articles 13-26 of Act No. 22/1957 concerning labour dispute settlement. Moreover, on 30 January 2006, the Government in coordination with the Confederation of Indonesian Prosperous Labour Unions/KSBSI tried to obtain a decision by the North Jakarta Regional Court ordering the execution of the decision of the Central Committee for Labour Dispute Settlement. Unfortunately, however, the Court found it difficult to assess the company's assets in order to have the capital auctioned.

- 117.** *The Committee notes the information provided by the Government. Concerning the issue of the recognition of the plant-level F-KUI trade union by the company, the Committee, while noting the Government's indication that the company had never complained of the establishment of the union which was registered in July 2003, recalls from the previous examination of the case that according to the findings of the Manpower and Transmigration Municipal Office (MTMO) labour mediator, the company did not "agree with the establishment of the trade union". The Committee notes with regret that the Government does not provide any information on steps taken to ensure that the company recognizes the F-KUI plant-level trade union and effectively engages in collective bargaining, particularly in light of information that no collective labour agreement is applied yet in the company. The Committee once again requests the Government to take the necessary steps to ensure trade union recognition and encourage collective bargaining in good faith between the company and the plant-level F-KUI trade union.*
- 118.** *Concerning the allegations that the dismissals of the 11 members and officials of the plant-level F-KUI trade union were motivated by anti-union discrimination, the Committee recalls from the previous examination of this case that a combination of factors suggests that the issue of trade union discrimination was not fully reviewed by the Central Committee for Labour Dispute Settlement in its decision on this case. The Committee recalls that the Central Committee approached this case in relation to the general law relating to dismissals, rather than as a matter concerning freedom of association; the Central Committee found that the dismissals were caused by seasonal fluctuations in work, and confined itself to increasing the severance pay of each of the dismissed workers. The Committee deeply regrets that the Government provides no information on any procedures commenced for the examination of the specific allegations of anti-union discrimination against the company, despite the clear conclusion of the MTMO mediator that the company did not agree with the establishment of the trade union and as a result terminated the 11 workers' employment. In light of the information provided by the Government, however, that these workers had not appealed against the decision of the Central Committee, the Committee would urge the Government to ensure in the future sufficient mechanisms for preventing and remedying acts of anti-union discrimination. Finally, with regard to the difficulties encountered in the execution of the decision of the Central Committee ordering the payment of severance pay to the 11 dismissed workers, the Committee requests the Government to continue to take all necessary measures to obtain execution of this decision and to keep it informed in this respect.*
- 119.** *The Committee notes with regret in this context that the Government provides no information on any measures taken or contemplated to ensure that allegations of anti-union discrimination are examined in the framework of national procedures which are prompt, impartial and considered as such by the parties concerned. The Committee once again urges the Government to take the necessary legislative measures so as to guarantee such procedures and requests to be kept informed in this respect.*

### **Case No. 2114 (Japan)**

- 120.** The Committee last examined the follow-up to this case at its November 2002 meeting when it requested the Government to take appropriate measures to encourage and promote the full development and utilization of machinery for voluntary negotiation with a view to

the regulation of terms and conditions of employment by means of collective agreements for public school teachers [see 329th Report, paras. 67-72].

**121.** In communications dated 14 February 2003, 10 May 2004 and 27 July 2005, the Okayama Prefectural High School Teachers' Association Union ("the OHTU") provided additional information. Concerning the right of public school teachers to bargain collectively, the Okayama Prefectural Education Commission ("OPEC") took measures which the OHTU considered unfair because it goes against the right to bargain collectively under ILO Convention No. 98 and the Local Public Service Law. According to the OHTU, the reality is that even negotiations based on the Local Public Service Law are not fully guaranteed. There are no voluntary negotiations and collective agreements do not cover wages and employment conditions, which the OHTU illustrates with some examples:

- Although the OHTU demanded that a special pay raise at retirement be separately negotiated (instead, OPEC took up the subject for discussion in the annual negotiation session) and although the OHTU demanded the withdrawal of the proposal (instead, OPEC made changes not in favour of the OHTU), in 2004, OPEC decided to abolish the special pay raise at retirement without sufficient negotiations and resulted in losses to teachers retiring in the current year.
- In 2001, OPEC established a commendation system and took a measure to shorten the pay-raise period without negotiation and did not inform the OHTU at all (they were only informed in 2004). The OHTU made strong protests to OPEC and filed a request statement that OPEC should open negotiations with the OHTU because OPEC established a new special pay-raise system, disregarding the progress made during previous negotiations between the two parties.
- In 2003, OPEC founded the "Research and Study Council relating to Teacher Evaluation" ("Teacher Evaluation Council") and requested that the Teacher Evaluation Council examine what a teacher evaluation should be. Although teachers are the objects of evaluation for the Teacher Evaluation Council, there are no teachers on the Council. Only a few meetings took place in 2004 and although the OHTU continued to request that OPEC open negotiations over teacher evaluations, OPEC did not comply.
- On 23 February 2005, OPEC proposed the "New Evaluation System for Teachers (Plan)-Trial Manual" ("Trial-Manual") to the OHTU. In response to this proposal, the OHTU filed a request statement to OPEC demanding negotiations and the withdrawal of the Trial Manual. One short discussion took place but OPEC did not adopt a single proposition of the OHTU and adopted the plan for the Trial Manual in its original form.

**122.** Concerning the impartiality of the Okayama Prefectural Personnel Commission ("OPPC"), the OHTU stated that a certain degree of progress can be seen in the contents of the reports issued by the personnel commission. However, its impartiality has not been fully secured. For example, in 2004 the OPPC failed to issue recommendations on wage improvement, and this failure is deemed to be a waiver of its role of recommendation of "showing the appropriate wage level as it should be" like OPPC mentioned itself.

**123.** *The Committee notes the information communicated by the OHTU. Noting with regret that, in spite of several requests to that effect, the Government has not provided its observations on the complainant's additional information and had not kept it informed of measures taken to implement its previous recommendations [see 329th Report, paras. 67-72], the Committee requests once again the Government to do so in the near future, and to keep it informed of the measures taken to encourage and promote the development of collective bargaining machinery for public school teachers.*

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**Case No. 2301 (Malaysia)**

**124.** This case concerns the Malaysian labour legislation and its application which, for many years, have resulted in serious violations of the right to organize and bargain collectively: discretionary and excessive powers granted to authorities as regards trade unions' registration and scope of membership; denial of workers' right to establish and join organizations of their own choosing, including federations and confederations; refusal to recognize independent trade unions; interference of authorities in internal unions' activities, including free elections of trade unions' representatives; establishment of employer-dominated unions; arbitrary denial of collective bargaining. The Committee formulated extensive recommendations at its March 2004 meeting [see 333rd Report, para. 599] and last examined the follow-up to this case at its June 2005 meeting [see 337th Report, paras. 87-90].

**125.** In a communication dated 2 September 2005, the Government stated that the project to modify the Industrial Relations Act, 1967, and the Trade Union Act, 1959, was in its final stage of discussion with representatives from the employers and trade unions, in the spirit of tripartite consultation. It further stated that these amendments were expected to be tabled in Parliament during its September-December 2005 sitting. Among others, the following major amendments were contemplated:

- When a claim for recognition is served on the employers, they must respond within 21 days and a secret ballot is the only process for determining membership strength. This is expected to shorten the period required for recognition.
- Repealing of section 28(1)(b) of the Trade Unions Act, 1959, which prohibits a person from becoming a trade union officer if he has not been engaged or employed for at least one year in the establishment, trade, occupation or industry with which the trade union or federation is connected. With this amendment, a person can act as an officer of a trade union or federation of trade unions as soon as his membership has been approved by the registered trade union.

**126.** The Government added that:

- Under the Industrial Relations Act, 1967, a decision taken by the Honourable Minister is final. However, a process of judicial review is available to employers and trade unions. According to the Government, both parties availed themselves of this form of judicial review.
- The Industrial Relations Act affords voluntary negotiation between employers' and workers' organizations; they are free to set up their own machinery to settle disputes. Conciliating services are only provided by the Industrial Relations Department when a deadlock arises.
- Section 13(3) of the Industrial Relations Act lays down some terms that cannot be negotiated, as they are management prerogatives (promotion, transfer, appointment, termination by reason of redundancy, dismissal, reinstatement and allocation of duties). This does not prevent the parties from discussing these issues in a general manner.

**127.** In addition, the Government stated that the claims of 8,000 workers for representational and collective bargaining rights in 23 companies were processed according to the Act and the unions concerned were found not to be competent to represent the group of workers. The Government added that when a trade union is found not competent and the management does not accord recognition, the claim is deemed resolved. The Government

further stated with regard to the court challenges filed by some employers and affecting 2,000 workers, after the Director-General had ruled in favour of the unions in a case concerning collective bargaining rights, that there are a total of nine companies affecting 2,000 workers which have challenged the decision of the Honourable Minister in this respect. Most of these decisions are still pending. The Government attached an analytical table with the information on these cases (parties, year, subject, decision).

**128.** *The Committee recalls that it has been called to comment upon the extremely serious matters dealt within the present case on no less than seven occasions over a period of more than 15 years. The Committee notes with interest from the Government's reply that a project to make major amendments to the Industrial Relations Act, 1967, and the Trade Union Act, 1959, is in its final stage of discussion with representatives from the employers and trade unions. The amendments were expected to be tabled in Parliament during its September-December 2005 sitting. The Committee requests the Government to keep it informed of developments in this regard and to send the text of the project. While observing that States are free to provide certain formalities in their legislation in order to ensure the normal functioning of organizations and in conformity with freedom of association principles, the Committee trusts that the envisaged amendments will take fully into account its longstanding recommendations concerning the need to ensure that:*

- *all workers without distinction whatsoever, enjoy the right to establish and join organizations of their own choosing, both at primary and other levels, and for the establishment of federations and confederations;*
- *no obstacles are placed, in law or in practice, to the recognition and registration of workers' organizations, in particular through the granting of discretionary powers to the responsible official;*
- *workers' organizations have the right to adopt freely their internal rules, including the right to elect their representatives in full freedom;*
- *workers and their organizations enjoy appropriate judicial redress avenues over the decisions of the minister or administrative authorities affecting them; and*
- *the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to regulating terms and conditions of employment by means of collective agreements is encouraged and promoted by the Government.*

*The Committee recalls that the Government may avail itself of the ILO's technical assistance in the framework of the abovementioned project, so as to bring its law and practice into full conformity with freedom of association principles.*

**129.** *The Committee also notes with regard to the 8,000 workers who claimed representational and collective bargaining rights in 23 companies, that the Government reiterates previously provided information according to which the recognition claims of these workers were processed according to the Act, and the unions were all found not competent to represent the group of workers concerned. The Committee notes once again that the Government provides no other information on the reasons why such a decision was made or whether the trade unions in question were given an opportunity to present their views in contradictory proceedings, etc. The Committee therefore once again reiterates its previous recommendation on this point and requests the Government rapidly to take appropriate measures and give instructions to the competent authorities so that the 8,000 workers denied representational and collective bargaining rights in the 23 named companies may effectively enjoy these rights, in accordance with freedom of association principles.*

- 130.** *With regard to the court challenges filed by some employers and affecting 2,000 workers after the Director-General had ruled in favour of the unions in a case concerning collective bargaining rights in nine companies, the Committee takes note of the information provided by the Government. The Committee notes in particular, that only one case seems to have been decided by the High Court which, in a judgement handed down in 2003, quashed the decision to grant representative status to the Non-Metallic Mineral Products Manufacturing Employees' Union in the Top Thermo Manufacturers Sdn. Bhd. Company. The Committee requests the Government to provide information on the grounds on which this decision was based and to transmit the relevant text.*
- 131.** *With regard to the other pending cases, which concern court challenges filed by employers against the decision granting representative status to trade unions in eight companies (Syarikat Murulee (M) Sdn. Bhd.; Dipsol Chemicals Sdn. Bhd.; Senju Metal Industries Sdn. Bhd.; Pacific Quest (M) Sdn. Bhd.; Great Wall Plastics Sdn. Bhd.; White Horse Ceramic Industries Sdn. Bhd.; Kiswire Malaysia Sdn. Bhd.; and Silverstone Bhd.), the Committee observes that some of them date as far back as 1998 and recalls that justice delayed is justice denied [see **Digest of decisions and principles of Freedom of Association Committee**, 4th edition, 1996, para. 105]. The Committee requests the Government to continue to transmit information on these cases and to take all necessary measures to ensure that final decisions may be reached on them without further delay.*
- 132.** *The Committee urges the Government to address all these issues rapidly and to keep it informed of developments.*

### **Case No. 2164 (Morocco)**

- 133.** This case was last examined by the Committee at its November 2005 meeting [see 338th Report, paras. 236-240] and concerns measures taken by the Caisse nationale du Cr dit agricole (CNCA) against several workers represented by the National Union of Bank Employees (SNB/CDT) for having exercised trade union activities or taken part in a strike. The Committee acknowledged the Government's reply of 25 May 2005. It also noted the verdicts, given in Arabic, of the Administrative Division of the Supreme Court (27 June 2002), the Administrative Court of Rabat (10 October 2002), the Court of First Instance of Rabat (25 March 2004) and the Court of Appeal of Rabat (24 August 2004) concerning the position of Mr. Chatri Abdelkader, a member of the trade union executive committee. Since these verdicts were, at that time, still being translated, the Committee moved to examine them at its next meeting.
- 134.** *The Committee notes that the Court of Appeal of Rabat overturned the verdict of the Court of First Instance of Rabat. The said verdict ordered that the decision to dismiss Mr. Chatri be reversed and that he be reinstated in his post, on the basis that the original decision was groundless. Recalling that respect for the principles of freedom of association requires that workers should not be dismissed for engaging in legitimate trade union activities, the Committee requests the Government to indicate whether this decision by the Court of Appeal has been appealed. The Committee hopes that, if so, the final decision will be in conformity with the principles of freedom of association.*
- 135.** *In addition, with regard to the situation of the striking workers and the reasons stated with regard to the steps taken concerning the ten trade union officials referred to by the complainant organization, the Committee regrets that the Government has not provided the information requested on the opening of an independent inquiry to determine whether the striking workers in question were the target of sanctions following their participation in the strike of 13 and 14 June 2001. The Committee regrets that the Government has also failed to provide the decision of the Court of First Instance in respect of the suit filed against the CNCA by 34 temporary workers. The Committee once again requests the*

*Government to keep it informed on this issue and provide it with a copy of the verdict as requested, as soon as possible.*

### **Case No. 2338 (Mexico)**

- 136.** When previously examining the case, the Committee requested the Government to carry out an inquiry into allegations that workers of the enterprise CONFITALIA S.A. de C.V. were assaulted whilst on picket lines and to indicate why the Conciliation and Arbitration Board refrained from initiating the procedure for determining the circumstances surrounding the strike [see 336th Report, paras. 576-604].
- 137.** In its communication of 22 September 2005, with regard to the inquiry requested regarding the alleged assault of workers on the picket lines, the Government states that, taking into account the fact that the Mexican legal system makes a clear distinction between empowerment and competences, the only authorities empowered to carry out inquiries would be the State Public Ministry, given that the alleged events occurred within the enterprise CONFITALIA S.A. de C.V. which is located in the city of Cuernavaca, in the State of Morelos. It is therefore the responsibility of that State to carry out the corresponding inquiry. As to the reasons why the Conciliation and Arbitration Board has not initiated the procedure for determining the circumstances of the strike, the Government states that the competent authority is the Local Conciliation and Arbitration Board of the State of Morelos and that any request for information should be addressed to that body.
- 138.** *The Committee notes this information. Consequently, the Committee requests the Government to take the measures necessary to ensure that the authorities of the State of Morelos carry out an inquiry into the alleged assault of workers of the enterprise CONFITALIA S.A. de C.V. who were on picket lines and to request the Local Conciliation and Arbitration Board of the State of Morelos to provide the reasons why it has not initiated the procedure for determining the circumstances of the strike. The Committee requests the Government to keep it informed in this regard.*

### **Case No. 2340 (Nepal)**

- 139.** The Committee examined this case, which concerns violations of trade union rights through the notification of a broad list of essential services and government interference in peaceful workers' demonstrations culminating in the arrest of a large number of trade union leaders and members, at its March 2005 meeting [see 336th Report, paras. 631-654]. On that occasion, the Committee made the following recommendations:
- (a) The Committee requests the Government to expeditiously take the necessary measures to amend the Essential Services Act, 1957, in the light of its conclusions above and to confirm whether or not the notification of 17 February 2004 issued under the Essential Services Act, 1957 in respect of the 14 services mentioned in the Act continues to remain in force and, in the event that it continues to remain in force, requests the Government to immediately take the necessary measures to repeal the notification or limit it to essential services in the strict sense of the term, that is services whose interruption would affect the whole or part of the population and to keep it informed of the measures taken in this regard.
  - (b) The Committee requests the Government to take appropriate measures to ensure due respect in practices for the principles laid down by the Committee in respect of the right of workers' organizations to hold public demonstrations and to keep it informed of the measures taken in this regard.
  - (c) The Committee requests the Government to ensure that, in practice, workers' organizations enjoy the right to place banners stating their point of view.



- (d) The Committee reminds the Government that it may avail itself of the technical assistance of the Office, if it so desires.
- 140.** In a communication dated 17 September 2005, the Government reiterates that its main concern is to ensure services to the common people and not to hinder the rights of trade unions. However, as His Majesty's Government of Nepal is sensitive to trade unions' rights, it is considering reducing the list of essential services to the most basic services. The Government will give due consideration to amending the Essential Services Act, after completion of the consultation process. While strikes are prohibited for workers or unions working in the services declared to be essential, they can formulate their demands to management. The Government also underlines that, if both parties fail to settle the dispute by mutual consultations, an independent tribunal will be constituted providing for adequate, impartial and speedy reconciliation.
- 141.** Regarding the allegation of government interference in peaceful workers' demonstrations, the Government indicates that the demonstration staged for reform of the Essential Services Act was never interrupted. It adds that security personnel removed the banners, not because they contained the demands of the trade unions, but for the reason that the demonstrators put them up in restricted areas. In other words, the Government indicates that there is no restriction on the placing of banners as long as it is not done in restricted areas. The Government also takes this opportunity to assure the Committee that utmost care will be taken to ensure that the legitimate rights of the workers are protected by all means.
- 142.** *The Committee notes this information. It notes in particular the Government's indication that it is considering reducing the list of essential services to the most basic services and amending the Essential Services Act. The Committee urges the Government to expeditiously take the necessary measures to appropriately amend the Essential Services Act, including the notification of 17 February 2004 if it is still valid, and to keep it informed of any measures taken in this regard.*
- 143.** *As regards the Government's indication that security personnel removed the banners simply because the demonstrators put them up in restricted areas, the Committee once again recalls that the full exercise of trade union rights calls for workers to enjoy freedom of opinion and expression in the course of their trade union activities and that the prohibition on the placing of posters stating the point of view of a trade union organization is an unacceptable restriction on trade union activities; the only exception possible being in expressing their opinions, trade union organizations should respect the limits of propriety and refrain from the use of insulting language [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, paras. 152 and 467]. Therefore the Committee urges the Government to ensure that, in practice, trade unions can enjoy the right to place banners stating their point of view.*
- 144.** *Concerning the Government's statement to the effect that the demonstration staged for reform of the Essential Services Act was never interrupted, the Committee recalls that, in a communication dated 7 September 2004, the Government had indicated that arrests had occurred on this occasion in order to maintain law and order in the city and that a short-term emergency measure had prohibited more than five persons from assembling in the "riot zone". Noting the Government's assurances that it will take the utmost care to ensure that the legitimate rights of workers are protected, the Committee trusts that the Government will take appropriate measures to ensure due respect for freedom of association principles relating to the right of workers' organizations to hold public demonstrations. The Committee requests the Government to keep it informed of the measures taken in this regard. It once again reminds the Government that it may avail itself of the technical assistance of the Office, if it so desires.*

**Case No. 2267 (Nigeria)**

- 145.** During its examination of this case at its June 2005 meeting [see 337th Report, paras. 98-101], the Committee had noted that no information had been provided by the Government in respect of the complaint concerning the dismissal of 49 academic lecturers, including five trade union officials, for having exercised the right to strike, as far back as May 2001, and reiterated its previous recommendation that it firmly expects the Government to ensure that the complaint is resolved by the competent labour institutions, including the National Industrial Court, in conformity with freedom of association principles and to keep it informed rapidly of developments in this respect.
- 146.** In previous communications, to which the Committee had requested the Government to reply, the Academic Staff Union of Universities (ASUU) had provided additional information, according to which the award of the Industrial Arbitration Panel that handled the dispute between the Government and the ASUU concerning the dismissed lecturers was notified by the Federal Minister of Labour and Productivity on 31 March 2004 and, on the same day, a notice of objection was given by the ASUU to the Minister. Despite the fact that, as per section 13(1) of the Trade Disputes Act (Cap 432), 1990, if notice of objection to the award of an arbitration tribunal is given to the Minister, within the time and in the manner specified in the notice under section 12(2) of the Act, the Minister shall forthwith refer the dispute to the National Industrial Court, the Minister, in a letter dated 2 August 2004, indicated that the matter was being referred back to the Industrial Arbitration Panel for reconsideration. According to the complainant, this was contrary to section 12(3) of the Act according to which the Minister shall not exercise his powers under section 12(2) until the award has been reconsidered by the tribunal. In a communication dated 6 June 2003, the complainant indicated that the Minister of Labour and Productivity had not yet referred the case to the National Industrial Court.
- 147.** In a communication dated 22 June 2005, the complainant made additional allegations according to which, after having illegally dismissed 49 academics in the University of Ilorin, the Government had been trying to take away the right of the union to collective bargaining. More specifically, the complainant stated that on 30 June 2001 an agreement was signed between the federal Government and the ASUU which covered funding, conditions of service and university autonomy (copy attached to the ASUU communication). According to section 7.7(b), a comprehensive review of the agreement, including allowances, should be undertaken every three years. On 30 June 2004 the agreement of 2001 was due for a comprehensive review. Since July 2004, the ASUU had been making representations to the federal Government with a view to getting the Government to honour the agreement. The latest effort was a meeting between the Ministries of Labour and Productivity and Education, the National Universities Commission (NUC), the Committee of Vice-Chancellors and the ASUU on 3 March 2005. The outcome of that meeting was an agreement between the ASUU and the Government. According to point (2) of that agreement, by 3 May 2005, the Government would have constituted the negotiating team to review the 2001 agreement and communicate its decision to the ASUU. The Government however failed to fulfil this agreement according to the complainant.
- 148.** The complainant added that evidence from recent acts of the Government indicated that it was planning to take away the right of university workers to collective bargaining. The NUC, which was a participant in the 3 March 2005 agreement, organized a workshop between 31 May and 2 June 2005 for newly appointed chairpersons and members of the governing councils of federal universities, where each council was directed to negotiate the conditions of service with individual chapters of the ASUU in each federal university. This decision was aimed according to the complainant, at undermining and invalidating the renegotiation of the 2001 agreement which was negotiated centrally on behalf of all the

branches of the union. On 18 June 2005, at the Convocation of the University of Abuja, the Federal Minister of Education announced that university workers should negotiate with their individual councils, ignoring the existence of the collective agreement of June 2001. At the same time, the federal Government sent a bill to the National Assembly the substance of which was to decentralize negotiations with university unions. According to the complainant, this bill, if passed into law, would not only violate the right to freedom of association but also outlaw the right of university workers to collective bargaining.

- 149.** In a communication dated 12 September 2005, the complainant indicated that on 26 July 2005, the Federal High Court in Ilorin rendered its judgement on the suit filed by five union officials and 44 rank and file members against the former Vice-Chancellor of the University of Ilorin with regard to their dismissal. The Court ordered that the defendants be reinstated in their posts in the University of Ilorin with all their rights, entitlements and other perquisites of their offices. The University was also ordered to pay the plaintiffs all their salaries and allowances from February 2001 until the day of the judgement and thenceforth (except for two, who were dead, whose salaries and allowances should cease on the date of death). However, according to the complainant, the University of Ilorin authorities, encouraged by the presidency, refused to comply with the judgement. They got the solicitors of the University to file an appeal without giving the University's Governing Council an opportunity to examine the matter and decide whether to comply with the terms of the judgement, which were very clear. The complainant attached copies of the two judgements and a letter addressed by its lawyer to the Attorney-General of Nigeria, protesting against the presidency's intervention in the matter, which according to the complainant, led the university authorities to refuse to comply with the order of the Federal High Court.
- 150.** *The Committee notes with deep regret that the Government has not yet replied to its previous request, nor provided its observations on the additional information submitted by the ASUU. With regard to the dismissal of 49 academics/ASUU officials and members in the University of Ilorin, the Committee notes with interest the decision of the Ilorin Federal High Court which ordered that the dismissed workers be reinstated without loss of pay. The Committee also notes however, from the complainant's allegations, that the university administration decided to file an appeal against this decision without bringing the matter for decision to the governing body of the University, pursuant to pressure exercised by the presidency to this effect. Recalling that the dismissals took place in May 2001 and that justice delayed is justice denied [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 105], the Committee requests the Government to intercede with the parties with a view to obtaining the execution of the judgement of the Federal High Court of Ilorin ordering the reinstatement of the 49 academics, while the appeal lodged by the university authorities is pending. The Committee requests to be kept informed in this respect.*
- 151.** *The Committee further notes that, according to new allegations made by the complainant, the Government refused to renegotiate the collective agreement of 2001, which was due for a comprehensive review on 30 June 2004, and even failed to implement an agreement reached on 3 March 2005 to constitute a negotiating team and communicate the relevant decision to the ASUU with a view to commencing negotiations. Moreover, the Government had been allegedly giving instructions to university authorities and governing councils, so as to negotiate with individual chapters of the ASUU in each university rather than centrally. Finally, the federal Government allegedly sent a bill to the National Assembly, the substance of which was to decentralize negotiations with university unions.*
- 152.** *Recalling that, according to the principle of free and voluntary collective bargaining embodied in Article 4 of Convention No. 98, the determination of the bargaining level is essentially a matter to be left to the discretion of the parties and, consequently, the level of*

*negotiation should not be imposed by law, by decision of the administrative authority or by the case-law of the administrative labour authority [see **Digest**, op. cit., para. 851], the Committee requests the Government to provide its comments in respect of the new allegations made by the complainant and to communicate the text of any bill concerning collective bargaining with university unions.*

### **Case No. 1996 (Uganda)**

- 153.** The Committee last examined this case at its March 2005 session [see 336th Report, paras. 90-95] where it pointed out that more than six years had elapsed since the filing of this complaint, which concerns the refusal by several companies to recognize the Uganda Textiles, Garments, Leather and Allied Workers' Union (UTGLAWU) as the most representative, if not the sole, organization of workers in the textiles sector in Uganda. In this connection, the Committee: (a) noted with regret that the Government had merely stated that the provisions of the Trade Unions Act which were meant to remedy situations of refusal to recognize a representative union "were not applied in practice", and stressed that the major responsibility for having such legislation applied in practice rested with the Government. Noting further that the matter of the recognition of the UTGLAWU at the Southern Range Nyanza Ltd. was pending before the Industrial Court, the Committee trusted that the latter would hand down a decision in the very near future, in view of the inordinate delays already incurred, and requested the Government to provide it as soon as possible with a copy of the said judgement; (b) noting that the Bills amending some provisions of the Trade Unions Decree that were inconsistent with freedom of association principles would be submitted to Cabinet for consideration and adoption, after clearance by the Ministry of Finance, the Committee trusted that these Bills would be adopted in the very near future and requested the Government to provide it with a copy as soon as they were adopted; (c) the Committee noted that the Government had not yet provided any information on the legal proceedings filed by the UTGLAWU against a number of companies (Vitafoam Ltd.; Leather Industries of Uganda; Kimkoa Industry Ltd.; Tuf Foam (Uganda) Ltd.; and Marine and Agro Export Processing Co. Ltd.) in order to obtain recognition for collective bargaining purposes, and urged once again the Government to provide without delay information on these legal proceedings.
- 154.** In a communication dated 30 August 2005, the Government emphasized its commitment to the respect and promotion of fundamental principles and rights of workers as demonstrated by the ratification of Convention No. 87, which had taken place on 2 June 2005. The Government added that it had taken the following steps to ensure that workers' trade union rights were respected: (1) on the directive of the Prime Minister, the Minister of State for Labour and Industrial Relations held meetings with the employers in the textiles and garments sector in March 2005 in order to discuss with them the issue of unionization of workers in the country and seek their perspective on their failure to recognize trade unions; (2) the management of Southern Range Nyanza Ltd. was requested in writing by the Minister of State for Labour and Industrial Relations to show cause why they were not recognizing the trade union and were given 28 days within which to respond; (3) after having received an unsatisfactory reply to the letter, the Minister of State for Labour and Industrial Relations ordered Southern Range Nyanza Ltd. to recognize the UTGLAWU in accordance with section 17(2) and (3) respectively, of the Trade Unions Act, 2000, Cap. 228 of the laws of Uganda, on 12 August 2005. Furthermore, pursuant to a meeting between the Minister of State for Labour and Industrial Relations and the President of Uganda on 22 August 2005, the President directed that the labour law Bills (including the labour unions Bill) be tabled in Parliament in the month of September 2005. The Bills were at the time of communication under active consideration in Parliament.
- 155.** *The Committee takes note with interest of the steps taken by the Government in order to obtain the recognition of the UTGLAWU by Southern Range Nyanza Ltd., in particular,*

*the issuing of an order for the recognition of this trade union under section 17(2) and (3) of the Trade Unions Act. The Committee expects that the Government will spare no effort until the recognition of UTGLAWU by Southern Range Nyanza Ltd. has been effectively obtained and requests the Government to keep it informed in this respect. The Committee further requests once again the Government to provide information on the proceedings pending before the Industrial Court on this case, as well as a copy of the judgement as soon as it is handed down.*

- 156.** *With regard to the legislative reform process, noting with interest the recent ratification of Convention No. 87 and the introduction of the relevant Bills in Parliament, the Committee hopes that the legislative reform will be concluded without further delay and requests the Government to keep it informed of the progress made in this respect.*
- 157.** *Lastly, the Committee notes with regret that the Government still has not provided any information on the legal proceedings filed by the UTGLAWU against a number of companies (Vitafoam Ltd.; Leather Industries of Uganda; Kimkoa Industry Ltd.; Tuf Foam (Uganda) Ltd.; and Marine and Agro Export Processing Co. Ltd.) in order to obtain recognition for collective bargaining purposes. The Committee urges once again the Government to provide without delay information on these legal proceedings.*

### **Case No. 2086 (Paraguay)**

- 158.** The Committee last examined this case, concerning: (1) the trial and sentencing in first instance for “breach of trust” of the three presidents of the trade union confederations CUT, CPT and CESITEP, Alan Flores, Jerónimo López and Reinaldo Barreto Medina; and (2) the dismissal of trade unionist Florinda Insaurralde [see 332nd Report, paras. 120-124], at its meeting in November 2003. On that occasion, it made the following recommendations: (a) “the Committee deeply regrets the long delay taken by the Court of Appeal to make its ruling and reiterates its previous recommendations. Accordingly, it strongly urges the Government once again to take immediate action to secure the release of trade union leaders Reinaldo Barreto Medina, Jerónimo López and Alan Flores. The Committee requests the Government to keep it informed of any measures taken to that end”; and (b) “the Committee regrets that the Government has not sent the observations requested concerning any proceedings filed by Florinda Insaurralde against resolution No. 321/99 and Decree No. 7081/2000, which led to her dismissal, and once again requests the Government to keep it informed in this respect”.
- 159.** In communications dated 31 March and 18 May 2004, the complainant organizations refer to the slowness of the judicial process (which began in June 2000) and to certain irregularities during that process. In a communication dated 7 September 2004, the Trade Union Confederation of State Employees of Paraguay (CESITEP) states that Ms. Florinda Insaurralde has died.
- 160.** In a communication dated 14 December 2005, the Government states, in relation to the allegations concerning the trial of the trade union leaders Jerónimo López, Alan Flores, and Reinaldo Barreto Medina, that the case against “Edgar Cataldi and others on charges including fraud” began in March 1988 following an investigation into the administration of the National Workers’ Bank (BNT). In the ruling handed down in first instance, the then judge Hugo López sentenced some 23 persons to terms of imprisonment of ten, seven and four years for their part in embezzling bank assets, those persons including the former bank president Edgar Cataldi, who received the maximum sentence, along with the other former bank administrators. The judge in his ruling concluded that losses incurred by the bank as a result of this amounted to 120 billion guaraníes. An appeal was lodged against the ruling before the Appeals Chamber. The trade unionists who were sentenced have sought to have the legal proceedings annulled on the grounds that they related to debt. After several

months of investigation, the appeal was rejected, and the defence again appealed against that decision. This was also unsuccessful on the grounds that the period allowed had elapsed, and the plaintiffs then appealed again in mid-2005. Faced with this situation, the Appeals Chamber referred the case to the Supreme Court of Justice, which means that examination of the original sentences has again been postponed until the appeal is decided. The Government adds that, in December 2003, Alan Flores, Jerónimo López and Reinaldo Barreto Medina applied to the court to suspend the precautionary measures imposed on them (house arrest), basing their application on article 19 of the National Constitution and sections 236, 250 and others of the Code of Criminal Procedure. The First Chamber of the Criminal Court of Appeal on 31 December 2003 upheld the application and consequently suspended the measures imposed on the trade union officials, leaving the workers concerned at liberty but ordering them to report any change of address or travel outside the country in writing to the courts and police.

- 161.** *The Committee takes note of the information communicated by the complainant organization and the Government. In particular, the Committee notes with interest that, on 31 December 2003, the judicial authority cancelled the prevention detention of the trade union officials in question, who are currently at liberty. The Committee expresses the hope that the judicial proceedings initiated against these trade union officials will be concluded in the near future, and requests the Government to keep it informed of the final ruling handed down in this case.*

### **Case No. 2211 (Peru)**

- 162.** The Committee last examined this case at its June 2005 meeting [see 337th Report, paras. 113-115]. On that occasion, the Committee requested the Government to inform it as to whether the 574 workers dismissed from the telecommunications sector had been reinstated, as ordered by the Constitutional Court, and whether an independent inquiry had been carried out into the allegations presented by the ICFTU concerning police repression in the framework of the strike that took place from July to September 2002 and to transmit the results of said inquiry.
- 163.** In its communications dated 19 April and 26 August 2005, the Government refers to various demonstrations which took place in Lima between 22 July 2002 and 7 August 2002 and states that the national police were present at these demonstrations, in particular, that held on 7 August. During the protest of 7 August, around 800 protestors gathered in the area surrounding a branch of the enterprise Telefónica del Perú and some of them, mounted in a van, began to attack the police using stones, sticks and other offensive weapons, forcing the police to use water cannons and tear gas. According to the Government, no one was arrested at any of the demonstrations. The Government also refers to dismissals which are not related to the allegations.
- 164.** *The Committee notes this information. The Committee observes that the Government has not sent any information regarding the dismissal of 574 workers from the telecommunications sector, whose reinstatement was ordered by the Constitutional Court. In effect, the Government refers to other issues which are not related to the present case. The Committee therefore requests the Government, without delay, to report whether it has reinstated the 574 workers dismissed from the telecommunications sector as ordered by the Constitutional Court.*

### **Case No. 2291 (Poland)**

- 165.** The Committee last examined this case, which concerns numerous acts of anti-union intimidation and discrimination, including dismissals, by the management of two

companies (Hetman Limited and SIPMA S.A.) as well as partiality by the Public Prosecutor's Office, lengthy proceedings and non-execution of judicial decisions, at its March 2005 meeting [see 336th Report, paras. 103-112]. During its previous examination of the case, the Committee had: (1) noted with regret that the NSZZ "Solidarnosc" trade union in the SIPMA S.A. enterprise had been dissolved and requested the Government to intercede with the parties with a view to improving the industrial relations climate between the enterprise and the NSZZ "Solidarnosc" Inter-Enterprise Organization of the Middle East Region so the latter could exercise its activities with respect to this enterprise without any interference or discrimination by the employer against its members or delegates; (2) expressed the expectation that the measures taken by the Government would effectively speed up the judicial proceedings initiated since July 2002 by Zenon Mazus, leader of the NSZZ "Solidarnosc" trade union in the SIPMA S.A. enterprise, for recognition of his dismissal as ineffective; (3) requested the Government to keep it informed on the above issues as well as the progress of the proceedings concerning the employer's obligation to cooperate with the trade union and the penal charges filed against 19 senior managers of SIPMA S.A.; and (4) requested the Government to provide information with regard to the disputes in the Hetman Limited enterprise.

- 166.** In its communication of 21 October 2005, the Government states that concerning the steps requested to be taken so as to bring the parties back to the bargaining table, under the auspices of the Regional Dialogue Commission, controversies between employers and employees may be presented to the Commission by any of the parties thereof, trade unions and employers' associations not being party to the Commission, public administration bodies, and by the conflicted parties. However, according to the Government, no motions concerning the above matter have been filed yet.
- 167.** Regarding the judicial proceedings initiated by Zenon Mazus, the Government indicates that, in its judgement dated 14 June 2005, the Regional Court in Lublin decided to dismiss an appeal lodged by the defendant (the employer) against the verdict passed by the court of first instance, which had ordered the reinstatement of the leader of the NSZZ "Solidarnosc" trade union in the enterprise. However, the Government adds that the final appeal against the said judgement has not been lodged yet.
- 168.** Regarding the penal charges filed against 19 senior managers of SIPMA S.A., the Government states that court sittings have been postponed several times, due to health problems reported by one of the defendants and by the judge. The trial was scheduled for 12 October 2005 but proceedings being very slow, the court trial has not yet commenced. As for the reason for transferring the case from the Lublin to the Kielce Prosecutor, it declares that the Regional Prosecutor's Office in Kielce had been previously entrusted with another case involving SIPMA S.A. in Lublin. When making this decision, the Deputy General Prosecutor took into consideration that the Lublin Appeal Prosecutor's wife was a member of the Supervisory Board of SIP-MOT S.A. (a SIPMA S.A. subsidiary).
- 169.** *The Committee takes note of the information provided by the Government. The Committee notes with regret that the Government does not indicate any steps taken or contemplated so as to intercede with the parties with a view to improving the industrial relations climate between the SIPMA S.A. enterprise and the NSZZ "Solidarnosc" Inter-Enterprise Organization in the Middle East Region. Regarding the steps that the Committee previously requested of the Government so as to bring the parties back to the bargaining table, under the auspices of the Regional Dialogue Commission, the Committee notes with regret from the Government's report that no such steps have yet been taken by the public administration bodies despite their competence to do so, as previously shown by the Minister of Labour's referral of the issue concerning the Hetman Limited enterprise to the Regional Social Dialogue Commission [see 333rd Report, para. 909]. The Committee once again requests the Government to intercede with the parties, either directly or in the*

framework of the Regional Social Dialogue Commission, with a view to improving the industrial relations climate between the SIPMA S.A. enterprise and the NSZZ “Solidarnosc” Inter-Enterprise Organization in the Middle East Region so that the latter may exercise its activities with respect to this enterprise without any interference or discrimination by the employer against its members or delegates.

- 170.** Regarding the judicial proceedings initiated by Zenon Mazus, the Committee notes that, according to the Government, in its judgement dated 14 June 2005, the Regional Court in Lublin decided to dismiss an appeal lodged by the defendant against the verdict passed by the court of first instance, which had ordered the reinstatement of the leader of the NSZZ “Solidarnosc” trade union in the SIPMA S.A. enterprise. Noting that a final appeal had not yet been lodged according to the Government and this case has been pending since July 2002, the Committee requests the Government to take all necessary measures so as to ensure that Zenon Mazus is reinstated in his post without loss of pay, in accordance with the decision of the Court of Appeal, without further delay. The Committee requests to be kept informed in this respect.
- 171.** In respect of the penal charges filed against 19 senior managers of the SIPMA S.A. enterprise, the Committee notes that, according to the Government, the court trial had not commenced at the time of its last communication (21 October 2005). In respect of the reason for transferring the case from the Lublin to the Kielce Prosecutor, the Committee notes from the Government’s report that, when making this decision, the Deputy General Prosecutor took into consideration that the Lublin Appeal Prosecutor’s wife was a member of the Supervisory Board of SIP-MOT S.A. (a SIPMA S.A. subsidiary). The Committee nevertheless notes with concern that the case of the penal charges filed against 19 senior managers of SIPMA S.A. has been pending since 14 October 2003, and once again recalls that justice delayed is justice denied [see *Digest of decisions and principles of the Freedom of Association Committee*, 4th edition, 1996, paras. 105 and 749]. The Committee requests the Government to keep it informed of the progress of the proceedings and expresses the firm hope that they will finally commence without further delay.
- 172.** The Committee also observes with regret that the Government does not provide any information with regard to the disputes in the Hetman Limited enterprise. It therefore once again requests the Government to provide such information, as well as any developments in the Regional Social Dialogue Commission on this matter.

### **Case No. 2395 (Poland)**

- 173.** The Committee examined this case, which concerns several freedom of association violations at the Hydrobudowa-6 S.A. company (decision to discontinue the deduction of trade union fees of the NSZZ “Solidarnosc” trade union in the enterprise and anti-union dismissals of the chairperson and a member of the executive committee of the abovementioned trade union in violation of the relevant legislation) as well as the indulgent attitude of the Government and the judicial authorities towards these acts of anti-union discrimination and the serious delays in the proceedings concerning the reinstatement of the abovementioned trade union officials, at its June 2005 meeting [see 337th Report, paras. 1150-1201]. The Committee made the following recommendations:
- (a) Noting that the check-off facility in the Hydrobudowa-6 S.A. company has been allegedly unilaterally modified since January 2002, the Committee requests the Government to intercede with the parties (either in the framework of the renewal of the discontinued proceedings or otherwise) with a view to re-establishing the previously available check-off facility and to keep it informed of progress made in this respect.
  - (b) The Committee expects that the measures now taken by the Government will effectively speed up the judicial proceedings initiated for reinstatement by Sylwester Fastyn,



chairperson of the NSZZ “Solidarnosc” trade union in the Hydrobudowa-6 S.A. company, and for recognition of dismissal as ineffective by Henryk Kwiatkowski, member of the executive committee of the trade union, and requests the Government to keep it informed of the progress of the proceedings as well as their final outcome.

- (c) The Committee requests the Government to intercede with the parties with a view to enabling Sylwester Fastyn, who has kept his post as chairperson of the trade union, to exercise his trade union activities without any further interference by the employer, in particular, to be able to remain in the trade union office without having to be accompanied by an employee. The Committee requests to be kept informed in this respect.
- (d) The Committee requests the Government to take all necessary measures as soon as possible with a view to establishing procedures which are prompt, impartial and considered as such by the parties concerned, in order to ensure that trade union officials and members have the right to an effective remedy by the competent national tribunals for acts of anti-union discrimination. The Committee requests to be kept informed of developments in this respect.

**174.** In its communication of 21 October 2005, the Government indicates as regard the check-off facility in the Hydrobudowa-6 S.A. Company, that all the actions taken in connection with legal proceedings by the Prosecutor’s Office were in accordance with the binding law and all the possible steps related to the instance and service supervision were taken. Effectively, the District Court for Warsaw Pragapnosc as well as the Appeals Prosecutor rejected the appeal and decided that there existed no grounds for resuming the proceedings, which had been validly discontinued.

**175.** With regard to the progress of the cases of Henryk Kwiatkowski and Sylwester Fastyn before the competent tribunals, the Government first states that, concerning the action undertaken by Henryk Kwiatkowski, the District Court for Warsaw-Praga, on 28 July 2005, withheld the action and ordered the reinstatement of the plaintiff. However, the decision is still not enforceable, as the employer has decided to lodge an appeal against it. In respect of the case of Sylwester Fastyn, which was heard for the first time on 27 April 2005 and the second on 17 October 2005 (six months later), the hearing was finished but the Court had still not yet rendered its decision. The Government explains that the half-year’s interruption in the main proceedings was due to a special procedure instituted in connection with another motion raised by the defendant – Hydrobudowa-6 S.A. – to suspend the proceedings, but this motion was dismissed on 5 July 2005. The Government adds that, concerning these two cases, the legal proceedings are currently conducted without delay. It further states that the importance of the delay in proceedings depends on the motions and requests filed by the parties.

**176.** With regard to the fourth recommendation of the Committee to take all necessary measures as soon as possible in order to establish procedures which are prompt, impartial and considered as such by the parties concerned, so as to ensure that trade union officials and members have the right to an effective remedy by the national tribunals for acts of anti-union discrimination, the Government affirms that under the Polish law, public administration bodies are not authorized to interfere in bilateral disputes between employees and employers. According to the Government, independent courts are currently resolving those disputes. Moreover, the parties may decide, pursuant to the Act on the Settlement of Collective Disputes of 1991, to jointly appoint an external mediator who would guarantee an unbiased resolution of the dispute. The mediator may be selected from a list defined by the Minister of Labour, in cooperation with the organizations representing workers and employers, pursuant to the Act on the Tripartite Commission for Social and Economic Affairs. If the parties fail to reach a consensus within five days, further proceedings will be attended by a mediator appointed, following a request filed by any of the parties, by the Minister of Labour from the list of mediators.

177. *The Committee takes note of the information provided by the Government. Regarding the issue of the unilateral modification of the check-off facility, the Committee notes with regret that the Government reiterates previously provided information and does not indicate any measure taken or contemplated so as to intercede with the parties with a view to re-establishing this facility, as requested by the Committee. The Committee takes due note of the fact that the District Court for Warsaw Pragapolnoc as well as the Appeals Prosecutor rejected the complainant's appeal and decided that there existed no grounds to resume the proceedings, but it observes once again that neither the judicial texts previously provided by the Government, nor the Government's response contain any indication as to the grounds justifying the unilateral termination of this facility. The Committee once again recalls that the withdrawal of the check-off facility, which could lead to financial difficulties for trade union organizations, is not conducive to the development of harmonious industrial relations and should therefore be avoided [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 435]. It therefore once again urges the Government to intercede with the parties with a view to re-establishing the previously available check-off facility and to keep it informed of progress made in this respect.*
178. *As regards the action filed by Henryk Kwiatkowski, the Committee notes with interest from the Government's report that on 28 July 2005, the District Court for Warsaw-Praga upheld it and ordered the reinstatement of the plaintiff to work. However, the decision is still not enforceable, as the employer has decided to lodge an appeal against it. Furthermore, the Committee notes that, in respect of the case of Sylwester Fastyn, at the date of the last communication of the Government (21 October 2005), the hearing had ended but the Court had still not rendered its decision. The Committee regrets to observe that although the Government indicates that the proceedings initiated by Messrs. Fastyn and Kwiatkowski are currently conducted without delay, these proceedings have been pending since April and March 2002 respectively and have still not been concluded. The Committee recalls once again that cases concerning anti-union discrimination contrary to Convention No. 98 should be examined rapidly, so that the necessary remedies can be really effective, and that justice delayed is justice denied [see **Digest**, op. cit., paras. 105 and 749]. The Committee requests the Government to ensure that the proceedings initiated by the two union leaders will be concluded without further delay, and requests the Government to keep it informed of the progress of the proceedings as well as their final outcome.*
179. *Concerning the interference in the exercise of Sylwester Fastyn's functions as chairperson of the trade union in the enterprise and full-time union officer after his dismissal, the Committee notes with regret that the Government provides no information in this respect. The Committee once again emphasises that the dismissal of Sylwester Fastyn, for which the employer has already been sentenced and fined, as well as the long delay in the reinstatement proceedings, should not hinder the activities of the trade union by enabling the employer to prohibit the presence of the chairperson in the trade union office unless he is accompanied by an employee. Therefore, the Committee requests once again the Government to intercede rapidly with the parties with a view to enabling Sylwester Fastyn to exercise his trade union activities without any interference by the employer and to keep it informed in this respect.*
180. *With regard to the allegation of an indulgent attitude towards anti-union discrimination on behalf of the authorities and the serious delays in proceedings concerning reinstatement in cases of unlawful dismissal, the Committee notes with regret that the Government does not indicate any measures aimed at establishing prompt and impartial procedures leading to an effective remedy. The Committee observes that the issue of a possibly indulgent attitude towards anti-union discrimination, which can be largely attributed to serious delays in the administration of justice, has also been raised in the framework of Case No. 2291*

concerning Poland. The Committee had noted in its previous examination of this case, the Government's affirmation that the problem of delay in the administration of justice is a generalized one. The Committee once again recalls that the Government is responsible for preventing all acts of anti-union discrimination and that it 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. The existence of legislative provisions prohibiting acts of anti-union discrimination is insufficient if they are not accompanied by efficient procedures to ensure their implementation in practice [see *Digest*, op. cit., paras. 738 and 742]. The Committee therefore once again urges the Government to take all necessary measures as soon as possible with a view to establishing procedures which are prompt, impartial and considered as such by the parties concerned, in order to ensure that trade union officials and members have the right to an effective remedy by the competent national tribunals for acts of anti-union discrimination, and to keep it informed of developments in this respect.

### **Case No. 2199 (Russian Federation)**

- 181.** The Committee last examined this case, which concerns alleged acts of anti-union discrimination by the administration of the Commercial Seaport of Kaliningrad (MTPK), at its May-June 2004 meeting. On that occasion, the Committee noted the Government's statement to the effect that the Baltic District Court, in its decision of 24 May 2002, ordered the reinstatement of the illegally dismissed dockworkers and that this decision was implemented and the dockworkers were offered jobs at the Transport and Freight Company Ltd. (TPK). Despite the numerous job offers issued by the TPK management, the dockworkers did not return to work [see 334th Report, paras. 44-46].
- 182.** In its communication of 19 March 2005, the complainant organization, the Russian Labour Confederation (KTR) alleged that discrimination against members of the Russian Trade Union of Dockworkers (RPD) continued at the MTPK. It submitted that it was not until 16 March 2004, that the management of the MTPK ordered the reinstatement of dockworkers – members of the RPD under the conditions laid down in the decision of 24 May 2002 of the Baltic Regional Court and as interpreted by the Baltic Regional Court in its ruling of 15 March 2004. However, even after the issuance of orders to reinstate the RPD members, the dockworkers were allowed to return to work only on 12 May 2004. Moreover, until 12 May 2004, the RPD representative, Mr. Mikhail Chesalin, was not allowed to access the port premises. The KTR submitted that the employer once again separated the reinstated dockworkers from all other dockworkers and formed two brigades consisting solely of the RPD members. Once again, their access to work was restricted and the work of loading and unloading goods had not been offered to them. The KTR alleged that the employer used the RPD members for auxiliary work, paid at a considerably lower rate than cargo handling. As a result of the restricted access to work, monthly wages of the RPD members were equivalent to half of that paid to dockworkers/machine operators, who were not members of the RPD. In June-August 2004, five of the ten RPD members were once again dismissed from the MTPK, this time, in connection with their state of health, allegedly incompatible with their duties. According to the complainant, of these five dismissals, only one was justified. The employer's continued policy of discrimination against the RPD, and resulting low wages, forced 12 dockworkers to leave. The KTR finally alleged a continual refusal of the employer to reform the trade union brigades and to grant the RPD's request for the dockworkers' training.
- 183.** In its communication dated 15 September 2005, the Government provided the following information with regard to the above communication submitted by the complainant. It confirms that on 16 March 2004, in compliance with the ruling of the Baltic District Court of Kaliningrad dated 15 March 2004, clarifying the Court ruling of 24 May 2002, the port management had issued orders to reinstate the 23 port machine operators – members of the

RPD to their posts at the MTPK. However, not agreeing with the terms and conditions of the contracts of employment offered by the port management, the workers (Messrs. A.N. Kasyanov, N.N. Grushevoy, A.I. Pushkarev, V.P. Kolyadin, A.F. Verkhoturtev, A.E. Milinets, O.A. Tolkachev, V.M. Morozov, A.K. Lemashov, I.Y. Zverev, N.G. Egorov, I.N. Vdovchenko and Y.A. Bychkov) refused to sign them.

- 184.** In the period between 25 March and 11 June 2004, the head of human resources at the port sent written instructions to the head of the Port Entrance Security Service to grant access to the port to the reinstated port machine operators on one-day passes between 9 a.m. and 5 p.m. As followed from the official statements drawn up by a Court executor, certain workers (Messrs. A.F. Verkhoturtev, V.M. Sinyakov, I.Y. Zverev, I.I. Vdovchenko and A. P. Kasyanov) had not reported for work on 21 April 2004; Messrs. Y.A. Bychkov, A.V. Solovev, V.M. Sinyakov, A.I. Kiselev, N.N. Grushevoy and A.I. Pushkarev had also failed to report for work on 7 May 2004; Messrs. N.G. Egorov, A.P. Kasyanov, A.K. Lemashov, O.A. Tolkachev, A.E. Milinets and I.Y. Zverev had reported to the port entrance on 12 May 2004, but after being informed of the work schedule for May 2004 and the team they were required to join, refused to work.
- 185.** As concerns the denial of access to the port premises to 14 reinstated port machine operators, the Government explained that the workers refused to work claiming that they needed qualified legal assistance to legalize their reinstatement. They requested to be allowed onto the premises together with Mr. Chesalin, their representative. Following the denial of access to Mr. Chesalin to the port premises, the workers refused to go to the port Human Resources Department. On 21 May 2004, the Court executor drew up resolutions recognizing the termination of employment of all 23 of the port machine operators who had been previously reinstated.
- 186.** The Government further stated that the Baltic District Court of Kaliningrad in its ruling of 22 February 2005 established a failure on the part of the employer to implement the Court ruling dated 24 May 2002 ordering reinstatement of the 23 machine operators during the period 3 April 2003 to 12 May 2004. As a result, the employer was imposed a fine.
- 187.** In August 2005, the state labour inspectorate of Kaliningrad district carried out an inspection into the matters raised in this case. The inspection documents showed that the reinstated machine operators Messrs. N.E. Yakovenko, V.F. Grabchuk, Yu.E. Malinovski, A.E. Milinets, I.N. Vdovchenko, A.V. Lukshis, A.V. Solovev and P.I. Mironchuk had not reported for work because they disagreed with the ruling of the Baltic District Court of Kaliningrad of 24 May 2002 and with the ruling of the Baltic District Court of 15 March 2004. On 21 May 2004, they informed the employer of their disagreement in writing. The reinstated machine operator Mr. A.N. Kasyanov was relieved of his duties on 6 July 2004 at his own request, in accordance with section 77(3) of the Labour Code. The reinstated worker Mr. A.I. Kiselev did not report for work until 1 March 2005. Therefore, the refusal of the port authorities to conclude a contract of employment with him was lawful.
- 188.** As regards the difference in wages, the Court rulings stated that the employer was required to reinstate workers on the same terms and conditions as they enjoyed at the time of their dismissal in October 2002. The Court ruling of 2002 specified the terms and conditions on which these workers were supposed to be hired, including wages and shifts. According to the Government, the order by the port authorities dated 16 March 2004 was thus entirely in accordance with the Court rulings on reinstatement.
- 189.** In accordance with the labour legislation and on the basis of the findings of the Commission of Clinical Experts of the North-Western District Medical Centre "Kaliningrad Hospital" of 25 May, 13 and 14 July 2004, the machine operators Messrs. O.A. Tolkachev, A.F. Verkhoturtev and N.N. Grushevoy were dismissed under

the terms of section 77(8) of the Labour Code (concerning refusal by a worker to accept transfer to other duties on health grounds as established by a qualified medical practitioner). In accordance with section 72(2) of the Labour Code, they were offered other suitable positions in the port but refused all of them and were consequently dismissed. The workers lodged an unsuccessful appeal against the Commission's findings and their dismissals before the Baltic District Court in Kaliningrad. The Government explained that all workers were required to undergo annual medical examinations, regardless of their trade union membership. The Court found no evidence to support the plaintiffs' allegations that the dismissals were motivated by their RPD membership, nor was there any evidence found that the dismissals and referrals to a medical practitioner were discriminatory.

- 190.** Mr. A.E. Milinets was dismissed on 7 June 2004 in accordance with section 77(8) of the Labour Code. Mr. A.I. Pushkarev was dismissed on 8 June 2004 in accordance with section 81(3)(a) of the Labour Code after the Commission concluded on 23 April 2004 that he was a Class 2 invalid. These workers did not avail themselves of the opportunity to defend their rights in court or to appeal to the state labour inspectorate.
- 191.** As regards the composition of work teams, it was found that, at the time of the workers' reinstatement, all work teams at the port were already formed. The reinstated workers were therefore integrated into new teams.
- 192.** Finally, the Government stated that, in accordance with section 377(1) of the Labour Code, within the territory of the port, the management had placed heated and equipped premises at the disposal of trade unions, even though the labour legislation does not require the employer to provide such premises for all trade union organizations.
- 193.** In the light of the above, the Government considered that there was no evidence of any discrimination against members of the RPD at the MTPK.
- 194.** *The Committee notes the complainant's allegations and the information provided by the Government. The Committee notes that, according to the Government, the workers reinstated by the port management order of 16 March 2004 refused to sign the contracts of employment offered to them because they disagreed with the terms and conditions. However, it appears from the information provided by the Government that the terms and conditions of reemployment, at least as wages are concerned, were the same as provided in the Court's ruling of 2002. At the same time, on 22 February 2005, a court found the employer guilty of failing to comply with the Court order to reinstate the dismissed workers during the period from 3 April 2003 to 12 May 2004. In the light of these circumstances, the Committee notes that, while having won their court cases against unjustifiable dismissal both at the initial stage and on appeal, the members of the RPD were finally offered contracts of employment on the basis of a wage rate corresponding to that of more than two years before and one which, according to the complainant, was equivalent to half of what other dockworkers/machine operators were being paid. The Committee deeply regrets that, despite the numerous court judgements and fines against the employer, the MTPK did not give effect to the reinstatement orders and that, despite the judgement of February 2005, the Government considers that there is no evidence of anti-union discrimination against the members of the RPD. Regretting that almost four years after the complaint was filed, the issues raised in this case have not been resolved, the Committee urges the Government to take all the necessary measures so as to ensure that the port management and the dismissed members of the RPD find a mutually acceptable solution. The Committee requests the Government to keep it informed in this respect.*

**Cases Nos. 2216 and 2251 (Russian Federation)**

- 195.** The Committee examined these cases at its June 2005 meeting [see 337th Report, approved by the Governing Body at its 293rd Session, paras. 140-155] and referred the legislative aspects of these cases in respect of the application of Conventions Nos. 87 and 98 to the Committee of Experts on the Application of Conventions and Recommendations. As concerned the practical application of the Conventions, the Committee requested the Government: (1) to keep it informed of the outcome of the investigation on the alleged violations of trade union rights of the URALPROFCENTRE by the administration of the UECE; (2) to initiate the relevant inquiries into the allegations made by the TRTUC concerning the refusal to establish a unified representative body for collective bargaining purposes at the “Managing Company for Housing Communal Services UG”; and (3) in the light of the complainant’s allegation to the effect that, in practice, strikes are often postponed or declared illegal, to provide relevant information, including statistical information, on how the right to strike is exercised in practice.
- 196.** In its communication of 29 August 2005, the Russian Labour Confederation (KTR), the complainant organization in Case No. 2251, reiterated its concerns over certain provisions of the Labour Code previously commented upon by the Committee. It further referred to a number of cases of violation of trade union rights in practice. More particularly, as concerned the right to strike in the railway sector, the KTR alleged that the Strike Committee of the Russian Union of Railway Locomotive Teams (RPLBZh), established to carry out a one-hour warning strike at the Russian Rail Roads Co., received a warning from the Moscow Transport Prosecutor’s Office on inadmissibility of such a strike. This warning referred to section 26 of the new Law on Rail Transport, which restricted the right to strike for railway workers. In Perm City, the Perm Regional Court, also invoking section 26 of the same Law, declared a potential strike illegal.
- 197.** With regard to section 37(5) of the Labour Code and the preference given by the Labour Code to majority unions in the collective bargaining process, the complainant submitted that while, as previously noted by the Committee, this section provided that a chair was kept for other primary trade unions for their participation in the collective bargaining process, the legislation did not provide for any legal remedy in case of a refusal by the majority trade union to admit a minority union to the single representative body. The complainant alleged that when the RPLBZh addressed a demand to be included in the collective bargaining process at the Moscow Rail Road Co., the negotiation committee replied that “the Committee was already formed and making any changes would be inexpedient”. An attempt by the RPLBZh to protect its right to participate in collective bargaining in court was not successful. On 17 January 2005, the Meschansky District Court of Moscow refused to receive the RPLBZh’s claim to consider the signed collective agreement invalid. The Court considered that, as a non-party to the collective agreement, the RPLBZh had no right to request its annulment. The Moscow City Court upheld the District Court ruling.
- 198.** The KTR once again raised the question of representation of workers during collective bargaining at the enterprise level by trade unions other than primary trade unions. It submitted a court decision relieving the Aeroflot Co. from its obligations under the collective agreement to the Trade Union of the Aviation Specialists of the Aeroflot Co. (PrAS), one of the signatories of the agreement. The decision was based on the fact that the union in question was not a primary trade union (organizational structure of a trade union) but had a territorial status. Consequently, by its Order of 14 April 2005, the employer withdrew the right previously granted to the PrAS trade union officers to access the workplace of their trade union members, stopped the check-off facilities, withdrew the right to use premises and means of communication and excluded the PrAS representatives

from the Committee on Social and Labour Relations and the Committee on Labour Disputes.

- 199.** The KTR further alleged that, in practice, all demands a trade union wished to make of the employer had to be confirmed by a meeting (conference) of all workers and referred to two cases (“Yefremovskiy Glucose and Molasses Co.” in Yefremov City in Tula Region and “Khladoproduct Co.” in Timoshevsk City in Krasnodar Region) where an employer refused to consider a trade union demand which did not satisfy this requirement.
- 200.** Finally, the KTR stated that the State Duma was considering a draft law to amend the Labour Code.
- 201.** In its communication of 21 October 2005, the KTR regretted that none of the recommendations made by the Committee in Case No. 2251 had been implemented by the Government. It further stated that the position of a total denial of the existence of violations of freedom of association on the part of the Government made any constructive discussion on amendments of the Labour Code virtually impossible. However, according to the complainant organization, the Government had recently changed its position. On 13 September 2005, a meeting took place between the Ministry of Health and Social Development and representatives of the KTR and the Russian Seafarers’ Union (RPSM) concerning complaints in Cases Nos. 2216, 2244 and 2251. It was agreed by the parties that it was essential for the Government to implement the Committee’s recommendations. It was further decided that the RPSM and the KTR would participate in the drafting of the amendments to the Labour Code.
- 202.** In its communication of 24 October 2005, the RPSM confirmed the establishment of a working group for the purpose of formulating proposals regarding amendments to the Labour Code in accordance with the recommendations of the Committee made in Cases Nos. 2216 and 2251. While viewing this as a positive step towards implementing the Committee’s recommendations, the RPSM expressed its concern over the fact that, in practice, no real action had so far been made by this working group.
- 203.** By its communication of 7 October 2005, the Government informed of the meeting held on 13 September 2005 between the Ministry of Health and Social Development and representatives of the KTR and RPSM, during which the parties agreed to continue working together on improvement of the Labour Code.
- 204.** *The Committee notes the information provided by the complainant organizations and the Government. It regrets, however, that the Government failed to submit its observations on the effect given to its recommendations related to practical application of Conventions Nos. 87 and 98 as well as on the allegations made by the KTR in its communication of 29 August 2005. It requests the Government to provide its observations on the issues related to the practical application of Conventions Nos. 87 and 98 raised in these cases without delay. The Committee does note with interest, however, that the Government and the complainant have recently had constructive discussions on the measures necessary for the implementation of the Committee’s recommendations in these and other cases, including through the amendment of the labour legislation. The Committee requests the Government to keep it informed of the progress made in this regard.*

### **Case No. 2255 (Sri Lanka)**

- 205.** The Committee last examined this case, which concerns certain provisions of the Guidelines for the Formation and Operation of Employees’ Councils issued by the Board of Investment (BOI), the overseeing authority for Sri Lanka’s free trade zones (FTZs) as well as the BOI Manual of Labour Standards and Employment Relations, at its

March 2005 meeting [see 336th Report, paras. 103-112]. During its previous examination of the case, the Committee had: (1) noted the affirmation of the Government to the effect that the BOI guidelines had been amended although the issue of the 40 per cent requirement needed to be brought up before the National Labour Advisory Council (NLAC), and had requested the Government to clarify whether amendments had come into effect; (2) noted the observation of the Government to the effect that the issue would be put on the NLAC agenda for examination within the next three months and had requested to be kept informed in this respect; (3) noted that the Government did not specify the measures that had been taken and that were intended to be taken in order to promote collective bargaining in FTZs and had requested the Government to indicate more specifically the measures taken to promote collective bargaining in FTZs; and (4) noted that, while the Government had indicated that the phrase “representation functions” included all activities and functions that a trade union might undertake to protect and further the interests of its members, it did not indicate that trade union representatives might have access to the workplace for the purpose of communicating to workers the potential advantages of unionization, and had requested the Government to take the necessary measures to ensure that trade union representatives could seek access to FTZ enterprises under section 9A of the BOI Manual on Labour Standards and Employment Relations for the purpose of apprising the workers in the enterprises of the potential advantages of unionization.

- 206.** In its communication of 31 August 2005, the Government indicates that, with regard to the first issue noted above, the amendments to sections 5, 12.3 and 13(ii) of the BOI Guidelines for the formation and operation of Employees’ councils have been given effect. The Government adds that the guidelines were circulated among all the actual and new investors as well as among trade unions, and that in case of violations, the BOI assists the Department of Labour through the facilitation process and has the power to stop services to investors who violate the guidelines.
- 207.** Concerning the 40 per cent requirement for the recognition of trade union representativeness for collective bargaining purposes, the Government indicates that the issue has been referred to a tripartite committee, the Committee on Labour Reforms (CLR), appointed by the NLAC on overall labour reforms. This Committee is currently reviewing the labour legislation and is making proposals to give effect to international labour standards, and in particular Conventions Nos. 87 and 98.
- 208.** According to the Government, all the members of the Committee agreed that the reason for signing only a few collective agreements in the BOI was not the 40 per cent threshold, and except for one of the trade union members, the CLR was of the opinion that this requirement should be retained. Furthermore, the great majority of the committee was of the view that reducing the threshold would only contribute to the multiplicity of trade unions and affect negatively the process of collective bargaining. However, even if the CLR is not in favour of reducing the threshold of 40 per cent, the issue would be presented to the NLAC, along with the other proposals, for its deliberation and the outcome of the deliberations would be communicated after its final decision.
- 209.** In respect of the third issue mentioned above, the Government indicates that with the technical assistance and the guidance of the ILO, the Ministry of Labour Relations and Foreign Employment and the Department of Labour is undergoing a restructuring process. On that occasion, a unit called the “Social Dialogue Unit” has been set up; its main function is to promote workplace cooperation and social dialogue within enterprises, and to guide employers and workers in entering into collective bargaining. Currently, the division is carrying out a study in 100 workplaces including enterprises of the BOI to find out about the existing workplace cooperation and social dialogue methods in the enterprises. According to the Government, programmes will be implemented based on the findings of



the study. The Government also states that it will inform the Committee on the progress made. The Government also underlines, in its communication of 12 September 2005, that collective bargaining is gaining ground in the FTZs. In addition to the four collective agreements and the two memorandums of settlement signed in 2004, two agreements have been signed in 2005, while six are currently being negotiated.

- 210.** In respect of the fourth issue of access of trade union representatives being restricted for the performance of trade union functions, the Government points out that the trade union representatives can seek access to FTZ enterprises in terms of section 9A of the BOI Manual on Labour Standards and Employment Relations. The Government underlines that FTZs being bonded areas, the rights of the property and management should be respected by the trade unions.
- 211.** *The Committee notes the information provided by the Government. In respect of the first of the aforesaid issues, the Committee takes due note of the indication of the Government to the effect that the amendments to sections 5, 12.3 and 13(ii) of the BOI Guidelines for the formation and operation of employees' councils entered into force and that the guidelines are being circulated among all the actual and new investors, as well as among trade unions. Furthermore, the Committee notes that the BOI has the power to stop services to investors who violate the guidelines. The Committee takes note of this information.*
- 212.** *Concerning the 40 per cent requirement for the recognition of trade union representativeness, the Committee notes that the issue has been referred to the CLR, a tripartite committee appointed by the NLAC. The Committee observes that the CLR is not in favour of the reduction of the threshold of 40 per cent. It also notes that the issue would be presented to the NLAC for its deliberation and that the outcome of the deliberations would be intimated after its final decision. The Committee requests the Government to keep it informed in this respect.*
- 213.** *With regard to measures taken in order to promote collective bargaining, the Committee notes that the Government indicates that the Ministry of Labour Relations and Foreign Employment and the Department of Labour is undergoing a restructuring process with the technical assistance and guidance of the ILO. It further notes that a study is being carried out in 100 workplaces, including enterprises of the BOI, and that programmes will be implemented based on the findings of the study. The Committee notes with interest that, according to the Government, collective bargaining is gaining ground in the FTZs, and that, in addition to the four collective agreements and the two memorandums of settlement signed in 2004, two agreements have been signed in 2005 while six are currently being negotiated. The Committee requests the Government to keep it informed of developments in this respect, and asks the Government, once again, to specifically indicate the measures taken to promote collective bargaining in the FTZs and to transmit the texts of the collective agreements signed in 2005.*
- 214.** *Regarding the issue of access of trade union representatives being restricted for the performance of trade union functions, the Committee notes that, according to the Government, trade union representatives can seek access to FTZ enterprises in terms of section 9A of the BOI Manual on Labour Standards and Employment Relations. The Government also mentions that FTZs being "bonded areas", that the rights of the property and management should be respected by the trade unions. As the Government has not yet indicated whether access under section 9A of the BOI Manual included access for the purpose of apprising the workers in the enterprises of the potential advantages of unionization, the Committee would request the Government to indicate whether trade union representatives may seek access to FTZ enterprises under section 9A for such purposes.*

**Case No. 2171 (Sweden)**

- 215.** At its June 2005 session, the Committee examined this case, which concerns a statutory amendment enabling workers to remain employed until the age of 67 and prohibiting negotiated clauses on compulsory early retirement. Pointing out that the complaint was filed in November 2001, the Committee reiterated its previous requests that the Government take remedial measures and hoped that a negotiated solution would be found in the near future. The Committee also requested the Government to keep it informed of developments in this matter, including the results of any meetings held with social partners [see 337th Report, para. 158].
- 216.** In a communication dated 17 October 2005, the Government underlined that the matter in question is of considerable political and legal complexity. The new old-age pension system was preceded by a long political process and is the outcome of negotiations between five of the political parties in parliament. The new pension system can largely be characterized as a defined contribution system. The financing of this system is designed with regard to future demographic and economic trends. Increased participation of the labour force broadens the contribution base and contributes to the strengthening of this basically income-related pension system. According to the Government, financial stability is an important cornerstone of the system by avoiding an excessive financial burden to be placed on generations to come, and, thus, contributing to solidarity between generations. Moreover, the close link between the contributions made to the system and pensions entitlements is one way of ensuring fair treatment of individuals, making it possible for a person with a longer work record to receive a higher pension than a person with a shorter work record. The amendment to the Employment Protection Act that establishes an individual right to work beyond the age of 65 should be viewed in relation to this overall economic and social context.
- 217.** The Government further stressed that there are several legal difficulties arising in the process of trying to reinstate a previous invalid collective agreement into force. An abrogation of the transitional provision, which invalidates provisions restricting the employees right to remain employed until the age of 67 in collective agreements concluded before 1 September 2001, may lead to negative economic and personal consequences for the individual worker. The worker's possibility to improve his or her financial situation, by working until the age of 67, would be restricted if this right was abrogated and he or she was obliged to retire at an early age.
- 218.** Finally, the Government provided information regarding a survey they have administered, indicating that today, there are only a few collective agreements which were concluded before September 2001 that contain provisions restricting the employees' right to remain employed until the age of 67. It is even possible that all such collective bargaining agreements have expired, and that only a few – if any – provisions in collective bargaining agreements are invalidated by the transitional provision. The Government adds that it has not been possible to reach a satisfactory solution during the meetings with social partners.
- 219.** *The Committee notes this information. The Committee requests the Government to provide precise information on how many collective agreements contain provisions that are abrogated by the transitional provision and how many of the concerned agreements have expired. When noting that the Government has indicated that it had not been possible to find a satisfactory solution during the meetings with social partners, the Committee regrets that the Government has not provided any specific information on the measures taken in this regard (date and number of meetings held, social partners involved, views expressed, etc.). Recalling its previous recommendations and that more than four years have elapsed since the filing of this complaint, the Committee strongly urges the Government to take all*

*the necessary measures in order to ensure that a negotiated solution with the social partners will be agreed in the very near future.*

### **Case No. 2088 (Bolivarian Republic of Venezuela)**

**220.** In its previous examination of the case, the Committee made the following recommendation [see 337th Report, para. 178]:

As regards the death threats allegedly made against the trade union official, Mario Naspe, by Judge Hilda Zamora, when interceding to safeguard the employment stability and physical security of a number of members of the complainant organization, the Committee notes that the Government in its reply does not refer to the death threats but to threats against employment stability. The Committee requests the Government to send observations relating specifically to alleged death threats.

**221.** In its communications of 15 August and 7 September 2005, the Government refers to previous communications and to a report by the Executive Board of the Magistrature which states with regard to this pending allegation that nothing could be further from the truth. The Government refers to a decision by Judge Hilda Zamora (Court No. 3) rejecting the allegations and giving a completely different account of events; it cannot be deduced from that account that the alleged threats took place. The Government provides a *copy of the recognition agreement of 15 June 2005* between SOUNTRAJ and two other trade unions and the Executive Directorate of the Magistrature.

**222.** In its communication of 18 October 2005, the complainant organization SOUNTRAJ states that the judge who made death threats against the trade union leader Mario Naspe is no longer in office, and that no practical purpose is to be served by insisting on a recommendation on this matter. *The Committee takes note of this information.*

**223.** In its communication dated 18 October 2005, the complainant organization SOUNTRAJ refers to the Government's statements noted during the previous examination of the case in relation to various allegations, describes the statements in question as false, and makes new allegations. *The Committee requests the Government to send its observations on this most recent communication.*

### **Cases Nos. 1937 and 2027 (Zimbabwe)**

**224.** The Committee last examined these cases at its meeting in March 2005. They concern violations of the right to strike, anti-union dismissal, assault of a trade union leader and attacks on trade union premises. On that occasion, the Committee noted the lack of material developments regarding the very serious matters raised in these cases and expressed, once again, its deepest concern at the lack of cooperation of the Government in relation to the legislative changes necessary to ensure compatibility with Conventions Nos. 87 and 98. It also noted that the Government refused to hold independent investigations into the allegations of assault on a trade union leader and of arson of union facilities. The Committee recalled that the Government, as a member of the ILO, had to respect the fundamental principals embodied in the Constitution and the Declaration of Philadelphia, including the principles of freedom of association, and reminded it of its obligation to respect fully the commitments undertaken by its ratification of ILO Conventions. The Committee once again repeated its earlier conclusions in these cases and strongly urged the Government to take the appropriate steps in this regard. The Committee requested to be kept informed of all developments envisaged or undertaken in relation to the matters raised by these cases [see 336th Report, paras. 138-141].

- 225.** In a communication dated 21 September 2005, the Government states that, as regards Case No. 1937, it stands by its earlier submissions that the legislative amendments contained in the current Labour Act 28:01 are adequate to address the concerns of the Committee. It adds that the case should be closed given the fact that it has adequately taken care of all concerns of the Committee.
- 226.** Concerning Case No. 2027, the Government states that no material developments have occurred and it reaffirms its earlier position. The Government notes that the Committee insists on the setting up of independent investigations both on the alleged assault of the former ZCTU Secretary General, Mr. M. Tsavangirai, as well as on alleged arson attacks on ZCTU offices. The Government states it does not wish to set a wrong precedent, by setting up an independent investigation inquiry over matters which its law enforcement organs and the judiciary are seized with. It declares that such actions would not serve any purpose apart from seeking to create suspicions regarding the actions and discharge of duty by institutions that defend the rule of law. The Government states it applies the rule of law without fear or favour.
- 227.** *The Committee notes with deep regret the lack of cooperation from the Government, as reported in the paragraphs above. The Committee recalls once again its previous comments and strongly urges the Government to amend the Labour Relations Amendment Act No. 17/2002, to allow the workers and their organization to take industrial action in respect of economic and social policy questions without being sanctioned and to ensure that no imprisonment sanctions are taken in the case of peaceful strikes and that the sanctions are proportionate to the seriousness of the infringement.*
- 228.** *As regards the assault on Mr. Tsavangirai and the allegations of arson of the ZCTU offices, the Committee regrets that the Government simply refers to the separation of powers in respect of this matter which has been pending since 1997 and about which the Committee has not been informed of any pending court proceedings. In these circumstances, the Committee urges the Government to keep it informed of all developments envisaged or undertaken in relation to the matters raised in these cases.*

### **Case No. 2328 (Zimbabwe)**

- 229.** The Committee examined this case on the merits at its March 2005 session [see 336th Report, paras. 866-890]. It concerns acts of anti-union discrimination against trade union executives, more particularly the dismissal of the President of the Zimbabwe Congress of Trade Unions (ZCTU) and the indefinite suspension of three other union executives. The Committee had asked the complainant organization to provide further information, including written documentation, in relation with Mr. Matombo's dismissal. Secondly, it had asked the Government to convene an independent inquiry to examine promptly and thoroughly the allegations of anti-union discrimination in relation with the dismissal of Mr. Matombo as well as the indefinite suspension of Mr. Nkala, Mr. Chizura and Mr. Munandi and to take the appropriate measures according to the conclusion reached, such as reinstatement without loss of pay or benefits. It had finally required the Government to keep it informed of all new developments in this regard.
- 230.** The Government, in its communications dated 16 February and 21 September 2005, indicates that the cases of Mr. Nkala, Mr. Chizura and Mr. Munandi were heard by an arbitrator and disposed of under section 98 of the Labour Act, and that the parties are entitled to appeal the decision to the Labour Court. Mr. Matombo's case has been referred to compulsory arbitration, and the process should be left to run its course without undue interference. Furthermore, the fact that Mr. Matombo appealed to the Labour Office demonstrates his faith in that jurisdiction. The Government states that its labour offices and labour courts are highly competent to adjudicate the cases involving allegations of

anti-union discrimination since provisions in the law protects workers against such unfair labour practices. The Government adds that setting up an independent inquiry over a matter that is being dealt with by the dispute resolution system is inappropriate and premature as it subverts the rule of law.

**231.** *The Committee notes the information provided by the Government as regards Messrs. Nkala, Chizura and Munandi. The Committee recalls that if the competent body were to decide that they have been suspended from their position for anti-union reasons, it expects that they will be reinstated in their jobs or in equivalent positions, without loss of pay and benefits. It requests the Government to indicate the results of the arbitrator's decision under section 98 of the Labour Code, whether an appeal has been filed and, if so, its final result.*

**232.** *Concerning Mr. Matombo, the Committee notes that no information was provided by the complainant organization that might have contributed to resolve the contradictions noted by the Committee in its 336th Report. The Committee recalls that if it appears that Mr. Matombo had fulfilled the requirements applicable for trade union leave, he should be reinstated in his job, without loss of pay and benefits. It requests the Government to keep it informed of the final result of the proceedings filed by Mr. Matombo against his dismissal and to transmit the text of the arbitration decision.*

\* \* \*

**233.** 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
1890 (India)	June 1997	November 2005
1962 (Colombia)	November 2002	June 2003
1991 (Japan)	November 2000	June 2004
2006 (Pakistan)	November 2000	November 2005
2048 (Morocco)	November 2000	June 2005
2096 (Pakistan)	March 2004	November 2005
2111 (Peru)	November 2004	June 2005
2134 (Panama)	June 2003	June 2005
2139 (Japan)	June 2002	November 2005
2158 (India)	March 2003	November 2005
2164 (Morocco)	March 2004	November 2005
2186 (China/Hong Kong Special Admin. Region)	March 2004	November 2005
2187 (Guyana)	November 2003	November 2005
2189 (China)	June 2005	–
2228 (India)	November 2004	November 2005
2229 (Pakistan)	March 2003	November 2005
2234 (Mexico)	November 2003	November 2005
2242 (Pakistan)	November 2003	November 2005
2244 (Russian Federation)	June 2005	–
2253 (China/Hong Kong Special Admin. Region)	June 2004	November 2005

Case	Last examination on the merits	Last follow-up examination
2256 (Argentina)	June 2004	November 2005
2257 (Canada)	November 2004	–
2258 (Cuba)	June 2005	–
2264 (Nicaragua)	November 2005	–
2273 (Pakistan)	November 2004	November 2005
2274 (Nicaragua)	November 2004	November 2005
2277 (Canada)	June 2005	–
2283 (Argentina)	November 2004	November 2005
2289 (Peru)	November 2004	November 2005
2293 (Peru)	June 2005	–
2342 (Panama)	November 2005	–
2343 (Canada)	November 2005	–
2350 (Republic of Moldova)	November 2005	–
2357 (Bolivarian Republic of Venezuela)	June 2005	–
2378 (Uganda)	November 2005	–
2381 (Lithuania)	March 2005	November 2005
2383 (United Kingdom)	March 2005	November 2005
2386 (Peru)	November 2005	–
2387 (Georgia)	November 2005	–
2391 (Madagascar)	November 2005	–
2399 (Pakistan)	November 2005	–
2401 (Canada)	November 2005	–
2402 (Bangladesh)	November 2005	–
2403 (Canada)	November 2005	–

**234.** The Committee hopes that these governments will quickly provide the information requested.

**235.** In addition, the Committee has just received information concerning the follow-up of Cases Nos. 2046 (Colombia), 2068 (Colombia), 2109 (Morocco), 2126 (Turkey), 2141 (Chile), 2142 (Colombia), 2148 (Togo), 2151 (Colombia), 2160 (Bolivarian Republic of Venezuela), 2172 (Chile), 2192 (Togo), 2200 (Turkey), 2239 (Colombia), 2249 (Bolivarian Republic of Venezuela), 2252 (Philippines), 2272 (Costa Rica), 2281 (Mauritius), 2286 (Peru), 2296 (Chile), 2302 (Argentina), 2303 (Turkey), 2304 (Japan), 2305 (Canada), 2326 (Australia), 2329 (Turkey), 2330 (Honduras), 2344 (Argentina), 2346 (Mexico), 2352 (Chile), 2363 (Colombia), 2364 (India), 2367 (Costa Rica), 2374 (Cambodia), 2376 (Côte d'Ivoire), 2382 (Cameroon), 2385 (Costa Rica), 2404 (Morocco) and 2407 (Benin), which it will examine at its next meeting.

CASE NO. 2406

DEFINITIVE REPORT

**Complaint against the Government of South Africa  
presented by  
the Oil, Chemical, General and Allied Workers' Union (OCGAWU)**

*Allegations: The complainant organization alleges that 963 workers have been dismissed by Volkswagen S.A. for their participation in a strike, on the basis of a narrow interpretation of the Labour Relations Act 1995, which emphasized procedural irregularities over workers' substantive rights and had a disproportionate effect on them. The complainant also alleges employer interference in the affairs of the trade union of which the 963 workers were then members*

- 236.** The complaint is contained in communications dated 9 December 2004 and 7 March 2005 from the Oil, Chemical, General and Allied Workers' Union (OCGAWU).
- 237.** The Government provided its observations in a communication dated 18 May 2005.
- 238.** South Africa 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**

- 239.** In its communication of 9 December 2004, the complainant OCGAWU indicates that 963 of its members were dismissed from their employment by Volkswagen S.A. because of their participation in a strike, and that all internal remedies have been exhausted. It alleges that, in essence, the decision to dismiss the workers was based on their failure to observe certain procedural requirements of the Labour Relations Act, 1995 (the "Act") in relation to a strike in which they engaged. That strike followed the employer's intervention in the affairs of the trade union of which the workers were then members (National Union of Metalworkers of South Africa (NUMSA)) through the seeking of an interdict preventing action by elected shop stewards on their behalf. For the complainant, that intervention was in itself a violation of Convention No. 98.
- 240.** The complainant organization also alleges that another violation of freedom of association principles arose from the narrow interpretation of the provisions of the Act, so as to give primacy to procedural irregularities over the substantive right of workers to engage in strike action. In this case, the workers concerned took industrial action because NUMSA refused to act on their behalf; they therefore had no alternative but to seek redress themselves, first through unsuccessful approaches to the employer, and then by making it clear to the employer that they would strike if their demands were not met. According to the complainant, the employer never agreed or attempted to discuss with the employees the nature of their grievances, with a view to preventing the strike; it was clearly aware of the

impending industrial action but only reacted through threats concerning the illegality of the strike.

- 241.** The OCGAWU further alleges that the dismissal of workers for their participation in what it considers to be a legitimate strike violated freedom of association principles in that it constituted unwarranted action, depriving of their livelihoods many workers who had been employed in highly skilled occupations for long periods, and totally disproportionate to any infringement of the law that might have occurred. That law is supposed to apply ILO principles, as well as the South African Constitution which enshrines the right of every worker to strike as a fundamental right, and also provides for the application of ratified treaties and Conventions and of other elements of international law. These arguments were submitted to both levels of the Labour Court which heard the case but were not properly considered so as to give dismissed workers the protection to which they were entitled.
- 242.** In its communication of 7 March 2005, the OCGAWU submits that these arguments were not submitted to the Constitutional Court, which declined to consider the matter because of the ill-preparedness of the case presented by six individual employees without consultation of the other workers concerned. The Act and the Constitution required the application of ratified ILO Conventions as well as the principles derived from them, including those established by the ILO Committee of Experts and Committee on Freedom of Association. These arguments were either not addressed or misconstrued by the Constitutional Court, which summarily dismissed the referral. This exhausted all legal avenues of redress at national level.
- 243.** The OCGAWU stresses the unwarranted and improper interference in trade union affairs through the seeking by the employer of interdicts restraining the shop stewards concerned with the dispute which gave rise to the strike from proceeding with their activities. The recourse to strike action was in pursuit of their legitimate interests as workers and as members of a trade union (which had sought to remove their representative shop stewards from office and received the employers' support in that action). The OCGAWU submits that the dismissals in this case were an unwarranted and improper form of retaliation, a sanction wholly out of proportion to the degree of the workers' omission to comply with a legislative modality concerning strike action, which has been applied so as to deny them rights they have under the South African Constitution and ILO principles on freedom of association. The OCGAWU emphasizes that the complainants have been without employment since their dismissal in 2000, and that they seek whatever action may be necessary or possible to rectify the wrongs to which they have been subjected.
- 244.** The complainant organization attaches to its communication: the arbitrator's award ruling in its favour; the judgement of the Labour Court which overruled the arbitrator; and the Labour Appeal Court confirming the decision of the Labour Court.

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

- 245.** In its communication of 18 May 2005, to which are attached the observations made by the employer on 7 March 2005 and the observations made by the National Union of Metalworkers of South Africa (NUMSA) on 5 April 2005, the Government states that it does not consider it appropriate to enter into the merits of the dispute between the workers and their union and the employer, and stresses that it does not and should not take sides in a labour dispute between dismissed workers and their private sector employer, particularly where the judicial process has run its course. Since the main thrust of the complainant's criticism is directed at the employer, the Government considers it inappropriate to express any observations on the conduct of the employer, on the merits of the dispute, or on the decisions of the various jurisdictions that have adjudicated it.



- 246.** The Government does however consider appropriate to make observations on the constitutional or legislative provisions, and the judicial processes that are available for the resolution of disputes and for the realization of fundamental rights of workers and their trade unions, as guaranteed in national law and ILO instruments. In essence, the Government argues that: the relevant constitutional or legislative provisions are fully in compliance with the obligations of the Republic of South Africa under ILO Conventions; the national legislation does provide a system and a hierarchy of courts that are entrusted with interpreting and applying both national and international laws; the dismissed workers have fully utilized the four levels of the judicial process available, which has been exhausted with the decision of the Constitutional Court; there is no reason for concern about the inadequacy of the legislative provisions or of the judicial process; there is accordingly no basis for the Committee to intervene, either in connection with this dispute or with the domestic laws and judicial process that are in place. The Government provides detailed explanations on the applicable provisions, which are summarized below.
- 247.** Section 23 of the Bill of Rights, which is part of the Constitution, provides for fundamental rights of association of workers including the right to form and join trade unions, to participate in their activities and programmes, and to strike. Section 39(1) of the Constitution states that: “When interpreting the Bill of Rights, a court, tribunal or forum: (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; (c) may consider foreign law.”
- 248.** Section 1 of the Labour Relations Act (the “Act”) provides that the objective of the Act is to realize both the fundamental rights guaranteed in the Bill of Rights and the Constitution, and the obligations of the Republic of South Africa as a member State of the ILO. Section 3 provides guidelines for the interpretation of the Act (give effect to its primary objects; and comply with the Constitution, the public international law obligations of the Republic). Section 4 protects the right to organize of workers, and their right to strike is protected by section 64(1), which provides inter alia some conditions and limitations before the taking of industrial action (referral of the dispute to a council; 30 days cooling-off period; 48 hours notice of strike; etc.). The Act distinguishes between “protected” and “unprotected” strikes, the latter being those that do not comply with its requirements. In case of unprotected strike, the Labour Court has jurisdiction to grant an interdict or an order to restrain any person from participating in that strike. The Act also protects workers against unfair dismissal; “automatically unfair dismissals” include those where an employee is dismissed for participation in a protected strike. In addition, where a worker participates in an unprotected strike, dismissal is not necessarily justified but may be appropriate, if it is both substantively and procedurally fair. Disputes about unfair dismissals are determined by a tribunal or a court. The Government concludes that the domestic legislation, which is the product of consultation and negotiation with all interested stakeholders, including representative trade unions, fully accords with the letter and spirit of Conventions Nos. 87 and 98.
- 249.** Whilst refraining from commenting on the correctness of the decisions made by the various courts on the merits of the dispute, the Government points out that there is in place a judicial process which was indeed utilized by the dismissed workers and their representatives. The dispute was first dealt with in arbitration; this was unusual since dismissals that relate to unprotected strikes are generally adjudicated at the outset by the Labour Court; the workers thus had an additional opportunity to present their case to an arbitrator before it reached the courts. The matter was then dealt with by the Labour Court, the Labour Appeal Court and finally the Constitutional Court. An analysis of all the judgements reveals that careful consideration was given to all the evidence and arguments advanced on behalf of the parties, including arguments relating to freedoms and rights

protected under relevant ILO Conventions. The judicial process has accordingly been invoked and exhausted.

- 250.** Similarly, the employer invoked the statutory provisions that apply in the case of unprotected industrial action when seeking the interdict from the Labour Court, which exercised its jurisdiction and granted it on the basis of facts and law.
- 251.** In its communication of 7 March 2005, Volkswagen S.A. explains the background of the dispute. On 20 January 2000, a large number of workers engaged in industrial action at the Uitenhage plant, which the company had to close by 24 January. On 28 January, it concluded an agreement with NUMSA, whereby it recognized it as representing the overwhelming majority of weekly paid employees at the plant; it was agreed that the plant would reopen and that the workers would return to work on 31 January; the agreement also provided that those who continued the strike would be subject to disciplinary action, including dismissal. At the request of NUMSA, the company issued an ultimatum on 1 February to all striking workers to return to work by 3 February or be dismissed. A total of 1,336 employees did not comply and were accordingly dismissed.
- 252.** On 29 February, the affected workers referred the dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA), in the following terms: "Our dismissal was the result of a dispute which we had with our own union. Workers embarked on protest action after NUMSA forced 13 democratically elected shop stewards out of their positions with a Court order. For the first time in history of the labour movement, as far as we are aware, workers experienced a situation whereby their own union sided with the bosses against them and were dismissed thereafter." The dispute remained unresolved during the conciliation process and was referred to arbitration. In his decision of 22 January 2001, the arbitrator found that the dismissal of the affected employees was substantively fair but procedurally unfair, and ordered their reinstatement, albeit not retrospectively.
- 253.** The employer filed an urgent application to review and set aside the arbitrator's award and the employees brought a counter-application to set aside the arbitrator's finding that their dismissal had been substantively fair. On 6 March 2001, the Labour Court: set aside the arbitrator's award; held that although the employees' dismissal had been procedurally unfair, they were not entitled to any relief; and dismissed the employees' counter-application. The employees appealed to the Labour Appeal Court; the employer filed a cross-appeal limited to the Labour Court finding that the dismissals had been procedurally unfair. On 22 June 2001, the Labour Appeal Court dismissed the employees' appeal, confirming the substantive fairness of their dismissal, and upheld the company's cross-appeal, finding that the dismissals had also been procedurally fair.
- 254.** On 27 January 2003, the affected employees filed proceedings against NUMSA, claiming approximately 385 million rands in damages; the claim is pending before the High Court. In 2004, some three years after the issuing of the Labour Appeal Court judgement, the affected employees applied to the Constitutional Court, seeking leave to appeal the Labour Appeal Court judgement and requesting an extension of the delay for filing the application; on the undisputed facts, the Constitutional Court decided that there was no prospect of the employees succeeding on the merits (i.e. persuading the court that their dismissal was procedurally unfair) and that it was not in the interest of justice to extend the delay for leave to appeal.
- 255.** In its communication of 5 April 2005, NUMSA states its belief that the national courts, in particular the Labour Appeal Court and the Constitutional Court, have adequately dealt with the issues in the present case. NUMSA emphasizes that it is being sued for damages (for a total amount of R350 million) by many of the dismissed workers, now represented

by OCGAWU. Their claim is principally based on the allegation that NUMSA caused their dismissals by agreeing to a collective agreement which dealt with, among other things, the return to work of striking workers. NUMSA has defended the claim, which it cannot comment since it is pending, except to deny strongly that it caused the workers' dismissals or that it colluded with the management of the company.

### C. The Committee's conclusions

- 256.** *The Committee notes that this complaint concerns allegations of dismissals of workers for their participation in a strike at a private company, on the basis of a narrow interpretation of the Labour Relations Act, 1995 (the "Act"), which emphasized procedural irregularities over workers' substantive rights. The complainant also alleges employer interference in the affairs of the trade union. The Government submits for its part that the domestic law gives full effect to relevant ILO Conventions, and that all judicial recourses have been utilized and exhausted.*
- 257.** *The Committee notes at the outset that the present complaint took place in a context of intra-union rivalry, as explained for instance in the arbitrator's decision of 22 January 2001. The Uitenhage production plant employs approximately 6,000 employees, of which some 4,500 were hourly paid; 80 per cent of those were members of the National Union of Metalworkers of South Africa (NUMSA), which became the sole bargaining agent in November 1990. In 1998 the company won a major export contract for A4 Golfs to the UK and Europe, which required it to more than double its production; negotiations took place between management and NUMSA, which resulted in August 1998 in the signing of the so-called "A4 Export Agreement", the hiring of some 850 new employees and the introduction of new work practices. A group of workers apparently had some concerns with the A4 Export Agreement and with NUMSA officials who had signed it. As a result of shop stewards' elections in March/April 1999, about half of the 32 shop stewards elected were new; division soon emerged within the Shop Stewards Council between the re-elected stewards and the newly elected ones, and also between the latter and NUMSA local officials. On 17 July 1999, NUMSA suspended eight shop stewards and requested the company to return them to the positions they held before their election, which it did; this led to a strike by a few hundreds of workers, a court order declaring the strike illegal, the lifting of the suspension of the eight shop stewards, a return to work, the resignation of 18 other shop stewards in protest against the reinstatement of the eight, etc. This resulted in serious difficulties in the labour relations structure, actions and counteractions by the opposing factions, including another strike on 20 January 2000. As a result, the plant was closed down from 24 to 28 January 2000, the date on which an agreement was concluded between management and NUMSA, whereby the workers would return to work on 31 January. As a number of workers did not return on that date, the company issued an ultimatum to all "striking workers" to resume work on 3 February 2000 or be dismissed. Most of them did not comply and were dismissed.*
- 258.** *The arbitrator seized with the dismissals ordered their reinstatement, albeit without retroactive pay; the Labour Court overruled the arbitrator; the Labour Appeal confirmed and strengthened the Labour Court ruling; and the Constitutional Court refused to grant the employees' leave to appeal, which put an end to legal recourses.*
- 259.** *The Committee recalls that it is not competent to make recommendations on internal dissensions within a trade union organization, so long as the government does not intervene in a manner which might affect the exercise of trade union rights and the normal functioning of the organization [see **Digest of decisions and principles of the Freedom of Association Committee**, 1996, 4th edition, para. 962]. There is no suggestion that there was such an intervention by the Government in this case.*

**260.** *As regards the complainant's argument that the employer's actions in seeking an injunction from the court was in itself a violation of Convention No. 98, the Committee fails to see how the exercising, by any party, of a legal recourse could constitute a violation of Convention No. 98.*

**261.** *In these circumstances, as the case is outside the mandate of the Committee, it would be inappropriate for the Committee to intervene and substitute its own conclusions to that of the arbitrator and of specialized courts, which have had the advantage of hearing witnesses, evidence and arguments. The Committee therefore considers that this case does not call for further examination.*

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

**262.** *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. 2377

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

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

- **the Confederation of Education Workers  
of the Republic of Argentina (CTERA)**
- **the Single Trade Union of Education Workers  
of the Province of Buenos Aires (SUTEBA)**
- **the Confederation of Argentine Educators (CEA) and**
- **the Domingo Faustino Sarmiento Federation  
of Educators of Buenos Aires (FEB)**

**supported by  
Education International (EI)**

<p><i>Allegations: The complainants allege violations of the right to collective bargaining and to strike of education workers in the public sector of the Province of Buenos Aires</i></p>
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**263.** The Committee last examined this case at its November 2005 meeting [see 338th Report, paras. 385-408], when it submitted an interim report to the Governing Body.

**264.** The Government sent its observations in communications dated 28 October 2005 and 1 February 2006.

**265.** 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. Previous examination of the case

266. At its November 2005 meeting, the Committee made the following recommendations with regard to the pending allegations [see 338th Report, para. 408]:

- The Committee requests the Government to provide information as to whether regulations have been issued for implementation of Act 25877, article 24, on collective labour disputes, within the 90-day period provided for in the Act and, if not, to take necessary measures to do so.
- The Committee requests the Government to communicate its observations on the most recent communication received from the complainants (7 July 2005) alleging that, as a result of continued wage claims backed by direct action in 2005, the authorities of the Ministry of Labour of the Province of Buenos Aires have informed education workers of the decision to dismiss them if they exercise their right to strike for a period exceeding three days.

## B. The Government's reply

267. In its communication of 28 October 2005, the Government states that, before referring to the allegations, it should be noted that, because of the federal system of government, provincial governments enjoy the autonomy to legislate and act with respect to their own administrations. Therefore, the national Government informed the provincial authorities of the complainants' new allegations, so that they could provide the corresponding observations.

268. In this regard, based on the information provided by the Undersecretariat of Labour of the Province of Buenos Aires, it should be noted that the complainants' allegations are bewildering given that the case was resolved through an agreement signed by the parties on 12 August 2005. On that occasion, the members of the *Frente Gremial Docente* accepted a proposal put to them by the provincial government, in which the latter agreed to return the salary deductions corresponding to the days of the strike which had led to the present complaint; furthermore, these deductions are currently being returned. The agreement in question includes, among other things, an increase in the basic wage, the return of wage deductions made by virtue of Provincial Emergency Act No. 12727 and a commitment to stay at the negotiating table in order to continually and definitively improve teaching and learning conditions for teachers and students of the Province of Buenos Aires.

269. With regard to the issuing of regulations for the implementation of article 24 of Act No. 25877 on collective labour disputes, the Government indicates in its communication of 1 February 2006 that the regulations will be issued after consultations with the employers' and workers' organizations. The Government adds that a draft decree (attached to the reply) has been prepared and is in the process of adoption. The social partners were consulted on its drafting.

## C. The Committee's conclusions

270. *The Committee recalls that this case concerns allegations of violations of the right to collective bargaining and to strike of education workers in the public sector of the Province of Buenos Aires. When it last examined the case, the Committee requested the Government to: (1) provide information as to whether regulations have been issued for implementation of Act 25877, article 24, on collective labour disputes, within the 90-day period provided for in the Act and, if not, to take necessary measures to do so; and (2) communicate its observations on the most recent communication received from the complainants (7 July 2005) alleging that, as a result of continued wage claims backed by*

*direct action in 2005, the authorities of the Ministry of Labour of the Province of Buenos Aires have informed education workers of the decision to dismiss them if they exercise their right to strike for a period exceeding three days.*

- 271.** *With regard to the allegations that, as a result of continued wage claims backed by direct action in 2005, the authorities of the Ministry of Labour of the Province of Buenos Aires have informed education workers of the decision to dismiss them if they exercise their right to strike for a period exceeding three days, the Committee notes with interest that the Government states that the dispute has been resolved and that the parties concluded an agreement on 12 August 2005, through which the members of the Frente Gremial Docente accepted a proposal according to which the provincial government agreed to return salary deductions corresponding to the days of the strike (the agreement also provides for an increase in the basic wage, the return of wage deductions made by virtue of Provincial Emergency Act No. 12727 and a commitment to stay at the negotiating table in order to continually and definitively improve teaching and learning conditions for teachers and students of the Province of Buenos Aires). In view of this information, the Committee will not proceed any further with the examination of these allegations.*
- 272.** *With regard to the request made by the Committee for information as to whether regulations have been issued for implementation of Act No. 25877, article 24, on collective labour disputes, within the 90-day period provided for in the Act, the Committee notes that the Government indicates that a draft decree has been prepared and is in the process of adoption and that the social partners were consulted on its drafting. The Committee hopes that the decree in question will be enacted shortly so as to implement the provisions of article 24 of Act No. 25877 of 2004 and requests the Government to keep it informed in this respect.*

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

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

*The Committee hopes that the Government will enact shortly the decree which is in the process of adoption with a view to implementing the provisions of Act No. 25877, article 24, on collective labour disputes, which, in its final paragraph, stipulates that “the National Executive, in conjunction with the Ministry of Labour, Employment and Social Security and after consultation with the employers’ and workers’ organizations, will enact this article within a period of 90 days, in accordance with the principles of the International Labour Organization”. The Committee requests the Government to keep it informed in this respect.*

CASE NO. 2414

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

**Complaint against the Government of Argentina  
presented by**

- **the Confederation of Education Workers of Argentina (CTERA) and**  
— **the Educational Workers' Association of Neuquén (ATEN)**

*Allegations: the complainants object to resolutions adopted by the Provincial Education Council of Neuquén province which oblige the directors of educational establishments to inform on workers who take part in stoppages, deny them the right to strike and apply sanctions to any of them who took part in stoppages in 2004*

- 274.** The complaint is contained in a communication from the Confederation of Education Workers of Argentina (CTERA) and the Educational Workers' Association of Neuquén (ATEN), dated 31 January 2004.
- 275.** The Government sent its observations in a communication dated 28 October 2004.
- 276.** 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 complainants' allegations**

- 277.** In their communication of 31 January 2004, received in March 2004, the Educational Workers' Association of Neuquén (ATEN) and the Confederation of Education Workers of Argentina (CTERA) objected to resolutions 1550 of 27 July 1999 and 163 of 1 March 2002, adopted by the Provincial Education Council (CPE) attached to the State Executive of Neuquén province, prohibiting teachers in the province from exercising the right to strike, as well as to other resolutions adopted in December 2004 by the same provincial body, imposing a 30-day period of suspension on the directors of educational establishments as a consequence of the aforementioned regulations denying the right to strike.
- 278.** The complainants consider that the purpose of resolution 163 is to oblige the directors of educational establishments to work, denying them their right to protest within the framework of a strike, at the same time requiring them to draw up "lists" of educational workers who take part in direct action organized by the trade union.
- 279.** The resolutions in question amount to clear intimidation and a curtailment of the free exercise of the right to strike. Worker absence is already monitored, and there is no need for any special measures. The intention is to set up a system for monitoring "strikers", the sole purpose of that system being to intimidate, since if the intention were merely to dock a day's pay it would be sufficient to have noted the worker's unannounced or unjustified absence. The only aim here is to identify those exercising their right, with a view to

instilling fear of dismissal or persecution, as was subsequently and regrettably the case with the 30-day period of suspension to which the directors were subjected pursuant to the aforementioned resolutions of 21 December 2004. Finally, the complainants maintain that education is not an essential service but a social right that the State has a duty to ensure.

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

- 280.** In its communication of 28 October 2005, the Government notes that the complainants object to the content of two resolutions adopted by the State Executive of Neuquén province on the grounds that they constituted a violation of the right to strike by seeking to keep tabs on those present and those absent on protest days called by the province's union of education workers. According to the Government, it is important to point out that the obligations imposed by the resolutions in question relate solely to the directors of educational establishments, who are required under the terms of those resolutions to ensure that their establishments open and close at the normal times during periods of direct action.
- 281.** The Government adds that, before going on to consider the alleged facts, it wishes to put on record the fact that, under the system of federal government, provincial governments enjoy autonomy when it comes to legislating and acting vis-à-vis their own administrations. This being the case, the national Government drew the attention of the Neuquén provincial authorities to the complainants' grievances in order that it might formulate its observations on the matter. In this context, the Government states that the resolutions in question were adopted by the Provincial Education Council (CPE), a tripartite body within which the teaching sector is duly represented, inasmuch as Act 242 of Neuquén province, creating this body, provides that its highest authority shall be a deliberative body comprising five members and a chairman, together representing the three parties involved, i.e. the provincial executive, the teachers and the community.
- 282.** The Government sees fit to emphasize that the school directors have a higher rank than the teaching staff, being in some measure depositories of the public authority and hence having a duty, by virtue of their position, to ensure the provision of the public service in question. It is along those lines that the judicial authority has expressed its opinion: "while article 14 of the National Constitution recognizes the right to strike for all trade unions, that right does not extend to officials who in some measure are depositories of the public authority, i.e. officials and employees in positions of authority".
- 283.** In the case of directors of educational establishments, the teaching function is accompanied by other types of function, including supervision and control of the pupils attending the establishment and management of its staff. The terms of article 5(a) of the Estatuto Docente (teachers' statutes), Act 14473, approved by Provincial Act 956/76, broadly provide that teaching staff must carry out their functions in a dignified, effective and loyal manner. Where directors are concerned, those functions include not only administration of the teaching side but also the administration, supervision and monitoring of the pupils, such functions being delegated by the State, which bears ultimate responsibility for any damage caused through the failure to fulfil such obligations.
- 284.** The Government points out that the State has delegated to directors certain crucial functions by virtue of which they are responsible for helping to avoid the kind of conflict of rights that occurs when they fail to fulfil their obligations, as happens when the right to strike clashes with the rights of the child in general. It is important to emphasize the fact that the obligation imposed by the resolutions to which the complainants object does not apply to all members of the teaching staff, but only to the administrative staff performing authoritative functions as representatives of the State. As regards the scope of the right to strike in relation to officials performing functions of this kind, the Committee has considered that "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 right to strike may be restricted or prohibited in the public service only for public servants exercising authority in the name of the State”.

- 285.** The Government adds that the Council, upon being informed of the protest measures being planned by the province’s educational union, requested the regional districts to provide the information necessary to ensure the provision of a minimum level of teaching activities, bearing in mind that these have to do not only with ensuring the pupils’ right to education but also include the school cafeteria services, and must therefore be considered essential services. In view of the special function that schools in Argentina fulfil in terms of nutrition, the Committee on Freedom of Association has recognized them as constituting an essential service. This social consideration is also underpinned by legislation in Neuquén province, where Act 242/61 (article 29, section VIII) makes it obligatory for the State to provide school cafeteria services to pupils of school age. Likewise, Decree 0572/62, containing the enabling provisions for Act 242, provides as follows: article 29 (regulatory): “The Provincial Education Council shall organize all the necessary services such as to ensure the pupil’s social, economic, physical and psycho pedagogical welfare.”
- 286.** Having regard to the obligation that is incumbent upon school directors, and by virtue of the responsibilities inherent in their position, the State has taken steps to ensure, on the one hand, that those of the establishment’s teachers and auxiliaries who did not participate in the direct action may also exercise their constitutional right to work, thereby guaranteeing the pupils’ right to learn, and, on the other hand, that pupils of school age receive daily meals. It is important in this regard to note that closure of the establishment on account of direct action bars access to those members of the teaching staff not engaging in that action and to non-teaching staff employed in the school canteen. It should further be noted that the latter category of staff comes under a different collective labour agreement that is not affected by the direct action in question. The risk and the danger that are entailed in the closure of public establishments in Neuquén province, given the nature of such establishments, are not arbitrary, but on the contrary undermine the protection of fundamental rights.
- 287.** The Government adds that the State’s obligation in regard to the provision of sustenance and child welfare became a constitutional one with the reform of 1994, which incorporated the Convention on the Rights of the Child into the text of the National Constitution. Similarly, article 257 of the Constitution of Neuquén province provides that “the laws which organize and regulate education should seek to ensure, to the extent possible, that those who lack resources are provided with clothing, equipment, snacks and other necessities such that they are able to pursue their obligatory education”. This constitutional provision has to do with the role that is played by schools in the process of social integration in Neuquén province. The serious nutritional deficiencies to be found among the child population have led the Government to transform school canteens into an effective means of ensuring health and nutritional welfare by becoming the main source of nutrition for children of school age affected by nutritional deficiency. Thus it is that many families accord greater significance to the welfare function of schools than to their traditional educational function.
- 288.** According to the Government, the information provided shows that the aim of the resolutions in question was not to limit the right of teachers to strike, but essentially to guarantee “the right of the child to enjoy the very highest possible level of health” and “to the greatest extent possible, the survival and development of the child”, in accordance with the obligations laid down in our National Constitution.

**289.** The Government further indicates that article 14 of the National Constitution, as well as the international treaties incorporated in its text, protect the right to teach and to learn. Given that education is a basic right of the individual and a means of improving the quality of life of society as a whole, its status as a fundamental human right cannot be denied. Teachers' strikes of an indefinite duration are bound to have an adverse effect on the main purpose of education, hampering the achievement of the learning goals that are pursued through the basic knowledge dispensed. The purpose of the disputed resolutions has been to ensure the fulfilment of the constitutional mandate that is incumbent upon the CPE. In accordance with the functions referred to in previous paragraphs, this entity is responsible for adopting measures to ensure the normal provision of educational services, including reasonable regulations governing the functioning of educational establishments during a period of direct action.

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

- 290.** *The Committee observes that in the present case the complainants allege that resolutions 1550 of 1999 and 163 of 2002, adopted by the Provisional Education Council (CPE) of Neuquén province, prohibit the directors of educational establishments in the province from exercising the right to strike by requiring them to be present at the establishment whenever protest days are taking place, while at the same time requiring them to draw up a list of those members of staff who participate in a stoppage. The complainants further allege that in 2004, pursuant to the aforementioned resolutions, numerous school directors received sanctions of 30 days' suspension, official warnings and reprimands.*
- 291.** *In this respect, the Committee takes note of the Government's statement that: (1) the disputed resolutions were adopted by the CPE, a tripartite body within which the teaching sector is duly represented; (2) school directors have a higher rank than the teaching staff, being in some measure depositories of the public authority and hence having a duty, by virtue of their position, to ensure the provision of the public service in question; (3) it is important to emphasize the fact that the obligation imposed by the resolutions to which the complainants object does not apply to all members of the teaching staff, but only to the executive staff performing authoritative functions as representatives of the State; (4) upon being informed of the protest measures being planned by the province's educational union, the CPE requested the regional districts to provide the information necessary to ensure the provision of a minimum level of teaching activities, bearing in mind that these have to do not only with ensuring the pupils' right to education but also include the school cafeteria services, and must therefore be considered essential services; and (5) the Government's aim in adopting the resolutions in question was not to limit the right of teachers to strike, but essentially to guarantee the right of the child to enjoy the very highest possible level of health and, to the greatest extent possible, the survival and development of the child, in accordance with the obligations laid down in the National Constitution.*
- 292.** *These statements by the Government regarding the resolutions objected to by the complainants notwithstanding, the Committee notes that the documentation it attaches to its reply shows that the CPE of Neuquén province adopted a new resolution (record No. 2503-37259/02) declaring resolution 163 of 2002 null and void, removing from resolution 1550 of 1999 the obligation to inform on those participating in stoppages, and recognizing that the directors of establishments or anyone in charge thereof may, in the context of protest days, freely exercise the right to strike without any sanction whatsoever (see in annex hereto the full text of the new resolution). The Committee notes with interest the new resolution of the Provisional Education Council and requests the Government to report on the implementation of the resolution.*

## The Committee's recommendation

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

*Noting that the documentation that the Government attaches to its reply shows that the Provincial Education Council (CPE) of Neuquén province adopted a new resolution (record No. 2503-37259/02) declaring resolution 163 of 2002 null and void, removing from resolution 1550 of 1999 the obligation to inform on those participating in stoppages, and recognizing that the directors of establishments or anyone in charge thereof may, in the context of protest days, freely exercise the right to strike without any sanction whatsoever (see in annex hereto the full text of the new resolution), the Committee notes with interest the new resolution of the CPE and requests the Government to report on the implementation of the resolution.*

## Annex

### Resolution

Record No. 2503-37259/02  
Provincial Education Council of the province of Neuquén

In view of:

Resolution 0163/02; and

Considering:

That in the matter of remuneration it is established, in accordance with the regulations in force, modern principles and case law, that in the public employment relationship the parties must fulfil their obligations fully and in a normal manner;

That the legislation in force guarantees dignified and equitable working conditions as provided for in the National Constitution, such conditions having not been adhered to by this Provincial Education Council, given the state of the establishments;

That there has been non-fulfilment on the part of the Provincial Education Council in regard to the timely and adequate payment of public employee salaries;

That educational policies have been applied without the necessary consensus that is required under the Provincial Constitution, which entrusts such responsibilities to a deliberative body with representatives from the teachers and from the educational community;

That such situations give rise to expressions of rejection and disagreement on the part of workers in the form of strike action as a means of protest that is legitimate and legally protected under article 14bis and specifically under the International Covenant on Civil and Political Rights and the Covenant of San José de Costa Rica, article 75(22), both of which form part of the National Constitution;

That resolution 163/02 approves forms for sworn statements to be used for informing on workers' presence and absence on days of protest;

That it makes the directors of establishments responsible for drawing up the aforementioned sworn statements;

That a worker who bears such a responsibility occupies a hierarchical post, as indicated in articles 8, 67, 101, 122 and 150 of Act 14473;

That under the abovementioned Act, workers achieve such positions by satisfying requirements relating to length of service, educational qualification, level of performance and, in many cases, through a competition based not only on past performance but also competitive examination;

That the director is therefore a worker who is free to decide whether to support and/or participate in action called for by the trade union organization;

That in any case it is a decision of the employer who may not delegate to any employee as this constitutes an unfair practice that runs counter to the Act on professional associations;

That any obligation to provide such information seriously violates the aforementioned constitutional rights;

That a very serious view is taken of the irregularity in the regulations in regard to the non-fulfilment of duties imposed under constitutional and legal rules;

That in accordance with article 64 of the Act on administrative procedures, pursuant to the provisions of articles 60 and 63, the competent authority is empowered to qualify such irregularities according to the degree to which the transgression violates the legislation in force;

That it is fitting to declare it null and void pursuant to the provisions of article 70, with the effects of article 71 of the same legal instrument;

That it is necessary to adopt the corresponding legal provision;

Therefore,

The Provincial Education Council of Neuquén

Resolves

- (1) To declare resolution 163/02 null and void.
- (2) To exclude Annex IV – List of staff occurrences – resolution 1550/99, Code 2107 – Participation in stoppage.
- (3) To recognize that the directors of establishments or anyone in charge thereof may, in the context of days of protest, freely exercise the right to strike without any sanction whatsoever.
- (4) To provide that these communications shall be transmitted through the Directorate-General for Dispatch.
- (5) To record and to inform the representatives; the Provincial Administrative Directorate; the General Directorate for Human Resources; classification boards; the Directorate General for Primary Education; the Directorate General for Initial Education; the Directorate for Pupils with Special Needs; the Directorate General for Secondary Education; the Directorate General for Higher Education; the Directorate General for Technical and Agricultural Education and Professional and Management Training of Regional District Areas I to VIII; and to submit this instrument to the Directorate-General for Dispatch, according to article 4. Accomplished. For filing.

CASE NO. 2417

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

**Complaint against the Government of Argentina  
presented by  
the Argentine Cabin Staff Association (AAA)**

***Allegations: The complainant organization alleges that the LAFSA enterprise is negotiating a collective agreement with a trade union organization that has no legal personality (personería gremial)***

- 294.** The complaint appears in a communication from the Argentine Cabin Staff Association (AAA) dated 29 March 2005.

295. The Government sent its observations in a communication dated 30 August 2005.
296. 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

297. In its communication dated 29 March 2005, the Argentine Cabin Staff Association (AAA) alleges that, through the Transport Secretariat, the Argentine State has adopted measures and resolutions that restrict, hinder and/or affect the constitutional right to bargain collectively. It has also undermined trade union autonomy by engaging in disloyal practices – refusal to recognize legitimate trade union representativity and illegally promoting the participation of a specific trade union association by means of manoeuvres that constitute a flagrant and undue interference in union affairs.
298. The complainant organization adds that Argentina's system of rules and regulations are of a pyramidal nature that is subject to hierarchical relationships and priorities that the system itself determines. Article 14bis of the Constitution guarantees trade unions the right to bargain collectively. Moreover, article 31(c) of Act No. 23551 stipulates that it is the exclusive right of trade unions with recognized legal personality to take part in collective negotiations and to verify compliance with labour and social security standards.
299. The complainant organization states that in 2004 it entered into a process of collective bargaining with the Líneas Aéreas Federales Sociedad Anónima (LAFSA) company, in order to secure the rights of workers represented by it. Despite repeated requests, which were also sent to the labour administration, the company systematically refused to enter into a dialogue with the AAA; instead, with the complicity of the Government, it began negotiations with the Association of Cabin Crews of Commercial Airlines, which claims the same representativity, thus unlawfully excluding the AAA from the negotiation.
300. The complainant organization points out that this is in flagrant violation of freedom of association, of the right to bargain collectively and of the right to trade union autonomy since, with the knowledge of the labour administration, the company is negotiating with a union which: (1) is merely registered as a trade union (it has no legal personality (*personería gremial*)); (2) has been operating for only one month; (3) has no authority to submit lists of demands to the Ministry of Labour, Employment and Social Security in so far as it has not complied with resolution No. 106/2005 and has not held elections; (4) at the present time has no members; (5) was formed and sponsored by a union organization representing another category of aeronautical workers (the Association of Aeronautical Technical Staff (APTA)); and (6) the association impugned has the same legal domicile as APTA.

#### B. The Government's reply

301. In its communication dated 30 August 2005, the Government notes that the complainant organization alleges that collective negotiations have been entered into with a trade union that has merely been registered as an organization – the Association of Cabin Crews of Commercial Airlines – to the detriment of the AAA. The Government comments in this regard that the participation of the merely registered association involved nothing more than the defence and representation of the interests of its members and that at no time was it recognized as being empowered to negotiate collectively, this being the exclusive right of the trade union possessing legal personality (*personería gremial*).

302. The Government emphasises that the merely registered body did not enter into any collective agreement, since at the very first meeting it attended the Government made it clear that, in the event of the privatization of the LAFSA enterprise, as provided for under section 7 of Decree No. 1283/03, it has been agreed that any future list of labour demands will include a clause requiring, as a minimum, that the conditions currently in force under the existing agreement shall be maintained, i.e. none other than those negotiated with the union possessing legal personality, the AAA.
303. The Government states further that the Ministry of Labour, through its General Directorate for Legal Affairs, has duly ruled that the AAA is the sole body empowered to negotiate within the purview of its personal and territorial representativity and that the merely registered body has acted within the framework of the broad authority conferred by Act No. 23551, namely under section 21(a), in defence of the individual interests of its members. The only body empowered to bargain collectively under section 31 of Act No. 23551 is therefore unquestionably the complainant organization, notwithstanding the right that other less representative bodies may have to defend the interests of their members.
304. Consequently, the Government concludes that, since the negotiating right of trade unions with legal personality as such has not been violated, there has been no violation whatsoever of the legislation or of the international Conventions mentioned by the complainant organization.

### C. The Committee's conclusions

305. *The Committee notes that the complainant organization, the Argentine Cabin Staff Association (AAA), alleges that, although it is the most representative organization (and as such possesses the exclusive right under the Trade Union Associations Act to negotiate collectively), the Líneas Aéreas Federales Sociedad Anónima (LAFSA) company refused to enter into a dialogue, despite repeated requests submitted both to the company and to the labour administration and, with the complicity of the Government, began negotiations with the Association of Cabin Crews of Commercial Airlines. The complainant states that the latter trade union is merely registered as an organization, that it has been operating for only a month, that it has no members and that it was established and sponsored by a trade union representing another category of aeronautical workers.*
306. *The Committee notes the Government's statement that: (1) the Association of Cabin Crews of Commercial Airlines, which is merely registered as an organization, did not enter into any collective agreement; (2) this trade union organization did no more than defend and represent the interests of its members and was never recognized as being empowered to negotiate collectively; (3) the Ministry of Labour, through its General Directorate for Legal Affairs, has duly ruled that the AAA is the sole body empowered to negotiate within the purview of its personal and territorial representativity.*
307. *While taking note of all this information, the Committee observes that the Government does not deny that the complainant organization has been endeavouring since 2004, unsuccessfully, to negotiate a collective agreement with the LAFSA enterprise (whereas it has responded to the demands of the merely registered organization on behalf of its members). The Committee expresses its serious concern that the LAFSA enterprise should have ignored the AAA in the collective bargaining process and expects that in future it will take duly into account the greater representativity of this organization. The Committee also recalls that the principle that both employers and trade unions should negotiate in good faith and make efforts to reach an agreement means that any unjustified delay in the holding of negotiations should be avoided [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 816]. In*

*these circumstances, the Committee requests the Government to take steps to encourage and promote the full development and use of voluntary negotiating procedures between the enterprise and the organization most representative of the cabin staff sector, with a view to regulating employment conditions by means of a collective agreement. The Committee requests the Government to keep it informed in this respect.*

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

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

*The Committee requests the Government to take steps to encourage and promote the full development and use of voluntary negotiating procedures between the enterprise and the organization most representative of the cabin staff sector, with a view to regulating employment conditions by means of a collective agreement. The Committee requests the Government to keep it informed in this respect.*

CASE NO. 2433

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

### **Complaint against the Government of Bahrain presented by the General Federation of Bahrain Trade Unions (GFBTU)**

*Allegations: The complainant organization alleges that Circular No. 1 of 10 February 2003 on the right of civil service workers to join workers' unions strictly prohibits government workers and employees from establishing unions of their own choosing, and that the authorities have repeatedly refused to register six unions in the public sector*

**309.** The complaint is contained in communications dated 13 June and 17 October 2005 from the General Federation of Bahrain Trade Unions (GFBTU).

**310.** The Government provided its observations in communications dated 19 July and 8 December 2005.

**311.** Bahrain has ratified none of the Conventions on freedom of association.

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

**312.** In its communication of 13 June 2005, the General Federation of Bahrain Trade Unions (GFBTU) challenges the continued denial of the right to organize of Bahraini workers in the public sector. The negative responses of the Government to the repeated requests of the GFBTU to register six trade unions in the public sector constitute a breach of articles 27

and 28 of the Bahrain Constitution and article 5 of the National Charter, which explicitly allows for the right to organize of all workers without any distinction or discrimination.

- 313.** The GFBTU also alleges that Circular No. 1 of 10 February 2003 on the right of civil service workers to join workers' unions, and article 10 of the Trade Union Act of 24 September 2002, both of which strictly prohibit government workers and employees to establish trade unions of their own choosing, are another flagrant violation of freedom of association.
- 314.** The complainant organization points out that it has made every effort to find an acceptable solution to this ongoing problem, including: repeated meetings during the last two years with the Minister of Labour, where the GFBTU explicitly raised the issue and indicated that a complaint would be filed to the ILO if a solution was not found; a joint meeting with the Minister of Labour, in presence of International Confederation of Free Trade Unions (ICFTU) and ILO representatives, where GFBTU officials requested the Minister to withdraw Circular No. 1 of 10 February 2003; communications sent on 5 June 2004 to the ILO Director-General, the Director-General of the Arab Labour Office (ALO), the General Secretary of the International Confederation of Arab Trade Unions (ICATU) and the General Secretary of the ICFTU; judiciary proceedings filed against the Council of Civil Service (the GFBTU attaches the court decision refusing to hear the case for lack of jurisdiction); press releases denouncing the problem; speeches delivered by GFBTU representatives at several sessions of the International Labour Conference (including the June 2005 session), at the Arab Labour Conference, and at trade union meetings inside and outside Bahrain.
- 315.** In its communication of 17 October 2005, the GFBTU provides: a copy of the letter of its General Secretary, requesting the Ministry of Transport to extend the Ministerial Decree concerning union leave to the executive officers of the Federation and to the President of the Trade Union of Post Office Workers; and a copy of the Ministry's reply, which clearly indicates that it does not recognize the existence of the Trade Union of Post Office Workers since it falls within the context of a public service union. The letter states that it is not possible to grant union leave to public servants and that any trade union entity or organization which has not been established in conformity with article 10 of Act No. 33 of 2002 is considered illegal.

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

- 316.** In its communication of 19 July 2005, the Government states that the current Trade Union Act (the "Act") promulgated through Decree No. 33/2002, was elaborated in consultation with the General Federation of Bahrain Trade Unions, as a social partner directly concerned by that law. Article 10 of the Act allows public servants, like their private sector counterparts, to join trade unions so as to benefit from the services offered by these unions.
- 317.** Although Bahrain has not ratified Convention No. 87, the authorities of Bahrain, with a view to safeguarding the interests of public servants, are currently examining amendments to article 10 of the Act, to authorize public servants to establish their own trade unions in order to defend their legitimate professional interests. The amendment is currently being debated in Parliament, which is the competent body for such amendments under article 32 of the Constitution; the Government cannot therefore interfere in that process.
- 318.** The Government adds that, with a view to furthering the work of trade unions, the Ministry of Labour has adopted Ministerial Decree No. 9/2005 on the right of paid union leave for trade union activities.



319. In its communication of 8 December 2005, the Government mentions the utmost importance it attaches to the role of trade unions in the strengthening of cooperation between workers and employers, in order to improve the stability of industrial relations in the country. To this end, the Government makes constant efforts to help trade unions: it has adopted the Ministerial Decree mentioned above; in addition, it has granted 150,000 dinars and a piece of land to the GFBTU.
320. As regards the prohibition to establish trade unions in the public sector, the Government points out that it flows from article 10 of Act No. 33/2002, which expressly and unambiguously provides that public servants may only join trade unions but that they cannot establish such organizations. On that legal basis, the courts have dismissed the lawsuit filed in this respect by the GFBTU. The Government reiterates that an amendment to article 10 is currently before Parliament; if it is adopted, public servants will have the right to establish trade unions like their private sector counterparts.

### C. The Committee's conclusions

321. *The Committee notes that this complaint concerns allegations of continued denial of the right to organize of public sector workers and employees, and refusal to grant union leave to trade union officers. The Government does not deny the allegations but replies that Parliament is currently discussing amendments to repeal the impugned provisions of the Trade Union Act, and to authorize public servants to establish their own trade unions in order to defend their professional interests.*
322. *The Committee notes that under article 10 of the Trade Union Act, workers in any specific enterprise, sector or activity, or in any industries or occupation, which are similar or related to each other, have the right to establish a trade union, which workers governed by the Civil Service Regulations can join, as recalled by the Government in Circular No. 1/2003 of 10 February 2003, by stating that workers covered by Civil Service Regulations may not establish trade unions, but can only join such organizations which regroup workers having occupations or professions similar to theirs.*
323. *Recalling that all public service employees (with the sole possible exception of armed forces and police) should, like workers in the private sector, be able to establish organizations of their own choosing to further and defend the interests of their members [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 206] the Committee notes the Government's indication that Parliament is currently discussing an amendment to the Trade Union Act designed to settle the issue. Expecting that this amendment will be adopted and promulgated in the very near future, the Committee requests the Government to provide it with a copy of the draft amendment and to keep it informed of developments in that respect, including as regards recognition of the six public service unions whose registration has been repeatedly refused.*
324. *Recalling that the right of workers to establish organizations of their own choosing implies in particular the effective possibility to create, if the workers so choose, more than one workers' organization per enterprise [see **Digest**, op. cit., para. 280], the Committee requests the Government to ensure that any new legislation adopted enables the workers concerned in the public sector, as well as those in the private sector, to establish more than one union per enterprise, if they so wish. The Committee requests the Government to keep it informed of developments in this respect.*
325. *Noting with interest that the Government has adopted Ministerial Decree No. 9/2005 concerning the right to paid union leave for trade union activities, the Committee requests the Government to provide it with a copy of the Decree and firmly trusts that necessary*

*time off from work, without loss of pay, or social and fringe benefits shall henceforth be granted to workers' representatives for the effective exercise of their trade union activities.*

**326.** *The Committee reminds the Government that it may avail itself of the technical assistance of the International Labour Office.*

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

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

- (a) The Committee expects that the legislative amendment allowing public workers and employees to establish trade unions of their own choosing will be adopted and promulgated in the very near future. It requests the Government to provide it with a copy of the draft amendment and to keep it informed of developments in that respect, including as regards recognition of the six public service unions whose registration has been repeatedly refused. Moreover, the Committee requests the Government to ensure that any new legislation adopted enables the workers concerned in the public sector, as well as those in the private sector, to establish more than one union per enterprise if they so wish, and to keep it informed of developments in this respect.*
- (b) The Committee requests the Government to provide it with a copy of Ministerial Decree No. 9/2005 on the right to paid union leave for trade union activities.*
- (c) The Committee reminds the Government that it may avail itself of the technical assistance of the International Labour Office.*

CASE NO. 2439

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

### **Complaint against the Government of Cameroon presented by the Confederation of Independent Trade Unions of Cameroon (CSIC)**

*Allegations: The complainant organization (CSIC) alleges that: the trade unions' registrar refused to register its affiliated trade union (SNI-ENERGIE) for the electricity and water sector; the employer is using this refusal as a pretext to promote a rival trade union organization (FENSTEEEC); the officials and members of SNI-ENERGIE are victims of harassment, the Secretary-General having been removed from his functions without grounds; the Secretary-General of the CSIC was dismissed, without prior notice from the labour*

*inspector, for issuing a notice of strike action; this harassment extends to 15 other trade unionists; the CSIC cannot participate in the trade union election process taking place in the enterprise; a collective agreement signed in irregular circumstances authorizes 1,000 layoffs as part of a restructuring/privatization of the National Electricity Company; and the Minister of Labour seems to have given his green light to let this happen*

328. The complaint is contained in communications from the Confederation of Independent Trade Unions of Cameroon (CSIC), dated 20 July, 20 October and 2 December 2005, and 23 January 2006.
329. The Government transmitted its reply in communications dated 1 and 29 November 2005.
330. Cameroon 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**

331. The CSIC was set up on 25 November 2000, when the trade unions' registrar issued a certificate of registration. The CSIC always operated alongside four other trade union confederations until the time it denounced the collective agreement and the protocol agreement, signed in breach of the law, between the AES-SONEL enterprise (Society of energy production and distribution) and the trade union organization FENSTEEEC, a trade union organization backed by the employer, which authorized the enterprise to dismiss 1,000 workers upon the signing of the agreement and to continue its restructuring for two years – a renewable period – thereby, according to the CSIC, circumventing the provisions of section 40 of the Labour Code and the concession agreement with the State of Cameroon.
332. In its communication of 20 July 2005, the CSIC submits allegations pertaining to serious violations of freedom of association and regulations in force, as well as to cases of persecution and dismissals of trade unionists carrying out their activities, by AES-SONEL and the Government of Cameroon.
333. In its communication dated 20 November 2005, the CSIC states that the persecutions of trade unionists had been stepped up: the list of candidates submitted to the employer on 11 April 2004, as well as the list of members, had been used to take repressive measures against those members supporting candidates from the National Independent Electricity Trade Union (SNI-ENERGIE) to the staff election; the transfer without prior notice of officials and members of SNI-ENERGIE had become commonplace; the payment of separation indemnities was non-existent; and the employer's discrimination in the electoral process seemed to have been given the green light by the Ministry of Labour.

#### **Serious violation of trade union freedoms**

334. As part of its engagement in all branches of activity, the CSIC undertook to organize the sector of electricity and water production, transport and distribution by establishing SNI-

ENERGIE. It submitted its application for the certificate of registration to the trade union registry on 21 February 2005. As the trade unions' registrar had not examined the application for registration of the trade union and its statutes after 30 days, the trade union was thus "deemed effective" in accordance with section 11(b) of the Labour Code. It was only in April 2005 that the employer, AES-SONEL, sent to the trade union, a correspondence from the trade unions' registrar in which he stated that SNI-ENERGIE had not yet been legally recognized in the register. The CSIC adds that, jointly with SNI-ENERGIE, they requested the courts to prevent the illegal withholding of the registration certificate that SNI-ENERGIE should have had since 21 February 2005.

**335.** Subsequently, the employer launched a vast campaign of repression and restriction of freedom of association rights, disinformation and manipulation against the workers, doing so to the advantage of the rival trade union organization, FENSTEEEC. The CSIC then referred the matter to the court of the first instance of Doula, ruling on the substance of the case, in order to declare the collective agreement, its annex and the protocol agreement between AES-SONEL and FENSTEEEC void. During the proceedings, FENSTEEEC voluntarily intervened to support the employer against the CSIC. The FENSTEEEC and the employer used the correspondence from the trade unions' registrar as grounds for the case of the CSIC to be dismissed alleging that the trade union failed to register. During the hearing, CGT/Liberté, an organization manipulated by the Government according to the complainant, openly gave its support to FENSTEEEC in a communication dated 6 April 2005 and made public a correspondence referring to the removal of Ndzany Olongo Gilbert, Secretary-General of the CSIC. Given the urgency of the matter, the CSIC also requested the interim relief judge to defer enforcement of these measures provisionally until the ruling on the substance of the case. Despite numerous representations to the employer and the courts, the outcome was a categorical refusal from the employer and a lack of response on the part of the authorities responsible for labour issues.

**336.** The CSIC states that the electoral process has started out in a chaotic way in the enterprise. Only one trade union organization has been involved in the drawing up of electoral lists, a flagrant case of discrimination in favour of one trade union to the detriment of the other. Consequently, this other trade union has no competition and is organizing the primary elections. This matter was also brought before the courts of the first instance, ruling on grounds of urgency, which handed down two different verdicts. On 28 September 2005, the Court of the First Instance of Yaoundé ordered the participation of the CSIC in the electoral process; AES-SONEL appealed against this ruling. Conversely, on 3 October 2005, the Court of the First Instance of Douala stated its lack of competence *ratione materiae* (section 126 of the Labour Code); the CSIC and SNI-ENERGIE will appeal against this decision.

### ***Violation of the regulations in force***

**337.** During the hearings of the interim relief judge, the representative of FENSTEEEC, defending the collective agreement signed with AES-SONEL, referred to Order No. 46/MINETPS/SG/DT/SDRCIT/SNT of 21 August 2003, authorizing FENSTEEEC to negotiate an enterprise agreement. According to the CSIC, this order was drawn up in violation of Decree No. 93/578/PM of 15 July 1993 which stipulates, in section 3, that: "When a national collective agreement has been concluded, no further enterprise collective agreement may be negotiated in the same branch of activity. In this case, only company agreements shall be admitted under the conditions laid down in section 57 of the Labour Code." It is also in violation of the Order of 20 July 1999 which lays down that, in line with constitutional legality, a Ministerial Order can in no event abrogate a Decree adopted by the head of the Government, even if the Order drawn up by his predecessor has not

been nullified. According to the CSIC, the sectoral agreement binding the AES-SONEL and SNEC companies for many years must therefore continue to be upheld.

- 338.** The complainant organization also alleges that, in the concession agreement, the Government of Cameroon had taken care to exclude the social component. This is confirmed by a correspondence from the Minister responsible for the economy and finances, dated 30 March 2000, from the Minister of Employment, Labour and Social Affairs, dated 17 October 2001, and from the Chairperson of the technical committee dealing with privatizations and liquidations. Although AES-SONEL undertook not to go ahead with any layoffs, as had occurred in other cases of privatization, it nevertheless dismissed workers without any objective grounds, thereby contravening section 40 of the Labour Code.
- 339.** According to the complainant organization, the fact that the trade unions' registrar accepted the collective agreement and the protocol agreement proves that no progress has been made in the area of respect for trade union rights. Apart from the grounds referred to above, the collective agreement should be considered null and void for the following reasons: (i) section 6(4) allows for regulation on matters of public order by banning strikes and lock outs, whereas these are rights recognized by the Constitution of Cameroon and section 165 of the Labour Code; (ii) article 11(2) and (4) infringes freedom of expression and communication by stipulating that no text can be made public unless it has been previously submitted for authorization to the employer, while the law does not allow the employer to censor any trade union communications; and (iii) section 14 provides that trade union organizations themselves establish the rate of contributions to be deducted, whereas a decree from the Prime Minister sets the rate at 1 per cent of the employee's wage.
- 340.** As regards the protocol agreement, this should also be declared invalid on grounds of public order because: (i) the Government of Cameroon has retained responsibility concerning staff, thus excluding any possibility for AEL-SONEL to go ahead with mass layoffs; (ii) the reasons for "negotiated separations" are linked to the internal organization of the enterprise and are not in compliance with the process of public order laid down in section 40 of the Labour Code which, among other things, provides for the presence of the Labour Inspector during these negotiations.
- 341.** The CSIC deplors that the Director-General of AES-SONEL had allegedly infringed the enterprise's code of ethics which does not allow direct communication with the Vice-Minister responsible for justice, or indeed with the Ministry of Justice, the Prime Minister or the Secretary-General of the Presidency of the Republic, so that they might intervene in his favour with the courts to retain the collective agreement and protocol agreement concerned. These actions constitute an offence as they obstruct the course of justice and are in violation of the principles of separation of powers and the independence of the magistracy.
- 342.** The CSIC also invokes the responsibility of the Minister of Labour and Social Security, who had allegedly played a role in the signing of the enterprise agreement between AES-SONEL and FENSTEEEC, in violation of section 3 of Decree No. 93/578/PM of 15 July 1993 establishing the conditions of substance and form applicable to collective labour agreements.

### ***Persecution and dismissal of trade unionists***

- 343.** Since the time the CSIC and SNI-ENERGIE submitted their case to the competent jurisdictions, the leading officials of these organizations have been persecuted and all obliged to live in hiding because of the many death threats and other threats they receive

each day. For example, the list of candidates submitted to the employer on 11 April 2004, as well as the list of members, have been used to take repressive measure against those members supporting SNI-ENERGIE candidates to the staff election.

- 344.** The CSIC describes the case of the Secretary-General of SNI-ENERGIE, Mr. Julien Fouman, who received three communications, accompanied by written threats of reprisals, demanding that he give explanations for having addressed an open letter to the Minister. He was subsequently relieved of his duties as head of the customer division at Douala, demoted and sent to Garoua, in the north of the country, despite the fact that his six children are still in the middle of their schooling. Furthermore, no decision was taken as to the future of his wife, who also works for AES-SONEL in Doula. All these actions were taken without any previous consultations, as required in the enterprise agreement. In accordance with the legal procedure pertaining to individual disputes, he requested the intervention of the Inspector of Labour and Social Welfare of the coastal region which resulted in a memorandum of failure to reach agreement.
- 345.** The CSIC also alleges the dismissal of its Secretary General, Mr. Gilbert Ndzana Olongo, on the grounds that the notice of strike action that he gave for 11 and 12 April 2005 – and subsequently withdrew – constitutes a serious offence. According to the complainant organization, the cases of Messrs. Fouman and Ndzana Olongo are an infringement to freedom of association and also in violation of sections 4 and 30 of the Labour Code of Cameroon and ILO Convention No. 135. This repression has also been extended to other officials in the enterprise.
- 346.** In its communication of 20 November 2005, the CSIC sent a list of trade unionists, who have been persecuted, dismissed, transferred or demoted (see annex). Other officials in the enterprise who support SNI-ENERGIE have also been subjected to repressive measures.
- 347.** In its communications of 2 December 2005 and 23 January 2006, the CSIC states that freedom of association violations continue in Cameroon and mentions several acts of interference by the Government in legitimate trade union activities.

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

- 348.** In its communication of 1 November 2005, the Government states that the CSIC's complaint raises numerous questions. It wonders, for instance, if its attitude is not intended to destabilize the only society of energy production and distribution that supplies the whole country, thereby undermining the economy as a whole and increasing both unemployment and poverty. According to the Government, this attitude deviates from section 3 of the Labour Code which states that trade unions are set up for the study, defence, promotion and protection of the economic, industrial, commercial, cultural and moral interests their members.

### ***Serious violations of trade union freedoms***

- 349.** As regards SNI-ENERGIE's application for registration, the Government states that it was submitted to the trade unions' registry at a time when the secretary-general, legal registrar, had not yet been appointed. According to the Government, Mr. Ndzana Olongo knew that the trade unions' registrar had still not been appointed when he started, once the month allocated to the registrar for registration provided for under section 11(b) of the Labour Code had elapsed, his trade union activities in violation of section 6(2) of the Labour Code.
- 350.** The Government adds that, not satisfied with starting his activities without a certificate of registration, Mr. Ndzana Olongo, in his capacity as Secretary-General of the CSIC, issued

a notice of strike action on 31 March 2005 with a view to: (i) denouncing the AES-SONEL enterprise collective agreement that had just been signed; (ii) refusing the separations freely negotiated between certain workers and the AES-SONEL general management; and (iii) accusing the Government of the offence of manifestly obstructing freedom of association.

- 351.** As a result of this action taken without the agreement of the other trade union organizations, the President of the CSIC, Mr. Mougoue Oumarou, informed the public, in a press communiqué dated 4 April 2005, that Mr. Ndzana Olongo had been struck off the list of this Confederation since 11 March 2005 and that consequently his actions no longer committed the CSIC. The Secretary-General of CGT-Liberté and FENSTEEEC, in a statement of 6 April 2005, stated that they were also withdrawing their support and disapproved this action which they considered based on unfounded claims.
- 352.** As regards Mr. Ndzana Olongo, the Government points out that, at the time he issued the strike notice, he had just been reinstated in his job at AES-SONEL with back payment of all wages due to him during the 14-year suspension period, which was only possible thanks to the Government's intervention. According to the Government, Mr. Ndzana Olongo had been so involved in his trade union activities that he had neglected his role as a worker, a fact noted by a bailiff. Furthermore, Mr. Ndzana Olongo had been dismissed by his employer for incitement to rebellion, conditional threats and desertion of his post which, according to the Government, had nothing to do with his trade union activities.
- 353.** Concerning the election process, the Government states that the provisional results of the election of staff delegates would seem to indicate that only 0.70 per cent of the CSIC delegates had been elected during the social elections held from 1 February to 30 April 2005.

### ***Violation of regulations in force***

- 354.** As regards the signing of the collective agreement, the Government recalls that on 1 June 1970 the regional inspector of the coastal region had signed the enterprise collective agreement pertaining to the production, transport and distribution of electricity and water between the workers and officials of the electricity company in Cameroon. When the collective agreements had been revised, as they were no longer adapted to present economic conditions, the national collective agreement covering the water and electricity sector had been negotiated in a meeting dated 21 March 2000, at the office of the Ministry of the Economy, Labour and Social Welfare, but it had not been signed for reasons of state. The negotiations were subsequently resumed in this sector and resulted in the AES-SONEL enterprise collective agreement. Consequently, section 3 of Decree No. 93/578/PM of 15 July 1993 establishing conditions of substance and form applicable to collective agreements has not been violated.
- 355.** Furthermore, since the AES-SONEL enterprise collective agreement is valid, Mr. Ndzana Olongo, did not, under section 14 of the abovementioned Decree, have the necessary authority to denounce the collective agreement that had been signed as he was neither a signatory nor a contracting party of that enterprise agreement.
- 356.** Concerning the protocol agreement, the Government specifies that the "so-called disguised dismissals" of AES-SONEL workers were negotiated within the framework of section 40 of the Labour Code, after tripartite consultations. According to the Government, none of the 1,000 employees concerned had lodged a complaint or denounced the protocol.

### **Persecution and dismissal of trade unionists**

357. In its communication of 29 November 2005, the Government states that, since the AES-SONEL company is in the throes of a restructuring process, the claims connected to this reorganization must follow a legal procedure.
358. In the case of Mr. Fouman, the Government specifies that the latter did indeed seek the intervention of the Douala labour inspectorate with a view to having his transfer annulled and that the proceedings resulted in a memorandum of failure to reach an agreement. The Government points out that these proceedings could continue before the courts.

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

359. *The Committee notes that this complaint concerns the following allegations: the trade unions' registrar refused to register SNI-ENERGIE, the CSIC affiliate trade union for the electricity and water sector; the employer is using this refusal as a pretext to promote a rival trade union organization (FENSTEEEC); the officials and members of SNI-ENERGIE are the victims of harassment and the Secretary-General was removed from his functions without grounds; the Secretary-General of the CSIC was dismissed, without prior notice from the labour inspector, for issuing a notice of strike action; this harassment extends to 15 other trade unionists; the CSIC cannot participate in the trade union electoral process taking place in the enterprise; a collective agreement signed in irregular circumstances authorizes 1,000 layoffs as part of a restructuring/privatization of the National Electricity Company; and the Minister seems to have given his green light to let this happen.*

### **Serious violations of trade union freedoms**

360. *As regards the refusal of the trade unions' registrar to issue the certificate of registration since 21 February 2005, the Committee notes that, according to the Government, it had been impossible to issue the certificate given that the post of legal registrar was vacant at the time the request was submitted. The Committee notes that it was only in April 2005 that the employer sent correspondence from the trade unions' registrar in which he announced that the trade union had not yet been legally recognized in the register. The Committee recalls that, although the founders of a trade union should comply with formalities prescribed by legislation, these formalities should not be of such a nature as to impair the free establishment of organizations. The formalities prescribed by law should not be applied in such a way as to delay or prevent the setting up of occupational organizations [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, paras. 248-249]. In view of the fact that the Government is responsible for the late appointment of the trade unions' registrar and taking note of section 11(b) of the Labour Code, which stipulates that a trade union is considered as having been registered one month after the request for registration has been submitted, the Committee requests the Government to issue without delay the certificate of registration to SNI-ENERGIE.*
361. *Concerning the favouritism shown towards one of the trade unions in the enterprise over the other, the Committee notes the complainant's allegation that the employer, following the CSIC's denouncement of the new collective agreement, launched a vast campaign of repression and restriction of trade union freedoms, disinformation and manipulation against the workers, turning everything to the advantage of the rival trade union organization, FENSTEEEC. The Committee recalls that both the government authorities and employers should refrain from any discrimination between trade union organizations*



[see *Digest*, op. cit., para 307] and requests the Government to ensure that this principle is respected in the future.

- 362.** As regards the ongoing trade union electoral process in the AES-SONEL enterprise, the Committee notes that only one trade union had been involved in the drawing up of the electoral lists and that, at present, FENSTEEEC is organizing alone the elections of staff delegates. In this respect, the Committee observes the Government's information to the effect that the provisional results of the election of staff delegates seemed to indicate that only 0.70 per cent of the CSIC delegates had been elected during the social elections held from 1 February to 30 April 2005. The Committee notes that the matter had been brought before the courts of the first instance which handed down different verdicts. On 28 September 2005, the Court of the First Instance of Yaoundé ordered the participation of the CSIC in the electoral process; the AES-SONEL appealed against this ruling. On 3 October 2005, the court of the first instance stated its lack of competence *ratione materiae*; both the CSIC and SNI-ENERGIE announced that they would appeal this decision. The Committee recalls the fundamental principle of workers being able to join organizations of their own choosing and of the enterprise not interfering in favour of a trade union [see *Digest*, op. cit., para. 274] and trusts that the decisions of the judiciary authority will take full account of the principles of freedom of association. The Committee requests the Government to keep it informed of the outcome of these decisions.
- 363.** Concerning the notice of strike action considered by the Government to be in contravention of sections 157 and the following sections of the Labour Code, which stipulate that a strike can only take place once the procedures of conciliation and arbitration have been exhausted, and qualified by the employer as being an incitement to rebellion and conditional threats (sections 255, 301 and 302 of the Penal Code), the Committee takes note of the complainant organization's information to the effect that despite numerous representations to the employer and the courts, the outcome was a categorical refusal from the employer and a silence on the part of the authorities responsible for labour issues. The Committee recalls that, although a strike may be temporarily restricted by law until all procedures available for negotiation, conciliation and arbitration have been exhausted, such a restriction should be accompanied by adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage [see *Digest*, op. cit., para. 501]. The Committee requests the Government to ensure that this principle is guaranteed in the future.

### **Violation of regulations in force**

- 364.** The Committee notes that the CSIC referred the matter to the Court of the First Instance of Douala, ruling on the substance of the case, in order to declare the collective agreement, its annex and the protocol agreement between AES-SONEL and FENSTEEEC void, and that, given the urgency of the situation, the CSIC also requested the interim relief judge to defer provisionally the application of the protocol until the final ruling on the substance of the case. According to the complainant organization, the outcome was a total lack of response on the part of the authorities responsible for labour issues. The Committee requests the Government to send it the text of the judgements and to keep it informed of any developments of the situation in this regard.
- 365.** Concerning the protocol agreement, the Government specifies that the "disguised dismissals" were negotiated within the framework of section 40 of the Labour Code, by means of tripartite consultations, and that none of the employees had lodged a complaint or denounced the protocol. In view of all this, the Committee recalls that it can examine allegations concerning economic rationalization programmes and restructuring processes only in so far as they might have given rise to acts of discrimination or interference

against trade unions. In any case, the Committee points out that rationalization and staff reduction processes should involve consultations or attempts to reach agreement with the trade union organizations [see *Digest*, op. cit., para. 936]. The Committee requests the Government to make sure that such consultations are held in the event of future restructuring processes.

### **Harassment and dismissal of trade unionists**

- 366.** *The complainant states that from, the time the CSIC and the national independent electricity trade union submitted their case to the competent jurisdictions, the leading officials of these organizations have been harassed and that this repression has been extended to other employees. The Committee particularly notes the cases of Mr. Fouman, Secretary-General of SNI-ENERGIE, and Mr. Ndzana Olongo, Secretary-General of the CSIC, and takes note of the list of 15 names of trade unionists who have been harassed, dismissed, transferred or demoted (see annex). In this respect, the Committee notes the Government's statement that since the company is in the throes of a restructuring process, the claims connected to this process should follow a legal procedure.*
- 367.** *In this respect, 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 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. Furthermore, the Committee recalls that the Government is responsible for preventing all acts of anti-union discrimination and it 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*, op. cit., paras. 724 and 738].*
- 368.** *Noting that the case of Mr. Fouman has been referred to the labour inspectorate at Douala and that these proceedings might continue before the court, and that the case of Mr. Ndzana Olongo is before the courts, the Committee expects that the competent instances take account in their deliberations of the abovementioned principles. It urges the Government to keep it informed of the outcome of the proceedings under way and to communicate to it the text of the final judgements handed down by the courts in this respect.*
- 369.** *With respect to the various allegations of anti-union discrimination against officials and members of the CSIC and SNI-ENERGIE (see list of 15 names in the annex), the Committee requests the Government to undertake immediately an independent inquiry into the allegations of anti-union discrimination against the officials and members of the CSIC and SNI-ENERGIE, taking full account of the judicial proceedings under way. If it turns out they have been subjected to harassment and persecution on account of their trade union activities, the Committee requests the Government to take the necessary measures in order to ensure that these trade union officials might freely perform their trade union duties and exercise their trade union rights. The Committee requests the Government to keep it informed of the situation. Taking into account that Cameroon has ratified the Workers' Representatives Convention, 1971 (No. 135), the Committee requests the Government to take rapidly the necessary measures so that the trade union officials dismissed in violation of the relevant national legislation might benefit effectively from all*

*the protections and guarantees provided for under this legislation. If it is found that acts of anti-union discrimination have been committed, the Committee requests the Government to take the necessary measures to guarantee their reinstatement. The Committee requests the Government to keep it informed of the measures taken to ensure this.*

- 370.** *On the basis of information provided from both sides, there seems to be a disagreement within the CSIC, the latter claiming that Mr. Ndzana Olongo had been struck off the list of the said trade union organization on 11 March 2005. Consequently, all the actions by Mr. Ndzana Olongo would no longer commit the CSIC. The Committee recalls that it is not competent to make recommendations on internal dissensions within a trade union organization, so long as the Government did not intervene in a manner which might affect the exercise of trade union rights and the normal functioning of an organization. In cases of this nature when there have been internal dissensions, the Committee has also pointed out that judicial intervention would permit a clarification of the situation from the legal point of view for the purpose of settling the question of the leadership and representation of the organization concerned [see **Digest**, op. cit., para. 965].*
- 371.** *The Committee notes the supplementary information contained in the CSIC communications of 2 December 2005 and 23 January 2006 and requests the Government to provide its observations thereon.*

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

- 372.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) In view of the fact that the Government is responsible for the late appointment of the trade unions' registrar and taking note of section 11(b) of the Labour Code, which stipulates that a trade union is considered as having been registered one month after the request for registration has been submitted, the Committee requests the Government to issue without delay the certificate of registration to SNI-ENERGIE.*
  - (b) The Committee requests the Government to ensure that the principles of freedom of association are fully respected in the AES-SONEL enterprise, particularly as concerns the non-interference of the enterprise in favour of a trade union, and to ensure that all negative effects of favouritism are rectified.*
  - (c) Concerning the CSIC's participation in the electoral process, the Committee trusts that the decisions of the judicial authority will take full account of the principles of freedom of association and requests the Government to keep it informed of the outcome of these decisions.*
  - (d) Concerning the notice of strike action, the Committee requests the Government to ensure that in the future, the restrictions concerning the right to strike, more specifically in the case of notice of strike action, should be accompanied by adequate, impartial and speedy conciliation and arbitration proceedings in which the parties can take part at every stage.*
  - (e) Concerning the referral to the courts of the matter of the legality of the collective agreement, the Committee requests the Government to*

*communicate to it the text of the judgements handed down and to keep it informed of the development of the situation in this respect.*

- (f) *The Committee requests the Government to make sure that, in the event of any future restructuring, including rationalization and staff reduction processes, the process involves consultations or attempts to reach agreement with the trade union organizations.*
- (g) *The Committee expects that the competent instances will bear in mind the principles of freedom of association in their deliberations on the cases of Messrs. Fouman and Ndzana Olongo. It requests the Government to keep it informed of the outcome of the proceedings undertaken and to communicate to it the final judgements handed down by the courts in this respect.*
- (h) *The Committee requests the Government to set up immediately an independent inquiry on the allegations of anti-union discrimination against the officials and members of the CSIC and SNI-ENERGIE and to keep it informed of the situation.*
- (i) *The Committee requests the Government to take rapidly the necessary measures so that the trade union officials dismissed in violation of national legislation might benefit effectively from all the protections and guarantees provided for under this legislation. If it is found that acts of anti-union discrimination have been committed, the Committee requests the Government to take the necessary measures to guarantee their reinstatement. The Committee requests the Government to keep it informed of the measures taken in this respect.*
- (j) *The Committee requests the Government to provide its observations on the supplementary information provided by the CSIC in its communications of 2 December 2005 and 23 January 2006.*

## Annex

Name	Position	Observations	
NDZANA OLONGO Gilbert Supervisor	Chairperson of the National Committee and staff delegate	Dismissed	Matter before the court
FOUMAN Julien Marcel Executive Business Economist	Secretary-General of SNI- ENERGIE, candidate for staff delegates' election	Removed from post, transferred secretly and in an irregular manner to Garoua. Has already received and replied to three demands for explanations	Likely at any moment to be dismissed, with the trade union movement continuing to be a monopoly at AES-SONEL
NGUINI FOUA A. Executive Engineer	2nd Vice-Chairperson, candidate for staff delegates' election	No mention of his post on his management's organizational chart, following his refusal of an offer of forced separation.	Threatened with being transferred outside Douala where he is a candidate for election

Name	Position	Observations	
BIENG Jean Jacques Executive Accountant and Financial Analyst	Deputy Secretary for financial and economic affairs, candidate for staff delegates' election	No mention of his post on his management's organizational chart, following his refusal of an offer of forced separation. Finally accepted to leave but the employer now refuses	Posted to Bertoua, 600 km from Douala, as measure of reprisal. The matter is before the court at Douala; he is likely to be dismissed at any moment
KELLE Jacqueline Administrative executive	Secretary responsible for women workers and gender equality, candidate for staff delegates' election.	Her name was on the list of forced separations, despite her status as staff delegate.	Has just been redeployed but demoted to a supervisor position. She is considering requesting her voluntary departure to avoid this humiliation.
SOBGOU François Didi Executive Business Economist	1st Deputy Secretary-General, candidate for staff delegates' election	Was obliged to accept forced separation	The matter is before the court on account of procedural irregularity as acceptance did not take place in presence of the labour inspector and transaction was fraudulent, as false promise of CNPS retirement was given.
GWANDI Patricia Executive	2nd Deputy to National Secretary responsible for women workers and gender equality	Refused offer of forced separation	Has just been redeployed at Ombe, 60 km. away from her job in Douala
OWONO Marie Thérèse Executive Business Economist	2nd Deputy to National Secretary for Social Affairs, head of group of HIV/AIDS-infected persons, candidate for staff delegates' election	Offer of forced departure was withdrawn after her observations	Has just been redeployed at Ombe, 60 km away from her job in Douala and far from medical centres
NDINGUE Philippe Executive Business Economist	2nd Deputy to National Secretary responsible for communications and press.	Offer of forced departure was withdrawn after his observations	Has just been redeployed at Maroua, 1,500 km away from his job in Douala
SONDECK Gabriel Executive Engineer	Candidate for delegates' election at Douala	Offer of forced departure was withdrawn after his observations	Has just been redeployed at Lagdo, 1,400 km from his job in Douala. The matter is before the courts
ONGUENE NOMO Pierre Executive Business Economist	Candidate for delegates' election at Douala		Threatened with transfer 300 km from Douala, hence his fear of continuing his activities with the trade union
NGAMBI Théodore Supervisor	Candidate for delegates' election at Douala	See withdrawal document	Despite his withdrawal, has been transferred outside Douala in a very isolated area where the enterprise has no job suited to his qualifications
BALOG Benjamin Administrative executive	1st Vice-chairperson	Gave up his activities long ago as a result of considerable pressures	
NGAMBO Jean-Baptiste Engineer	2nd Deputy to the National Secretary of the organization	Offer of forced departure was withdrawn after his observations.	Was transferred to Bertoua, 600 km. from Douala, headquarters of the trade union. The case is before the courts
AKOA Placide Supervisor	1st Deputy to Secretary for inter-union cooperation	Dismissed after refusing the offer of forced separation	The case is before the courts

CASES NOS. 2314 AND 2333

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

**Complaints against the Government of Canada  
concerning the Province of Quebec  
presented by**

**Case No. 2314**

— **the Confederation of National Trade Unions (CSN)**  
supported by  
— **Public Services International (PSI)**

**Case No. 2333**

— **the Centre of Democratic Trade Unions (CSD)**  
— **the Quebec Trade Union Centre (CSQ) and**  
— **the Quebec Workers' Federation (FTQ)**

*Allegations: The complainant organizations allege legislative interference by the Government to cancel the trade union registrations of certain workers in social and health services (Bill No. 7) and childcare services (Bill No. 8). The Government is thereby depriving them of employee status under the Labour Code and is redefining them as independent workers, denying them the right to unionize; it obliges them to form "representative" organizations with responsibility for concluding agreements on working conditions, which are, in fact, at the mercy of the authorities, and is denying them the right to bargain collectively through independent trade union organizations*

- 373.** The complaint concerning Case No. 2314 is contained in communications dated 19 December 2003 and 10 February 2004 from the Confederation of National Trade Unions (CSN); it is supported by Public Services International (PSI) in a communication dated 6 July 2004.
- 374.** The complaint concerning Case No. 2333 is contained in joint communications from the Centre of Democratic Trade Unions (CSD), the Quebec Trade Union Centre (CSQ) and the Quebec Workers' Federation (FTQ), dated 30 March and 27 May 2004.
- 375.** The Government of Canada has sent the replies of the Government of Quebec concerning the two complaints in communications dated 29 December 2004 and 21 November 2005.
- 376.** Canada has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87). It has not ratified the Right to Organise and Collective

Bargaining Convention, 1949 (No. 98), the Labour Relations (Public Service) Convention, 1978 (No. 151), or the Collective Bargaining Convention, 1981 (No. 154).

## A. The complainant organizations' allegations

### *The complainant organizations*

**377.** In its communication of 19 December 2003, the complainant organization in Case No. 2314 (CSN) states that it has 280,000 members who form nearly 2,700 trade unions, which are, in turn, grouped into nine federations by sector of the economy, in both the private and public sectors. The CSN represents over 90 per cent of unionized workers in the childcare services sector – a total of more than 6,000 workers.

**378.** In their communications of 30 March and 27 May 2004, the complainant organizations in Case No. 2333 give the following facts. The Centre of Democratic Trade Unions (CSD) has close to 65,000 members and around 400 member unions, including unions in the social sector; it has made more than 30 applications for registration to represent workers working as intermediary and family resources; it is affiliated to the World Confederation of Labour (WCL). The Quebec Trade Union Centre represents around 170,000 workers in 250 trade unions and 13 federations, including in early-childhood education, health and social services. The Quebec Workers' Federation (FTQ) is the oldest trade union organization and the main trade union centre in Quebec, with over half a million members in over 5,000 trade union sections, around 40 larger unions and 17 regional councils; at national level, it is a member of the Canadian Labour Congress, while at international level it is affiliated to the International Confederation of Free Trade Unions (ICFTU).

### *The general legislative framework*

**379.** One of the essential concepts of the Labour Code, which governs collective labour relations in Quebec, is that of "employee", since this definition determines whether or not a person has trade union rights. Only "employees" within the meaning of the Code enjoy the rights laid down therein, including the right to form unions, to protection against anti-union interference or intimidation, to registration, collective bargaining, arbitration of disputes, strike action, collective agreements and arbitration of grievances. Some categories of workers – for instance, management – are excluded from the scope of the Code by section 1(l). Others like the workers who are the subject of this complaint, can be excluded under other laws (the overwhelming majority of whom are women).

**380.** The complainant organizations challenge the following two laws (cf. relevant extracts reproduced in annex to the present document), which they believe to constitute violations of freedom of association:

- the Bill to amend the Act on health and social services (LSSSS) (Bill No. 7, which on enactment became L.Q. 2003, c.12, hereinafter known as the Act to amend the LSSSS);
- the Bill to amend the Act on early childhood centres and other early childhood care services (LCPE) (Bill No. 8, which on enactment became L.Q. 2003, c.13, hereinafter known as the Act to amend the LCPE).

These two Acts were adopted at the very moment Canada's international commitments on freedom of association were explicitly recognized by the Supreme Court of Canada, the highest court in the land, in the *Dunmore* case.

### **Context of the Act to amend the LSSSS**

- 381.** The Act on health and social services (c.S-4.2) sets out a system of health and social services whose aim is to maintain and improve individuals' physical, mental and moral capacity to achieve fulfilment in their own environment. With the aim of deinstitutionalizing rehabilitation services for people with mental disabilities, the competent Ministry decided in 1991 to abandon the system of accommodation in public institutions in favour of integration and care for people in more natural surroundings. This has given rise to the appearance of new home-based care and accommodation roles including "intermediary resources" ("*ressources intermédiaires*" or RIs) and "family-type resources" ("*ressources de type familial*" or RTF). Since the last residential public institutions closed their doors in 1999, the RIs and RTFs have played the most important role in this area; they take care of adults with physical and mental disabilities and have to be approved by the public institutions, which establish the maximum number of adults they may accept and determine their level of pay, which varies according to the services provided and the number of persons cared for.
- 382.** After receiving requests for certification from various trade union organizations, the competent administrative courts decreed that RIs and RTFs exhibited all the characteristics of employees, as defined by the Code, and should therefore be granted all the rights provided for by the Code: trade union registration, collective bargaining on working conditions, relevant legislative protection and so on. This judgement was confirmed by both the Superior Court and the Court of Appeal of Quebec. Following this, the Government adopted the Act amending the LSSSS, which entered into force on 18 December 2003, in order to revoke union certifications already obtained, prevent all collective bargaining and call into question the situation that had previously been settled in the courts for these workers. Moreover, the Attorney-General of Quebec and individual employers (on the basis, in particular, of the laws contested in this complaint) began judicial proceedings aimed at overturning the certifications held by the unions.

### **Context of the adoption of the Act to amend the LCPE**

- 383.** In 1997, the Act on early childhood centres and other early childhood care services set up a national network of early childhood care services, largely subsidized by the State and serving children between birth and nursery-school age. Early childhood centres ("*centres de la petite enfance*" or CPEs) form the cornerstone of the network and coordinate early childhood care both in the home and at centres (educators working at centres are not included in the complaint as they do enjoy trade union rights). Early childhood care in the home is essentially a service provided in a private home by an individual, known as a "home child-care provider" ("*responsable de service de garde en milieu familial*" or RSG), for remuneration. RSGs have to obtain recognition from a CPE to carry out childcare services and, to this end, have to conform to a very detailed set of obligations, both for initial approval and for renewal of recognition. RSGs, the vast majority of whom are women, work a minimum of 50 hours per week, excluding the hours spent performing other related tasks, and do not enjoy any social benefits. The authorities have always considered them to be independent workers.
- 384.** In 2001, the first certification applications were submitted by a number of trade union organizations for a first group of RSGs (in a period of two years, around 80 such applications were submitted by various organizations). These requests were accepted by the competent specialized bodies, who granted them the status of employees under the Labour Code, thereby entitling them to unionize and to enjoy the other provisions of the Code. These decisions were confirmed in May 2003 by the Labour Tribunal, and the registered unions then initiated bargaining for an initial collective agreement for the RSGs concerned. However, the Attorney-General and the CPEs affected appealed to the Superior



Court against the judgement of the Labour Tribunal, and, without awaiting the Court's judgement, the Government adopted the Act to amend the Act on early childhood centres and other early childhood care services (hereinafter referred to as the Act to amend the LCPE). This law entails various trade union rights violations; in particular, it revokes the union certifications obtained before its entry into force and denies RSGs the right to unionize and to bargain collectively.

### ***Common aspects of the two laws***

- 385.** The complainant organizations claim that these two laws share the same purpose: to deny RIs, RTFs and RSGs employee status and, hence, to dismantle the trade union organizations that they had succeeded in forming, following long struggles and despite the isolation of the workers concerned, and for which they had obtained recognition as representative organizations for the purposes of collective bargaining with regard to working conditions.
- 386.** In addition, these laws create an entire parallel framework in which RIs, RTFs and RSGs are forced into a system of groupings in which their representative organizations will be dependent on the goodwill of the Ministry, which constitute a violation of freedom of association and interference in the right to organize. Furthermore, the laws deny representative organizations any right to negotiate working conditions, thus reducing to nothing their right to bargain collectively.
- 387.** These laws are all the more unjust as they discriminate against a whole socio-occupational category because it is made up of women. In forcing them to fight all over again to obtain recognition of their employee status and trade union associations, the revocation of employee status has clearly had damaging consequences for these women's freedom of association, but it also has major repercussions on their social security, as employee status is the condition of access to various social programmes in Quebec. In forcing these female workers to fight the social battles of the last hundred years all over again, the Government is discriminating against them both as women and as an occupational group. The complainant organizations emphasize that these individuals do not enjoy any social benefits (such as paid public holidays, sick leave, maternity leave, parental leave, a retirement scheme or access to occupational equality or salary equity programmes). These laws perpetuate social stereotypes and selectively exclude an occupational group that works in isolated and very vulnerable conditions.
- 388.** The complainant organizations allege that RSGs, RIs and RTFs are denied the freedom to choose a trade union organization, as the two laws under dispute allow recognition of the organizations for non-employees only. Thus, the Act to amend the LSSSS provides that "an intermediary resource shall be considered not to be in the employment, nor to be an employee, of the statutory body using her/his services and any agreement or contract reached between them ... shall not be considered a contract of employment". Similarly, the LCPE stipulates that a recognized home childcare provider "shall be a provider of services under the Civil Code, and shall be considered not to be in the employment, nor to be an employee, of the permit holder of the early childhood centre where she/he is recognized; the same shall apply for persons assisting her/him and any person employed by her/him". In other words, only associations that do not demand employees' working conditions will be recognized by the Ministry, and discussions will be held only on conditions for the provision of services, not on conditions of labour.
- 389.** The provisions concerning consultation compound the Government's interference in the freedom to join associations of choice. The Act to amend the LSSSS provides that the Ministry can conclude an agreement with one or more representative organizations of intermediary resources concerning general conditions for the exercise of their activities,

the legislative framework for the living conditions of users and methods of payment for services. Similarly, the Act to amend the LCPE provides that the Ministry may conclude an agreement with one or more representative associations of RSGs concerning the exercise and financing of home childcare and the creation and maintenance of programmes and services to meet the needs of all RSGs. Therefore, it is impossible to discuss – let alone negotiate – the working conditions of RSGs, RIs and RTFs. All discussion on retirement schemes, occupational safety and health, salary equity, maternity leave or other social benefits is also ruled out, since everything relates to the conditions under which the service is provided, while the effect of those conditions on the providers of the services is ignored.

- 390.** The retroactive scope of these amending Acts and the behaviour of the Attorney-General and the employers concerned (who have used the laws to attempt to have certifications revoked) are evidence of selective exclusion from employees' associations. The Act to amend the LSSSS and the Act to amend the LCPE are defined as "declaratory" and as applicable even to an administrative, quasi-judicial or judicial decision made before their entry into force. The complainant organizations claim that the closure of existing employees' associations, when those organizations are in the process of discussions for the conclusion of an agreement, violates the freedom to join trade unions of one's own choice and constitutes improper interference on the part of the Government.
- 391.** These laws also have the effect of excluding RSGs, RIs and RTFs from the legislative mechanisms that protect workers and their organizations from any interference in their freedom of association, as they contain no provisions for prohibiting and punishing interference or reprisals against an organization or management interference in the representative nature of a union, or even to preserve the confidential nature of union membership. On the contrary, the laws are incompatible with protections of this sort, as they do not deal with occupational relations but rather with the relationship between an enterprise and its service providers. The laws in question go so far as to allow the Minister to inspect the membership rolls of the "bodies" that he wishes to recognize as representative. The Act to amend the LSSSS (section 303.2, as amended) and the Act to amend the LCPE (section 73.5, as amended) provide that a representative association must, on demand, supply the Minister with up-to-date documents establishing its existence and the name and address of each of its members. This lack of any protection mechanism and the intrusion by the Minister into the membership rolls constitutes a direct violation of Articles 1 and 2 of Convention No. 98.
- 392.** The offending laws explicitly deny RSGs, RIs and RTFs the freedom to bargain. Even in discussions on the conditions of the provision of services – themselves limited – the Minister is under no obligation to negotiate and conclude a collective agreement, and can choose with whom he will conclude an agreement. There is therefore no real obligation to negotiate, or any possibility for strike action to support workers' demands, even though the right to conduct free and voluntary bargaining and the right to strike are both considered fundamental rights, linked to freedom of association.
- 393.** The complainant organizations state that a judicial challenge has been launched at national level to have these two laws declared unconstitutional. Lastly, they request the Committee to recommend that the laws be completely repealed, or that legislative measures be adopted to give the workers concerned the same rights as all other employees in Quebec, particularly with regard to: the right to form organizations of their own choosing and take part in their activities; protection against acts of discrimination and interference; collective bargaining and the right to strike.

## B. The Government's replies

- 394.** In its communication dated 29 December 2004, the Government of Quebec states that it has respected the principles of freedom of association with regard to the two laws challenged by the complainant organizations, and stresses that Canada has not ratified the Collective Bargaining Convention, 1981 (No. 154). The Government adds that these laws are not discriminatory, since they apply both to men and women without distinction and comply with the Canadian and Quebec Charters of rights and freedoms.
- 395.** Concerning the historical and social context of the adoption of the Act to amend the LSSSS, the Government emphasizes that the organization of accommodation for people suffering from mental illnesses has been developing ever since a report in 1962 recommended that they be treated in institutions and that community resources be used for their accommodation. The concepts of intermediary resources (RI) and family-type resources (STF) were set out in the Act on health and social services of 1991, which thus enshrined the model of non-institutional accommodation. The Government stresses that 90 per cent of RIs and RTFs provide their services in their own homes; the accommodation thereby offered cannot, therefore, be considered an extension of the statutory bodies. The average annual remuneration is: CAD22,031 for an RI; CAD13,136 (per child) and CAD12,950 (per adult) for an RTF. Given the specific nature of their social contribution, RIs and RTFs who take individuals into their own principal residences enjoy an altered tax regime, as their payment is not classed as income and is therefore untaxed. The Act of 1991 also gave regional authorities the principal role in determining the payment of RIs and RTFs. Technical amendments to the 1991 Act, adopted in 1998, have brought about some alterations, but these have not changed the relationships between the various actors.
- 396.** The Act to amend the LSSSS, which the complainant organizations challenge, is driven by the same spirit and provides (section 302.1) that the relation between an RI and a statutory body is a contract for the provision of services under the Civil Code, and therefore is outside the definition of a contract of employment. The law revokes the right of regional authorities to determine levels of pay and gives it to the Minister, who now has the power (section 303.1) to conclude an agreement with one or more representative organizations. Objective criteria of representativeness of organizations for the purposes of concluding an agreement are laid down in section 303.2 of the Act as amended (these provisions also apply to RTFs).
- 397.** With regard to the freedom of association of RIs and RTFs, the Government states that there were bodies of RIs and RTFs, formed under the Companies Act, in existence even before the adoption of the Act to amend the LSSSS, functioning in various different ways according to the period in question (before 1990, 1990 to 2000 and since 2001). Since 2001, a Non-Institutional Accommodation Resources Coordination Committee ("*Comité de coordination des ressources d'hébergement non institutionnel*" or "RNI Coordination Committee"), which includes all actors, has met four times a year to discuss all the issues that arise: remuneration, contract clauses, insurance, selection and evaluation criteria for resources, definition of users' needs, exchange of information between the establishment and the resources. The Government claims that this is evidence of the effective exercise of these workers' freedom of association.
- 398.** The Act to amend the LSSSS provides for the possibility of agreements between the Minister and one or more representative bodies of RIs and RTFs to determine general conditions for the exercise of their activities, the legislative framework for the living conditions of users and methods of payment for services. A body is considered representative if its membership comprises a minimum of either 20 per cent of the total number of resources or the number of resources required to serve a minimum of 30 per cent of the total number of users. These criteria, which are adapted according to whether

the bodies to which they apply operate at national, local or regional level, apply to both RIs and RTFs, who may join an association of their own choosing, irrespective of its affiliation to a trade union. Since the entry into force of the Act to amend the LSSSS, several organizations have fulfilled the representativeness criteria for the conclusion of agreements: in June 2004, four organizations were recognized, of which one (the Assembly of Adult Residential Resources of Quebec or RESSAC) is a member of the CSD, one of the complainant organizations in Case No. 2333. Also in June 2004, the Ministry asked the representative organizations to confirm the names of their representatives as well as a list of the subjects they considered most important, in order to be able to initiate discussions with a view to concluding an agreement.

**399.** The Government refutes the arguments of the complainant organizations founded on the *Dunmore* case. It stresses that that case had to do with agricultural workers who had been excluded from Ontario legislation governing collective labour relations, and who had been unable to form trade unions because they were geographically isolated and had insufficient resources to be able to organize without State protection. In the present case, associations of RIs and RTFs have been able to form under the Companies Act, and these are able to represent and defend the interests of their members. Furthermore, the affiliation of a body to a trade union organization is not a criterion for exclusion from the conclusion of an agreement. The Government concludes that the Act to amend the LSSSS respects the principles of freedom of association laid down in Convention No. 87.

**400.** As regards the conditions for the provision of services, the Government recalls that the relationship between statutory bodies and RIs and RTFs is one of a contract for the provision of services, as governed by section 2098 of the Civil Code. This provision states that “a person, be it an entrepreneur or a provider of services, shall commit to supply another person, the client, with physical or intellectual labour or to provide a service for a price which the client shall be obliged to pay”. This being the case, the activities of RIs and RTFs do not constitute a work relationship and do not come under Convention No. 98. As it recognizes the particular nature of the service provided by RIs and RTFs, the Government has not wished to limit the contents of the model contract to the single question of remuneration: future agreements will deal with general conditions for the exercise of their activities, the legislative framework for the living conditions of users and measures for and methods of payment for services. The Government also states that it had meetings in April 2004 with representatives of organizations recognized as representative, at which discussions were held on the foundations and guiding principles that should direct the way that agreements were concluded, in accordance with the Act to amend the LSSSS. These meetings were continued in May and June 2004, and, with the participation of the RNI Coordination Committee, in September 2004.

### **The Act to amend the LCPE**

**401.** The Government provides a detailed explanation of the historical and social context of the development of subsidized care services, which have progressively been established in response to the need of parents to reconcile their work and family commitments. The Act on childcare services, adopted in 1979, has two central pillars: day-care centres (“*garde en garderie*”) and home childcare (“*garde en milieu familial*”). The latter takes the form of care provided by an individual, for remuneration, in a private home. The Act set up home day-care agencies (“*agences de services de garde en milieu familial*”) – bodies authorized to coordinate all the care services provided by persons recognized by them as home childcare providers (“*responsables de service de garde en milieu familial*” or RSG); the Act also set up the Office of Child-care Services, whose role is to verify the overall quality of early childhood care services. These agencies have formed an association (RASGMFQ), which represents them before the Office and defends the interests of RSGs. In 1997, the LCPE created “early childhood centres”, not-for-profit, private organizations whose

governing bodies are made up chiefly of parents. Permit holders of early childhood centres must provide their care services in centres (“installations”) (collective care) and are responsible for coordinating home early-childhood education services. Since RSGs are not considered employees, they can make deductions from their annual income under expenses related to the provision of services. This system of childcare at reduced rates (the parents pay CAD7 and the Government CAD17 per day) has been a great success: 100,000 places were created between 1997 and 2004 in addition to the 78,864 places that already existed; the Government is aiming for 200,000 places by 2006, 89,000 of which are to be home based. In March 2004, there were around 13,000 RSGs, under the coordination of permit holders of early childhood centres. The Government has dedicated a budget of over CAD1.3 billion to childcare services in the 2004-05 financial year; a significant proportion of this money is earmarked for home childcare services.

- 402.** The Act to amend the LCPE, which is the subject of this complaint, exists to define the status of RSGs in greater detail by confirming that the relationship between an RSG and a parent is one of a provision of services under the Civil Code, not an employment relationship. For their part, permit holders at early childhood centres are responsible for coordinating and supervising home childcare services, particularly regarding the application of the Regulations on early childhood centres, which chiefly comprise standards to ensure the health and safety of the children. Hence, the relationship between RSGs and permit holders at early childhood centres cannot be described as an employment relationship either.
- 403.** The Government stresses, however, that even though RSGs are not included in the general system of the Labour Code, they do enjoy the right of association; various associations, alliances, societies and federations have been formed, even before the adoption of the Act to amend the LCPE, under the Companies Act or the Act on trade unions (many of these have since disbanded voluntarily). An Association of Home Educators of Quebec (AEMFQ) was set up in 1999, in particular to promote the development and ensure the quality of home childcare services, to improve working conditions for RSGs – specifically their independent worker status – and to defend their rights. For its part, the Ministry for Family and Children has established discussion mechanisms on all issues relating to home childcare: an Issue Table (“*Table de concertation*”) in 2000; the National Forum on Home Child-care in 2001 (one of the complainant organizations, the CSN, has participated in the last three Forum meetings). Between April 2002 and Autumn 2003, the Ministry met several times with the AEMFQ, the CSQ and the CSN (the latter two organizations being among the complainant organizations), and a steering committee, set up within the Ministry, facilitated the follow-up for these meetings. The Government concludes that, even if they are not covered by the Labour Code, RSGs can rely on legally established associations to represent them, and that the exchange mechanisms and the numerous meetings that have taken place between these associations and the Ministry are both evidence that they are genuinely able to exercise their right of association.
- 404.** The Government reiterates, with certain alterations that are relevant to RSGs, the arguments developed above with regard to RIs and RTFs concerning mechanisms of representation and the differences between this situation and the *Dunmore* case.
- 405.** In respect of agreements on conditions for the provision of services, the Government recalls that RSGs do have a contract for the provision of services under the Civil Code, and that those services are paid for in part by parents and in part by the Government. The activities of RSGs cannot, therefore, come under the category of an employment relationship, nor can they be covered by Convention No. 98. The contents of agreements are stipulated by section 73.3 of the Act to amend the LCPE, which provides that the Minister may conclude an agreement with one or more representative associations of RSGs concerning the exercise and financing of home childcare and the creation and maintenance

of programmes and services to meet the needs of all RSGs. An agreement could therefore include provisions concerning not only the financing of RSGs, but also other conditions relevant to home childcare, such as the creation of a process to mediate and settle disputes between RSGs and CPEs, the development of training programmes suited to the needs of RSGs, their remuneration, etc. The contents of an agreement are not the sole prerogative of the Minister, as the Minister is legally obliged to consult the representative bodies of RSGs. In the context of the implementation of the Act to amend the LCPE, the Ministry of Employment, Social Security and the Family (MESSF) created the “AEMFQ-MESSF supervision committee” in February 2004, charged with examining all the files in order to increase the accessibility and flexibility of home childcare services. The supervision committee held several meetings in 2004 regarding numerous different subjects in the area of home childcare. As a result of these exchanges, the Government, inter alia, amended the regulations on early childhood centres in order to act on one of the associations’ major concerns, the issue of the casual replacement of RSGs. Other issues have also been discussed at sessions of the supervision committee, and some have been resolved. The exchanges between the associations and the Ministry have therefore produced real, convincing results. Lastly, the Government points to the mechanism that has been introduced by section 2 of the Act to amend the LCPE, which provides for agreements to be extended to all RSGs, irrespective of whether they are members of one of the associations that concluded it.

**406.** In its communication dated 21 November 2005, the Quebec Government confirms that the workers concerned are not wage-earners. It therefore considers that the description of the employment relationship with the statutory bodies concerned and the presentation of the point of view of the highest employers’ organization at the provincial level are irrelevant in the circumstances. The Government describes the context in which the intermediate and family-type resources and the persons responsible for a home childcare service are called upon to take action. The Government delegates to an administrative body the authority to apply an administrative framework to the protection of the users where intermediate and family-type resources are involved, and to the protection of the children where persons responsible for home care services are involved. Distorting the relations between the public establishments and the intermediate or family-type resources and the relations between the day-care centres and the persons responsible for home care services and turning them into private law relations implying that a contractual relationship, and hence a labour contract, exists would have the effect of denying the relations arising out of the aforementioned delegated authority, which itself is a product of the law.

**407.** The Government emphasizes that the intermediate and family-type resources provide non-institutional accommodation so that numerous vulnerable people can live in an environment that is as close as possible to a natural environment. This natural living environment, which it is impossible to reproduce in the context of an institution, is fundamental to the rehabilitation of these people and to their reintegration into society. More specifically, the role of the intermediate resources is to provide a user with an environment that is suited to his or her needs so as to maintain or integrate him or her in the community. The role of family-type resources – foster family – is to accommodate one or more exceptional children in their home so as to meet their needs and offer them living conditions that are conducive to a parental relationship in a family context. The role of family-type resources – foster home – is to accommodate one or more adults or elderly people so as to meet their needs and offer them living conditions that are as close as possible to those of a natural living environment. Although some intermediate resources take the form of a corporation or are administered by physical persons assisted by employees in physical installations, most of them, like the family-type resources, are people who receive one or more users into their homes. In practice, almost 90 per cent of the intermediate and family-type resources accommodate the users in their private domicile.

- 408.** The Government maintains that the relationship between an intermediate or family-type resource and a public establishment does not constitute an employer/employee relationship but, instead, can be assimilated to a contract for services rendered that is governed by the Quebec Civil Code, as distinct from a labour relationship. In order to confirm this rule of law, the Health Services and Social Services Act Amendment Act introduced section 302.1 into the Health Services and Social Services Act (see annex). This was essential since the relations between the public establishments and the intermediate or family-type resources are essentially of an administrative nature, geared first and foremost to the protection of the users.
- 409.** Regarding the background to the administrative supervision, the Government states that the concept of administrative supervision was introduced into the law in 1974, when the legislative body brought foster families under the control and supervision of the social services centres so as to protect the beneficiaries and guarantee the exercise of their rights. By doing so, the legislative body conferred on the latter a power of administrative control over the foster families, which is anything but indicative of an employer/employee relationship.
- 410.** Following the reform of the health and social services network initiated by the Act on Health and Social Services and to Amend Various Legislative Provisions (1991 Act), this power was devolved to the public establishments identified by the regional management boards. Over the years, the emergence of other kinds of resources was also encouraged by the approach taken by Quebec society towards intellectual deficiency and mental health, which focuses on the integration and social participation of people suffering from an intellectual deficiency or from mental health problems. The 1991 Act recognizes the existence of these other kinds of resources by introducing the concept of intermediate resources. The Act also introduces the concept of family-type resources, which comprises the foster family for exceptional children and the foster home for adults. Even more important, the 1991 Act provides for the administrative supervision of the intermediate resources, as well as of family-type resources. The administrative framework governs relations between the intermediate or family-type resources and the public establishments to which they are linked; it does not create the kind of private law link between them that characterizes an employer/employee relationship. The 1991 Act accordingly stipulates *inter alia* that:
- (a) the Minister establishes a classification of the services offered by the intermediate resources that is based on the degree of support or assistance required by the users (section 303);
  - (b) the Minister determines the levels of remuneration for the services rendered (section 303);
  - (c) the Minister identifies the guidelines that regional rules and regulations must follow in determining the conditions of access to the resources of the intermediate resources, including the general criteria for admission to these resources (section 303);
  - (d) the regional management boards establish for their respective regions the conditions of access to the services of the intermediate resources (section 304);
  - (e) the regional boards determine the criteria for recognizing intermediate resources, recognizes them and maintains a record of known resources by type of clientele (section 304);
  - (f) the regional boards identify the public establishments in their respective regions which may resort to the services of intermediate resources and which must monitor their performance (section 304);

- (g) the regional boards allocate to the establishments concerned the necessary monies for the payment of intermediate resources, in accordance with the applicable rates of remuneration (section 304);
- (h) the regional boards ensure the institution and the functioning of the machinery for consultation between the establishments and their intermediate resources (section 304);
- (i) the regional boards may examine a misunderstanding between a public establishment and an intermediate resource and rule on the matter after having given the parties an opportunity to present their observations (section 307).

It is clear from these provisions that they establish a set of rules and regulations for the protection of the users rather than a form of subordination typical of an employer/employee relationship.

**411.** The Health Services and Social Services Act Amendment Act (2003 Act), in addition to clarifying the nature of the relations between the public establishments and the intermediate and family-type resources, also confers on the Minister of Health and Social Services the authority to conclude an agreement with bodies representing the intermediate and family-type resources so as to determine the general conditions governing the exercise of their activities, as well as the rules and regulations governing the living conditions of the users and the remuneration of their services. Moreover, the 2003 Act establishes the criteria for the representativity of these bodies.

**412.** Over the years, the legislative body has always been concerned to respect the approach of Quebec society towards older people who are losing their autonomy, towards exceptional children and towards the intellectually or mentally deficient and the mentally handicapped. It is an approach that seeks, first and foremost, to provide such people with a living environment that resembles as far as possible that of a home. The role of the public establishments, for their part, is clearly to apply the rules and regulations established for the protection of the users. That is why the contract between the intermediate or family-type resources and the public establishments is not an employment contract. It is more an agreement which, because the rules and regulations for the protection of the users have already been established and the remuneration of the intermediate or family-type resources has already been fixed in terms of the needs of the users, sets out the conditions for the provision of services, which is governed by the Quebec Civil Code. The Government of Quebec accordingly reiterates that the activities of the intermediate and family-type resources are not covered by Convention No. 98 since they are not governed by a work relationship.

**413.** Regarding the status of persons responsible for a home care service, the Government recalls that home care is a service provided by a physical person, for payment, in a private residence. Since the relationship between the person responsible for a home care service and the parent, i.e. the person requiring the service, is of a contractual nature, the Government repeats that that relationship is governed within the framework of a contract for services rendered in the sense of the Quebec Civil Code, as distinct from a work relationship. To guarantee the provision of quality care services in order to protect the health and safety of the children and ensure their development, the Government has introduced a number of administrative measures. The administrative supervision of the home care services has been entrusted to the day-care centres (CPE). The CPE's role in ensuring this administrative supervision of the services provided by persons responsible for home care services who have chosen to be recognized by the CPE in question does not constitute an employer/employee relationship.



**414.** This is why, in the Act to Amend the Act on Day-care Centres and Other Childcare Services (LCPI Amendment Act), the legislative body confirmed the nature of this supervision, as follows:

8.1. A person recognized as a person responsible for a home care service is, as far as the services he or she provides to the parents in that capacity are concerned, a service provider in the Civil Code sense.

Notwithstanding any irreconcilable provision, a person responsible for a home care service shall be deemed not to be an employee or wage-earner of the person in charge of a day-care centre that has recognised him or her when he or she is acting within the framework of the services rendered. The same shall apply to the person who assists him or her or any person in his or her employment.

**415.** As to the background to the administrative supervision in this matter, the Government states that the Day-care Services Act (1979 Act) recognized that home care services, i.e. care services provided by a physical person, for payment, in a private residence, existed. The 1979 Act authorized the administrative supervision of the persons responsible for a home care service, when they chose to be recognized by a home care services agency constituted by virtue of the said Act. Recognition of a person responsible for a home care service was granted by an agency, on the one hand, in terms of the Act itself, and on the other in term of a set of rules adopted by the Home Care Services Office in 1993, which established the conditions of admissibility and the procedure for granting that recognition under the rules and regulations governing home care agencies and services.

**416.** For the agency this recognition entailed the exercise of certain powers *vis-à-vis* the administrative supervision that the persons responsible for home care services were required to accept. The supervision related to a series of standards with regard to health, hygiene, safety, facilities, heating, lighting, equipment and furnishing that persons responsible for home care services are required to comply with. Moreover, the regulations stipulates that the training course that a person recognized as being responsible for a home care service must attend deals, inter alia, with the development of the child, its diet and the organization and stimulation of the living environment.

**417.** The remuneration of the person responsible for a home care service used to be established by the latter and paid by the parents, except in the case of low-income families. In 1997, the Act on the Ministry of Family and Childhood and to Amend the Childcare Service Act (1997 Act) amended the 1979 Act. It also created the Ministry for the Family and Childhood and gave the CPE the power, previously exercised by the agencies, to provide the administrative supervision established by the Day-care Centres Regulations that persons responsible for home care services must observe. These Regulations took the place of the Home Care Agencies and Services Regulations. The 1997 Act also introduced a “reduced contribution” programme whereby the Government can fix the contribution due to a care service provider by a parent in the case of certain care services determined by the Government. In other words, the parent pays a reduced contribution for the daily care that his or her child receives while the Government pays an additional contribution to the care service provider. Today, recognition by a CPE is still not required for a person to be able to provide parents with paid home care services. Where there is no such recognition, however, the parent is not entitled to the government contribution.

**418.** By requiring that the persons responsible for home care services meet the standards set out in the Day-care Centres Regulations, whose implementation is entrusted to the CPE, the legislative body made the latter responsible for the administrative supervision of persons responsible for home care services, which is different from an employer/employee relationship. The Government repeats that the relationship between a person responsible for a home care service and a parent is to be assimilated to the provision of services in the sense of the Quebec Civil Code, and that the LCPE Amendment Act establishes clearly

that the relations created by the legislative body between persons responsible for home care services and the CPE do not constitute an employment contract. The Government therefore reiterates that the activities of persons responsible for home care services do not constitute a labour relationship and are not covered by the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

419. In conclusion, the Government submits that the Act to amend the LSSSS and the Act to amend the LCPE take account of the choices of Quebec society with regard to the development of non-institutional accommodation services and home early-childhood education, while still conforming to both domestic and international regulations on the right of association. It is the compliance of these laws with the Constitution that is currently being contested in the courts by the complainants.

### C. The Committee's conclusions

420. *The Committee notes that the complainant organizations allege legislative interference by the Government to cancel the trade union registrations of certain persons working from home in the social services, health and childcare sectors, thereby depriving them of "employee" status under the Labour Code and denying them all the related rights and protections. In particular, the complainant organizations contest the Act to amend the Act on health and social services, hereinafter referred to as the "Act to amend the LSSSS", and the Act to amend the Act on early childhood centres and other childcare services, hereinafter referred to as the "Act to amend the LCPE" (cf. the relevant extracts reproduced in annex to this document).*
421. *The Government replies that the specific nature of the services provided at home by these individuals, for people suffering from mental disabilities or in caring for children of pre school age, means that this case does not deal with labour relations as governed by the Labour Code, but with contracts for the provision of services by independent workers. The Government also claims that these workers can join organizations and associations of their own choosing, and that these organizations and associations are able to defend their rights and interests through agreements concluded with the Ministry.*
422. *The Committee observes that, beyond the apparent complexity of the historical and social context and the institutional regime that has arisen as a result, the central question, from the perspective of the principles of freedom of association, is the right of the workers concerned to form organizations of their own choosing with the same rights and guarantees as any other worker. The main point in dispute is therefore not fundamentally different from that which arose in Case No. 2257, which the Committee recently decided and which also concerned Quebec. In that case, managerial employees were excluded from the Labour Code because of the restrictive definition of the term "employee"; those managers were also able to form associations that enjoyed significant prerogatives in discussions on working conditions [see 335th Report, paras. 412-470].*
423. *In this case, the exclusion is not the result of a particular provision of the Labour Code, but of particular provisions in the two contested laws. The Act to amend the LSSSS provides that persons whom it covers shall be considered not to be in the employment, nor to be an employee, of the statutory body using their services, and that any agreement concluded to determine provisions for their relations shall not be considered a contract of employment (section 302.1). The Act to amend the LCPE stipulates that home childcare services constitute a contract for the provision of services under the Civil Code, and that an individual recognized as responsible for a home childcare service is considered not to be in the employment, nor to be an employee, of an early childhood centre (section 8.1). The exclusion may be based on a different mechanism, but the outcome is similar. Where the workers in question succeed in forming associations or organizations in spite of the*

difficulties inherent in their particular situation and status (it does appear that these associations are sometimes – albeit rarely – affiliated to trade union organizations) they, like the managerial workers in Case No. 2257, enjoy significant **prerogatives**; however, they lack all the **rights** granted to other workers by the Labour Code. The Committee must therefore remind the Government once again that the only possible exclusions provided for by Convention No. 87 concern the armed forces and the police, and underlines yet again that these exclusions should be defined in a restrictive manner [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, paras. 219-222]. The workers in this complaint should therefore be able to enjoy the provisions of the Labour Code as other workers in Quebec, or enjoy genuinely equivalent rights.

424. The conclusions of the Committee regarding the other aspects of the complaint follow from the main conclusion above, with appropriate adaptations.
425. With regard to the revocation of certifications that had already been obtained, the Committee notes that the workers concerned have been designated independent workers – what is more with retroactive effect – under the two laws under dispute. The laws have the practical effect of overturning the decisions of specialized bodies and of the Labour Tribunal, even though these are competent to pronounce judgement on disputes regarding certification and in particular in this case, to rule on the employee status of workers. In reality, events unfolded as follows: overcoming the hurdles of their geographical and social isolation, these workers applied to the competent body to form a trade union, invoking the relevant provisions of the Labour Code; that body recognized their employee status under the Code and the rights thereto pertaining; this decision was affirmed by the Labour Tribunal; the trade union organizations gave notice to begin bargaining for an initial collective agreement, in accordance with the Code; the Government, through legislation, intervened to change the designation of their relationship from an employment relationship to a contract for the provision of services, and appealed to the courts to revoke the certifications already obtained. The Committee is forced to conclude that even though, formally and legally, it is a tribunal that will pronounce the final ruling on the consequences for legally certified trade union sections of the adoption of these laws, the situation in reality is that existing certifications will be revoked through legislation, which is contrary to the principles of freedom of association [see **Digest**, *op. cit.*, paras. 675-676]. Noting that the Attorney-General has appealed to the Superior Court to have the previously obtained certifications revoked, and that the complainant organizations have launched a judicial appeal to have the laws declared unconstitutional, the Committee expects that the various rulings that will be pronounced by the courts at national level with regard to these cases will fully take account of the principles of freedom of association set out above. The Committee requests the Government and the complainant organizations to keep it informed of the outcome of the various current judicial appeals and to provide it with copies of the judgements in question.
426. With regard to the representativeness of the groups with which the Minister may conclude agreements (referred to as “representative bodies” in the Act to amend the LSSSS and as “representative associations” in the Act to amend the LCPE), the Committee notes that the Acts in question do set out precise and objective criteria for representativeness. It nevertheless observes that, given the isolated situation of the workers, who are spread over a vast area, the thresholds stipulated (20 per cent of the total number of resources or the number of resources required to serve a minimum of 30 per cent of the total number of users; 350 home childcare workers) are so high as to risk hindering – even rendering impossible – the formation of representative associations or bodies [see **Digest**, *op. cit.*, paras. 254-258]. The mechanisms for extending the scope of agreements concluded in this way to include all the workers concerned (section 303.1, paragraph 2, of the Act to amend the LSSSS, as amended; section 73.4 of the Act to amend the LCPE, as amended) would solve this problem up to a point, as persons not represented by an association would be

able to apply to themselves the content of agreements concluded with the Minister. However, that leaves untouched the main issue, namely, that the workers are not considered as employees under the Labour Code and do not enjoy the rights and protections provided therein.

- 427.** *With regard to the determination of labour conditions, the Committee notes that section 73.3, paragraph 2, of the Act to amend the LCPE establishes a consultation mechanism, accompanied, if necessary (section 73.7 of the same Act) by the intervention of a third party, if the parties deem that such intervention would facilitate the conclusion of an agreement (... the Act to amend the LSSSS is less explicit on these two aspects). However, this mechanism is not a genuine process of collective bargaining according to the principles of freedom of association and, in any case, offers far less in terms of rights and guarantees than the general system of labour relationships established by the Code. The Committee also notes that, owing to their exclusion from the Labour Code, the workers concerned cannot make use of the mechanism provided in sections 93.1 to 93.9 of the Code, which is intended to facilitate the adoption of an initial collective agreement. Such provisions are important for precisely these types of vulnerable workers, for whom organization and bargaining are difficult.*
- 428.** *Given all these elements, the Committee considers that the mechanism set up by the laws under dispute does not constitute a set of measures to encourage and promote the development and utilization of the broadest possible voluntary bargaining procedures with a view to the regulation of conditions of employment by collective agreements.*
- 429.** *In addition, the Committee draws attention to other provisions in the laws contested by the complainant organizations that pose problems under the principles of freedom of association, for example: section 73.5, paragraph 4, of the Act to amend the LCPE, which gives the authorities broad powers of surveillance over associations and their members, who are obliged to supply the Minister, on demand, with their names and addresses.*
- 430.** *In view of all the preceding points, the Committee requests the Government to amend the provisions of the Act to amend the LSSSS and of the Act to amend the LCPE, in order for the workers concerned to be able to form organizations of their own choosing under the general collective labour rights system or in a framework whereby they are genuinely offered similar rights and protections. The Committee requests the Government and the complainant organizations to keep it informed of the development of all the aspects mentioned above.*
- 431.** *The Committee draws the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of these cases.*

## **The Committee's recommendations**

- 432.** *In 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 provisions of the Act to amend the Act on health and social services and of the Act to amend the Act on early childhood centres and other childcare services, in order for the workers concerned to be able to benefit from the general collective labour rights system and to form organizations that enjoy the same rights, prerogatives and means of recourse as other workers' organizations, in accordance with the principles of freedom of association.*

- (b) *The Committee expects that the various rulings that will be pronounced by the courts at national level with regard to these cases will fully take account of the principles of freedom of association. It requests the Government and the complainant organizations to keep it informed of the outcome of the various judicial appeals undertaken and to provide it with copies of the judgements in question.*
- (c) *The Committee requests the Government and the complainant organizations to keep it informed of the development of the situation concerning all the matters mentioned above, in particular the measures taken to bring the legislation into line with the principles of freedom of association.*
- (d) *The Committee draws the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of these cases.*

## Annex

### Act to amend the Act on health and social security services

(extracts; emphasis added)

*Section 1 (section 302.1) – Notwithstanding any provision to the contrary, an intermediary resource shall be considered not to be in the employment, nor to be an employee, of the statutory authority using her/his services, and any agreement or contract reached between them to establish rules and methods for their relations with regard to the conduct of the activities and duties expected of the intermediary resource shall not be considered a contract of employment.*

...

*Section 3 (section 303.1) – The Minister may, with the consent of the Government, conclude an agreement with one or more representative bodies of intermediary resources to determine general conditions in which all of these resources will carry out their activities as well as the legislative framework for the living conditions of the users for whom they are responsible and to set out various measures and methods for the remuneration of the services provided by the intermediary resources.*

An agreement of this sort shall cover the regional health and social services boards, the authorities and all intermediary resources, irrespective of whether or not they are members of the body that concluded the agreement.

*(Section 303.2) – A representative body of intermediary resources shall, at national level, include any resource fulfilling the body's specific criteria, and its members shall include either a minimum of 20 per cent of the total number of these resources at national level or the number of resources necessary to serve a minimum of 30 per cent of the total number of users of these resources at national level.*

The same shall apply for a group consisting of bodies of intermediary resources acting only at local or regional level, as long as these bodies as a whole meet the same representativeness criteria as those required in the first subparagraph above.

*A representative body must, on demand, provide the Minister with up-to-date documents establishing its existence, as well as the name and address of each of its members.*

Similarly, *a group must provide up-to-date documents establishing its existence, the name and address of the bodies it represents and, for each of them, the name and address of each of its members.*

Where a representative body is a group of bodies, only [the greater group] shall be authorized to represent each of its member bodies.

*No intermediary resource may be a member of more than one representative organization, for the purposes provided for in section 303.1, other than a group [of bodies].*

...

*Section 7 – The provisions of section 302.1 of the Act on health and social services, enacted by section 1 of this Act, shall be declaratory. They shall apply equally to administrative, quasi-judicial or judicial decisions made before [... the entry into force of the Act].*

## **Act to amend the Act on early childhood centres and other childcare services** (extracts; emphasis added)

*Section 1 (section 8.1) – A person recognized as a home childcare provider shall, with regard to the services she/he provides to parents in this capacity, be a provider of services under the Civil Code.*

Notwithstanding any provision to the contrary, the person recognized as a home childcare provider shall be *considered not to be in the employment, nor to be an employee, of the permit holder of the early childhood centre* where she/he is recognized and where her/his services are used. *The same shall apply to persons assisting her/him and any persons employed by her/him.*

*Section 2 (section 73.3) – The Minister may conclude an agreement with one or more representative associations of home childcare providers concerning the carrying out and financing of home childcare and the establishment and maintenance of programmes and services to meet the needs of all home childcare providers.*

*Before concluding such an agreement, the Minister shall consult those representative associations of home childcare providers and of permit holders of early childhood centres that have notified him of their formation and sent the proposed agreement to the Government for approval.*

(Section 73.4) – The provisions of this agreement shall apply to all home childcare providers, whether or not they are members of the association that concluded it, as well as all permit holders of early childhood centres.

(Section 73.5) – *An association shall be considered representative where it comprises only home childcare providers and has a membership of at least 350, or a group of associations whose members consist only of home childcare providers and which has a total membership of at least 350 such persons ...*

*A representative association must, on demand, provide the Minister with up-to-date documents establishing its existence, as well as the name and address of each of its members, and, in the case of a representative association of home childcare providers, the name of the permit holder of the early childhood centre at which each of those persons is recognized.*

Similarly, *a group must provide up-to-date documents establishing its existence, the name and address of each of the associations of home childcare providers or permit holders of early childhood centres represented by it, the name and address of each of the members of each association that it represents and, in the case of associations of home childcare providers, the name of the permit holder recognizing them.*

Where a representative association is a group of associations, only [the greater group] shall be authorized to represent each of its member associations.

*No home childcare provider may be a member of more than one representative association, for the purposes of section 73.3, other than a group [of associations]. The same shall apply to permit holders of early childhood centres.*

(Section 73.6) – No permit holder of an early childhood centre, nor any association or group of associations of such permit holders, nor any person acting on behalf of a permit holder, may represent a representative association of home childcare providers or participate in the formation or management of such an association.

(Section 73.7) – When, during the process undertaken for the conclusion of an agreement, the parties deem that the intervention of a third party could be useful to provide advice on any matters that could potentially be covered by an agreement or to assist them in concluding such an

agreement, they may agree to appoint such a third party and the terms and conditions of its appointment.

Section 3 – The provisions of section 8.1 of the Act on early childhood centres and other childcare services, enacted by section 1 of this Act, shall be declaratory. They shall apply equally to administrative, quasi-judicial or judicial decisions made before [... the entry into force of the Act].

CASE NO. 2405

INTERIM REPORT

**Complaint against the Government of Canada  
concerning the Province of British Columbia  
presented by  
— Education International (EI)  
on behalf of  
— the Canadian Teachers' Federation (CTF) and  
— the British Columbia Teachers' Federation (BCTF)**

*Allegations: The complainant organization alleges that the Government, in order to re-impose an arbitration decision that had been overturned by the British Columbia Supreme Court, has adopted unilaterally and without any consultation with social partners, retroactive legislation (Bill No. 19/2004) that modifies or eliminates numerous provisions from freely negotiated collective agreements in the education sector. These actions deprive teachers of lawful means to promote and defend their occupational interests, and undermine the right of the complainant organizations to act as bargaining agent for their members*

- 433.** The complaint is contained in a communication dated 31 January 2005 from Education International (EI) on behalf of the British Columbia Teachers' Federation (BCTF). EI submitted additional allegations in a communication dated 7 February 2006.
- 434.** The federal Government transmitted the provincial Government's observations in a communication dated 17 August 2005.
- 435.** Canada has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); it has not ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. The complainant's allegations**

- 436.** In its communication of 31 January 2005, the complainant organization indicates that the British Columbia Teachers' Federation (BCTF) represents 42,000 teachers and associated professional workers, from kindergarten to grade 12, in the public education sector of British Columbia. The BCTF bargains with the British Columbia Public School

Employers' Association, the central bargaining agent of the 60 school boards in the province.

- 437.** The complainants recall that, over the past three years, British Columbia has enacted legislation affecting tens of thousands of workers in the province, contrary to fundamental principles of freedom of association and free collective bargaining. They refer in particular to a complaint previously submitted by the BCTF (Case No. 2173) in view of its close connection to the present case, and to the decision issued in that respect by the Committee [March 2003, 330th Report, paras. 239-305].
- 438.** The complainants summarize the issue as follows (a detailed chronology is attached as annex to the present document): the Government had enacted legislation granting an arbitrator jurisdiction to remove hundreds of provisions from the parties' collective agreement; the arbitrator appointed by the Government deleted these provisions from the collective agreement on 30 August 2002; the BCTF sought judicial review of the arbitrator's decision; on 22 January 2004, the British Columbia Supreme Court upheld the application and restored many of the collective agreement provisions deleted by the arbitrator; in response to the Supreme Court ruling, the Government introduced Bill No. 19/2004, removing from the parties' collective agreement those provisions that the British Columbia Supreme Court had restored.
- 439.** Bill No. 19/2004 amended the previous legislation (the Education Services Collective Agreement Act, ESCAA, and the School Act) to remove hundreds of provisions from the parties' collective agreement, effective 1 July 2002. The Bill went from first to third reading in three days (20-22 April 2004) and received Royal Assent on 29 April, whereupon it became the Education Services Collective Agreement Amendment Act, 2004 (ESCAAA). By overturning the 2004 British Columbia Supreme Court ruling, the ESCAAA accomplished three government objectives: (1) remove the collective agreement provisions that had been partially restored by the Supreme Court; (2) delete from the School Act (retroactively to 1 July 2002) the section that gave the arbitrator jurisdiction to remove provisions from the collective agreement; and (3) provide that the Bill applies "despite any decision of the court to the contrary". Section 5 of the Bill also provides that it applies retroactively. The legislation thus ensures that despite the Supreme Court ruling that there were "fundamental errors" on points of law, the judicial process is not available to either party to challenge the legislation and its impact on teachers and students; this prevents any adjudication of legal claims which rely on the deleted collective agreement's provisions, regardless of when the claim was filed.
- 440.** The complainants give some examples of provisions that have been deleted from agreements under the ESCAAA: evacuation procedures and fire drills for students with special needs (Kamloops-Thompson agreement); placement of students with special needs (Cariboo-Chilcotin agreement); number of students in laboratories, etc. where safety is a factor (Qualicum agreement); integration of students with special needs into regular classrooms (Delta agreement).
- 441.** The complainants point out that the Committee has already criticized the British Columbia Government for enacting Bill No. 27/2002 and Bill No. 28/2002, and for its dismissive reply to their previous complaint; the Committee then stated that when a State decides to become a Member of the ILO, it accepts the fundamental principles embodied in the Constitution and the Declaration of Philadelphia, including freedom of association principles [330th Report, para. 288]. Despite the Committee's unequivocal condemnation, the Government continues to violate international labour standards. When the British Columbia Supreme Court ruled that the manner in which collective agreement provisions had been eliminated was fundamentally flawed, the Government unilaterally imposed legislation overruling it, thereby placing itself above the law. As shown by the Minister's



declarations in Parliament, the objective was to avoid “the hassle of court challenges” (Hansard, 22 April 2004).

- 442.** The Government has not followed the Committee’s previous recommendations: that it avoid legislatively imposed settlements [330th Report, para. 305(c)]; that it respect the autonomy of bargaining partners in reaching negotiated agreements [330th Report, para. 305(c)]; that it hold meaningful consultations with representative organizations when workers’ rights of freedom of association and collective bargaining may be affected [330th Report, para. 305(d)]. Rather than following these recommendations, the Government again unilaterally adopted draconian legislation. The Government has thus imposed terms and conditions of employment on teachers without discussion or consultation, and contrary to the ruling of its own provincial Supreme Court, thereby depriving teachers of any lawful means to promote and defend their occupational interests.
- 443.** The complainants submit that the Government has demonstrated utter disregard for both the ILO and the Supreme Court. By including the provision that the legislation applies “despite any decision of a court to the contrary”, the Government has shown its contempt for the rule of law and any restraints on its power. The latest actions of the Government undermine the democratic collective bargaining system, contrary to ILO international standards to which Canada is a signatory; they further confirm and expand its disturbing pattern of disregard for basic freedom of association principles, free collective bargaining and the rule of law.
- 444.** In its communication of 7 February 2006, EI provides information in connection with alleged further violations of freedom of association and collective bargaining, in particular in respect of the enactment of Bill 12, the Teachers’ Collective Agreement Act, S.B.C. 2005, Chap. 27.

## **B. The Government’s reply**

- 445.** In its communication of 17 August 2005, the Government states that it disagrees with the allegations made by the Canadian Teachers’ Federation (CTF) and the British Columbia Teachers’ Federation (BCTF). The Education Services Collective Agreement Amendment Act (ESCAAA) does not violate Convention No. 87 as it does not restrict workers’ rights to: establish or form organizations of their own choosing; draw up their own constitutions and rules; elect their representatives; organize their administration or formulate their programmes. Nor does it dissolve or suspend workers’ organizations, infringe on their right to join federations, impede their legal personality, or contravene the law of the land.
- 446.** According to the Government, the ESCAAA does not overturn the British Columbia Supreme Court ruling as alleged by the complainants. In July 2002, an arbitrator was appointed to determine which provisions in the 60 teachers’ collective agreements needed to be changed because they conflicted with the School Act, after it had been amended by the Public Education Flexibility and Choice Act (PEFCA). The PEFCA includes limits on class size, which the Government decided is a matter of provincial public policy and not something to be negotiated at the bargaining table. The PEFCA also returns to local school boards the decisions about school year structure, and allows decisions on other matters (e.g. non-classroom educators such as librarians, counsellors, special needs assistants, teachers of English as a second-language) to be driven by student needs, parents’ concerns and local priorities, rather than by rigid, provincially imposed ratios that have been negotiated at the bargaining table.
- 447.** The ESCAAA removes those contract provisions identified by the arbitrator as being in conflict with the School Act. The British Columbia Supreme Court rejected the BCTF’s claims of bias and challenged the legality of the arbitrator’s appointment, and said that he

should not have deleted all sections of the agreement where those sections only partly conflicted with the PEFCA; the court ruled that the arbitrator should have sought to harmonize those sections with the Act by changing the wording used in these sentences and paragraphs, and set his decision aside. This left the teachers' collective agreements as they stood prior to the arbitrator's decision, i.e. containing limits on class size different from those now present in the School Act.

448. The court upheld the validity of the legislation that removed class size from collective agreements and the arbitrator's authority to make changes to collective agreements. The court decided that the arbitrator had interpreted his mandate too narrowly and, on that basis, set his decision aside. Although the ESCAAA deletes all sections of the collective agreements that the arbitrator had listed, the parties are able to negotiate replacement language as long as the negotiated terms are not in conflict with the School Act.

### C. The Committee's conclusions

449. *The Committee notes that this complaint concerns allegations of legislative intervention in the collective bargaining process in the education sector in the Province of British Columbia. Therefore, the Government's arguments relating to Convention No. 87 do not find application here.*
450. *While observing that this case concerns the Province of British Columbia, the Committee is bound to remind the federal Government that the principles of freedom of association should be fully respected throughout its territory.*
451. *The Committee also points out that this case cannot be considered in isolation from its previous decisions in Cases Nos. 2166, 2173, 2180 and 2196 [330th Report, paras. 239-305], more particularly Case No. 2173 where the BCTF was one of the complainants, and which involved closely related legislation: the Education Services Collective Agreement Act [ESCAA, introduced in Parliament as "Bill No. 27"]; and the Public Education Flexibility and Choice Act [PEFCA, introduced in Parliament as "Bill No. 28"]. The Committee thus refers, by way of background, to the conclusions and recommendations then made concerning these two statutes [330th Report, paras. 295-300].*
452. *As regards more specifically the allegations made in the present case, the Committee notes that the Government, again, intervened through legislation to modify or eliminate provisions from negotiated collective agreements. The Committee is particularly concerned at this new unilateral intervention, within a very short lapse of time, in view of its previous conclusions in Case No. 2173, and its concluding remarks, which it reiterates here: "The Committee notes that all the Acts complained of in these cases involve a legislative intervention by the Government in the bargaining process, either to put an end to a legal strike, to impose wage rates and working conditions, to circumscribe the scope of collective bargaining, or to restructure the bargaining process. Recalling that the voluntary negotiation of collective agreements, and therefore the autonomy of bargaining partners, is a fundamental aspect of freedom of association principles [see **Digest of decisions and principles of the Freedom of Association Committee**, 1996, 4th edition para. 844] ..., the Committee regrets that the Government felt compelled to resort to such measures and trusts that it will avoid doing so in future rounds of negotiations. The Committee also points out that repeated recourse to legislative restrictions on collective bargaining can only, in the long term, prejudice and destabilize the labour relations climate if the legislator frequently intervenes to suspend or terminate the exercise of rights recognized for unions and their members. Moreover, this may have a detrimental effect on workers' interests in unionization, since members and potential members could consider it useless to join an organization the main objective of which is to represent its members in*

collective bargaining, if the results of bargaining are constantly cancelled by law” [see 330th Report, para. 304].

- 453.** *The Committee considers in the present case that, following the decision of the Supreme Court, any changes that were made should have at least been the subject of full and frank consultations with the BCTF, especially as regards the various options to be considered. In addition, given the apparent disregard shown to the judgement of the provincial Supreme Court, the Committee recalls that respect for the rule of law also implies respect for the final outcome of the national judicial process and avoiding retroactive intervention in collective agreements through legislation. The Committee hopes that, in future, full, frank and meaningful consultations will be held with representative organizations in all instances where workers’ rights of freedom of association and collective bargaining are at stake.*
- 454.** *While recalling that the determination of the broad lines of educational policy is not a matter for collective bargaining between competent authorities and teachers’ organizations, although it may be normal to consult these organizations on such matters [see **Digest**, op. cit., para. 813], the Committee emphasizes that matters touching upon employment terms and conditions fall within the scope of collective bargaining.*
- 455.** *Emphasizing the utmost importance attached to the voluntary nature of collective bargaining and to the autonomy of bargaining partners, as fundamental aspects of freedom of association principles, the Committee once again firmly requests the Government to refrain in future from having recourse to such legislative intervention in the collective bargaining process. The Committee requests the Government to keep it informed of developments of the collective bargaining situation in the education sector.*
- 456.** *The Committee requests the Government to provide its observations on the additional allegations contained in the communication of 7 February 2006 from EI and the BCTF.*

## **The Committee’s recommendations**

- 457.** *In the light of its foregoing interim conclusions, taking into account the previous complaints concerning the interference of the Government of British Columbia in public sector collective bargaining, emphasizing the necessary respect for the principle of the rule of law, and recalling that the determination of the broad lines of educational policy that do not touch upon employment terms and conditions is not a matter for collective bargaining (although it may be normal to consult teachers’ organizations in this respect), the Committee invites the Governing Body to approve the following recommendations:*
- (a) *Noting that, following the decision of the Supreme Court, full and frank consultations should have been held with the British Columbia Teachers’ Federation (BCTF), the Committee firmly requests the Government of British Columbia to amend the impugned legislation, in line with freedom of association principles; the Committee once again requests the Government to refrain in future from having recourse to retroactive legislative intervention in the collective bargaining process and to keep it informed of developments as regards the collective bargaining situation in the education sector.*
- (b) *The Committee requests the Government to provide its observations on the additional allegations contained in the communication of 7 February 2006 from EI and the BCTF.*

## Annex

- 27 January 2002 Bill No. 27/2002 legislatively imposed a deemed collective agreement on the parties, modifying the previous provincial collective agreement by making changes largely on the terms sought during negotiations by the British Columbia Public School Employers' Association.
- 28 January 2002 Section 9 of Bill No. 28/2002 extensively amended section 27 of the British Columbia School Act by setting out a number of subjects that may not be included in a "collective agreement". The list of items which previously could not be included in a collective agreement, included terms:
- (a) regulating the selection and appointment of teachers under this Act, the courses of study, the programme of studies or the professional methods and techniques employed by a teacher;
  - (b) restricting or regulating the assignment by a board of teaching duties to principals, vice-principals or directors of instruction;
  - (c) limiting a board's power to employ persons other than teachers to assist teachers in the carrying out of their responsibilities under this Act and the regulations.
- Bill No. 28/2002 added a further list of items which cannot be included in a collective agreement between the parties. These include terms:
- (d) restricting or regulating a board's power to establish class size and class composition;
  - (e) establishing or imposing class size limits, requirements respecting average class sizes, or methods for determining class size limits or average class sizes;
  - (f) restricting or regulating a board's power to assign a student to a class, course or programme;
  - (g) restricting or regulating a board's power to determine staffing levels or ratios or the number of teachers or other staff employed by the board;
  - (h) establishing minimum numbers of teachers or other staff;
  - (i) restricting or regulating a board's power to determine the number of students assigned to a teacher; or
  - (j) establishing maximum or minimum case loads, staffing loads or teaching loads.
- An unusual process was mandated by Bill No. 28/2002 which eliminated the consensual appointment model of arbitration utilized in British Columbia. In place of the consensual appointment model, the Minister of Skills, Development and Labour (the "Minister") was given the power to appoint an arbitrator to determine whether a provision in the teachers' collective agreement constituted under Bill No. 27/2002 conflicted with or was inconsistent with section 27(3)(d)-(j), as enacted by Bill No. 28/2002. Section 27.1(2) required that the arbitrator "resolve all issues and make a final and conclusive determination ...".
- Arbitrator Eric Rice was appointed by the Minister on 17 July 2002 pursuant to section 9 of Bill No. 28/2002 to determine which provisions in the parties' collective agreement needed to be modified or eliminated due to the enactment of Bill No. 28/2002.
- 30 August 2002 Arbitrator Rice rendered his decision on 30 August 2002. In his decision, Arbitrator Rice deleted hundreds of provisions from the parties' collective agreement. These deletions covered a wide range of voluntarily agreed-to contractual provisions including class size, class composition, school-based teams, specialized services, staffing formulae, equitable distribution of workload provisions and limitations concerning home education students.
- 20 November 2002 The BCTF applied to the British Columbia Supreme Court for judicial review of Arbitrator Rice's decision. The matter was heard in the fall of 2003.

- 22 January 2004 Justice Shaw of the British Columbia Supreme Court issued the 2004 British Columbia Supreme Court ruling. Although he rejected the BCTF's challenge on the legality of Arbitrator Rice's appointment, Justice Shaw found five errors of law. Justice Shaw ruled that Arbitrator Rice should have applied the principle of harmonization to attempt to reconcile the differences between the legislative intention and the language embodied in the parties' collective agreement. Justice Shaw concluded that: "The errors of law that I have found are of such fundamental importance to a correct determination of the issues put to arbitration that it would be wrong to refuse a remedy." He therefore quashed the decision of Arbitrator Rice.
- 20 February 2004 The British Columbia Public School Employers' Association filed notice to the British Columbia Court of Appeal appealing the 2004 British Columbia Supreme Court ruling. The BCTF cross-appealed.
- 22 April 2004 The British Columbia Government enacted Bill No. 19/2004, effectively re-imposing Arbitrator Rice's decision stripping hundreds of provisions from the parties' collective agreement.
- 30 April 2004 The British Columbia Public School Employers' Association filed notice abandoning its appeal of the 2004 British Columbia Supreme Court ruling since the British Columbia Government had legislatively rendered its appeal academic. The BCTF abandoned its cross-appeal.

In summary, the British Columbia Government enacted legislation granting Arbitrator Rice jurisdiction to remove hundreds of provisions from the parties' collective agreement. Arbitrator Rice deleted these provisions from the parties' collective agreement on 30 August 2002. Consequently, the BCTF sought judicial review of Arbitrator Rice's decision, and the British Columbia Supreme Court restored many of the collective agreement provisions. **In response to the court ruling, the British Columbia Government, by legislation removed from the parties' collective agreement the provisions that the 2004 British Columbia Supreme Court ruling had restored.**

CASE NO. 1787

INTERIM REPORT

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

- **the International Confederation of Free Trade Unions (ICFTU)**
- **the Latin American Central of Workers (CLAT)**
- **the World Federation of Trade Unions (WFTU)**
- **the Single Confederation of Workers of Colombia (CUT)**
- **the General Confederation of Democratic Workers (CGTD)**
- **the Confederation of Workers of Colombia (CTC)**
- **the Trade Union Association of Civil Servants of the Ministry of Defence, Armed Forces, National Police and Related Bodies (ASODEFENSA)**
- **the Petroleum Industry Workers' Trade Union (USO)**
- **the World Confederation of Labour (WCL) and others**

***Allegations: Murders and other acts of violence against trade union leaders and members***

**458.** The Committee last examined this case at its May-June 2005 meeting [see 337th Report, paras. 489-551]. The Cali Municipal Enterprises Workers' Union (SINTRAEMCALI) sent additional information in a communication dated 6 June 2005. In a communication of

26 April 2005, the Caquetá Teachers' Association also provided additional information. The International Confederation of Free Trade Unions (ICFTU) sent new allegations in communications dated 14 September 2005 and 10 January 2006.

**459.** The Government sent its observations in communications dated 12 and 23 August, 12, 22 and 29 September and 20 October 2005 and 27 January 2006.

**460.** 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**

**461.** At its May-June 2005 meeting, the Committee made the following recommendations on the allegations that were still pending, which for the most part related to acts of violence against trade union members [see 337th Report, para. 551]:

- (a) in general, the Committee deplores that the reigning situation of impunity instils a climate of fear which prevents the free exercise of trade union rights. The Committee 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.
- (b) regarding the serious situation of impunity, the Committee is bound to reiterate the conclusions it reached in its previous examinations of the case, namely, that the lack of investigations in some cases, the limited progress in the investigations already begun in other cases and the total lack of convictions underscore the prevailing state of impunity, which inevitably contributes to the climate of violence affecting all sectors of society and the destruction of the trade union movement. The Committee once again urges the Government, in the strongest terms, to take the necessary measures to carry on with the investigations which have begun and to put an end to the intolerable situation of impunity so as to punish effectively all those responsible.
- (c) regarding those allegations on which the Government states that it does not have sufficient information, as these are serious allegations of abductions, disappearances and threats, the Committee requests the Government to take all the necessary measures so that, on the basis of the information recorded in the case, the corresponding investigations begin on these and all the other alleged acts of violence up to March 2005, on which there is no report that investigations or judicial proceedings have begun (Appendix I) and it asks the Government to continue sending its observations on the progress of the investigations that have already begun and on which it has already provided information.
- (d) the Committee once again urges the complainant organizations to take all possible measures to provide the Government with all the information they have on the allegations presented so that it can properly carry out investigations into them.
- (e) regarding the trade union status of some victims, queried by the Government, the Committee regrets that once again the complainant organizations did not submit that information to the Government and urges them once again to do so without delay.
- (f) regarding the measures of protection for trade unions and their members, the Committee requests the Government to continue to keep it informed of the measures of protection and of the security schemes implemented as well as those adopted in the future for other trade unions and other departments or regions.
- (g) regarding the allegations of aggression against FECODE members, the Committee asks the complainant organization to submit the necessary information to the Government so that it can carry out the relevant investigations.

- (h) lastly, and generally, the Committee considers that taking into account the violent situation which the trade union movement must face due to the serious situation of impunity, and the numerous cases that have not been resolved and the fact that the last mission of this Office to the area took place back in January 2000, it would be highly desirable to collect further and more detailed information from the Government and the workers' and employers' organizations, in order to have an up-to-date understanding of the situation. Consequently, the Committee suggests that the Chairperson of the Committee meet with the Government representative at the International Labour Conference in June 2005 with a view to determining possible future action so as to obtain the fullest information on the matter to place before the Committee.
- (i) the Committee requests the Government to send without delay its observations with regard to the new allegations presented by SINTRAEMCALI and the WFTU.

## B. New allegations

- 462.** In its communication of 21 April 2005, which was noted in the previous examination of the case [see 337th Report, para. 551(i)], the Cali Municipal Enterprises Workers' Union (SINTRAEMCALI) alleges that on Monday, 23 August 2004, representative Alexander López Maya, a former president of SINTRAEMCALI, was informed of a plan that was being developed to murder various political, trade union and human rights leaders, prepared by active and retired military personnel operating from the cities of Cali, Medellín, Barranquilla, Ibagué and Bogotá. In view of the above, he and several other persons met the Deputy Public Prosecutor and lodged a formal complaint concerning death threats, providing precise information on where these plans were being hatched. According to the information, the plan would commence with the physical elimination of the president of SINTRAEMCALI, Luis Hernández Monrroy, the president of the NOMADESC Association, Berenice Celeyta Alayón, and representative Alexander López Maya.
- 463.** On the same day, the Office of the Public Prosecutor and the Technical Investigation Unit (CTI) carried out two raids in the cities of Cali and Medellín, which revealed that the Colombian army had provided classified information to the private enterprise Consultoría Integral Latinoamericana (CIL), the personnel of which included Lieutenant Colonel Julián Villate Leal and retired Major Hugo Abondano Mikan. These activities were being undertaken by the CIL under a consultancy contract for security and global risk management, concluded by the National Energy Financing Agency by order of the Office of the Superintendent of Public Services, at the request of the official responsible for the management of the Municipal Enterprises of Cali (EMCALI). The purpose of these activities was to gather information to identify precisely the political views, customs, activities and, in particular, the vulnerability during their daily travel of trade union leaders of SINTRAEMCALI and other organizations and persons.
- 464.** This private enterprise in turn subcontracted to an armed private enterprise, known as SECARIS S.A., thereby constituting an unlawful parallel intelligence network which acted in coordination with the Third Brigade of the national army, the Office of the Superintendent of Public Services, the administration of the EMCALI; the Intelligence Service of the National Police (SIPOL); the National Electricity Financing Agency (FEN); the Ministry of the Interior and the Administrative Department of Security (DAS) and the metropolitan police of Cali, which were aware of, collaborated with, supported and, above all, assisted in the intelligence work carried out by these enterprises.
- 465.** In the house search (raid) carried out by the Office of the Public Prosecutor at the headquarters of the SERACIS and CIL enterprises in the cities of Cali and Medellín, several computers, documents and the personal diary of Lieutenant Colonel Julián Villate Leal were seized. The information contained in this diary (a copy of which was forwarded

by the union) records the holding of meetings by the managers of EMCALI with representatives of the above private enterprises, one of which is armed, in which activities were proposed to undermine freedom of association through the infiltration of SINTRAEMCALI, the promotion of a new trade union within EMCALI, the penetration of the security plans provided for SINTRAEMCALI for the protection of its leaders and members and the launching of legal proceedings against the latter.

- 466.** These activities entrusted by the Office of the Superintendent of Public Services and EMCALI to private enterprises, one of which was armed, were undertaken in a context of constant violations of the rights to life, freedom and integrity, particularly by state agents and paramilitary groups, a situation which led the Inter-American Commission on Human Rights to call for precautionary measures for the leaders of the trade union on 21 June 2000. On that occasion, the Inter-American Commission on Human Rights considered that “these trade union leaders are in imminent danger due to constant allegations and accusations by the civil and military authorities of the Department of Valle del Cauca that they are guerrillas, terrorists or sympathizers with insurgent groups”.
- 467.** On 27 January 2003, the national Government ordered the seizure, for the purposes of its liquidation, of the EMCALI. This gave rise to a new process of negotiation between SINTRAEMCALI and the Government with a view to seeking alternative solutions to overcome the crisis faced by the enterprise. As from that time, a wave of threats and hostile acts was unleashed against the organization and its leaders. During that period, 33 members of SINTRAEMCALI, including 12 of its leaders, were the victims of violations against their lives, personal integrity or freedom.
- 468.** On 21 October 2004, in Cali (Valle), Tania Valencia was the victim of threats and ill-treatment by members of an unidentified armed group. Ms Valencia was travelling to the headquarters of SINTRAEMCALI in her private vehicle, when she stopped at a traffic signal and a man pointed a firearm at her, entered the car beside her and ordered her to turn down the road towards Jamundí. A little further on, he ordered her to stop and two more men entered the vehicle. During the journey they insulted her and made disparaging remarks about her trade union activities. When they reached Jamundí, one of the men struck her on the head and made her walk bent double to a house which was very dark inside. Once inside, they struck her and interrogated her about representative Alexander López and the leaders of SINTRAEMCALI, Carlos Marmolejo and Carlos Ocampo. They told her they knew that she was a member of the “*Los Indumiles*” group and that, if she did not collaborate with them, they would kill her. The terms used are in accordance with those employed by the national army and the private enterprises SERACIS and CIL in their intelligence reports, in which they refer to the alleged existence of a group of workers whom they call “*Los Indumiles*”. Those indicated as belonging to this group include: the representative and a former president of SINTRAEMCALI, Alexander López Maya; Luis Antonio Hernández, current president of SINTRAEMCALI; Robinsón Emilio Masso, director of human rights in the union; and Oscar Figueroa, member of the executive board of SINTRAEMCALI. The interrogation lasted several hours. Finally, they said they would spare her life so she could take a message to Alexander López: “tell him to withdraw from the legal proceedings, otherwise we will shoot him in the head. Tell him to suspend his current legal proceedings and projects because, if not, he will soon come up against us.”
- 469.** On 2 December 2004, at approximately 1.40 p.m., Jhon Jairo Quintero Vargas, escort of Carlos Ocampo, one of the leaders of SINTRAEMCALI, was leaving the headquarters of SINTRAEMCALI, located in Street 18 Kr 6-54, when he was intercepted at the junction of Street 18 and Street 13 by three armed persons who fired on several occasions, breaking the windshield. According to the escort of the trade union leader, he had noted for several weeks that they were being followed and had even indicated to the leader that they should change their routes. Carlos Ocampo had on various occasions reported to the investigating



agencies that he and his family had been followed constantly since his election as a member of the executive board of SINTRAEMCALI.

- 470.** The facts relating to “Operation Dragon” (the name given to the plan to eliminate the leaders referred to above) were denounced by representative Alexander López at a public hearing held in the Congress of the Republic on 29 September 2004. On that occasion, the Minister of the Interior and Justice denied the existence of “Operation Dragon”. Nevertheless, an investigation has been taking place since October 2004 into these facts by the Human Rights Unit of the Office of the Public Prosecutor. Up to now, the investigation has been in the preliminary phase and no one has been identified in relation to these acts. Nevertheless, attacks have multiplied against members of the union and against Alexander López to persuade him to withdraw his claims for the situation to be investigated and for justice to be done.
- 471.** At various times, public officials, such as the Minister of the Interior and Justice, have made public statements casting doubt on the existence of “Operation Dragon”, and the Human Rights Director of the Ministry of the Interior, Rafael Bustamante, has indicated that “until the Office of the Public Prosecutor has completed the investigation, it is not possible to speak of the existence of such an operation”. At present, various means are being used to divert attention from and minimize the facts and responsibilities, facilitate impunity and cover up the operation of the security measures taken by the Government for the protection of trade union leaders and human rights defenders. The evidence that has so far been gathered in the case investigated by the National Human Rights Unit of the Office of the Public Prosecutor gives grounds for concluding that various activities have been undertaken deliberately and for political purposes to persecute and weaken the SINTRAEMCALI, in violation of freedom of association.
- 472.** The enterprise CIL includes among its personnel retired Major Hugo Abondano Mikan, who is also the legal representative of the armed private security firm SERACIS S.A. According to the trade union organization, the Major maintains relations with known paramilitary chiefs.

### ***Origins of the contract***

- 473.** On 15 June 2004, on the instructions of the Office of the Superintendent of Public Services, the FEN concluded a consultancy contract with the enterprise CIL for the purpose of “promoting global security risk management”, with the aim of “undertaking a study of the technical and socio-political risks” of the enterprise EMCALI. The FEN concluded this contract with the enterprise CIL without having the authority to do so. In turn, the enterprise CIL concluded a contract with the private armed enterprise SERACIS S.A. for advice, consulting and investigation, as well as intelligence on SINTRAEMCALI and its leaders, even though it did not have the authorization of the Office of the Superintendent to do so, as its remit is limited to mobile and fixed security and the provision of escort services. In addition, in violation of all the rules governing private security firms, the enterprise SERACIS S.A. operated in the city of Cali, opening an agency or branch without the authorization of the Superintendent of Private Vigilance and Security, with which it did not register its representatives. Lieutenant Colonel Julián Villate Leal and Major Marco Rivera Jaimes were working for the enterprise SERACIS S.A. in the city of Cali, without being in possession of permits from the Superintendent of Private Vigilance and Security for their work. In other words, an enterprise was contracted to undertake advisory, consultancy and investigatory activities which did not have an operating licence; offices were opened unlawfully in the city of Cali with personnel engaged in clandestine activities. In the computer seized from Lieutenant Colonel Julián Villate Leal, one of the mails was found which had been sent to the manager of EMCALI

clearly setting out what had been agreed in relation to the reasons and purpose of the contract:

This proposal consists of a first phase of three months. During this phase, procedures will be developed to follow and gather intelligence on the positions and activities of the union (...) the information obtained, the analyses and risk studies undertaken during this phase will provide the basis for developing, planning and coordinating the necessary security strategies and measures to address appropriately the risks and crises arising as a result of the positions and activities of the union, armed groups and groups which may be supporting the union's activities.

This means that it was proposed from the outset to undertake unlawful intelligence activities, in violation of freedom of association, to combat SINTRAEMCALI's opposition to privatization. Intelligence activities, which are the exclusive competence of state security bodies, were in this case entrusted to armed private enterprises, including among their personnel, persons suspected of collaborating with paramilitary structures, which have committed multiple crimes against the members of SINTRAEMCALI.

**474.** The following was stipulated with regard to the services required from CIL in its intelligence work:

The services are specified below which, in our opinion, are required to develop action and contingency plans for the security component, necessary to achieve the objectives set by the national Government, the Office of the Superintendent of Public Services and the enterprise management, with the expected levels of reliability and security.

*1. Monitoring and intelligence*

*Objective*

Compile information and carry out analysis of the strengths, interests and plans in existence in the union and opinion groups in the city, in the Department and at the national level, to provide a basis for decision-making and the development of action plans by the enterprise management.

*Specific aims*

Collect information within the union, groups which support or influence the union's decisions.

**475.** From the outset, it was clearly proposed to contract private enterprises for the evident purpose of infiltrating SINTRAEMCALI and carrying out intelligence work on the organization, and on persons and organizations (at the local, regional and national levels) which support it, to secure the plans established by the national Government, the Office of the Superintendent of Public Services and the management of EMCALI. The intention to undermine SINTRAEMCALI and the free exercise of trade union activities is evident.

### ***What activities were undertaken?***

**476.** Similarly, in the computer seized from Lieutenant Colonel Julián Villate Leal, a document was found entitled "DAS/questionnaire to Fabio.doc" setting out a series of requirements, especially relating to the leaders of SINTRAEMCALI, containing the following specifications:

Fabio:

The following is a list of the persons of interest to us in the union:

Luis Antonio Hernández Monroy President

Luis Enrique Imbachi Rubiano Vice-President

Oscar Figueroa Pachongo	Administrator
Harold Viafara González	Treasurer
Alberto Jesús Hidalgo L.	Secretary-General
Carlos Adolfo Marmolejo	Board member
Robinsón Emilio Masso Arias	Board member
Fabio Fernando Bejarano C.	Board member
Carlos Antonio Ocampo	Board member
Domingo Angulo Quiñónez	Vocal

The general information that we need on them, in so far as possible, is:

Home address

Home telephone number

Mobile phone number

Photograph

Security plan:

Vehicles assigned: colour, registration numbers, characteristics

Escort personnel: numbers

Communication team

Arms

Personal data:

Marital status

Spouse: name, occupation, other

Children: names, ages, other

Normal activities

Frequent journeys in Cali

Destinations outside Cali

Other available information on their personal profile:

Education

Whether they own businesses

Whether they own a ranch or properties

Problems which have arisen during the period when they have been escorted, with whom and for what reason

I do not know whether you have information on Alexander López, as any such information would be useful to me, including when he was being escorted. This is important.

Any other data which appear relevant to you are welcome.

**477.** The address book in the diary of Lieutenant Colonel Julián Villate Leal contains the name and telephone number of Fabio Ortiz who, at the time when the existence and activities of “Operation Dragon” became public knowledge, was the chief of protection of the DAS in the city of Cali, a position which he held until 4 January 2005, when he was appointed human rights chief in the same organization.

**478.** It should be recalled that the Government of Colombia has repeatedly informed the International Labour Organization and various intergovernmental organizations of the measures adopted to guarantee the right to life of trade union leaders, and accordingly

freedom of association, through the establishment of protection plans. The case of SINTRAEMCALI gives grounds for serious concern concerning the effectiveness, professionalism and transparency of such protection plans.

- 479.** The protection programme of the Ministry of the Interior has indicated on several occasions that the information that is discussed and approved in the Commission for the Regulation and Evaluation of Risks is totally confidential. Nevertheless, in the raid carried out by the Office of the Public Prosecutor at the home of Lieutenant Colonel Julián Villate Leal in the city of Cali, his personal diary was seized.
- 480.** The Lieutenant Colonel's diary, containing 50 pages, contains exclusive and detailed information on trade union and human rights organizations and opposition political parties. The most detailed information concerns the members of the executive board of SINTRAEMCALI, their security plans, the names of their confidential escorts, their identity card numbers, telephone numbers, the registration numbers of the vehicles assigned by the Ministry of the Interior protection programme, the type of armouring of each vehicle, the number of the motor, etc. The diary also contains detailed descriptions of persons under threat, some of whom benefit from protection measures requested by the Inter-American Commission on Human Rights.
- 481.** It is a matter of particular concern to note that page 31 of the personal diary of Lieutenant Colonel Julián Villate Leal contains a literal transcription of a communication sent by the Inter-American Commission on Human Rights to the Government of Colombia on 21 July 2000, requesting the adoption of protection measures for all the members of the executive board of SINTRAEMCALI. The concern is that information, which is only known to the Government of Colombia and those seeking and benefiting from protective measures, has been provided to armed private security firms.
- 482.** The content of the information contained in the diary of Lieutenant Colonel Julián Villate Leal, in view of its confidential nature, indicates that public bodies which are members of the Commission for the Regulation and Evaluation of Risks and which administer the protection programme for human rights defenders and trade union leaders passed on to armed private enterprises the security plans assigned by the Ministry of the Interior to the trade union leaders of SINTRAEMCALI and representative Alexander López Maya.
- 483.** This is illustrated by the level of detail of the vehicles assigned to the protection plan in the possession of the armed enterprise SERACIS S.A., which is only available to the bodies responsible for the security plans, such as the DAS.
- 484.** The emphasis placed on identifying the security plans of SINTRAEMCALI and its leaders is reaffirmed on page 8, which contains a list of questions, including: "Security plans for leaders? Security plans for the union? What are they?"
- 485.** Another cause for concern is the expression used on page 24 of the diary, which is emphasized as an objective to be achieved by the private armed enterprise and consists of "penetrating the escorts". This indication is particularly serious in view of the note on page 9 which includes, among the tasks to be carried out, "pressure to change personnel and security plans in the DAS ...".
- 486.** The task of establishing the operation and weaknesses of the assigned security plans was not confined solely to the DAS, as the enterprise EMCALI, through its head of security, also participated. Page 2 contains the name "Germán Huertas", head of security of EMCALI and retired army colonel, apparently in relation to a number of matters decided upon by Lieutenant Colonel Julián Villate Leal and retired Colonel Germán Huertas for the commencement of intelligence work, starting with the following list:

Map of areas of political interest for contractor, list of union addresses, etc., security and location, information on the U, background, location of areas of interest, institutional plan, security instructions for security enterprise and EMCALI, organizational chart, places where the union meets; it continues with a subtitle “Investigation” in which emphasis is placed on the following questions: Which union leaders left? Who stayed? Who sought disaffiliation? Reactions to their desertion. Who benefits from DAS security? Union’s legal and illegal income, means of communication, *Súper Occidente, Caracol*.

**487.** The various documents seized in the raid carried out in the city of Cali, including those contained in the computer of Lieutenant Colonel Julián Villate Leal and the enterprise SERACIS S.A., and in the former’s diary, contain repeated references and establish the objectives of undermining the right to freedom of association, and these subjects were covered in various meetings held with the public authorities.

**488.** One of the references is on page 5 of the personal diary, which contains a subtitle: “Possible strategies, fostering dissidence, strategy for counter communication, undermining the political career of Alexander López”. Furthermore, on page 9 of the diary the tasks established for the private armed enterprise include promoting: “assembly, changing leaders, promoting new candidates”.

**489.** Page 19 contains a list of questions which demonstrate the clear intent to promote and achieve the weakening of the trade union organization and to attack the right of freedom of association for trade unions:

- (1) Who can succeed those who were dismissed?
- (2) Who are the dissidents? How many? How? When?
- (3) Which branches of the enterprise are under union control?
- (4) Who are the militants?
- (5) What has to be done?
- (6) What security does the union have?

**490.** It is a matter of concern that private armed enterprises are contracted to promote dissidence and the weakening of a trade union organization. It is also of concern that private armed enterprises are entrusted with promoting candidates to replace trade union leaders who have been unlawfully dismissed, according to the information provided to the ILO.

**491.** The diary of Lieutenant Colonel Julián Villate Leal also contains a reference to the existence of meetings with persons working in EMCALI, which discussed:

Trade union organization: delegates  
 Who and which organization supports them: Berenice and others  
 Which trade union organization do they support  
 Contracts which they handle  
 Trainees  
 Who can provide leadership  
 Any decision  
 Income of trade unionists  
 How does it work as an institution  
 Which branches are under control  
 Who could lead the dissidence

What strategy should be followed

Networks and power of Alexander

Links with subversion

- 492.** The intelligence work is intended to achieve the undermining, weakening and persecution of SINTRAEMCALI, for which purpose the assistance of various public officials would be procured. Accordingly, the establishment of a network appears to be envisaged for the interception of communications, all outside the legal and constitutional rules. This emerges from the management report of 12 August 2004 to Huber Botello, in his capacity as manager of the CIL, which contains the following passage:

I am pleased to inform you of the arrangements made for my visit to the city of Cali for the period 9-12 August 2004, as follows:

Telephone and personal contact with Hugo Salas. He is a major in the army, works in the technical section of the telephone enterprise EMCALI. He is responsible for telephone monitoring based on legal requirements ... Direct communication established so that Julián can give him the necessary indications and requirements. Negotiation opened.

- 493.** Negotiations and open contacts were held with the person responsible for intercepting communications in the city of Cali, in disregard for constitutional procedures, in the sense that communications can only be legally intercepted under orders issued constitutionally.
- 494.** In a statement made to the Human Rights Unit of the Office of the Public Prosecutor, retired Major Hugo Salas acknowledged that he had been contacted and offered remuneration for information that he could provide on SINTRAEMCALI.
- 495.** Similarly, in the computer seized from Lieutenant Colonel Julián Villate Leal in the city of Cali, the file “/fuentes/emcali/direc/comentario1.doc” contained a document entitled “Summary of comments on the union”, indicating as alternatives for consideration:

- weakening the current leadership of the union through legal actions against it, including irrefutable proof of its participation in unlawful activities through the relevant organizations;
- SINTRAEMCALI and its inclusion in intelligence reports. The Office of the United Nations High Commissioner for Human Rights in Colombia has repeatedly recommended the revision and deletion of intelligence files, as their existence has been a source of persecution and violations of human rights, including freedom of association.

- 496.** In the context of “Operation Dragon”, an intelligence report was drawn up by the Third Brigade against SINTRAEMCALI, in which it was indicated:

The Cali Municipal Enterprises Workers’ Union has proven to be one of the most militant in the south-west of the country, with a high level of subversive infiltration by the ELN and the FARC. Subversive groups have found in this union a propitious environment for generating dissent and confrontation with the national Government.

- 497.** The same report indicates that the members of the union are the leaders of an allegedly subversive group which they call “*Los Indumiles*”. According to the report, “this group has turned into the ‘terror’ of workers, making them fearful to oppose any action by the union, and has set itself up as the ‘enforcer’ against anyone interfering in the organization’s activities”.

- 498.** It is also stated that:

The structure of the union includes a strong commission dedicated to human rights under the responsibility of Berenice Celeyta Alayón, a well-known lawyer who is the director of

NOMADESC, and who denounces alleged violations against EMCALI workers, thereby providing legal protection for trade union leaders faced with charges of rebellion and terrorism.

- 499.** Furthermore, these intelligence reports are not only intended to undermine the legitimacy of our union's activities in the legal and political fields, and in defence of human rights, but also provide the basis for atrocious acts, such as the murder of 16 of our activists, leaders and members, in some cases using barbarous methods in an attempt to terrorize the whole membership of the union, who are now working in a permanent state of anxiety.
- 500.** The gravity of the threats, of which SINTRAEMCALI is currently the victim, has led to the extension of protection plans to the family members of executive board members and activists, as well as to legal and human rights advisers in the union.
- 501.** In its communication of 6 June 2005, SINTRAEMCALI reports the decision of the Cali branch of the Office of the Public Prosecutor, of 11 April 2005, not to proceed with the investigation of Carlos Alberto González Narváez and Gustavo Tacuma Becerra, members of the union, in relation to the explosions which occurred at the headquarters of EMCALI on 7 June 2004. The trade union indicates that the above charges placed those persons and the trade union in a situation of vulnerability.
- 502.** In its communication of 14 September 2005, the International Confederation of Free Trade Unions (ICFTU) indicates that the recent Justice and Peace Act, No. 975, approved on 25 July 2005, provides a legal framework for the demobilization of the paramilitary forces of the Self-Defence Units of Colombia (AUC), which are negotiating the surrender of their arms with the Government. Furthermore, it confers upon the paramilitary the status of political prisoners and envisages short prison sentences even though they are responsible for crimes against humanity. Both international trade union organizations and Colombian and international human rights bodies have strongly criticized the new Act. The trade union organization quotes the High Commissioner for Human Rights who, in his press release, states that "the Act confers very generous judicial benefits on those responsible for these serious crimes, without making any effective contribution to revealing the truth or providing compensation". According to the trade union organization, the Act does not guarantee that the truth will be established because there will be no investigation of crimes, killings, collective murders, torture and forced displacement, nor any denunciation of those with real political responsibility; nor will the possessions taken violently from the victims and their family members be returned.
- 503.** The list of alleged acts of violence is as follows:

*Murders*

- (1) Agapito Palacios, member of the Chocó Teachers' Union (UNIMACH), was murdered on 4 January 2004 in the municipality of Unguía, Department of Chocó.
- (2) Bernardo Rebolledo, member of the Cartagena Taxi Drivers' Trade Union (SINCONTAXCAR), was murdered on 4 January 2004 in the city of Cartagena, Department of Bolívar.
- (3) Edgar Arturo Blanco Ibarra, member of the North Santander Teachers' Association (ASINORT), was murdered on 7 January 2004 in the city of Cúcuta, Department of North Santander.
- (4) Luz Aída García Quintero, member of the Antioquia Teachers' Association (ADIDA), was murdered on 15 January 2004 in the municipality of Carmen de Viboral, Department of Antioquia.

- (5) Jairo Gonzáles Oquendo, member of the Antioquia Teachers' Association (ADIDA), was murdered on 17 January 2004 in the city of Medellín, Department of Antioquia.
- (6) Daniel Vitola Pérez, member of the Cartagena Taxi Drivers' Trade Union (SINCONTAXCAR), was murdered on 23 January 2004 in the city of Cartagena, Department of Bolívar.
- (7) Francisco Lotero Ríos, member of the United Teachers' Union of Caldas (EDUCAL), was murdered on 27 January 2004 in the city of Manizales, Department of Caldas.
- (8) Calixto Gómez Rummer, member of the National Union of Coal Industry Workers (SINTRACARBON), was murdered on 31 January 2004 in the city of Riohacha, Department of Guajira.
- (9) Lucero Henao, leader of the Agricultural Workers' Union of Meta (SINTRAGRIM), was murdered on 6 February in the municipality of Castillo, Department of Meta.
- (10) Pedro Alirio Silva, official of the Putumayo Teachers' Association (ASEP), was murdered on 2 March in the municipality of Orito, Department of Putumayo.
- (11) Lina Marcela Amador Lesmer, member of the Putumayo Teachers' Association (ASEP), was murdered on 3 March in the Department of Putumayo.
- (12) Ferreira Osorio, member of the Petroleum Industry Workers' Trade Union (USO), was murdered on 11 March in the municipality of Barrancabermeja, Department of Santander.
- (13) José Arcadio Sosa Soler, official of the General Confederation of Labour (CGT), was murdered on 4 April in the district of Bogotá, Department of Cundinamarca.
- (14) Luis Francisco Gómez Verano, official of the Association for the Construction of the Aqueduct, was murdered on 6 April in the municipality of Mesetas, Department of Meta.
- (15) Nohora Martínez Palomino, member of the Teachers' Association of César (ADUCESAR), was murdered on 19 April in the municipality of Valledupar, Department of César.
- (16) Juan José Guevara, member of the North Santander Teachers' Association (ASINORT), was murdered on 19 April in the municipality of Villa del Rosario, Department of North Santander.
- (17) José María Ruiz Sara, member of the Teachers' Association of the Atlantic (ADEA), was murdered on 23 April in the municipality of Barranquilla, Department of the Atlantic.
- (18) Gerson Agudelo, member of the Union of National Education Ministry Workers (SINTRENAL), was murdered on 24 April in the municipality of Villa del Rosario, Department of North Santander.
- (19) Evelio Henao Marín, leader of the Union of Workers of the Department of Antioquia (SINTRADEPARTAMENTO), was murdered on 24 April in the municipality of San Rafael, Department of Antioquia.



- (20) Ovidio Arturo Marín Cuevas, member of the National Union of Liquor Industry Workers (SINTRALIC), was murdered on 4 May in the municipality of Cali, Department of El Valle.
- (21) Jesús Alberto Campos, member of the Arauca Teachers' Association (ASEDAR), was murdered on 7 May in the Department of Arauca.
- (22) Elías Durán Rico, leader of the Transit Workers' Union of Barranquilla, was murdered on 7 May in the municipality of Cisneros, Department of Antioquia.
- (23) Beatriz Pineda Martínez, member of the Antioquia Teachers' Association (ADIDA), was murdered on 9 May in the municipality of Barranquilla, Department of the Atlantic.
- (24) Wilson Gómez Sierra, member of the Santander Teachers' Union (SES), was murdered on 23 May in the Department of Santander.
- (25) Mildret Berteyd Mazo Jaramillo, member of the Antioquia Teachers' Association (ADIDA), was murdered on 26 May in the municipality of San Andrés de Cuerquia, Department of Antioquia.
- (26) Javier Montero Martínez, member of the Teachers' Association of César (ADUCESAR), was murdered on 1 June in the municipality of Valledupar, Department of César.
- (27) Fernando Ramírez Barrero, member of the Risaralda Teachers' Union (SER), was murdered on 1 June in the municipality of Pereira, Department of Risaralda.
- (28) Isabel Toro Soler, member of the Putumayo Teachers' Association (ASEP), was murdered on 1 June in the municipality of Yopal, Department of Putumayo.
- (29) Luis Ovidio Machado Nisperuza, member of the Córdoba Teachers' Association (ADEMACOR), was murdered on 1 June in the municipality of Montería, Department of Córdoba.
- (30) Nelson Wellington Cotes López, official of the DIAN Workers' Union (SINTRADIAN), was murdered on 4 June in the municipality of Barranquilla, Department of the Atlantic.
- (31) Salomón Freite Muñoz, member of the National Association of Civil Servants and Employees in the Judicial Branch (ASONAL JUDICIAL), was murdered on 21 July in the city of Cúcuta, Department of North Santander.
- (32) Yanis Valencia Fajardo, member of the Córdoba Teachers' Association (ADEMACOR), was murdered on 11 August in the municipality of Tierralta, Department of Córdoba.
- (33) Adiel Torres, member of the Putumayo Teachers' Association (ASEP), was murdered on 5 August in the municipality of Puerto Legízamo, Department of Putumayo.
- (34) Esther Marleny Durango Congote, member of the Antioquia Teachers' Association (ADIDA), was murdered on 7 August in the municipality of Anzá, Department of Antioquia.

- (35) Harold Antonio Trujillo, member of the Cali Municipal Enterprises Workers' Union (SINTRAEMCALI), was murdered on 8 August in the city of Santiago de Cali, Department of Valle del Cauca.
- (36) Luis Galindo, leader of the Agro Small and Medium-sized Producers' Union (SINDEAGRO), was murdered on 10 August in the municipality of Líbano, Department of Tolima.
- (37) Jorge Eliécer Valencia Oviedo, leader of the Valle Single Education Workers' Trade Union (SUTEV), was murdered on 23 August in the municipality of Tulúa, Department of Valle.
- (38) Manuel Gómez Wólfram, member of the Cartagena Taxi Drivers' Trade Union (SINCONTAXCAR), was murdered on 24 August in the city of Cartagena, Department of Bolívar.
- (39) Bernardo Rebolledo, member of the Cartagena Taxi Drivers' Trade Union (SINCONTAXCAR), was murdered on 4 January 2004 in the city of Cartagena, Department of Bolívar.
- (40) Miguel Córdoba, official of the Union of Sugar Cane Drivers and Workers of the Valle del Cauca (SINTRACAÑAVALC), was murdered on 4 January 2004 in the city of Palmira, Department of Bolívar.
- (41) Humberto Tovar Andrade, member of the Tolima Teachers' Union (SIMATOL), was murdered on 30 August in the municipality of Espinal, Department of Tolima.
- (42) Exenen Hernández Barón, member of the North Santander Teachers' Association (ASINORT), was murdered on 10 September in the city of El Carmen, Department of North Santander.
- (43) Luis José Torres Pérez, member of the National Association of Workers and Employees in Hospitals and Clinics (ANTHOC), was murdered on 11 September in the municipality of Bordó, Department of Cauca.
- (44) Luis Eduardo Duque, member of the Tolima Teachers' Union (SIMATOL), was murdered on 11 September in the municipality of Líbano, Department of Tolima.
- (45) Oler Hernández Moreno, member of the Single Construction Industry and Materials Workers' Union (SUTIMAC), was murdered on 11 September in the city of Sincelejo, Department of Sucre.
- (46) Iría Fenide Mesa Blanco, member of the Arauca Teachers' Association (ASEDAR), was murdered on 11 September in the municipality of Arauca, Department of Arauca.
- (47) Jean Warrean Buitrago Millán, leader of the DIAN Workers' Union (SINTRADIAN), was murdered on 15 September in the municipality of Tulúa, Department of the Valle.
- (48) Alfredo Correa de Adréis, leader of the Association of University Professors (ASPU), was murdered on 17 September in the municipality of Barranquilla, Department of the Atlantic.
- (49) Pedro Jaime Mosquera Cosme, official of the National Federation of Agricultural Unions (FENSUAGRO), was murdered on 6 October in the municipality of Arauca, Department of Arauca.

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- (50) Ana de Jesús Durán Ortega, member of the North Santander Teachers' Association (ASINORT), was murdered on 12 October in the city of Cúcuta, Department of North Santander.
  - (51) Angel de la Hoz Castelar, member of the Atlantic Branch of the Single Confederation of Workers of Colombia (CUT), was murdered on 19 October in the municipality of Soledad, Department of the Atlantic.
  - (52) Martha Lucía Gómez Osorio, member of the Tolima Teachers' Union (SIMATOL), was murdered on 23 October in the Department of Tolima.
  - (53) José Joaquín Cubides, member of the Arauca Agricultural Workers' Union (SINTRAGRICOLAS), was murdered on 7 November in the municipality of Fortul, Department of Tolima.
  - (54) Eli Machado Wolmar, member of the North Santander Teachers' Association (ASINORT), was murdered on 8 November in the city of San Calixto, Department of North Santander.
  - (55) Arnoldo Cantilla, member of the Cartagena Taxi Drivers' Trade Union (SINCONTAXCAR), was murdered on 24 November in the city of Cartagena, Department of Bolívar.
  - (56) Juan Mrando Usula, member of the Cartagena Taxi Drivers' Trade Union (SINCONTAXCAR), was murdered on 24 November in the city of Cartagena, Department of Bolívar.
  - (57) Senen Mendoza Molinares, member of the Teachers' Association of César (ADUCESAR), was murdered on 24 November in the municipality of Codazzi, Department of César.
  - (58) Juan Bernardo Gil, member of the Meta Teachers' Association (ADEM), was murdered on 6 December in the municipality of Mesetas, Department of Meta.
  - (59) Héctor Téllez Alzate, member of the Valle Single Education Workers' Union (SUTEV), was murdered on 6 December in the municipality of Tulúa, Department of the Valle.
  - (60) Carlos Eduardo Montoya Gutiérrez, member of the Risaralda Teachers' Union (SER), was murdered on 12 December in the municipality of Pereira, Department of Risaralda.
  - (61) Nelson de Jesús Martínez, member of the Antioquia Teachers' Association (ADIDA), was murdered on 18 December in the municipality of Carmen de La Ceja, Department of Antioquia.
  - (62) José Nevardo Osorio Valencia, official of the Risaralda Teachers' Union (SER), was murdered on 27 December in the municipality of Mistrato, Department of Risaralda.
  - (63) José Ortiz, member of the Single Union of Education Workers of the Amazon Region, was murdered on 29 December in the municipality of Puerto Santander, Department of the Amazon.
  - (64) John Smith Ruiz Córdoba, member of the Cauca Teachers' Association (ASOINCA), was kidnapped on 6 May 2005 and murdered on 9 May 2005.

- (65) María Elena Díaz, member of the Valle Single Education Workers' Union (SUTEV), was murdered on 24 May 2005 in the Department of the Valle.
- (66) Myriam Navia Silva, member of the Valle Single Education Workers' Union (SUTEV), was murdered on 2 June 2005 in Cali.
- (67) Alfredo Mendoza Vega, member of the Teachers' Association of César (ADUCESAR), was murdered on 9 June 2005 in the municipality of Valledupar.
- (68) Gilberto Chinote Barrera, former official of the Petroleum Industry Workers' Trade Union (USO), was murdered on 28 July 2005 in the Estrella quarter of the city of Bolívar.
- (69) Factor Antonio Durango, president of the Trade Union Association of Bookmakers and Lottery Workers of Antioquia (ASCAPLAN), was murdered on 17 August 2005. He benefited from a security plan, which had been suspended by the DAS despite the death threats he had received.
- (70) Manuel Antonio Florez, member of SINTRAINAGRO, was murdered on 20 August 2005 in Barrancabermeja.
- (71) Luciano Enrique Romero Molina, leader of the National Food Workers' Union (SINTRAINAL), was murdered on 10 September 2005 in Las Palmas. He was under threat and benefited from security measures provided by the Inter-American Commission on Human Rights.
- (72) Derly Cecilia García, nurse, was murdered on 9 December 2005 in Puerto Gaitán, municipality of TAME.
- (73) Angel Manuel Pérez Tobar, teacher, was murdered on 14 December 2005, in Santa Ana, municipality of Santa Ana.

#### *Attempted murder*

Jorge Ortega, branch president of the Petroleum Industry Workers' Trade Union (USO), on 14 May 2005 in Cartagena.

#### *Arrests*

- (1) Jesús Javier Dorado Rosero, Territorial Affairs Secretary of the executive board of the Nariño Magistrates' Union (SIMANA), on 27 May 2005, by members of the Administrative Department of Security, charged with rebellion.
- (2) Ricardo Santrich Pernet, member of the Magdalena Teachers' Union, on 30 May 2005, charged with rebellion, is detained in the Barranquilla prison.
- (3) Hernando Hernández Tabasco, Director of the Human Rights Department of the National Federation of Agricultural Unions (FENSUAGRO), on 1 June 2005, is in Manizales. Mr. Hernández Tabasco had been transferred in 2001 in view of the constant threats from the Central Paramilitary Block "Heroes of Bolívar". He benefits from security measures provided by the Inter-American Commission on Human Rights. On 4 June 2005, Mr. Hernández was accused by the DAS of being a member of the 45 Front of the FARC.

*Threats*

- (1) The Nariño Magistrates' Union (SIMANA), according to the ICFTU's allegations, is constantly the victim of threats by the paramilitary forces of the Liberators of the South Block of the Self-Defence Units of Colombia (AUC).
- (2) Leaders of the Single Confederation of Workers of Colombia (CUT), and particularly Rafael Antonio Ovalle Archille, leader of the Trade Union of Workers and Employees in Public and Autonomous Services and Decentralized Institutions of Colombia (SINTRAEMSDES), have received threats from the Central Bolivar Block of the Self-Defence Units of Colombia. If they fail to cede to the threats by withdrawing from their trade union activities, the following are threatened with death: Carolina Rubio, Gabriel González, César Plaza, Adela Peña, Martha Díaz, William Rivero, Jaime Reyes, David Flores, Rodrigo Córdoba, Oswaldo Bonilla, Alfonso León, Jorge Cadena and Wilson Ferrer (trade unionists and prosecutors).
- (3) Samuel Morales Florez, president of the Arauca branch of the Single Confederation of Workers, and his family have received constant threats. Mr. Morales has been in detention in the model prison of Bogotá since 5 August 2004, when Héctor Alirio Martínez, Leonel Goyeneche and Jorge Prieto were murdered (as reported in a previous examination of the case). According to the complainant organization, the threats originate from members of the army in view of the allegations made in relation to the murders of the three leaders referred to above.

**C. The Government's reply**

- 504.** In its communications dated 12 and 23 August, 12, 22 and 29 September and 20 October 2005 and 27 January 2006, the Government has provided the following observations in reply to the recommendations made by the Committee in its previous examination of the case.
- 505.** In relation to points (a) and (b) of the recommendations relating to the situation of impunity, the Government indicates that the Government and the Office of the Public Prosecutor have joined forces to achieve the best results in the investigations that are being conducted, even though some of them are making little progress in view of the means used by illegal groups outside the law (paramilitary forces and guerrillas), for which the only witnesses are the members of these criminal organizations. For this reason, the State is currently engaged in a process of reinsertion, demobilization and investigation of these crimes so as to reduce the incidence of impunity, since 88 per cent of the cases that are under investigation to identify those responsible relate to crimes which were committed in sparsely populated and marginal areas with serious public order problems.
- 506.** The Government shares the Committee's concern with regard to the situation of impunity in penal matters. For this reason, with a view to making the investigation procedure more flexible, Act No. 906 of 2004 was adopted establishing a new adversarial penal system. This system, which entered into force on 1 January 2005, is the outcome of serene reflection by the members of the Constitutional Commission and many of those engaged in the judiciary, academics, law professionals and trade unionists in general, who at this very difficult time were willing to provide their knowledge and experience on a voluntary basis to resolve the problem of penal justice in the country. Although admittedly there was a certain reticence at the beginning, the concept has finally received the support of many sectors and is considered a real option to improve the administration of penal justice. The system has its basis in the Constitution, in articles 29 and 250. The first of these provisions establishes the right of every citizen to a "public trial without unreasonable delays, to present evidence and refute charges made against them". Article 250 provides that "the

Office of the Public Prosecutor shall bring criminal charges and conduct investigations of acts which may constitute offences which come to its knowledge following a denunciation, special petition or dispute, or of its own motion, if there are sufficient reasons and circumstantial evidence to indicate that a crime may have been committed. It may not consequently suspend, interrupt or decide to end a criminal prosecution, except in the cases established by law for the application of the principle of equality of opportunity as regulated within the framework of the criminal policy of the State, the lawfulness of which shall be examined by the judge responsible for compliance with the [constitutional] guarantees”.

- 507.** The new adversarial system is also based on the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the American Convention on Human Rights, taking into account higher standards relating to the principles of publicity, oral process, rapidity, mediation and adversarial proceedings.
- 508.** It is envisaged that the Office of the Public Prosecutor will be strengthened by the removal of judicial functions, so that it can be solely and exclusively dedicated to the function of investigation, with the support of the forces of the Judicial Police that are under its direction, coordination and control in all action taken on the basis of the executive report which has to be submitted within 36 hours of notification of the act (by any of the means established by law) in cases where there are sufficient reasons and circumstantial evidence to assume that a crime may have been committed. This ensures impartiality and equality between the parties with a view to reaching a just ruling through an oral, focused and adversarial process with equality of arms for the plaintiff and defendant. This in turn implies a change in the role of the Public Prosecutor in the sense that, despite remaining part of the judicial branch, she or he loses the power to take judicial decisions. For the discharge of this function, the establishment of a highly technical and professional judicial police force is envisaged. It will also be integrated with the state agencies which, in discharging their functions, are entrusted with investigatory powers under the coordination and direction of the officers of the Public Prosecutor. The National Forensic Medicine and Science Institute, as well as the laboratories of the judicial police agencies, will provide the necessary support throughout the national territory for the effective discharge of this function, particularly in those cases in which the judicial police can intervene directly in the context of investigations without the intervention of the Public Prosecutor.
- 509.** The envisaged efficiency of the system necessarily involves a balance between the prosecution and the defence, which involves the need to restructure and strengthen the Office of the Public Ombudsperson to ensure a real presence within the penal process, thereby guaranteeing a true judgement between the parties. This takes into account the fact that, in our country, very few plaintiffs and defendants are able to pay for their own defence.
- 510.** The establishment of the function of supervising compliance with constitutional guarantees, to be discharged by municipal judges, with the exception of matters falling within the competence of the Penal Chamber of Cassation of the Supreme Court of Justice (a function discharged by the Penal Chamber of the Supreme Court of Bogotá), is one of the essential characteristics of our adversarial system to verify and ensure the lawfulness of all acts related to fundamental rights.
- 511.** In the explanation of the reasons for these changes submitted to the Congress of the Republic, it was stated that: “(...) the solution is envisaged of removing from the Office of the Public Prosecutor judicial functions involving the fundamental rights of trade unionists, so that it can focus all of its energy on investigating crimes and bringing charges to the courts against any persons in violation of criminal law”.

- 512.** Oral proceedings eliminate once and for all the burden of carrying out trials by means of written documents (originals and copies), which undoubtedly gives rise to enormous costs, as well as significant delays in the related acts and proceedings. It should be borne in mind that, although not in every case, there are now proceedings of enormous volume (up to over 100 original notebooks, without counting copies and appendices), making their examination and analysis both difficult and costly. For this reason, section 145 of the Code of Penal Procedure (CPP) provides that “all the proceedings, both prior to and during the trial, shall be oral”, with the proceedings being recorded by technical means to ensure their accuracy.
- 513.** The principle of publicity is established in technical terms in the CPP, in sections 149 et seq., in order to guarantee the access of the community to the courts, as well as the transparency of truly democratic proceedings in accordance with article 1 of the Political Constitution.
- 514.** The principle of equality of opportunity, which is not opposed to the principle of legality, is established as an effective instrument for the functioning of the system within the context of the State’s criminal policy.
- 515.** A party producing material evidence must not influence the official entrusted with compiling and assessing the evidence. The involvement of the respective judge in compiling the evidence facilitates compliance with the principle of adversarial proceedings with a view to reaching an impartial, autonomous and independent decision.
- 516.** The formalization of the function of the bringing of charges as the most important role of the Office of the Public Prosecutor in legal proceedings is balanced by the communication of the material evidence to be submitted during the hearing so that the defence is informed of it and can present its own evidence at the preliminary hearing.
- 517.** The trial hearing, as the most important element of the procedure in the adversarial system, will be the appropriate setting for the examination of the evidence directly by the judge without the intervention of any other official or its deterioration through the inexorable passage of time, thereby ensuring its preservation and more effective and appropriate adversarial proceedings between the parties.
- 518.** The role played by the victims will contribute to the involvement of the community in the process, thereby changing its perception of the manner in which rights are safeguarded and asserted, and the effectiveness with which justice is administered. Through the impact of integral compensation and programmes for the restoration of justice based on conciliation and mediation, victims will be able to obtain compensation for the damages caused by the crime, while the Office of the Public Prosecutor remains responsible for taking urgent measures to guarantee their personal safety and that of their family, and for protection against any publicity which implies an attack on their privacy or dignity (section 102 of the CPP).
- 519.** The roles played within the adversarial system by the various actors, whether they are lawyers, experts, investigators, judges, the Department of the Public Prosecutor and Ombudspersons, are determined by the Department of the Public Prosecutor. This is the body through which the State is represented and defended, as well as the interests of the Treasury and the general interests of society in the administration of justice. During criminal proceedings, with a view to giving effect to the principle of technical defence, a lawyer is automatically assigned to the defence by law for each defendant, unless a registered lawyer is appointed by the defence, accepts the case and takes legal responsibility for it.

**520.** The first benefit that it is hoped to obtain is the decongestion of judicial bodies, with a view to avoiding the delays which, under the current system, have had a direct effect on social perceptions, diminishing the credibility of the administration of justice. The right of a defendant to a trial without unjustified delay is a guarantee which forms part of the human rights set out in the Universal Declaration of Human Rights, in Article 10, as well as in the European Convention for the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights.

**521.** With the new oral adversarial system, the progress made in the field of investigation and court proceedings has given excellent results. A clear example is that, in the six months following the commencement of the system, which up to now has been operating in the coffee region and in Bogotá DC, some 2000 judgements have been handed down.

**522.** As shown by the information provided in the table on the status of investigations of murders of trade unionists in 2005, the results of the investigations have been very significant. Accordingly, as indicated by the Office of the Public Prosecutor, of the total of 23 investigations, 17 of which are in the preliminary or initial inquiry phase, five are at the inquiry or investigation stage and one is before the court: 22 of the investigations are at the stage of the gathering of evidence, in one of the investigations charges have been brought, in four investigations precautionary measures have been adopted in the form of preventive detention and in only one of the investigations has a decision been taken not to proceed with the inquiry in accordance with section 327 of Act No. 600 of 2000.

**523.** The following is a list of the sentences handed down in trials for crimes committed against trade unionists.

Name of trade unionist	Jurisdiction	Convicted	Sentence	Comments
1. Roque Alfonso Morelli Zarate	Single Specialized Court of Santa Marta	Leonardo de Jesús Ariza, Edgar Antonio Ballesteros	360 months each (30 years each)	Date of crime, 5 September 2002. Sentenced on 16 September 2004.
2. Oscar Jaime Delgado Valencia	Third Criminal Court, Armenia Circuit	Edilson Ospina Rubiano Crimes: aggravated murder, attempted qualified and aggravated robbery and unlawful possession of personal defensive firearms	28 years' imprisonment	Date of crime, 4 February 2002. Teacher Jaime Delgado Valencia, when leaving the school, was accosted by two persons to rob the chains he was wearing and, as he tried to seize and recover the chains from the attacker, he was shot in the head and the attacker escaped. Third Criminal Court, Armenia circuit. Conclusion: according to the sentence, he was murdered for reasons of common crime (robbery), therefore he was not murdered as a result of his trade union activities. Sentenced on 2 December 2002.
3. Joselino Beltrán Sepúlveda	First Specialized Court of Popayán	José María Reyes Guerrero	29 years	Date of crime, 19 November 2002.



Name of trade unionist	Jurisdiction	Convicted	Sentence	Comments
4. José Fernando Mesa Alvarez	Single Specialized Court of Santa Marta	Jaime Alberto Pavuena Vanegas	Sentenced in 2004 to 320 months' imprisonment	Date of crime, 2002. Sentenced on 4 August 2004.
5. Jorge Ignacio Boada Palencia	Sixth Criminal Court of E. Bogotá	Hugo Antonio Toro Restrepo	28 years' imprisonment	Date of crime, 17 April 1998. Sentenced on 16 July 2004.
6. Wilson Borja Díaz	National Human Rights Unit (UNDH)	Maldonado Vidales, major in the Colombian army Rueda Chávez Peña Avila, Rojas Galindo (retired corporal, Colombian army), Basto Bernal (corporal, Colombian army). Olaya Grajales (former soldier), Cadavid Acevedo (former lieutenant, Colombian army), Peña Avila (former corporal, Colombian army), Valero Santana (soldier, Colombian army), Castaño Gil (these five persons sentenced in absentia)	28 years 28 years 42 months 18.5 years 18.5 years	15 December 2000.
7. Tomás Quiñónez	UNDH	Maldonado Vidales (major in the Colombian army) Rueda Chávez Peña Avila, Rojas Galindo (retired corporal, Colombian army), Basto Bernal (corporal, Colombian army). Olaya Grajales (former soldier), Cadavid Acevedo (former lieutenant, Colombian army), Peña Avila (former corporal, Colombian army), Valero Santana (soldier, Colombian army), Castaño Gil (these five persons sentenced in absentia)	28 years 28 years 42 months 18.5 years	Date of crime, 15 December 2000.

Name of trade unionist	Jurisdiction	Convicted	Sentence	Comments
8. Sandra Liliana Quintero Martínez Gilberto Díaz Germán Martínez María Gladis Rodríguez	UNDH	Olga Lucia Sánchez Castrillón (alias Morooha or Yunari) FARC Front 21		Date of crime, 16 March 2002. The court ended the prosecution in view of the death in combat with the Colombian army of Olga Lucia Sánchez Castrillón.
9. Jacobo Rodríguez		Javier Reyes Hernández	Sentenced	Date of crime, 18 September 2001.
10. Luis Miguel Rubio Epinel	Third Criminal Court, Cúcuta Circuit	Víctor Julio Pallares Ibarra	320 months' imprisonment	Date of crime, 15 July 2001. Sentenced on 4 August 2004.
11. Luis Enrique Coiran Acosta	Specialized Court of Cúcuta		Sentenced	Date of crime, 19 June 2002.
12. Cristina Echeverry Pérez	Specialized Criminal Court of Manizales	Mauricio de Jesús Espinoza Córdoba y Verónica, Berlain Sánchez Jaramillo A. Chiquito Becerra Manuel Salvador Florez Marinez Antonio Torres Torres	21 years and 8 months' imprisonment 35 years imprisonment 16 years and 8 months 16 years and 4 months' imprisonment	Date of crime, 23 June 2001. Sentenced on 12 June 2003.
13. Hugo Ospina Ríos	Fourth Criminal Court, Risaralda Circuit	Andrés Mauricio Sánchez Gelves, Carlos Fernando and Molina Agudelo	13 years' imprisonment	Date of crime, 26 February 2002. Sentenced on 5 March 2005.
14. Rito Hernández Porras	Mixed Court, Saravena Circuit	Jaime Nelson, Jorge Hugo, Edwin and Werner Londoño, Mosquera, González Florez y Oliveros Agudelo	Preventive detention	Date of crime, 22 July 2003.
15. Bertilda Pavón Orozco	Criminal Circuit Court	Geovanny Alfonso Escamilla Maldonado	29 years	Date of crime, 3 January 2002 .Sentenced on 7 October 2002.

**524.** With regard to point (c) of the recommendations concerning investigations, the Government recalls that it is the party most interested in investigations being conducted and completed of alleged kidnappings, disappearances and threats. Therefore, as soon as any such acts come to its knowledge, it enters into contact with the competent bodies to ensure that investigations are being conducted and have commenced. Nevertheless, the Government indicates that, on certain occasions, the information provided by the complainant organizations is inadequate and that it is consequently very difficult for the competent agencies to be able to indicate the stage reached in the investigations.

**525.** However, the Government also recalls that it is making every effort to ensure that investigations are conducted and that it will keep the Committee informed. The Government is currently working in collaboration with the Public Prosecutor with a view, among other objectives, to initiating legal proceedings and compiling an updated report on investigations into acts of violence against trade union leaders and members.

**526.** The Government provides a report, reproduced below, of the investigations that are currently being conducted into murders of persons associated with trade union organizations by the offices of the Public Prosecutor for 2002-04:

Sectoral office	Murders 2002	Murders 2003	Murders 2004	Murders 2005	Total
Bogotá	1	0	5	0	6
Antioquia	4	4	3	1	12
Armenia	3	0	0	0	3
Barranquilla	2	2	1	0	5
Bucaramanga	8	4	1	1	14
Buga	2	2	9	0	13
Cali	9	4	6	1	20
Cartagena	2	1	3	3	9
Cúcuta	21	27	9	1	58
Cundinamarca	0	1	0	0	1
Florencia	8	1	0	0	9
Ibagué	2	4	1	0	7
Manizales	4	2	0	3	9
Medellín	26	7	9	0	42
Mocoa	3	1	4	0	8
Montería	0	1	0	2	3
Neiva	4	1	0	0	5
Pasto	7	2	0	0	9
Pereira	2	3	2	1	8
Popayán	3	1	4	0	8
Riohacha	1	0	1	0	2
Santa Marta	15	6	1	1	23
Santa Rosa de Viterbo	1	1	1	1	4
Sincelejo	2	2	1	0	5
Tunja	0	0	4	0	4
National Human Rights Unit	6	2	4	0	12
Valledupar	1	2	5	0	8
Villavicencio	2	0	4	0	6
Total	139	81	78	15	313

**527.** It may be concluded from the table above that:

- the total number of investigations into murders of persons associated with trade union organizations is 313;
- the local office of the Public Prosecutor of Cúcuta is investigating 58 cases of murders of persons associated with a trade union organization. This office covers the region with the most violations;

- the local office of the Public Prosecutor of Cundinamarca is investigating one case of the murder of persons associated with a trade union organization. This office covers the region with the lowest number of violations.

**528.** The decisions which have been adopted in each of the investigations for the years 2002-04 are as follows:

Decision	Total
Imposition of precautionary measures. Preventive detention.	36
Decision to bring charges	21
Sentenced	4
Order the gathering of evidence	131
Order completion of the investigation to assess its merits (to bring charges or close the case)	5
Order that the investigation should not proceed	99
Suspension of the investigation	19
Order the closure of the case	2

**529.** The above table shows that the 313 cases in which the victims of murders are associated with a trade union organization have been covered by effective investigations, the gathering of evidence has been ordered with a view to identifying those responsible for the crime, sentences have been imposed and those responsible for the crime have been imprisoned.

**530.** It should be noted that, in accordance with Act No. 600 of 2000, the Public Prosecutor or officers shall not order an investigation to be commenced, that is shall decide that an investigation shall not proceed, when criminal proceedings cannot be initiated or pursued. This decision is provisional since, once evidence is obtained demonstrating the responsibility of those who committed or participated in the crime, the investigation may be continued.

**531.** Decisions not to proceed with or to suspend investigations mean that evidence was gathered, but that it was not possible to identify those responsible or who participated in the crime. Nevertheless, such decisions are provisional, as the investigation may be continued where such evidence is produced.

**532.** It is also important to emphasize a number of the reasons why an investigation may be provisionally suspended or a decision taken not to proceed with it:

- difficulties relating to the protection of witnesses;
- lack of collaboration by the community in providing information to help clarify the events;
- difficulties for investigators to travel to the scene of the crime because it occurred in areas in which public order is not effective;
- difficulties relating to the identification of members of illegal armed groups, such as paramilitary forces and guerrillas;
- the refusal of witnesses to give evidence;
- the lack of witnesses who can identify or indicate those responsible for crimes.

**533.** The Public Prosecutor, with the assistance of the judicial police, undertakes a methodological programme to gather evidence with a view to elucidating crimes, for which purpose objectives are established and the investigation coordinated and controlled.

**534.** Appendices 1, 2, 3 and 4 contain various tables showing the current situation with regard to investigations:

- Appendix 1 shows the current situation with regard to investigations in 2002-05 concerning cases of victims associated with trade union organizations and prosecutions in which sentences have been imposed;
- Appendix 3 enumerates the situation with regard to the investigations which have been undertaken up to now by the Public Prosecutor.

**535.** With regard to point (f) concerning protection measures for trade unions and their members, the Government places emphasis on its constant concern to ensure respect for the human rights of the inhabitants of the country, particularly in the case of trade union leaders. It has accordingly continued to strengthen the protection programme, despite the budgetary deficit, of which everyone is aware. At present, protection plans are in operation for 163 trade unions, and up to 2004 the programme had covered 6,107 trade union leaders (Appendix 2).

**536.** The strengthening of the protection programme is described below, and it may be noted that 54.96 per cent of the total budget is currently allocated for trade union leaders.

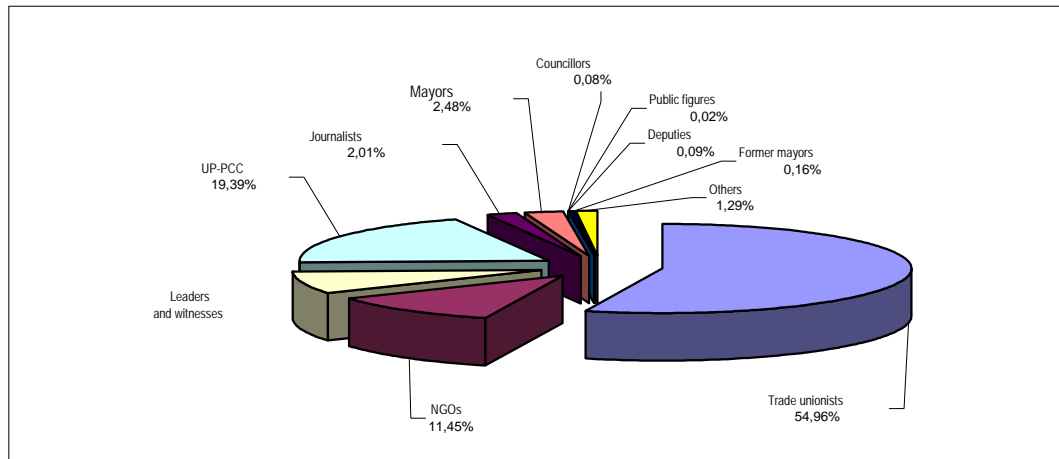
#### Financial strengthening of the protection programme – Budgetary resources (thousands of Colombian pesos)

Year	National budget	USAID international cooperation	Total	Increase in relation to previous year (percentage)
1999	4 520 000		4 520 000	0
2000	3 605 015		3 605 015	-20
2001	17 828 455	4 095 000	21 923 455	508
2002	26 064 000	4 043 995	30 107 995	37
2003	29 000 000	4 954 955	33 954 955	13
2004	30 740 000	6 426 304	37 166 304	9
Total	111 757 470	19 520 254	131 277 724	

Budgetary period	Amount	Proportion
1999-31 July 2002	36 017 470	32.23
August 2000-June 2004*	75 740 000	67.77
Total	111 757 470	100.00

\* In addition, during this period resources totalling 13,066 million pesos were made available through international cooperation.

## Budgetary allocations



	Quantity						Total
	1999	2000	2001	2002	2003	2004	
Persons directly benefiting from protection measures	84	375	1 043	1 566	1 424	1 615	6 107
Mobile protection plans:							
with vehicle		31	60	70	40	13	
escort vehicles						10	224
Armouring for buildings		40	1	27	30	25	123

## 2004

Item	Quantity
Number of sessions of the Commission for the Regulation and Evaluation of Risks	33
Persons directly benefiting from protection measures	1 615
Mobile protection plans in operation	23
Armouring for buildings	25
Bullet-proof jackets	22
Communication equipment:	
1. Avantel 615	
2. Celular 692	1 307
Support measures:	
Support for temporary relocation	114
National air tickets	144
International air tickets	1
Support for transport	106
Participation by national budget (thousands of pesos)	17 518 801

**537.** In relation to security, the Government indicates that the security of citizens is one of its priorities and that, with a view to affording the whole community the means and resources indispensable for its protection, the Government issued Decree No. 2170 of 7 July 2004, determining the organization and operation of the National Citizens' Security and Coexistence Fund.

- 538.** As the International Labour Organization is aware and recognizes, the Government, in its constant concern to ensure respect for the human rights of the inhabitants of the country, with particular regard to trade union leaders, in 1997 established the protection programme, which is unique in the world, through the “Commission for the Regulation and Evaluation of Risks (CRER) of the Programme for the Protection of Witnesses and Persons under Threat”, under the leadership of the Ministry of the Interior and Justice. The objective of the programme is to protect persons who are in a situation of imminent risk affecting their life, integrity, security or freedom for reasons related to political or ideological violence, or terrorism. This is a clear demonstration of the concern of the country’s leaders that, despite the budgetary deficit, which is common knowledge, great efforts should be made to ensure the protection of trade unionists.
- 539.** Between August 2002 and June 2004, the Government invested 111,757,470 Colombian pesos in the protection programme, in addition during the same period to resources totalling 13,066 million Colombian pesos through international cooperation.
- 540.** Despite the protection measures provided, various factors unfortunately affect the community as a whole and it is therefore necessary to recall that murder victims come from many sectors of society and all types of situations, ranging from those who simply live in situations of conflict to those whose work involves risks, of whatever type.
- 541.** The following table shows the total number of murder victims in relation to the number of murdered trade unionists.

Comparative table of murders 2000-May 2005

Year	Total number of victims	Murders of trade unionists	Variation (percentage)
2000	26 540	155	0.5
2001	27 841	205	0.7
2002	28 837	196	0.6
2003	23 507	101	0.4
2004	20 167	89	0.4
2005	7 025	21	0.2

- 542.** This information is not intended as a justification since, as the Government has always indicated, “for Colombia, even a single violent death is sufficient to maintain its efforts to strengthen state action to guarantee the life of its citizens, including most particularly trade union leaders and members, in view of their importance for our democracy”.
- 543.** Of the 93 persons reported in the communication sent in 2004 by the World Confederation of Labour as trade union leaders and members who were murdered in 2004, the following should be noted:
- (1) Luis José Torres Pérez (Nos. 19 and 73 in the list) is listed twice in the communication provided by the Federation, under No. 19 with the indication that Luis José Torres Pérez of the ANTHOC union was murdered on 4 March in the municipality of Barranquilla Atlántico and, under No. 73, also as a member of ANTHOC, but with a different date and place, where he is reported as being murdered in the municipality of Bordó, Department of Cauca: according to our information, Luis José Torres Pérez was murdered on 4 March in Barranquilla Atlántico.
  - (2) Wilson Gómez Sierra (No. 44 on the list), murdered on 23 May 2004 in the Department of Santander, is reported as being a member of the Teachers’ Union

(SES) while, according to the certification sent by the Teachers' Union of Santander (SES), by Pedro J. Contreras Delgado, Wilson Gómez Sierra was not a member of that union.

- (3) Yanis Valencia Fajardo (Nos. 58 and 66 on the list), murdered on 11 August in the municipality of Tierra Alta Córdoba, is reported as being a member of the Teachers' Association (ADEMACOR) while, according to the certification sent by the Teachers' Association of Córdoba (DEMACOR) by Eliazar Pérez Oviedo, Yanis Valencia Fajardo was not a member of that union. Moreover, she is included twice in the list under Nos. 58 and 66.
- (4) Pedro Jaime Mosquera Cosme (No. 79 on the list), reported as being a leader of the Single National Agricultural and Stock-raising Federation, murdered in the municipality of Arauca, according to the information of the Public Prosecutor, was killed in Nula, municipality of San Camilo, Apure state, Venezuela, during the rescue of the young Dayan Lisette Guerrero Morales, with Pedro Jaime Mosquera Cosme appearing in the capacity of kidnapper in the rescue.

**544.** The above information shows that the real figure is not 93, but 89, as the Government has always indicated. Evidently, while this figure should not exist, there has however been a reduction in the number of murders in 2003.

**545.** As stated by the Federation and in accordance with the data collected by the Observatory on Human Rights and International Humanitarian Law on violations of the human rights of the most vulnerable population groups, teachers form one such group. Given that, as has already been demonstrated, the teaching sector is one of the most vulnerable sectors, the national Government, as a part of its ongoing efforts to guarantee and provide protection to all inhabitants of the national territory and with the aim of protecting this vulnerable sector, issued Decree No. 1645 of 1992 "adding to and amending Decree No. 1706 of 1989 and establishing mechanisms for assisting teaching and administrative personnel employed in national and nationalised training establishments who are under threat, and setting out other provisions." Furthermore it issued Decree No. 3222 of 2003 "regulating Article 22 of Law No. 715 of 2001, with regard to transfers of teaching staff and educational administrators from state educational establishments."

**546.** Appendix 3 contains details of progress made concerning the cases which have so far been forwarded by the Office of the Attorney-General. It should be pointed out that, given the inexact nature of the information available relating to a number of cases, it has been difficult to collect data and it is for this reason that it has not been possible to provide certain details. In Appendix 4, the Office of the Attorney-General provides a list of the enquiries carried out into killings committed in 2004.

**547.** Appropriate measures have, however, been taken whenever trade union organizations have come forward with information. As was previously stated, as soon as a complaint has been lodged regarding any act of violence against any member of a trade union or its organization, it is communicated to the competent bodies, which initiate the appropriate investigation procedure, automatically or following a complaint.

**548.** With regard to subparagraph (i) of the recommendations regarding the allegations put forward by SINTRAEMCALI, the Government states that Municipal Enterprises of Cali (EMCALI EICE ESP) is a multi-service industrial and commercial enterprise, whose main activity is the provision of water, basic sanitation and the distribution, marketing and generation of energy and telecommunication services to Cali and various neighbouring municipalities.



- 549.** EMCALI EICE ESP's aim was to become, within five years, the enterprise of choice in South-West Colombia with regard to the provision of domestic public services, including water, sewers, energy and telecommunications, through its attention to the needs of its clients and users and its constant quality of service, competitiveness and productivity.
- 550.** In 1997, EMCALI stood out amongst the 500 largest companies in Latin America as a model of efficiency and solvency in the field of provision of public services. However, subsequently it went on to top the tables of technically bankrupt public enterprises on the point of being liquidated. Faced with this situation, Cali Town Hall requested the national Government to intervene in the enterprise's affairs, an act made official by the Superintendency of Public Services. Thanks to an agreement between the trade union, the workers, national and local government, clients and creditors, the public services enterprise of Cali avoided liquidation and is able to guarantee that from now on it will be a viable concern, providing a quality service to the population (the Government provides below a chronological account of the events relating to the dispute between the trade union organization and the enterprise which cannot be transcribed in full as they are being studied as a part of another ongoing case, Case No. 2356).
- 551.** In accordance with the provisions laid down by law, on 13 February 2003 EMCALI EICE ESP-EMCALI EICE ESP Empresa Industrial y Comercial del Estado del Orden Municipal signed an irreversible trust management agreement for administration and payment, governed by private law as expressly stated under Law No. 689 of 2001 and Law No. 80 of 1993, the aim of which is to manage the resources necessary for the adoption and implementation of measures that will lead to the shaping of decisions regarding the future of EMCALI, in accordance with the plan contained in Resolution No. 000141 of the Superintendency of Domestic Public Services.
- 552.** The National Electricity Financing Agency (FEN) is a commercial mixed economy company linked to the Ministry of Mines and Energy, which is governed by articles 258-263 of the Organic Statute of the Financial System, Decree-Law No. 663 of 1993. In order to achieve the company's corporate purpose, the Financial Organic Statute sets out the operations that FEN is authorized to carry out, operations in which FEN provides services as a trustee.
- 553.** Basically the aim of the trust management agreement is to lend support in providing the professional services required for the adoption and implementation of the measures which will lead to the taking of decisions regarding the future of EMCALI EICE ESP. The agreement contains the mandate given by the EMCALI EICE ESP to FEN, so that FEN may represent it during the process of achieving the aims of the trust management agreement whilst acting in accordance with the instructions of the Trust's Technical Committee or the special agent of EMCALI.
- 554.** To date FEN has signed various contracts on behalf of EMCALI, in accordance with the aims of the trust management agreement and on the instructions of the Trust Technical Committee or the special agent of EMCALI. In accordance with Act No. 23 of the EMCALI Trust Technical Committee and in order to encourage integral safety management of technical risks on the part of EMCALI and to complete the process of restructuring with regard to the latter, at its meeting on 8 June 2004 the Technical Committee authorized FEN to conclude a consultancy contract on behalf of EMCALI with the contractor Consultoría Integral Latinoamericana Ltda. (CIL), in order to encourage integral safety management of technical risks on the part of EMCALI, in accordance with the aims of the trust management agreement for administration and payment concluded between FEN and EMCALI and the operational financial and labour adjustment agreement for the restructuring of EMCALI's debts, an agreement lasting twenty years which contains conditions and controls that must be respected by the enterprise. One such

condition is related to losses, especially concerning the energy business, which clearly affect EMCALI's financial results.

**555.** Consultancy contracts are defined in subparagraph 2 of Article 32 of Law No. 80 of 1993 in the following fashion:

Article 32

2. *Consultancy contract.* Any contract concluded by a state entity regarding studies necessary for the execution of investment projects, diagnostic, pre-feasibility or feasibility studies for specific programmes or projects, such as technical coordination, control and supervisory assessments.

Any contract the aim of which is to intervene in, assess or manage works or projects, or manage, plan and execute designs, plans, preliminary projects and projects is held to be a consultancy contract.

The intervening party shall not impart any instructions verbally. The intervening party must submit its instructions or suggestions in written form and must do so in accordance with the terms of the respective agreement.

**556.** Consultancy contracts may be concluded with natural or legal persons, through which the administration contracts specialized consultancy, intervention or management services for works or projects, or the preparation of studies and diagnostics which do not always coincide in terms of content with the activities of the contracting body; for which reason the latter may have recourse to natural or legal persons specializing in a determined field who offer knowledge and experience in a specific area or activity.

**557.** As a part of the consultancy contract concluded between CIL and FEN, CIL undertook to provide EMCALI with integral advice on risk management and maintenance engineering concerning its infrastructure, while undertaking to fulfil the following obligations:

- assess the infrastructure maintenance programmes and plans currently in place at EMCALI;
- assess the plans, programmes and reports on the carrying out of maintenance on 115,000 and 34,500 volt lines and substations (transformers, components of substations and control and protection systems and equipment). As a part of which the consultants were required to:
  - (a) collect information on the maintenance plans and programmes, reports on the carrying out of maintenance, as well as on the administrative and technical structure of the relevant electricity provider;
  - (b) inspect the electricity provider's substations to gather information on the state of the systems and equipment;
  - (c) analyse the management of maintenance work carried out within the electricity provider;
  - (d) prepare an analytical report and recommendations;
  - (e) carry out a study into the technical and socio-political risks affecting the electricity provider and the services provided by the latter, in order to identify natural and technical risks and assess the vulnerability of the electricity provider's systems, equipment and installations. In order to achieve this the consultants were required to:

- (1) identify and document technical and natural risks to which the electricity provider's systems and equipment are exposed;
  - (2) assess the state of the main systems and components of the substations;
  - (3) assess the vulnerability of the electricity provider and its service in the face of the most serious threats;
  - (4) assess the importance of energy installations with regard to their impact on the stability and operation of the electricity provider's system;
  - (5) provide a framework of recommendations for the improvement of maintenance management within EMCALI with the aim of designing plans, programmes and the minimum administrative and technical structure required to achieve this objective. In order to perform this task the contractor was required to:
    - (i) design the maintenance plans and programmes necessary in obtaining the best possible levels of dependability, in accordance with levels of deterioration or ageing of equipment;
    - (ii) design the minimum administrative and technical structure required to develop the recommended approach to maintenance management;
    - (iii) prepare, structure and edit the reports containing the analysis and recommendations of the contractor;
      - define the structure of the report containing the studies carried out and the recommendations made concerning the approach to maintenance management that, as a result of the assessment, needs to be developed within EMCALI;
      - edit and transmit reports and carry out the other activities that the contractor shall perform in order to comply with the contract;
- 558.** The completion time for the contract concluded with CIL was four months, within which time the contractor was required to carry out its obligations and transmit the respective reports to the contract administrator for approval.
- 559.** The consultancy contract was authorized by the Technical Committee at its meeting of 8 June 2004, in order to encourage integral security management of technical risks on the part of EMCALI.
- 560.** It should be pointed out here that, as is stated in the report, risk management consists of the systematic application of management policies, procedures and practices to establish the context, identification, analysis and assessment of the risks to which an enterprise or project is exposed and the definition of the measures necessary to reduce the vulnerability engendered by these threats, as well as the definition of risk follow-up and monitoring activities with the aim of minimizing losses, increasing dependability and quality of processes and maximizing the enterprise's profitability.
- 561.** Integral risk management is necessary as all activities and processes entail various inherent risks and those involved in developing such processes are affected by threats present around them which may lead such individuals to compromise the development of processes and to generate losses, or in some way damage the management of the enterprise. The threats affecting an enterprise like EMCALI are determined by the

processes which are carried out within such organizations, the environment in which the enterprise's infrastructure is located, or within which the processes unfold.

- 562.** Risk management has traditionally been used to give structure to those risk administration systems which allow enterprises to identify the risks of accidents to which they are exposed and to define measures to reduce their vulnerability to such risks. An important element of risk administration systems is the recording of disasters and accidents that have occurred, the assessment of the impact of disasters on the enterprise's main resources and components and the follow-up to the events using indicators, through statistical databases.
- 563.** Over the last ten years, risk management has also been applied as a fundamental tool for structuring process management within companies, as well as: to define and apply management indicators; to continually improve processes; to give structure to plans for technological improvements; in plans to reduce job completion times; in developing plans aimed at lowering exposure and fatigue amongst personnel and increasing the time available for research and development; in plans to reduce waste, surpluses, pollutants and residues (protection of the environment and communities); to guarantee greater access to the service provided by the enterprise and to maximize financial profits and human benefits, with the overall aim of boosting the enterprise's profile and increasing its profitability.
- 564.** In accordance with the aim of the consultancy contract, the contractor opted to carry out the risk assessment based on the gathering of information, on the facts which came to light regarding the enterprise's electrical infrastructure, offences reportedly committed in and around substations and data collected during visits to substations to check on the private surveillance arrangements in place and prevention, protection and monitoring measures.
- 565.** Based on this information, threats that could affect the electrical infrastructure were identified and profiled and vulnerable areas were assessed to determine the most serious risks affecting substations.
- 566.** Once risks have been assessed, existing security measures are examined to determine whether they can adequately minimize such risks, or whether measures need to be heightened in order to render the installations and the energy provision service less vulnerable.
- 567.** As is stated in the report, risk analysis is solely focused on electricity substations, in accordance with the terms of the contract. It is extremely important to profile socio-political threats in order to assess the vulnerability of substations and the energy provision service and, on this basis, to be able to recommend the adoption of the security measures necessary to render substations less vulnerable and the emergency and contingency plans that the consultants guarantee will reduce the impact of this kind of event should it occur.
- 568.** The Government transmits a few paragraphs of the study carried out by the consultants within the context of the socio-political issues that were affecting EMCALI, these issues mainly being linked to the current situation in the country, the various problems of violence afflicting Colombia, their origins and the way in which they may affect EMCALI. The study was carried out taking account of the characteristics of the enterprise and the situation regarding vulnerability. Most importantly the study was carried out with the sole aim of making recommendations regarding the adoption of the security measures necessary to reduce weaknesses affecting installations and the emergency and contingency plans that would ensure the reduction of the impact of events adversely affecting the provision of electricity to the inhabitants of Cali and neighbouring municipalities.

- 569.** The Government points out that, as is stated in Act No. 23 of 29 of November 2004 issued by the EMCALI Special Technical Committee, it checked that all the obligations contained in the contract concluded with the enterprise CIL had been met, concluding that they had been satisfactorily met by the contractor and, in accordance with the terms contained in the liquidation clause appearing in the respective contract, FEN was authorized to proceed to liquidate the contract.
- 570.** However, both the trust management agreement and the consultancy contract were signed in accordance with current guidelines. The aim of the agreement was justified in that there was a need to carry out a risk assessment in the case of EMCALI. The consultancy contract was necessary because, in general, all public and private enterprises have an inalienable right to ensure the security of their assets. In the same way our penal code does not consider the purpose of the abovementioned contract to be improper, as presumption of legality already exists and the enterprise is acting in good faith.
- 571.** In the same way, given that contracts arise from administrative procedures, in the event that they are held to be contrary to the principles of the civil service such contracts may be challenged before the competent legal body. In this case, no known actions have been launched to challenge the legality of the abovementioned contracts.
- 572.** However, it should be pointed out that, under Article 52 of Law No. 80 of 1993, contractors must answer, both in the civil and penal courts, for their actions and omissions when carrying out a contract within the terms of the law and, thus, for whatever reason, if irregularities occur which derive from the contracts that have been signed, the contractors shall answer before the penal courts for the acts of which they stand accused.
- 573.** As to the enquiries into this subject carried out by the competent authorities, the Government states that the National Human Rights Unit of the Office of the Attorney-General, is carrying out an enquiry (No. 2028) which is in the preliminary stages.
- 574.** Branch No. 36 of the Office of the Attorney-General initiated an enquiry (No. 691553-1563-36) into reports of threats against Alexander López, Carlos Marmolejo and Oscar Figueroa.
- 575.** The decision of 24 September 2004, ordered that a preliminary investigation be opened, as a part of which the order was given to gather the following evidence, which was duly presented:
- The Operational Committee of Cali issued the Head of the Metropolitan Police with a protection order for Messrs. Luis Imbachi, Carlos Marmolejo, Oscar Figueroa and Alexander López Maya, members of the SINTRAEMCALI trade union;
  - On 20 October 2004, the Section Head of Intelligence MECAL (Metropolitan Police of Cali), informed us that “Personnel attached to the Intelligence Section visited the premises of the SINTRAEMCALI trade union. It not being possible to interview Messrs.. Luis Imbachi, Carlos Marmolejo, Oscar Figueroa Pachón and Alexander López Maya, on 11 October 2004 through communication No. 1164 Messrs. Luis Imbachi, Carlos Marmolejo, Oscar Figueroa and Alexander López Maya were requested to meet with the risk analysis group but this request met with no reply. On 15 October 2004 through communication No. 1234, the abovementioned individuals were again requested to meet with the risk analysis group which was ready to address their security needs;
  - On 28 September 2004 a written request was sent to the SINTRAEMCALI trade union, calling on Mr. Luis Imbachi to come to the office in order to comply with the

communication of 11 October, a communication that had been duly received, as is shown by the copy of the communication bearing a receipt stamp dated 4:04 pm, 30 October 2004. In a communication dated 16 November 2004, an identical request was made convoking the same individual to a meeting on 23 November.

- No cooperation or reply was forthcoming from the abovementioned individual.
- On 28 September 2004, a request was passed on to the Administrative Security Department (DAS) for information concerning the security of Messrs. López Maya, Imbachi, Marmolejo and Figueroa;
- On 7 October 2004, a reply was received to the abovementioned communication, stating that the individuals referred to in the aforementioned communication were covered by a DAS protection scheme consisting of bodyguards, armoured vehicles, armed support and communications services for an indefinite period;
- On the same date, the National Police Intelligence Service (SIPOL) was requested to assess the level of risk affecting the abovementioned individuals;
- The reply dated 22 October 2004 stated that “Personnel attached to the Intelligence Section on several occasions visited calle 18, No. 6-54, in this city, the site of the premises of the SINTRAEMCALI trade union, requesting an interview with Mr. Alexander López Maya and the Chairperson or members of the Executive Committee, having been informed by a security guard (Guillermo Pineda) that these individuals were prepared to speak with us. However, when no response was forthcoming it was decided to send a request to the Chairperson of the trade union (communications Nos. 4433 and 4434 of 19 September 2004) for an interview with each of the individuals referred to in the document, in the hope of initiating the risk level assessment”;
- The Technical Investigations Corps (CTI) was ordered to identify or profile those responsible for the events under investigation;
- In a report received on 15 September 2004, the investigator assigned by the CTI to carry out the abovementioned mission stated that: “In order to comply with the request made by the present working commission, I made inquiries into the SINTRAEMCALI organization in order to obtain information regarding those responsible for the events. As a part of this investigation, Mr. Luis Imbachi was interviewed and, on being made aware of the circumstances, identified himself with Identity Card No. 16 643 116 Cali, stating the following with regard to the events: “They have continued to make threatening calls to the families of my colleagues and we have spoken with the Office of the Attorney General (FGN) in Bogotá, the Public Prosecutor’s Office, the Public Ombudsman’s Office, the United Nations High Commissioner, the embassies and all of the various government bodies who said that they would strengthen security; I know that these threats are linked to Operation Dragon, some of my colleagues have moved to new locations for security reasons, I don’t know who it could be ...”, in brief, the outcome of the mission was negative;
- On 13 October 2004, the Bogotá office of the DAS was requested to carry out a risk level assessment concerning the individuals who had been threatened;
- On 21 October 2004, it was reported that “... following the instructions of the General Directorate of the Administrative Security Department and within the legal framework of competencies pertaining to that body, in reply to your communication of 13 October 2004, I wish to report that, currently, Congressman Alexander López Maya and Messrs. Luis Enrique Imbachi Rubiano and Oscar Figueroa Pachongo are

receiving protection under the protection programme for trade union leaders and defenders of human rights which is run by the DAS of the Ministry of the Interior and Justice. Since 2000, these individuals have been under strict guard, involving the use of trucks, bodyguards and weapons. This office will assess the self-protection and personal security of the leaders of SINTRAEMCALI and Mr. Alexander López Maya, an active member of Congress and will guide them through the steps that they must take regarding their situation before the Ministry of the Interior and Justice and the Human Rights Directorate, where their cases will be studied and an assessment made of their security.”;

- Moreover, on 31 December 2004, the Bogotá DAS office sent a copy of the confidential security service re-assessment carried out in Bogotá for Doctor Alexander López Maya, which states that: “... In this regard, during its 9 December 2004 session, the Technical Committee of the Special Protection Office estimated the level of risk (medium-low) and made recommendations”.
- Along with a communication received on 21 January 2005, the Bogotá DAS office sent a strictly confidential copy of the technical assessment of the level of risk and grade of threat affecting Mr. Carlos Adolfo Marmolejo and other members of the SINTRAEMCALI Executive Committee, estimating the level of risk to be medium-low: there is no evidence of any kind of threat which might affect the personal security of the subject; the level of risk is the same as that affecting anyone in a public or private post, job or profession;
- In a communication dated 13 October 2004 and 16 November 2004, the management of the EMCALI telecommunications division was requested to provide a copy of the details of the action taken following Mr. Imbachi’s request to trace the location from which the threatening call was made to him and to inform him of the number of the card used to make the call. The communication was duly received on 20 October 2004, according to the enterprise’s receipt stamp.
- Finally, the following reply was received in a communication received on 3 January 2005: “In relation to your request, please find attached a communication signed by Mr. Robinsón Romero Mazuera, a public servant in this organization who dealt with the call made by a female relative of Mr. Luis Enrique Imbachi Rubiano.” Attached is a note regarding the “Report on the Luis Imbachi case”: “When the case of the threat against Mr. Luis Imbachi came up, I got a call from his wife asking me for information about it all, she said that Luis Imbachi’s mobile phone had recorded a phone number and asked me to tell her the location of this phone, the number of the card used to make the call and to give her the record of any other calls made using this card. I gave her the location based on the registry in our database of public telephones, and, if I am not mistaken, it corresponded to a public phone located in the area surrounding the San Fernando plant. I also told her that the telephone card monitoring systems recorded neither the series, nor the details of calls made using each card and that, therefore, I could not give her that information.”

**576.** As a part of the abovementioned enquiries the Office of the Attorney-General issued an inhibitory order based on the following considerations:

It should be pointed out that the terms of Article 322 of the Criminal Procedure Code (CCP) could not be complied with, given that all lines of enquiry were exhausted, without mentioning the fact that despite the urgent need for Mr. Imbachi to attend an interview in the office, he did not do, demonstrating a complete lack of cooperation and of interest in making progress with regard to the case. Nor was there any evidence that would allow investigators to determine whether the calls were made in the way reported and whether they fell into the strict

definition stipulated by the law and secondly it was not possible to profile or identify any suspects.

Despite the obvious effort made by the Office of the Attorney-General concerning this investigation, it was not possible to achieve the results that would have led to an inquiry and, thus, it is proper to proceed, in accordance with Article 327 of the CCP to issue an inhibitory order, consequently provisionally filing the enquiries on the understanding that, should further evidence be found, the case will be re-opened, should there be grounds to do so.

In seeking out arguments which provide a base for and support our decision we had recourse to the terms of the ruling handed down by the Constitutional Court on 28 September 1993 which states that “The purpose of the pre-trial investigation is to establish the minimum grounds for proceeding to prosecute and to give effect to the formal initiation of the criminal process. A simple report of an offence having been committed (*noticia criminis*) is not sufficient to justify initiating criminal proceedings and activating the investigative and punitive apparatus of the State, unless it is supported by evidence providing the prerequisites for criminal proceedings (the fact that the act committed is a statutory offence, the identification of those responsible for or participating in the act, the admissibility of the proceedings) which, in principle, provide rational grounds for taking action. The legislator rejected the automatic initiation of criminal proceedings on the grounds that, as well as being a serious oversight with regard to the principle of effectiveness, it could also lead to poor use of state justice administration resources which, being scarce, necessarily have to be put to appropriate use.

**577.** With regard to compliance with these terms, mention should be made of the comments made by the Superior Court of the Judicial District of Armenia, as a part of the Penal Decisions Division protection ruling (*sentencia de tutela*) of 12 June 2001: “When legal proceedings are initiated owing to a crime of any sort having been committed, officials of the judiciary must follow a certain course of action. Such a course of action must contain guarantees for the parties involved, in order to allow a defence to be mounted in an expeditious manner and to ensure that each and every one of the rights of the accused is respected in this regard. In this particular case, these conditions are set out in the Criminal Procedure Code which establishes the precise steps which must be followed, from the “*noticia criminis*” up to the moment of the final decision regarding the dispute through a ruling or any other decision with similar binding force to a ruling, such as the dismissal of charges or cessation of procedure. The conditions include the establishment of the procedure, the opportunity for the accused to mount a defence, the definition of the legal situation and specific indication of the charge or charges, the peremptory terms within which all procedures and investigations must be carried out, with the appropriate legal classification and the right of the defendant to have every opportunity from a procedural point of view to challenge decisions and guaranteed compliance with and respect of all rights of all the parties during the trial and during the corresponding term of imprisonment.”

**578.** On the other hand, Articles 1 and 7 of the Statutory Justice Administration Law establish the principles of swiftness and efficiency as being fundamental to the workings of the legal system, holding contempt of the terms to be a disciplinary matter. In such a way, the Disciplinary Chamber of the Honourable Superior Council of the Judiciary has supported such principles in a practical manner by reiterating them and applying them to cases brought before it (Files Nos. 1998141301315 of 12 February 2003, Magistrate Rubén Darío Henao Orozco and 200110285-01 of 13 February 2003, Magistrate Guillermo Bueno Miranda, published in the *Gaceta Jurisprudencial* (Jurisprudence Gazette), editorial LEYER, No. 121, March 2003, and Nos. 127 and 129).

**579.** Luis Imbachi was notified of the above decision in order to allow him to submit the corresponding appeal. None of the parties concerned lodged an appeal and the ruling was enforced.



- 580.** The Office of the Attorney-General began efforts to investigate, identify and punish those allegedly responsible for the actions in question. However, presumably owing to the behaviour of those individuals who had been threatened, it was not possible to continue with the legal proceedings.
- 581.** The Office of the Public Prosecutor, in accordance with communication No. 002171 of 3 June 2005 of the National Directorate of Special Investigations of the Office of the Public Prosecutor, carried out a preliminary investigation (No. 009-112759) which is currently in the assessment stage.
- 582.** Decree No. 2788 of 2003 “Unifying and governing the Risk Assessment and Control Committee for the Protection Programmes of the Human Rights Directorate and the Protection Programmes of the Ministry of the Interior and Justice states in Articles 1 and 2 that:

*Article 1.* The structure of the Risk Assessment and Control Committee (CRER). The Risk Assessment and Control Committee for the Protection Programmes of the Human Rights Directorate of the Ministry of the Interior and Justice will be structured in the following fashion:

- (1) The Vice-Minister of the Interior or his deputy, who will chair the Committee.
- (2) The Director of Human Rights at the Ministry of the Interior and Justice or his deputy.
- (3) The Director of the Presidential Programme for the Promotion, Respect and Protection of Human Rights and the application of International Humanitarian Law or his deputy.
- (4) The Director of the Administrative Department of Security (DAS), or his deputy from the Protection Directorate.
- (5) The General Director of the National Police or his deputy for Human Rights.
- (6) The Head of the Social Solidarity Network or his deputy.

The Director of Human Rights of the Ministry of the Interior and Justice shall act as Committee Secretary.

*Paragraph 1.* Representatives of the Office of the Public Prosecutor, the Office of the Public Ombudsman and the Office of the Prosecutor of the Republic shall take part in the meetings of the Committee but will only have the right to speak.

*Paragraph 2.* The Office of the United Nations High Commissioner for Human Rights and four (4) representatives of each of the target populations covered by the Protection Programmes of the Human Rights Directorate of the Ministry of the Interior and Justice shall participate as special and permanent guest members.

*Paragraph 3.* Taking into account their constitutional and legal competences, each of the Committee members shall answer for his actions and omissions with the framework of the functions of the Committee.

*Paragraph 4.* The non-governmental members of the Committee shall only attend those sessions during which issues linked to the target populations they represent are examined.

During the same Committee sessions members may discuss issues affecting various target populations. In such a case, the representatives of those target populations shall be in attendance.

*Paragraph 5.* A public servant designated by the Director of the Human Rights Directorate of the Ministry of the Interior and Justice shall take on the role of Technical Secretary of the Committee.

The Technical Secretary shall take the minutes of each session, minutes which shall then be approved and signed by all the Committee members attending the session in question.

*Article 2.* The functions of the Risk Assessment and Control Committee (CRER). The Risk Assessment and Control Committee, which unifies and governs the Committee for

Control and Protection Programmes of the Human Rights Directorate of the Ministry of the Interior and Justice shall have the following functions:

- (1) Evaluate cases presented by the Human Rights Directorate of the Ministry of the Interior and Justice and, in exceptional circumstances, by any of the Committee members. This evaluation shall be carried out taking into account the target populations covered by the Protection Programmes and the regulations applicable.
- (2) Examine expert assessments of risk levels and grades of threat and expert studies of the physical security of installations, according to each case.
- (3) Recommend the protection measures it considers to be appropriate.
- (4) Periodically follow up the implementation of protection measures, and, based on this follow-up, recommend that the necessary changes be made.
- (5) Establish its own regulations.
- (6) Any other functions which may be necessary in the course of its work.

**583.** The CRER is an evaluation body, made up of representatives of different state bodies and the target populations, the objective of which is to recommend the adoption of the most appropriate measures for the protection of individuals.

**584.** In order to establish the level of risk affecting those individuals requesting protection under the programmes, a risk level and threat grade assessment is carried out. This is a technical procedure, carried out by the state security bodies (the DAS and the National Police).

**585.** The aim of the protection programme is to protect individuals in situations where their lives, wellbeing, safety or liberty are in imminent danger owing to factors linked to political or ideological violence. For this reason, the information dealt with within the protection programme is only made available to the representatives of the institutions and target populations involved in the work of the CRER (in this case representatives of the CUT [Single Confederation of Workers of Colombia], CTC [Confederation of Workers of Colombia] and CGT [General Confederation of Workers]) and the individual directly involved in the case being heard by the CRER.

**586.** As to the protection measures implemented in practice, the Government states that once the facts regarding "Operation Dragon" were reported, the Presidential Programme for the Promotion, Respect and Protection of Human Rights and International Humanitarian Law entered into direct communication with representative López, in order that he might establish a link with the Chairman of SINTRAEMCALI, Luis Imbachi, in order to assess the protection measures that had been taken regarding these trade union leaders within the framework of the Trade Union Leaders Protection Programme which is run by the Human Rights Directorate of the Ministry of the Interior and to look for alternatives to improve the safety of the members of the SINTRAEMCALI Executive Committee and work together with the competent bodies within the framework of the CRER with regard to the new alleged threats.

**587.** Following the reports regarding the latest occurrences, the CRER of the Trade Union Leaders Protection Programme unanimously decided (decision No. 24 of 4 October 2004) to assign an individual protection scheme to Ms. Celeyta, with two unarmed escort units. She is currently accompanied by Peace Brigades International volunteers. To date, however, Dr. Celeyta has not accepted the offer of the protection scheme.

**588.** As to the situation regarding the new members of the SINTRAEMCALI Executive Committee and Messrs. Imbachi and Pachongo who are already covered by the Ministry's protection programmes, the DAS was requested to carry out or re-assess the risk studies corresponding to these gentlemen and, depending on the result, the appropriate measures for their protection and safety were to be adopted.

- 589.** Subsequently, following a request on the part of various SINTRAEMCALI trade union leaders, together with Ms. Celeyta, an extraordinary meeting was organized at the offices of the Human Rights Directorate of the Ministry of the Interior and Justice. A new threat arose in the form of the up-coming national day of protest on 12 October. Following expressions of concern on the part of the individuals concerned, approval was given to provide them with plane tickets so that they might leave the area, together with their families. The tickets were not used by the recipients, even though initially it had been them who had requested such a measure.
- 590.** With regard to the protection measures for representative Alexander López, at the end of February 2005 he was provided with a new armour-plated car to replace the previous one which had mechanical problems.
- 591.** In the wake of the reports made regarding events allegedly linked to “Operation Dragon”, the following steps were taken by the Ministry of the Interior and Justice:
- *21 September 2004:* Meeting with Berenice Celeyta during which she presented facts regarding the events linked to the so-called “Operation Dragon” and made certain requests on behalf of the members of NOMADESC (the Association for Social Investigation and Action), which were examined by the CRER. The CRER then approved the granting of four Avantel communication systems to members of the organization and an individual protection scheme for Berenice Celeyta;
  - *28 September 2004:* Meeting with Berenice Celeyta and SINTRAEMCALI delegates, during which time the individuals benefiting from assistance presented information concerning the events related to the so-called “Operation Dragon”. It was agreed that risk level studies would be carried out for those SINTRAEMCALI leaders who still did not enjoy any protection: Carlos Marmolejo, Carlos Antonio Bernal, Fabio Fernando Bejarano and Alberto de Jesús Hidalgo;
  - *8 October 2004:* Meeting held in this Directorate, during which four leaders of the abovementioned organization who appeared to be in imminent danger were granted plane tickets for domestic flights and a month of temporary relocation support. Although the tickets were made available as of Saturday 9 October, the date when they specified that they wished to travel to Cartagena, only two of the tickets were used, it would seem on 14 October. For this reason, during extraordinary session No. 25 of the same date, the CRER determined that, although the said measures had been adopted owing to an urgent situation, as use had not been made of them at the time, they would be withdrawn as they were not warranted.
- 592.** Moreover, the DAS informed the CRER that Mr. Domingo Angulo had rejected the protection offered to him by one of his body guards and that it seemed that he has been making use of the assigned security scheme from Monday to Friday but then going off on his own to the country at the weekends, thus putting his life and physical safety in danger.
- 593.** As a result of the abovementioned meeting, the following protection measures were implemented:
- provision of domestic plane tickets for the Cali-Cartagena-Cali route and a month of temporary relocation support:
    - (1) Oscar Figueroa Pachongo and immediate family;
    - (2) Carlos Adolfo Marmolejo and immediate family;

- overseeing of maintenance of armoured protection at SINTRAEMCALI head office;
- approval by the CRER during session No. 25 of 14 October 2004 of two collective schemes to protect the four following trade union leaders: Messrs. Carlos Marmolejo, Carlos Antonio Bernal, Fabio Fernando Bejarano and Alberto de Jesús Hidalgo. Six Avantel radios to strength the schemes covering Luis Hernández, Domingo Angulo, Harold Viáfara, Luis Imbachi, Oscar Figueroa and Robinsón Emilio Masso.

**594.** The following are the security schemes covering the SINTRAEMCALI trade union. Measures adopted:

*Hard personal security schemes:*

- (1) Luis Hernández; armoured vehicle and three bodyguards;
- (2) Domingo Angulo;
- (3) Harold Viafara;
- (4) Luis Enrique Imbachi;
- (5) Oscar Figueroa;
- (6) Robinsón Emilio Masso.

*Means of communication: three mobile phones and nine Avantel radios*

- (1) Alexander López Maya, mobile phone, Avantel radio;
- (2) Robinsón Emilio Masso, mobile phone, Avantel radio;
- (3) Domingo Angulo Quiñónez, Avantel radio;
- (4) Harold Viáfara González, mobile phone;
- (5) Luis Hernández Monrroy, Avantel radio;
- (6) Cesar Martínez, Avantel radio;
- (7) Milena Olave Hurtado, Avantel radio;
- (8) Luis Imbachi, Avantel radio;
- (9) Ricardo Herrera, Avantel radio;
- (10) Alexander Barrios, Avantel radio.

In addition, six Avantel radios were provided, in order to strengthen the protection schemes for Messrs. Luis Hernández, Domingo Angulo, Harold Viáfara, Luis Imbachi, Oscar Figueroa and Robinsón Emilio Masso.

**595.** In order to encourage integral security management of technical risks to EMCALI and to complete the restructuring process being carried out within that enterprise, at its meeting on 8 June 2004, the Technical Committee authorized FEN to conclude, on behalf of EMCALI, a consultancy contract with CIL. The aim of the contract was to encourage integral security management of technical risks to EMCALI. This objective was also one

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of the aims of the trust management agreement for administration and payment, concluded between FEN and EMCALI and the operational financial and labour adjustment agreement for the restructuring of EMCALI's debts, an agreement lasting 20 years which contains conditions and controls that must be respected by the enterprise. One such condition is related to losses, especially concerning the energy business, which clearly affect EMCALI's financial results.

- 596.** Over the last ten years, risk management has become universally recognized as a fundamental tool for structuring process management within companies, as well as: to define and apply management indicators; to continually improve processes; to give structure to plans for technological improvements; for use in plans to reduce job completion times; developing plans aimed at lowering exposure and fatigue amongst personnel and increasing the time available for research and development; in plans to reduce waste, surpluses, pollutants and residues (protection of the environment and communities); to guarantee greater access to the service provided by the enterprise and to maximize financial profits and human benefits, with the overall aim of boosting the enterprise's profile and increasing its profitability. For these reasons, a consultancy contract was concluded.
- 597.** Both the trust management agreement and the consultancy contract were signed in accordance with current guidelines. The aim of the agreement was justified in that there was a need to carry out a risk assessment in the case of EMCALI. The consultancy contract was necessary because, in general, all public and private enterprises have an inalienable right to ensure the security of their assets. In the same way our penal code does not consider the purpose of the abovementioned contract to be improper, as presumption of legality already exists and the enterprise is acting in good faith.
- 598.** As was stated beforehand, given that contracts arise from administrative procedures, in the event that they are held to be contrary to the principles of the civil service such contracts may be challenged before the competent legal body. In this case, no known actions have been launched to challenge the legality of the abovementioned contracts.
- 599.** We also wholeheartedly reject the statement made by SINTRAEMCLI that EMCALI attempted to contract the intelligence services in order to persecute SINTRAEMCALI. As has been demonstrated, this was never the purpose of the consultancy contract, a contract concluded in accordance with law. On the contrary, according to the study, both the members of the trade union and the Executive-Director are included in the most vulnerable group of persons.
- 600.** At no time has the Government attempted to divert attention away from or minimize events or responsibilities, nor has it encouraged a culture of impunity. On the contrary, it is the Government, more than any of the other parties concerned, which has the strongest desire to see those responsible for the crimes committed against society punished.
- 601.** Finally, it should be pointed out that the Office of the Attorney General is currently carrying out the corresponding inquiry into the alleged events reported by the trade union organization. The documents related to the investigation are confidential in nature, as they are linked to raids and equipment that has been seized. This information is only available to the body carrying out the enquiry. In accordance with the principle of the separation of the executive, legislative and judicial powers, the Government can only give statements regarding the current state of the enquiry and it is the Office of the Attorney-General which must identify those allegedly responsible.

602. Finally, in the communication dated 27 January 2006, the Government sends general information referring, among other things, to the various measures adopted for the protection of workers' rights. The Government also refers to the agreement concluded in the framework of the Permanent Commission on Wage and Labour Policies on 14 December 2005. This agreement provided for the establishment of a bilateral forum in January 2006, for the discussion of subjects including the application of Conventions Nos. 87, 98, 151 and 154 in the public sector. Moreover, in this agreement, the Government, the employers and the workers agree to consider trade unionism as an integral part of democracy and to respect and promote the fundamental rights at work. The Government also refers to the administrative investigations and sanctions imposed to those companies which refuse to negotiate collectively and the workers' cooperatives which operate in violation of labour laws. Finally, the Government sends a list of investigations under way, filed or suspended, with respect to allegations of murders and threats against trade union members and leaders.

#### D. The Committee's conclusions

603. *The Committee takes note of the new allegations concerning acts of violence against trade union officials and members and a plan to eliminate the members of a trade union organization. It also notes the Government's extensive reply which contains detailed information on the judicial proceedings under way in connection with the numerous allegations presented to the Committee and examined by it during successive examinations of the case, as well as information on the safety measures adopted for the members of certain trade union organizations.*
604. *The Committee also notes with interest the report of the high-level tripartite visit that took place in Colombia from 24 to 29 October 2005 following an invitation from the Government to the President of the Committee. This invitation was made in the light of the Committee's June 2005 conclusions regarding the present case, according to which, "taking into account the violent situation which the trade union movement must face due to the serious situation of impunity, and the numerous cases that have not been resolved and the fact that the last mission of this Office to the area took place back in January 2000, it would be highly desirable to collect further and more detailed information from the Government and the workers' and employers' organizations, in order to have an up-to-date understanding of the situation" [see 337th Report, para. 551(h)]. The Government subsequently extended its invitation to the Employer and Worker Vice-Chairpersons of the Committee on the Application of Standards. As a result, this Committee decided that the visit should take place and meet with the Government, the workers' and employers' organizations and the competent bodies in Colombia in the area of investigation and supervision, and that it should place special emphasis on all questions relating to the application of Convention No. 87 in law and in practice and to the Special Technical Cooperation Programme for Colombia.*
605. *The Committee notes the full cooperation shown during the visit and the significant efforts made to ensure that the members of the visit had access to the fullest and most accurate information on the trade union rights situation in Colombia. The members were able to meet with Government ministries and the highest relevant authorities, including with the country's President and Vice-President, the four high courts, the Attorney-General, the Procurator-General and members of the Senate of the Republic and the Chamber of Representatives. The members of the visit were also able to meet on two occasions with officials and members of the three trade union confederations – the United Confederation of Workers (CUT), the General Confederation of Workers (CGT) and the Confederation of Workers of Colombia (CTC), as well as with the National Association of Industrialists (ANDI) and other affiliated employers' organizations. The Committee notes that the visit's*

*extensive programme allowed the participants to obtain a comprehensive view of the situation in the country.*

- 606.** *With regard to the acts of violence against the trade union movement, be they against trade union officials and members or union headquarters, the Committee notes that a reduction has been observed in the number of acts of violence reported. This reduction does not, however, lessen the importance and gravity of the situation currently facing the trade union movement. The Committee notes that in this sense, the report of the tripartite visit reflects the concern expressed by the Procurator-General, the Constitutional Court and the Deputy Minister for Defence, who believe that trade unionists continue to be a target for armed groups. The Committee also notes the measures adopted by the Government to ensure the increased safety of citizens in general and the resources assigned to the protection programme for trade unionists.*
- 607.** *The Committee takes note of the detailed information submitted by the Government (see Appendix 2) regarding safety measures to protect trade unionists. The Committee observes that, according to the table provided by the Government, 54.96 per cent of the budgeted resources are destined for the protection programme for trade union leaders because this is a highly vulnerable group. This circumstance was acknowledged by the Deputy Minister for Labour and the Deputy Minister for Defence when meeting with the members of the tripartite visit. In this regard, the Committee is obliged to recall once again 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**, 4th edition, 1996, para. 47].*
- 608.** *The Committee considers it positive that trade unionists continue to be afforded a high level of protection, and observes that the protection measures have provided some results although they cannot provide any definitive solution to the problem of violence as long as there continue to be individuals or groups that are able to carry on threatening trade unions with impunity. In these circumstances, the Committee urges the Government to take all possible measures to put an end to the acts of violence against trade union officials and members and to continue to keep it informed of the protection measures and of the security schemes implemented, as well as those adopted in the future for other trade unions and other departments or regions.*
- 609.** *With regard to the investigations carried out by the Government and, in particular, by the National Public Prosecutor's Office into the murders, disappearances and other acts of violence against trade union officials and members (see Appendices 1, 3 and 4), the Committee notes that, according to the Government, the new accusatory penal system, which has been partially in force in Colombia since January 2005, will help to speed up proceedings and will allow more effective action to be taken against impunity. In this respect, the Committee observes that the new system will only apply to crimes committed after 1 January 2005 and that it will therefore not have any significant bearing on the investigations into allegations relating to acts of violence against trade unionists committed before that date, which constitute, for the most part, the allegations in the present case.*
- 610.** *The Committee takes note of the existence of a specialized sub-unit within the National Public Prosecutor's Office for dealing with cases of human rights violations involving trade unionists. The Committee requests the Government to keep it informed of the progress made by this sub-unit.*

- 611.** *With regard to the lists of investigations submitted, the Committee observes that although the Government provides details of the large number of investigations already launched, it cannot help but notice, once again, that for the most part these investigations have progressed no further than the preliminary stage (84 investigations), have been dismissed for lack of evidence (55 investigations) or have been suspended (four) and that only 14 investigations are currently at the pre-trial stage, some involving persons being held in custody, while seven are at the trial stage, with persons being held in custody, and that there have been only 15 convictions. The Committee observes that although the number of convictions has increased in relation to previous examinations of the case, the situation regarding impunity is still extremely serious, since very little progress has yet been made to improve it.*
- 612.** *The Committee agrees with the members of the tripartite visit, who emphasized the importance of tripartite dialogue on fundamental human rights and possible measures for better combating the prevalent impunity, based on comprehensive, relevant and up-to-date information and accompanied by clear and extensive political will and the provision of the necessary resources. The Committee also agrees with the members' encouragement of the Government to rapidly reactivate the Inter-institutional Committee for the Promotion and Protection of Human Rights of the Workers, which includes in its composition the sectors of society affected by the violence emanating from the armed groups. The Committee trusts that the Inter-institutional Committee will make it possible to determine the exact number of victims of the violence and the status of these victims, particularly whether they are trade union officials and workers, as this information could be used to move the investigations forward. The Committee requests the Government to provide information on the reactivation of this Inter-institutional Committee.*
- 613.** *The Committee takes note of the information provided by the Government regarding the judicial procedures and the convictions handed down for crimes committed against trade unionists as well as definitive sentences that have been issued against the perpetrators of such crimes. The Committee once again urges the Government to continue taking all necessary measures to investigate all the new alleged acts of violence and to vigorously continue the investigations that have already begun so as to put an end to the intolerable situation of impunity, punishing effectively all those responsible.*
- 614.** *With regard to the question of impunity, the Committee also takes note of the recently adopted Law on Justice and Peace whose stated aims are to facilitate peace and the collective and individual reincorporation into civilian life of the members of the armed unlawful groups and to guarantee the rights of the victims to truth, justice and redress. The Committee notes that two appeals concerning this Law are still pending before the Constitutional Court. The Committee requests the Government to keep it informed of the entry into force of this Law and the manner in which it is applied, the final outcome of the appeals that have been initiated and any impact that this Law might have on the various cases of murder and violence that are pending.*
- 615.** *As regards the allegations submitted by the workers' trade union of the municipal enterprises of Cali (SINTRAEMCALI) relating to the existence of a plan named "Operation Dragon", instigated by the company and active and retired members of the armed forces, to eliminate several officials of that trade union organization, a member of the Chamber of Representatives and other defenders of human rights, the Committee takes note of the abundant information provided by the complainant organization which includes photocopies of the legal proceedings instigated and the evidence seized. The Committee notes that according to the complainant organization, the company had contracted a security firm formed by members of the armed forces, with a view to destabilizing the trade union and physically eliminating some of its members. According to the allegations, this security firm collected information on the personal lives of the trade union officials, their*



family members, their movements, the protection systems they used, the identity of their bodyguards, and the number plates of the vehicles in which they travelled. It also gathered information on political ideas and on ways to discredit the officials or infiltrate the trade union with a view to destabilizing it. According to the allegations and the accompanying evidence, this personal information was obtained from members of the Administrative Department of Security, which, amongst other things, is responsible for providing protection for trade unionists and assessing the level of risk to which they are exposed. The complainant organization highlights the fact that the information seized in the legal proceedings was only available to the national Government and expresses its deep concern in this respect.

- 616.** *The Committee takes note of the Government's information according to which it denies the existence of a plan to eliminate the trade union or its officials but affirms that the EMCALI EICE ESP enterprise signed a consultancy contract with the Latin American Integral Consultancy company (CIL) to promote integral security technical risk management at EMCALI, in particular with regard to the energy trade which constitutes one of the enterprise's activities. The Committee notes that the Government includes an extract from one of the consultancy reports, which refers to these issues and which addresses the question of the enterprise trade union and its members, particularly from the point of view of the risks to which they are exposed. The Committee also takes note of the legal action taken and the protection measures adopted by the Government to protect the trade union officials who were allegedly threatened. The Committee takes particular note of the inhibitory decision of the National Public Prosecutor's Office in this respect, which was issued owing to of the lack of cooperation from the parties concerned. The Committee also notes that the Procurator-General's Office is currently carrying out a preliminary investigation. Moreover, the Committee notes with great concern the statements made by the Deputy Procurator-General to the members of the tripartite visit, according to which it is undeniable that some state agents were involved in acts of violence against trade unionists and one operation carried out by isolated members of the intelligence services or similar agents had recently been dismantled, which had had a dissuasive effect on other cases discovered in the city of Medellín.*
- 617.** *The Committee observes that the allegations involved are of the utmost gravity and that they seriously affect the free exercise of both trade union rights and fundamental human rights. Although it takes note of the Government's information according to which the activities carried out by the CIL enterprise were limited simply to a consultancy contract and the investigations of the Attorney-General ended in dismissal due to the lack of cooperation from the parties concerned, the Committee must underscore that the Procurator-General's Office is carrying out a pending investigation and that it informed the members of the tripartite visit that it had knowledge of the issue concerned. In these circumstances, the Committee requests the Government to provide the Procurator-General's Office with all the necessary means to carry out an independent and exhaustive investigation, to report on the results of that investigation and to ensure fully the safety and physical integrity of all the people threatened, guaranteeing them protection that they can rely on.*
- 618.** *The Committee acknowledges the efforts made by the Government to improve protection for trade union officials, members and organizations and to move the investigations of the cases forward. The Committee agrees on the importance of tripartite dialogue for ensuring that such efforts continue and supports not only the tripartite visit members' recommendation to reactivate the Inter-institutional Committee for the Promotion and Protection of Human Rights of the Workers, but the reactivation of the Standing Negotiation Committee on Labour and Wage Policies and the Special Committee for the Handling of Conflicts Referred to the ILO. The Committee also urges, as the members of the visit suggest, that consideration be given very seriously to the possibility of setting up*

*an ILO office in Colombia in order to facilitate dialogue between the Government, social partners and the Committee on Freedom of Association on the steps to be taken to continue to combat and ultimately eliminate the existing situation of impunity as well as ensuring more effective implementation of freedom of association, tripartite dialogue and the STCP objectives.*

- 619.** *Finally, the Committee notes with interest the communication of the Government dated 27 January 2006 which contains information relative to the agreement concluded in the framework of the Permanent Commission on Wage and Labour Policies on 14 December 2005. This agreement addresses several issues such as the application of Conventions Nos. 87, 98, 151 and 154 in the public sector, education, family benefits and public utility subsidies for families with limited resources. The Committee also notes that in this agreement the employers and the workers agreed to consider trade unionism as an integral part of democracy and to respect and promote the fundamental rights at work. The Government also refers to the sanctions imposed on those companies which refuse to negotiate collectively and make use of the regime of workers' cooperatives in violation of labour laws. The Committee also notes the list sent on the status of the investigations over alleged murders and threats.*

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

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

- (a) *The Committee wishes to express its appreciation for the invitation extended to its Chairperson. It notes with interest the report of the high-level tripartite visit and the full cooperation shown by the Government to ensure that the members of the visit had access to the fullest and most candid information on the trade union situation. The Committee acknowledges the efforts made by the Government to improve protection for trade union officials, members and organizations and to move the investigations of the cases forward. The Committee agrees on the importance of tripartite dialogue for ensuring that these efforts continue and supports not only the tripartite visit members' recommendation to reactivate the Inter-institutional Committee – a process which the Committee asks to be kept informed about – but the reactivation of the Standing Negotiation Committee on Labour and Wage Policies and the Special Committee for the Handling of Conflicts Referred to the ILO. The Committee also urges, as the members of the visit suggest, that consideration be given very seriously to the possibility of setting up an ILO office in Colombia in order to facilitate dialogue between the Government, social partners and the Committee on Freedom of Association on the steps to be taken to continue to combat and ultimately eliminate the existing situation of impunity as well as ensuring more effective implementation of freedom of association, tripartite dialogue and the STCP objectives.*
- (b) *The Committee urges the Government to take all possible measures to put an end to the acts of violence against trade union officials and members and to continue to keep it informed of the protection measures and of the security schemes implemented, as well as those adopted in the future for other trade unions and other departments or regions.*

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- (c) *The Committee requests the Government to keep it informed of the progress made by the specialized sub-unit within the National Public Prosecutor's Office which deals with cases of human rights violations involving trade unionists.*
- (d) *Taking note of the information provided by the Government regarding the judicial procedures and the convictions handed down for crimes committed against trade unionists as well as definitive sentences that have been issued against the perpetrators of such crimes, the Committee once again urges the Government to take the necessary steps to investigate all the new alleged acts of violence and to continue vigorously the investigations that have already begun so as to put an end to the intolerable situation of impunity, punishing effectively all those responsible.*
- (e) *The Committee requests the Government to keep it informed of the entry into force of the Law on Justice and Peace and the manner in which it is applied, the final outcome of the appeals initiated before the Constitutional Court and any impact that this Law might have on the various cases of murder and violence that are pending.*
- (f) *As regards the allegations submitted by the workers' trade union of the municipal enterprises of Cali (SINTRAEMCALI) relating to the existence of a plan, named "Operation Dragon", to eliminate several trade union officials, and, observing that the allegations involved are of the utmost gravity and seriously affect the free exercise of both trade union rights and fundamental human rights, the Committee requests the Government to provide the Procurator-General's Office with all the necessary means to carry out an independent and exhaustive investigation, to report on the results of that investigation and to ensure fully the safety and physical integrity of all the people threatened, guaranteeing them protection that they can rely on.*

## Appendix 1

### Current state of investigations, 2002-05

File No.	Branch	First name of victim	Surname of victim	Organization to which victim belonged according to charges	Current stage of proceedings	Most recent proceedings	Main decisions that have been adopted	Indicate any appropriate control measures implemented	Year in which events occurred
743989	Bogotá	Alvaro	Granados Rativa	SUTIMAC	Preliminary	Submission of evidence	Not applicable		2004
105257	Popayán	Yesid Hernando	Chicangana	ASOINCA	Preliminary	Submission of evidence	Not applicable		2004
91550	Buga	Camilo Arturo	Kike Azcarate	SINTRAGRACO	Inquiry	Submission of evidence	Legal status		2004
98910	Buga	James Raúl	Ospina	SINTRAEMSDES	Preliminary	Inhibitory	Inhibitory		2004
2320	Popayán	Rosa Mary	Daza Nieto	ASOINCA – Cauca Teachers' Association	Preliminary	Inhibitory	Inhibitory		2004
43709	Sincelejo	Hugo	Palacios Alvis	SINDISENA	Preliminary	Submission of evidence	Inhibitory		2004
99991	Cúcuta	Ana Elizabeth	Toledo Rubiano	ASEDAR	Preliminary	Inhibitory	Inhibitory	Not applicable	2004
142729	Cartagena	Segundo Rafael	Vergara Correa	SINTRACONTAXCAR – the Cartagena Taxi Drivers' Trade Union	Preliminary	Submission of evidence	Not applicable		2004
68139	Tunja	Alexander	Parra Díaz	SINDIMAESTROS	Preliminary	Submission of evidence	Not applicable		2004
800867	Medellín	Juan Javier	Giraldo Diosa	ADIDA	Preliminary	Submission of evidence	Not applicable		2004
86343	Cúcuta	José	García	ASEDAR	Preliminary	Submission of evidence	Not applicable	Not applicable	2004
77950	Medellín	Jorge Mario	Giraldo Cardona	ADIDA	Preliminary	Submission of evidence	Not applicable		2004
650784	Cali	Carlos Alberto	Chicaiza Betancourth	SINTRAEMSIRVA	Preliminary	Inhibitory	Inhibitory		2004

File No.	Branch	First name of victim	Surname of victim	Organization to which victim belonged according to charges	Current stage of proceedings	Most recent proceedings	Main decisions that have been adopted	Indicate any appropriate control measures implemented	Year in which events occurred
138833	Antioquia	Luis Alberto	Toro Colorado	SINALTRADIHITEXCO	Preliminary	Inhibitory	Inhibitory		2004
2009	National Human Rights Unit	Leonel	Goyeneche Goyeneche	ANTHOC (Saravena) CUT Arauca ADUC	Inquiry	Closure	Legal status	In custody	2004
2009	National Human Rights Unit	Jorge Eduardo	Prieto Chamucero	ANTHOC (Saravena) CUT Arauca ADUC	Inquiry	Closure	Legal status	In custody	2004
2009	National Human Rights Unit	Héctor Alirio	Martínez	ANTHOC (Saravena) CUT Arauca ADUC	Inquiry	Closure	Legal status	In custody	2004
96337	Buga	Julio Cesar	García García	ASEINPEC	Preliminary	Inhibitory	Not applicable		2004
1395	Tunja	Ernesto	Rincón Cárdenas	SINDIMAESTROS	Preliminary	Inhibitory	Not applicable		2004
114390	Pereira	Fernando	Ramírez Barrero	SER	Preliminary	Inhibitory	Not applicable		2004
2611	Mocoa	Jesús Fabián	Burbano Guerrero	USO	Preliminary	Inhibitory	Inhibitory		2004
77776 (78508)	Cúcuta	Uriel	Ortiz Coronado	ECAAS trade union	Preliminary	Submission of evidence	Not applicable	In custody	2003
203453	Bucaramanga	José de Jesús	Rojas Castañeda	ASDEM	Preliminary	Submission of evidence	Not applicable		2003
62410	Santa Rosa de Viterbo	Orlando	Frías Parado	Workers' Trade Union of Colombia (STC)	Preliminary	Submission of evidence	Not applicable		2003
4439	Medellín	Janeth del Socorro	Vélez Galeano	ADIDA	Preliminary	Submission of evidence	Not applicable		2004
651376	Cali	Raúl	Perea Zúñiga	SINTRAMETAL	Preliminary	Inhibitory	Inhibitory		2004
228501	Bucaramanga	Camilo	Borja	USO	Preliminary	Submission of evidence	Not applicable		2004
105018	Buga	Henry	González López	SINTRASANCARLOS	Preliminary	Inhibitory	Inhibitory		2004
105018	Buga	Gerardo de Jesús	Vélez Villada	SINTRASANCARLOS	Preliminary	Inhibitory	Inhibitory		2004

File No.	Branch	First name of victim	Surname of victim	Organization to which victim belonged according to charges	Current stage of proceedings	Most recent proceedings	Main decisions that have been adopted	Indicate any appropriate control measures implemented	Year in which events occurred
650680	Medellin	Jamil	Mosquera Cuesta	ADIDA	Preliminary	Submission of evidence	Not applicable		2003
542175	Cali	Luis Hernando	Caicedo León	UNIMOTOR	Preliminary	Inhibitory	Inhibitory		2003
6960	Santa Marta	Luis Antonio	Romo Rada	President of the National Foundation of Fishermen of Ciénaga	Preliminary	Inhibitory	Not applicable		2003
40556	Santa Marta	Luis Antonio	Romo Rada	National Association of Artisanal Fishermen	Preliminary	Submission of evidence	Not applicable		2003
78012	Buga	Ana Cecilia	Salas Cuero	Workers' Trade Union of Cali	Preliminary	Submission of evidence	Not applicable		2003
941	Pasto	Evelio Germán	Salcedo Taticuan	SIMANA	Preliminary	Suspension	Suspension		2003
1893	Manizales	Luz Stella	Calderón Raigoza	Unknown	Preliminary	Inhibitory	Not applicable		2003
51227	Pasto	Tito Libio	Hernández Ordóñez	SINTRAUNICOL-CUT	Preliminary	Submission of evidence	Not applicable		2002
97418	Manizales	Luz Helena	Zapata Cifuentes	EDUCAL	Preliminary	Inhibitory	Not applicable		2003
4134	Medellin	Ana Cecilia	Duque Villegas	ADIDA	Preliminary	Submission of evidence	Not applicable		2003
43879	Montería	Ramiro Manuel	Sandoval Mercado	Indigenous leader	Preliminary	Inhibitory	Inhibitory		2003
62138	Cúcuta	Omar Alexis	Peña Cárdenas	Not mentioned in file whether victim belonged to any trade union	Preliminary	Inhibitory	Inhibitory	Not applicable	2003
564069	Cali	Jorge Eliécer	Vásquez Ramírez	EMCALI trade union	Preliminary	Submission of evidence	Not applicable		2003
2114	Antioquia	Maria Rebeca	López Garcés	ADIDA	Preliminary	Inhibitory	Inhibitory		2003
84370	Cúcuta	Nubia	Cantor Jaime	ANTHOC	Preliminary	Inhibitory	Inhibitory	Not applicable	2003

File No.	Branch	First name of victim	Surname of victim	Organization to which victim belonged according to charges	Current stage of proceedings	Most recent proceedings	Main decisions that have been adopted	Indicate any appropriate control measures implemented	Year in which events occurred
59588	Cúcuta	Jorge Eliécer	Suárez Sierra	ASINORT	Preliminary	Inhibitory	Inhibitory	Not applicable	2003
60541	Cúcuta	Luis Humberto	Rolon	Trade Union of Vendors of Betting Slips and Lottery Tickets	Preliminary	Inhibitory	Inhibitory	Not applicable	2003
126200	Ibagué	Fanny	Toro Rincón	ANTHOC	Preliminary	Inhibitory	Inhibitory		2003
79892	Cúcuta	Pedro Germán	Florez	ASEDAR	Inquiry	Submission of evidence	Legal status	Not applicable	2003
67556	Cúcuta	Marco Tulio	Díaz Fernández	Trade Union of Ecopetrol Pensioners – Cúcuta	Preliminary	Submission of evidence	Not applicable	Not applicable	2003
129390	Ibagué	Alberto y otro	Márquez García	SINTRAAGRICOL	Preliminary	Suspension	Suspension		2003
36571	Florencia	Marleny Stella	Toledo	ANTHOC	Preliminary	Submission of evidence	Not applicable		2003
2978	Antioquia	Flor Marina	Vargas Valencia	Teachers' Association of Antioquia	Preliminary	Inhibitory	Inhibitory		2003
2186	Popayán	Freddy Buenaventura	Cruz	ASOINCA	Preliminary	Inhibitory	Inhibitory		2003
136570	Ibagué	Renzo	Vargas Vélez	SIMATOL	Preliminary	Suspension	Suspension		2003
5931	Medellín	Margot	Londoño Medina	ASDEM	Preliminary	Submission of evidence	Not applicable		2003
136490	Ibagué	Dora Melba	Rodríguez Urrego	Unknown	Inquiry	Suspension	Legal status		2003
38807	Sincelejo	Abel Antonio	Ortega Medina	ADES	Preliminary	Submission of evidence	Inhibitory		2003
38807	Sincelejo	Nelly	Erazo Rivera	ADES	Preliminary	Submission of evidence	Inhibitory		2003
77776 (78508)	Cúcuta	Rito	Hernández Porras	ECAAS trade union	Preliminary	Submission of evidence	Not applicable	In custody	2003
4392	Medellín	Luis Carlos	Olarte Gaviria	SINTRAMIENERGETICA	Preliminary	Submission of evidence	Not applicable		2003

File No.	Branch	First name of victim	Surname of victim	Organization to which victim belonged according to charges	Current stage of proceedings	Most recent proceedings	Main decisions that have been adopted	Indicate any appropriate control measures implemented	Year in which events occurred
7923	Santa Marta	Everto	Fiholl Pacheco	EDUMAG-FECODE Patriotic Union	Preliminary	Inhibitory	Not applicable		2003
48140	Santa Marta	Nubia Stella	Castro	EDUMAG-FECODE	Preliminary	Submission of evidence	Not applicable		2003
1828	Barranquilla	Zuly Esther	Codina Pérez	Health and Social Security Workers' Trade Union – SINDESS	Preliminary	Submission of evidence	Not applicable		2003
7945	Santa Marta	Emerson José	Pinzon Pertuz	SINDESS	Preliminary	Submission of evidence	Not applicable		2003
7919	Santa Marta	Jorge Enrique	Peña Moreno	Teachers' Trade Union of Magdalena	Preliminary	Submission of evidence	Not applicable		2003
80894	Cúcuta	Mario	Sierra Anaya	SINTRADIN-CUT-Arauca Branch	Preliminary	Inhibitory	Inhibitory	Not applicable	2003
80916	Cúcuta	Miguel Angel	Anaya Torres	SINTRAEMSDES, Trade Union of Workers of the Enterprise Transportadores del Atlántico	Preliminary	Inhibitory	Inhibitory	Not applicable	2003
78012	Buga	Ana Cecilia	Salas Cuero	Workers' Trade Union of Cali	Preliminary	Submission of evidence	Not applicable		2003
87114	Cartagena	Gabriel Enrique	Quintana Ortiz	SUDEB	Preliminary	Inhibitory	Inhibitory		2002
29156	Santa Marta	Carlos Miguel	Padilla Ruiz	EDUMAG	Preliminary	Inhibitory	Inhibitory		2002
20309	Florencia	Nelly	Avila Castaño	AICA	Preliminary	Inhibitory	Inhibitory		2002
21989	Sincelejo	Francisco	Sarmiento Yepes	ADES	Inquiry	Submission of evidence	Indictment	In custody	2002
3111	Antioquia	Rubén Darío	Campuzano	ADIDA	Preliminary	Inhibitory	Inhibitory		2002
575501	Medellín	Barqueley	Ríos Mena	ADIDA	Preliminary	Submission of evidence	Not applicable		2002
535563	Medellín	Wilfredo	Quintero Amariles	Unknown	Preliminary	Submission of evidence	Suspension		2002
50731	Cúcuta	Manuel Alberto	Montañez Buitrago	ASINORT	Trial	Indictment	Indictment	In custody	2002
44160	Cúcuta	Eddie Socorro	Leal Barrera	ASINORT	Preliminary	Inhibitory	Inhibitory	Not applicable	2002



File No.	Branch	First name of victim	Surname of victim	Organization to which victim belonged according to charges	Current stage of proceedings	Most recent proceedings	Main decisions that have been adopted	Indicate any appropriate control measures implemented	Year in which events occurred
56590	Popayán	Fredy Armando	Girón Burbano	ASOINCA-CUT	Preliminary	Suspension	Suspension		2002
1419	Santa Marta	Miguel	Acosta García	EDUMAG	Preliminary	Submission of evidence	Not applicable		2002
1004	Mocoa	Henry y otro	Rosero Gaviria	ASEP	Preliminary	Inhibitory	Not applicable		2002
22641	Florencia	Jairo	Betancur Rojas	AICA	Preliminary	Inhibitory	Inhibitory		2002
23865	Florencia	Enio	Villanueva Rojas	AICA	Preliminary	Inhibitory	Inhibitory		2002
30715	Santa Marta	Ledys	Pertuz Moreno	EDUMAG	Preliminary	Submission of evidence	Not applicable		2002
882	Mocoa	Fernando	Olaya Sabala	ASEP	Inquiry	Indictment	Indictment	In custody	2002
54007	Pasto	Adriana Patricia	Díaz Jojoa	SIMANA	Preliminary	Inhibitory	Inhibitory		2002
81472 (1026)	Cúcuta	Carlos Alberto	Barragán Medina	ASEDAR	Preliminary	Inhibitory	Inhibitory	Not applicable	2002
64521	Cúcuta	José Olegario	Gómez Sepúlveda	ASEDAR	Preliminary	Inhibitory	Inhibitory	Not applicable	2002
34452	Santa Marta	Wilson	Rodríguez Castillo	EDUMAG	Preliminary	Submission of evidence	Not applicable		2002
34448	Santa Marta	Jaime Enrique	Lobato Montenegro	EDUMAG	Preliminary	Inhibitory	Inhibitory		2002
43140	Santa Marta	Ingrid	Cantillo Fuentes	EDUMAG	Preliminary	Submission of evidence	Not applicable		2002
24926	Florencia	Abigail	Girón Campos	AICA	Inquiry	Submission of evidence	Legal status		2002
25522	Florencia	Guillermo	Sanin Rincón	AICA	Preliminary	Inhibitory	Inhibitory		2002
3387	Medellín	Luis Eduardo	Vélez Arboleda	ADIDA	Preliminary	Submission of evidence	Not applicable		2002
2548	Antioquia	Lucia	Jaramillo Gema	ADIDA-CUT	Preliminary	Inhibitory	Inhibitory		2002
15	Villavicencio	Jorge Ariel	Díaz Aristizabal	Teachers' Association of Meta	Inquiry	Submission of evidence	Not applicable		2002
	Bogotá	Edgar	Rodríguez	ADEC	Preliminary	Submission of	Not applicable		2002

File No.	Branch	First name of victim	Surname of victim	Organization to which victim belonged according to charges	Current stage of proceedings	Most recent proceedings	Main decisions that have been adopted	Indicate any appropriate control measures implemented	Year in which events occurred
			Guaracas			evidence			
34360	Santa Marta	Oscar David	Polo Charrys	EDUMAG-FECODE-CUT	Preliminary	Submission of evidence	Not applicable		2002
678834	Medellín	Yaneth	Ibarguen Romana	ADIDA	Preliminary	Submission of evidence	Not applicable		2002
64999	Popayán	José Lino	Beltrán Sepúlveda	ASOINCA	Preliminary	Indictment	Not applicable		2002
63400	Pasto	Cecilia	Ordóñez Córdoba	SIMANA	Preliminary	Suspension	Suspension		2002
168120	Bucaramanga	Abelardo	Barbosa Páez	SINTRAINAGRO	Preliminary	Submission of evidence	Not applicable		2003
62477	Antioquia	Luis Eduardo	Guzmán Alvarez	ADIDA	Preliminary	Inhibitory	Inhibitory		2003
2059	Mocoa	Luz Mery	Valencia	ASEP	Preliminary	Inhibitory	Inhibitory		2003
10927	Cundinamarca	Juan Antonio	Bohórquez Medina	ADEC	Preliminary	Submission of evidence	Not applicable		2003
548541	Cali	Fredy	Perilla Montoya	SINTRAEMCALI	Preliminary	Inhibitory	Inhibitory		2003
61384	Cúcuta	Luis Alfonso	Grisales Peláez	ASEDAR	Preliminary	Inhibitory	Inhibitory	Not applicable	2003
103616	Pereira	Soraya Patricia	Díaz Arias	SER-Teachers' Trade Union of Risaralda	Preliminary	Submission of evidence	Not applicable		2003
64553	Cúcuta	Adolfo	Florez Rico	SINDICONS	Preliminary	Inhibitory	Inhibitory	Not applicable	2002
	Cali	Marco Antonio	Beltrán Banderas	SUTEV	Preliminary	Submission of evidence	Not applicable		2002
49553	Cúcuta	Cesar Orlando	Gómez Velasco	Trade Union of University Workers of Colombia – SINTRAUNICOL Pamplona branch	Preliminary	Inhibitory	Inhibitory	Not applicable	2002
135110	Barranquilla	Adolfo de Jesús	Munera López	SINALTRAINAL	Trial	Indictment	Indictment		2002
34792	Santa Marta	José Fernando	Mena Alvarez	EDUMAG-FECODE-CUT	Preliminary	Indictment	Not applicable		2002
159622	Bucaramanga	Jairo	Vera Arias	Unknown	Inquiry	Detention	Detention		2002
139319	Ibagué	Gustavo	Oyuela Rodríguez	SIMANA-FECODE	Preliminary	Inhibitory	Inhibitory		2002

File No.	Branch	First name of victim	Surname of victim	Organization to which victim belonged according to charges	Current stage of proceedings	Most recent proceedings	Main decisions that have been adopted	Indicate any appropriate control measures implemented	Year in which events occurred
549773	Medellín	María Nubia	Castro	Affiliated to the National Workers' Association	Preliminary	Submission of evidence	Not applicable		2002
44160	Cúcuta	Eddie Socorro	Leal Barrera	ASINORT	Preliminary	Inhibitory	Inhibitory	Not applicable	2002
579031	Medellín	Nelsy Gabriela	Cuesta Córdoba	Unknown	Preliminary	Submission of evidence	Not applicable		2002
44967	Armenia	Heliodoro	Sierra Muñoz	SUT EQ	Preliminary	Submission of evidence	Inhibitory		2002
56590	Popayán	Fredy Armando	Girón Burbano	ASOINCA-CUT	Preliminary	Suspension	Suspension		2002
51227	Pasto	Tito Libio	Hernández Ordóñez	SINTRAUNICOL-CUT	Preliminary	Submission of evidence	Not applicable		2002
46079	Cúcuta	Said	Ballona Gutiérrez	ASINORT	Preliminary	Inhibitory	Inhibitory	Not applicable	2002
623974	Medellín	Aicardo Eliécer	Ruiz	Trade Union of Workers of the Municipality of Bello	Preliminary	Submission of evidence	Not applicable		2002
562612	Medellín	Froylan Hilario	Peláez Zapata	ADIDA-CUT	Preliminary	Submission of evidence	Not applicable		2002
586755	Medellín	Isaías Arturo	Gómez Jaramillo	ADIDA-CUT	Preliminary	Submission of evidence	Suspension		2002
62144	Manizales	Hernán de Jesús	Ortiz Parra	CUT, FECODE, Vice-President of EDUCAL	Preliminary	Inhibitory	Not applicable		2002
31186	Santa Marta	Eduardo Martín	Vásquez Jiménez	SINTRAEECOL subdirectiva Magdalena	Preliminary	Inhibitory	Inhibitory		2002
5845	Antioquia	Jhon Jairo	Alvarez Cardona	Trade Union of Workers of the Textile	Preliminary	Inhibitory	Inhibitory		2002
1527	Neiva	Héctor Julio	Gómez Cuellar	Committee of La Plata Communal Action	Preliminary	Inhibitory	Inhibitory		2002
47393	Cúcuta	Luis Enrique	Coiran Acosta	ANTHOC-CUT	Trial	Indictment	Indictment	In custody	2002
27099	Bucaramanga	Helio	Rodríguez Ruiz	HOCAR	Preliminary	Submission of evidence	Not applicable		2002
64430	Cúcuta	Julio Roberto	Rojas Pinzon	ANTHOC-CUT	Preliminary	Inhibitory	Inhibitory	Not applicable	2002

File No.	Branch	First name of victim	Surname of victim	Organization to which victim belonged according to charges	Current stage of proceedings	Most recent proceedings	Main decisions that have been adopted	Indicate any appropriate control measures implemented	Year in which events occurred
143371	Bucaramanga	Wilfredo	Camargo Aroca	BRISAS	Preliminary	Submission of evidence	Not applicable		2002
51581	Cúcuta	Felipe Santiago	Mendoza Navarro	USO	Preliminary	Inhibitory	Inhibitory	Not applicable	2002
26411	Sincelejo	Francisco	Méndez Díaz	ADES-FECODE-CUT	Preliminary	Submission of evidence	Inhibitory		2002
66319	Armenia	Blanca Ludivia	Hernández Velásquez	Healthworkers' Trade Union	Preliminary	Submission of evidence	In absence		2002
871	Pasto	Carlos Alberto	Bastidas Coral	SIMANA FECODE	Preliminary	Inhibitory	Inhibitory		2002
42501	Cúcuta	Sol María	Ropero	SINDIMACO	Preliminary	Inhibitory	Inhibitory	Not applicable	2002
623973	Medellín	Rubén Darío	Arenas	ADIDA	Preliminary	Submission of evidence	Not applicable		2002
524903	Medellín	Jairo Alonso	Giraldo Suárez	ADIDA	Preliminary	Submission of evidence	Not applicable		2002
50374	Cúcuta	Gloria Eudilia	Riveros Rodríguez	ASEDAR	Trial	Indictment	Indictment	In custody	2002
42315	Armenia	Oscar Jaime	Delgado Valencia	SUTEQ	Trial	Submission of evidence	Indictment		2002
64639	Cúcuta	Henry Mauricio	Neira Leal	ANTHOC	Preliminary	Inhibitory	Inhibitory	Not applicable	2002
529734	Medellín	Nohora Elcy	López Arboleda	SINTRACINOBI	Preliminary	Submission of evidence	Not applicable		2002
123084	Bucaramanga	Angela María	Rodríguez Jaimes	Miembro del SES	Preliminary	Submission of evidence	Not applicable		2002
575501	Medellín	Barqueley	Ríos Mena	ADIDA	Preliminary	Submission of evidence	Not applicable		2002
575501	Medellín	Juan Manuel	Santos Rentería	ADIDA	Preliminary	Submission of evidence	Not applicable		2002
50606	Neiva	José Wilson	Díaz Rojas	SIMEC	Preliminary	Inhibitory	Inhibitory		2002
74765	Pereira	Hugo	Ospina Ríos	Teachers' Trade Union SER	Trial	Conviction	Indictment	In custody	2002
30436	Santa Marta	Juan	Montiel Jiménez	SINTRAINAGRO	Preliminary	Submission of evidence	Not applicable		2002

File No.	Branch	First name of victim	Surname of victim	Organization to which victim belonged according to charges	Current stage of proceedings	Most recent proceedings	Main decisions that have been adopted	Indicate any appropriate control measures implemented	Year in which events occurred
30435	Santa Marta	Emilio Alfonso	Villeras Durán	SINTRAINAGRO	Preliminary	Submission of evidence	Not applicable		2002
51170	Neiva	Alirio	Garzón Córdoba	SINTRAREGIONAL	Trial	Indictment	Indictment	In custody	2002
26345	Bucaramanga	Luis Eduardo	Chinchilla Padilla	SINTRAPALMA	Preliminary	Submission of evidence	Not applicable		2002
50498	Pasto	Luis Omar	Castillo	SINTRAEECOL-CUT	Preliminary	Suspension	Suspension		2002
549670	Medellin	Ernesto Alfonso	Giraldo Martínez	ADIDA-CUT	Preliminary	Submission of evidence	Not applicable		2002
559892	Medellin	Jesús Alfredo	Zapata Herrera	El Cairo Cement Trade Union	Preliminary	Submission of evidence	Not applicable		2002
62144	Manizales	José Robeiro	Pineda	SINTRAEECOL trade union	Preliminary	Inhibitory	Not applicable		2002

## Office of the Public Prosecutor– National Directorate of Prosecutor’s Offices – Homicide inquiries carried out (2005)

File No.	Branch	First name of victim	Surname of victim	Data- events	Location – events	Stage of proceedings	Date opened	Most recent proceedings	Date of most recent proceedings	Main decisions	Date of decisions
68800	Montería	Faiver Antonio	Alvarez Pereira	24-01-2005	Montería	Inquiry	24-01-2005	Submission of evidence	13-06-2005	Legal status. Abstención	11-02-2005
2176	National Human Rights Unit	Liris del Carmen, Orlando José, José F rancisco	Benítez Palencia, Benítez Palencia, Mestra Martínez	09-04-2005	Montería	Preliminary	12-04-2005	Submission of evidence	12-04-2005	Not applicable	Not applicable
170016000030200500206	Manizales	Rigoberto	Arias Ospina	18-02-2005	Manizales	Inquiry	18-02-2005	Submission of evidence. Photo identification procedure	13-04-2005	Not applicable	Not applicable
173806000071200500057	Manizales	Luis Gonzaga	Sánchez Bedoya	21-02-2005	Carrera 9 núm. 13-35 barrio San Antonio	Preliminary	25-02-2005	Interviews	01-06-2005	Not applicable	Not applicable
178676000077200500020	Manizales	Octavia	Ramírez Vargas	01-04-2005	Victoria (Caldas)	Inquiry	01-04-2005	Submission of evidence. Report of field investigator	27-04-2005	Not applicable	Not applicable
104446	Neiva	Luis Alberto	Melo Palacios	14-02-2005	San Agustín (huila) Vda. El Retiro	Preliminary	04-03-2005	Submission of evidence. CTI Committee	11-05-2005	Not applicable	Not applicable
111165	Cúcuta	José Diomedez	Zubieta Alfonso	15-03-2005	Vereda Caño Camame	Preliminary	16-03-2005	Referral to Specialized Office of Attorney-General of Arauca	22-06-2005	Not applicable	Not applicable
109433	Cúcuta	Arbey	Niño Villareal	17-05-2005	Cúcuta	Inquiry	18-05-2005	Submission of evidence. Taking of statements	27-06-2005	Legal status In custody	27-05-2005

File No.	Branch	First name of victim	Surname of victim	Data- events	Location – events	Stage of proceedings	Date opened	Most recent proceedings	Date of most recent proceedings	Main decisions	Date of decisions
171309	Valledupar	Alfredo	Mendoza Vega	09-06-2005	Valledupar	Inquiry	09-06-2005	Submission of evidence. Testimonies	27-06-2005	Legal status  In custody	16-06-2005
660016000-35-2005-00364	Pereira	Arley de Jesús	Toro Bedoya	13-03-2005	Pereira	Investigation	13-03-2005	Justification of appeal	03-06-2005	Second instance confirmed acceptance of charges. In custody	03-06-2005
122634	Popayán	Jhon Smith	Ruiz Córdoba	09-05-2005	El Tambo (Cauca)	Preliminary	23-05-2005	Submission of evidence. Committee	24-06-2005	Not applicable	Not applicable
2542	Antioquia	Albeiro de Jesús	Tabares Parra	15-03-2005	Vereda «El Sireno»	Preliminary	17-03-2005	Submission of evidence. Testimonies	None	Not applicable	Not applicable
82837	Santa Rosa de Viterbo	Jhon Henry	Aguilar Pino	23-02-2005	Monterrey (casanare)	Preliminary	23-02-2005	Submission of evidence	07-04-2005	Referral to Specialized Office of Attorney-General of Yopal	Not applicable
217059	Barranquilla	Adán Alberto	Pacheco Rodríguez	02-05-2005	Calle 49 núms. 8-15 barrio Las Palmas	Preliminary	02-05-2005	Submission of evidence. CTI Committee	27-06-2005	Not applicable	Not applicable
2427	Barranquilla	José María	Maldonado	17-05-2005	Barranquilla	Preliminary	17-05-2005	Submission of evidence. Telephone intercepts. Legal medicine	01-06-2005	Not applicable	Not applicable
249533	Bucaramanga	Lilia	Ramírez Ortíz	03-02-2005	Sabana Torres	Preliminary	16-02-2005	Submission of evidence	17-05-2005	Not applicable	Not applicable
256419	Bucaramanga	Alicia Stella	Caballero Badillo	30-04-2005	Calle 73 cdra. 21 nomenclatura 73-17	Preliminary	30-04-2005	Submission of evidence	02-05-2005	Not applicable	Not applicable

File No.	Branch	First name of victim	Surname of victim	Data- events	Location – events	Stage of proceedings	Date opened	Most recent proceedings	Date of most recent proceedings	Main decisions	Date of decisions
750325	Cali	María Elena	Díaz	24-05-2005	Cali	Preliminary	26-05-2005	Not applicable		Not applicable	Not applicable
752227	Cali	Miryam	Navia Silva	02-06-2005	Cali	Inquiry	02-06-2005	Legal status	08-06-2005	Legal status	08.06.2005
60553	Santa Marta	Benjamín	Ramos Rangel	21-02-2005	Guamal (Magdalena)	Preliminary	23-02-2005	Submission of evidence. CTI Committee	27-06-2005	In custody Not applicable	No
165241	Cartagena	Nelson Enrique	Jiménez Osorio	06-01-2005	Barrio Crespo casa núms. 67-59 y 67-47.	Trial	06-01-2005	Preparation of indictment	11-04-2005	Not applicable	Not applicable
160388	Cartagena	Angel María	Varela Rodelo	22-02-2005	San Juan Nepomuceno	Preliminary	29-03-2005	Submission of evidence. CTI Committee	21-05-2005	Not applicable	Not applicable
722855	Cali	Luis Francisco	Montaño	38378	Cali	Preliminary	28-01-2005	Inhibitory	20-04-2005	Not applicable	Not applicable



## Appendix 2

### List of measures

Organization	Target group	Total
Single Confederation of Workers of Colombia (CUT)	Trade union	195
Petroleum Industry Workers' Trade Union (USO)	Trade union	165
ANTHOC	Trade union	117
National Union of Workers in the Food Industry	Trade union	109
Union of Electricity Workers of Colombia (SINTRAELECOL)	Trade union	100
Pending	Trade union	99
SINTRAUNICOL	Trade union	88
SINTRAMIENERGETICA	Trade union	60
SINTRAEMSDES – CUT	Trade union	47
National Federation of Agricultural Unions (FENSUAGRO – CUT)	Trade union	39
SUTIMAC	Trade union	37
SINTRAIMAGRA	Trade union	30
SINTRADEPARTAMENTO	Trade union	26
ASOINCA	Trade union	26
SINTRAEMCALI	Trade union	24
SINTRABECOLICAS	Trade union	23
SINTRAENTEDDIMCOL	Trade union	18
FENASINTRAP	Trade union	17
SINTRAMETAL	Trade union	16
ASINORT	Trade union	14
FECODE	Trade union	14
SINTRAHOINCOL	Trade union	13
SINTRACOOLECHERA	Trade union	13
FENALTRASE	Trade union	13
SINTRAVIDRICOL	Trade union	12
SINTRAIME	Trade union	12
ADIDA	Trade union	12
SINTRAPALMA	Trade union	11
SINTRAMUNICIPIO YUMBO	Trade union	11
ASONAL JUDICIAL	Trade union	11
Confederation of Workers of Colombia (CTC)	Trade union	11
SUTEV	Trade union	10
SINTRAOFAN – FENASINTRAP	Trade union	10
SINDIBA	Trade union	10
SINALTRAPROAL	Trade union	10
SINALPROCHAN	Trade union	10

Organization	Target group	Total
SIMANA	Trade union	10
FUNTRAENERGETICA	Trade union	10
Community Aqueduct and Drainage Enterprise Workers' Union of the Municipality of Saravena (ECAAS)	Trade union	10
SINTRATITAN	Trade union	9
ATELCA	Trade union	9
ASPU	Trade union	8
SINTRAFAPROCONS	Trade union	8
National Union of Agricultural Workers (SINTRAINAGRO)	Trade union	8
SINTRASERVIMOS	Trade union	7
SINTRAHOSCLISAS	Trade union	7
UNIMOTOR	Trade union	6
SINTRAOFIEMCALI	Trade union	6
SINTRAINCAPLA	Trade union	6
SINTRAGRITOL	Trade union	6
SINSERCOSTA	Trade union	6
General Confederation of Democratic Workers (CGTD)	Trade union	6
SINDAGRICULTORES	Trade union	6
FEGTRAVALLE	Trade union	6
SINTRASINTETICOS	Trade union	5
SINTRAPULCAR	Trade union	5
SINTRAMUNICIPIO	Trade union	5
SINTRAMINERCOL – FENASINTRAP	Trade union	5
SINTRAICAÑAZUCOL	Trade union	5
SINTRACARBON	Trade union	5
UTRADEC	Trade union	4
SINALTRAPROAL	Trade union	4
SINTRAMUNICIPIO DAGUA	Trade union	4
SINCONTAXCAR	Trade union	4
SINTRAMUNICIPIO CHINCHINA	Trade union	4
ASODEFENSA	Trade union	4
Meta Teachers' Association (ADEM)	Trade union	4
SINTHOL	Trade union	4
Risaralda Teachers' Union (SER)	Trade union	4
National Union of Banking Employees (UNEB)	Trade union	3
ASEDAR	Trade union	3
FENACOA	Trade union	3
Santander Teachers' Union (SES)	Trade union	3
SINTRAUNICOL	Trade union	3
FENTRALIMENTACION	Trade union	3
ADES-FECODE	Trade union	3

Organization	Target group	Total
SINTRAISS	Trade union	3
SINALTRAICA	Trade union	3
SINTRAHOSPICLINICAS	Trade union	3
Union of the University Hospital of Valle	Trade union	3
SINTRAGRICOLAS	Trade union	3
SINTRAEMPOPASTO	Trade union	3
SINDESENA	Trade union	3
SINALTRAINBEC	Trade union	3
SINDINALCH	Trade union	3
CSPP	Trade union	2
FENSUAGRO – SINTRAGRITOL	Trade union	2
Union of Local Hospital Employees of Aguachica (SINESHLA)	Trade union	2
SINTRATEXTIL	Trade union	2
SIGGINPEC	Trade union	2
SINTRAMUNICIPIO VALLE	Trade union	2
SINTRAMARITIMOS	Trade union	2
SINTRALIMENTICIA	Trade union	2
ASTDEMP	Trade union	2
Association of Telecommunications Workers (ATT)	Trade union	2
SINTRAGRICOVAL	Trade union	2
SINTRAENERGIA	Trade union	2
SINTRAENCAPLA	Trade union	2
SINTRACREDITARIO	Trade union	2
Association of Retirees and Pensioners of Valle University	Trade union	2
ANATRASIN	Trade union	2
National Directorate of the National Union of Workers of the Dairy Industry (SINTRAINDULECHE)	Trade union	1
ASOPERSONERIAS – CUT	Trade union	1
SINTRAEMDDICOL VALLE	Trade union	1
ADESCOP	Trade union	1
CINEP	Trade union	1
Trade Union Association of Civil Servants of the Ministry of Defence, Armed Forces, National Police and Related Bodies (ASODEFENSA)	Trade union	1
FENACOA	Trade union	1
SINTRAGRACO	Trade union	1
Health and Social Security Workers' Trade Union – SINDESS	Trade union	1
National Union of Workers in the Construction Industry (SINDICONS)	Trade union	1
FUNTRAMETAL	Trade union	1
Arauca Teachers' Association (ASEDAR)	Trade union	1
Association of Pensioners of Atlántico University (ASOJUA)	Trade union	1

Organization	Target group	Total
National Diver's Union of Colombia (SINDINALCH)	Trade union	1
Union of Workers and Public Employees of the Arauca Municipality (SINTREMAR)	Trade union	1
Union Association of the National Penitentiary and Prison Institute Pereira Judicial District (ASEILTEC)	Trade union	1
SINTRABAVARIA	Trade union	1
SINDEPEAH	Trade union	1
SINTRAINQUIGAD – Chemical industry and similar	Trade union	1
Union of Workers of the Agustín Codazzi Institute	Trade union	1
SINTRAISS	Trade union	1
SINTRABANCOL	Trade union	1
SINTRALINA	Trade union	1
SINDESS	Trade union	1
District Teachers' Association (ADE)	Trade union	1
Fusagasuga Town Hall	Trade union	1
SINALTRABAVARIA	Trade union	1
DAF	Trade union	1
Caqueta 1 Gold Mining Project	Trade union	1
SINCONTAXCAR	Trade union	1
SINTRAMUNICIPIO Medellin	Trade union	1
National Institution of Social Studies (INES)	Trade union	1
ACA Cimitarra River Valley	Trade union	1
COM DH USO	Trade union	1
Cali Municipal Enterprises Workers' Union (SINTRAEMCALI)	Trade union	1
National Housing Centre (CENAPROV)	Trade union	1
EDUCAL	Trade union	1
SINTRARAUCA	Trade union	1
SINTRAREGIONAL	Trade union	1
SINTRASANCARLOS	Trade union	1
SINTRASENA	Trade union	1
FENALTRASE	Trade union	1
SINDINALCH	Trade union	1
SINTRATELEFONOS	Trade union	1
National Union of Workers in the Cooking Fats and Food Industry (SINTRAIMAGRA)	Trade union	1
ACEU – Colombian Association of University Students (ACEU)	Trade union	1
AJUCOR	Trade union	1
Tolima Teachers' Association (SIMATOL)	Trade union	1
SINDICIENAGA	Trade union	1
SINTRENAL	Trade union	1
SUDEA	Trade union	1

Organization	Target group	Total
CONFACAUCA	Trade union	1
Teachers' Association of Santander	Trade union	1
SUTIMAC	Trade union	1
Single Teachers' Association of Amazonas	Trade union	1
National Union of Stock Employees of Colombia (UTRADEC)	Trade union	1
Union of Workers of Atlántico (UTRAL)	Trade union	1
PCCUP 1 Valle	Trade union	1
Trade Union of Communications Workers (USTC)	Trade union	1
ACEB	Trade union	1
USTC – CGTD	Trade union	1
Overall total		1 774

## Appendix 3

### Murders

1. Camilo Borja Pérez, 12 July 2004, Diagonal 33 At No. 16 Barranacabermeja, murder.  
 File No.: 228501  
 Branch: Bucaramanga  
 Investigating authority: 5 specialised  
 Stage of proceedings: preliminary  
 Current status: gathering evidence
2. Gerardo de Jesús Vélez Villada, member, SINTRASANCARLOS, 9 August 2004, Tulúa, murder.  
 DAS and PONAL ordered to proceed, protection requested. DJ ordered of victims and of Henry Gordon. CTI to carry out investigation. 4 December 2001 Gordon interviewed in DJ. 5 December 2001. DJ of Yoris and Hernando. 11 December 2001. DJ of Jorge Lu.  
 File No.: 105018  
 Branch: Buga  
 Investigating authority: Public Prosecutor 33 Branch, Tulúa  
 Stage of proceedings: preliminary  
 Current status: gathering evidence
3. Benedicto Caballero, leader, FENACOA, 22 July 2004, Mesitas (Cundinamarca), murder.  
 Flor María Santiago (reported by ICFTU as Carreño Santiago Flor María).  
 File No.: 631-1 URI  
 Branch: Cundinamarca  
 Investigating authority: Public Prosecutor No. 37 Branch  
 Stage of proceedings: preliminary  
 Current status: gathering evidence

4. Alberto Torres García (arrived as Adalberto), member, ADIDA, 12 December 2001, murder.  
File No.: 517442  
Branch: Antioquia  
Investigating authority: Public Prosecutor No. 129 Medellin Branch  
Stage of proceedings: preliminary  
Current status: suspended
5. Nicanor Sánchez, member, ADE, 20 August 2002, murder.  
File No.: 81828  
Branch: Villavicencio  
Investigating authority: Public Prosecutor 9  
Stage of proceedings: preliminary  
Current status: prohibition proceedings
6. Miguel (Antonio) Espinoza Rangel, ex leader, 24 June, 2004, Barranquilla, murder.  
File No.: 1919159  
Branch: Barranquilla  
Investigating authority: 32, life  
Stage of proceedings: preliminary  
Current status: suspended
7. José, Jesús Rojas Castañeda, member, ASDEM, 3 December 2003, Barrancabermeja, murder.  
File No.: 203453  
Branch: Bucaramanga  
Investigating authority: Public Prosecutor 11, Bucaramanga Branch  
Stage of proceedings: preliminary  
Current status: suspended
8. Janeth del Socorro Vélez Galeano, member, ADIDA, 15 February, 2004, Vereda Lejanías, Remedios, murder.  
File No.: 4439  
Branch: Medellin  
Investigating authority: Public Prosecutor No. 110 Segovia Branch,  
Stage of proceedings: preliminary  
Current status: gathering evidence
9. Camilo Arturo Kike Azcarate, manager, SINTRAGRACO, 24 January, 2004, Buga la Grande, murder, deprived of liberty in Oscar Alonso Rivera Mendoza prison. No security measure ordered.  
File No.: 91550  
Branch: Buga  
Investigating authority: Branch No. 2  
Stage of proceedings: investigation  
Current status: cierre, la investigación
10. Carlos Raúl Ospina, treasurer del Sindicato de MERTULUA, SINTRAEMSDES, 24 February, 2004, Tulúa, murder, case under investigation.

File No.: 98910

Branch: Buga

Investigating authority: Public Prosecutor No. 33, Buga Branch

Stage of proceedings: preliminary

Current status: gathering evidence. How to identify and attribute individual responsibility to the authors.

11. Luis José Torres Pérez, member, ANTHOC, 4 March, 2004, Barranquilla, murder. Not possible to identify authors.

Decision fgn 03131, 8 July 2004, order of transmittal to Public Prosecutor 32, National Human Rights Unit

File No.: 184081

Branch: Barranquilla

Investigating authority: Public Prosecutor 12 representative

Stage of proceedings: preliminary

Current status: SIJIN Judicial Police assigned, 6 April, 2004. Maryha Cecilia Chico and Isabel Miranda questioned by DJ.

12. Raúl Perea Zúñiga, leader, SINTRAMETAL, 14 April, 2004, murder, case under investigation.

During and information meeting, the complainant was videoed while he made his speech. On 22 October, decision pending.

File No.: 651376

Branch: Cali

Investigating authority: Public Prosecutor No. 23, JPCTO Branch

Stage of proceedings:

Current status: prohibition proceedings

13. Jesús Fabián Burbano Guerrero, member, USO, Dora Lilia Imbache (wife), murder, case under investigation.

During the investigation, it was suggested that the murder occurred for sentimental reasons. (information received by Public Prosecutor 51 of Orito Putumayo). The police has made progress in its investigations. Burbano's murder was not linked to his trade union immunity or with his work for ECOPETROL. Statement Lucía Cenaida; statement by Dora Lilia Imbachi Bolaños and statement by Nora Librada Bolaños.

File No.: 2611

Branch: Mocoa

Investigating authority: Public Prosecutor 51 Branch, Orito

Current status: police mission, 1 June, 2004, reply pending

14. Luis Alberto Toro Colorado, member, SINALTRADIHITEXCO, 22 June, 2004, ex officio, murder.

File No.: 138833

Branch: Antioquia

Investigating authority: Public Prosecutor No. 5 Branch, Bello

Stage of proceedings: preliminary

15. Hugo Fernando Castillo Sánchez, servidor public sector, funcionario DAS, 22 June, 2004, ex officio, murder, case under investigation.

File No.: 667370

Branch: Cali

Investigating authority: Public Prosecutor No. 47 Cali Branch

Stage of proceedings: preliminary

Current status: gathering evidence

16. Carmen Elisa Nova Hernández, nursing auxiliary Clínica Bucaramanga, SINTRACLINICAS, 15 July 2004, ex officio, murder, investigation.

When he was about to mount his motorbike, he was assaulted by unknown persons bearing firearms.

File No.: 2149

Branch: Bucaramanga

Investigating authority: specialized Public Prosecutor Bucaramanga, his unit

Stage of proceedings: preliminary

Current status: investigation conducted by Judicial Police, CTI has taken statements from family members and CUT staff, SINTRACLINICAS trade union.

17. Gerardo, Jesús Vélez Villada, member, SINTRASANCARLOS, 9 August 2004, ex officio, murder.

File No.: 105018

Branch: Buga

Investigating authority: Public Prosecutor 33, Tulúa Branch

Stage of proceedings: preliminary

18. José Céspedes, Ricardo Espejo Galindo, Marco Antonio Rodríguez Moreno, Germán Bernal Baquero, Public Prosecutor, SINTRAGRITOL, 10 November, 2003, murder.

File No.: 1893

Branch: specialized

Investigating authority: specialized Public Prosecutor No. 9 UDH

Stage of proceedings: preliminary

## Threats and abductions

1. Ana Milena, Cobos, deputy manager, SINTRAUNICOL, complainant: Jaime Maisonnneuve Saninet, 27 November, 2003, Cali, personal threats, gathering evidence during investigation. No evidence exists to indicate that the deceased belonged to any trade union organization. See documents obtained for the investigation revealed that Jhonthan Jiménez Cadena was an eighth grade student of the Instituto Cerros del Sur and a member of a football training school, suspects under investigation.

File No.: 796189

Branch: Bogotá

Investigating authority: Public Prosecutor No. 240 Branch

Stage of proceedings: preliminary

Current status: gathering evidence

2. Ariel, Díaz, leader, CUT, complainant: Jaime Maisonnneuve Saninet, 27 November, 2003, Cali, personal threats, suspects under investigation.

File No.: 796189

Branch: Bogotá

Investigating authority: Public Prosecutor No. 240 Branch



- Stage of proceedings: preliminary  
Current status: gathering evidence
3. Carlos, González, leader, CUT, complainant: Jaime Maisonnneuve Saninet, 27 November, 2003, Cali, personal threats, suspects under investigation.
- File No.: 796189  
Branch: Bogotá  
Investigating authority: Public Prosecutor No. 240 Branch  
Stage of proceedings: preliminary  
Current status: gathering evidence
4. Uriel, Ortiz Coronado, member, SINTRACAASA, ex officio, 22 July 2003, Saravena, murder, investigation, investigating judge Saravena Circuit, suspects : Jaime Nelson Londoño, Jorge Hugo Mosquera, Edwin González Florez, Werner Oliveros Agudelo, the victim was shot with a firearm in a public establishment when leaving with friends.
- File No.: 77776  
Branch: Cúcuta  
Investigating authority: Public Prosecutor1, Saravena Branch, Arauca  
Stage of proceedings: investigation  
Current status: ordered to submit case to court for trial proceedings
5. Alvaro Enrique, Villamizar, president, SINTRAUNICOL, complainant: Jaime Maisonnneuve Saninet, 27 November, 2003, Cali, personal threats, suspects under investigation.
- File No.: 796189  
Branch: Bogotá  
Investigating authority: Public Prosecutor No. 240 Branch  
Stage of proceedings: preliminary  
Current status: gathering evidence
6. Eduardo, Camacho, member, SINTRAUNICOL, complainant: Jaime Maisonnneuve Saninet, 27 November, 2003, Cali, personal threats, suspects under investigation.
- File No.: 796189  
Branch: Bogotá  
Investigating authority: Public Prosecutor No. 240 Branch  
Stage of proceedings: preliminary  
Current status: gathering evidence
7. David, Jesús, Vergara Peñaranda, leader, SINTRAGRICOLAS, 29 September, 2003, unknown, abduction.
- File No.: 157373  
Branch: Valledupar  
Investigating authority: Specialized First Public Prosecutor  
Stage of proceedings: preliminary  
Current status: gathering evidence
8. Seth Jojhan, Cure Castillo, leader, SINTRAGRICOLAS, 29 September, 2003, unknown, abduction.
- File No.: 157373  
Branch: Valledupar  
Investigating authority: Specialise First Public Prosecutor

- Stage of proceedings: preliminary  
Current status: gathering evidence
9. Euclides Manuel, Gómez Ricardo, leader, SINTRAINAGRO, complainant: Euclides Manuel Gómez Ricardo, 31 July 2003, Zona Bananera, Cienaga, personal threats.  
File No.: 44093  
Branch: Santa Marta  
Investigating authority: Specialised Public Prosecutor No. 3  
Stage of proceedings: preliminary  
Current status: gathering evidence
10. José Moisés, Luna Rondón, member, ASPU, 30 July 2003, personal threats.  
File No.: 48129  
Branch: Montería  
Investigating authority: 80 Branch  
Stage of proceedings: prohibition proceedings  
Current status: closed
11. David José, Carranza Calle, 10 September, 2003, enforced disappearance.  
File No.: 171001  
Branch: Barranquilla  
Public Prosecutor : Life 32 Branch  
Stage of proceedings: preliminary  
Current status: prohibition proceedings
12. José, Munera, president, SINTRAUNICOL, 11 November, 2003, personal threats.  
File No.: 771518  
Branch: Medellín  
Investigating authority: 78  
Stage of proceedings: preliminary  
Current status: suspended
13. Elizabeth, Montoya, president, SINTRAUNICOL, 11 November, 2003, personal threats.  
File No.: 771518  
Branch: Medellín  
Public Prosecutor: 78  
Stage of proceedings: preliminary  
Current status: suspended
14. Norberto, Moreno, activista, SINTRAUNICOL, 11 November, 2003, personal threats.  
File No.: 771518  
Branch: Medellín  
Investigating authority: 78  
Stage of proceedings: preliminary  
Current status: suspended

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15. Bessi, Pertuz, vice-president, SINTRAUNICOL, 11 November, 2003, personal threats.  
File No.: 771518  
Branch: Medellin  
Public Prosecutor No.: 78  
Stage of proceedings: preliminary  
Current status: suspended
  16. Luis Ernesto, Rodríguez, president, SINTRAUNICOL, 11 November, 2003, personal threats.  
File No.: 771518  
Branch: Medellin  
Investigating authority: 78  
Stage of proceedings: preliminary  
Current status: suspended
  17. Alvaro, Vélez, president-Montería, SINTRAUNICOL, 11 November, 2003, personal threats.  
File No.: 771518  
Branch: Medellin  
Public Prosecutor: 78  
Stage of proceedings: preliminary  
Current status: suspended
  18. Mario, López Puerto, treasurer, SINTRAUNICOL, 11 November, 2003, personal threats.  
File No.: 771518  
Branch: Medellin  
Investigating authority: 78  
Stage of proceedings: preliminary  
Current status: suspended
  19. Eduardo, Camacho, SINTRAUNICOL, 11 November, 2003, personal threats.  
File No.: 771518  
Branch: Medellin  
Public Prosecutor: 78  
Stage of proceedings: preliminary  
Current status: suspended
  20. Ana Milena, Cobos, SINTRAUNICOL, 11 November, 2003, personal threats.  
File No.: 771518  
Branch: Medellin  
Investigating authority: 78  
Stage of proceedings: preliminary  
Current status: suspended
  21. Ariel, Díaz, SINTRAUNICOL, 11 November, 2003, personal threats.  
File No.: 771518  
Branch: Medellin  
Investigating authority: 78

Stage of proceedings: preliminary

Current status: suspended

22. Fredy Adolfo, Páez Romero, member, complainant: the victim, 1 March, 2004, Barranquilla, personal threats to family members.

File No.: 180286

Branch: Barranquilla

Investigating authority: 15

Stage of proceedings: case under investigation

Current status: preliminary

23. Eduardo Gracia Pimienta, Euripides Yance, Evelio Mancera, Eduardo Arévalo, Antonio Andrade, Roberto Borja, Tomás Ramos, Adalberto Ortega, Víctor Vaca, Luis Jiménez, Osvaldo Camargo, Eliécer Garcés, Jorge Eliécer Sarmiento, Freddy Páez, Ramón Camargo, Germán Castaño, Antonio Gracia and Orlando Pérez Contreras, sede, SINALTRAINAL, 28 February, 2005, personal threats all threats to family members.

File No.: 209323

Branch: Barranquilla

Investigating authority: 23

Current status: preliminary

## Arrests

1. Blanca Aurora Segura, president, SINTRAENAL.

File No.: 201819

Branch: Bucaramanga

Investigating authority: 3 specialized

2. Ney M. Medrano Navas, rebellion, pre-trial detention without bail, sentenced to six years imprisonment.

File No.: 36537

Branch: Sincelejo

Investigating authority: Public Prosecutor No. 4

Current status: charged, appearing before the Second Criminal Circuit Court

3. Apolinar Herrera, member, SINDEAGRICULTORES, arms trafficking.

Branch: Florencia

Investigating authority: 8 specialised

Current status: trial proceedings

4. Apolinar Herrera, member, SINDEAGRICULTORES, arms trafficking.

File No.: 237992

Branch: Bucaramanga

Investigating authority: 12 specialised

Current status: gathering evidence

5. Víctor Rodrigo Oime Hormiga, member, SINTRAGIM, embezzlement.

File No.: 1493

Branch: Florencia

- Investigating authority: 8 specialised  
Current status: detention
6. Víctor Rodrigo Oime Hormiga, member, SINTRAGIM, rebellion.  
File No.: 5418  
Branch: Bogotá Regional Public Prosecutor  
Investigating authority: representative at court  
Current status: investigation
7. Samuel Morales, president, CUT-Arauca, rebellion, pre-trial detention.  
File No.: 61427  
Branch: Nacional Anti-abduction Unit Saravena Court  
Investigating authority: 12 specialised  
Current status: trial proceedings
8. Raquel Castro, member, ASEDAR, rebellion, pre-trial detention without bail.  
File No.: 61427  
Branch: Nacional Anti-abduction Unit Saravena Court  
Investigating authority: 12 specialised  
Current status: trial proceedings
9. Adolfo Tique, rebellion, pre-trial detention.  
File No.: 1125206  
Branch: Ibagué  
Investigating authority: 12 specialised  
Current status: kept decision to press charges
10. Nibia Esther González de Coll, member, FENSUAGRO, advocacy of the offence.  
Branch: Barranquilla  
Investigating authority: 54  
Current status: detention

## Appendix 4

### Information on the investigations of crimes of murder of trade union members – 2004

#### *Cases where investigation has been completed – Trial proceedings*

1. Leonel Goyeneche Goyeneche, treasurer, Arauca Teachers' Association (ASEDAR), teacher, 5 August 2004, Saravena, departament of Arauca.  
Authors: national army  
File No.: 2009  
Branch: National Human Rights Unit  
Pre-trial detention: pre-trial detention (five defendants)  
Stage of proceedings: completion of investigation– trial

2. Jorge Eduardo, Prieto Chamucero, president, National Association of Workers and Employees in Hospitals and Clinics (ANTHOC), health, 5 August 2004, Saravena, departament of Arauca.

Authors: national army

File No.: 2009

Branch: National Human Rights Unit

Pre-trial detention: pre-trial detention (five defendants)

Stage of proceedings: completion of investigation – trial

3. Héctor Alirio Martínez, former president, National Federation of Agricultural Unions (FENSUAGRO), agricultural, 5 August 2004, Caserío Caño Seco, municipality of Fortul, departament of Arauca.

Authors: national army

File No.: 2009

Branch: National Human Rights Unit

Pre-trial detention: pre-trial detention (five defendants)

Stage of proceedings: completion of investigation– trial

### ***Cases undergoing investigation***

1. Camilo Arturo, Kike Azcárate, manager, Fat, Vegetable Oil and Oleaginous Products Workers' Nacional Trade Union of Colombia (SINTRAGRACO), industry, 24 February 2004, Buga, departament of Meta.

Authors: unknown

File No.: 91550

Branch: Buga

Pre-trial detention: pre-trial detention (one)

Stage of proceedings: investigation – trial

CRER protection measure: had not requested or been granted any protection measure

2. Martha Lucía Gómez Osorio, member, Tolima Teachers' Union (SIMATOL), teacher, 27 October 2004, Chaparral, departament of Tolima.

Authors: unknown

File No.: 181800

Branch: Ibagué

Pre-trial detention: pre-trial detention (two defendants)

Stage of proceedings: investigation – trial

### ***Cases at the preliminary stage***

1. Jairo González Quintero, member, Antioquia Teachers' Association (ADIDA), teacher, 17 January 2004, Medellin, department of Antioquia.

Authors: unknown

File No.: 776970

Branch: Medellin

Stage of proceedings: preliminary, gathering evidence

CRER protection measure: has not requested or been granted any protection measure.

2. Alvaro Granados Rativa, vice-president Branch Bogotá, Single Construction Industry and Materials Workers' Union (SUTIMAC), 8 February 2004, Bogotá, department of Cundinamarca.  
Authors: unknown  
File No.: 743989  
Branch: Bogotá  
Stage of proceedings: preliminary, gathering evidence
3. Yesid Chincanga, member, Cauca Teachers' Association (ASOINCA), teacher, 9 February 2004, Santander, Quilichao, department of Cauca.  
Authors: unknown  
File No.: 105257  
Branch: Popayán  
Stage of proceedings: preliminary – gathering evidence  
CRER protection measure: has not requested or been granted any protection measure
4. Janeth del Socorro Vélez Galeano, member, Antioquia Teachers' Association (ADIDA), teacher, 15 February 2004, Remedios, department of Antioquia.  
Authors: unknown  
File No.: 4439  
Branch: Medellín  
Stage of proceedings: preliminary – gathering evidence
5. Rafael Segundo Vergara Correa, member, Cartagena Taxi Drivers' Trade Union (SINCONTAXCAR), taxi driver, 22 March 2004, municipalities of Campestre and Milagro, department of Bolívar.  
Authors: unknown  
File No.: 142729  
Branch: Cartagena  
Stage of proceedings: preliminary – gathering evidence  
CRER protection measure: has not requested or been granted any protection measure
6. Alexander Parra Díaz, member, Boyacá Teachers' Union, teacher, 28 March 2004, Chiquinquirá, department of Boyacá.  
Authors: unknown  
File No.: 68139  
Branch: Tunja  
Stage of proceedings: preliminary – gathering evidence  
CRER protection measure: has not requested or been granted any protection measure
7. Juan Javier Giraldo, member, Antioquia Teachers' Association (ADIDA), teacher, 1 April 2004, Medellín, department of Antioquia.  
Authors: unknown  
File No.: 800867  
Branch: Medellín  
Stage of proceedings: preliminary – gathering evidence  
CRER protection measure: has not requested or been granted any protection measure
8. Luis Francisco Verano Gómez, Association of Aqueduct Construction Workers, construction, 6 April 2004, Mesetas.

Authors: unknown

File No.: 125611

Branch: Villavicencio

Stage of proceedings: preliminary – gathering evidence

9. José García, member, Arauca Teachers' Association (ASEDAR), teacher, 12 April 2004, Tame, department of Arauca.

Authors: unknown

File No.: 86343

Branch: Cúcuta

Stage of proceedings: preliminary – gathering evidence

CRER protection measure: has not requested or been granted any protection measure

10. Mildreth Berteyd Mazo Jaramillo, member, Antioquia Teachers' Association (ADIDA), teacher, 26 May 2004, municipality of San Andrés, Cuerquia, department of Antioquia.

Authors: unknown

File No.: 141400

Branch: Antioquia

Stage of proceedings: preliminary – gathering evidence

11. Javier Montero Martínez, member, Teachers' Association of César (ADUCESAR), teacher, 1 June 2004, Valledupar, department of Cesar.

Authors: unknown

File No.: 163406

Branch: Valledupar

Stage of proceedings: preliminary – gathering evidence

12. Isabel Toro Soler, member, Putumayo Teachers' Association (ASEP), 1 June 2004, Yopal, department of Putumayo.

Authors: unknown

File No.: 67405

Branch: Santa Rosa, Viterbo

Stage of proceedings: preliminary – gathering evidence

13. Camilo Borja, member, Petroleum Industry Workers' Trade Union (USO), oil sector, 12 July 2004, Barranca Bermeja, department of Santander.

File No.: 228501

Branch: Bucaramanga

Stage of proceedings: preliminary, gathering evidence

14. José Joaquín Cubides, secretary general, Agro Small and Medium-sized Producers' Union (SINDEAGRO), agricultural, 7 November 2004, Fortul, department of Arauca.

Authors: unknown

File No.: 4760

Branch: Cúcuta

Stage of proceedings: preliminary – gathering evidence

15. Iria Fenilde Mesa Blanco, member, Arauca Teachers' Association (ASEDAR), teacher, 9 November 2004, Fortul, department of Arauca.



Authors: unknown

File No.: 4759

Branch: Cúcuta

Stage of proceedings: preliminary – gathering evidence

16. Ana, Jesús Durán Ortega, member, North Santander Teachers' Association (ASINORT), teacher, 10 December 2004, Cúcuta, department of North Santander.

Authors: unknown

File No.: 101631

Branch: Cúcuta

Stage of proceedings: preliminary – gathering evidence

17. Nelson, Jesús Martínez, member, Antioquia Teachers' Association (ADIDA), teacher, 18 December 2004, municipality of La Ceja, department of Antioquia.

Authors: unknown

File No.: 101631

Branch: Medellín

Stage of proceedings: preliminary – gathering evidence

18. José Nevardo Osorio Valencia, leader sindical, Risaralda Teachers' Union (SER), teacher, 27 December 2004, Mistrató, department of Risaralda.

Authors: unknown

File No.: 125805

Branch: Pereira

Stage of proceedings: preliminary – gathering evidence

### ***Cases undergoing prohibition proceedings***

1. Edgar Arturo Blanco Ibarra, member, North Santander Teachers' Association (ASINORT), teacher, 7 January 2004, Cúcuta, departamento of North Santander.

Authors: unknown

File No.: 79360

Branch: Cúcuta

Stage of proceedings: prohibition proceedings

2. Ricardo Barragán Ortega, member, Cali Municipal Enterprises Workers' Union (SINTRAEMCALI), public sector, 16 January 2004, Cali, departament of Valle.

Authors: unknown

File No.: 627693

Branch: Cali

Stage of proceedings: prohibition proceedings

CRER protection measure: has not been granted protection measure

3. Carlos Raúl Ospina, treasurer of the MERTULUA trade union, Trade Union of Workers and Employees in Public and Autonomous Services and Decentralized Institutions of Colombia (SINTRAEMSDDES), public sector, 24 February 2004, Tulúa, departament of Valle.

Authors: hired assassins

File No.: 98910

Branch: Buga

Stage of proceedings: prohibition proceedings

CRER protection measure: has not requested or been granted any protection measure

- Ernesto Rincón Cárdenas, information and press secretary, Boyacá Teachers' Union (SINDIMAESTROS), teacher, 27 January 2004, Caldas, department of Boyacá.

Authors: unknown

File No.: 1395

Branch: Tunja

Stage of proceedings: prohibition proceedings

CRER protection measure: has not requested or been granted any protection measure

- Pedro Alirio Silva, Putumayo Teachers' Association (ASEP), teacher, 2 March 2004, Orito, department of Putumayo.

Authors: unknown

File No.: 563

Branch: prohibition proceedings

Stage of proceedings: prohibition proceedings

- Julio César García García, member, Association of Employees of the National Penitentiary and Prison Institute (ASEINPEC), 2004, Cartago, department of Valle.

Authors: unknown

File No.: 96337

Branch: Buga

Stage of proceedings: prohibition proceedings

- Mary Rosa Daza, member, Cauca Teachers' Association (ASOINCA), education, 16 March 2004, Bolívar, department of Cauca.

Authors: unknown

File No.: 2320

Branch: Popayan

Stage of proceedings: prohibition proceedings

CRER protection measure: has not requested or been granted any protection measure

- Alvis Hugo Palacios, member, National Union of Public Employees of the National Service for Training (SINDESENA), education, 16 March 2004, Vetulia and Since, department of Sucre.

Authors: unknown

File No.: 43709

Branch: Sincelejo

Stage of proceedings: prohibition proceedings

CRER protection measure: has not requested or been granted any protection measure

- Ana Elizabeth Toledo Rubiano, member, Arauca Teachers' Association (ASEDAR), teacher, 19 March 2004, Mapoy, department of Arauca.

Authors: unknown

File No.: 99991

Branch: Cucuta

Stage of proceedings: prohibition proceedings

CRER protection measure: has not requested or been granted any protection measure

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10. Carlos Alberto Chicaiza Betancourt, secretary general, General Services Workers' Union (SINTRAEMSIRVA), public sector, 15 April 2004, Cali, department of Valle.
- Authors: unknown
- File No.: 650784
- Branch: Cali
- Stage of proceedings: prohibition proceedings
- CRER protection measure: has not requested or been granted any protection measure
11. Evelio Henao Marín, vice-president, deputy director of the Bolombolo operational group, Union of Workers of the Department of Antioquia (SINTRADEPARTAMENTO), 24 April 2004, municipality of San Rafael, department of Antioquia.
- Authors: unknown
- File No.: 153671
- Branch: Antioquia
- Stage of proceedings: prohibition proceedings
12. Fernando Ramírez Barrero, member, Risaralda Teachers' Union (SER), teacher, 10 May 2004, Pereira, department of Risaralda.
- Authors: unknown
- File No.: 114390
- Branch: Pereira
- Stage of proceedings: prohibition proceedings
13. Jesús Alberto Campos Pérez, member, Arauca Teachers' Association (ASEDAR), teacher, 7 May 2004, Tame, department of Arauca.
- Authors: unknown
- File No.: 99998
- Branch: Cucuta
- Stage of proceedings: prohibition proceedings
14. Jesús Fabián Burbano Guerrero, member, Petroleum Industry Workers' Trade Union (USO), oil sector, 31 May 2004, Cartagena, department of Bolívar.
- Authors: unknown
- File No.: 2611
- Branch: Mocoa
- Stage of proceedings: prohibition proceedings
- CRER protection measure: has not requested or been granted any protection measure
15. Adiel Torres, member, Putumayo Teachers' Association (ASEP), teacher, 1 June 2004, Puerto Legizamo, department of Putumayo.
- Authors: unknown
- File No.: 3778
- Branch: Mocoa
- Stage of proceedings: prohibition proceedings
16. Lina Marcela Amador Lesmer, member, Putumayo Teachers' Association (ASEP), teacher, 1 June 2004, La Hormiga, department of Putumayo.

Authors: unknown

File No.: 3834

Branch: Mocoa

Stage of proceedings: prohibition proceedings

17. Gerardo, Jesús Vélez, member, San Carlos Sugar Refinery Workers' Union (SINTRASANCARLOS), 9 July 2004, Tulúa, departament of Valle.

Authors: unknown

File No.: 105018

Branch: Buga

Stage of proceedings: prohibition proceedings

18. Jorge Eliécer Valencia Oviedo, president, Valle Single Education Workers' Trade Union (SUTEV), education, 21 August 2004, deputy director Tulúa, departament of Valle.

Authors: unknown

Branch: Buga

Stage of proceedings: prohibition proceedings

CRER protection measure: has not requested or been granted any protection measure

19. Jean Warren Buitrago Millán, secretary, DIAN Workers' Union (SINTRADIAN), 15 September 2004, Tulúa, departament of Valle.

Authors: hired assassins

File No.: 4977

Branch: Buga

Stage of proceedings: prohibition proceedings

20. Juan José Guevara Maturana, member, North Santander Teachers' Association (ASINORT), teacher, 22 April 2004, Arauca, department of Arauca.

Authors: unknown

File No.: 107590

Branch: Cucuta

Stage of proceedings: preliminary – gathering evidence

CRER protection measure: has not requested or been granted any protection measure

21. Calixto Gómez Rummer, member, National Union of Coal Industry Workers (SINTRACARBON), mining sector, 31 January 2004, Fonseca, department of Guajira.

Authors: unknown

File No.: 62793

Branch: Riohacha

Stage of proceedings: preliminary – gathering evidence

CRER protection measure: has not requested or been granted any protection measure

22. Lucero Henao, Meta Independent Agricultural Workers' Union (SINTRAGRIM), agricultural, 6 February 2004, Castillo, department of Meta.

Authors: unknown

File No.: 1891

Branch: Villavicencio

Stage of proceedings: preliminary – gathering evidence

23. Jorge Mario Giraldo Cardona, member, Antioquia Teachers' Association (ADIDA), teacher, 14 April 2004, Medellin, department of Antioquia.
- Authors: unknown  
 File No.: 77950  
 Branch: Medellin  
 Stage of proceedings: preliminary – gathering evidence  
 CRER protection measure: has not requested or been granted any protection measure
24. Nohora Martínez Palomino, member, Teachers' Association of César (ADUCESAR), teacher, 19 April 2004, Valledupar, department of Cesar.
- Authors: unknown  
 File No.: 162374  
 Branch: Valledupar  
 Stage of proceedings: preliminary – gathering evidence  
 CRER protection measure: has not requested or been granted any protection measure
25. Salomón Freite Muñoz, member National Association of Civil Servants and Employees in the Judicial Branch (ASONAL JUDICIAL), public sector, 21 July 2004, Cúcuta, department of North Santander
- Authors: unknown  
 File No.: 93730  
 Branch: Cúcuta  
 Stage of proceedings: preliminary, gathering evidence  
 CRER protection measure: has not requested or been granted any protection measure
26. Erinia María Caicedo Sarria, member, National Association of Workers and Employees in Hospitals and Clinics (ANTHOC), health, 11 September 2004, Bordo, department of Cauca.
- Authors: hired assassins  
 File No.: 8166  
 Branch: Popayan  
 Stage of proceedings: preliminary – gathering evidence
27. José Aicardio Sosa Soler, General Confederation of Democratic Workers (CGT), 4 April 2004, Bogotá, department of Cundinamarca.
- Authors: unknown  
 File No.: 751768  
 Branch: Bogotá  
 Stage of proceedings: preliminary – suspended

## Appendix 5

### Mission report Colombia (24-29 October 2005)

#### *I. Background information*

1. The ILO high-level tripartite visit to Colombia took place from 24 to 29 October 2005 at the invitation of the Colombian Government within the framework of two different ILO supervisory

mechanisms. First, the Government invited the President of the ILO Committee on Freedom of Association, Professor Paul van der Heijden, following the Committee's conclusion in Case No. 1787 in June 2005 that, taking into account the violent situation which the trade union movement must face due to the serious situation of impunity, the numerous cases that have not been resolved, and the fact that the last mission of the Office to the area took place back in January 2000, it would be highly desirable to collect further and more detailed information from the Government and the workers' and employers' organizations, in order to have an up-to-date understanding of the situation. Secondly, following discussions in the International Labour Conference Committee on the Application of Standards in respect of the application of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Government extended its invitation to include the Employer and Worker Vice-Chairpersons of the Committee on the Application of Standards, Mr. Edward E. Potter and Mr. Luc Cortebeek. This Committee decided that a high-level tripartite visit should take place and meet with the Government, the workers' and employers' organizations, and the competent bodies in Colombia in the area of investigation and supervision, and should place particular emphasis on all questions relating to the application of Convention No. 87 in law and in practice and to the ILO Special Technical Cooperation Programme for Colombia.

## **II. Pending cases before the Committee on Freedom of Association**

2. There are currently ten cases pending before the CFA concerning Colombia, without taking into account the other ten cases that are at the follow-up stage. Case No. 1787 refers to allegations of murders, disappearances and other acts of violence against trade union leaders and affiliates and to the important aspect of impunity.
3. The other pending cases are Nos. 2068, 2355, 2356, 2362, 2363, 2384, 2424, 2434 and 2448. These cases refer principally to acts against the exercise of freedom of association through the refusal to register trade unions, or trade unions' executive committees, the refusal to grant trade union leave, the restructuring of public enterprises or public bodies, involving the collective dismissal of workers including trade union leaders and members; and the recourse by many enterprises to outsourcing through cooperatives or other civil and commercial contracts where unionization is not permitted. Many allegations also refer to acts of anti-union discrimination, such as dismissals and demotion for the legal exercise of union activities, and the obstacles met to bargain collectively: denial of collective bargaining rights for public services employees and the celebration of non-union collective accords that undermine the trade unions.

## **III. Programme of the visit**

4. The members of the high-level tripartite visit had the opportunity to meet with the President of Colombia, Mr. Alvaro Uribe Vélez and the Vice-President, Mr. Francisco Santos Calderón. They also met with the following representatives of the Government: the Minister of Social Protection, Mr. Diego Palacios Betancourt, the Deputy Minister of Social Protection, Mr. Jorge León Sánchez Mesa, the Deputy Minister of Foreign Affairs, the Deputy Minister of Defence, Mr. Andrés Peñate, the Deputy Minister of Internal Affairs, Mr. Luis Hernando Angarita and officials from these ministries as well as with the Deputy High Commissioner for Peace, General Eduardo Antonio Herrera, and other officials from his office. They also had meetings with the four high judicial courts: the Supreme Court of Justice, the Constitutional Court, the Council of State and the Council of the Judicature; the Attorney-General and the Procurator-General.
5. The members of the visit also had long and extensive discussions with the three confederations (United Confederation of Workers (CUT), General Confederation of Workers (CGT) and the Confederation of Workers of Colombia (CTC)) their presidents, Mr. Carlos Rodríguez Díaz from the CUT, Mr. Julio Roberto Gómez Esguerra from the CGT and Mr. Apécides Alvis Fernández from the CTC, as well as many of their affiliates.
6. The members of the visit also met on two occasions with the employers' organization, the National Association of Industrialists (ANDI), its President, Mr. Alberto Villegas and the Vice-President for Legal and Social Affairs, Mr. Alberto Echavarría Saldarriaga and many of its enterprise affiliates. Finally, they met with the Director of the Office of the United Nations High Commissioner for Human Rights in Colombia, Mr. Michael Frühling.

7. The description of these meetings below is made in an attempt to share as fully as possible the information and viewpoints communicated by those met. With this objective in mind, bare assertions have also been reported even though the members of the visit did not have the time available to them to confirm such statements or to give all the other parties concerned an opportunity to rebut them.

#### **IV. Government representatives**

8. During the meetings held with public authorities, including with the President, the Vice-President, the Minister of Social Protection and the Deputy Minister of Social Protection, the need for a deep understanding of the context in which the high-level tripartite visit was going to be carried out was emphasized.

##### **President of the Republic**

9. The President of the Republic, Mr. Alvaro Uribe Vélez, who has a term of office of four years and, following a recent decision of the Constitutional Court, can be re-elected for another four-year period, emphasized the current priorities of the Government in the fight against terrorism, corruption, poverty and misery. He stressed the need to develop a new relationship with trade unions based on increased participation in contrast with the more conflicting attitude of the past. He highlighted some positive experiences, such as that of Acerías Paz del Río (steel company) and Gestión Energética S.A.E.S.P. (GENSA S.A., electric company) where the trade unions, in cooperation with the management, succeeded in overcoming the crisis. He admitted nonetheless, that there were some abuses in the use of some contractual forms such as the cooperatives, and informed the visit that a decree would be issued to control these abuses.
10. He emphasized that these concerns had to be addressed, however, while taking into account the broader context of a difficult fiscal situation and a high unemployment rate, which amounted to 20 per cent when he took office. Concerning the restructuring processes, he stressed the need to undertake a reform of the public administration, which was not intended as a policy against trade unions.

##### **Vice-President of the Republic**

11. The Vice-President, Mr. Francisco Santos Calderón, underlined that the country was going through a difficult situation of generalized violence involving different actors that had lasted for decades. However, he pointed out that the situation was currently improving, although still worrying. He further referred to the need to understand that many aspects of labour relations had been influenced by ideology. He recognized that different human rights defenders, including trade unionists, had been the target of some violent groups and underlined his open condemnation for this situation. He pointed out that the protection programme designed for these victims was oriented principally to protect trade unionists to which \$7 million had already been devoted. He further regretted that the Inter-Institutional Commission for the Promotion and Protection of Workers' Human Rights had not met since 2004 and pointed out the Government's intention to reactivate it.
12. As regards labour relations, the Vice-President recalled the difficult situation the new Government faced in 2002, when the country went almost bankrupt, which led to a vast programme of state restructuring that affected many workers. He underlined the positive role played by unions in many cases, through innovative figures like the trade union contract and in some cases the cooperatives in order to have a sustainable State. He further pointed out that many enterprises have overcome the crises through social dialogue.

##### **Ministry of Social Protection**

13. The Minister of Social Protection, Mr. Diego Palacio Betancourt, referred to the rise of the minimum wage in 2003, which had been the highest for the last 13 years, going beyond the inflation rate. He further referred to the National Education Service (SENA), and to the family subsidy system, which were currently receiving increased financing, thus permitting an increased number of workers to benefit from them. Concerning the labour reform he mentioned in particular, the pensions reform, which will imply a limitation in the right to collective bargaining. He also

referred to some capitalization programmes for small enterprises. He regretted that the workers' centrals did not agree with the current labour reform and refused participation in the commissions that are dealing with these issues.

14. He pointed out that, thanks to the increased security after the implementation of the Democratic Security Programme, tourism had considerably improved. Moreover, he stressed that those enterprises that would provide employment for the poorest or for the demobilized people would benefit from subsidies.
15. As regards the violence against trade unionists, he stressed that their social role should be stressed as opposite to their stigmatization. He referred to the Programme of Protection to Witnesses and Threatened Persons, the Commission for the Regulation and the Evaluation of Risks (CRER), which decides on the protection programmes to be granted on a consensus basis. He pointed out that 99 per cent of the requests for protection received had been provided. However, he regretted the existence in many cases of abuses from the workers.
16. The Minister of Social Protection recognized that there were situations where perception was different depending upon whether it came from the point of view of employers, the Government or workers. He admitted the existence of abuses by the employers in the use of cooperatives, which implied that, on several occasions, regular workers were dismissed from the enterprises and were replaced by subcontracted cooperatives where unionization was not permitted. He informed that in order to remedy this situation, Congress was currently examining a new Bill to amend the Act on cooperatives. He also referred to the numerous processes of enterprise and public institutions restructuring and emphasized that these measures were absolutely necessary for the fiscal health of the public budget and refused categorically any hidden anti-union intentions. Moreover, he signalled that in the latest restructuring processes the special trade union immunity (*fuero sindical*) was fully respected, and trade union leaders were not dismissed until the proper judicial authorization was granted.
17. The Deputy Minister of Social Protection, Mr. Jorge León Sánchez Mesa, further referred to the current use of a figure, already contemplated in the substantive Labour Code, the Trade Union Contract, which they consider to be an innovative way of ameliorating labour relations. In fact, the members of the visit had the opportunity to visit the public enterprise GENSA S.A. (electric company) in Paipa where this type of union contract has been implemented. During this visit the members also had the opportunity to see the steel company, Acerías Paz del Río. In both opportunities, the members of the visit met with the companies' management and the trade unions.
18. A government representative in charge of the Group for the Defence, Protection and Promotion of Human Rights of the Ministry of Social Protection explained that this group was aimed at strengthening democracy through the protection of human rights. She further explained that the Inter-institutional Commission for the Promotion and Protection of Workers' Human Rights was created in 1997 by the State Labour Accord of 18 February 1997 and Decree No. 1413 of 1997 and was given permanent status by Decree No. 1828 of 1998. It serves as a forum for dialogue to deal with issues such as the right to life of trade unionists and the strengthening of freedom of association. In order to achieve these objectives, a tripartite work plan was elaborated, which has already yielded positive results. She explained that out of 35 trade unionists killed in 2005, five were trade union leaders. The education sector is the most affected by these homicides. She highlighted the 78 per cent reduction in the homicides rate in 2005 (27 homicides in the period January-June 2004 and six homicides in the same period in 2005). These figures did not take into account the assassination of teachers where a reduction of the rate of homicides was also noticeable (42 per cent decrease).
19. She added that in 1997, the Government created, within the Programme of Protection to Witnesses and Threatened Persons, the CRER. It is a tripartite institution that assesses the level of risk for every person that is considered to be threatened. Currently, there are 163 trade unions benefiting from protection schemes. In 2004, 1,615 union leaders or members were given protection. The financial resources devoted to the whole protection programme have been increased throughout the past five years from national and international sources. Currently, 54.96 per cent of the protection granted to special vulnerable groups is allocated to the trade unions. The protection allocated to trade unionists varies significantly from one case to another. It may consist of cellphones, in the more simple programmes, up to bodyguards, armour-plated cars and the reinforcement of trade union premises.



20. Finally, the government representative provided the members of the visit with detailed information about the investigations that are currently being carried out concerning homicides, the protection measures that benefit trade unions and trade unionists and all the training workshops organized by the Ministry for judges, attorneys and trade unionists.
21. Concerning labour relations in particular, another government representative from the Office of the Vice-Minister further referred to the standing negotiation committees, which were established by Acts Nos. 278 of 1996 and 790 of 2005. There are standing committees at the national and the local levels, with already 22 committees at the district level. The final objective is to cover the whole territory. It is however easier for a district committee to meet than a national one. In fact, in September 2005, the national committee could not meet following the refusal of one of the worker confederations.
22. She emphasized that, in order to expand these standing negotiation committees on wages and labour policies, it was essential to secure the territory to allow the free and safe participation of all the social partners. Moreover, it is crucial that the social partners recover their essential role in social dialogue, which is a clear response against any intention to solve the problems through violence. In order to achieve this goal, the Government finances many training programmes for unionists within their unions following programmes designed by the unions themselves.
23. Concerning labour inspection, the official from the Ministry of Social Protection in charge of this issue referred to the considerable increase in the supervision as well as in the imposition of fines. He referred to the importance of prevention. He emphasized that in many cases of misuse of cooperatives to disguise employment relations the appropriate sanctions to the responsible enterprises had been imposed. He affirmed that, after the intervention of the labour inspection, the registration of cooperatives reduced in a 67 per cent, which implied that there has been certain control in these abuses. Moreover, a plan to visit the cooperatives was established.

#### Deputy Minister of Defence

24. Concerning the issue of public security, the Deputy Minister of Defence, Mr. Andrés Peñate, referred to the Democratic Security Programme, which had already been in place for three years and had yielded positive results. In fact, it was shown to be an effective protection programme against armed actors. The mandate of the programme was to address the security problem within a context of democracy, the rule of law and the constitutional separation of state powers. He underlined that the legitimacy of the programme came from the respect for human rights and the approval of the Colombian people. The solution did not involve necessarily an intervention of the army, but its presence helped the realization of the programme's goals. Moreover, within the army and the national public force structures there are human rights departments that train officials to respect human rights.
25. The first step of the Democratic Security Programme consisted in recovering state control over the territory. As a matter of fact, great parts of the Colombian territory were, in 2002, in the hands of illegal armed groups. Some of them still are. In many places, mayors were not able to take up office in the places where they had been elected; representatives from the Attorney-General's office, judges and police were absent in many districts. In fact, they were also victims of violence. The main challenge was to ensure the security of the people once again. The main objective was not necessarily to destroy the armed groups by force, but rather to restore normal life in these territories. For the first time, this policy was made public and accountable. Since its implementation, there have been several positive results. In 2003, and for the first time, there was not a single murder of a candidate to local elections. Nowadays, all mayors, except one, are carrying out their functions in their cities and towns and the threats to them have been reduced from 415 cases in 2002 to 130 in 2005. In 2002, the police was not present in 168 municipalities. In 2004 there were no municipalities without a police presence.
26. Colombia has been considered for many years as the country with the highest rate of homicide. The tendency is now being reversed, although the number of victims is still very high. There were 28,837 murders in 2002. In 2004, this number was reduced by 32 per cent, and it is expected that there will be an additional reduction of 15 per cent in 2005. The Deputy Minister also felt it was important to underline that, even in the fight against the violent armed groups, the number of dead had been considerably reduced, while the emphasis was now being placed on the capture and surrender of members of these groups. In fact, the Deputy Minister underlined that, according to recent polls, the armed forces enjoy the highest rate of favourable opinion.

27. Concerning kidnappings, the Deputy Minister stated that this was a method widely used by guerrillas to finance their activities. He explained that this created a vicious circle since the lack of adequate response from the Government under past administrations had given rise to the paramilitary phenomena as a wrong solution to the problem. In addition, kidnappings had a negative impact on tourism, transportation and local businesses in many regions. People had been afraid to travel by car. Again, it was necessary for the Government to reassume its role as the guarantor of the rule of law in order to effectively eliminate the problem. The Democratic Security Programme led to a 50 per cent reduction in the number of cases of kidnappings from October 2004 to October 2005 and there have been no kidnappings on the roads for the last year-and-a-half.
28. People have been more confident to travel within the country again and the number of displaced families has considerably diminished.
29. The number of people involved in the illegal armed groups has varied throughout the years. While the National Liberation Army (ELN) increased by 1,300 members from 1990 to 2004 and is currently in a phase of slight diminution, the United Self-defence Forces of Colombia (AUC) and the Armed Revolutionary Forces of Colombia (FARC) increased considerably from 1990 until 2002 and are currently in a phase of reduction. Current figures for these groups are: the ELN – 3,655 men, the FARC – 12,515, and the AUC – 10,916. During the present presidential period 8,177 persons from different illegal armed groups were demobilized.
30. The Deputy Minister of Defence also referred to the Law on Justice and Peace, which was approved by Congress on 21 June 2005, and is currently before the Constitutional Court, following some appeals as to the constitutionality of some of its provisions. This Law would address the issue of demobilization and the benefits of sentence reduction for those members of illegal armed groups that demobilized and collaborated with the public forces in the demobilization and capture of other armed elements.
31. The Deputy Minister of Defence considered that the general perception of the Democratic Security Programme and the Law on Justice and Peace by people was positive and the programme was generally accepted, since it was important that the Government be the only one to provide security in the country.
32. Concerning the policies implemented to deal with the acts of violence against trade union leaders, he reiterated that the protection programme devoted 54.6 per cent of the budget to the protection of trade unionists. He agreed that the significant allocation for trade unionists showed that this was a highly vulnerable group. He emphasized that these violent acts are used to convey a message to the trade unions and to society as a whole. According to his opinion, trade unionists are targeted, as are also other human rights defenders, because of the impact that any violent act against one of these agents would have on society in general and the threat it would convey.

### High Commissioner for Peace

33. General Eduardo Antonio Herrera, Darío Mejía Guzmán and Roberto Moro, from the Office of the High Commissioner for Peace, a governmental institution, referred in particular to the demobilization programmes. They emphasized the need to urgently cease hostilities and that every armed illegal group was being pushed to demobilize. They stated that the Government was currently facing a crisis with the AUC in their demobilization process, concerning the implementation of the Law on Justice and Peace but if they managed to get out of this crisis, by the end of 2005, 51 per cent of the AUC would have abandoned their arms.
34. Concerning the Law on Justice and Peace, they considered it to be a useful instrument to reduce violence, with adequate sanctions and some judicial benefits as incentives to those who choose to demobilize. The big challenge for the future would be the reincorporation of the demobilized groups to a productive and peaceful personal and professional life.
35. With respect to trade unions, the High Commissioner admitted that they had indeed been a specific target for the armed illegal groups. Notwithstanding, the situation was very complicated, because in each different case they might be victims of the paramilitaries or of the guerrillas and sometimes of both at varying times. They further referred to trade union links with the guerrillas and, in exceptional cases, with the paramilitaries and stressed the commitment for peace made by the current trade union leaders of the three trade union centrals.

36. They also admitted that there had been links between employers in certain districts and the paramilitaries. Finally, it was recalled that a great deal of the activities of the armed groups were limited to drug trafficking.

### Visit to the high Colombian courts

37. The members of the visit had the opportunity to meet the four high Colombian courts: the Constitutional Court, the Supreme Court, the Superior Council of the Judicature and the Council of State.
38. The **Supreme Court** is the highest court of ordinary jurisdiction. The Court itself elects its 23 judges from lists of candidates submitted by the Superior Council of the Judicature. The judges serve for a period of eight years. Members of the Court meet in plenary sessions and in separate chambers to hear appeals in civil, criminal and labour cases. The Supreme Court of Justice acts as an appeal court, but is also competent to investigate and rule on infringements by particular authorities. It also acts as the court of cassation for cases such as those brought before the military courts.
39. The members of the Supreme Court recalled that the right of association and the right to collective bargaining were fundamental rights recognized by the 1991 Constitution, as were Conventions Nos. 87 and 98 themselves. They emphasized their impartiality and stated that their judgements were based on equity and justice. Neither the Government, nor enterprises, or workers' organizations had any influence on their decisions. They further indicated that, along with trade unionists, judges were also victims of violence.
40. With respect to the registration of trade unions, they indicated that there were very few such cases that actually reach the Supreme Court. In fact, any irregularity in registration should fall under the authority of the Council of State, since it was the highest judicial authority in administrative cases. To their knowledge, however, there was not a generalized refusal to register trade unions if the legal requirements were met. On the contrary, they considered that the registration of trade unions had considerably increased in recent times due to the recent decision of the Constitutional Court allowing the formation of more than one trade union at the enterprise level.
41. Concerning the trade union special immunity (*fuero sindical*), the judicial procedures did not reach the Supreme Court. In fact, there was no extraordinary recourse of annulment because of the special nature of the right protected and the need to keep this procedure shorter. They also referred to the restructuring processes and remarked that these were allowed under the Constitution and involved the reorganization of public institutions and reduction of personnel in many cases. They underlined that workers should be adequately compensated and that on many occasions they could be hired by other public institutions.
42. Concerning anti-union dismissals, they recalled that workers could be reinstated through the tutela procedure, which was rapid and expeditious. Judges had granted reinstatement to trade union leaders dismissed during the collective bargaining process. Moreover, trade union leaders could also have recourse to the ordinary court proceedings. They further referred to a draft sent to Congress to shorten the judicial procedure concerning labour and social rights
43. The Constitutional Court is the body, within the Colombian judicial system, which has constitutional jurisdiction. The Court's judges are elected by the Senate for an eight-year term of office under the terms set out by the President, the Supreme Court and the Council of State. The Constitutional Court has a number of functions. It is the competent body responsible for reviewing judgements given by judges on tutela proceedings. It has extended the scope of such proceedings through a body of case law broadening the category of rights, which can be covered by proceedings of this type. The Court has adopted an approach, which allows tutela proceedings in order to protect rights that are related or connected to the "fundamental" rights referred to specifically in article 86 of the Constitution. The Constitutional Court acknowledged the importance of the fundamental ILO Conventions, which have been incorporated into the national legal framework by the Constitution. The justices recalled that their role consisted in the judicial defence of the Constitution. They recognized the current situation of impunity and underlined that it had to be understood within the current situation of armed conflict. They had issued several decisions on the subject, concerning in particular the control of the constitutionality of the penal laws, the rule of law and the right of defence. Not only their individual decisions but also all their constitutional doctrines were binding.

44. They explained that the acción de tutela, provided for in section 86 of the Constitution, allows individuals to seek protection of constitutional rights in the courts. Any individual may present a *tutela* in order to protect his fundamental constitutional rights when they are affected by some action or omission by the public authority. They consist of a decision upon which the public authority against which the action is taken is compelled to act or to abstain itself from acting. This order must be followed immediately and can be challenged before the competent judicial authority. Eventually the final decision can be adopted by the Constitutional Court. This kind of recourse is only available in those cases in which the individual cannot use other judicial mechanisms or to avoid permanent harm. The *tutelas* take into account the decisions of the supervisory bodies of the ILO, but to varying degrees.
45. They admitted that trade unionists were targeted victims of the armed groups, together with other specific sectors like journalists, teachers and even priests. They considered that impunity had not been diminished since there were still almost no final convictions for the acts of violence. Impunity only benefited the intellectual authors of the crimes and all those who financed the violent acts. They considered that the impunity was also due to the crisis in the judicial system, which had been unable to face the serious violations of human rights; violent groups controlled vast parts of the territory, where the local authority, the judges and the representatives of the Attorney-General's office were intimidated, as well as witnesses and victims.
46. Concerning the new accusatory penal system based on oral hearings that, according to the Government would help to improve the situation of impunity, some of the members of the Court recalled that this system would not be applicable to those cases that occurred before January 2005. Besides, it would not operate in vast sectors of the territory due to severe budget restrictions. Moreover, the role of the victims within this new procedure might be considerably reduced since they no longer would be able to intervene in the penal procedure as before. Other members, on the contrary, considered that the new system would help eradicate the impunity.
47. They could not make substantive comments on the recently approved Law on Justice and Peace because they were currently examining some appeals presented in respect of the Law.
48. With respect to labour relations, they admitted that trade union membership was constantly falling and they underlined the essential role of trade unions in restructuring processes. Moreover, they regretted that, although the 1991 Constitution provided for the elaboration of a new labour code, this had not yet been done. The legislation determining the list of essential services had not been approved either, considerably limiting the right to strike since the Labour Code provided a list of essential services that went beyond those, the interruption of which would endanger the life, personal safety or health of the whole or part of the population. Besides, the law regulating the right of collective bargaining in the public sector had not been approved, despite the ratification of Conventions Nos. 151 and 154.
49. One of the functions of the Constitutional Court consisted in introducing the constitutionalism in the judicial decisions of lower-land judges. This meant that the Court had the right to amend judicial errors through *tutela*. However, some judges had shown resistance to revert sentences through this proceeding. In the case of *tutelas* against other judicial decisions, the Constitutional Court may issue a compliance order, even to the Labour Chamber of the Supreme Court, and also may charge the responsible judge with contempt of court. Finally, they underlined that the existence of the right to constitute trade unions enjoyed constitutional rank, which meant that any violation of this right could be the object of a *tutela*.
50. The **Superior Council of the Judicature** is another institution created by the 1991 Constitution. It is divided into the Administrative Division and the Disciplinary Jurisdictional Division. The former consists of six judges, two of whom are elected by the Supreme Court, one by the Constitutional Court and three by the Council of State. The Disciplinary Jurisdictional Division comprises seven magistrates elected by Congress. The Superior Council of the Judicature fulfils many administrative and institutional functions connected with the courts and the administration of justice. For example, it draws up lists of candidates for appointment to the judiciary, rectifies errors committed by members of the judiciary or the legal profession in the exercise of their profession, monitors the activities of law practices and drafts the proposed budget for the judicial branch. The Superior Council of the Judicature is empowered to resolve disputes concerning the powers of different jurisdictions. This function becomes important in cases pertaining to human rights when the Superior Council is required to decide whether a case comes under the jurisdiction of the ordinary courts or the military courts.

51. They explained that it was created by the 1991 Constitution to ensure a true independence of the judiciary. However, it was in 1996, when Act No. 270 on the administration of justice was approved, that they began to work with the appropriate legislative instrument. They recognized that the judicial system was overwhelmed with work and in order to cope with this situation they requested further resources from the Government. They were currently facing a 30 per cent budget deficit. This economic aspect had a negative impact on the judicial administration and could be one explanation for judicial delay and impunity.
52. They expressed their will to accelerate the current reforms in the system, in particular the implementation of the oral labour proceedings. They recalled that these proceedings were already provided for in the Labour Code of 1950 but they had never been implemented.
53. Concerning the administrative proceedings that deal with all the conflicts between the State and individuals, they recognized that currently there was a serious problem of work overload that involved important delays in the administration of justice. In order to solve this situation they were planning to create a new stage in the administrative procedure. Up until now there were only two, the administrative tribunals and the Council of State. The proposal consists of creating a first stage before the administrative tribunals. The delay in the administration of justice in the Council of State had forced citizens to use *tutelas* before the Constitutional Court, as a more rapid and priority procedure.
54. They underlined that the judicial authorities had increased their references to ILO Conventions and emphasized the important role of training of judges on the subject, in particular with reference to the fundamental ILO Conventions.
55. The **Council of State** is the highest jurisdictional authority in matters relating to administrative disputes. It also acts as the Government's advisory body on matters of administrative law. Twenty-seven judges are elected to serve on the Council of State from lists of candidates submitted by the Superior Council of the Judicature. The judges serve for a period of eight years.
56. The Council of State recalled their role of consulting and providing technical assistance to the Government on those subjects chosen by the Government. They had already been consulted on the Law on Justice and Peace and on many restructuring processes, in particular on the constitutional power of the State to carry out restructuring. The opinions of the Council of State, however, were not binding. The Council of State was also the final authority in reviewing administrative decisions. The Council of State also examined the constitutionality of decrees and the legality of arbitrations.
57. Concerning impunity, they emphasized that there was no State policy against trade unionists and that violence affected many sectors in society. Moreover they were not competent in the penal cases.

### Visit to the Attorney-General

58. The Office of the Attorney-General<sup>1</sup> comprises the Attorney-General, Mr. Mario Germán Iguarán Arana, delegate attorneys and other officials. The Attorney-General is elected by the Supreme Court of Justice from a list of candidates submitted by the President for a four-year term of office. The Attorney-General is part of the judicial branch and enjoys administrative and financial autonomy.
59. The Office of the Attorney-General is empowered to adopt measures, either acting on its own initiative or following complaints, to investigate offences and charge suspects before the competent courts and tribunals within the ordinary and regional courts. This does not apply in the case of offences, which come under the jurisdiction of the military courts.
60. Within the Attorney-General's office there are a number of bodies that work closely on human rights cases. The Human Rights Unit is responsible for formulating charges before regional courts, in particular important cases of human rights violations. There is also a special unit that deals with all the acts of violence against trade unionists. Intervention of this unit is only possible where the status of the trade unionist as such has been proved. The Ministry of Labour gathers all the relevant information and transmits it to the special unit.

<sup>1</sup> In many legal systems, this would correspond more accurately to the Office of the Public Prosecutor, but has been translated throughout the United Nations system as Attorney-General and will be so translated here for reasons of consistency.

61. Referring to the question of impunity, the Attorney-General and other assistants stated that both state agents and society in general were undergoing a process of awareness raising about the current situation of trade unionists with a view to creating a new more tolerant environment. Within the Office of the Attorney-General, special investigative units had recently been created to deal specifically with all acts of violence committed against trade unionists. It was therefore necessary that the victims be identified as trade unionists in order to send the case to this unit. The Attorney-General's office works in collaboration with the Human Rights Unit of the Ministry of Social Protection in order to determine whether or not the victims are trade unionists. The collaboration from trade unions is also essential. In fact many cases do not go beyond the preliminary stage due to lack of information provided by the trade unions, to which the victims were affiliated.
62. Out of 1,600 denunciations, 1,000 cases of acts of violence have already been identified.
63. Two penal systems now coexist in Colombia. The mixed penal system and the accusatory one. The first and oldest one is based on Act No. 600 of 2000. Within this scheme the penal procedure is divided into three stages, the prior investigation, the instruction or preliminary investigation and the judgement. During the prior investigation, the attorney responsible has to determine whether the crime purportedly committed has actually occurred and whether it is a violation of one of the provisions of the Penal Code. The period for collection of proof lasts six months, after which the attorney has to decide whether to preclude the investigation or to open the preliminary investigation. During the preliminary investigation, the attorney has to determine those presumed responsible for the punishable conduct, their antecedents, social condition and motive. The attorney has 24 months for this stage, after which, he or she must accuse or close the investigation. If the accused is detained, the attorney has to decide within 180 days if detention should continue. However, despite the time limits imposed by the penal law, in practice it is difficult to respect them. During the judgement stage, the attorney may present additional evidence. If the accused admits responsibility, the judge may dictate an anticipated sentence. Normal procedures should last a year, but in practice the whole procedure takes more time. One of the main characteristics of this procedure is that the judge only takes part in the final stage. In the preliminary stages, the attorney decides on the collection of evidence and the detention of suspects without the intervention of the judicial authority.
64. In the new accusatory system, the judicial authority is present throughout the whole procedure. The preliminary stage is similar to the mixed procedure, however, while the mixed system lasted six months, the accusatory system has no time limit for this stage (the only time limit being prescription). The main characteristics of this procedure are that any decision of the attorney is examined and checked by the judicial authority and that every stage is carried out in oral hearings. If the attorney has decided to arrest a suspect, the judge has to decide within 24 hours whether there are sufficient motives to maintain the detention. During the instruction stage, if the accused admits responsibility, the procedure is shortened. The fact that the procedure is oral helps to solve the cases more effectively and quickly. This can be an important element for reducing impunity.
65. Both systems currently coexist. At present, the new procedure is only applicable in four districts and the objective is to extend its application so that by 2009 all districts will have adopted it. However, it should be borne in mind that the new accusatory system will be applied only to those crimes committed after 1 January 2005. This implies that, in practice, despite the generalized application of the new system all over the Colombian territory, both systems will continue to coexist beyond 2009, as long as those cases that originated before 2005 have not been closed.
66. The role of witnesses during the whole procedure is essential. However, in the vast majority of cases they do not intervene because they are afraid of the consequences for themselves and their families. A special protection system for those witnesses who have collaborated in the elucidation of cases is of crucial importance, and therefore adequate human and financial resources should be allocated.
67. As regards Case No. 1787 in particular, the Attorney-General and his assistants were clearly well aware of the conclusions and recommendations of the Committee on Freedom of Association. The Attorney-General and his assistants expressed their commitment to identify the cases and carry out the necessary investigations. The Attorney-General further offered to have direct communication with the International Labour Office in order to find the adequate mechanisms to elucidate all the cases dealt with in Case No. 1787 and to punish those responsible. They informed the members of the visit that there were currently 1,155 investigations of cases of violence against trade unionists in the Office of the Attorney-General and its delegate offices, of which 1,038 were at the stage of prior investigation, 64 at the stage of the instruction or preliminary investigation and only 53 were in the

- judgement stage. These 1,155 investigations concern: 559 homicides, 405 threats, 31 forced disappearances, 20 cases of rebellion, 38 kidnappings, 26 attempted murders, and 76 other punishable acts.
68. Of these 1,155 cases, 43 had been identified to be given priority, of which charges were brought in 13 cases, two cases had been closed, 13 cases ended in condemnations, there were three cases in which the investigation ended at the initial stage, and in one case the suspect was absolved.
  69. They noted that there had been a considerable reduction of the cases of violence against trade unionists denounced. The homicide rate peaked in 2002, with 139 cases and there has been a considerable decrease since then: 81 cases in 2003, 78 in 2004 and 15 in 2005. It should be borne in mind, however, that these 15 cases refer only to those homicides in which the trade union status of the victim has been proven. In fact, there are currently 37 alleged cases of homicide of trade unionists where the identification of their role as trade unionist is being confirmed. Those that are not taken into account by the Office of the Attorney-General are being examined by the Human Rights Unit of the Ministry of Social Protection to determine whether the victims were trade unionists or not.
  70. Taking into consideration the cases which have occurred between 2002 and 2005, there have been four condemnations, 131 cases in the preliminary stage for the collection of proof, 17 cases where charges have been brought, 36 cases of preventive detentions, five investigations have been closed, 19 suspended, and in 99 cases the investigation did not go beyond the preliminary stage.
  71. According to the Attorney-General, the fact that a great number of cases end at the preliminary stage was due to a number of causes: the lack of witnesses or their fear of negative consequences if they collaborated; the difficulty to send investigators to the crime scene due to the geographic or the armed conflict in the area; problems in identifying those responsible within an armed group; delays in receiving the information requested from trade unions.
  72. The Office of the Attorney-General, with the collaboration of the ILO Regional Office had organized several seminars for judges, police and members of the Administrative Security Department (DAS) to evaluate the issues raised in Case No. 1787 in particular. They felt it important to point out that the participants had concluded that there was a decrease in the number of victims and that many of them were not trade unionists or that the reason for the violence was not related to their trade union activities.
  73. Finally, the Attorney-General and his assistants expressed their commitment to the creation of an environment where human rights are respected, to reduce human rights violations, to develop joint action with other institutions in order to eliminate impunity and to speed up investigations for rapid and effective administration of justice.

## Visit to the Procurator-General <sup>2</sup>

74. The Constitution also establishes “supervisory bodies” which do not come under any of the three main branches of government. These bodies are the Public Ministry and the Office of the Comptroller-General of the Republic. The Comptroller-General supervises the administration of public funds. The Public Ministry is responsible for analyzing the human rights situation in Colombia. The head of the Public Ministry is the Procurator-General (*Procurador General*), elected by the Senate for a period of four years from a list of candidates submitted by the President, the Supreme Court and the Council of State. The Procurator-General and his representatives have a wide range of responsibilities including the protection of human rights and the defence of the Constitution and laws of Colombia. The work of the Public Ministry and the Procurator-General is divided between the Procurator-General’s office and that of the Ombudsman. The Office of the Procurator-General is responsible for carrying out disciplinary inquiries and imposing sanctions on agents of the State, whether civilians or members of the armed forces. It has the power, for example, to investigate human rights violations and where necessary to order the discharge of members of the armed forces, the national police or any other body responsible for such violations.
75. The Procurator-General’s office may also intervene in judicial or administrative proceedings, including those in the military courts, where this is necessary to ensure that human rights are

<sup>2</sup> In many jurisdictions, this post would correspond to what is known as the post of the Attorney-General.

respected. In practice, this allows the office to request charges to be brought against additional individuals in criminal cases, to request the initiation or closure of investigations, formulation of charges, etc., under ordinary or military criminal law. The Office of the Procurator-General is empowered to carry out investigations and impose disciplinary sanctions on judicial bodies that are found to have acted inappropriately in the course of criminal proceedings, either in the ordinary courts or the military courts.

76. The Deputy Procurator-General, Carlos Arturo Gómez Pavajeau, and other procurators stated that the violence against trade unionists had to be understood within the framework of generalized violence that prevails in the country. In fact, the current violent situation conspired against the right of freedom of association. Trade unionists had been stigmatized and in some cases identified with the guerrilla movements. However, he underlined that they were victims of violence coming from both the paramilitaries and the guerrillas. In fact, trade unionists have been one of the groups that has most suffered from the violence. Unfortunately, the State did not understand this situation in time. Many efforts were currently being made to reverse this situation, but they are still insufficient. It was necessary to raise awareness within the State about the essential role of trade unionists.
77. Notwithstanding the lack of sufficient evidence of the existence of a state policy to undermine the trade unions, he considered the involvement of some state agents in the violent acts against trade unionists to be undeniable. There were some cases of trade unionists being blacklisted in some public enterprises in the framework of secret plans to eliminate those trade unionists supposed to be members of the guerrilla. These operations were often carried out by isolated members of intelligence services, or other similar state agents. One operation involving state agents in Cali has been dismantled, which has had a dissuasive effect on other cases discovered in Medellín; the Office of the Procurator-General has ordered that effective protection to those threatened be granted.
78. Another function of the Office of the Procurator-General consists of analyzing state policies and checking their compatibility with freedom of association. It is a preventive role of defence of human rights in the public administration for which they are the disciplinary authority. A special unit within the Office of the Procurator-General has been created to deal with all those cases concerning violations of human rights allegedly committed by state agents. Moreover, they may issue non-binding opinions in all those judicial processes where a state agent is involved. The Procurator-General has also initiated the legislative procedure for the adoption of the new penal system. The Office of the Procurator-General is also in charge of examining the protection programmes run by other public institutions, like the CRER, that is under the scope of the Defence Ministry. The members of the Office regretted that most protection programmes were only financed by international sources thus making the continued existence of these programmes more vulnerable. They believed that these programmes should be financed by the Government on a regular basis.
79. They further referred to the displaced people and the serious situation which they had to face, in particular to find new jobs. The armed illegal groups that are currently demobilizing will face a similar situation. Indeed, they expressed their worry about the fact that some demobilized people worked for security service companies, thus permitting the maintenance of paramilitary structures.
80. Apart from all the violent acts against trade unionists there are many other unfavourable situations that go against freedom of association. Indeed, in the case of trade union registration, they noted that on many occasions registration was denied for reasons that were not provided for in the legislation. They further referred to the unlawful use of some types of contracts, such as cooperatives, by some employers both in the public and the private sector to evade their social responsibilities and to create union free workplaces. They welcomed the possibility of some form of technical assistance to help cope with this situation. In their opinion the Ministry of Social Protection was the competent authority to issue the appropriate rules to control the situation.
81. As regards collective bargaining, the Office of the Procurator-General noted a current practice that obliged the parties to negotiate collectively and to submit any subsequent conflict to binding arbitration tribunals. They considered that the workers had the right to withdraw their petitions in those cases in which they feared that the arbitration might undermine the benefits they had obtained in past negotiations and that workers have the right to withdraw from negotiations any time they feel that the appropriate conditions are not met. They also referred to a recent practice called "resort negotiations" that consisted of negotiations carried out in hotels or closed places where workers were intimidated and forced to resign or to accept worse working conditions. These mechanisms had sometimes been used in restructuring processes.



82. As for collective bargaining in the public sector, the Procurator-General did not consider there to be a constitutional limitation to this right. Following the ratification of Convention No. 151 the appropriate regulation of the right of collective bargaining for civil servants should be elaborated. The Office of the Procurator-General had already issued a favourable opinion on the subject in a case pending before the Constitutional Court. Concerning the right to strike in essential services, they recalled that the Constitutional Court had given admonitory decisions to constrain Congress to legislate on the subject.
83. The Office of the Procurator-General, in collaboration with the ILO Regional Office, has already organized some seminars on fundamental ILO principles and rights and Conventions Nos. 87 and 98. They believed these seminars were essential in the prevention of violence against trade unions.

### Visit to Congress

84. The legislature comprises the Senate and the House of Representatives, which together form the Colombian Congress. The basic function of Congress is to amend the Constitution, adopt laws and exercise political control of the Government. All its members are elected directly by the people for a period of four years. The members of the Senate are elected at national level, while the members of the House of Representatives are elected by district. Two benches are reserved in the Senate for representatives of indigenous communities. Both the Senate and the House of Representatives have their own human rights commissions.
85. The members of the visit held meetings with some representatives from the Senate, in particular the Seventh Commission on Labour Law of the Senate, and the House of Representatives.
86. The congressional members referred to the labour reform and indicated that it was inspired by the concept of social protection, which explained the transformation of the Ministry of Labour into the Ministry of Social Protection. Concerning the Civil Servants Act, they stated that it was the result of consensus and that it provided for worker stability. They also referred to the Colombian family subsidy system, a private 51-year-old institution, as a good example of coordination between workers and employers. In addition, Congress had recently approved a law on harassment in the workplace, which was the first instrument of the kind in Latin America.
87. They regretted that cooperatives were being used in an inappropriate way and indicated that a new draft, restricting the use of cooperatives, was being examined. Concerning the reform of the pensions system, they indicated that it had involved a reform of the national Constitution and that the Constitutional Court was currently examining the issue.
88. They emphasized the active participation of citizens in their sessions, in particular that of the trade unions. They recalled the great importance of the SENA and the training work this institution carried out.
89. On the right of collective bargaining in the public sector, they expressed their concern about the economic responsibility of the State if this right were to be recognized. They further referred to the restructuring processes in many public enterprises as a consequence of the high labour costs, originating particularly in the pension obligations, and emphasized the importance of the survival of these enterprises. They indicated that the Government had asked for legislative authorization to proceed to restructure many of them, and that this was granted on the condition that the rights of the workers would be respected.

### Visit to two public enterprises in Paipa

90. The members of the visit were invited by the Government to Paipa where they had the opportunity to visit two public enterprises: the steel mill, Acerías Paz del Río, and the electricity company, GENSA S.A. According to the Government, these enterprises represented constructive examples of how serious economic and financial crises could be overcome thanks to significant efforts on the part of the employers and the workers. In the case of Acerías Paz del Río, the members visited the premises. The president of the enterprise explained the important role of Acerías Paz del Río in the region, with almost 500,000 persons depending directly or indirectly on it. Moreover, a great number of the workers' families lived on the enterprise premises. The enterprise had been confronted with two important crises, during which the workers accepted to buy shares in the company and to go without wages for several months. The members met with the president of the union at the steel mill who, while indicating his relief at the fact that, through these efforts, the mill

was still functioning, also expressed his concern about the long-term capacity of the mill and the future of the workers.

91. In the GENSA premises, a meeting was held with the enterprise management and some representatives from the trade union, as well as another trade union from Bucaramanga. They explained that a union contract had recently been offered to these unions as a way of both saving the company from bankruptcy and permitting the union to play an important role in determining the maintenance of union labour. Both the enterprise and the trade union still appeared unclear, however, as to certain aspects of the contract itself, in particular with respect to the question of legal responsibility. The members of the trade union explained that the union contract was a solution to the difficult economic situation the enterprise was going through and that they had decided to subscribe to it in order to avoid a massive dismissal of workers and the corresponding negative repercussions on the trade union. On the other hand, they did express their concerns as to whether this could truly be a long-term solution.

## Public enterprise management

92. Within the framework of the meetings held with the Ministry of Social Protection, the members of the visit had the opportunity to hear presentations from the management of some public enterprises named in some of the cases pending before the Committee on Freedom of Association: ECOPETROL, EMCALI, BANCAFE and TELECOM. There was also a presentation from the person in charge of the Programme for the Reform of the Public Administration (PRAP). By way of a general introduction, the Minister of Social Protection explained that, in light of the high level of poverty, 52 per cent, the State could no longer finance enterprises that were not viable. It was important for the economy to be boosted by the private sector, while honouring relevant recommendations coming from the ILO. The enterprises provided general background information to their recent and current situations, but were told (as well as the unions that wanted to present additional information concerning those enterprises) that any information they wished to be specifically taken into account in the consideration of outstanding complaints should be transmitted directly to the Committee on Freedom of Association.
93. The president of ECOPETROL, Mr. Isaac Yanovich, explained that the company was the largest in the country, and the only one to process crude and refined oil, making the entire country dependent on its services. This meant that if the service were affected by a strike, all the petrol needed for the domestic market would have to be imported. However, the country does not have sufficient transportation facilities or available ports for such significant imports.
94. On the restructuring of the public administration generally, the representative of the PRAP explained that there was a need to move towards a managerial, austere and productive State. Seventy per cent of the budget was devoted to administration and this figure should be significantly reduced, thus eliminating unnecessary bureaucracy. When reducing personnel, special efforts were made not to impact upon female heads of household, disabled and those near retirement. Unoccupied posts following retirement could be eliminated. Thirty-five state enterprises had gone into liquidation, yet measures were taken to ensure the labour stability of those with trade union immunity, amounting to some 900 workers. He emphasized that, while they may not totally agree on all issues, it was clearly essential that these plans for restructuring be discussed and reviewed with the unions concerned.
95. The representative of EMCALI gave a general presentation on the circumstances in the enterprise and added that all problems have now been surmounted. The person responsible for the liquidation of TELECOM referred to the constitution of cooperatives that could use the assets of the liquidated company. Finally, the labour dispute coordinator of BANCAFE referred to the privatization process and indicated that costs were too high and the unions too inflexible so they had no choice but to privatize.

## V. *Meetings held with the trade unions*

96. The workers were able to present the issues that according to them were undermining the work and existence of trade unions during the two meetings held between the members of the visit and the three confederations (the CUT, the CGT and the CTC) and many of their affiliates. On this occasion, the presidents of the three centrals, Mr. Carlos Rodríguez Díaz from the CUT, Mr. Julio Roberto Gómez Esguerra from the CGT and Mr. Apecídes Alvis Fernández from the CTC, gave

presentations showing the situation of trade unions and trade union leaders in the country. Besides, over 50 other presentations from trade union affiliates were also submitted.

97. In these presentations, the unions referred to the acts of violence committed against trade union leaders and affiliates as well as trade union premises, some legislative aspects and many problems respecting trade unions rights in practice. Referring to impunity, they mentioned that in 2005, 38 workers affiliated to the CUT had been murdered, five of whom were trade union leaders and two CGT affiliates were murdered. Besides, they referred to the serious situation of impunity concerning the acts of violence against these leaders and members and they estimated it at a level of 99, 44 per cent. Many organizations present described the daily situation they had to face in their enterprises and the different attacks they had suffered. They particularly emphasized the current process of stigmatization on the part of some government representatives and enterprise directions of which they have been victims, which further transforms them into the target of violent groups.
98. They further referred to a recent secret plan to eliminate the leaders of one of the unions, orchestrated by ex-members of the army, in collusion with the public enterprise, which was currently being examined by the judicial authority. According to information available to them, these agents had available to them personal information, such as movements, family names and routines, car number plates, cellphone numbers, etc.
99. Concerning the legal provisions they referred to:
  - section 55 of Law No. 50 of 1990 that impedes the unions from establishing subdirectives and union committees (in fact, section 55 refers to the establishment of them, but they have to have at least 25 members in the district to form a subdirective);
  - Law No. 584 of 2000 forbids the exercise of any activity by a union until its registration is published in a nationwide journal;
  - Law No. 79 of 1989 regulating the associated work cooperatives. There has lately been an excessive use of cooperatives to change the worker into an associate and deny him his trade union rights;
  - Legislative Act No. 1 of 2005 reforms the Constitution on the pensions issue so as to eliminate the possibility of bargaining collectively beyond the budget restrictions already established;
  - the lack of regulation concerning collective bargaining in the public sector despite the ratification of Conventions Nos. 151 and 154 in 2000 resulted in the denial of the right to collective bargaining rights to public employees.
100. As regards the different practices that, according to the unions, undermine the work and the existence of trade unions, they referred to several problems, including the recourse to different forms of civil and commercial contracts, current utilization of the trade union contract, restructuring processes, problems of registration, anti-union dismissals and problems of collective bargaining.
101. They emphasized that enterprises had recourse to different legal forms, which altered the traditional labour relationship. Commercial and civil contracts were often used to hire employees; subcontractors or temporary work agencies were used to provide workers to enterprises for work that could be considered part of the normal activities of the enterprise. Before that, such recourse would often follow a pattern where the regular workers of the enterprise were, first, only to be replaced by contractual workers deprived of their freedom of association rights as well as other benefits, such as social security. On many occasions, the same workers that were dismissed are rehired to do the same job but under these different modalities and without the rights normally incumbent to the employment relationship. The new use of union contracts (sections 482 to 484 of the Labour Code) was also rejected by the unions.
102. The unions also denounced the common practice of, under the guise of enterprise and state organ restructuring, dismissing all workers for economic reasons, closing the institution and then reopening it with another name. Workers would often be rehired but with other working conditions and rights similar to those mentioned previously. The existing collective agreement is made redundant and trade unions are generally not consulted in these processes. In fact, in the whole process of restructuring the employer addresses the workers directly offering some compensated retirement plans, sometimes through individual negotiation with each worker after an open and public offer or following, different kinds of pressure on workers to accept this compensation. The means of pressure vary from acts, such as taking all workers to hotels, far from their union's protection, where they are confined until they sign their acceptance, to threats and offers of

inexistent benefits. Despite the special trade union immunity (*fuero sindical*) that benefits trade union leaders, on many occasions they are also dismissed. After the collective dismissals, trade unions cease to exist due to lack of members and because in the new institutions, following the new forms of contract, workers are once more not allowed to unionize.

103. While all collective dismissals have to be approved by the Ministry of Social Protection upon economic studies presented by the employers, unions complain of not having access to this economic information, which makes the defence of workers' rights very difficult. The numerous presentations on this issue showed that this situation was widespread throughout the country. All sectors, private and public, are affected. In the public sector, workers referred to hospitals, petrol sector, banking sector, television and telecommunication sectors and public administration at the national and district levels.
104. Complaints were also made of the militarization of enterprises and institutions. On many occasions, when there is a labour dispute in an enterprise, private or public, the direction of the enterprise decides to send the army in. This means that no workers are allowed in or out of the enterprise and the public force is established on the premises. Workers who are in the enterprise are taken out by force. This method has also been used in some restructuring processes.
105. According to the unions, registration of trade unions, of statute modifications or new executive committees is frequently challenged by the enterprise or denied by the Registrar on a variety of grounds. In addition, in the process of restructuring, any registration of a new trade union or a new commission is denied.
106. Trade union leaders that enjoy a special protection (*fuero sindical*) are fired and not reinstated. Ordinary judicial procedures are too long and the special rapid procedure of the *tutela* does not always recognize their right to rapid reinstatement, which means they have to wait until the ordinary procedure is finished.
107. Concerning collective bargaining, workers referred particularly to the current tendency of enterprises to celebrate non-union collective accords instead of bargaining collectively. These non-union collective accords are provided for in the Labour Code. Section 481 provides that these accords may be concluded between employers and non-unionized workers and are applicable only to those workers that have signed them or adhere to them thereafter. This section further establishes the prohibition to conclude this kind of accord if the trade union existing in the enterprise covers more than a third of the workers. According to the unions, this type of accord undermines the position of trade unions to bargain collectively. In fact, they denounce some practices of many enterprises that convince workers to withdraw from the union so as to sign the accord. Once the trade union membership has fallen below one-third of the enterprise workers, non-union collective accords with non-unionized workers may be concluded. Moreover, according to the statements made, despite the fact that in principle the benefits accorded in collective accords should not be more advantageous than those of the collective agreements, this is not always the case.
108. In 2004, 434 collective agreements covered 62,777 workers, whereas 192 collective non-union accords covered 40,066 non-unionized workers.
109. Workers also referred to the refusal of employers to bargain collectively once the period of direct solution has elapsed. In fact, according to the workers, after they have presented their demands to the employer and, once the 20-day period established by the Labour Code (section 432) to negotiate directly is over, the employers refuse to negotiate and refer the matter to arbitration. The arbitration tribunals are composed of three members, one from the employers, one from the government and one from the workers. The unions consider that in many cases the employer and the government arbitrators work in collusion, thus undermining the position of the worker arbitrator. This means that the final arbitration will not maintain many of the benefits already acquired by workers in past negotiations. For this reason, it is common for workers to opt to withdraw their demands, after the period of direct negotiations. Moreover, workers complained of the fact that currently, after they presented their list of demands, the employers made a counter presentation setting out all the points they wanted to modify from the collective agreement in force. Finally, the unions felt that, in any event, collective agreements were often not respected.
110. The unions also referred to the prohibition of the right to strike in essential services and the fact that the definition of such services was too broad, including the petroleum services, the bank services, and the administrative sector of health services. In addition, the Minister of Social Protection has the faculty to declare a strike illegal.

111. Under section 430, strikes are not permitted in public services (those services provided for the community on a regular basis to satisfy basic necessities of the population). The following are considered public services: all the public sector, telecommunications, transport, hospitals, social and charity institutions, petrol and cleaning and hygiene of the city. Moreover, federations and confederations may not have recourse to strike (section 417). In case of a strike declared in these public services, the Minister of Social Protection may declare them illegal, which involves the possibility of dismissal of those workers having taken part in the strike. This has been the case in recent strikes in the petrol and bank sector, where there have been collective dismissals following a strike. The unions further referred to the fact that the Minister of Social Protection may issue a back-to-work order after 60 days of strike and call for compulsory arbitration.
112. The leaders and members of the Unión Sindical Obrera (USO) requested to make a special petition to the members of the high-level visit and referred to the dismissal of workers that had participated in a strike in the petroleum enterprise, ECOPETROL, allegations that are currently being examined by the Committee on Freedom of Association. The workers' trade union of the municipal enterprises of Cali (SINTRAEMCALI) and the workers of BANCAFE also raised concerns about the ongoing situation in their companies. Taking into account that all these issues are pending before the Committee on Freedom of Association, the trade unions were informed that such information would have to be sent directly to the Committee for its examination.

## **VI. Meeting with the employers' organization, ANDI, and some of its affiliates**

113. The visit had also the opportunity to meet twice with the employers' organization, ANDI, its president, Mr. Alberto Villegas, and the vice-president for legal and social affairs, Mr. Alberto Echavarría Saldarriaga, as well as with many of its affiliates, who made presentations about the current situation in their enterprises.
114. The president of ANDI referred to the macroeconomic situation and indicated that there was a forecasted growth of 5 per cent for the current year and that non-traditional industrial exports had increased during 2005. Moreover, a decrease of the unemployment rate to a one-digit figure was expected for the end of the year.
115. Concerning the security issue, he indicated that the general perception was that currently the level of security was much greater due to the success of the Democratic Security Programme. The number of homicides had significantly decreased, as had the instances of kidnapping, including extortion kidnappings. He emphasized ANDI's strong commitment to democracy and democratic institutions. ANDI had always supported the peace process and thus also supported the new Law on Justice and Peace, which they felt would restore rights and dignity to the Colombian people. Moreover, the Law contained provisions on reparation for victims, which the members of ANDI considered to be crucial. He underlined the need to re-educate the demobilized into civil life and to ensure their constructive reinsertion into work. In this respect, he indicated that a large percentage of the leadership of the United Self-defence Forces of Colombia (AUC) were very close to drug traffickers, while the thousands of rank and file were simply recruited kids, who clearly needed to find a productive role in society once they had given up their arms. Yet, at present, the Government's resources were insufficient to ensure the full and proper functioning of the demobilization process. ANDI would like to actively participate in assisting those suffering from violence out of this situation and requested ILO assistance for training and rehabilitation of the demobilized.
116. He emphasized that there was no hostility towards trade unions and underlined the existence of a good relationship with the current trade union leaders and many trade unionists. When asked about his opinion on the militarization of some enterprises he indicated that, nowadays, such measures were not used.
117. Concerning collective bargaining, he regretted that it was not possible to have bilateral negotiations between employers and workers at the national level. He pointed out that negotiations were always tripartite, which made it very difficult to reach agreements due to the fact that the trade unions linked the results in private sector negotiations first to the success of negotiations in the public sector. This was mostly due to the fact that the majority of trade unionists came from the public sector. He emphasized the need to build a common agenda between workers and employers and stressed the importance of dialogue.

118. He further referred to the misuse of some specific contractual situations, such as recourse to cooperatives, and indicated that Congress was currently considering how to control this situation. With respect to non-union collective accords he stated that they were provided for in the Labour Code and that they constituted good competition for the trade unions. He further stated that they were allowed only in those cases in which the trade union represented less than 30 per cent of the workforce and that the terms agreed to could not be superior to those set out in an already existing collective agreement. For ANDI, these non-union collective accords upheld the principle that trade union membership was not compulsory and non-union workers could also be covered by collective accords. He added that in many cases workers preferred to be covered by these non-union accords. One condition however was that they must not be a trade union member and, if they were, they would have to resign from the union. Moreover, those who have signed a non-union collective accord are not allowed to go on strike. ANDI considered that, if workers under such conditions opted for a collective accord, then the union was clearly not doing its job effectively. In addition, they did not believe that any pressure was placed on workers to sign collective accords and leave their union.
119. Several representatives from different enterprises gave presentations on past and current labour relations in their workplaces (see list attached). Some of them referred to the non-union collective accords in force in their company, others indicated that workers were not unionized. Some companies admitted having recourse to cooperatives or other forms of outsourcing for the main activities of the enterprise and others spoke of the necessary restructuring process that their enterprises had undergone. Labour relations with trade unions were, according to some enterprises, very conflictual and in some cases trade union membership was insignificant. Certain enterprises indicated their desire for assistance in dispute resolution and training of their managers and the unions with the aim of improving labour relations.
120. Other representatives indicated that they had a long-standing history of collective bargaining within their enterprises, had signed many collective agreements and considered the union or unions in their enterprises to be an essential component in the success of their operations and a constructive element to harmonious industrial relations. Reference was also made to the use of codes of conduct and good governance codes within the enterprises.
121. In reply to questions related to the security concerns within their enterprise, some referred to specific measures of protection provided to union leaders, including armoured facilities and premises, cellphones, etc., while other employers stated that there was no need for such protection, which only existed in the movies.
122. Many enterprises regretted that trade unions used the complaints procedure before the Committee on Freedom of Association as if it was equivalent to the national "tutelas" without trying first to address the difficulties at home. They underlined the need for training, as well as the importance of holding regular meetings of the Special Committee for the Handling of Conflicts Referred to the ILO, which up until now had met only once, to adopt its rules of procedure in 2002. In addition, ANDI hoped that the Government would more effectively consult with them in replying to complaints concerning specific enterprises so that the Committee on Freedom of Association could have more complete information available to it.
123. ANDI also provided a presentation on the Family Compensation Fund (*Cajas de Compensación Familiar*), which it had helped to create in 1954, as well as a presentation of its view on corporate social responsibility in Colombia. ANDI showed the main areas of investment of the 2 per cent of sales that were dedicated to corporate social responsibility, including education, training, health, housing, environment, justice and peace. In 2004, there had been a total investment of US\$140 million providing benefits to 1,572,123 persons. The results of a survey they had undertaken demonstrated that an overwhelming majority of companies favoured establishing codes of conduct and corporate governance codes.
124. In conclusion, ANDI agreed that legislation had to be changed on certain issues already highlighted by the ILO supervisory bodies. They recognized that cooperatives were not used properly but underlined at the same time the need for greater flexibility in workplace relations. They also highlighted the need to adopt new legislation on the right to strike, taking into account international practice. They felt it crucial that the national tripartite bodies begin functioning effectively in the very near future and that there was a need to provide for a monthly agenda. They felt that the high-level tripartite visit was a very important step towards facilitating the improvement in labour relations in Colombia and expressed the hope that the technical cooperation provided by the ILO would continue.

## **VII. Visit to the Director of the office in Colombia of the High Commissioner for Human Rights**

125. Mr. Michael Frülhing, the Director of the office in Colombia of the High Commissioner for Human Rights, explained that his mission consisted principally in making a systematic and analytical observation in the country and providing advisory services with regard to human rights. The Office provides technical cooperation structured around the implementation of the High Commissioner's recommendations and has the task of disseminating information on human rights as widely as possible.
126. Concerning impunity, he referred to the Inter-institutional Committee for the Promotion and Protection of Human Rights of the Workers, which he considered had not yielded much result. In fact, he felt that, although many efforts had been made, there was insufficient political will to have a real impact on the impunity that prevailed. He further stressed that there are groups in the country that are interested in the persistence of impunity.
127. As regards the Law on Justice and Peace, the Director considered that this law did not adequately fulfil the conditions to be a good instrument for transitional justice. Firstly, there was not enough will to clarify what really happened in the country, in respect of the conflict. The Law refers only to the armed groups, without any reference to state responsibility in the armed conflict. The absence of a full picture here nullifies the second aspect of the Law which is justice. There can be no justice if there is not adequate knowledge of the actors and the facts and if the truth is not complete. Finally, the reparation aspect of the Law was not well defined and he queried whether the mechanisms in place could be sufficient to address this aspect. Moreover, one should not forget that the majority of the outstanding acts of violence against trade unionists will not fall under the scope of this Law.
128. The Director further emphasized that the Law needed the full support of the population yet, for the time being, the only ones who were benefiting from it were the paramilitaries. Despite these shortcomings, he is currently working side by side with the Attorney-General in respect of the implementation of the Law.
129. Concerning trade unions and other non-governmental organizations, he stated that in many cases they had been stigmatized in public governmental statements as being linked to the guerrillas. Such accusations had a negative effect on the possibility of exercising of their basic rights, as well as on their security conditions.

## **VIII. Conclusions**

130. The members of the high-level tripartite visit would first like to express their sincere appreciation to the Government of Colombia for the total cooperation it has shown the visit and the great efforts made so that the members would have available to them the fullest and most candid information on the situation of trade union rights in Colombia.
131. While the programme was an intensive one, no effort was spared for the visit to see all the relevant partners in the areas of concern, and at the highest levels, including the President of the country. This has enabled the members of the visit to hear all points of view on the trade union situation in Colombia and to collect full information on the steps being taken by the Government.
132. While noting the detailed information provided by the Government to combat impunity and improve the safety and security of trade union leaders and members, the members of the visit further note the concerns still expressed by several sectors of society including the Procurator-General, the Constitutional Court and the Deputy Minister of Defence, that trade unionists are still targeted by the armed groups and little progress had been made in reducing impunity.
133. The members of the visit welcome the great emphasis placed on the protection of trade union leaders and members. This can be seen in particular in that, of the available funds for protection of members of civil society as a whole, the majority has been allocated to respond specifically to the need for protective measures for trade unionists. The members feel further encouraged by the creation of a special unit within the framework of the unit for the protection of human rights in the Attorney-General's office dedicated to resolving crimes against trade unionists. Finally, as regards the criminal justice system, the members hope that the recent issuance of decrees providing for oral proceedings will accelerate the process and be a further important tool for combating impunity, although they recognize that these decrees will have no impact upon the numerous cases of violence

against trade unionists that have already been brought before the Committee on Freedom of Association as oral proceedings will only be applicable to crimes committed after 1 January 2005.

134. The members of the visit further note the recent Law on Justice and Peace and its stated objectives of facilitating peace and the collective and individual reincorporation to civilian life of the members of the armed unlawful groups, and guaranteeing the rights of the victims to truth, justice and redress. Noting that the appeals before the Constitutional Court concerning this Law are still pending, they also observe that concerns have been raised by certain sectors of Colombian society about the emphasis placed in the Law on the rehabilitation of the paramilitaries and the insufficiency of resources to ensure its adequate implementation in terms of, among others, the investigatory work to be carried out and the need for adequate resources to redress the damages suffered by the victims.
135. The members wish to recall that to combat impunity it is essential that the full truth about the crimes committed be revealed. They, therefore, wish to express their firm hope that the Law, as finally applied, will be complemented by sufficient resources so that its implementation can be fully effective both in determining those responsible, including the intellectual authors of the crime, and in compensating the victims. The members sincerely hope that the implementation of the Law will be truly successful in obtaining its stated objectives of peace and justice and that it will have played an important role in preventing future acts of violence against trade unionists.
136. The members feel that ongoing tripartite dialogue on fundamental human rights and the possible measures for better combating the prevalent impunity, based on all the relevant and up-to-date information, is an essential step and should be accompanied by clear and extensive political will and the provision of the necessary resources. For this reason, they would encourage the Government to rapidly reactivate the Inter-institutional Committee for the Promotion and Protection of Human Rights of the Workers, which it understands includes in its composition the sectors of society affected by the violence emanating from the armed groups.
137. Welcoming the offer made by the Attorney-General to provide the ILO with the real-time data on its efforts to find and punish those responsible for violence against trade unionists, the members firmly hope that the further information provided, in particular within the framework of Case No. 1787, will show a significant reduction, if not the total elimination of acts of violence against trade unionists, as well as a rapid determination and sentencing of those responsible for the acts of violence already committed.
138. Beyond the question of impunity as regards violence against trade unionists, the trade union movement insisted that the climate of violence against trade unionists could only be understood within the context of the laws, policies and practices that it felt seriously undermined trade unionism in the country. Among the issues raised as having a severe impact on freedom of association and collective bargaining were: restructuring of companies to eliminate union representation, the use of cooperatives to disguise employment relationships and avoid unionization; subcontracting and the use of commercial and civil contracts to keep workplaces union free; collective accords and their impact on unions and collective bargaining; the use of the union contract; the denial of collective bargaining for public servants; obstacles to trade union registration; and legal prohibition of the right to call for a strike in services not considered as essential *stricto sensu*, in many public services that are not essential *stricto sensu*, as well as for the federations and confederations. The CUT, CGT and CTC insisted that the policies that entail the disrespect of freedom of association and collective bargaining have been carried out in the absence of social dialogue. They also reiterated their concern regarding the merging of two ministries (health and labour) into one (social protection), which they considered tended to weaken the Ministry of Labour rather than strengthen it. In this respect, they also referred to inadequacies in the labour inspection services and the incapacity of these services to fully protect workers' trade union rights.
139. The members heard of a number of examples of the use of contractual arrangements, such as associated work cooperatives and service, civil or commercial contracts, to disguise employment relationships and the exercise of tasks and duties that are part of the normal activities of the establishment. In particular, they heard of numerous circumstances whereby workers had been fired and new workers hired under a cooperatives contract to do the same work, yet under the existing legislation, without any right to establish or join a union. The members noted, however, that both the Government and ANDI had acknowledged the existence of abuses in the use of these contracts, in particular in respect of cooperatives, and the need to address these real concerns. In that respect, the members note the draft bill pending in Congress aimed at ensuring the proper use of cooperatives and at prohibiting their use as intermediaries or temporary work agencies. While recognizing that cooperatives are one particular way of organizing production methods, the



members of the visit consider that they should not be abused so as to restrict the organizational rights of workers. In this context, it is important to take fully into account Article 2 of Convention No. 87, which provides that workers and employers, without distinction whatsoever, shall have the right to establish and to join organizations of their own choosing. The members of the visit hope that the legislation contemplated by the Government will ensure that workers in so-called cooperatives, or who are covered by other types of civil or commercial contracts while performing work within the normal activities of the establishment in the context of a relationship of subordination, shall fully enjoy organizational rights as well as all other related freedom of association rights.

140. The members also received information about the current practice of concluding non-union collective accords to the prejudice of collective agreements. The facts on the manner in which non-union collective accords may come into being were agreed to by all, the Government, the employers' organization, ANDI, and the unions. Under the provisions of the substantive Labour Code, non-union collective accords can only be concluded in cases in which the membership of the trade union organization does not include over one-third of the workers. Once the trade union membership has fallen below one-third of the enterprise workers, non-union collective accords with non-unionized workers may be concluded. Collective accords may not, however, provide for better terms and conditions than those that may have been stipulated in a concluded collective agreement. Any signing of a collective accord automatically results in withdrawal of the worker from the union.
141. According to some trade unions, it is common practice for workers who are members of a trade union to be encouraged by the employer to disaffiliate from it and to sign a collective accord. Such practices may even be carried out when the union has the required one-third membership, thus leading to a reduction in the union's membership below the minimum requirement and releasing the enterprise from any obligation to conclude a collective agreement. The unions have indicated that, although the benefits accorded in collective accords should not be greater than those provided in existing collective agreements, in practice they are, particularly in light of the absence of any obligation on the employer to conclude a collective agreement in such circumstances.
142. The members of the visit also heard the view of ANDI in respect of collective accords. ANDI felt that collective accords were an important element of competition for trade unions that obliged them to offer real results to their members for their membership to be faithful. They also felt that it was essential to ensure that, in the case of a union that has not reached the one-third requirement for exclusive collective bargaining rights and in the absence of any possibility to conclude a collective agreement with that union, non-unionized workers could be covered by collective accords so as to ensure equal and well-established working conditions. ANDI did not believe that these contracts were used to undermine trade unions, nor did it know of any cases where employers had attempted to lead members away from their unions to sign collective accords.
143. While observing that a minimum requirement for the granting of status as a bargaining agent is a perfectly legitimate means of regulating constructive industrial relations, the members consider that the underlying purpose for which some non-union collective accords are concluded could undermine the effective recognition of the right of collective bargaining. Further, it would appear that individual non-union collective accords are inherently not collective in nature and should therefore not be considered as a substitute for voluntary negotiation between employers or employers' organizations and workers' organizations with a view to the regulation of terms and conditions of employment by means of collective agreements. The members believe that ILO technical cooperation could be particularly helpful in resolving these issues, including with respect to the practice of linking the signing of a collective accord with the resignation of trade union membership.
144. The members heard much information about the prohibition of true collective bargaining in the public sector. Currently, public servants may only submit "respectful petitions". While some sectors of the Government have claimed that this restriction is based on a constitutional limitation, the Deputy Procurator-General did not believe this to be the case and referred to a consultative opinion prepared by his Office for the Constitutional Court on this question. Following the ratification of Conventions Nos. 151 and 154, the Deputy Procurator-General felt that legislation should be elaborated to provide for collective bargaining rights for civil servants. The Ministry of Social Protection, however, felt that, in the light of some decisions from the Constitutional Court and the fact that the public budget depends on legislative approval, the conditions of employment of public servants can only be governed by the law, thus rendering it very difficult to go beyond the current

system of respectful petitions. Some of these issues were also raised in the meeting with the members of Congress.

145. Following the ratification of Conventions Nos. 151 and 154, the members hope that the Government will request the technical assistance of the Office so as to be in a position to address this question and ensure the right of public employees to bargain collectively in the very near future.
146. With regard to the newly-utilized “union contracts”, the members observe that these are provided for in the substantive Labour Code and consist of contracts concluded by one or more unions of workers with one or more (employers) or employers’ organizations for the provision of services or the execution of a task by their members. It appears from the terms of section 483 that “the workers’ trade union which has concluded a trade union contract shall be responsible both for the direct obligations arising out of the contract and for compliance with those established for its members, except in cases of the simple suspension of the contract, as envisaged by the law or the agreement, and shall have the legal personality to exercise both the rights and actions which correspond to it directly, as well as those which correspond to each of its members. For these effects and purposes, each of the parties to the contract shall establish a sufficient security; if such is not established, it shall be understood that the assets of each party to the contract shall cover the respective obligations”.
147. The trade union organizations that spoke to the members, however, expressed their serious concerns regarding the use of this type of contractual arrangement. The members of the visit had the opportunity to visit an enterprise in which a trade union contract was in operation. The presentation of this scheme gave rise to numerous questions and led the members to believe that an in-depth investigation of the subject was necessary in order to clarify certain issues such as the legal relationship between the enterprise and the union, the enterprise and the workers and the union and the workers; the responsibilities assumed by the union with respect to the enterprise and with respect to the workers; and the new role of the union. In order to assess correctly the implications of this contract, it would also be useful to have an idea of the number of such contracts in operation and the number of workers affected.
148. The members paid due attention to the numerous and extensive complaints from various workers’ organizations concerning other issues, such as the arbitrary refusal to register new trade union organizations, new by-laws or trade union executive committees at the discretion of the authorities for reasons beyond the explicit provisions of the legislation; and the restructuring of public establishments involving the massive dismissal of workers, including trade union leaders, and in some cases the closure of such establishments, only to be reopened as a different entity with contracts accorded only to former workers who were not unionized or on condition that they resign from the union (in such cases, the mere existence of a trade union was no longer possible). While noting the Government’s indication that, in both cases, the law has been strictly respected, the members hope that all efforts will be made to ensure full respect for the organizational rights of trade unions and that special consideration will be given to cases of restructuring so as to ensure that any necessary changes are not made with the aim of impairing or eliminating trade unions and that any future hiring does not discriminate against trade unionists. The members ask for the implementation of the recommendations of the Committee on Freedom of Association relating to such cases, including finding solutions to the illegal lay-offs of trade unionists in public entities. They acknowledge the efforts made in this direction by several officials but recognize that more progress is required.
149. In conclusion, the members of the visit strongly feel that, in the light of all of their discussions with the public authorities and the employers’ and workers’ organizations, there is a great deal of common ground on a number of the concerns raised in particular by the workers’ organizations. The members would encourage the social partners to look for solutions to these matters within the context of the tripartite mechanisms already available in the country. On this point, and noting the willingness and desire expressed by the Government and the social partners in this regard, the members would urge the Government to reactivate the regrettably insufficiently utilized national tripartite bodies, in particular the Standing Negotiation Committee on Labour and Wage Policies and the Special Committee for the Handling of Conflicts referred to the ILO, with a view to a full and meaningful dialogue on the issues of concern. Rapid and sincere action in this regard would go a long way to resolving the difficulties noted and to making a significant improvement in the labour relations climate. The members consider that the climate of trust that can be built within such mechanisms is crucial to social cohesion and progress within the country.

150. Finally, the members noted that, despite numerous important projects and training provided, the laudable goals set for the Special Technical Cooperation Programme in Colombia (STCP) remained far from realized. The members strongly believe that a permanent ILO presence within the country would be extremely valuable in ensuring a more sustainable programme and activity addressed at combating impunity, as well as ensuring more effective implementation of freedom of association, tripartite dialogue and the STCP objectives. This proposal should not be understood as a punitive action or an additional supervisory mechanism, but rather a tool to assist the Government and the social partners to best address the issues of concern with coherency and with the benefit of an outside party, removed from the direct influence of the concerns at hand, and which might further assist in the development of a full and constructive dialogue among the stakeholders.

*(Signed)* Professor Paul van der Heijden,  
Chair, Committee on Freedom of Association.

*(Signed)* Mr. Edward Potter,  
Employer spokesperson,  
Conference Committee on the Application of Standards.

*(Signed)* Mr. Luc Cortebeeck,  
Worker spokesperson,  
Conference Committee on the Application of Standards.

### ***Persons interviewed during the mission***

#### Office of the President of the Republic

Alvaro Uribe Vélez  
President of the Republic  
  
Francisco Santos Calderón  
Vice-President of the Republic

#### Ministry of Social Protection

Dr. Diego Palacio Betancourt  
Minister for Social Protection  
  
Dr. Jorge León Sánchez Mesa  
Vice-Minister for Social Protection  
  
Dr. Gloria Gaviria Ramos  
Coordinator of the Human Rights Group  
  
Ludmila Flórez Malagón  
Director-General for Labour Protection  
  
Dr. Luz Stella Veira de Silva  
Head of the Special Labour Inspection, Monitoring and Control Unit  
  
José Gabriel Mesa  
Cooperation and International Relations Office  
  
María Teresa Losada  
Cooperation and International Relations Office  
  
Rocío Devia  
Cooperation and International Relations Office

State-owned enterprises

*ECOPETROL*

Dr. Isaac Yanovich  
Chairman

*EMCALI*

Dr. Roberto Rodríguez

*BANCAFE*

Dr. Freddy Bayota Gómez  
Labour Disputes Coordinator

*TELECOM*

Dr. Javier Alonso Lastra  
Liquidator

*PRAP*

*Programa Reforma de la Administración Pública Public  
Adminstration Reform Programme (PRAP)*

Dr. Mauricio Castro Forero  
Director of PRAP

Ministry of the Interior and Justice

Dr. Luis Hernando Angarita Figaredo  
Vice-Minister of the Interior and Justice

Dr. Carlos Franco Echevarria  
Director of the Human Rights and International Humanitarian Law Programme, Office of the  
President of the Republic

Dr. Rafael Emiro Bustamante Pérez  
Director General for Human Rights  
Ministry of the Interior and Justice

Attorney-General

Carlos Arturo Gómez Pavajeau  
Vice-Attorney-General

Patricia Linares  
Procurator responsible for human rights

Dúmar Otálora  
Elite group responsible for investigating human rights violations

Osvaldo Duque  
Procurator responsible for labour affairs

Ministry of Defence

Andrés Peñate  
Vice-Minister of Defence

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## Members of the State Council

German Rodríguez Villamizar  
Chairperson

Gabriel Eduardo Mendoza M.

María Elena Giraldo Gómez

Tarsicio Cáceres Toro

Camilo Arciniegas Andrade

Jesús M. Lemos Bustamante

Enrique José Arboleda Perdomo

María Inés Ortiz Barbosa

Reinaldo Chavarro Buritica

María Noemí Hernández Pinzón

Darío Quiñones Pinilla

Ana Margarita Olaya Forero

Ramiro Saavedra Bercerra

Flavio Augusto Rodríguez A.

Filemon Jiménez Ochoa

Jaime Moreno García

María Claudia Rojas Lasso

Ligia López Díaz

Rafael O. de Lafont Pianeta

Gustavo Eduardo Aponte S.

Héctor J. Romero Díaz

Alejandro Ordóñez M.

Alier Eduardo Hernández E.

Ruth Stella Correa Palacio

Alberto Arango Mantilla

Juan Angel Palacio Hincapié

Luis Fernando Alvarez Jaramillo

## Members of the Supreme Court

Dr. Carlos Isaac Nader  
Chairperson

Dr. Yesid Ramírez Bastidas  
Vice-Chairperson

### *Magistrates of the Civil Chamber of Cassation*

Dr. Edgardo Villamil Portilla

Dr. Jaime Alberto Arrubla Paucar

### *Magistrates of the Criminal Chamber of Cassation*

Dr. Yesid Ramírez Bastidas

Dr. Sigifredo Espinosa Pérez

*Magistrates of the Labour Chamber of Cassation*

Dr. Luis Javier Osorio López  
Dr. Eduardo Adolfo López Villegas  
Dr. Carlos Issac Nader  
Dr. Camilo Humberto Tarquino Gallego  
Dr. Francisco Javier Ricaurte Gómez  
Dr. Isaura Vargas Díaz  
Dr. Gustavo Gnecco Mendoza

**Constitutional Court**

Manuel José Cepeda Espinosa  
Chairperson  
Alfredo Beltrán Sierra  
Jaime Córdoba Treviño  
Rodrigo Escobar Gil  
Marco Gerardo Monroy Cabra  
Humberto Sierra Porto  
Jaime Araujo Rentarías  
Alvaro Tafur Galvis  
Clara Inés Vargas Hernández

**Supreme Council of the Judicature**

Guillermo Bueno Miranda  
Chairperson  
Temístocles Ortega Narváez  
Chairperson  
Disciplinary Jurisdictional Chamber

*Administrative Chamber*

José Alfredo Escobar Araújo  
Francisco Escobar Henríquez (since 2 September 2004)

*Disciplinary Jurisdictional Chamber*

Guillermo Bueno Miranda  
Fernando Coral Villota

**Office of the Prosecutor-General of the Nation**

Mario Germán Iguirán Arana  
Prosecutor-General  
Yolanda Sarmiento Amado  
Director of International Affairs

Janny Jadith Jalal Espitia  
National Director of the Prosecutor's Office

Marisol Palacio Cepeda  
Director of the National Human Rights Unit

Elba Beatriz Silva Vargas  
Procurator assigned to the Supreme Court in and by Bogotá

Luis González León  
Procurator assigned to the Supreme Court in and by Bogotá

## National Congress

Dr. Claudia Blum de Barberi  
Chairperson of the Senate

Dr. Julio Gallardo Archibold  
Chairperson of the Chamber of Representatives

Representative Ifran Hernández Díaz  
Chairperson of the External Relations Committee

Senator Oscar Iván Zuluago  
Representative Carlos Ignacio Cuerdo Valencia

## National Office of the High Commission for Peace

Luis Carlos Restrepo  
General Eduardo Antonio Herrera

Dr. Darío Mejía

## National Association of Industry (ANDI)

Luis Carlos Villegas Echeverri  
Chairperson

Alberto Echavarría Saldarriaga  
Vice-Chairperson for Legal and Social Affairs

Imelda Restrepo  
Director of the Centre for Economic Studies

Ricardo Correa  
Secretary-General

## Enterprises interviewed

### ASOCAJAS

Alvaro José Cobo  
President

### SOFASA

Luis Fernando Peláez  
President

Silvia Cujar  
Director of Human Resources

*FABRICATO-TEJICONDOR*

Oscar Tirado  
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*COLTEJER*

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Oral and written presentations submitted by workers' organizations within the framework of the tripartite mission

1. Presentation produced by Mr. Carlos Rodríguez Díaz, Chairperson of the Single Confederation of Workers
2. Presentation by Mr. Julio Roberto Gómez Esguerra, Chairperson of the General Confederation of Workers (CGT)
3. Presentation by Mr. Apécides Alvis, Chairperson of the Confederation of Workers of Colombia
4. The General Confederation of Workers (CGT), with the case of the Union of Workers of the Administrative Department of Social Welfare of Cundinamarca
5. Presentation by sugar cane cutters
6. Union of Government Workers of Cundinamarca (SINTRACUNDI)
7. Union of Electrical Workers of Colombia (SINTRAELECOL)
8. National Union of Bookmakers, Lottery Sellers and Allied Professions (SINALPROCHAN)
9. SINRATEL – Barranquilla
10. National Union of Communications and Allied Professions and Transport (SINTRACOMUNICACIONES)
11. Union of Civil Servants in the Customs, Tax and Foreign Exchange Services
12. Workers' Trade Union (USO)
13. USO National Committee for Dismissed Workers, USO
14. Oil Industry Workers' Trade Union (USO) Cartagena branch
15. National Union of Public Servants in State Social Enterprises (SINALTRAESSES)
16. Union of Bogotá and Cundinamarca hospital, clinic, surgery and sanatorium workers (ANEC) Cundinamarca branch
17. Public Services International (ISP) on behalf of the Trade Union Association of Civil Servants of the Ministry of Defence, Armed Forces, National Police and Related Bodies (ASODEFENSA), the National Union of Civil Servants and Officials of the Municipalities of Colombia (SINALSERPUB), the Union of Municipal Workers of Cali (SINTRAEMCALI), the Union of Workers at the Aseo de Cali Public Services Board (SINTRAEMSIRVA) and the Trade Union of Workers and Employees of Public and Autonomous Services and Decentralized Institutes of Colombia (SINTRAEMSDES)
18. Union of Workers and Employees of the Department of Antioquia
19. Colombian Association of Civil Pilots (ACAV)
20. Trade Union of Workers at the Cerro Matoso company
21. General Confederation of Workers, in association with the Union of State Employees of Colombia (UTRADEC)
22. District Administrative Department of Social Welfare, presentation given by Mrs. María Eugenia Monsalve López
23. National Federation of Trade Unions of Workers in Public Service and Official Enterprises and Bodies, representing SINTRADEPARTAMENTO, workers from TERMOCARTAGENA, workers dismissed from the Municipality of Medellín, SINTRAMINERCOL
24. National Union of Banking Employees (UNEB)
25. National Union of Workers in the Catering, Hotel and Tourist Industry of Colombia
26. Professional Association of Technicians and Technologists of Colombia (APROTEC)
27. Trade Union of Communications Workers (USTC)

28. National Telecom Retirement Plan Association (ANPRETEL)
29. ASMETROSALUD
30. Trade Union of Armed Forces Pension Workers (SINTRACREMIL)
31. Presentation on the Bogotá Telephone Company by Mr. José Fidolo López
32. Union of Postal Workers of Colombia (STPC)
33. National Federation of Retired Dockworkers (FENALPENPOR), on the Colombian Port Authority
34. Presentation on the San Camilo de Bucaramanga Psychiatric Hospital by Mr. Ricardo Velandia Medina
35. National Trade Union of Civil Servants of the Colombian State (SINTRAESTATALES)
36. University Lecturers' Association (ASPU)
37. Union of Officials in the Department of Norte de Santander
38. Union of Workers in the Costa Atlántica Milk Producers' Cooperative (SINTRACOOLECHERA)
39. Union of Civil Servants and Public Service Workers
40. Colombian Red Cross Union, executive committee for Bogotá and Cundinamarca
41. Union of Workers at the Administradora de Seguridad Limitada S.A. (SINTRACONSEGURIDAD)

Office of the United Nations High Commissioner  
for Human Rights in Colombia

Mr. Michael Frülhing  
Director of the Office

CASE NO. 2424

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

**Complaint against the Government of Colombia  
presented by  
— the National Union of Bank Employees (UNEB) and  
— the Single Confederation of Workers of Colombia (CUT)**

*Allegations: the complainant organizations  
allege collective dismissals of workers as part of  
the process of restructuring at the Banco  
Cafetero S.A. BANCAFE, in a manner contrary  
to the collective agreement in force; cuts in  
staffing; and the total liquidation of the  
company through the Decree of 26 October  
2004*

- 621.** The complaint is contained in a communication presented by the National Union of Bank Employees (UNEB) and the Single Confederation of Workers of Colombia (CUT) which was received on 2 June 2005. The CUT sent new allegations in a communication dated 20 June 2005.

- 622.** The Government sent its observations in a communication dated 15 September 2005.
- 623.** 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**

- 624.** In their communication of 2 June 2002, the Union of Bank Employees (UNEB) and the Single Confederation of Workers of Colombia (CUT) allege that on 17 July 2000, the national government, through Decree No. 1388, ordered that the workforce at BANCAFE be reduced to 4,800 workers, which led to the dismissal of 2,000 workers, all of whom belonged to the UNEB, between 17 July 2000 and 25 February 2001. The union appealed against the Decree, but the appeal was rejected on 19 October 2000. Two further proceedings were then initiated to suspend the Decree, one on grounds of unconstitutionality and the other on grounds of illegality, before the Council of State on 19 September 2002.
- 625.** The complainant organizations indicate that on 26 February 2001, the Council of State ordered the provisional suspension of the Decree in question owing to certain irregularities in its issuance. However, on 15 May 2003, the Council of State rejected the applications for suspension.
- 626.** There exists a collective agreement between the UNEB and BANCAFE according to which workers with ten or more years of service with the company cannot be dismissed. The workers lodged an official appeal for reinstatement before the labour courts, and reinstatement was ordered in some cases. The dismissals were, however, confirmed by the higher courts.
- 627.** The UNEB adds that on 26 October 2004, the national government, through Decree No. 3520, ordered the reduction of the workforce at BANCAFE to 3,400 workers, which led to the dismissal, between 28 October 2004 and 7 March 2005, of 300 workers, all members of the union. The union sought the annulment of the Decree, but this was rejected by the Ministry on 16 February 2005. The workers did not apply to the labour courts for reinstatement because the higher courts had on a previous occasion set aside reinstatement orders.
- 628.** On 7 March 2005, the national government enacted Decree No. 610 of 2005 ordering the liquidation of BANCAFE and the consequent termination of all the 3,250 employment contracts in force. This also entailed the termination of the collective agreement.
- 629.** On the same date, through Decree No. 611, a new workforce list was established for the new entity entitled GRANBANCO BANCAFE. The list comprised a president, seven vice-presidents, three general directors, an internal comptroller, a general secretary and 3,200 employees.
- 630.** The unilateral liquidation of the company is a serious infringement of the right of association, since the termination of the existing employment contracts means that the union loses its members and consequently ceases to exist. According to the unions concerned, the explanations they were given state that the liquidation was due to the considerable staff costs resulting from the collective labour agreement and to the company's economic difficulties. However, the workers of UNEB decided at ordinary and extraordinary meetings not to present a list of claims from October 2001 until December 2005 in order to help the bank to avoid any increase in staff costs. Furthermore, according

to the complainant organization, BANCAFE was financially sound. According to the UNEB, workers at the Banco Cafetero S.A. in liquidation are hired out on loan to the new bank without any clear agreement concerning work, which is clearly illegal and unconstitutional.

- 631.** According to the complainant organizations, liquidation of the company was the result of the unilateral decision by the Government, which did not take into account the collective agreement in force and was not preceded by any talks with the unions.
- 632.** The new entity GRANBANCO has concluded contracts with the same workers, but the contracts in question are civil contracts which prohibit union membership. The establishment of the new entity was not, according to the complainant organization, justified and its sole objective was to establish a new entity in which the workers would not be allowed to join a union.

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

- 633.** In its communication of 15 September 2005, the Government states that it has been undertaking far-reaching reforms of the national public administration in order to improve its services in terms of quantity and quality, at the same time reducing excessive operating costs. It was with that aim in mind that the reorganization and restructuring of certain national bodies was ordered.
- 634.** With regard in particular to the Banco Cafetero S.A., the Government states that the crisis which the country experienced in 1998 and 1999 particularly affected the bank, causing a decline in its assets and liquidity and a serious administrative crisis. The declining value of assets brought the solvency level down to levels well below those required under Colombian law, and obliged the Superintending Authority for Banks to place the bank under special supervision.
- 635.** In August 1989, the Superintending Authority for Banks, who considered that the bank's solvency continued to be poor, in accordance with the authority conferred on him under the terms of section 113(2) of the Organic Financial System Statutes, ordered the recapitalization of the bank as a means of preventing receivership by an amount not lower than US\$260 million. Given that the shareholders of BANCAFE did not have the resources needed to capitalize the bank to the extent required by the Superintending Authority for Banks, the recapitalization order could not be implemented. As a result, the Financial Institutions Guarantee Fund (FOGAFIN), in accordance with its powers under section 320(4) of the Organic Financial System Statutes, in 1999, proceeded with capitalization by the amount required by the Superintending Authority for Banks. The decision was taken by FOGAFIN on the basis of an analysis of the risks entailed in liquidating an entity the size of Banco Cafetero undergoing a financial crisis, which would require about US\$1.3 billion in liquid assets. FOGAFIN thus became the owner of 99.9 per cent of the bank's shares. State intervention in the bank was intended as a temporary measure until such time as solvency could be restored.
- 636.** Three further capitalization initiatives followed the first, but it was not possible to achieve a definitive improvement in the bank's condition.
- 637.** In parallel with the capitalization strategy, the bank launched an administrative restructuring and institutional adjustment plan, the aim of which was to restore its financial viability by reducing its branch network, rationalize its administrative costs, update its technology and optimize its organizational structure at all levels. These efforts were reflected in improved operational efficiency, adaptation of its technological platform, and reduced labour and operating costs.

- 638.** In accordance with state policies regarding public banks, the Board of Directors of FOGAFIN, in September 2000, gave authorization to the bank to engage the investment bank to undertake the process of evaluation and transfer of FOGAFIN shares in the Banco Cafetero.
- 639.** The recommendations concerning the strategy of obtaining private funding are contained in the document produced by the National Council for Economic and Social Policy (CONPES) No. 3239 of 25 August 2003, and state that:
- ... BANCAFE has been restructured, although its current situation cannot be sustained in the longer term for the following reasons:
- BANCAFE has the lowest net assets of the entire financial system. Owing to its lack of capital, the bank is unable to maintain its commercial operations and maintains an excessive concentration of assets in investments. As a result of this, it requires an injection of new capital of at least US\$108 million, which would allow the removal of the capital guarantee provided by FOGAFIN. The current composition of the capital assets of BANCAFE exposes shareholders to the possibility of the new capitalization exercises in the event of losses arising from the market risks entailed by its activities.
  - BANCAFE, by comparison with the other banks of similar size operating in Colombia, has still not achieved adequate levels of efficiency...
- 640.** The document also maintains that “elimination of pension liabilities is required in order to attract investors, and because in addition to improving the operating margin, it will reduce possible future risks”.
- 641.** The sell-off programme, together with the evaluation, was last submitted to the Council of Ministers on 22 December 2001, but no final decision was taken. In accordance with the recommendations of the Council of Ministers, FOGAFIN and the bank were required to seek options other than the sale of 100 per cent of FOGAFIN shares, which would make it possible to bring private capital into BANCAFE. For that purpose, an “information room” was opened in October 2003 where FOGAFIN launched a strategy for bringing private capital into BANCAFE; this involved two successive and independent processes.
- 642.** The first process was intended to bring about capitalization of the bank by an investor or group of investors, thereby enabling FOGAFIN to remove the capital guarantee granted to the bank without any risk to its assets. In the second process, FOGAFIN, following the adoption of the transfer programme by the national government, would be in a position to transfer the BANCAFE shares.
- 643.** During the development of the capitalization process, three potential investors visited the information room, having met the requirements established in the regulations concerning the use of private capital. On 18 February 2004, the adjudication hearing took place but no offer was received.
- 644.** Although it is not possible to determine with certainty the reasons for which no proposals were received regarding capitalization of the bank, there are a number of possible causes. These included the bank’s high labour and pension costs (inefficiency), its large size in relation to its portfolio, the low level and profitability of its branch network, the difficulty of implementing new commercial policies in an environment which makes proper accounting impossible, and the need to improve operational efficiency (related costs). Despite all the efforts that were made, it was not possible to determine the bank’s position precisely.
- 645.** In conclusion, the strategy of bringing in private capital, which does not in itself contravene the provisions of the Conventions on freedom of association and collective

bargaining, failed owing among other things to the inflexibility of the relevant collective agreement and a number of other crucial aspects mentioned above.

- 646.** As explained above, one of the main causes of the critical situation of the Banco Cafetero, which necessitated further commitment of state resources, was related to the high labour costs, which made it impossible to manage the institution in an effective way. For this reason, the Government, in accordance with its constitutional and legal prerogatives, in particular the authority conferred on it under article 189(14) of the Political Constitution, enacted Decree No. 1388 of 2000 to restructure staff at the Banco Cafetero S.A., now in liquidation. As a result of this, it was necessary to cut posts through the unilateral termination of contracts of employment, a process which was implemented without regard to the union status of the workers concerned, that is, whether or not they were union members.
- 647.** As regards Decree No. 3520 of 26 October 2004, this was based on the same basic principles as Decree No. 1388 of 2000, in the sense that the bank, in view of its critical economic situation, decided to reduce administrative and staff costs.
- 648.** The bank's senior management held 12 meetings with the officers of the union UNEB during 2004 and 2005. The bank undertook a broad process of dialogue aimed at making the union aware of the economic situation and of the need to adopt appropriate measures to tackle the inflexibility of existing contractual arrangements. Unfortunately, the union did not respond positively to these proposals.
- 649.** As regards the refusal to rescind Decrees Nos. 1388 of 2000 and 3520 of 2004, it should be noted that in accordance with section 69 of the Administrative Disputes Code:

Administrative decisions shall be revoked by the officials responsible for enacting them or by their immediate superiors, either acting on their own initiative or following an application to that effect, in any of the following cases:

- where it is clear that the decisions in question are not consistent with the Political Constitution or the laws in force;
- where they are not consistent with the interests of the public or society as a whole;
- where they result in unjustified injury to any person.

- 650.** In conclusion, direct annulment is conceived as a juridical mechanism which is intended to correct an error, injury, illegality or inconvenience arising from a decision taken by the public administration. In the present case, the application was not successful because the Decrees in question were entirely legal, given that they did not infringe any constitutional or legal provisions, and because they caused no injury to the workers of BANCAFE, as is shown by the content of the Decrees in question, which stipulated that appropriate entitlements and benefits must be guaranteed in the case of termination of employment, in accordance with the many legal provisions applicable in such cases.
- 651.** As regards the application for annulment on grounds of illegality, this also did not succeed and for this reason the Council of State, on 15 May 2003, ruled that the Decree was legally and constitutionally well founded.
- 652.** As regards the failure to comply with the collective agreement during the liquidation process, the Government states that, in accordance with Ruling No. 07094 of 21 July 2004 by the First Section of the Council of State:

Labour agreements or collective agreements do not constitute a valid impediment to the exercise by the authorities at different regional levels of their constitutional and legal prerogatives in the area of administrative restructuring and labour force reductions, given the

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undoubted overriding benefit of rationalizing costs and modernizing the public administration by eliminating unnecessary posts in the administrative service.

- 653.** As regards the decision by the union at different meetings not to present a list of claims, no evidence of this is provided, and it should be noted that December 2005 lies in the future and cannot be spoken of in terms of established fact. From 2002 onwards, the bank stopped making losses and registered profits of US\$2.5 million and US\$19.5 million during 2003. Nevertheless, profits remained significantly lower than the average for the banking system as a whole. The unsuccessful attempt to use private capital forced the management to focus its efforts on certain aspects of banking operations that were not affected by inflexible contractual arrangements and to take advantage of conditions in the Colombian market. Along the same lines, two main areas of activity were emphasized: generation of revenues through the treasury and austerity measures to reduce costs. The results of that strategy were reflected in profits in 2004 of US\$69 million, representing an increase of 252 per cent over the previous year's figure of US\$20 million. Nevertheless, the greater part of the bank's profits were the result of extraordinary, rather than recurrent, factors, and not necessarily related to banking business.
- 654.** In 2004, and especially during the second half of the year, the treasury's new investment portfolio underwent significant changes with regard to volume and composition, the intention being to boost revenues. The average volume of the investment portfolio between January and June 2004 was of the order of US\$1.2 billion, compared to an average of US\$1.4 billion for the period July-December 2004.
- 655.** At the same time, the Government emphasizes that the other major source of positive results during 2004 was the reduction in administrative costs, and warns that this was the result of the realignment of policies to control costs and hiring which entailed the renegotiation of the main agreements in force; this led to significant savings. Nevertheless, the pace of such reductions cannot continue, at least over the next few years.
- 656.** Although the bank reduced its costs compared to the previous year, it is important to note that staff and administrative costs account for some 95 per cent of the revenues generated directly by the bank's commercial operations. Liabilities in the form of staff costs account for 58 per cent of total operating costs, much of this total being taken up by pension costs, which amounted to US\$37 million.
- 657.** It is clear from this assessment that these results are not explained by the structure of intermediation business. The greater part of the bank's revenues are thus derived from non-recurrent factors and treasury transactions, which further increases the gulf between the bank and comparable institutions.
- 658.** The inefficiency went hand in hand with an inflexible staff costs structure, which increased the operating costs of the commercial network, as well as failing to provide incentives to improve commercial management, let alone responding to a market as competitive as the present one. This is shown by the poor results in terms of related revenues over recent years.
- 659.** In December 2004, BANCAFE was one of the most inefficient banks in the Colombian banking system. Administrative and labour costs rose to 81.5 per cent of BANCAFE's gross financial margin, whereas the average for the comparison group (Bancolombia, Banco de Bogotá and BBVA) was 50.5 per cent, and the figure for the banking system as a whole was 56 per cent. Some 60 per cent of all costs were accounted for by staff costs, while the figure for comparable banks was 49 per cent, and 42 per cent for the system overall.

- 660.** The critical element of the bank's staff costs was the pension liabilities, which amounted to US\$194 million, or more than the total pension liabilities of the rest of the Colombian financial sector. Secondly, there were the disproportionate pay and benefits under the collective labour agreement, which meant that an employee received 21.5 monthly salaries per year, that is, almost two years of pay for one year of service. Thirdly, the terms of the agreement in question resulted in virtual immunity of bank staff to lay-offs.
- 661.** In conclusion, it should be noted that the efforts made by the management over recent years were not enough to achieve figures equivalent to the average for comparable banks. This was clear from its overall indicators.
- 662.** Despite the progress made in recent years in improving the financial structure, the bank still had serious deficiencies.
- 663.** The overall level of net assets of BANCAFE was low by comparison to its total assets, with regard to the prevailing levels in the financial system, and without the capital guarantee would be below the legal minimum. For this reason, the level of risk concentrated in the enterprise was well above that of its competitors at a time when its revenues were highly volatile owing to the dependence on investment, all of which limited the bank's capacity to achieve its full commercial potential.
- 664.** The fact that the capital guarantee made up a large part of BANCAFE's net assets exposed its shareholders to further capitalization initiatives in the event of losses arising from market risks entailed by its operations.
- 665.** BANCAFE was inefficient by comparison with other banks of similar size in Colombia, owing to the high operating costs comprising mainly staff-related overheads.
- 666.** In order to assess the possible effect of its structure on future performance, two scenarios were projected: the first assumed continuity based on current labour conditions; the second was based on the Banco Puente model, a bank with labour costs similar to those of comparable banks without any pension liabilities or capital guarantee.
- 667.** The "continuity" scenario suggested that the bank was losing its potential to generate profits because of its labour costs and pension liabilities; this meant lower profitability versus assets and poorer dividends for shareholders.
- 668.** The bank's net assets as at 28 February 2005 stood at US\$217 million, of which almost 60 per cent (US\$128 million) was intended to cover high labour costs and benefits. Another US\$49 million was earmarked for contingencies arising from pension and labour liabilities. Under such circumstances, a bank could not provide the public service for which it was established, or honour its commitments to workers and retired staff.
- 669.** The Government adds that legal mechanisms exist to defend workers who feel that their individual or collective rights have been infringed. To that end, they can petition the labour tribunals; in the present case, the bank acknowledged the entitlements of the dismissed workers to certain benefits and payments under the terms of the relevant agreements and laws. The relevant documents in support of this will be forwarded later.
- 670.** The Government concludes that the workers did not initiate any legal proceedings against the Government because they know that the bank was obliged to undergo restructuring and liquidation, and respected their rights by paying the various benefits to which they were entitled in line with statutory requirements.



- 671.** In the light of the above, it is clear that the bank had lost the purpose for which it was established, and the continued use of public funds in the bank was costly in social terms and not in keeping with the supposedly temporary nature of assistance from the Financial Institutions Guarantee Fund (FOGAFIN), especially given the failure of procedures intended to reduce that funding by bringing in private sector capital.
- 672.** The national government, in accordance with its constitutional and legal powers, passed Decree No. 610 of 2005 ordering the dissolution and liquidation of the Banco Cafetero S.A. Consequently, that now governs labour relations as long as workers are employed by the bank now undergoing liquidation. The Banco Cafetero thus assumed the total labour liabilities, including pension-related ones, supported by a portfolio of investments to guarantee funds needed to meet established obligations with regard to the company's employees and pensioners. In addition, the bank was left with assets of US\$42 million, which is to be used to fund the process of liquidating the labour force and meet other related costs. If that sum is insufficient, the bank will be provided with a back-up guarantee from FOGAFIN.
- 673.** One may conclude that the Government, through FOGAFIN, has earmarked a considerable sum for the purpose of ensuring that workers' acquired rights are duly protected, with total compensation of US\$68.5 million being paid to 2,337 employees. Compensation for individual workers varies between 108 and 1,442 times the legal minimum wage.
- 674.** As explained before, Decree No. 610 of 7 March 2005 ordered the dissolution and liquidation of the bank and consequently, as indicated in similar provisions relating to the closure of such entities, refers among other things to protection of statutory benefits for workers, whether unionized or not, in such a way that the Decree does not in itself "terminate the collective labour agreement", as the complainant has claimed. On the contrary, according to section 9:
- Termination of employment: as a consequence of the dissolution and liquidation provided for in this Decree, the liquidator shall terminate existing contracts of employment in accordance with the provisions of the relevant agreements, laws and regulations, and with the procedures for eliminating public service posts.
- 675.** The Government also states that the Decree in question did not terminate the collective agreement in force at the bank. The provisions that have been applied protect every bank worker over the period in which he or she has been employed there. Neither the UNEB nor any other union organization can claim that an institution which is failing to make the sort of profits required in banking and is not competitive in the banking and credit sector must continue to operate in order to protect a trade union.
- 676.** The national government, in accordance with its constitutional and legal powers, enacted Decree No. 611 of 2005 which did not order the establishment of GRANBANCO-BANCAFE, as the union erroneously claims, but approved the staff list of a body established under Official Public Act 0681 of 7 March 2005, registered with the Public Notary's Office No. 38 of Bogotá Capital District.
- 677.** The Government adds that it had adopted measures aimed at optimizing the resources of the public treasury. One strategy for achieving this has been an effort to reunify the functions of the state through various bodies at different levels – national, departmental and municipal. This process has been under way for a number of years, and had preserved the constitutional autonomy delegated to the executive in taking decisions with a view to rationalizing and optimizing national resources.
- 678.** Thus, as part of the process of splitting up the assets of the Banco GRANAHORRAR Banco Comercial S.A., the bank GRANBANCO S.A. was established; this is a banking

establishment with aims similar to those of the Banco Cafetero S.A. now undergoing liquidation, and in the interests of ensuring continuity in banking services as GRANBANCO S.A. had undertaken to do when it was set up, an agreement was concluded regarding the provision of services between the two institutions in question with a view to facilitating the human resource service for the liquidation process on a temporary basis while the liquidation process proceeded, for which GRANBANCO would acknowledge the labour costs incurred by the body undergoing liquidation during the process.

- 679.** The Government states that UNEB initiated two actions for protection (*tutela*) before the Second Court of Bogotá Circuit and through the Higher Court of Bogotá, but these were rejected.
- 680.** The Government states that the Bank Superintending Authority has kept a close watch on the bank's activities throughout this period, and it was for this reason that it adopted the liquidation decisions. Restructuring and liquidation of institutions are the result of financial crises which can lead to the elimination of posts regardless of the status of the workers concerned, that is, whether or not they are union members, and this would therefore not be contrary to the terms of Conventions Nos. 87 and 98. It is clear that the liquidation of BANCAFE was not motivated by anti-union discrimination, and had nothing to do with the union membership or otherwise of the employees concerned.
- 681.** The bank's senior management tried on numerous occasions to negotiate with the union but the latter had no proposals as to how to modify the situation.
- 682.** It is also clear that the Colombian State committed considerable resources in an attempt to prevent, even up to the last minute, the liquidation of the institution. This proves that there was genuinely no intention of carrying out acts of anti-union discrimination. It should also be noted that the bank complied with all legal requirements regarding the payment of severance pay. Similarly, workers who enjoyed trade union immunity were not dismissed pending judicial decisions to suspend that immunity. They continued to work in BANCAFE, now being liquidated. This is further proof of the total absence of anti-union motives in this case.

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

- 683.** *The Committee notes that this complaint concerns allegations of collective dismissal during restructuring at the Banco Cafetero S.A. which meant the resignation of these workers from the National Union of Bank Employees (UNEB). The Committee notes that according to these allegations, the restructuring process was implemented without consultations with the trade unions, in contravention of the collective agreement in force, which provided for tenure for workers with ten or more years of service. The Committee also notes that according to the allegations, the workers had decided not to present a list of claims from October 2001 to December 2005 in order to allow the bank to avoid increases in staff costs.*
- 684.** *The Committee notes that according to the complainant organizations, the dismissed workers were hired under contract by the new bank GRANBANCO S.A., but that under the terms of their contracts of employment they cannot form or join a union.*
- 685.** *The Committee notes that according to the Government, the restructuring and subsequent liquidation of BANCAFE were due to the need to re-size and restructure public bodies. The Committee notes that the Government refers to the serious economic crisis which affected the bank, prevented it from functioning and made it impossible to save it, despite the considerable efforts made to that end. The Committee indeed notes the failure of various*

efforts to inject capital and restore the bank to a sound condition, in particular the failed attempt to bring in private capital which did not lead to the expected results, partly, according to the Government, because of the excessive staff costs. The latter comprised, according to the Government, excessive pension liabilities, disproportionate pay and benefits under the terms of the collective agreement, and an inflexible staff costs structure.

686. The Committee notes that according to the Government, labour costs accounted for 58 per cent of total operating costs, and a large proportion of that total resulted from pension costs. For this reason, following failed attempts to restore the bank's financial health through restructuring and capitalization, it was decided to liquidate the bank by Presidential Decree. The Committee also notes that according to the Government, some 12 meetings were arranged between the union and the Government to discuss this issue, but it was not possible to reach agreement.
687. The Committee notes that according to the Government, the restructuring and liquidation entailed the dismissal of many workers but this was not related to union membership. Furthermore, the workers concerned received appropriate compensation.
688. As regards the failure to comply with the collective agreement during the liquidation process, the Committee notes that the Government, citing the Council of State, states that the labour agreements or collective agreements do not constitute a valid impediment to the exercise by the various regional authorities of their constitutional and legal prerogatives with regard to administrative restructuring and changes in the labour force, given that there is an undoubted overriding public benefit in rationalizing costs and modernizing public administrations by eliminating unnecessary posts, including in the administrative service. The Committee also notes that according to the Government, the liquidation Decree did not terminate the collective agreement in force at the bank, as the provisions that have been applied protect every bank employee during their employment.
689. As regards the allegations concerning the process of restructuring and liquidating BANCAFE S.A., which entailed the collective dismissal of bank workers, all of them members of UNEB, the Committee recalls that the Committee "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" [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 935]. In this regard, the Committee notes that there is a discrepancy between the allegations and the Government's observations as regards consultations. While the complainant organizations maintain that the process went ahead without any union involvement, the Government states that it met 12 times with UNEB in an unsuccessful attempt to agree on the restructuring. The Committee notes, however, that the documents from the National Council for Economic and Social Policy (CONPES), a copy of which is provided by the Government, do not indicate that there were any consultations with the trade unions on the restructuring process. Indeed, the restructuring initiatives of 2003 and 2005 were implemented through Presidential Decrees (Nos. 1388 of 2000 and 3520 of 2004, which ordered restructuring, and Nos. 610 and 611, which ordered the dissolution and liquidation of the Banco Cafetero S.A. and approved the staff list of GRANBANCO S.A.).
690. As regards the allegations that the process of restructuring and liquidation unilaterally terminated the collective agreement in force, the Committee notes that the Government denies that this is the case, and maintains that workers still employed by BANCAFE in liquidation are still covered by the collective agreement. In this regard, the Committee

recalls that “the closing of an enterprise should not in itself result in the extinction of the obligations resulting from the collective agreement, in particular as regards compensation in the case of dismissal” [see **Digest**, *op. cit.*, para. 914]. The Committee requests the Government to ensure that the collective agreement continues to be applied to workers at BANCAFE while it is liquidated, in accordance with this principle.

- 691.** While the Committee is not in a position to determine whether the dismissals, which occurred during the process of liquidation of BANCAFE, were motivated by anti-union considerations, it notes with great concern the allegations according to which former BANCAFE workers who were collectively dismissed and are now working at GRANBANCO cannot, under the terms of their contracts of employment, form or join unions of their own choosing. The Committee regrets that the Government did not send its observations on this aspect. The Committee recalls that according to Article 2 of Convention No. 87, “Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.” The Committee accordingly urges the Government to take the necessary steps to guarantee that workers dismissed from BANCAFE and now working for GRANBANCO enjoy the right to form a union and bargain collectively. The Committee requests the Government to keep it informed in this regard.

### **The Committee’s recommendations**

- 692.** *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 ensure that the collective agreement continues to be applied to workers of BANCAFE while it undergoes liquidation, in accordance with the principle that the closing of an enterprise should not in itself result in the extinction of the obligations resulting from the collective agreement, in particular as regards compensation in the case of dismissal.*
  - (b) *While the Committee is not in a position to determine whether the dismissals which occurred during the process of liquidation of BANCAFE were motivated by anti-union considerations, it urges the Government to take the necessary steps to guarantee that workers dismissed from BANCAFE and now working for GRANBANCO enjoy the right to form a union and bargain collectively. The Committee requests the Government to keep it informed in this regard.*

CASE NO. 1865

INTERIM REPORT

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

- **the Korean Confederation of Trade Unions (KCTU)**
- **the Korean Automobile Workers' Federation (KAWF)**
- **the International Confederation of Free Trade Unions (ICFTU)**
- **the Korean Metalworkers' Federation (KMWF) and**
- **the International Federation of Building and Wood Workers (IFBWW)**

*Allegations: The complainants' pending allegations concern the non-conformity of several provisions of the labour legislation with freedom of association principles and the dismissal of several public servants connected to the Korean Association of Government Employees' Works Councils for the exercise of illegal collective action. New allegations by the IFBWW concern the unjust prosecution and imprisonment of trade union organizers and officials from the Korea Federation of Construction Industry Trade Union (KFCITU) so as to prevent the effective organization of construction workers. New allegations by the ICFTU concern the Establishment and Operation of the Public Officials' Trade Unions Act which was fast-tracked through official consultation procedures without regard to due process while severe measures of repression were taken against the leaders of the Korean Government Employees Union (KGEU) who opposed the adoption of the Act and pressed for recognition of the right to strike*

- 693.** The Committee already examined the substance of this case at its May-June 1996, March and June 1997, March and November 1998, March 2000, March 2001, March 2002, May-June 2003 and November 2004 meetings, when it presented an interim report to the Governing Body [304th Report, paras. 221-254; 306th Report, paras. 295-346; 307th Report, paras. 177-236; 309th Report, paras. 120-160; 311th Report, paras. 293-339; 320th Report, paras. 456-530; 324th Report, paras. 372-415; 327th Report, paras. 447-506; 331st Report, paras. 165-174; 335th Report, paras. 763-841 approved by the Governing Body at its 266th, 268th, 269th, 271st, 273rd, 277th, 280th, 283rd, 287th and 291st Sessions (June 1996, March and June 1997, March and November 1998, March 2000, March 2001, March and June 2003, and November 2004)].
- 694.** In a communication dated 12 October 2004, the International Federation of Building and Wood Workers (IFBWW), which had associated itself to this case in a communication dated 19 January 1996, submitted new allegations. In a communication dated 3 May 2005, the International Confederation of Free Trade Unions (ICFTU) submitted new allegations.

**695.** The Government provided its observations in communications dated 28 February and 7 September 2005 and 16 January 2006.

**696.** 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).

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

**697.** At its November 2004 session, in the light of the Committee's interim conclusions, the Governing Body approved the following recommendations:

- (a) As regards the legislative aspects of this case, the Committee requests the Government:
  - (i) to confirm that the Public Officials. Trade Union Bill permits the possibility of trade union pluralism and to take the necessary measures in the very near future so as to ensure that all public servants fully enjoy the right to establish and join trade union organizations of their own choosing;
  - (ii) to take rapid steps for the legalization of trade union pluralism, in full consultation with all social partners concerned, so as to guarantee at all levels the right of workers to establish and join the organization of their own choosing;
  - (iii) to enable workers and employers to conduct free and voluntary negotiations in respect of the question of payment of wages by employers to full-time union officials;
  - (iv) to amend the list of essential public services in section 71(2) of the Trade Union and Labour Relations Amendment Act (TULRAA) so that the right to strike may be restricted only in essential services in the strict sense of the term;
  - (v) to repeal the notification requirement (section 40) and the penalties for violation of the prohibition on persons not notified to the Ministry of Labour from intervening in collective bargaining or industrial disputes (section 89(1) of the TULRAA);
  - (vi) to repeal the provisions prohibiting dismissed and unemployed workers from keeping their union membership and making non-union members ineligible to stand for trade union office (sections 2(4)(d) and 23(1) of the TULRAA);
  - (vii) to bring section 314 of the Penal Code (obstruction of business) in line with freedom of association principles and to rectify the situation of any workers who may have been penalized under this provision for non-violent industrial action and to provide further details, including any court judgements, on the 28 cases of workers arrested for obstruction of business in 2003, despite the absence of violent acts;
  - (viii) to keep it informed of the progress made in respect of all of the abovementioned matters.
- (b) As regards the factual aspects of this case:
  - (i) the Committee requests the Government to provide information on the outcome of the appeal made by Kwon Young-kil, former president of the KCTU, and to transmit a copy of the court judgement in this case;
  - (ii) noting that the dismissal of 12 public servants connected to the Korean Association of Government Employees. Works Councils was in large part due to the absence of legislation ensuring their basic rights of freedom of association and that four of the dismissed have already been reinstated, the Committee requests the Government to provide information on the outcome of the administrative litigation and requests for examinations under way, as well as a copy of the Supreme Court judgement in the case of Oh Myeong-nam.

## B. The complainants' new allegations

### *New allegations by the IFBWW*

- 698.** In its communication dated 12 October 2004 the International Federation of Building and Wood Workers (IFBWW) made new allegations of victimization and discriminatory prosecution and imprisonment of union officials and local organizers of the Korean Federation of Construction Industry Trade Union (KFCITU), an affiliate of the Korean Confederation of Trade Unions (KCTU) and the IFBWW. According to the allegations, since September 2003, the police and the prosecution had launched a series of unjust investigations specifically targeting the organizing efforts of KFCITU local unions in an attempt to stop the union from carrying out organizing activities aimed at establishing more effective representation and collective bargaining for workers in the construction industry. The complainant explained that the KFCITU represented an amalgamation of workers in the construction industry. It was comprised of enterprise unions (white-collar workers), trade unions (electricians, tower crane operators and ready-mixed cement drivers) and local unions organizing construction site workers and construction plant workers. The latter category amounted to more than 1.8 million workers. The workers (carpenters, masons, steel workers, painters, dry welders and other skilled labourers) were basically non-permanent, irregular, seasonal workers, hired by contractors and subcontractors on a daily basis. Since these workers were paid for each day of work performed, if they missed work due to an illness, family emergency or for any other reason, or if the construction site closed due to rain, natural disasters or for any other reason, they were not paid. Despite working at least ten to 12 hours a day, seven days a week under dangerous and undignified working conditions, their wages barely sustained them. An average of two construction workers died every day due to an accident at the worksite. South Korean construction sites could be compared to “war zones” due to the high number of accidents that resulted in serious injuries and deaths of construction site workers. Although the Republic of Korea was now part of the Organisation for Economic Co-operation and Development (OECD), the rate of construction site accidents was similar to that of non-OECD countries. Because of this, occupational safety and health (OSH) issues were a serious priority for construction site workers. Clearly one of the ways for construction site workers to address their concerns and improve their lives was through forming and participating in trade union activities. The police and the prosecution had specifically targeted the nine KFCITU local unions organizing construction site workers in the construction of big apartment complexes and buildings.
- 699.** The complainant explained that South Korean construction sites were a complex pyramid structure comprised of one main construction company and several subcontractors that often went down to seven levels. In this organizational structure, the main construction company “hid” behind several layers of contractors and subcontractors to remove itself from any responsibility over the construction site workers who were hired by the contractors and subcontractors. This system also allowed the project budget to be reduced by more than 50 per cent and was accountable for the low wages, unsafe working conditions and lack of benefits for construction site workers.
- 700.** The complainant added that although efforts to organize these workers since 1988 had met with minimal success (the union density of construction site workers lying at a depressing 0.1 per cent), in 1999, the KFCITU received a grant from the IFBWW to educate and train organizers, union officials and union members with the objective of assisting the union’s organizing programme to further increase its union density. The South Korea Trade Union Development and Education Project was critical of the union’s decision to develop a national organizing programme, which they launched in 2000. Part of the programme included the signing of a collective agreement between the local unions and the main

construction companies represented by company managers and supervisors at the construction site.

- 701.** The complainant stated that as a result of the collective agreement signed, the main construction companies agreed to abide by South Korean labour laws and ensure worker rights at the construction site. In addition, the main company agreed to the following: (i) ensure and allow union activities at the construction site. These activities included access to the construction site, educating union members about South Korean labour laws and other government benefits, election of site delegates and worker representatives, promotion of union activities and recruiting new members, and putting an end to corrupt practices by construction companies; (ii) meet OSH guidelines and regulations, establish OSH committees, educate workers about OSH issues, and provide necessary safety equipment to workers; (iii) contribute to the national employment insurance programme and pension plan; (iv) provide sanitary and clean washing facilities, bathrooms and cafeterias. The collective agreement allowed the union to form OSH committees that monitored the abidance by OSH guidelines and regulations at each construction site, leading to a considerable decrease in the number of accidents in these construction sites and also allowed workers to directly approach the union to help them in receiving their back payments. In the first half of 2003, the total amount of back payments owed to construction site workers was more than US\$125 million. The local unions' contribution was critical in helping workers get their back payments. The local unions were also able to educate workers at the construction site about requirements and changes in employment insurance programmes, pension plans, and other national government social benefits applicable to construction site workers. In addition, as a result of the collective agreement, the Kyonggido Subu local union was successful in their "No Work on Sundays" campaign, in which the local union was able to stop work at 30 construction sites in Ohsan/Hwasung, Ahnyoung, Euiyang, and Kunpo areas on Sundays. This set a historical precedent and encouraged other local unions to try to incorporate this provision in their collective agreement negotiations. The major success in the signing of collective agreements was an increased union presence at the construction site and an increase in union membership by more than 5,000 members since 2000.
- 702.** The complainant explained that a collective agreement with the main construction company, rather than contractors and subcontractors, was necessary for the following reasons: (i) the main construction company was responsible for contributing to the national employment insurance programme and pension plan and ensuring the South Korean labour laws were followed at the workplace, including with regard to OSH; (ii) the main construction company might exert significant control and influence over the employment practices of the contractors and subcontractors, for example, by urging them to tell the workers to either not join or quit the union, or threatening to terminate the contract with the subcontractor if the latter failed to follow the main company's suggestions; (iii) local unions could only have access to the construction site with the permission of the main construction company.
- 703.** According to the complainant, the recent government crackdown was an attempt to stop construction site workers from organizing for their rights to living wages, good benefits, safe and decent working conditions and dignity in the workplace. The complainant attached a chronological table which indicated that police action and prosecution in the three local regions of the Republic of Korea (Daejeon, Chunahn, Kyonggido Subu) followed a pattern which amounted to a concerted attack on union officials and organizers. These actions involved charges based on criminal rather than labour law and included imprisonment of union organizers and union officials prior to trial. The simultaneous actions demonstrated, according to the complainant, that these were not independent cases but part of a deliberate and coordinated attack on members of the KFCITU. In total, 14 union officials and organizers had been arrested and jailed. Six union officials and



organizers in the Daejeon local union (Lee Sung Hwe, Kim Myung Hwan, Kim Wool Hyun, Cho Jung Hee, Noh Jae Dong, and Park Chung Man); Park Yong Jae and Noh Sun Kyun, President and Vice-President of the Chunahn local union; six union officials and organizers with the Kyonggido Subu local union (Kim Seung Hwan, Kim Kwang Won, Lee Myung Ha, Kim Ho Joong, Choi Jung Chul, and Lee Young Chul). In addition, five union organizers with the Kyonggido Subu local union (Yi Joo Mo, Ha Dong Yun, Ko Tae Hwan, Son Hyung Ho and Park Jung Soo), were on the “run” since they were wanted by the police for further questioning and had no confidence that they would be treated justly.

- 704.** The complainant added that the police and the prosecution’s investigations focused on the collective bargaining agreements signed between the local unions and the main construction companies. Police began their investigations with the Daejeon and Chunahn local unions and then expanded to the organizing activities of the Deagu local union, Kyonggido local union, Incheon local union and Kyonggido Subu local union. Using criminal law, the police and prosecution charged union officials and organizers with using force and coercing construction site managers who were hired by the main construction company to sign collective agreements. The police further alleged that the local unions threatened to report OSH violations if the main construction company did not sign these agreements. In addition, the police claimed that the local unions extorted payments as a result of these collective bargaining agreements. The complainant added that the police and the prosecution overstepped the limits of their power by investigating the organizing efforts of the local unions of the KFCITU and had intervened in the legitimate collective agreement negotiations between the local unions and the main construction company.
- 705.** The complainant further alleged that the investigations were initiated and carried out by the criminal division of the police and prosecution division, which have no familiarity with labour issues and trade union activities, despite the fact that there was a specific section that addressed union activities in both divisions. Although the police and the prosecution interviewed several construction site managers as part of their investigations, the reality was that the police and the prosecution had already determined the guilt of the union officials and organizers. Several construction site managers who were witnesses for the prosecution stated that their statements during the investigations were different from what was presented at the trial. The police’s line of questioning was focused on ways to provide evidence of the “guilt” of the local union officials and organizers. In addition, the police “grilled” construction site managers, in some cases for hours, to state that they were forced by the union to sign the collective agreements. Although several construction site managers denied being forced or coerced to sign collective bargaining agreements, the police had already come prepared with written statements stating otherwise and under pressure from the police, these construction site managers felt compelled to sign these statements. The police and the prosecution deliberately jailed and sought arrest warrants for local union officials and organizers on a mass scale.
- 706.** On 16 February 2004, the trial of the six Daejeon union officials and organizers came to an end. Finding the six guilty, the judge presiding the case ruled that they did indeed use “force” to coerce the main construction company to sign collective bargaining agreements and the six received payments as a result of these agreements. However, the judge stated that since the six were implementing the national organizing programme of the KFCITU and the payments received from the collective agreements were for organizational purposes and not personal use, they were not personally liable. Consequently, the judge gave each of the accused a “light” sentence. The judge further ruled that the collective agreements signed by the union and the main construction company were only applicable to employees of the main company. According to the judge, these collective agreements did not apply to workers hired by contractors, subcontractors, sub-subcontractors, sub-sub-sub-contractors and so on. The local union appealed the verdict and the appellate court was currently reviewing the case.

**707.** The judge presiding the case of Park Yong Jae, President of the Chunahn local union, found Park guilty and sentenced him to imprisonment for one year. In the case of Noh Sun Kyun, Vice-President of the Chunahn local union, there were serious errors in the gathering of “evidence”. Noh was elected Vice-President in September 2003 but the police accused him of signing collective agreements prior to September. After reviewing the documents, the prosecution recognized the police errors and that they did not have sufficient evidence against Noh to go to trial. Thus, they were forced to release him on 1 November 2003. Nevertheless, the prosecution proposed to fine him with 2 million Korean won. Even though the judge at the time apologized for the police error, he agreed with the prosecution’s recommendation when he announced his sentence on 27 August 2004. Thus, he was fined with 2 million Korean won.

**708.** The six Kyonggido Subu union officials and organizers were released on bail. Kim Ho Joong, Choi Jung Chul, and Lee Young Chul were currently facing trial which had begun on 3 September 2004. The complainant concluded by indicating its belief that the police investigations were part of a campaign to intimidate and persecute union members who were carrying out legitimate trade union activities to encourage effective collective bargaining and freedom of association.

### ***New allegations by the ICFTU***

**709.** In a communication dated 3 May 2005, the ICFTU submitted new allegations concerning the continued repression of the Korean Government Employees Union (KGEU), affiliated to the Korean Confederation of Trade Unions (KCTU) which is affiliated to the ICFTU. The ICFTU added that the KGEU had throughout 2005 protested against the proposed Bill on the Public Officials’ Trade Union Act owing to, inter alia, the fact that the bill did not recognize the right to strike. The bill was passed by Parliament on 31 December 2004 and was to enter into force in 2006. A positive feature of the bill was that it would allow public servants to form trade unions. However, ICFTU sources maintained that the bill was fast-tracked through official consultation procedures without regard for due process and contained unacceptable provisions that would restrict trade union rights. The complainant then presented a series of trade union rights violations which allegedly took place between April 2004 and the spring of 2005.

### ***April 2004 arrests***

**710.** The complainant alleged that on 2 April 2004, arrest warrants were issued against nine KGEU leaders; the Vice-President Kim Jung-Soo was arrested on 3 April 2004, and 18 KGEU members were arrested by the police the day after at a press conference that was set up to demand the immediate release of Kim Jung-Soo. Several regional branch leaders of the KGEU had had arrest warrants issued against them, or were summoned to appear before the police during the weeks that followed the arrest. On 21 April 2004, a further six KGEU trade union leaders were arrested. They included President Kim Young-Gil, Vice-Presidents Kim Sang-Girl, Kim Jung-Soo and Kim Il-Soo, and General Secretary Ahn Byeong-Soon. While many of the other arrested unionists were quickly released, the above five KGEU leaders were kept for at least five days. On 8 June 2004, President Kim Young-Gil received a four-month prison sentence suspended for two years for violation of the Public Officials Act and an eight-month prison sentence equally suspended for two years for violations of election laws. Vice-President Kim Jung Soo and General Secretary Ahn Byeong-Soon both received on the same day a four-month prison sentence suspended for two years for violation of election laws, and a six-month prison sentence equally suspended for two years for violation of the Public Officials Act.

## **October 2004 arrests**

**711.** The complainant further alleged that in a new wave of repression, riot police were reportedly placed in front of all major universities in order to prevent the KGEU from holding a rally in order to mobilize opposition to the proposed bill on 9 and 10 October 2004. At 9 p.m., when 1,500 KGEU members, who had gathered at the subway station near Kunkook University, attempted to enter the university, the police responded violently and ten union members were injured. Another 40 members were arbitrarily detained for 20 hours. On 31 October, the Public Sector Union Solidarity (KPSU) and the KGEU jointly held another rally in Seoul. Around 10,000 public sector workers including government employees participated in the rally, but more than 6,000 riot policemen were deployed to prevent strikers from reaching the rally venue. Forty-four strikers were arrested and released 27 hours later. A KPSU member who resisted illegal questioning was reportedly beaten up by the police.

## **Arrests at the beginning of November 2004**

**712.** The complainant also alleged that during the period 6-8 November 2004 arrests took place in Gokseong-gun county, Seoul, Gangwon-do, Ulsan, Gyeongnam-do, Jeonnam and many other locations totalling around 121 arrests. The arrests were part of a government attempt to prevent nationwide rallies organized by the KCTU and the KGEU in protest at the Bill on the Public Officials' Trade Union Act. The Government also attempted to prevent KGEU members from voting on a general strike on 15 November, and confiscated KGEU ballot boxes. Public security forces raided not only union offices but also private homes and cars of union officials and even private homes of their relatives. Union rallies were dispersed throughout the country, sometimes violently, leaving dozens of union members injured.

- (a) In Gokseong-gun county, four members of the Gokseong-gun county section of the KGEU Jeonnam regional branch were arrested at around 10 a.m. on 6 November 2004 for organizing a vote on industrial action. The arrested trade unionists were Mr. Joh Myeong-Ik, Section Director of Planning, Mr. Kim Hee-Cheon, Section's Assistant Director of Policy, Mr. Hwang Hee-Tae, Section's Director of Policy, and Ms. Park In-Jah, Section's Director of External Relations. The police also took the ballot box containing 40 members' voting papers. Around 11 a.m., Mr. Kim Jin-Seung, a member of the Seoguipo-si (city) section of the KGEU Jeju regional branch, was threatened with arrest if he did not help the detectives' investigation. He was released about four hours later. Two more members were arrested while trying to join the rally. They were released hours later.
- (b) In Seoul, the police openly threatened that all government employees who participated in the rally scheduled to take place at 3 p.m. would be arrested. Three members of the KGEU Seoul Metropolitan branch, Mr. Yoon Yong-Ho, Chairperson of the Gwanak-ku district section, Mr. Kim Joo-Hwan, Director-General of the section, and Mr. Jeh Chang-Rok, Chairperson of the Seongbuk-ku section were arrested. Before the rally, riot police blocked a district office in Incheon and investigated all government employees prone to join the rally. At or around 10 p.m., police stormed the office of the Gangseo-gu section of the KGEU's Seoul branch with seizure and search warrants. Union computers and all material they thought related to the vote, including ballot papers and poll boxes, were confiscated.
- (c) In Gyeonggi-do province, the detectives closely followed union leaders of the branch threatening them with arrest if they tried to join the rally. Furthermore, a KGEU Gyeonggi regional branch member, Mr. Yoo Je-Il was arrested close to the rally venue.

- (d) In Gangwon-do, riot police broke into a university, initially supposed to be the rally venue, blocked the building and started investigating government employees. The members of the KGEU Gangwon regional branch then had to change the rally venue, but riot police violently dispersed KGEU members and arrested some of them. Those arrested were Mr. Kim Cheol-Gi, and Mr. Park In-Cheol from Wonju-si section, Mr. Huh Pil-Yong from Chuncheon-si section, and Mr. Gahng Gi-Mahn from Samcheok-si section. Before the rally, police had forcefully stopped KGEU section buses from departing at a number of locations throughout Gangwon region.
- (e) In Daegu, the authorities announced that a search warrant against the regional branch office would be given to the police.
- (f) In Ulsan, riot police also blocked the rally venue and investigated government employees. Three members, Mr. Kim Sang-Hwan from the Waterworks Facilities' Section, Messrs. Lee Tae-Ha and Gwon Myeong-Ho from Nam-gu section, were arrested while trying to reach the rally venue. Riot police questioned all participants, though the rally was discontinued; they also tried to arrest some government employees. Mr. Lee Jae-Hak, Chairperson of Ulju-gun section and Mr. Lee Jun-Ho from Nam-gu section were arrested when leaving the rally.
- (g) In Geongnam-do, one hour before the rally, riot police entered the venue and seized all KGEU material including the union's flags and banners. KGEU sections buses that were departing for the rally all over the Gyeongnam region were stopped by the police. The police also detained government employees that might join the rally inside the city hall for hours. In the morning, Mr. Noh Gi-Hwan, Chairperson of Hamyang-gun section was arrested for encouraging collective activities and in Milyang-si, eight members were arrested on their way to the rally. They were released four hours later. Furthermore, four members of the KCTU were arrested and questioned while they were trying to join the rally. The KGEU Gyeongnam branch and the regional KCTU council nevertheless succeeded in starting the rally, but while the rally was in process, riot police went into action and dispersed the participants violently. Tens of KCTU members were arrested and injured.
- (h) In Jeonnam, 78 members of Haenam-gun section of the KGEU Jeonnam regional branch, being bussed to the venue, were forced to stop by the police and all of them were arrested.
- (i) In Jeonbuk, riot police blocked the rally causing KGEU members and KCTU members to hold separate rallies.

**713.** The complainant added that those arrested on 6 November were all released on 8 November. In addition to this, on 7 November at 8.30 a.m., the office of Seoguipo section of the KGEU Jeju branch was raided by the police with a seizure and search warrant. The police ordered ballot papers to be surrendered. When they could not find the papers, they searched the home and car of the chairperson of the section, as well as the home of his father. At 10.30 a.m. the same day, police detectives confiscated ballot papers in the Euiryeong section of the KGEU Gyeongnam branch. And at 5 p.m., the police broke into the office of the Pocheon section of KGEU's Gyeonggi branch. Ballot papers and computers were taken by the police. They searched the Vice-Chairperson's home and car, as well as those of the Director-General. On the same day at 9 p.m., the office of the Yeongdo section of KGEU's Busan branch was raided by riot police. They took union posters, meeting documents and even destroyed some union documents. The office of the Dong-gu section of the union's Busan branch was similarly raided.

**714.** According to the complainant, police raids continued on 8 November. On this day, the police raided the office of the Gokseong section of Jeonnam branch at 11.30 a.m. Ballot

papers and all material related to the vote, as well as computers were taken away. Equally at 11.30 a.m., detectives and district managers confiscated ballot papers and poll books in Guro section office of the KGEU's Seoul branch. Riot police units were deployed around the union's office and in other parts of the Guro-gu district. At 1.30 p.m., Sohn Dae-Hyeop, Director-General of Daiseong-gun section of Daegu/Gyeongbuk branch, was arrested when he tried to distribute ballot papers. He was allegedly treated as a criminal during his arrest; all the union's documents were reportedly confiscated. At 6 p.m., the police broke into the office of Yeongdong section of KGEU Chungbuk branch. The Director-General of the section, who opposed police violence, was detained for several hours.

- 715.** According to the complainant, the Ministry of Government Administration and Home Affairs (MOGAHA) announced on 9 November that it had searched a total of 47 branches of the KGEU's 207 branches and that it had pre-empted the vote of 37 branches and made 51 branches give up or voluntarily end the voting. On 9 November, the Government also confirmed that arrest warrants against KGEU President Kim Young-Gil and General Secretary Ahn Byeong-Soon were issued and several companies of riot police were deployed around the KGEU office. On 10 November, riot police were also deployed around KGEU section offices, threatening to sweep away any "illegal collective activities".
- 716.** The complainant further indicated that another 40 trade union leaders including KGEU First Vice-President Jeong Yong-Cheon and five other Vice-Presidents had arrest warrants issued against them in order to prevent the general strike planned for 15 November. A non-exhaustive list was attached to the complaint (see Annex I). In the run-up to the general strike, a "work-to-rule campaign" had been launched, which had been declared illegal and described as dereliction of duty by the authorities. Furthermore, the MOGAHA issued a directive on "disciplinary measures concerning KGEU's general strike" to government offices and local governments. According to the directive all means could be used to prevent the strike. This included making a blacklist of trade union activists and any employee expected to participate in collective activities, tracking mobile phones to determine the location of striking trade unionists, questioning colleagues and acquaintances, reporting about the existence of strike funds and forming special task force units to secure evidence, i.e. pictures and video of striking civil servants. In the directive, the MOGAHA also threatened to punish all who would collaborate, tolerate or be too lenient with the strikers.

### ***Arrests in mid-November***

- 717.** The complainant further alleged that riot police arrested around 191 unionists between 13-17 November, including several local union leaders after rallies and walkouts or in front of their trade union offices. A list of the arrests was attached to the complaint (see Annex II). Some of those arrested were questioned by the police.
- 718.** According to the complainant, before the general strike, the Government had intimidated unionists by threatening to dismiss them if they participated in the strike, which led many unionists to refrain from exercising their legitimate right to strike. Furthermore, local governments had mobilized substitute staff during the strike. A total of about 3,200 unionists were facing dismissal after the walkouts and the rallies. The MOGAHA even threatened legal action against local governments that did not dismiss all striking workers. The prosecutor promised strict punishment for all strikers and stated that no compromises or deals would be made with strikers.

### ***Intimidation, harassment and interference by the Government***

719. The complainant added that it had received reports according to which the Minister of Government Administration and Home Affairs, Huh Sung Kwan, has repeatedly announced repressive government measures, and used intimidating language towards the KGEU. It has been informed that the Minister conducted a press conference with the Chief of the National Police Agency, Ki Moon Choi, on 8 September 2004, when it was announced that all rallies and demonstrations would be banned and organizers and participants charged with criminal offences. The Minister also announced that he might withhold subsidies from local government authorities negotiating with the KGEU with a view to drawing up collective agreements, thus attempting to jeopardize collective bargaining. The Minister was also reported to have said that the Ministry would prevent KGEU from creating a struggle fund, and prosecute organizers thereof. He further issued directives on 9 and 13 September 2004 prohibiting government departments from permitting the collection of union solidarity funds and the collection of union fees for the KGEU on the grounds that it was an illegal organization. Ahead of the general strike on 15 November, the Government also intimidated unionists by threatening to dismiss them if they participated in the strike and the MOGAHA issued a directive on “disciplinary measures concerning KGEU’s general strike” as described in detail above. After the strike, the Minister Huh Sung-kwan threatened to revise the laws imposing stricter penalties on strikers; the current penalties already being one year of imprisonment or up to a 3 million Korean won (US\$2,700) fine. Furthermore, the complainant had been informed that the MOGAHA had started a “New Wind Campaign” at the end of 2004 targeting the KGEU and promoting a (*sic*) “reformation of organizational culture, focusing on rearing workplace councils and healthy employee groups”. The complainant was very concerned at the abovementioned attempts of intimidation and interference by the MOGAHA, which could only be described as anti-union behaviour.

### ***Arrests and sentences in spring 2005***

720. The complainant had also been informed that since arrest warrants were issued against Kim Young-Gil and Ahn Byeong-Soon on 9 November 2004, the police had been looking for the two men. Riot police had surrounded and monitored the KGEU office building since November and prevented almost every event of the union. The police finally arrested KGEU President, Kim Young-Gil at 2 a.m. in the morning of 8 April 2005. His union feared that he would be detained and imprisoned for several months. On 28 April, Kim Young-Gil was prosecuted under charges of violation of the Public Officials Act. A few weeks earlier, on 15 March, the General Secretary Ahn Byeong-Soon was also arrested. On 17 March, the courts allowed for his continued detention in Seoul prison, however, Ahn was released on 28 April after 44 days in prison. He was sentenced to an eight-month imprisonment with two years’ suspension of sentence.

## **C. The Government’s reply**

### ***New allegations by the IFBWW***

721. In its communication dated 28 February 2005 the Government indicated with regard to the new allegations made by the IFBWW that the legitimacy of the collective agreements signed by the KFCITU should be reviewed from the point of view of: (i) the parties to collective bargaining; (ii) the methods and procedures for collective bargaining; (iii) the recognition of full-time unionists and employers’ payments to them; and (iv) the conclusion of collective agreements and the methods of collecting payments to full-time unionists. With regard to (i) the Government indicated that according to the Supreme Court

ruling of May 1993, an “employer” was a person who had an “employment relationship” with the workers – who had made an employment contract with workers for the purpose of receiving labour from the workers and paying wages to them in return, while directing and supervising them. With regard to construction work carried out by a subcontractor, in principle, it was the subcontractor who was the employer of the workers even if the work took place at the construction site of the original contractor. However, with exceptions, in the event that the original contractor contributed to the purchase of Industrial Accident Compensation Insurance for the daily workers hired by subcontractors, directly paid them wages daily, provided them with equipment and facilities required for the construction and supervised their work, the daily workers should be considered to have made an employment contract with the original contractor and the original contractor could be considered the “employer” of these workers (in August 1986, the Supreme Court issued a ruling to this effect). With regard to the complaint in question, the Government indicated that since subcontractors were the ones who directly hired and paid daily wages to the workers, the employer’s party to collective bargaining or agreement with the KFCITU was not the original contractors but the subcontractors.

- 722.** With regard to (ii), the Government indicated that collective bargaining should be carried out freely between a trade union and an employer. In principle, a trade union should demand collective bargaining from the representative of the workplace where the union members worked. If the workers were members of the KFCITU, the employer had a duty to bargain with the trade union. But if an original contractor hired workers who had not joined the KFCITU, it could not be easily argued that the original contractor had a duty to take part in bargaining with the KFCITU. Thus, it was not justifiable for the KFCITU to coerce an original contractor into concluding a collective agreement when there were no KFCITU members working for the original contractor or when the original contractor did not know whether the workers were members of the KFCITU (the construction site manager was not allowed to check the list of KFCITU members on the site).
- 723.** With regard to (iii), the Government indicated that the Trade Union and Labour Relations Act stipulated that a full-time unionist was one who was employed by a firm and was engaged only in trade union activities without doing work stated in an employment contract. Thus, if an executive of a trade union was not employed by a firm in charge of the construction site, he/she could not request the firm to recognize him/her as a full-time unionist. With regard to the case in the complaint, the KFCITU received money from the original contractors in the name of “activity payment” to full-time unionists. In fact, the KFCITU called upon the third party employer to give money to the trade union in the name of “activity payment” to executives of the trade union.
- 724.** With regard to (iv) the Government indicated that even if a full-time unionist was recognized and payment to him/her was to be provided as a result of collective agreements or approval from the employer, the payment should be made in a way that was universally accepted. Although a person had a right to do something, if the means and manner of exercising the right were not what was universally accepted, they could not be justified and committed an abuse of right. If a full-time unionist received money and other valuables using illegal means such as blackmail or threats, this constituted the crime of blackmail under section 350 of the Criminal Law. With regard to the specific case, union executives (who were at the time detained or wanted by the police) had visited the construction site managers of the original contractors who did not have the obligation to conclude collective agreements and coerced them to sign the agreements. When the managers refused, the union executives threatened that they would accuse the original contractors of insufficient safety measures at the construction sites (some actually did accuse and the accused original contractors immediately concluded collective agreements with the KFCITU for fear of disadvantages to come). As a result, the union executives received 60 million to 180 million Korean won from the original contractors under the pretext of “activity

payment” to full-time unionists according to the collective agreements. The crime of blackmail applied in this case, since union executives threatened and received money from a person who had no duty to sign a collective agreement. The threat committed by conspiracy of two or more people constituted a violation of the Act on the Punishment of Violence.

- 725.** The Government concluded by stating that the defendants and suspects who were executives of the KFCITU were the ones who coerced people with no obligation to do so into signing collective agreements and who received money and other valuables under the pretext of “activity payments” to full-time unionists. Thus, the collective agreements concluded could not be considered legitimate. Since such acts constituted the crime of blackmail, detaining and searching for the KFCITU unionists could hardly be regarded as infringing on legitimate trade union activities or collective bargaining.

### ***New allegations by the ICFTU***

- 726.** In a communication dated 16 January 2006, the Government provided its comments to the allegations submitted by the ICFTU. With regard to the allegation concerning the fast-tracking of the Public Officials’ Trade Union Act, the Government indicated that after one year of discussions at the Tripartite Commission since July 2001, the Government drafted and proposed a legislative bill in 2002, which was opposed by organized public officials. So the Government accepted considerable part of their demands and redrafted a new legislative bill. In this process, the Government gathered opinions from various circles by conducting interviews and working-level consultations with organized public officials, holding an open forum (5 June 2003), and making a preliminary announcement of the legislative bill (23 June-12 July 2003). Therefore, the ICFTU’s argument that the bill was fast-tracked through official consultation procedures without regard to due process was groundless.
- 727.** The Government emphasized that the KGEU was an organization established by public officials who were not allowed to organize a trade union under the then applicable State Public Officials Act or Local Public Officials Act. Accordingly it was not a trade union protected by the Trade Union and Labour Relations Adjustment Act. In the Republic of Korea, if public officials established a trade union in an illegal manner, voted on industrial action, or refused to perform their official duties by collectively refusing to attend work, they were considered to have committed an illegal act in violation of national laws.
- 728.** The Government added that in the past, public officials in the Republic of Korea, excluding those engaging in de facto “simple labour”, were not given the right to organize in accordance with the State Public Officials Act. However, as the Public Officials’ Trade Union Act was enacted on 31 December 2004 and was due to become effective from 28 January 2006, their freedom of association was expected to be guaranteed to a considerable extent. However, under the new Act, the right to collective action is restricted to ensure that minimum services are maintained.
- 729.** With regard to the April 2004 arrests, the Government indicated that the following six KGEU leaders were arrested on charges of supporting a particular political party in relation to the 17th general election due to be held on 15 April 2004: (i) KGEU Vice-President Kim Jung-Soo was arrested on 6 April 2004 and released on 8 June 2004 after receiving a ten-month prison sentence suspended for two years; (ii) KGEU Vice-Presidents Kim Il-Soo and Ban Myung-Ja were arrested on 9 April 2004; Kim Il-Soo was released on 29 April 2004 following the decision on the arrest cancellation; Ban Myung-Ja was released on 22 April 2004 after the legality of the arrest was examined; (iii) KGEU President Kim Young-Gil, General Secretary Ahn Byeong-Soon and Vice-President Kim Sang-Girl were arrested on 23 April 2004; Kim Young-Gil was released on 8 June 2004



after receiving a one-year prison sentence suspended for two years; Ahn Byeong-Soon was released on 8 June 2004 after receiving a ten-month prison sentence suspended for two years; Kim Sang-Girl was released on 28 April 2004 after the legality of the arrest was investigated.

- 730.** According to the Government, the arrested KGEU leaders held a national convention of KGEU delegates on 23 March 2004 before the general election of 15 April 2004, decided at the convention to support the Democratic Labour Party (DLP) in the 17th general election and posted the decision on the union's web site. On 30 March 2004, they held a press conference at which they demanded that public officials be allowed to engage in political activities and announced their decision to support the DLP. They sent KGEU members a letter in the name of the KGEU President to encourage them to vote for the DLP and declared that they would stage struggles to implement their decision by providing support and conducting a campaign to collect political funds for DLP candidates likely to be elected.
- 731.** Their acts constituted "public officials' political movements" prohibited under section 65 of the State Public Officials Act and section 57 of the Local Public Officials Acts (punishable by imprisonment of up to one year or a fine not exceeding 3 million Korean won according to section 84 of the State Public Officials Act and section 82 of the Local Public Officials Act); and "collective acts for work other than public services" prohibited under section 66 of the State Public Officials Act and section 58 of the Local Public Officials Act (punishable by imprisonment of up to one year or a fine not exceeding 3 million Korean won according to section 84 of the State Public Officials Act and section 82 of the Local Public Officials Act). They were also considered illegal acts falling under "election campaigns by organizations prohibited from engaging in election campaigns" pursuant to section 87(1)8 of the Act on the Election of Public Officials and the Prevention of Election Malpractices (punishable by imprisonment of up to three years or a fine not exceeding 6 million Korean won according to section 255(1)11 of the same Act); "election campaigns by public officials" prohibited pursuant to section 60(1)4 of the same Act (punishable by imprisonment of up to three years or a fine not exceeding 6 million Korean won according to section 255(1)1 of the same Act); and "unlawful distribution of documents" prohibited pursuant to section 93(1) of the same Act (punishable by imprisonment of up to two years or a fine not exceeding 4 million Korean won according to section 255(2)5 of the same Act). The KGEU leaders were arrested because they were involved in organizing and leading these illegal acts. The arrest had nothing to do with establishing a trade union or engaging in union activities.

### **October 2004 arrests**

- 732.** With regard to the October 2004 arrests, the Government indicated that the KGEU held a nationwide rally from 9 to 10 October 2004 and a joint rally with the Korean Federation of Transportation, Public and Social Services Workers Unions (KPSU) on 31 October 2004, both of which were illegal, demanding that public officials' right to collective action (right to strike) be guaranteed in the bill on public officials' trade unions, which granted public officials the right to organize, the right to collective bargaining and the right to conclude collective agreements. Though it was true that the police kept public officials from reaching the rally venues, all the public officials arrested in the process were immediately released after investigation, leaving no one detained. The ICFTU's allegation that 44 strikers had been arrested was not factual. Their acts were considered illegal under the current Public Officials Acts prohibiting public officials from engaging in labour movements and collective acts other than public services (section 66 of the State Public Officials Act, section 58 of the Local Public Officials Act). That was why the police prevented their acts. Collective action by public officials was an illegal act not allowed

even by the Public Officials' Trade Union Act soon to be implemented after passage through the National Assembly.

### ***Arrests at the beginning of November 2004***

**733.** With regard to further arrests at the beginning of November 2004, the Government indicated that the KGEU planned to go on a general strike starting from 15 November 2004 and attempted to vote on the strike in its 231 branch offices across the nation from 9 to 10 November 2004, demanding that the right to collective action (right to strike) be guaranteed in the bill on public officials' trade unions. However, the allegation by the KGEU and ICFTU that during the period of 6-8 November 2004, arrests took place in Gokseong-gun of Jeonnam, Seoul, Gangwon-do, Ulsan, Gyeongnam, Jeonnam and many other locations totalling around 121 arrests was not true. In fact, no one had been arrested during the said period. Just one person, called Lee Chang-Hwa, Chairperson of the Goryeong-gun section of Daegu/Gyeongbuk branch, was arrested on 12 November 2004 in relation with the strike vote.

**734.** The KGEU's attempt to "vote on industrial action" had been blocked because it was considered an illegal act falling under "labour movements and collective acts other than public services" prohibited under the current Public Officials Acts (section 66 of the State Public Officials Act, section 58 of the Local Public Officials Act). However, Lee Chang-Hwa continued to push for a strike vote despite the interruption by the police, and took collective action, repeatedly demanding that union members be allowed to participate in the personnel committee. In addition, he, along with about ten other union members, occupied the office of the governor of Goryeong-gun. He was arrested on these charges.

### ***Arrests in mid-November 2004 to spring 2005***

**735.** With regard to further arrests from mid-November 2004 to the spring of 2005, the Government indicated that the KGEU had staged a general strike in which its members collectively did not attend work and refused to perform their official duties starting from 15 November 2004, demanding that the right to collective action (right to strike) be guaranteed in the bill on public officials' trade unions. The allegation by the KGEU and ICFTU that around 191 unionists were arrested was not true. The arrests in the spring of 2005 of President Kim Young-Gil and General Secretary Ahn Byeong-Soon who led the KGEU's general strike were made because they had refused to appear for investigation and ran away until they were caught. KGEU General Secretary Ahn Byeong-Soon was arrested on 17 March 2005 and released after the court handed down an eight-month prison sentence suspended for two years on 28 April 2005. KGEU President Kim Young-Gil was arrested on 9 April 2005 and released after the court handed down a one-year prison sentence suspended for two years on 24 June 2005. At present, there was no union official in detention.

**736.** The Government added that the KGEU's general strike was considered not only an illegal act falling into the category of "labour movements and collective acts other than public services" prohibited under the abovementioned Public Officials Act but is also prohibited by the recently adopted Public Officials' Trade Union Act. All of those arrested were union officers of the KGEU and were arrested for planning, organizing and leading these illegal acts.

**737.** More generally, the Government considered that the Public Officials' Trade Union Act which did not recognize the right to collective action (right to strike) for public officials, was in conformity with international standards, such as the International Covenants on Human Rights and ILO Convention No. 151 and Recommendation No. 159, which did not

contain any provision clearly prescribing public officials' right to strike. Thus, KGEU leaders and members were not arrested arbitrarily and their human rights and basic freedoms were respected in accordance with the Declaration of Human Rights and Human Rights Conventions ratified by the Republic of Korea.

- 738.** Even though it was believed by some in the international community that unionists were arbitrarily arrested even for justifiable industrial action in the Republic of Korea, this was not the case. In the Republic of Korea too, justifiable industrial action was protected by laws without being subject to criminal or civil liability (section 33 of the Constitution, sections 3 and 4 of the Trade Union and Labour Relations Adjustment Act). The KGEU union officers had been arrested because they had taken collective action not permitted by law. And other arrested union members had not engaged themselves in justifiable union activities but committed illegal acts beyond the boundary of the three labour rights protected by the Constitution. They were mostly arrested for the use of violence.
- 739.** Article 8(1) of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), stipulated that "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 laws and regulations of the land." The ILO's Committee on Freedom of Association had also stated that "freedom of association principles do not protect abuse of the right to strike which consists of criminal activities in exercising the right to strike". Therefore, given the ILO Conventions and Recommendations mentioned above, punishing the abuse of the right to strike according to national laws was not considered to be counter to the principle of freedom of association as long as the punishment was not excessive or contrary to the principle of imposing a punishment commensurate with the nature of the violation.

### **Legislative issues**

- 740.** In its communications dated 28 February and 7 September 2005, the Government presented its observations with regard to the public officials' basic labour rights. The Government recalled that the Tripartite Commission reached an agreement on 6 February 1998 to first allow the establishment of workplace associations and then trade unions as a second step. The Government had prepared a new bill which gave public employees greater rights to organize. After gathering opinions from various bodies and institutions, including public officials' organizations, and holding consultations with related ministries on the bill's content, in 2004, the Government finalized its bill which was passed by the National Assembly on 31 December 2004 and was promulgated on 27 January 2005. The Act on the Establishment and Operation of Public Officials' Trade Unions was scheduled to take effect on 28 January 2006.
- 741.** As to the main substance of the Act on the Establishment and Operation of Public Officials' Trade Unions, the Government indicated that: (1) the right to organize a trade union and the right to collective bargaining (including the right to conclude collective agreements) were guaranteed. But the right to collective action (right to strike) was not recognized. (2) The scope of public officials eligible to join a trade union included general public officials with Grade 6 or lower, and those with an equivalent grade in specific government services, contracted work, technical services and temporary services. Public officials of Grade 5 or higher, those who directed and supervised other public officials and were responsible for generally managing affairs for other public officials, military personnel, policemen, firefighters etc., were restricted from joining a trade union due to the nature of their jobs. The specific scope would be prescribed by Presidential Decree. (3) The minimum organizing units for the establishment of a trade union were the National Assembly, the courts, the Constitutional Court, the National Election Commission, the administration, the local governments and local education offices of special metropolitan

cities, metropolitan cities and provinces. (4) Matters subject to negotiation included trade unions or union members' pay, welfare and other working conditions. However, matters concerning policy decisions made under the authority of the State or local governments, and matters concerning management and operation, such as the exercise of the right to appointment, not directly related to working conditions, were excluded from negotiation. (5) The bargaining representatives of the Government included the administrative head of each constitutional organization, the Secretary General of the National Assembly, the Administrator of each Court, the Secretary General of the Constitutional Court, the Secretary General of the National Election Commission, the Minister of Government Administration and Home Affairs, the head of each local government and the head of each local education office. (6) From the point of view of bargaining procedure, a public officials' trade union should organize a negotiating group composed of its representatives or members. If there were two or more trade unions demanding to negotiate with the Government's representatives, they should be united into a single bargaining channel. (7) With regard to the effect of collective agreements, given that unlike in the private sector, working conditions for public officials were determined and affected by laws and budgets, the effect of agreements made through collective bargaining could hardly be seen as having precedence over laws and budgets. Therefore, if some matters contained in collective agreements were stipulated in laws, regulations and budgets, they were considered to have no effect. However, government representatives would establish a practice of guaranteeing the implementation of collective agreements in good faith. (8) Public officials' trade unions and their members were prohibited from conducting any activities, such as strikes, slowdowns, etc., that might undermine normal operations, as, given the nature of their job as servants of the nation as a whole, industrial actions by public officials could interrupt administrative services, paralyse national functions and inflict damage on people. (9) In an effort to mediate and arbitrate public officials' industrial relations in a fair manner, the "Public Officials' Labour Relations Mediation Committee" was set up under the National Labour Relations Commission and its members were appointed. (10) A trade union member could work as a full-time union official with the consent of a person who had the authority to appoint him/her. The period during which he/she would work as a full-time union official was regarded as unpaid leave and he/she should not be given any unfavourable treatment on the grounds of his/her status as a full-time union official. (11) In order to enhance the effectiveness of guaranteeing public officials' basic labour rights, any unfavourable treatment given on the grounds of justifiable union activities was banned according to the provisions on unfair labour practices in the Trade Union Act. Public officials or their trade unions were allowed to file a charge with a labour relations commission to remedy unfair labour practices.

**742.** As regards trade union pluralism at the enterprise level, the Government reiterated in its communication dated 7 September 2005, the previously provided information on this point. It added that discussions at the Tripartite Commission over the recommendations of the Research Committee on Industrial Relations System Development were being stalled due to the non-participation by some labour organizations. Based on the outcomes of the discussions (to be concluded by September 2005), the Government planned to submit the bill to the National Assembly within 2005.

**743.** As regards the payment of wages to full-time union officials, the notification requirement and the trade union membership of the dismissed and unemployed workers, the Government reiterated the previously provided information in its communication dated 7 September 2005, and noted that it would promote legislation on these issues based on the relevant discussions at the Tripartite Commission.

**744.** On the issue of essential public services, the Government reiterated in its communication dated 7 September 2005, the previously provided information on this point. It added that it tried to be cautious in enforcing compulsory arbitration to clear the concerns that

compulsory arbitration might excessively restrict unions' right to industrial action. As a result, the number of disputes referred to compulsory arbitration was on the decrease, with only one such case in 2003 and five in 2004 from 17 and 16 cases in 2000 and 2001 respectively. The Government further indicated that pursuant to the recommendations of the Research Committee on this matter, it would cautiously operate the current system, and at the same time, prepare measures with a view towards harmonizing the guarantee of the right to industrial action for trade unions and the protection of public interests, based on discussions at the Tripartite Commission.

745. On the issue of obstruction of business, the Government reiterated in its communication dated 7 September 2005, the previously provided information on this point. It added that it had made and would continue to make every effort to minimize the criminal punishment of workers and refrain from arresting workers even in the event of an illegal industrial action if it was violence-free. The Government attached to its communication a table with information on the offences and trial results of 28 workers detained on charges of obstruction of business.

### ***Factual issues***

746. In respect of Mr. Kwon Young-kil, former president of the Korean Confederation of Trade Unions (KCTU), who was sentenced to ten months' imprisonment with a two-year grace period at the first trial on 31 January 2001, the Government indicated in its communication dated 7 September 2005, that the decision of the appeals court was scheduled to be pronounced at the end of April 2004. However, the court ordered the reopening of the pleadings and the proceedings had therefore reconvened. At the conclusion for the hearing on 14 January 2005, the court designated 16 February 2005 as the date of pronouncement, but the proceedings reconvened on that date as the prosecutor requested the reopening of the pleadings to submit an opinion on the consultations on "third party intervention" to the court. The pleadings were scheduled to continue on 18 March 2005 but the date of pleadings was postponed as Kwon Young-kil, an incumbent lawmaker, submitted a "request for postponement of the trial date", due to his schedule at the National Assembly. The proceedings were scheduled to take place in August 2005. Due to the abovementioned reasons, the Government could not provide the court judgement on the appeal, as it had not yet been pronounced. The judgement on the first trial was attached (in Korean).
747. In respect of the dismissed 12 public servants, the Government indicated in its communication dated 7 September 2005 that nine people were reinstated following requests for examination in 2003 and 2004: Oh Myeong-nam (February 2003), Kim Jong-yun (April 2003), Ha Jae-ho (June 2003), Ahn Hyun-ho (June 2003), Hwang Gi-joo (June 2003), Min Jum-ki (September 2003), Kim Young-kil (February 2004), Kang Soo-dong (February 2004), and Kang Dong-jin (February 2004). The three others were not reinstated (Kim Sang-kul, Koh Kwang-sik, and Han Seok-woo) since their cases had been dismissed by the court. An administrative litigation for nullification of the dismissal of the last two workers was currently pending in the court. With regard to Kim Sang-kul, the sentence was confirmed via the administrative litigation on 30 July 2004. The Government attached the court judgement (in Korean). The Government added that three of the reinstated workers were dismissed again for carrying out illegal activities and their cases were currently pending examination (Kim Young-kil (November 2004), Kang Dong-jin (January 2005) and Kim Jong-yun (January 2005)). Two persons received a final sentence finding them guilty and they were sentenced to ipso facto retirement by the court (Oh Myeong-nam – sentenced to one year's imprisonment and two years' probation in April 2005; Min Jum-ki – sentenced to ten months' imprisonment and two years' probation in April 2005). Oh Myeong-nam had received a sentence of dismissal on 8 February 2003 but the court decision had been nullified following a request for examination. He therefore received a mitigated punishment of two months' suspension from office. He did not file

any administrative litigation after the appeals process. However, he received his final sentence of one year's imprisonment and two years' probation by the Supreme Court on 11 December 2003, for a relevant criminal case. He therefore became subject to ipso facto retirement under section 61 of the Local Public Officials Act and was dismissed. According to section 61 of the Local Public Officials Act, "if a public official falls under any of the subparagraphs of section 31, he shall be subject to an ipso facto retirement". According to section 31(3) and (4) "a person who was sentenced to a punishment heavier than imprisonment without prison labour and for whom five years have not passed since the completion of service of such sentence or since the final decision of exemption from the service of such sentence" and "a person who was sentenced to a punishment heavier than imprisonment without prison labour, but for whom two years have not passed since the expiry of the probation period" would be subject to ipso facto retirement. The judgements of the first, second and final trials of Oh Myeong-nam were attached (in Korean).

#### D. The Committee's conclusions

**748.** *The Committee recalls that it has been examining this case which concerns both legislative and factual issues since 1996. The Committee observes that new allegations submitted by the International Confederation of Free Trade Unions (ICFTU) concern the Establishment and Operation of Public Officials' Trade Unions Act which was fast-tracked through official consultation procedures without regard to due process while severe measures of repression were taken against the leaders of the Korean Government Employees Union (KGEU) who opposed the adoption of the Act and pressed for recognition of the right to strike. Moreover, new allegations submitted by the International Federation of Building and Wood Workers (IFBWW) concern the unjust prosecution and imprisonment of trade union organizers and officials from the Korean Federation of Construction Industry Trade Union (KFCITU) so as to prevent the effective organization of construction workers.*

#### Legislative issues

**749.** *The Committee recalls that the outstanding legislative issues concern the need to: ensure the right to organize for public servants; legalize trade union pluralism at the enterprise level; resolve the issue of payment of wages to full-time union officers in a manner consistent with freedom of association principles; amend section 71 of the Trade Union and Labour Relations Amendment Act (TULRAA) so that the right to strike may be prohibited only in essential services in the strict sense of the term; repeal the notification requirement in section 40 of the TULRAA and the penalties provided for in section 89(1) concerning the prohibition on persons not notified to the Ministry of Labour from intervening in collective bargaining or industrial disputes; amend the prohibition on dismissed and unemployed workers from remaining union members or holding trade union office (sections 2(4)(d) and 23(1) of the TULRAA); and amend section 314 of the Criminal Code concerning the obstruction of business to bring it into line with freedom of association principles. During its last examination of this case in November 2004, the Committee had noted that a Research Committee on Industrial Relations System Development had been established to review the issues raised in its pending recommendations and had issued a final report entitled "Reform Measures for Advanced Industrial Relations Laws and Systems" on 3 December 2003.*

**750.** *As regards the **right of public servants to establish and join trade union organizations of their own choosing**, the Committee notes with interest from the Government's reply that the Act on the Establishment and Operation of Public Officials' Trade Unions was passed by the National Assembly on 31 December 2004, was promulgated on 27 January 2005, and entered into force on 28 January 2006. This Act guarantees the right to form and join*

*a trade union of their own choosing and the right to collective bargaining to public servants. It also prohibits any unfavourable treatment for justifiable union activities as an unfair labour practice. The Committee wishes to make a certain number of comments on the Act as adopted.*

- 751.** *The Committee recalls from its previous comments on this case that: (i) the total exclusion from the legislation of public servants at Grade 5 or higher is a violation of their fundamental right to organize; (ii) the right of firefighters to form and join organizations of their own choosing should also be guaranteed (although the right to collective action may be subject to restrictions or a prohibition); (iii) 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 [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 526]; (iv) it may be more appropriate to leave the issue of whether all trade union activity by full-time union officials will be treated as unpaid leave to consultations between the parties concerned.*
- 752.** *The Committee therefore requests the Government to give consideration to further measures aimed at ensuring that the rights of public employees are fully guaranteed by: (i) ensuring that public servants at Grade 5 or higher obtain the right to form their own associations to defend their interests and that this category of staff is not defined so broadly as to weaken the organizations of other public employees; (ii) guaranteeing the right of firefighters to establish and join organizations of their own choosing; (iii) limiting any restrictions of the right to strike to public servants exercising authority in the name of the State and essential services in the strict sense of the term; (iv) allowing the negotiating parties to determine on their own the issue of whether trade union activity by full-time union officials should be treated as unpaid leave. The Committee requests to be kept informed of any measures taken or contemplated in this respect.*
- 753.** *The Committee will examine the allegations concerning the context in which the Act on the Establishment and Operation of Public Officials' Trade Unions was adopted, and in particular, the alleged absence of full consultations and severe measures of repression against trade unionists who opposed the adoption of the Act and pressed for a greater recognition of their rights, notably the right to strike, in the section concerning factual issues.*
- 754.** *With regard to the other pending legislative issues, the Committee notes with regret that the Government largely reiterates previously provided information, which was analysed and discussed in detail in the Committee's previous examinations of this case. The Committee once again expresses its conviction that the quicker a solution can be found to the serious pending matters which is acceptable to the parties concerned and in conformity with internationally accepted freedom of association principles, the better it will be for the overall industrial relations climate in the country. The Committee therefore urges the Government to take all possible steps to accelerate this process, while ensuring full consultation with all the social partners concerned, including those not presently represented on the Tripartite Commission. In particular, the Committee urges the Government: (i) to take rapid steps for the legalization of **trade union pluralism at the enterprise level**, in full consultation with all social partners concerned, so as to guarantee at all levels the right of workers to establish and join the organization of their own choosing; (ii) to enable workers and employers to conduct free and voluntary negotiations in respect of the question of **payment of wages by employers to full-time union officials**; (iii) to amend the list of **essential public services** in section 71(2) of the Trade Union and Labour Relations Amendment Act (TULRAA) so that the right to strike may be restricted only in essential services in the strict sense of the term; (iv) to repeal the **notification***

*requirement* (section 40) and the penalties for violation of the prohibition on persons not notified to the Ministry of Labour from intervening in collective bargaining or industrial disputes (section 89(1) of the TULRAA); (v) to repeal the provisions prohibiting **dismissed and unemployed workers** from keeping their union membership and making non-union members ineligible to stand for trade union office (sections 2(4)(d) and 23(1) of the TULRAA); (vi) to bring section 314 of the Penal Code (**obstruction of business**) in line with freedom of association principles. The Committee requests to be kept informed of the progress made in respect of all of the abovementioned matters.

## **Factual issues**

- 755.** *The Committee recalls that the pending factual issues in this case concern the arrest and detention of Mr. Kwon Young-kil, former president of the KCTU, and the dismissal of leaders and members of the Korean Association of Government Employees' Works Councils (KAGEWC). The Committee further notes the new allegations submitted by the IFBWW and the ICFTU as well as the information provided by the Government concerning the application of the provisions concerning obstruction of business.*
- 756.** *The Committee notes that according to the information provided by the Government in respect of the appeal process of **Kwon Young-kil**, former president of the KCTU, after successive postponements the decision of the appeals court was scheduled to be made in August 2005. The Committee recalls with grave concern that the issue of Mr. Kwon Young-kil has been pending ever since the first examination of this case in 1996 and that he has been convicted in the first instance for violating the prohibition of third party intervention in industrial disputes to ten months' imprisonment with a two-year stay of execution. Recalling that the prohibition of third party intervention in industrial disputes is incompatible with freedom of association principles and that justice delayed is justice denied [see **Digest**, op. cit., para. 105], the Committee trusts that the appeals court will render its decision on Mr. Kwon Young-kil without further delay, taking into account the relevant freedom of association principles. The Committee requests the Government to provide information in this respect as well as a copy of the court judgement.*
- 757.** *As regards the dismissals of 12 people connected to the KAGEWC for having committed illegal activities (attempt to establish a trade union, holding of illegal outdoor assemblies, break-in at the offices of the Minister of Government and Home Affairs (MOGAHA) and consequent damage, illegal decision to go on a general strike and taking of annual leave and absences, without permission, so as to wage that strike), the Committee notes that according to the Government, four of them have been reinstated. Three workers were not reinstated: Kim Sang-kul, Koh Kwang-sik and Han Seok-woo. The dismissal of Kim Sang-kul is now final while the other two cases are currently pending administrative litigation. Furthermore, Oh Myeong-nam and Min Jum-ki received final sentences finding them guilty and their dismissals are now final. In addition to this, the cases of three other workers who were initially reinstated but then dismissed once again are pending examination: Kim Young-kil, Kang Dong-jin and Kim Jong-yun.*
- 758.** *The Committee expresses its deep regret at the difficulties faced by these public servants which appear to have been due to the absence of legislation ensuring their basic rights of freedom of association, in particular the right to form and join organizations of one's own choosing, respect for which is now largely guaranteed by the entry into force of the Act on the Establishment and Operation of Public Officials' Trade Unions. The Committee requests the Government to reconsider the dismissals of Kim Sang-kul, Oh Myeong-nam and Min Jum-ki in the light of the adoption of the new Act and to keep it informed in this respect. It also requests the Government to provide information on the outcome of the pending administrative litigation and requests for examination concerning the dismissals of Koh Kwang-sik, Han Seok-woo, Kim Young-kil, Kang Dong-jin and Kim Jong-yun and*



expresses the hope that the new legislation will be taken into consideration in rendering the relevant decisions. The Committee finally requests the Government to provide copies of the relevant decisions.

- 759.** *The Committee notes moreover that the Government provides a table with information on the offences and trial results concerning 28 workers detained on charges of **obstruction of business** under section 314 of the Criminal Code. The Committee notes from this table that two trade union officials were convicted without having committed any violent act. In particular, Oh Young Hwan, President of Busan Urban Transit Authority Workers' Union, has not been accused of any other act than the fact that he went on strike, along with about 200 other union members, "in the pursuit of illegal purposes, such as demanding the company to increase its workforce, cancel the entrustment of ticket sales to a private company, withdraw from its outsourcing contracts, reinstate dismissed workers, etc. By doing so, [he] obstructed passenger transportation services". He was sentenced to a fine of 10 million Korean won. Similarly, Yoon Tae Soo, first Executive Director of Policy of the Korea Financial Industry Union, has not been accused of any violent act but of having gone, along with approximately 5,000 other workers, "on a strike in the pursuit of illegal purposes, such as opposing the sale of the Government's stakes in Chohung Bank pursued as a government policy, without undergoing mediation process, and [causing] 270 workers and its Computer Centre to walk out of their workplaces, thereby obstructing the bank's loan and deposit business and payment services". He was sentenced to one year in prison with a three-year probation period.*
- 760.** *The cases noted above illustrate the Committee's concern that section 314 as drafted and applied over the years has given rise to the punishment of a variety of acts relating to collective action, even without any implication of violence, with significant prison terms and fines. The Committee recalls that in its previous examination of this case, it had noted with interest the Government's general indication that it would establish a practice of investigation without detention for workers who violated current labour laws, unless they committed an act of violence or destruction – a statement considered to be of paramount importance, particularly in a context where certain basic trade union rights have yet to be recognized for certain categories of workers and where the notion of a legal strike has been seen as restricted to a context of voluntary bargaining between labour and management uniquely for maintaining and improving working conditions [see 331st Report, para. 348 and 335th Report, para. 832]. The Committee therefore requests the Government: (i) to continue making all efforts to ensure a practice of investigation without detention for workers who have violated current labour laws, unless they have committed an act of violence or destruction, as indicated in its previous reports; (ii) to review the situation of Oh Young Hwan, President of Busan Urban Transit Authority Workers' Union and Yoon Tae Soo, first Executive Director of Policy of the Korea Financial Industry Union, who appear to have been penalized under this provision for non-violent industrial action and to keep it informed in this respect; (iii) to continue to provide details, including any court judgements, on any new cases of workers arrested for obstruction of business.*
- 761.** *The Committee notes with concern the **new allegations submitted by the ICFTU** according to which: (i) the proposed bill on the Establishment and Operation of Public Officials' Trade Unions Act was fast-tracked through official consultation procedures without regard for due process; (ii) between April 2004 and April 2005, at least 34 KGEU leaders and members were arrested, including President Kim Young Gil, Vice Presidents Kim Sang Gil, Kim Jung Soo and Kim Il Soo and General Secretary Ahn Byeong-Soon, who were detained; (iii) on 8 June 2004, President Kim Young Gil, Vice President Jung Soo Kim and General Secretary Ahn Byeong Soon, all received prison sentences for violation of the Public Officials Act and election laws; (iv) in October 2004, riot police was deployed on two occasions in order to prevent strikers from holding rallies leading to*

violent clashes and injuries of union members; (v) forty union members were arbitrarily detained for 20 hours between 9 and 10 October, while 44 strikers were arrested on 31 October and released 27 hours later (one was reportedly beaten up by the police); (vi) from 6 to 8 November 2004, approximately 21 arrests took place throughout the country (enumerated in detail in the complaint) as part of a government attempt to prevent nationwide rallies organized by the KCTU and the KGEU in protest at the Establishment and Operation of Public Officials' Trade Unions Act; union rallies were dispersed throughout the country, sometimes violently, leaving dozens of union members injured; those arrested were all released on 8 November 2004; (vii) in order to prevent KGEU members from voting for a general strike to be staged on 15 November 2004, the authorities made raids on union offices, private homes and cars of union officials and even the homes of their relatives, arresting one trade union official for trying to distribute ballot papers (Sohn Dae Hyeop) and confiscating all materials related to the vote as well as posters, meeting documents, computers and union documents; (viii) the authorities carried out several acts of intimidation and harassment of trade union leaders and members so as to discourage their participation in rallies and demonstrations; (ix) the Ministry of Government Administration and Home Affairs (MOGAHA) had started a "New Wind Campaign" at the end of 2004 targeting the KGEU and promoting a "reformation of organizational culture, focusing on rearing workplace councils and healthy employee groups"; (x) in November 2004, arrest warrants were issued against 40 trade union leaders including KGEU President Kim Young-Gil and General Secretary Ahn Byeong-Soon, First Vice-President Jeong Yong-Cheon and five other Vice-Presidents in order to prevent the general strike planned for 15 November 2004 (see Annex I); (xi) between 13 and 17 November 2004, riot police arrested 191 unionists including several local union leaders after rallies and walkouts (see Annex II); (xii) on 8 April 2005 at 2 a.m., the police arrested the KGEU President Kim Young-Gil (who had gone into hiding); he was prosecuted under charges of violation of the Public Officials Act on 28 April 2005; (xiii) Ahn Byeong-Soon was also arrested on 15 March 2005 and released on 28 April after 44 days in prison; he was sentenced to eight months' imprisonment with two years' suspension.

- 762.** *The Committee takes note of the Government's reply according to which: (1) the bill was adopted after gathering opinions from various circles by conducting interviews and working-level consultations with organized public officials, holding an open forum (5 June 2005) and making a preliminary announcement of the bill (23 June-12 July 2003); (2) the KGEU has been established by public officials who were not allowed to organize a trade union under the previously applicable State Public Officials Act or the Local Public Officials Act. Accordingly, they were considered to have committed an illegal act in violation of national laws and the KGEU was not protected by the Trade Union and Labour Relations Adjustment Act; (3) six KGEU leaders were arrested in April 2004 on charges of supporting a particular political party for the 17th general election to be held on 15 April 2004: KGEU President Kim Young-Gil was released on 8 June 2004 after receiving a one-year prison sentence suspended for two years. Vice President, Kim Jung-Soo and General Secretary Ahn Byeong-Soon were released on 8 June 2004 after receiving a ten-month prison sentence suspended for two years. Vice Presidents Kim Sang-Girl and Ban Myung-Ja were released on 28 and 22 April 2004 respectively after the legality of the arrest was investigated. Vice President, Kim Il-Soo was released on 29 April following an arrest cancellation; (4) the convictions were due to the decision of the arrested leaders (taken at the national convention of the KGEU on 23 March 2004) to support the Democratic Labour Party (DLP) at the 17th general election – a decision announced at the KGEU web site and a press conference in which it was demanded that public officials be allowed to engage in political activities. Those convicted also encouraged the KGEU members to vote for the DLP and declared that they would implement their decision by providing support and conducting a campaign to collect political funds for DLP candidates; (5) these acts are prohibited under Korean law*

(section 65 of the State Public Officials Act, section 57 of the Local Public Officials Act, sections 87(1)(8), 60(1)(4) and 93(1) of the Act on the Election of Public Officials and the Prevention of Election Malpractices); (6) the rallies staged on 9-10 and 31 October 2004 were illegal as they were aimed at demanding recognition of the public officials' right to collective action in the bill; (7) although it is true that the police kept the public officials from reaching the rally venues, all those arrested in the process were immediately released after investigation. Thus, the ICFTU's allegation that 44 strikers were arrested is not factual; (8) the KGEU attempt to vote on industrial action to be carried out on 15 November 2004 had been blocked because the strike was considered illegal even under the Establishment and Operation of Public Officials' Trade Unions Act which recently entered into force. It also fell under the prohibition of "labour movements and collective acts other than public services" in section 66 of the Public Officials Act and section 58 of the Local Public Officials Act; (9) the allegation that arrests took place throughout the country on 6-8 November is not true. No one was arrested during this period except for one KGEU official (Lee Chang Hwa) who continued to push for a strike vote and undertook collective action by repeatedly demanding that union members be allowed to participate in the personnel committee. He also occupied the office of the governor of Goryeong-gun along with about ten other union members; (10) the allegation that around 191 unionists were arrested between 13-17 November 2004 is not true; (11) KGEU officers were arrested for planning, organizing and leading the illegal strike of 15 November 2004: President Kim Young-Gil and General Secretary Ahn Byeong-Soon who led the general strike were arrested in spring 2005; (12) Kim Young-Gil received a one-year prison sentence suspended for two years on 24 June 2005. (13) Ahn Byeong-Soon received an eight-month prison sentence suspended for two years on 28 April 2005.

- 763.** *The Committee would make the following observations on these points. First, the Committee recalls the importance, for the preservation of a country's social harmony, of regular consultations with employers' and workers' organizations; such consultations should take place irrespective of the philosophical or political beliefs of these organizations' leaders. In particular, it is essential that the introduction of draft legislation affecting collective bargaining or conditions of employment should be preceded by full and detailed consultations with the appropriate organizations of workers and employers [see **Digest**, op. cit., para. 931]. Second, although at the time of its creation the KGEU faced legislative obstacles, the entry into force of the Establishment and Operation of Public Officials' Trade Unions Act should normally lead to the elimination of any such obstacle, so that the KGEU may be now considered as a legitimate trade union organization. Third, the Committee has reaffirmed the principle expressed by the International Labour Conference in the resolution concerning the independence of the trade union movement that governments should not attempt to transform the trade union movement into an instrument for the pursuance of political aims, nor should they attempt to interfere with the formal functions of a trade union movement because of its freely established relationship with a political party. Thus, provisions imposing a general prohibition on political activities by trade unions for the promotion of their specific objectives are contrary to the principles of freedom of association [see **Digest**, op. cit., paras. 451 and 452].*
- 764.** *In addition to this, with regard to the legality of the strike staged on 15 November 2004, the Committee would refer the Government to the comments already made above with regard to the public servants' right to strike which should be granted to those public servants who are not exercising authority in the name of the State or carrying out essential services in the strict sense of the term. While taking due note of the contradiction between the allegations concerning the issuing of warrants and numerous arrests aimed at preventing public servants from staging rallies and the Government's reply, the Committee would recall that the arrest of trade unionists may create an atmosphere of intimidation and fear prejudicial to the normal development of trade union activities and workers*

*should enjoy the right to peaceful demonstration to defend their occupational interests [see Digest, op. cit., paras. 76 and 132].*

- 765.** *Finally, noting with regret the convictions of KGEU President Kim Young-Gil and General Secretary Ahn Byeong-Soon to prison sentences for organizing the strike of 15 November 2004, in addition to the prison sentences they received for violating election laws, the Committee would once again recall from its previous conclusions that it is not possible for a stable industrial relations system to function harmoniously in the country as long as trade unionists are subject to arrests and detentions [see 327th Report, para. 505 and 331st Report, para. 352].*
- 766.** *Recalling that the practice of arresting and prosecuting trade union leaders for their activities aimed at greater recognition of trade union rights is not conducive to a stable industrial relations system and that public servants should enjoy the right to strike as long as they are not exercising authority in the name of the State and do not carry out essential services in the strict sense of the term, the Committee requests the Government to look at the possibility of reviewing the convictions of KGEU President Kim Young-Gil and General Secretary Ahn Byeon-Soon given that they were convicted under the now repealed Public Officials Act for actions aimed at acquiring recognition, de facto and de jure, of the basic rights of freedom of association of public servants and that their sentences are subject to a two-year suspension. The Committee requests to be kept informed in this respect.*
- 767.** *The Committee regrets that the Government has not provided any comment on the allegations of violent police intervention in rallies, injury of trade unionists, intimidation and harassment of trade union leaders and members so as to discourage their participation in the strike of 15 November 2004 and finally, the initiation of a “New Wind Campaign” by MOGAHA at the end of 2004 targeting the KGEU and promoting a “reformation of organizational culture, focusing on rearing workplace councils and healthy employee groups”. The Committee requests the Government to refrain from any act of interference in the activities of the KGEU and to provide its comments on these allegations.*
- 768.** *The Committee finally takes note of the **new allegations submitted by the IFBWW** with regard to the unjust prosecution and imprisonment of trade union organizers and officials from the KFCITU so as to prevent the effective organization of construction workers. According to the IFBWW, since September 2003, the police and prosecution have launched a series of unjust investigations specifically targeting the organizing efforts of the KFCITU local unions in an attempt to stop the union from organizing construction site workers and construction plant workers who are basically non-permanent, irregular, seasonal workers, hired by contractors and subcontractors on a daily basis and face substandard terms and conditions of employment (precariousness, excessive hours of work, very low wages, high rate of occupational accidents, etc.). The complainant attributes this situation mainly to the complex pyramid structure of South Korean construction sites which comprise one main construction company and several layers of subcontractors behind which the main construction company may “hide”. The complainant emphasizes the need to conclude an agreement with the main construction company rather than subcontractors because of the dominant position of the main construction company in terms of contributing to the national employment insurance programme and pension plan as well as ensuring that the labour laws are followed at the workplace, including with regard to OSH, exerting influence over the employment practices of the contractors and subcontractors and allowing unions access to the construction site.*

- 769.** *The complainant alleges that in 1999 the KFCITU received a grant from the IFBWW to increase union density which was extremely low among these workers. As a result of the campaign, a collective agreement was signed. Under the collective agreement, the main construction companies agreed to abide by South Korean labour laws and ensure respect for the rights of all workers at the construction site regardless of whether they worked directly for them or for subcontractors. In particular, the main companies agreed inter alia, to allow union activities at the construction site and meet OSH guidelines. The collective agreement led inter alia to a considerable decrease in the number of accidents through the creation of OSH committees in the construction sites, helped workers to claim their back pay (the total amount of back pay owed to construction site workers in the first half of 2003 amounted according to the complainant to US\$125 million), and contributed to claiming further improvements in the terms and conditions of employment. As a result, union membership increased by more than 5,000 members.*
- 770.** *The complainant is of the view that the Government crackdown was an attempt to stop construction site workers from organizing. The complainant attaches a chronological table which indicates that police action and prosecution in three local regions (Daejeon, Chunahn, Kyonggido Subu) followed a pattern which amounted to a deliberate and concerted attack on union officials and organizers. In total, 14 union officials and organizers were arrested and jailed. These included six union officials and organizers in the Daejeon local union: Lee Sung Hwe, Kim Myung Hwan, Kim Wool Hyun, Cho Jung Hee, Noh Jae Dong, and Park Chung Man; two trade union officials of the Chunahn local union, Park Yong Jae and Noh Sun Kyun, President and Vice-President respectively; six union officials and organizers with the Kyonggido Subu local union: Kim Seung Hwan, Kim Kwang Won, Lee Myung Ha, Kim Ho Joong, Choi Jung Chul, and Lee Young Chul. In addition, five union organizers with the Kyonggido Subu local union (Yi Joo Mo, Ha Dong Yun, Ko Tae Hwan, Son Hyung Ho and Park Jung Soo), were on the “run” since they were wanted by the police for further questioning and had no confidence that they would be treated justly.*
- 771.** *According to the IFBWW, the police and prosecution accused these trade union officials of: (i) using force and coercing construction site managers who were hired by the main construction company to sign collective agreements; (ii) threatening to report OSH violations if the main construction company did not sign these agreements; (iii) extorting payments as a result of these collective bargaining agreements. The investigations were initiated and carried out by the criminal division of the police and the prosecution division which have no familiarity with labour issues and trade union activities, despite the fact that there was a specific section on union activities in both divisions. The complainant further alleges that the police’s line of questioning was focused on ways to provide evidence of the “guilt” of the local union officials and organizers in violation of due process.*
- 772.** *According to the complainant, on 16 February 2004 the six Daejeon union officials were found guilty of using “force” to coerce the main construction company to sign collective agreements and receiving payments as a result of these agreements. However, since they were implementing the national organizing programme of the KFCITU and the payments received were for organizational purposes and not for personal use, they were not personally liable. They therefore received light sentences (not indicated specifically). It was further ruled that the collective agreements signed by the union and the main construction company were only applicable to employees of the main company and did not apply to workers hired by subcontractors. The local union appealed the decision and the appellate court was reviewing the case at the time of the complaint. Moreover, Park Yong Jae, President of the Chunahn local union, was found guilty and sentenced to imprisonment for one year. Noh Sun Kyun, Vice-President of the Chunahn local union, was released due to lack of evidence but was fined nevertheless with two million Korean*

won on 27 August 2004 despite the fact that the judge had apologized earlier for the police error. Of the six Kyonggido Subu union officials and organizers who were detained and later on released on bail, three had gone on trial as of 3 September 2004 (Kim Ho Joon, Choi Jung Chul, and Lee Young Chul).

- 773.** *The Committee notes that the Government justifies the action taken in this case on the basis of the following reasons: (i) since subcontractors were the ones who directly hired and paid daily wages to the workers, the employer's party to collective bargaining or a collective agreement with the KFCITU should be the subcontractors and not the original contractors; (ii) the original contractor was not under an obligation to bargain with the KFCITU if the workers had not joined the KFCITU; however, the original contractor did not know whether the workers were members of the KFCITU as the construction site manager was not allowed to check the list of KFCITU members on the site; thus, it was not justifiable for the KFCITU to coerce an original contractor into concluding a collective agreement when there were no KFCITU members working for him or when he did not know if the workers were members of the KFCITU; (iii) the KFCITU received money from the original contractors in the name of "activity payment" to full-time unionists; however, under the Trade Union and Labour Relations Act, a full-time unionist was one who was employed by a firm; thus, if an executive of a trade union was not employed by a firm in charge of the construction site, he/she could not request the firm to recognize him/her as a full-time unionist; (iv) even if a full-time unionist was recognized and payment to him/her was to be provided as a result of collective agreements or approval from the employer, the payment should be made in a way that was universally accepted; in this case, union executives visited the construction site managers of the original contractors who did not have the obligation to conclude collective agreements and coerced them to sign the agreements, threatening them that they would accuse the original contractors of insufficient safety measures at the construction sites when the managers refused (some actually did accuse them and the accused original contractors immediately concluded collective agreements with the KFCITU for fear of disadvantages to come); as a result, the union executives received 60 to 180 million Korean won from the original contractors under the pretext of "activity payment" to full-time unionists under the collective agreements; the Government considers that if a full-time unionist receives money and other valuables using illegal means such as blackmail or threats, this constitutes the crime of blackmail under section 350 of the Criminal Law; moreover, where the threat was carried out by conspiracy of two or more people, this constitutes a violation of the Act on the Punishment of Violence. The Government thus considers that it was the KFCITU executives who coerced people with no obligation to do so into signing collective agreements and who received money and other valuables under the pretext of "activity payments" to full-time unionists. Since such acts constituted the crime of blackmail, detaining and searching for the KFCITU unionists could hardly be regarded as an infringement of legitimate trade union activities or collective bargaining.*
- 774.** *Firstly, the Committee expresses its deep concern at the fact that the exercise by the KFCITU of legitimate trade union activities in the defence of construction site workers, including through collective bargaining, has been perceived as criminal activity and given rise to the institution of a massive investigation and police intervention. As concerns the specific charges brought against the KFCITU officials, the Committee has difficulty in conceiving a request to an employer to either improve the OSH practices at the workplace on a voluntary basis (by concluding a collective agreement on this issue) or the matter would be reported to the competent authorities, as a matter of blackmail. The Committee recalls that according to the allegations, the collective agreement signed contained provisions on the creation of OSH committees in the workplace which contributed to the reduction of occupational accidents. It is difficult to consider such actions (this being the only specific example given by the Government) as illegal coercion or threat on the part of the union and it would seem perfectly comprehensible that the contractors would prefer to*

address any possible OSH issues on a voluntary basis. In any case, the Committee considers that denouncing to the competent authorities insufficient OSH measures is in fact a legitimate trade union activity and a workers' right which should be guaranteed by law.

- 775.** *In the second place, the Committee would observe that, except for the elements examined above, the Government has not provided any information indicating that the collective agreement was not voluntary. It would seem indeed from the information submitted to the Committee, that there was no complaint of coercion by any employer party to the collective agreement in question, and that the relevant investigations were carried out at the initiative of the police. Given the absence of any evidence indicating that the agreement was not voluntary, the Committee would emphasize that although an employer/main contractor may not be under an obligation to negotiate with a trade union representing workers engaged by subcontractors (or a trade union that has not demonstrated its membership among the main contractor's workers) nothing should prevent such an employer from negotiating and concluding a collective agreement on a voluntary basis. Moreover, the trade union concerned should also be able to request negotiations with the employer of its choice, on a voluntary basis, especially as in cases such as this one, it would be impossible to negotiate with each and every one of the subcontractors. In fact, given the main contractor's dominant position in the construction site, and the general absence of collective bargaining at the branch or industry levels, the conclusion of a collective agreement with the main contractor would appear to be a viable option allowing for effective collective bargaining and the conclusion of a collective agreement with sufficiently general scope over the construction site.*
- 776.** *In the third place, with regard to the payment of money by the main contractor as "activity payment" to full-time unionists under the collective agreement, the Committee observes that this payment was found by the courts to be carried out for organizational purposes and not for the personal use of the accused trade union officials. The Committee is deeply concerned that this payment for the union, which appears to be the result of voluntary negotiations, should be considered to be a criminal act. Finally, the Committee considers that a main contractor on a construction site should be able to voluntarily recognize a worker on the site as a full-time unionist even if the worker concerned does not work directly for the main contractor.*
- 777.** *Consequently, the Committee considers that the arguments put forward by the Government do not convincingly demonstrate that the KFCITU officials engaged in any kind of criminal activity. On the contrary, the acts which the Government states were carried out by the KFCITU officials, with the financial support of the IFBWW, would seem to be regular activities of a union in conformity with basic notions of freedom of association, in the pursuit of the legitimate trade union objective of ensuring the representation and defence of the occupational interests of a particularly vulnerable category of workers in the building industry. The Committee also notes that according to the complainant, such action had met with considerable success (signature of collective agreements, reduction of occupational accidents, increase in trade union membership, etc.), before the intervention of the police and the prosecution prevented it from having any further effect.*
- 778.** *The Committee 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 [see *Digest*, op. cit., para. 71]. The arrest of trade unionists may create an atmosphere of intimidation and fear prejudicial to the normal development of trade union activities [see *Digest*, op. cit., para. 76]. This intimidating effect is likely to be even stronger in the case of precarious, and therefore particularly vulnerable, workers who had just recently exercised their right to organize and bargain collectively. The Committee recalls that*

while persons engaged in trade union activities or holding trade union office cannot claim immunity in respect of the ordinary criminal law, trade union activities should not in themselves be used by the public authorities as a pretext for the arbitrary arrest or detention of trade unionists [see *Digest*, op. cit., para. 83].

- 779.** *The Committee therefore expresses its deep regret at the intervention of the police and the criminal prosecution and sentencing of KFCITU officials to fines and imprisonment. The Committee requests the Government to issue appropriate instructions so that all actions of intimidation and harassment against the KFCITU officials cease immediately. It requests the Government to review all convictions and prison sentences, and to compensate the KFCITU officials for any damages suffered as a result of their prosecution, detention and imprisonment. It further requests the Government to inform it of the outcome of the trial of the three officials of the Kyonggido Subu local trade union and of the current situation of Park Yong Jae, President of the Chunahn local trade union who was convicted to one year imprisonment. The Committee requests to be kept informed on all of the above.*
- 780.** *The Committee further notes with regret that the courts found that the collective agreements signed by the union and the main construction company were only applicable to employees of the main company and did not apply to workers hired by subcontractors. The local union appealed the decision and the appellate court was reviewing the case at the time of the complaint. The Committee requests the Government to inform it of the outcome of the appeal lodged against the court decision which found that the collective agreements signed in 2004 did not apply to workers hired by subcontractors; it trusts that the appellate court will take due account of the freedom of association principles mentioned above.*

## **The Committee's recommendations**

- 781.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *The Committee notes with interest the adoption and entry into force of the Act on the Establishment and Operation of Public Officials' Trade Unions; it requests the Government to give consideration to further measures aimed at ensuring that the rights of public employees are fully guaranteed by:*
- (i) *ensuring that public servants at Grade 5 or higher obtain the right to form their own associations to defend their interests and that this category of staff is not defined so broadly as to weaken the organizations of other public employees;*
  - (ii) *guaranteeing the right of firefighters to establish and join organizations of their own choosing;*
  - (iii) *limiting any restrictions of the right to strike to public servants exercising authority in the name of the State and essential services in the strict sense of the term;*
  - (iv) *allowing the negotiating parties to determine on their own the issue of whether trade union activity by full-time union officials should be treated as unpaid leave.*



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*The Committee requests to be kept informed of any measures taken or contemplated in this respect.*

- (b) *As regards the other legislative aspects of this case, the Committee urges the Government:*
- (i) *to take rapid steps for the legalization of trade union pluralism at the enterprise level, in full consultation with all social partners concerned, so as to guarantee at all levels the right of workers to establish and join the organization of their own choosing;*
  - (ii) *to enable workers and employers to conduct free and voluntary negotiations in respect of the question of payment of wages by employers to full-time union officials;*
  - (iii) *to amend the list of essential public services in section 71(2) of the Trade Union and Labour Relations Amendment Act (TULRAA) so that the right to strike may be restricted only in essential services in the strict sense of the term;*
  - (iv) *to repeal the notification requirement (section 40) and the penalties for violation of the prohibition on persons not notified to the Ministry of Labour from intervening in collective bargaining or industrial disputes (section 89(1) of the TULRAA);*
  - (v) *to repeal the provisions prohibiting dismissed and unemployed workers from keeping their union membership and making non-union members ineligible to stand for trade union office (sections 2(4)(d) and 23(1) of the TULRAA);*
  - (vi) *to bring section 314 of the Penal Code (obstruction of business) in line with freedom of association principles.*

*The Committee requests to be kept informed of the progress made in respect of all of the abovementioned matters.*

- (c) *Recalling that the prohibition of third party intervention in industrial disputes is incompatible with freedom of association principles and that justice delayed is justice denied, the Committee trusts that the appeals court will render its decision on Mr. Kwon Young-kil without further delay, taking into account the relevant freedom of association principles. The Committee requests the Government to provide information in this respect as well as a copy of the court judgement.*
- (d) *The Committee expresses its deep regret at the difficulties faced by the 12 dismissed people connected to the Korean Association of Government Employees' Works Councils (KAGEWC), which appear to be due to the absence of legislation ensuring their basic rights of freedom of association, in particular the right to form and join organizations of one's own choosing, respect for which is now largely guaranteed by the entry into force of the Act on the Establishment and Operation of Public Officials' Trade Unions. Noting that four of them have been reinstated, the Committee requests the*

*Government to reconsider the dismissals of Kim Sang-kul, Oh Myeong-nam and Min Jum-ki in the light of the adoption of the new Act and to keep it informed in this respect. It also requests the Government to provide information on the outcome of the pending administrative litigation and requests for examination concerning the dismissals of Koh Kwang-sik, Han Seok-woo, Kim Young-kil, Kang Dong-jin and Kim Jong-yun and expresses the hope that the new legislation will be taken into consideration in rendering the relevant decisions. The Committee finally requests the Government to provide copies of the relevant decisions.*

- (e) With regard to the application of the provisions concerning obstruction of business, the Committee requests the Government: (i) to continue making all efforts to ensure a practice of investigation without detention for workers who have violated current labour laws, unless they have committed an act of violence or destruction, as indicated in its previous reports; (ii) to review the situation of Oh Young Hwan, President of Busan Urban Transit Authority Workers' Union and Yoon Tae Soo, first Executive Director of Policy of the Korea Financial Industry Union, who appear to have been penalized under this provision for non-violent industrial action and to keep it informed in this respect; (iii) to continue to provide details, including any court judgements, on any new cases of workers arrested for obstruction of business.*
- (f) With regard to the new allegations made by the ICFTU, the Committee, recalling that the practice of arresting and prosecuting trade union leaders for their activities aimed at greater recognition of trade union rights is not conducive to a stable industrial relations system and that public servants should enjoy the right to strike as long as they are not exercising authority in the name of the State and do not carry out essential services in the strict sense of the term, requests the Government to look at the possibility of reviewing the convictions of KGEU President Kim Young-Gil and General Secretary Ahn Byeong-Soon given that they were convicted under the now repealed Public Officials Act for actions aimed at acquiring recognition, de facto and de jure, of the basic rights of freedom of association of public servants and that their sentences are subject to a two-year suspension. The Committee requests to be kept informed in this respect.*
- (g) The Committee requests the Government to refrain from any act of interference in the activities of the KGEU and to provide its comments on the ICFTU allegations of violent police intervention in rallies, injury of trade unionists, intimidation and harassment of trade union leaders and members so as to discourage their participation in the strike of 15 November 2004 and finally, the initiation of a "New Wind Campaign" by MOGAHA at the end of 2004 targeting the KGEU and promoting a "reformation of organizational culture, focusing on rearing workplace councils and healthy employee groups".*
- (h) With regard to the new allegations made by the IFBWW, the Committee expresses its deep regret at the intervention of the police and the criminal prosecution and sentencing of officials of the Korea Federation of Construction Industry Trade Union (KFCITU) to fines and imprisonment.*

*The Committee requests the Government to issue appropriate instructions so that all actions of intimidation and harassment against the KFCITU officials cease immediately. It requests the Government to review all convictions and prison sentences, and to compensate the KFCITU officials for any damages suffered as a result of their prosecution, detention and imprisonment. It further requests the Government to inform it of the outcome of the trial of the three officials of the Kyonggido Subu local trade union and of the current situation of Park Yong Jae, President of the Chunahn local trade union who was convicted to one year imprisonment. The Committee requests to be kept informed on all of the above.*

- (i) *The Committee requests the Government to inform it of the outcome of the appeal lodged against the court decision which found that the collective agreements signed in 2004 did not apply to workers hired by subcontractors; it trusts that the appellate court will take due account of the freedom of association principles mentioned in the Committee's conclusions.*

## Annex I

### List of arrest warrants issued against the KGEU on 17 November 2004, provided by the ICFTU

KIM Young-Gil, President  
 JEONG Yong-Cheon, First Vice-President  
 AHN Byeong-Soon, General Secretary  
 KIM Jeong-Soo, Vice-President  
 MIN Jeom-Gee, Vice-President  
 KIM Sang-Girl, Vice-President  
 BAHN Byeong-Ja, Vice-President  
 KIM Il-Soo, Vice-President  
 GWON Seung-Bok, Chairperson of Anti-Corruption Campaign Committee  
 NOH Myeong-Woo, Chairperson of Seoul regional branch  
 HAN Seok-Woo, Chairperson of Busan regional branch  
 KIM Gab-Soo, Chairperson of Ulsan regional branch  
 KIM Won-Geun, Chairperson of Gyeonggi regional branch  
 KANG Yang-Hee, Chairperson of Gangwon regional branch  
 KIM Sang-Bong, Chairperson of Chungbuk regional branch  
 KIM Boo-Yoo, Chairperson of Chungnam regional branch  
 PARK Jong-Shik, Chairperson of Jeonbuk regional branch  
 KANG Ki-Soo, Chairperson of Gwangju regional branch  
 PARK Hyeong-Gee, Chairperson of Jeonnam regional branch  
 KEE Byeong-Ha, Chairperson of Gyeongnam regional branch  
 KIM Yeong-Cheol, Chairperson of Jeju regional branch  
 LEE Tae-Gee, Chairperson of Educational Administrative Organs branch

LEE Joon-Gee, Deputy Secretary  
JEONG Yong-Hae, Spokesperson  
SEO Hyeong-Taek, Policy Planning Secretary  
LEE Ho-Seong, Organizing Secretary  
KANG Soo-Dong, Education and Publicity Secretary  
HYEON In-Deok, External Relations Secretary  
LEE Byeong-Gwan, Executive Director of Organizing  
SEO Tae-Won, Executive Director of Industrial Dispute  
LEE Choon-Shik, Director-General of Ulsan regional branch  
LEE Dal-Soo, Chairperson of Seoul Ganbuk-ku chapter  
LEE Gyu-Sam, Chairperson of Gangwon Wonju-si (city) chapter  
CHOI Seon-Jung, Director-General of Gangwon Wonju chapter  
Eight Chairpersons of chapters in Chungbuk regional branch  
There may be more KGEU members under arrest warrants.

## **Annex II**

### **List of KGEU officials and members arrested in November 2004, provided by the ICFTU**

#### ***13 November 2004***

- JEONG Woo-Wan, Executive Director of Finance: arrested when he tried to get access to his email account at an Internet cafe. Released two days later.
- KIM Yong-Seong, Chairperson of National Assembly branch: released two days later.
- GWON Jong-Mahn, Chairperson of Seoul Yeongdeungpo-gu chapter: arrested in front of his chapter office. Detained on 16 November.

#### ***14 November 2004***

- KIM Hyeong-Cheol, Chairperson of Political Empowerment Committee: arrested and detained after the KCTU's annual workers' rally on 14 November.
- NAM Hyeon-Woo, Chairperson of Seoul Gangseo-gu chapter: released two days later.

#### ***15 November 2004***

- HONG Seong-Ho, Executive Director of Bargaining: released two days later.
- HYEON Chang-Yo, Chairperson of Incheon Gyeonggi-gu chapter: arrested after a rally at Hanyang University on 15 November. Detention warrant claimed.
- LEE Deok-Woo, Chairperson of Ulsan Nam-gu chapter: arrested after a rally at Hanyang University on 15 November. Detention warrant claimed.
- HEO Won-Haeng, First Vice-Chairperson of Seoul Guro-gu chapter: arrested after a rally at Hanyang University on 15 November. Detention warrant claimed.
- KIM Bae, Chairperson of Daegu Dong-gu chapter: arrested after a rally at Hanyang University on 15 November. Detained on 17 November.
- 24 more arrested after a rally at Hanyang University on 15 November. Released one day later.

- six arrested after a rally in front of Gangnam bus depot on 15 November. Released an hour later.
- 19 members of Gangwon branch arrested for walkout on 15 November. Released one day later.
- KIM Seon-Tae, Chairperson of Jeonnam Gangjin-gun (county) chapter: arrested during walkout on 15 November. Detention warrant claimed.
- 48 more members of Jeonnam Gangjin-gun (county) chapter: arrested for walkout on 15 November. Released one day later.
- 39 members of Ulsan branch arrested for walkout on 15 November. Released one day later.
- KANG Dong-Jin, Director-General of Gyeongnam branch: arrested in front of his branch office. Detention warrant claimed.
- 19 more members of Gyeongnam branch: arrested for walkout on 15 November. Released one day later.
- LEE Il-Sook, Director of Women's Activities of Gyeonggi Goyang chapter: arrested for walkout on 15 November. Released one day later.
- AHN Jeong-Gook, delegate, Gyeonggi Goyang chapter: arrested for walkout on 15 November. Released one day later.

### **16 November 2004**

- CHOI Yoon-Hwan, Chairperson of Daegu/Gyeongbuk regional branch: arrested with police questioning.
- PARK Joon-Bok, Chairperson of Auditing Committee: arrested with police questioning.
- KANG Woong-Je, Executive Director of Policy Planning: arrested with police questioning.
- 15 members of solidarity organizations like KCTU and DLP: arrested while joining a rally for protesting government suppression of KGEU in Wonju, Gangwon-do (province). Released hours later.

### **17 November 2004**

- GYEONG Gab-Soo, Chairperson of Chungbuk Jecheon chapter: arrested for KGEU's industrial ballots.
- YEO Jae-Yool, Chairperson of Ulsan Buk-ku (district) chapter: arrested in front of his chapter office.
- KIM Boo-Hwan, Chairperson of Ulsan Jung-gu chapter.
- LEE Gwang-Woo, Chairperson of Gangwon Samcheok chapter.
- KANG Yeong-Goo, Chairperson of Incheon regional branch: arrested in a cathedral.

CASE NO. 2368

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

**Complaint against the Government of El Salvador  
presented by  
the Trade Union of Electricity Workers (STESEL)**

*Allegations: The complainant organization alleges anti-union practices against two of its branches: at the Río Lempa Hydroelectricity Board (CEL) and the El Salvador Electricity Transmission Company (ETESAL). These practices comprise the following: dismissal of a large number of trade union officials and members; threats of dismissal against members who refuse to resign from the union; and violation of the collective agreement and support from the employer for a parallel union to the detriment of the abovementioned branches at CEL and ETESAL. The complainant organization adds that as a result of these anti-union practices its CEL branch no longer exists. It also claims that the Ministry of Labour maintained a complicit silence towards the complaints made on the situation at both enterprises*

**782.** The Committee last examined this case at its meeting in June 2005 and presented an interim report to the Governing Body [see the 337th Report, paras. 873-893, approved by the Governing Body at its 293rd Session (November 2005)]. The Government subsequently sent new observations in a communication dated 26 August 2005.

**783.** El Salvador has not ratified 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. Previous examination of the case**

**784.** At its meeting in June 2005, the Committee made the following recommendations [see 337th Report, para. 893]:

- (a) With regard to the alleged dismissal of union leaders and members at the Río Lempa Hydroelectricity Board (CEL), the Committee requests the Government to send a copy of the ruling concerning the dismissal of union official Mr. Germán Granados Figueroa and of any ruling issued in relation to the dismissal of Mr. Roberto Efraín Acosta, and to provide information on the situation of the other two dismissed officials who allegedly did not accept the statutory severance pay (Mr. René Torres Aguirre and Roger Bill Aguilar), indicating whether they have taken legal action.

- (b) The Committee asks the Government to examine the issue of reinstatement of the dismissed trade unionists who did not accept severance pay, and to ensure that in future the dismissal of union leaders can only occur in accordance with the procedure laid down in article 47 of the Constitution.
- (c) With regard to the alleged anti-union dismissals of trade unionists at the El Salvador Electricity Transmission Company (ETESAL) (nine union officials – including seven having trade union immunity – and seven members), the Committee requests the Government to send the text of the ruling which declared the strike at ETESAL illegal so that it can examine these allegations in full knowledge of the facts.
- (d) As regards the allegation concerning the promotion of parallel unions at CEL and ETESAL with intent to dissolve or damage the branches of the complainant organization at both institutions, the Committee requests the Government to send the text of the ruling of 21 December 2004 issued by the Administrative Disputes Chamber of the Supreme Court of Justice concerning the appeal lodged by the general secretary of the complainant organization in relation to the new union established at ETESAL, as well as its observations on the alleged actions of the enterprise concerning the creation of a parallel union at CEL.
- (e) With regard to the alleged campaign to intimidate workers into resigning from the branches of the complainant union at CEL and ETESAL, the Committee notes that the Government declares that the allegation concerning ETESAL could not be proven and that the enterprise states that it had no knowledge of the resignations from the union until the workers presented copies of their respective resignation letters to stop the check-off of their union dues. The Committee also observes that the Government has not sent observations on the allegations concerning the campaign of intimidation to make workers resign from the CEL branch or on the allegations concerning violation of the collective agreement. The Committee requests the Government to carry out an in-depth investigation into the abovementioned matters and keep it informed in this respect.
- (f) Finally, the Committee requests the Government to send its observations on the allegation that the Ministry of Labour maintained a complicit silence with regard to the complaints submitted by the complainant union in relation to the matters raised in the present case.

## B. The Government's reply

785. In its communication of 26 August 2005, the Government sends the following information on the recommendations made by the Committee in its 337th Report:

- recommendation (a): a photocopy of the ruling of 23 February 2004 is provided; by this ruling, the Constitutional Chamber of the Supreme Court of Justice suspended the claim made against the President of the CEL by Mr. Germán Granados Figueroa. According to the ruling, it is not possible to attribute the dismissal of Mr. Germán Granados Figueroa to the defendants (the President of the Río Lempa Hydroelectricity Board and Vice-President of the Río Lempa Hydroelectric Station (CEL)) because the dismissal was carried out by Mr. José Oscar Medina, Executive Director of the CEL, at the request of the CEL Administration and Human Resources Manager, as the documents of the Constitutional Chamber of the Supreme Court of Justice show; the Chamber accordingly refused to grant the protection (*amparo*) requested. As regards the application made by Mr. Roberto Efraín Acosta, a definitive ruling has not yet been handed down, but once it has been, it will be passed on to the Committee without delay. As regards Mr. René Torres Aguirre and Mr. Roger Bill Aguilar (who had not accepted statutory severance pay), they are no longer with the company and it is not known whether they have initiated any legal proceedings;
- recommendation (b): the Government takes note of the request to examine the issue of the reinstatement of the other dismissed trade unionists (28 in total); however, it should be noted that these workers have not asked the General Directorate of the Labour Inspectorate to carry out an investigation with a view to their reinstatement;

- recommendation (c): attached to the Government’s report is a copy of the ruling in which, on the basis of national law, the Third Labour Court of San Salvador, in accordance with sections 369, 546 and 553(c) of the Labour Code, declared the strike at ETESAL to be illegal (the ruling cites as a reason the fact that no procedures for resolving an economic dispute or conflict of interests had been initiated by the workers concerned (failure to implement the conciliation procedure));
- recommendation (d): the Government attaches a copy of the ruling of 21 December 2004 by the Administrative Disputes Chamber of the Supreme Court of Justice with regard to the administrative dispute action initiated by the complainant union STESEL in October 2002 against the decision of the Ministry of Labour and Social Security to grant legal personality to the Trade Union of Workers of the Hydroelectricity Board (STECCEL) on 7 January 2002. According to the ruling in question, the complainant union STESEL allowed the period of 60 days, stipulated in section 11 of the Act concerning administrative disputes jurisdiction for challenging a definitive court ruling, to lapse, so that the ruling became fixed and not subject to change administratively or jurisdictionally at the date the request was made (22 October 2002); the application was accordingly ruled inadmissible as having been made outside the statute of limitations. As regards the constitution of the union in question, the Government stated that according to article 47 of the Constitution of the Republic, private employees and employers and those employed by autonomous official institutions are entitled to associate freely for the purpose of defending their respective interests. The Labour Code does not restrict the number of unions that may operate at a given enterprise;
- recommendation (e): the Government has not sent observations regarding the campaign to induce workers to leave the CEL branch, alleged by the complainant, as the workers have not thus far asked the General Directorate of the Labour Inspectorate to investigate the alleged campaign and the violation of the collective labour agreement; and
- recommendation (f): the General Directorate of the Labour Inspectorate has not received, since the beginning of 2004 until the present, any requests for labour inspections for the purpose of investigating complaints by the complainant, in the light of which the complainant party’s attitude seems strange and disturbing and indicative of a lack of responsibility and seriousness.

### C. The Committee’s conclusions

**786.** *The Committee recalls that in the present case, the Trade Union of Electricity Workers (STESEL) had alleged anti-union practices at two of its branches: the Río Lempa Hydroelectricity Board (CEL) and the El Salvador Electricity Transmission Company (ETESAL). These practices comprise the following: dismissal of a large number of trade union officials and members, threats of dismissal against members who refuse to resign from the union, and violation of the collective agreement by the employer and support from the employer for a parallel union to the detriment of the branches at CEL and ETESAL. The STESEL adds that, as a result of these anti-union practices, its CEL branch no longer exists, the ETESAL branch has been much reduced, and the few members of the branch executive board who have not been dismissed are subjected to intimidation. It also claims that the Ministry of Labour maintained a complicit silence towards the complaints made on the situation at both enterprises.*

**787.** *The Committee notes the Government’s statements according to which: (1) the Constitutional Chamber of the Supreme Court of Justice did not grant the protection (amparo) that had been sought by the union official Mr. Germán Granados Figueroa following his dismissal because the request was not addressed against the person actually*



responsible for the dismissal (the Executive Director of the CEL, at the request of the administration and human resources management), but against the President of the Río Lempa Hydroelectricity Board and Vice-President of the Río Lempa Hydroelectric Station; (2) the legal action by the complainant union against the administrative decision to grant legal personality to the other union (STECCEL) was declared inadmissible because of the statute of limitations the 60-day period allowed by law for the purpose of challenging administrative decisions before the courts had elapsed. The Committee notes that, according to the ruling of the judicial authority, the strike was declared illegal because the conciliation procedure had not been followed.

**788.** *The Committee notes that according to the Government, the judicial authority has still not handed down an administrative ruling on the dismissal of the union official Mr. Efraín Acosta, and requests the Government to inform it of the ruling as soon as it is handed down.*

**789.** *The Committee notes that according to the Government, there is no knowledge of any legal action by the union officials Messrs. René Torres Aguirre and Roger Bill Aguilar (who according to the complainant had not accepted the statutory severance pay offered by the employer), or of any application from the other dismissed workers (28, according to the complainant organization) for an investigation by the General Directorate of the Labour Inspectorate; according to the Government, the complainant organization has not requested any action by the General Directorate with a view to investigating the alleged campaign by the employer to induce workers who were members of the complainant union to resign from the union, or the alleged violation of the collective labour agreement.*

**790.** *The Committee considers that in view of: the time that has elapsed since the alleged events (which according to the complainant union occurred in 2001 and 2002 [see 337th Report, para. 876]); the fact that some of the dismissed workers or supposed victims of threats of dismissal have not asked the Ministry of Labour to take any action; the fact that certain legal actions initiated by the complainant organization or its members have been unsuccessful for reasons of form (statute of limitations,, inadequate identification of the defendants) or are still pending; and in view of the concerns raised by the serious nature of the allegations during the period in question (including dismissals of union officials and members, threats of dismissal against workers who refuse to leave the union, promotion by the employer of a parallel union, and violation of the collective agreement), the Committee requests the Government to undertake mediation measures between the complainant trade union, on the one hand, and the Río Lempa Hydroelectricity Board (CEL) and El Salvador Electricity Transmission Company (ETESAL), on the other, with a view to resolving the problems that remain pending in a manner satisfactory to both parties, in the light of the ILO's principles of freedom of association and collective bargaining. The Committee requests the Government to keep it informed in this respect.*

## **The Committee's recommendations**

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

(a) *The Committee considers that, given the time that has elapsed since the alleged incidents (which according to the complainant union occurred in 2001 and 2002), the fact that some of the dismissed workers or persons claiming to have been threatened with dismissal have not asked the Ministry of Labour to take action, that some of the legal actions initiated by the complainant organization or its members have been unsuccessful for reasons of form (statute of limitations, inadequate identification of the*

*defendants) or are pending, and in view of the concerns raised by the serious nature of the allegations during the period in question (including dismissals of union officials and members, threats of dismissal against workers who refuse to leave their union, promotion by the employer of a parallel union and violation of the collective agreement), the Committee requests the Government to undertake mediation measures between the complainant trade union, on the one hand, and the Río Lempa Hydroelectricity Board and El Salvador Electricity Transmission Company, on the other, with a view to resolving the problems that remain pending in a manner satisfactory to both parties, in the light of the ILO's principles of freedom of association and collective bargaining.*

- (b) *The Committee requests the Government to keep it informed in this respect.*
- (c) *The Committee trusts that the Government will keep it informed of the ruling handed down concerning the dismissal of the trade union official Mr. Roberto Efraín Acosta as soon as it is handed down.*

CASE NO. 2418

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

**Complaint against the Government of El Salvador  
presented by  
the Union of Doctors and Workers of the Salvadoran  
Social Security Institute (SIMETRISSS)  
supported by  
the Public Services International (PSI)**

*Allegations: The complainant organization alleges that the trade union adviser of SIMETRISSS, Mr. Enrique Banchón Rivera, was unlawfully and violently expelled from the country on 28 April 2005, by virtue of a resolution from the Ministry of the Interior referring to political actions he had supposedly committed (which the complainant organization denies); according to the complainant organization, this adviser's expulsion is linked to a labour dispute that occurred in October 2002 at the Salvadoran Social Security Institute, and the expulsion proceedings failed to respect due process (flaws in the due process, insufficient grounds, lack of proof, etc.). In addition, the complainant organization points out that Mr. Banchón Rivera was expelled violently and received blows*

**792.** The complaint is contained in a communication dated 30 April 2005. The Public Services International (PSI) supported this complaint in a communication dated 11 May 2005.

**793.** The Government sent its observations in a communication dated 26 August 2005.

794. El Salvador has ratified neither the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), nor the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

## A. The complainant's allegations

795. In its communication dated 30 April 2005, the Union of Doctors and Workers of the Salvadoran Social Security Institute (SIMETRISSS) alleged that on 28 April 2005, the national police, acting upon the orders of the President of the Republic given by the Ministry of the Interior, expelled from the country Mr. Banchón Rivera, the trade union adviser of SIMETRISSS responsible for communications, in a violent, arbitrary and illegal manner. Mr. Banchón Rivera is a doctor of Ecuadorian nationality, married to a Salvadoran, who has been carrying out his trade union functions since 1999 under a contract duly registered with the Ministry of Labour.

796. SIMETRISSS points out that since October 2002, on grounds linked to the labour dispute that occurred in the Salvadoran Social Security Institute (ISSS), Mr. Banchón Rivera has been constantly and systematically persecuted by officials of the Directorate-General for Migration and Aliens on account of his activities as trade union adviser, which have been qualified in an arbitrary fashion as political activities; at no time did he in fact participate either directly or indirectly in this type of activity. In the proceedings initiated by the migration authorities, there is no evidence that categorically points to his participation in activities of a political nature; on the contrary, the newspaper cuttings that have been advanced as proof against him, refer to the strictly trade union nature of his role as trade union adviser, such as his participation in the trade union committee in the negotiations that put an end to the dispute in ISSS in 2002. Similarly, and always in the exercise of his duties as trade union adviser, he belonged to the Supervisory Committee of Agreements which ended the said labour dispute. Moreover, at no time did the Directorate-General for Migration and Aliens specify the reasons for which it qualified Mr. Banchón Rivera's conduct as engaging in political activities, itself a demonstration of the falseness of the statements. SIMETRISSS adds that on 28 April 2005, Mr. Banchón Rivera was notified of the resolution (of 15 April 2005) expelling him from the country. The resolution stated that he had infringed articles 96 and 97, paragraph 2, of the Constitution, as well as sections 4 and 8 of the Aliens' Act, by taking part in the country's domestic policy and that, consequently his permanent residency permit would be annulled and he would be expelled from the national territory, with a restriction on re-entry for five years. The resolution was enforced on the very day it had been announced by the border control authorities of the national civil police who transported him to the airport and proceeded to expel him from the national territory in a violent way, thereby causing physical and moral injury (they delivered blows and tore his shirt).

797. SIMETRISSS stresses that the actions with which Mr. Banchón Rivera is reproached date from 2002 and that the charges were only communicated to him in April 2005; furthermore, in the subsequent proceedings, there was no respect for due process and the rights to a fair hearing and defence, which require that sufficient time is allocated for the defence. The statutory offences attributed to Mr. Banchón Rivera were also not specified (there is no link to the facts in the case and the resolution of 15 April 2005 is flawed with respect to the reasons put forward in law and in fact).

798. SIMETRISSS concludes by stating that, in the proceedings initiated by the migration authorities upon which the accusations are based, it may be deduced that Mr. Banchón Rivera's alleged actions are linked to measures taken by the ISSS trade unions during the dispute in the health sector in 2002. Similarly, the Constitutional Court of the Supreme Court of Justice stated, in its resolution of 4 May, that the investigation did not produce any evidence of Mr. Banchón Rivera's participation in the country's politics. In this

respect, SIMETRISSS wonders how it is possible that he was expelled from the country for events that had already been examined by the judicial authorities and when his residency permit had just been approved in January 2004.

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

- 799.** In its communication of 26 August 2005, the Government states that the decision to expel Mr. Banchón Rivera from the national territory was not linked to matters connected with any trade union activity, given that he had never belonged to any trade union and that the labour laws do not forbid this right to anyone on grounds of nationality. The decision to expel him from the country was on account of his direct and indirect intervention in national politics which is banned to foreigners under the Constitution of the Republic and the Aliens' Act.
- 800.** This intervention took the form of: (1) participating actively in the Committee set up by the Trade Union of Workers of the Salvadoran Social Security Institute to negotiate the reinstatement of doctors; and (2) taking part in protest movements, in disrespect of the law and authorities, that resorted to violent measures such as: stone-throwing, brandishing posters and throwing high-grade mortar bombs in the country's main streets, thereby creating instability and insecurity between the workers and Salvadoran society.
- 801.** The Government adds that, during the course of the proceedings that opened on 28 October 2002, the inquest services of the Directorate-General for Migration informed Mr. Banchón Rivera of the facts and the legal provisions he had infringed, notably articles 96 and 97 of the Constitution and sections 4 and 8 of the Aliens' Act. As stated before, article 96 of the Constitution of the Republic, with regard to section 4 of the Aliens' Act, establishes that from the moment foreigners enter the territory of the Republic, they are strictly bound to respect the authorities and obey the laws, while obtaining the right to be protected by these same laws; in other words, foreigners differ from nationals in that they have a special obligation both towards the authorities and the laws of the land. Furthermore, article 97, paragraph 2, of the Constitution of the Republic and section 8 of the Aliens' Act specify that foreigners who directly or indirectly intervene in the country's national politics lose the right to reside in the country. It is important to point out that the possibility of foreigners losing the right of residency in the country is one of the few penalties expressly mentioned in the Constitution, which is intended to prevent any interference of foreigners in the country's politics; the Constitution therefore not only penalizes direct participation in national policy but also all forms of indirect participation.
- 802.** Consequently, it was on the basis of section 27 of the Aliens' Act and sections 1, 2 and 74 of the Migration Act that the Directorate-General for Migration advised Mr. Banchón Rivera, on 9 December 2003, to update his file.
- 803.** On 29 January 2004, Mr. Banchón Rivera submitted the following documents: (1) contract of professional services with SIMETRISSS as adviser responsible for communications; (2) sworn statement undersigned by his wife, together with payslips, employer's certificates, marriage certificate and birth certificate of his son; (3) copy of his police record; (4) proof of solvency from the national civil police; (5) certification of registration with the medical practitioners' board; and (6) attestation of the title deed of his home in favour of his wife.
- 804.** On 5 April 2005, the Directorate-General for Migration and Aliens summoned Mr. Banchón Rivera with a view to informing him of: (a) the statutory offences attributed to him (articles 96 and 97, paragraph 2, of the Constitution and sections 4 and 8 of the Aliens' Act); (b) the specific deeds carried out; (c) the evidence obtained; and (d) his right to have three days in which to produce statements in defence of his position. On 8 April

2005, within the time-limit granted him, Mr. Banchón Rivera submitted documentation in which he put forward his arguments and evidence for his defence; on 15 April 2005, the Ministry of the Interior, on the basis of the inquiry, the statements submitted, and the abovementioned provisions, decided that Mr. Banchón Rivera, of Ecuadorian nationality, had infringed articles 96 and 97, paragraph 2, of the Constitution and sections 4 and 8 of the Aliens' Act by participating in the country's national politics and therefore revoked the permanent residency that had been granted to him on 15 January 2004, ordering that he be expelled from the national territory and restricting his re-entry for a period of five years after the date of his expulsion.

- 805.** In concluding, the Government points out that, by making use of the statutory mechanisms provided for under a state governed by the rule of law, Mr. Banchón Rivera has brought an application for *amparo* (enforcement of constitutional rights) against the aforementioned resolution before the Constitutional Court of the Supreme Court of Justice; to date, however, the Court has not handed down a ruling on the proceedings in question.

### C. The Committee's conclusions

- 806.** *The Committee notes that in this complaint, the complainant organization alleges that the trade union adviser of SIMETRISSE, Mr. Banchón Rivera, was unlawfully and violently expelled from the country on 28 April 2005, by virtue of a resolution from the Ministry of the Interior referring to political actions he had supposedly committed (which the complainant organization denies); according to the complainant organization, this trade union adviser's expulsion is linked to a labour dispute that occurred in October 2002 at the Salvadoran Social Security Institute, and the expulsion proceedings failed to respect due process (flaws in the due process, insufficient grounds, lack of proof, etc.). In addition, the complainant organizations points out that Mr. Banchón Rivera was expelled violently and received blows.*
- 807.** *The Committee notes the Government's statements according to which: (1) the decision to expel Mr. Banchón Rivera from the country was not linked to matters connected with any trade union activity but to the direct and indirect intervention in national political life, banned by the Constitution of the Republic and the Aliens' Act, which oblige foreigners to respect the authorities and obey the law; (2) under article 97, paragraph 2, of the Constitution of the Republic, foreigners who directly or indirectly intervene in the country's national politics lose the right to reside in that country; (3) in April 2005, the Directorate-General for Migration and Aliens granted Mr. Banchón Rivera the right of three days in which to produce statements in defence of his position; (4) on 15 April 2005, the Ministry of the Interior ordered his expulsion from the national territory for a five-year period for having infringed articles 96 and 97, paragraph 2, of the Constitution and sections 4 and 8 of the Aliens' Act; and (5) Mr. Banchón Rivera appealed to the Constitutional Court of the Supreme Court of Justice which has not yet handed down a judgement.*
- 808.** *With regard to the allegations concerning the failure to respect the rules of due process, the Committee observes that the Government merely stated that three days were given for the accused to exercise the right of defence. Concerning the alleged acts of violence (mainly blows) that the trade union adviser allegedly suffered and given the lack of observations on the part of the Government, the Committee can only regret any violence that might have occurred. More specifically, it is up to the Committee to determine, in the light of the allegations, the Government's reply and the resolution of the Ministry of the Interior, whether Mr. Banchón Rivera's expulsion, dated 15 April 2005, was or was not contrary to the principles of freedom of association. In this respect, the resolution of 15 April 2005 reproaches Mr. Banchón Rivera for not handing over certain documents ("certification of rights and contributions of the ISSS", a copy of his social security card, a*

*statement issued by the pension fund and a certificate of compliance with national and municipal taxes), but above all it emphasizes the carrying out of political actions (“trade union activities to protest against the Government and its policies”).*

**809.** *In particular, the resolution reproaches the trade union adviser Mr. Banchón Rivera with the following:*

*Account of the facts*

*Mr. Banchón Rivera’s participation in national politics has been determined by evidence listed in the proceedings as follows:*

- I. As part of the protest activities carried out by the trade unions and associations in the health sector, Mr. Banchón Rivera participated actively in the so-called “II White March” of 23 October 2002. The protesters marched along the General Escalon Promenade, the Masferrer Sur Boulevard and La Mascota Street to state their disapproval of what they termed as the Government’s privatization of the health sector, as reported in articles published by La Prensa Gráfica, of 26 October 2002.*
- II. On 4 November 2002, Mr. Banchón Rivera was seen with other trade unionists creating a disturbance at the premises of the Physical Medicine and Rehabilitation Unit of the Social Security<sup>1</sup> to protest against the dismissal of Ms. Reyna Elizabeth Santos Beltran. According to the records of the inquest services of the Directorate-General for Migration and Aliens, dated the same day, month and year, the protesters were brandishing posters and exploding high-grade mortar bombs, as well as carrying out other actions described as aggressive against the premises and medical staff.*
- III. On 29 January 2003, Mr. Banchón Rivera joined with other doctors in inconveniencing doctors who were arriving for work at the Physical Medicine Unit. This is in accordance with the report of the inquest services of the Directorate-General for Migration and Aliens, dated 22 September 2003.*
- IV. On 27 March 2003, Mr Banchón Rivera, accompanied by strikers, attempted to prevent doctors from entering the abovementioned unit, blocking the Avenue Juan Pablo II de Oriente a Poniente with stones and placards. This is in accordance with the report of the inquest services of the Directorate-General for Migration and Aliens, dated 27 March of the same year.*
- V. According to page 16 of El Diario de Hoy, dated 30 May 2003, and page 4 of Diario El Mundo, dated 30 May 2003, Mr. Banchón Rivera played an active part in the Committee of the Trade Union of Workers of the Salvadoran Institute of Social Security (STISSS), negotiating the reinstatement of doctors dismissed during the dispute. Similarly, he was seen in the follow-up to the negotiations on 27 June and 4 July 2003.*
- VI. On 18 June 2003, the Supervisory Committee agreed upon the representation of the Union of Doctors and Workers of the Salvadoran Social Security Institute (SIMETRISSS) and requested that Mr. Pedro Enrique Banchón Rivera might replace Mr. Ricardo Monje as a substitute member of that Committee. From that date onwards, he was involved in matters related to the situation of the striking doctors from the Social Security and to the application of the agreements reached between the doctors and the Government. This is in accordance with the report of the inquest services of the Directorate-General for Migration and Aliens, dated 18 June of the same year.*
- VII. On 9 July 2003, the authorities of the Physical Medicine and Rehabilitation Unit of the Salvadoran Social Security Institute stated that Mr. Banchón Rivera was constantly entering the premises, creating unease among the workers in this unit. This is in accordance with the report of the inquest services of the Directorate-General of Migration and Aliens, dated 9 July of the same year.*
- VIII. On 18 September 2003, Mr. Banchón Rivera gave an informative briefing to the staff supporting the trade union movement in the parking area of the Social Security Institute with a view to informing them on the manner in which they should work to comply with the contract signed by each and every one of them and other related directives. This is in accordance with the report of the inquest services of the Directorate-General of Migration and Aliens, dated 18 September of the same year.*

- IX. On 10 December 2003, according to the Director of the 15 September Medical Centre of the Salvadoran Institute of Social Security, Mr. Banchón Rivera arrived with members of the STISSS and met with a group of nurses in front of Clinic No. 16 in the Centre; they subsequently went to the main entrance where they distributed pamphlets about the election of the new board of directors of the Medical College and told the nurses that they should not continue working compensatory hours as “they would not be paid”.
- X. On 18 January 2005, page 4 of the *Diario de Hoy* reported that Mr. Banchón Rivera, together with members of the Trade Union of Doctors and Workers of the Salvadoran Social Security Institute, had violently accused, in a totally disrespectful way, the authorities of this institution for trying to privatize external specialist care services.

**810.** *In view of all the preceding points, the Committee can only conclude that the expulsion of the trade union adviser Mr. Banchón Rivera is essentially linked to the exercise of his duties as trade union adviser and to the exercise of trade union rights, rather than to the exercise of political activities, it being understood that the exercise of trade union rights might at times entail criticisms of the authorities of public employer institutions and/or of socio-economic conditions of concern to trade unions and their members. The Committee notes with regret that a number of violent actions mentioned (although they refer in a very general way to Mr. Banchón Rivera “with other trade unionists” or strikers), such as the exploding of mortar bombs or blocking the entrance to doctors, do constitute an abuse of trade union rights. The Committee points out that: the resolution of the Ministry of the Interior ordering Mr. Banchón Rivera’s expulsion states that only three days were given to him to exercise his right of defence, although the facts dated back to 2002 and 2003; that Mr. Banchón Rivera has been married for years to a Salvadoran national and his expulsion would contravene the principle of family regrouping; that the resolution of the Ministry of the Interior does not provide evidence but refers to reports from the migration authorities and articles in the press; and, as may be ascertained from the resolution itself, that Mr. Banchón Rivera is primarily reproached for a number of activities that are clearly of a trade union rather than a political nature. In these circumstances, the Committee expresses the hope that the Constitutional Court of the Supreme Court of Justice will take all these factors into account when it examines the appeal concerning the expulsion order against the trade union adviser Mr. Banchón Rivera and that it keeps it informed in this respect. The Committee also requests the Government to communicate to it the text of the judgement handed down by the Constitutional Court of the Supreme Court of Justice on this matter.*

**811.** *Finally, the Committee draws the Government’s attention to the principle that no person should be dismissed or prejudiced in his or her employment by reason of trade union membership or legitimate trade union activities [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 696].*

## **The Committee’s recommendations**

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

- (a) *The Committee requests the Government to communicate to it the text of the judgement handed down by the Constitutional Court of the Supreme Court of Justice concerning the expulsion order against the trade union adviser Mr. Banchón Rivera.*
- (b) *The Committee hopes that the judgement handed down will take into account all the considerations put forward in its conclusions.*

CASE NO. 2241

INTERIM REPORT

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

— **the Trade Union of Workers of Guatemala (UNSITRAGUA)**

— **the Guatemalan Union of Workers (UGT)**

**supported by**

— **the World Confederation of Labour (WCL) and**

— **the Latin American Central of Workers (CLAT)**

*Allegations: The complainant organizations allege a number of anti-union acts in the Municipality of San Juan Chamelco, in enterprises, estates and the Higher Court (dismissals, refusal to enter into collective bargaining with a union affiliated to UNSITRAGUA), as well as physical and verbal aggression towards union officials and members and arrest and prosecution of a union official*

**813.** The Committee last examined this case at its June 2005 meeting and presented an interim report to the Governing Body [see 337th report, paras. 894-917]. The Trade Union of Workers of Guatemala (UNSITRAGUA) presented further allegations in communications dated 28 April and 11 May 2005. The WCL sent additional information in a communication dated 31 August 2005.

**814.** The Government sent its observations in communications dated 5 July, 23 and 31 August, 28 October 2005, and 10 February 2006.

**815.** 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**

**816.** At its June 2005 meeting, the Committee made the following recommendations [see 337th Report, para. 917]:

- (a) As to the anti-union dismissal of the worker Macedonio Pérez Julián by the enterprise La Comercial S.A., the Committee requests the Government to keep it informed as to the outcome of the legal procedure under way.
- (b) Concerning the allegations concerning the enterprise La Comercial S.A. regarding: (1) the refusal by the enterprise to recognize and enter into collective bargaining with the enterprise's trade union unless it gives up its affiliation to UNSITRAGUA; and (2) the refusal by the enterprise to deduct union dues from workers' wages, the Committee requests the Government to send its observations in this respect.
- (c) As to the allegation regarding the dismissal of the worker Marco Antonio Estrada López, a member of the Union of Workers of La Comercial S.A., the Committee, noting that the complainant organization states that the judicial authority ordered that he be reinstated in



August 2004, requests the Government to ensure that the worker in question is reinstated in his post.

- (d) As to the alleged harassment by the enterprise La Comercial S.A. of members of the Union of Workers of La Comercial S.A., Distribuidora de Productos Alimenticios Diana S.A. and other enterprises belonging to the same economic unit because of the union's opposition to the illegal deductions from the workers' wages made by the enterprise, the Committee, taking into account the fact that, according to the Government, the enterprise states that some workers do not hand over the money they have made from the sale of the enterprise's goods but instead keep it and, in order not to have to dismiss these workers, the enterprise makes deductions from their monthly wages by way of reimbursement of the money owed to the enterprise with their consent, will not make any further examination of these allegations, unless the complainant organizations provide more information in this respect.
- (e) As to the allegations that were pending concerning the anti-union harassment of the members of the Union of Workers of Rafael Landivar University by the university authorities after the union submitted a draft collective agreement on working conditions (according to the complainants, the members of the union were aggressed verbally and physically and its secretary-general, Mr. Timoteo Hernández Chávez, was attacked by armed men on his way home), the Committee requests the Government to conduct an investigation in order to determine those truly responsible for the acts of anti-union harassment and ensure that they are appropriately punished so that this kind of discrimination is avoided in the future within the university. The Committee requests the Government to keep it informed in this respect.
- (f) As to the dismissal of 50 workers belonging to the Union of Workers of the Asociación Movimiento Fe y Alegría in the work centres located in the department of Guatemala on 31 October 2001 in reprisal against the trade union, the Committee requests the Government to keep it informed as to the final outcome of the appeal lodged against the legal ruling ordering that six workers be reinstated (according to the Government, only eight workers requested to be reinstated before the law courts).
- (g) As to the allegations of the anti-union dismissal of Mr. Edgar Alfredo Arriola Pérez and Mr. Manuel de Jesús Dionicio Salazar on 23 October 2002 after they applied to join the Union of Workers of the Higher Electoral Tribunal on 17 October of the same year, the Committee requests the Government to state the nature of the disciplinary faults committed by the workers which gave rise to their dismissal.

## **B. Further allegations and additional information from the complainant organizations**

**817.** In a communication dated 28 April 2005, in connection with allegations regarding the enterprise La Comercial S.A.'s refusal to recognize and to enter into collective bargaining with the enterprise's trade union and the refusal by the enterprise to deduct union dues, UNSITRAGUA alleges that the enterprise La Comercial S.A. has refused since 1999 to negotiate with the Union of Workers of La Comercial S.A. and has negotiated with an ad hoc committee of workers, simulating the signature of an agreement, despite the fact that the trade union organization represents over 70 per cent of employees. The trade union organization alleges that it became aware of this negotiation and signature of an agreement with non-unionized workers when proceedings were initiated to bring the dispute before the Fifth Labour and Social Security Court, and called upon the enterprise to enter into collective bargaining. On that occasion, the enterprise refused and stated that an agreement already existed. Although a request was made to the labour inspectorate to revoke the decisions endorsing these agreements, the labour inspectorate has not as yet rendered its decision.

**818.** According to the complainant, the enterprise has in addition initiated a slander campaign and coerces workers to sign a new agreement and the labour inspectorate, which has been informed of this matter, has not yet taken any action.

- 819.** In a communication dated 11 May 2005, the complainant organization alleges that in 2005 the court dismissed the following members of the Trade Union of Employees of the Higher Electoral Court: Ulalio Jiménez Esteban (initially suspended for 15 days) and Víctor Manuel Cano Granados, while another trade union member, Pablo Menéndez Rodas, was suspended for 15 days.
- 820.** In a communication dated 31 August 2005, the World Confederation of Labour (WCL) alleges that Mr. Rigoberto Dueñas, deputy secretary-general of the CGTG, who, as noted by the Committee in its earlier consideration of the case, had been absolved of offences of embezzlement, fraud and complicity [see 337th Report, para. 902], was convicted by the First Appeal Chamber, in an appeal brought by the Guatemalan Social Security Institute, for the offence of abuse of authority and sentenced to three years imprisonment. This sentence may be commuted at a cost of 100 quetzals per day. The WCL alleges that the appeal was based on facts for which Mr. Duenas had never been tried.

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

- 821.** In communications dated 5 July, 23 and 31 August, 28 October 2005, and 10 February 2006, the Government states the following:
- *The case of Marcedonio Pérez Julián.* The Government states that the case brought by this worker against La Comercial S.A. was scheduled for 1 July 2003, but could not proceed because it had not been possible to notify the defendant and because Marcedonio Pérez Julián failed to attend.
  - *Refusal by the enterprise La Comercial S.A. to negotiate with the Union of Workers of La Comercial S.A. and the appointment of an ad hoc committee of workers with which the signature of an agreement had been simulated, and pressure on workers to sign a collective agreement.* As regards the establishment of an ad hoc committee, the Government states that, pursuant to Convention No. 87, Article 2, it is not the role of the labour inspectorate to intervene in negotiations between that body and the enterprise, by reason of the fact that workers have the right to organize as they see fit. The Government states that it has not been demonstrated that the ad hoc committee was supported by the employer. It further states that the agreement concluded with that committee is in compliance with legislation and with Convention No. 154 and that the trade union cannot enjoy exclusive bargaining powers. The Government adds that the labour inspectorate had considered the matter but had not seen fit to sanction the workers. Regarding the enterprise's refusal to negotiate with the trade union organization, the Government states that this is to be attributed to a series of flaws including failure to exhaust direct channels and to notify how many workers belong to the trade union. The Government adds that the collective dispute brought before the judicial authorities and which is being tried by the Second Labour and Social Security Court of the First Instance, registration number L1-2005-505, was found admissible on 7 June 2005, but the judicial authority raised the objection that a prior agreement existed and that direct channels had not been exhausted and that the number of union members had not been notified.
  - *The case of the Asociación Movimiento Fe y Alegría.* The Government states, as regards the dismissal of 50 workers from the work centres located in the Department of Guatemala, that the First Chamber of the Labour and Social Security Appeal Court, in a ruling dated 22 March 2004, accepted reinstatement proceedings brought by Claudia Griselda Perez Bolanos, and rejected the case involving Leonel Miguel Castillo, Luis Alberto Cifuentes Samayoa and Hisleni Masiel Blanco Monterroso by reason of the fact that they had fixed-term contracts and that therefore the company did not require authorization to dismiss them. As regards Ms. Perez Bolanos, the

Government states that she was summoned by the Court so that she could be informed of the decision, but failed to appear.

- *The case of the Higher Electoral Court.* The Government states that, according to information provided by the Higher Electoral Court, Edgar Alfredo Arriola Pérez and Manuel de Jesús Dionisio Salazar, employed by the Court, were dismissed for failure to report to work, under the powers provided by the electoral law to appoint, dismiss and sanction officials and staff, in particular in the case of employees in positions classified as being “of trust”. The Government adds that the employees requested the review of the decision but took no further action. The Government rejects the allegation, which is vague and confused, regarding the dismissal of Mr. Ulalio Jiménez Esteban, member of the Trade Union of Employees of the Higher Electoral Court and requests that it be found inadmissible. According to the Government, the allegations initially stated that an application was made to the court for authorization to terminate the labour relationship with the employee, imposing a penalty of 15 days without wages, but it was subsequently stated that an agreement exists in the Higher Electoral Court under which he can be dismissed and, finally, it was stated that the Higher Electoral Court threatened the employee with dismissal, with no proceedings being required.
- *The case of Rigoberto Dueñas.* The Government indicates that, in a decision of 23 January 2006, the Supreme Court (Criminal Chamber) found Mr. Dueñas not guilty of abuse of power.

#### D. The Committee’s conclusions

- 822.** *The Committee recalls that this case refers to allegations of anti-union discrimination, including dismissals, aggression and detention of trade union leaders.*
- 823.** *As to the anti-union dismissal of the worker Macedonio Pérez Julián by the enterprise La Comercial S.A., the Committee notes that the Government states that the case brought by this worker against La Comercial S.A. was scheduled for 1 July 2003, but could not proceed because it had not been possible to notify the defendant and because Mr. Perez Julian failed to attend.*
- 824.** *As to the refusal by the enterprise La Comercial S.A. to bargain collectively with the Union of Workers of La Comercial S.A. and the appointment of an ad hoc committee of workers with which the signature of an agreement has been simulated, and pressure on workers to sign a collective agreement, the Committee notes that the Government states that, pursuant to Convention No. 87, Article 2, it is not the role of the labour inspectorate to intervene in negotiations between that body and the enterprise, since workers have the right to organize as they deem fit. As regards the enterprise’s refusal to negotiate with the trade union, the Committee notes that the Government states that this refusal was prompted by the failure of the trade union organization to comply with certain prior requirements such as exhausting the remedy of direct settlement or providing information on the number of trade union members. The Committee notes that the judicial authority based its decision in regard to the collective dispute on the same arguments. In this regard, the Committee points out that “the Collective Agreements Recommendation, 1951 (No. 91), stresses the role of workers’ organizations as one of the parties in collective bargaining; it refers to representatives of unorganized workers only when no organization exists. In these circumstances, direct negotiation between the undertaking and its employees, by-passing representative organizations where these exist, might be detrimental to the principle that negotiation between employers and organizations of workers should be encouraged and promoted” [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 785] and that” collective agreements should not be*

used to undermine the position of trade union organizations” [324th Report, Case No. 1973 (Colombia)]. Under these circumstances, the Committee requests the Government to take the necessary measures to enable the trade union to enter freely into negotiations; to ensure that workers are not subjected to intimidation to accept the collective agreement against their will and to ensure that the collective agreement with the non-unionized workers does not undermine the rights of workers belonging to the trade union. The Committee requests the Government to keep it informed in this respect.

- 825.** *As to the pending allegations concerning anti-union harassment of the members of the Union of Workers of Rafael Landívar University by the university authorities, in regard to which the Committee had requested the Government to carry out an investigation without delay to determine those truly responsible for these acts, the Committee regrets that the Government has not forwarded information and repeats its request to be kept informed in this regard.*
- 826.** *As to the dismissal of 50 workers belonging to the Union of Workers of the Asociación Movimiento Fe y Alegría in the work centres located in the department of Guatemala on 31 October 2001, of which only eight workers had requested to be reinstated before the law courts, the Committee notes that the Government states that the First Chamber of the Labour and Social Security Appeal Court, in a ruling dated 22 March 2004, accepted reinstatement proceedings brought by Ms. Claudia Griselda Perez Bolanos, that she was summoned by the Court so that she could be informed of the decision, but that she failed to appear. The Committee notes that the Chamber rejected the cases involving Leonel Miguel Castillo, Luis Alberto Cifuentes Samayoa and Hisleni Masiel Blanco Monterroso by reason of the fact that they had fixed-term contracts and that therefore the undertaking did not require authorization to dismiss them.*
- 827.** *As to the allegations of the anti-union dismissal of Mr. Edgar Alfredo Arriola Pérez and Mr. Manuel de Jesús Dionicio Salazar on 23 October 2002 after they applied to join the Union of Workers of the Higher Electoral Tribunal on 17 October of the same year, the Committee notes that according to the Government and to information provided by the Higher Electoral Court, Edgar Alfredo Arriola Perez and Manuel de Jesus Dionicio Salazar were employed by the Court but had been dismissed for failure to report to work, under the powers provided by the electoral law to appoint, dismiss and sanction officials and staff, in particular in the case of employees in positions classified as being “of trust” and that the workers had submitted only one application for review. Noting that the dismissal occurred only six days after the workers joined the trade union and that the only reason offered by the Higher Electoral Court for the dismissal was that “they were not right for the job”, the Committee points out that dismissal of workers on grounds of membership of an organization or for trade union activities violates the principles of freedom of association [see *Digest*, op. cit., para. 702]. Under these circumstances, the Committee requests the Government to take the necessary measures to review the decision of the Higher Electoral Court to dismiss its employees, only six days after they had joined a trade union, and to keep it informed in this regard.*
- 828.** *As regards the dismissal, likewise by the Higher Electoral Court, of Ulalio Jiménez Esteban and Victor Manuel Cano Granados, and the suspension of Pablo Menéndez Rodas, the Committee notes that the Government considers as not receivable and rejects the allegation, as it considers it vague and confused, regarding the dismissal of union member, Mr. Ulalio Jiménez Esteban, given that the allegations initially stated that an application was made for authorization to terminate the labour relationship with the employee, that a penalty of suspension without wages was imposed, that an agreement exists under which he can be dismissed and, finally, that he was threatened with dismissal. On the basis of this information, the Committee requests the complainant organization to provide information on the exact employment situation of that worker. In addition, the*

*Committee requests the Government promptly to send its observations regarding the alleged dismissal of Victor Manuel Cano Granados and the 15-day suspension of Pablo Rudolph Menéndez Rodas, who are members of the Trade Union of Employees of the Higher Electoral Court.*

- 829.** *As regards the new allegations submitted by the WCL to the effect that Mr. Rigoberto Dueñas, deputy secretary-general of the CGTG, who, as noted by the Committee in its earlier consideration of the case, had been absolved of offences of embezzlement, fraud and complicity [see 337th Report, para. 902], was convicted by the First Appeal Chamber, in an appeal brought by the Guatemalan Social Security Institute, for the offence of abuse of power, and sentenced to three years' imprisonment, that the sentence may be commuted at a cost of 100 quetzals per day, that the WCL alleges that the appeal was based on matters for which Mr. Dueñas had never been tried, the Committee notes the information provided by the Government that the Supreme Court (Criminal Chamber) has found Mr. Dueñas not guilty of abuse of power.*

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

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

- (a) *Concerning the allegations regarding the refusal by the enterprise La Comercial S.A. to recognize and to bargain collectively with the Union of Workers of La Comercial S.A. and the refusal to deduct union dues, and the new allegations presented by UNSITRAGUA on the appointment of an ad hoc committee of workers with which the signature of an agreement has been simulated, the Committee requests the Government to take the necessary measures to enable the trade union to enter freely into negotiations; to ensure that workers are not subjected to intimidation to accept the collective agreement against their will and to ensure that the collective agreement with the non-unionized workers does not undermine the rights of workers belonging to the trade union. The Committee requests the Government to keep it informed in this respect.*
- (b) *As to the allegations concerning the anti-union harassment of the members of the Union of Workers of Rafael Landívar University by the university authorities after the trade union had submitted a draft collective agreement on working conditions. The Committee repeats its request to the Government to carry out an investigation without delay to determine those truly responsible for these acts of anti-union harassment and to ensure that they are appropriately punished so that this kind of discrimination is avoided in future within the university. The Committee requests the Government to keep it informed in this respect.*
- (c) *Concerning the allegations of the anti-union dismissal of Mr. Edgar Alfredo Arriola Pérez and Mr. Manuel de Jesús Dionicio Salazar on 23 October 2002 after they applied to join the Union of Workers of the Higher Electoral Tribunal the Committee requests the Government to take the necessary measures to review the decision of the Higher Electoral Court to dismiss its employees, only six days after they had joined a trade union and to keep it informed in this respect.*

- (d) *The Committee requests the complainants to send information on the employment situation of the worker Ulalio Jimenez Esteban, member of the Trade Union of Employees of the Higher Electoral Court and, if he has indeed been dismissed, to send information on the specific reasons advanced for his dismissal. In addition, the Committee requests the Government promptly to send its observations regarding the alleged dismissal of Victor Manuel Cano Granados and the 15-day suspension of Pablo Rudolph Menéndez Rodas, who are members of the Trade Union of Employees of the Higher Electoral Court.*

CASE NO. 2259

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

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

- **the Trade Union of Workers of Guatemala (UNSITRAGUA)**
- **the Unified Trade Union Confederation of Guatemala (CUSG)**
- **the National Trade Union and People's Coordinating Body (CNSP)**
- **the General Confederation of Workers of Guatemala (CGTG)**
- **the Federation of Workers' Trade Unions of the Ministry of Public Health and Social Aid (FESITRAMSA)**
- **the Federation of Bank and Insurance Employees (FESEBS) and**
- **the Trade Union of Food and Allied Workers (FESTRAS)**

*Allegations: The complainants allege that the free exercise of the right to freedom of association has been violated through the supervision and interference of the State in managing union funds. UNSITRAGUA further alleges that numerous anti-union acts and dismissals have taken place in contravention of legislation and the collective agreement in force at various enterprises and institutions*

- 831.** The Committee last examined this case at its meeting in March 2005 [see 336th Report, paras. 431-465].
- 832.** The Government sent new observations in communications dated 16 March, 25 April, 15 June, 5, 26 and 28 July, 8 and 31 August, 29 September and 29 November 2005, and 4 and 30 January 2006.
- 833.** 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

834. At its meeting in March 2005, the Committee made the following interim recommendations regarding the allegations presented by the complainant [see 336th Report, para. 465]:

- (a) As regards the allegations concerning dismissals in the municipality of Chiquimulilla in the Santa Rosa Department, the Committee requests the Government to reply without delay and in specific terms to these allegations and asks the CGTG to communicate the exact number and names of workers dismissed and to indicate whether the dismissals affected only trade union members or other municipality workers as well.
- (b) As regards the allegations concerning the municipality of Puerto Barrios (refusal to reinstate workers dismissed despite having trade union immunity), the Committee requests the Government to forward a copy of the Appeal Court ruling as soon as it is handed down.
- (c) As regards the allegations concerning the municipality of Pueblo Nuevo Viñas, the Committee requests the Government to take the necessary measures to ensure that the union's general secretary and the two consultative council members are reinstated in their posts without loss of wages and to keep it informed in this regard. The Committee requests the Government to inform it of any administrative or judicial decisions regarding the other dismissals, and requests the CGTG to communicate the names of the workers concerned.
- (d) As regards the new allegations concerning the Office of the Attorney-General of the Nation (illegal dismissals, disciplinary proceedings, dismissals without just cause in connection with reorganization, and transfers intended to force union members to resign), the Committee requests the Government to send its comments without delay, with details of the administrative or judicial rulings handed down on this matter.
- (e) As regards the dismissal of Félix Alexander Gonzáles from the Office of the Attorney-General of the Nation, the Committee once again requests the Government to send a copy of the ruling handed down by the Second Chamber of the Appeals Court on this case.
- (f) As regards the new allegations concerning the port enterprise Santo Tomás de Castilla (acts of anti-union discrimination against reinstated members of the executive committee), the Committee requests the Government to send its observations in this respect without delay.
- (g) In relation to the alleged acts of anti-union discrimination directed against the Trade Union of Workers of the Secretariat of Public Works of the First Lady of the Republic, the Committee requests the Government to carry out an independent inquiry without delay into the alleged anti-union acts and to keep it informed in this regard. As regards the dismissal of two trade union officials, the Committee requests the Government to indicate whether Dilia Josefina Cobox Ramón and Edna Violeta Díaz de Reyes have taken legal action and, if so, to keep it informed of developments.
- (h) As regards the alleged pressure applied to members of the Trade Union of Workers of Bocadelli S.A., the Committee requests the Government to keep it informed of developments in the judicial proceedings under way concerning the four union members in question.
- (i) As regards the alleged supervision and interference by the State in the management of trade union funds, the Committee notes that the Government has not sent any information in this respect, and requests it once again to ensure that the functions of the Superintendent for Tax Administration are brought into line with the principles of the financial autonomy of trade union organizations and, in consultation with trade union confederations, to modify the legislation as necessary in this direction, and to keep it informed of measures taken in this respect.
- (j) The Committee once again notes with regret that the Government has not sent its observations regarding the allegation concerning the state of indirect dismissal reported at the Industrial Agriculture Cecilia S.A. by 34 workers belonging to the trade union

there, resulting from failure to pay salaries, assign tasks, etc., and requests the Government to send its comments in this respect without delay.

- (k) The Committee notes that the Government has not sent any information regarding the measures adopted to bring about a peaceful settlement, through dialogue between the parties, in the dispute between the Union of Independent Traders of the Central Campus of the University of San Carlos of Guatemala (SINTRACOMUSAC) and the University, and begin appropriate investigations into the allegations of violence; the Committee once again requests the Government to keep it informed in this regard.
- (l) As regards the failure to implement the order to reinstate Byron Saúl Lemus Lucero in the Supreme Electoral Tribunal, in relation to which the Committee had requested the Government to take the measures at its disposal to rectify promptly the situation, the Committee once again requests the Government to keep it informed in this regard.
- (m) The Committee requests the Government to solicit information from the employers' organizations concerned, with a view to having at its disposal their views, as well as those of the enterprises concerned, which have not yet communicated any information.

## B. The Government's new replies

**835.** In its communications of 16 March, 25 April, 15 June, 5, 26 and 28 July, 8 and 31 August, 29 September and 29 November 2005, and 4 and 30 January 2006, the Government sent the following observations to the recommendations made by the Committee in its previous examination of the case.

**836.** *Subparagraph (a) of the Committee's recommendations.* As regards the dismissals of workers in the municipality of Chiquimulilla, Santa Rosa Department, according to the Government, the judge of the Labour Court ruled that there existed a collective labour agreement dated 8 March 2004, which mentions the withdrawal of the requests made by workers, and that there is no claim for reinstatement.

**837.** *Subparagraph (b) of the Committee's recommendations.* As regards the allegations concerning the refusal to reinstate workers having trade union immunity dismissed in the municipality of Puerto Barrios, the Government attaches a copy of the ruling handed down by the Second Labour and Social Security Appeals Court ordering the reinstatement as at 3 September 2004 of the dismissed workers, with payment of the salaries they had ceased to receive. The said workers were actually reinstated on 2 February 2005.

**838.** *Subparagraph (c) of the Committee's recommendations.* As regards the allegations concerning the dismissal of ten workers in the municipality of Pueblo Nuevo Viñas, including the union's general secretary and the two consultative council members, the Government states that both the general secretary and the consultative council members were in fact reinstated in their same positions and with the same salary conditions. As regards the other seven workers, the Government states that they were not reinstated on account of their not falling within the scope of articles 209 and 380 of the Labour Code.

**839.** *Subparagraph (d) of the recommendations.* As regards the allegations concerning illegal dismissals, disciplinary proceedings, dismissals without just cause in connection with reorganization, and transfers intended to force workers belonging to UNSITRAGUA to resign, the Government states that, according to the Office of the Attorney-General of the Nation, the said dismissals have not occurred and that in any case, if they did occur, it was for justified reasons. As regards the dismissal in connection with reorganization, this was accepted by the workers. In the case of Mr. Eliseo Rivera Castro and Ms. Laura Lili Alvarez, who challenged their dismissals, the Labour Justice Tribunals are currently determining their legal situation. As regards the allegation concerning the transfers, according to the Office of the Attorney-General, those transfers are provided for in the



Collective Agreement on Working Conditions and were limited to a transfer within the headquarters of the Office of the Attorney-General.

- 840.** *Subparagraph (e) of the Committee's recommendations.* As regards the dismissal from the Office of the Attorney-General of the Nation of Félix Alexander Gonzáles Barrios, who had asked to be reinstated, the Government once again states, in its communication of 16 March 2004, that his request was rejected since, in the view of the Second Chamber of the Labour and Social Security Appeals Court on 24 June 2003, he was dismissed with just cause. The Government submits a copy of the ruling handed down by the Second Chamber of the Labour and Social Security Appeals Court. The Government states, moreover, that the National Civil Service Board had rejected the appeal lodged by Mr. González Barrios against the dismissal on 8 October 2003 and that no appeals had been lodged against that decision.
- 841.** *Subparagraph (f) of the Committee's recommendations.* As regards the allegations concerning acts of anti-union discrimination against the members of the executive committee of the Union of Dockers, Loaders, Unloaders and Other Workers of the port enterprise Santo Tomás de Castilla involving economic aspects and working conditions, the Government states that it commissioned a labour inspector to investigate the complaint, the inspector having ascertained that the workers are being provided with adequate protective equipment, that the exhausting tasks have been eliminated through the allocation of new tasks to the workers in a new cargo hold, that in regard to the payment of a lower rate, an additional item has, in compliance with an order handed down by the judicial authority, been created in the payslips and that they enjoy the benefits received by other workers. The inspector also indicated that he had not found proof of any other acts of anti-union discrimination.
- 842.** With respect to subparagraph (g) of the recommendations concerning the alleged acts of anti-union discrimination against members of the Trade Union of Workers of the Secretariat of Public Works of the First Lady of the Republic, in regard to which the Committee had requested the Government to carry out an independent inquiry without delay into the alleged anti-union acts and to indicate whether the dismissed workers Dilia Josefina Cobos Ramón and Edna Violeta Díaz Reyes had taken legal action, the Government states that, having consulted the seven competent labour tribunals, it was established that the dismissed workers have not undertaken any legal action.
- 843.** *Subparagraph (h) of the Committee's recommendations.* As regards the alleged pressure applied to members of the Union of Workers of Bocado S.A., the Government states that the action was filed in the Second Jurisdictional Labour and Social Security Court, which confirmed the judgement ordering the company Bocado de Guatemala to repay to the workers, Damacio Salguero López, Edgar Giovanni Lara García, Julio César Rodas Maldonado and Miguel Angel Morayata Arévalo, the amounts deducted from their salaries under the headings of preventive fund, added value and weekly rest day. In addition, a fine was imposed on the company and it was ordered to refrain in future from making any kinds of deduction not provided for under the law.
- 844.** *Subparagraph (j) of the recommendations.* As regards the allegations concerning the state of indirect dismissal reported at the Agrícola Industrial Cecilia S.A. company by 34 workers on account of failure to pay salaries and assign tasks, the Government states that the Fourth Chamber of the Labour and Social Security Appeals Court dismissed the indirect dismissal incident put forward by the workers on 4 November 2003 (the Government attaches a copy of the corresponding decision).
- 845.** *Subparagraph (k) of the Committee's recommendations.* With regard to the measures adopted to bring about a peaceful settlement, through dialogue between the parties, in the

dispute between the Union of Independent Traders of the Central Campus of the University of San Carlos of Guatemala (SINTRACOMUSAC) and the University, the Government states that the members of the University and of the Union were invited to a meeting with the members of the Tripartite Commission on International Labour Affairs to explain their problem. During the course of that meeting, which took place on 9 June 2005, the representative of SINTRACOMUSAC stated that the trade union organization had, since its foundation, been subjected to repression and its members threatened, and that they were not permitted to sell handmade products on the University premises. For his part, the representative of the University denied that version and invited the Union to enter into discussions with the University regarding the siting of the points of sale, with a lease contract. The Government states that the parties undertook to reach a direct agreement and that the Tripartite Commission would be kept informed of the results achieved.

**846.** *Subparagraph (l) of the recommendations.* As regards the failure to implement the order to reinstate Mr. Byron Saúl Lemus Lucero issued by the Supreme Electoral Tribunal, the Government states that, on 8 September 2003, the Third Chamber of the Labour and Social Security Appeals Court annulled the reinstatement decision. Mr. Lemus Lucero applied for *amparo* on 25 November 2003 and, on 29 September 2004, the Chamber of Amparo of the Supreme Court of Justice turned down his application. The Government attaches a copy of that legal decision.

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

**847.** *The Committee takes note of the Government's observations in response to the recommendations made by the Committee in its previous examination of the case.*

**848.** *As regards subparagraph (a) of the recommendations relating to allegations concerning dismissals in the municipality of Chiquimulilla in the Santa Rosa Department, the Committee notes that according to the Government, the judge of the first-level Labour Court has informed that, under the collective agreement of 8 March 2004, the workers concerned have withdrawn their requests and that there is no claim for reinstatement currently pending.*

**849.** *As regards subparagraph (b) of the Committee's recommendations relating to the allegations concerning the refusal to reinstate workers having trade union immunity dismissed in the municipality of Puerto Barrios, the Committee observes that the Government attaches a copy of the decision by the Second Labour and Social Security Appeals Court ordering the reinstatement, as at 3 September 2004, of the dismissed workers, with payment of the salaries they had ceased to receive, and that the said workers were actually reinstated on 2 February 2005.*

**850.** *As regards subparagraph (c) of the recommendations relating to the allegations concerning the dismissal of ten workers in the municipality of Pueblo Nuevo Viñas, including the union's general secretary and the two consultative council members, the Committee takes note of the Government's information to the effect that both the general secretary and the consultative council members were in fact reinstated in their same positions and with the same salary conditions, but that the other seven workers were not reinstated on account of their not falling within the scope of articles 209 and 380 of the Labour Code, which refer, respectively, to the trade union immunity of founders and to the trade union immunity that protects workers following presentation of the list of claims.*

**851.** *The Committee regrets to note that the CGTG has not communicated the names of the workers from the municipality of Pueblo Nuevo Viñas affected by the dismissal, as it had been requested to do in the previous examination of the case. Under these circumstances,*

*the Committee does not have sufficient information to continue its examination of the allegations.*

- 852.** *As regards subparagraph (d) of the recommendations relating to the allegations concerning illegal dismissals, disciplinary proceedings, dismissals without just cause in connection with reorganization, and transfers intended to force workers belonging to UNSITRAGUA in the Office of the Attorney-General of the Nation to resign, the Committee notes the Government's statement that, according to the Office of the Attorney-General of the Nation, the dismissals occurred for justified reasons in some cases, to the reorganization of the entity, accepted by the workers, in others, and that in two cases in which the workers challenged their dismissals the legal situation of those workers is awaiting a decision by the court. The Committee also notes that, according to the Office of the Attorney-General, those transfers are provided for in the Collective Agreement on Working Conditions and were limited to a transfer within the premises of the headquarters of the Office of the Attorney-General. The Committee requests the Government to keep it informed regarding the pending legal decisions and to inform it whether the other dismissed or transferred workers have initiated legal or administrative proceedings and, if so, to inform it of the decisions taken.*
- 853.** *As regards subparagraph (e) concerning the dismissal from the Office of the Attorney-General of the Nation of Félix Alexander González Barrios, in respect of which the Committee had requested the Government to send it a copy of the ruling handed down by the Second Chamber of the Appeals Court, the Committee notes that, according to the decision of the Appeals Court, a copy of which the Government attaches, the request for reinstatement was rejected because the dismissal was considered to have been effected with just cause.*
- 854.** *As regards subparagraph (f) of the recommendations concerning acts of anti-union discrimination against the members of the executive committee of the Union of Dockers, Loaders, Unloaders and Other Workers of the port enterprise Santo Tomás de Castilla involving economic aspects and working conditions, the Committee notes that, according to the Government, the labour inspector commissioned to investigate the complaint ascertained that the workers are being provided with adequate protective equipment, that the exhausting tasks have been eliminated through the allocation of new tasks to the workers in a new cargo hold, that in regard to the payment of a lower rate, an additional item has, in compliance with an order handed down by the judicial authority, been created in the payslips and that they enjoy the benefits received by other workers.*
- 855.** *As regards subparagraph (g) of the recommendations concerning alleged acts of anti-union discrimination against members of the Trade Union of Workers of the Secretariat of Public Works of the First Lady of the Republic, in regard to which the Committee had requested the Government to carry out an independent inquiry without delay into the alleged anti-union acts and to indicate whether Dilia Josefina Cobos Ramón and Edna Violeta Díaz de Reyes had taken legal action, the Committee takes note of the information provided by the Government to the effect that the dismissed workers have not undertaken any legal action. The Committee regrets to note, however, that the Government does not state whether it has initiated an independent inquiry into the alleged acts of anti-union discrimination, as had been requested in the previous examination of the case, and requests it to do so without delay and to keep it informed in that regard.*
- 856.** *As regards subparagraph (h) of the recommendations concerning the alleged pressure applied to members of the Union of Workers of Bocado S.A., the Committee notes the Government's statement that the Second Jurisdictional Labour and Social Security Court confirmed the judgement ordering the company Bocado de Guatemala to repay to the workers Damacio Salguero López, Edgar Giovanni Lara García, Julio César Rodas*

*Maldonado and Miguel Angel Morayata Arévalo the amounts unduly deducted from their salaries under the headings of preventive fund, added value and weekly rest day, that a fine was imposed on the company for having made those deductions, and that the company was ordered to refrain in future from making any kinds of deduction not provided for under the law.*

- 857.** *As regards subparagraph (i) concerning the alleged supervision and interference by the State in the management of trade union funds, the Committee regrets to note once again that the Government has not sent any information in this respect, and requests it once again to ensure that the functions of the Superintendent for Tax Administration are brought into line with the principles of the financial autonomy of trade union organizations and, in consultation with the trade union confederations, to modify the legislation as necessary in this direction, and to keep it informed of measures taken in this respect.*
- 858.** *As regards subparagraph (j) of the recommendations relating to the allegations concerning the state of indirect dismissal reported at the Agrícola Industrial Cecilia S.A. company by 34 workers on account of failure to pay salaries and assign tasks, the Committee takes note of the Government's statement that the Fourth Chamber of the Labour and Social Security Appeals Court dismissed the indirect dismissal incident, reported by the workers, on 4 November 2003 (the Government attaches a copy of the corresponding decision).*
- 859.** *As regards subparagraph (k) of the Committee's recommendations relating to the measures adopted to bring about a peaceful settlement through dialogue between the parties, in the dispute between the Union of Independent Traders of the Central Campus of the University of San Carlos of Guatemala (SINTRACOMUSAC) and the University, the Committee takes note of the Government's statement that at a meeting held on 9 June 2005 between the members of the Tripartite Commission on International Labour Affairs, of the University and of the Union, the parties undertook to reach a direct agreement, and that the Tripartite Commission would be kept informed of the results achieved. The Committee requests the Government to keep it informed in regard to the direct agreement to be reached.*
- 860.** *As regards subparagraph (l) of the recommendations concerning the failure to implement the order to reinstate Mr. Byron Saúl Lemus Lucero issued by the Supreme Electoral Tribunal, the Government states that on, 8 September 2003, the Third Chamber of the Labour and Social Security Appeals Court annulled the reinstatement decision and that the Chamber of Amparo of the Supreme Court of Justice, on 29 September 2004, turned down the application for amparo that Mr. Lemus Lucero had presented on 25 November 2003.*

## **The Committee's recommendations**

- 861.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) As regards the allegations concerning illegal dismissals, disciplinary proceedings, dismissals without just cause in connection with reorganization, and transfers intended to force workers belonging to UNSITRAGUA in the Office of the Attorney-General of the Nation to resign, the Committee requests the Government to keep it informed regarding the pending legal decisions and to inform it whether the other dismissed or transferred workers have initiated legal or administrative proceedings and, if so, to inform it of the decisions taken.*

- (b) *As regards the alleged acts of anti-union discrimination against members of the Trade Union of Workers of the Secretariat of Public Works of the First Lady of the Republic (Dilia Josefina Cobos Ramón and Edna Violeta Díaz de Reyes), the Committee requests the Government to carry out an independent inquiry without delay and to keep it informed in that regard.*
- (c) *As regards the alleged supervision and interference by the State in the management of trade union funds, the Committee once again requests the Government to ensure that the functions of the Superintendent for Tax Administration are brought into line with the specific principles of the financial autonomy of trade union organizations and, in consultation with the trade union confederations, to modify the legislation as necessary in this direction, and to keep it informed of measures taken in this respect.*
- (d) *In regard to the undertaking by the Union of Independent Traders of the Central Campus of the University of San Carlos of Guatemala (SINTRACOMUSAC) and the University to resolve, by means of a direct agreement, the conflict between them, reached during the meeting held on 9 June 2005 within the framework of the Tripartite Commission on International Labour Affairs, the Committee requests the Government to keep it informed in regard to the direct agreement to be reached.*

CASE NO. 2339

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

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

- **the Trade Union of Workers in Civil Aviation (USTAC) and**
- **the Union of Workers in the Ministry of Agriculture,  
Cattle-raising and Food (SITRAMAGA)**

*Allegations: The complainant alleges: (1) the dismissal of Ms. Mari Cruz Herrera, a member of the USTAC trade union, in violation of the collective agreement in force and the possibility of dismissals of workers hired on the basis of “line 029” (of the state budget) in violation of Conventions Nos. 87 and 98; (2) the possibility that 40 workers, most of them members of USTAC, would be left without employment as a result of privatization through the contracting out of several of the services of the Directorate General of Civil Aviation; (3) the dismissal of union members Emilio Francisco Merck Cos and Gregorio Ayala Sandoval for participating as observers in the negotiation of the draft collective agreement with the Ministry of Agriculture, Cattle-raising and Food*

**862.** The complaints were made in a communication from the Trade Union of Workers in Civil Aviation (USTAC) dated 1 April 2004 and in a communication from the Union of Workers

in the Ministry of Agriculture, Cattle-raising and Food (SITRAMAGA) dated 20 February 2005. USTAC provided additional information in a communication dated 25 May 2004. The Government sent its observations in communications dated 25 April, 5 and 26 July, and 22 September 2005.

- 863.** 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**

**864.** In its communications of 1 April and 25 May 2004, the Trade Union of Workers in Civil Aviation (USTAC) alleges that on 31 December 2003, the Directorate General of Civil Aviation (La Aurora Airport) dismissed Ms. Mari Cruz Herrera for the sole reason that she was a member of the trade union and participated in union activity, violating article 13 of the collective agreement on working conditions. The joint committee mentioned in the collective agreement and the labour inspectorate both ruled in favour of the union member (the report by the labour inspectorate is attached in an annex) but the employer took no notice of the recommendations to reinstate the dismissed worker to her post. USTAC also alleges that all workers hired on the basis of "line 029" (of the state budget) are threatened with dismissal for any reason, including those in violation of Conventions Nos. 87 and 98. In addition, USTAC is concerned about the way in which attempts are being made to privatize some services of the Directorate General of Civil Aviation by contracting them out, which would leave 40 workers, most of whom are union members, without employment. USTAC also makes reference to cases of sexual harassment and the dismissal of three pregnant workers, but without making apparent any link to the exercise of trade union rights.

**865.** In its communication of 20 February 2005, the Union of Workers in the Ministry of Agriculture, Cattle-raising and Food (SITRAMAGA) alleges that on 18 July 1998 the general assembly of the union approved the draft collective agreement on working conditions and appointed delegates Mr. Mario Roberto Contreras Cetina, Mr. Julio Ronaldo Rodas Oroszco and Mr. José Daniel Avalos Ramos as its representatives to the direct negotiations, and gave them ad referendum authority. As the negotiations were not advancing and there was beginning to be negative speculation about the negotiators, particularly regarding their integrity and reputation, on 27 September 1998 the general assembly decided to appoint Emilio Francisco Merck Cos and Gregorio Ayala Sandoval as observers to the direct negotiations. On 18 October 1998, as it was not possible to negotiate the collective agreement directly, the general assembly agreed to bring a socio-economic collective action before the competent labour judge; later the Fifth Judge of Labour and Social Services of the First Economic Zone of Guatemala took on the case and decreed that neither party could take any reprisals against the other and that no contract could be terminated without his authorization. Nonetheless, SITRAMAGA maintains that on 24 November 1998, Ministry authorities drew up two reports accusing Mr. Emilio Francisco Merck Cos and Gregorio Ayala Sandoval of abandoning their posts and on 20 January 1999 they were dismissed without following the procedure as set out in the law, that is, without presenting charges to them or giving them a hearing to present the punishments that they considered appropriate, in accordance with the civil service law and the collective agreement on working conditions that regulates employer-worker relations within the Ministry of Agriculture, Cattle-raising and Food.

**866.** SITRAMAGA adds that on 24 February 1999 it was reported to the Fifth Labour Judge that Mr. Emilio Francisco Merck Cos and Mr. Gregorio Ayala Sandoval had been dismissed without the due administrative process and without legal authorization and, principally, as an anti-union reprisal for their role as observers to the negotiations

appointed by the general assembly; as a result of this report, on 25 February 1999, the Fifth Labour Judge ordered the immediate reinstatement of the men, with the same economic and working conditions. However, the Ministry of Agriculture, Cattle-raising and Food appealed against the order and, surprisingly, on 31 May 1999 the Third Chamber of the Court of Appeal upheld the appeal and revoked the order for reinstatement given by the Fifth Labour Judge. In the light of such a miscarriage of justice the workers presented an appeal for protection of their constitutional rights (amparo) before the Supreme Court of Justice but unfortunately and incredibly, amparo was denied, due to an error in the appeal, without consideration of the fact that the union leaders concerned had no charges made against them, which was the basis of their claim for amparo. A new appeal was presented to the Constitutional Court, which denied amparo and confirmed the decision of the Supreme Court of Justice. SITRAMAGA has not sent the text of the rulings handed down in this case.

## B. The Government's reply

- 867.** In its communications of 25 April, 5 and 26 July, and 22 September 2005, the Government stated, as regards the allegations made against the Directorate General of Civil Aviation, that 98 per cent of the technicians who maintain the equipment in the control tower and centre (telecommunications and radar including the tower and radar operators, known as air-traffic controllers), are hired under budget line 029 (technical/professional services). According to rule II of the manual of the Office of the Auditor General and the National Civil Service Office: "A contract created under budget line 029 – other remuneration of temporary staff – does not create a labour relationship between the parties, so payment for services is not for any post or employment at public expense". Therefore they are not qualified as workers or public employees so they do not have the right to organize. The Trade Union of Workers in Civil Aviation (USTAC) has recruited members who are employed under that budget line, promising to defend and secure their contracts, in many cases misleading people by taking advantage of their lack of knowledge about the laws regulating this right. As regards the contracting out of services to certain companies, this happened under the last two governments; if services were contracted out – which at the moment they are not – it would be done in such a way as to cause as little harm to the working class as possible. On the other hand, it is possible that the dismissed employees mentioned in the complaint were people who provided their services under budget line 029, in which case they were not dismissed but their contracts were simply not renewed; Ms. Beatriz Eugenia Calvo Pérez, then head of human resources, no longer provides her services to this department as her contract was rescinded.
- 868.** Regarding the allegations made by the organization SITRAMAGA, the Government states that Mr. Emilio Francisco Merck Cos and Mr. Gregorio Ayala Sandoval were dismissed because they were absent from work, did not provide any justification whatsoever and did not have the relevant permission from their immediate superior. Even if it is true that these men were nominated as observers in the direct negotiations for the collective agreement on working conditions, which was being negotiated at the time, they could not do anything that would result in their not fulfilling their duties as public employees. Absenting themselves from their work (for more than three weeks) was considered reason enough to dismiss them without responsibility of the Ministry of Agriculture, Cattle-raising and Food, as indicated in the Law on Unionization and Regulation of Strikes by State Workers in article 4, paragraph (c), third sub-paragraph (c)(1); and the Civil Service Law in article 76.
- 869.** The Government adds that Mr. Gregorio Ayala Sandoval, after having been dismissed in November 1998, was contracted again in March 2003, as a second worker operative. In addition, the Ministry of Agriculture, Cattle-raising and Food negotiated and signed a collective agreement on working conditions with the Union of Workers in the Ministry of

Agriculture, Cattle-raising and Food (SITRAMAGA), which is still in force. The Government notes that this shows that it has made serious efforts to ensure freedom of association and attaches documents giving evidence of the absence from work of Mr. Merck Cos and Mr. Ayala Sandoval.

### C. The Committee's conclusions

- 870.** *The Committee observes that in this case the complainant alleges: (1) the dismissal of Ms. Mari Cruz Herrera, a member of the USTAC trade union, in violation of the collective agreement in force and the possibility of dismissals of workers hired on the basis of "line 029" (of the state Budget) in violation of Conventions Nos. 87 and 98; (2) the possibility that 40 workers, most of them members of USTAC, would be left without employment as a result of privatization through the contracting out of several of the services of the Directorate General of Civil Aviation; (3) the dismissal of union members Emilio Francisco Merck Cos and Gregorio Ayala Sandoval for participating as observers in the negotiation of the draft collective agreement with the Ministry of Agriculture, Cattle-raising and Food.*
- 871.** *As regards the alleged dismissal of Ms. Mari Cruz Herrera for being a member of the trade union USTAC and participating in union activities, the Committee notes that, according to the complainant, this dismissal was made in violation of the collective agreement and both the joint committee established by the collective agreement and the labour inspectorate had ruled in favour of the union member. However, the Committee notes that the labour inspectorate undertook action to conciliate the parties and indicated the union member's right to have recourse to the tribunals, in accordance with the report sent in annex by USTAC. According to that report, the employer's representative is committed to make efforts to find possibilities of reinstatement in the Civil Service; lastly, the report of the labour inspectorate shows that the union member concerned had been contracted under "line 029" (of the state budget). The Committee takes note of the Government's statements regarding this type of contract that it "does not create a labour relationship between the parties, so payment for services is not for any post or employment at public expense. Therefore they are not qualified as workers or public employees so they do not have the right to organize".*
- 872.** *In this regard, the Committee reminds the Government that, according to Article 2 of Convention No. 87, workers and employers, without distinction whatsoever, shall have the right to establish and to join organizations of their own choosing; workers also enjoy the guarantees provided in Convention No. 98 against acts of anti-union discrimination.*
- 873.** *Therefore, the Committee urges the Government to fully respect Conventions Nos. 87 and 98, and in particular to guarantee the freedom of association of the many workers contracted under "line 029" (of the state budget) and to take measures to reinstate union member Mari Cruz Herrera to her post in accordance with the agreement made with the employer's representative before the labour inspectorate, especially given that the current system does not allow that worker, a union member, any right to freedom of association. The Committee requests the Government to keep it informed in this respect.*
- 874.** *Regarding the alleged possibility that 40 workers, most of them members of USTAC, could be left without employment as a result of privatization through contracting out several of the services of the Directorate General of Civil Aviation, the Committee points out that this allegation was made by USTAC in its communications of 1 April and 25 May 2004 and that since then no new communications have been received from USTAC confirming that possibility. Therefore, unless the complainant can provide new information, the Committee will simply draw attention to the principle that the Committee 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 [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 935]. Also, the Committee believes that rationalization and staff reduction processes should involve consultations or attempts to reach agreement with the trade union organizations, without giving preference to proceeding by decree and ministerial decision [see **Digest**, *op. cit.*, para. 936].*

- 875.** *Therefore, the Committee requests the Government to duly consult the trade union organization USTAC in any restructuring or privatization process in the Directorate General of Civil Aviation.*
- 876.** *Regarding the allegation of the dismissal of union members Mr. Emilio Francisco Merck Cos and Mr. Gregorio Ayala Sandoval for participating as observers in the negotiation of the draft collective agreement with the Ministry of Agriculture, Cattle-raising and Food, the Committee notes that, according to the Government, they were absent from work for more than three weeks, did not give any justification whatsoever and did not have the permission of their immediate superior. The Committee notes that the Government states that Mr. Gregorio Ayala Sandoval was later contracted again in the Ministry of Labour and that a collective agreement with the trade union was signed. The Committee notes the complainant's indication that, apart from the court of first instance, all the other courts, including the Constitutional Court, ruled against both union members and that they were nominated as observers to the collective bargaining by the general assembly of the union. In order to examine the allegations with all the elements, and taking into account that representatives of the employer must have known about the participation of both union members in the collective bargaining, the Committee requests the Government and the trade union SITRAMAGA to send the text of all rulings regarding the dismissal of union members Mr. Emilio Francisco Merck Cos and Mr. Gregorio Ayala Sandoval.*

## **The Committee's recommendations**

- 877.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee urges the Government to fully respect Conventions Nos. 87 and 98 and to guarantee the freedom of association of the many workers contracted under "line 029" (of the state budget) and to take measures to reinstate union member, Mari Cruz Herrera, to her post in accordance with the agreement made with the employer's representative before the labour inspectorate, especially given that the current system does not allow that worker, a union member, any right to freedom of association. The Committee requests the Government to keep it informed in this respect.*
  - (b) The Committee requests the Government to duly consult the trade union organization USTAC in any restructuring or privatization process in the Directorate General of Civil Aviation.*
  - (c) The Committee requests the Government and the trade union SITRAMAGA to send the text of all rulings regarding the dismissal of union members Mr. Emilio Francisco Merck Cos and Mr. Gregorio Ayala Sandoval.*

CASE NO. 2397

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

**Complaint against the Government of Guatemala  
presented by  
the Workers' Union of the National Literacy Committee (SINCONALFA)  
supported by  
the National Federation of Trade Unions of State Employees of Guatemala  
(FENASTEG)**

*Allegations: Threat of dismissal of the members of the executive committee of the complainant trade union; start of disciplinary proceedings against the general secretary of the trade union; obstacles and delaying tactics put in the way of collective bargaining by the National Literacy Committee*

**878.** The complaint is included in a communication from the Workers' Union of the National Literacy Committee (SINCONALFA) dated 19 November 2004, supported by the National Federation of Trade Unions of State Employees of Guatemala (FENASTEG) in a communication of the same date. SINCONALFA submitted additional information in a communication dated 14 January 2005. The Government replied in a communication dated 4 January 2006.

**879.** 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 complainant's allegations**

**880.** In its communication of 19 November 2004, the Workers' Union of the National Literacy Committee (SINCONALFA) alleges that its executive committee was threatened with dismissal without the judicial authorization required by law.

**881.** The complainant trade union alleges a lack of good will to bargain collectively by the National Literacy Committee, resulting in the trade union having to declare a socio-economic dispute before the judicial authority, which has entered the arbitration phase; nevertheless, the representatives of the National Literacy Committee have brought legal proceedings and have engaged in delaying tactics.

**882.** In its communication dated 14 January 2005, the complainant trade union indicates that the Court of Arbitration handed down an arbitral award in which it approved the collective accord on working conditions. However, the National Literacy Committee lodged an appeal against the award.

**883.** The complainant trade union adds that the National Literacy Committee, for the purpose of revenge, began disciplinary proceedings against the general secretary of the trade union, asking that he justify his arrivals at and departures from the workplace, when in reality he has never been provided with the relevant card to do so.

## B. The Government's reply

- 884.** In its communication dated 4 January 2006, the Government indicates that the State has followed up the collective dispute declared by the complainant trade union, in which an arbitral award was handed down for the conciliation of the parties, which was appealed, the appeal being granted by way of a decision dated 13 December 2004. On 5 September 2005, an application was entered for the protection of constitutional rights (*amparo*) with the Chamber of Amparo and Antejuicio of the Supreme Court of Justice, where it is still pending.
- 885.** The Government adds that the State of Guatemala grants its inhabitants the legal means to apply to the competent bodies so that their rights can be restored, offenders can be found responsible and appear before the courts where they will be subject to the weight of the law.

## C. The Committee's conclusions

- 886.** *The Committee observes that in this complaint the complainant trade union alleges that the members of its executive committee were threatened with dismissal, disciplinary proceedings were started against its general secretary and the National Literacy Committee put obstacles and delaying tactics in the way of collective bargaining.*
- 887.** *With regard to the alleged threat to dismiss the members of the Executive Committee of the complainant organization without the judicial authorization required by law, and the start of disciplinary proceedings against its general secretary, given the lack of specific observations by the Government, and noting that the alleged facts occurred during the process of collective bargaining, and, according to the complainant trade union, "were for the purpose of revenge", the Committee emphasizes the principle that no person shall be prejudiced in his employment by reason of his trade union membership or legitimate trade union activities, whether past or present [see **Digest of decisions and principles of the Freedom of Association Committee**, 1996, 4th edition, para. 690], and that this principle is particularly important in the case of trade union leaders. The Committee also recalls the principle whereby the government is responsible for preventing all acts of anti-union discrimination and it 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**, op. cit., para. 738]. This being the case, the Committee requests the Government to ensure that no leader of the Workers' Union of the National Literacy Committee – and in particular its general secretary – is dismissed or prejudiced on account of his legitimate trade union activities, and to keep it informed of the measures taken in this regard.*
- 888.** *With respect to the alleged obstacles to collective bargaining and delaying tactics taken by the National Literacy Committee, the Committee notes that in its second communication the complainant organization indicated that the collective dispute was submitted to the judicial authority, which handed down an arbitral award in which the collective accord on working conditions was approved. The Committee also notes that according to the Government, the National Literacy Committee lodged an appeal with the judicial authority against the abovementioned arbitral award, an appeal that resulted in a decision dated 13 December 2004. Also, according to the Government, on 5 September 2005 an application was entered for the protection of constitutional rights with the Supreme Court of Justice, which is still pending. The Committee requests the Government to keep it informed of the result of the application for the protection of constitutional rights presented to the Supreme Court. On a general note, the Committee recalls that the principle that both employers and trade unions should negotiate in good faith and make*

*efforts to reach an agreement means that any unjustified delay in the holding of negotiations should be avoided [see Digest, op. cit., para. 816].*

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

**889.** *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 ensure that no leader of the Workers' Union of the National Literacy Committee – and in particular its general secretary – is dismissed or prejudiced on account of his legitimate trade union activities, and to keep it informed of the measures taken in this regard.*
- (b) The Committee requests the Government to keep it informed of the result of the amparo proceedings lodged before the Supreme Court relating to the arbitral award handed down by the judicial authority in which the collective accord on working conditions was approved.*

CASE NO. 2413

INTERIM REPORT

### **Complaint against the Government of Guatemala presented by the Trade Union of Workers of Guatemala (UNSITRAGUA)**

*Allegations: The complainant organization alleges that the forces of law and order violently repressed trade union demonstrations (accompanied by associations of peasants and other organizations defending human rights) in March 2005, held to protest the signing of a free trade agreement, as a result of which four workers died (including a peasant worker leader) and a further 11 were injured, and that arrest warrants were issued for trade union leaders, and that the coordinator of the UNSITRAGUA Commission and Legal Office was prevented from leaving the country, and the President of the Republic used the media to refer in disrespectful terms to trade union leaders. In addition, the complainant organization alleges anti-union dismissals at the Ingenio Magdalena S.A., finca El Cobano (alleging also that the authorities of this undertaking appealed against the decision granting legal personality to the enterprise's trade union and that the administrative*

*authority decided the appeal in favour of the enterprise in an irregular manner), in the municipality of El Tumbador, San Marcos, in the municipality of San Juan Chamelco, department of Alta Verapaz, and in the San Vicente Tuberculosis Sanatorium. Lastly, the complainant organization alleges the closure of the undertaking Bocado S.A., following the submission of a draft collective agreement on working conditions by the enterprise's trade union*

- 890.** The complaint is contained in communications dated 17 March, 19 April, 11, 13 and 27 May, 13 July and 30 August 2005 from the Trade Union of Workers of Guatemala (UNSITRAGUA).
- 891.** The Government sent its observations in communications dated 5 and 7 July 2005.
- 892.** 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 complainant's allegations**

- 893.** In its communications dated 17 March, 19 April, 11, 13 and 27 May, 13 July and 30 August 2005, the Trade Union of Workers of Guatemala (UNSITRAGUA) alleges the following:

##### *Freedom of association and public freedoms*

- On 14 March 2005, the trade union organizations of Guatemala, together with peasant, indigenous, gender, human rights and student organizations convened a national stoppage and a march terminating in the Plaza de la Constitución in protest against the free trade agreement with the United States. During the course of the march, the national civil police intervened, on orders from the President of the Republic, and began to fire tear gas at the demonstrators. In addition, the complainants allege that the Government ordered the arrest of the leaders of the protesting organizations.
- On 14 March 2005, the President of the Republic used the media to refer in disrespectful terms to the leaders of the CGTG and the CNSP trade union organizations and stated that he was sorry that only one person had died during the demonstration.
- On 15 March 2005, members of the national army and of the national civil police fired on demonstrators from trade unions and other organizations, on the SELEGUA V Bridge at kilometre 287.5 of the Interamerican highway, in the village of Los Naranjales, municipality of Colotenango, Department of Huhuetenango, killing Juan Esteban López, leader of the Committee of Peasant Unity and member of the National Coordination of Peasant Organizations and the workers José Sánchez Gómez, Pedro Pablo Domingo García and Miguel Angel Velásquez Díaz, and gravely wounding a further 11 workers (Esteban Velásquez Jiménez, Alfonso Ramiro García

López, Marcos Pérez Ramos, Santiago Pablo Morales, Domingo Ramos Gabriel, Ricardo Leiva, Julián García Mendoza, Pascual Sales Méndez, José Sánchez Gómez, Pedro Pablo Domingo García and Miguel Angel Velásquez Díaz).

- On 16 March 2005, the coordinator of the UNSITRAGUA Commission and Legal Office was prevented from leaving the country.

### *Acts of anti-union discrimination*

#### Ingenio Magdalena S.A., finca El Cobano

- On 28 January 2005, workers jointly proposed collective bargaining to the employer and requested the Labour Inspectorate to forward their list of demands. The Labour and Welfare Court in Escuintla cautioned the parties to refrain from taking mutual reprisals. On 7 February 2005, upon learning of the workers' intention to engage in collective bargaining and to establish a trade union, the enterprise dismissed 18 workers. On 11 March 2005, the judicial authorities ordered the reinstatement of the workers and the enterprise appealed against the order, stating that they were not employees of the undertaking. On 17 March 2005, the trade union was recognized. On 23 March 2005, a further three workers were dismissed, thereby completing the dismissal of all the workers who had been involved in establishing the trade union. The judicial authorities ordered that these workers also be reinstated and again the enterprise appealed against the order, on the grounds that they were not employees. Lastly, the undertaking lodged an appeal to revoke the resolution recognizing legal personality and adopting the articles of incorporation of the Trade Union of Workers of the finca El Cobano Ingenio Magdalena S.A. (SITRAFECIMASA) and the Ministry of Labour, ignoring rules of due process, decided to modify the name of the trade union by deleting the reference to Ingenio Magdalena S.A.

#### Municipality of San Juan Chamelco, department of Alta Verapaz

- On 5 January 2005, five workers were dismissed (their names are listed by the complainant organizations) belonging to the Trade Union of Workers of the municipality of San Juan Chamelco, department of Alta Verapaz. On 29 April 2005, the judicial authorities ordered the reinstatement of the dismissed workers, but the municipality refused to comply with the order.

#### San Vicente Tuberculosis Sanatorium

- On 14 April 2005, the worker Hector Salvador Mendizabal Vega, member of the Trade Union of Workers of the San Vicente Sanatorium, was dismissed. According to the complainant organization, this was a violation of the collective agreement on working conditions which provided that nobody could be dismissed without a court decision confirming that grounds existed for dismissal.

#### Municipality of El Tumbador, San Marcos

- On 19 and 20 April 2005, the workers Victor Hugo Lopez Martinez and Julio Rene de Leon Estrada, belonging to the Trade Union of Workers of the Municipality of El Tumbador, San Marcos, were dismissed during a collective dispute in connection with the negotiation of a collective agreement on working conditions. The workers in question applied for reinstatement before the Court of Labour and Social Security and the Family of the First Instance, in the municipality of Malacatlan, in the Department of San Marcos.

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 Enterprise Bocadelli S.A.

- The Trade Union of Workers of Bocadelli of Guatemala S.A. (SITRABOCADELLI) drew up a draft collective agreement on working conditions which was forwarded to the enterprise for negotiation, through the General Labour Inspectorate, on 11 July 2005. During the following months, the enterprise's employees initiated court proceedings for payment of their wages. Workers obtained access to an internal company document entitled "Guatemala Ostrich Plan" outlining a plan to evade responsibilities for paying benefits to workers and an illegal stoppage was anticipated. On 11 August 2005, the company staged a lockout, barring access to workers. The complainants criticize the passivity of the Ministry of Labour authorities who, in their view, could have sought ways to establish a dialogue between the parties. Lastly, the complainant states that the president of the trade union was pursued by vehicles without licence plates and with tinted windows and that the First Labour and Social Security Court of the First Economic Zone placed an embargo on company assets in August 2005 when it became aware of the existing threat to workers' rights.

(The Committee observes that the complainant has submitted allegations relating to the undertaking La Comercial S.A. and the Higher Electoral Court which are considered in connection with Case No. 2241.)

## B. The Government's reply

- 894.** As to the allegations relating to the stoppage and demonstration against the free trade agreement, the Government states in its communication dated 5 July 2005 that Guatemalan legislation does not reduce the guarantees provided for in ILO Convention No. 87. The rights of trade unions (of employers and of workers) include the right to engage in work stoppages and strikes, as regulated in the following articles of the Constitution: 104 for workers and employers in private enterprise and 116 for State employees, and subsequently regulated in the respective ordinary laws.
- 895.** The Government adds that the right to strike is enjoyed by workers, for the purpose of improving or defending common economic interests against their respective employer, subject to compliance with legal requirements. The right to carry out stoppages is exercised by employers or trade unions of employers, for the purpose of defending their economic interests against their employees. Hence, Guatemalan legislation contains no regulation of the concept of "national stoppage", which is the term employed by UNSITRAGUA in reference to the demonstration held in Guatemala City on 14 March of this year.
- 896.** No demands were made on the State of Guatemala during the demonstration in regard to matters such as employment conditions or improvements of a socio-economic nature, in its capacity as boss or employer. If UNSITRAGUA is of the view that its right to freedom of association has been infringed, it must first apply to the competent jurisdictional body which will then issue a decision which determines or declares that the State of Guatemala has violated said freedom of association. The activity engaged in by these groups on 14 March 2005 contravenes the constitutional provision contained in article 33 of the national Constitution, in that it disturbed public order and caused damage to private property, and thus ceased to be a demonstration or manifestation of peaceful resistance and, according to domestic legislation, those responsible should be brought before the courts.
- 897.** According to the Government, the accusations formulated by UNSITRAGUA relate to situations that must be proven, in conformity with domestic legislation. In this regard, the Government makes the following observations: (a) UNSITRAGUA, in an irresponsible

manner, used minors, older persons and pregnant women in its demonstrations (in all events they would need to demonstrate that these persons are members of the participating trade unions); (b) UNSITRAGUA states that the Government issued orders for the arrest of leaders of the movement; this is untrue, since arrest warrants are issued by the jurisdictional bodies and not by the Government; (c) the words of the President of the Republic have been misrepresented by UNSITRAGUA and he had in fact said that “he regretted that a person had died”; and (d) the alleged murder of Juan Esteban Lopez must be established in a criminal trial, brought by the prosecution service, subsequent to the corresponding investigation.

**898.** Lastly, the Government states that, in view of the above, this case should not be considered admissible by reason of the fact that the allegations are of a political nature and the situations invoked are excessively vague and failed to provide sufficient evidence to justify the complaint.

**899.** In its communication of 7 July 2005, the Government states, as regards the allegations concerning the registration of the Trade Union of Workers of the finca El Cobano, Ingenio Magdalena, S.A., that the employer submitted a request to the Ministry of Labour and Social Security to have the registration of the trade union revoked, as a result of which the Ministry of Labour and Social Security modified the name of the trade union organization. According to the Government, the Ministry of Labour and Social Security acted in keeping with the law, after verifying the facts in situ, through the Labour Inspectorate. Specifically, the undertaking Ingenio Magdalena S.A. stated that the workers who had established the trade union in question were not employees of the undertaking, for which reason the change of name was requested. On the basis of this information, and following an in situ inspection, the application to have registration revoked was found to be justified and the name of the trade union was therefore changed, deleting the words Ingenio Magdalena S.A.

### C. The Committee’s conclusions

**900.** *The Committee observes that the complainant organization alleges: that the forces of law and order violently repressed trade union demonstrations (accompanied by associations of peasants and other human rights organizations) in March 2005, protesting against the signature of the free trade agreement, resulting in the death of workers (including a peasant worker leader), while a further 11 were injured; that arrest warrants had been issued against trade union officials; that the coordinator of the UNSITRAGUA Commission and Legal Office was prevented from leaving the country; and that the President of the Republic had used the media to refer in disrespectful terms to trade union leaders. In addition, the complainant organization alleges anti-union dismissals at the Ingenio Magdalena S.A., finca El Cóbano (alleging moreover that the management of the enterprise appealed against the decision granting legal personality to the enterprise’s trade union and that the administrative authority settled the appeal in favour of the enterprise in an irregular manner), in the municipality of El Tumbador, San Marcos, in the municipality of San Juan Chamelco, Department of Alta Verapaz and in the San Vicente Tuberculosis Sanatorium. Lastly, the complainant organization alleges that a slander campaign was directed against the trade union and a lockout staged at the Bocadelli S.A. enterprise, after the enterprise’s trade union submitted a draft collective agreement on working conditions.*

**901.** *As regards the alleged repression by the forces of law and order during the demonstration of 14 March 2005, undertaken in the context of a national stoppage called by the trade union and other organizations to protest the signature of a free trade agreement with the United States, the Committee notes that the Government states that: (1) the rights of trade unions (of employers and of workers) include the right to engage in work stoppages and*



strikes, as regulated in articles 104 and 116 of the national Constitution, but that there is no regulation of the concept of national stoppage, which is the term employed by UNSITRAGUA in reference to the demonstration held on 14 March 2005; (2) no demands of a socio-economic nature were made to the State during the demonstration in question; and (3) the activity engaged in by these groups on 14 March 2005 contravenes the constitutional provision contained in article 33 of the national Constitution, in that it disturbed public order and caused damage to private property, and thus ceased to be a demonstration or manifestation of peaceful resistance and, according to domestic legislation, those responsible are liable for prosecution. In this regard, the Committee recalls that, whilst purely political strikes do not fall within the scope of the principles of freedom of association, organizations responsible for defending workers' socio-economic and occupational interests should be able to use strike action to support their position in the search for solutions to problems posed by major social and economic policy trends which have a direct impact on their members and all workers in general, in particular as regards employment, social protection and standards of living [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, paras. 480 and 482]. The Committee considers that the signature of a free trade agreement may have consequences for the members of workers' organizations and workers in general, and that consequently they should be permitted to stage demonstrations in support of their views. Nonetheless, given the contradictory nature of the accounts of the events that occurred during the demonstration of 14 March 2005 (according to the complainant, the national civil police intervened during the event and started to fire tear gas at the demonstrators while, according to the Government, a disturbance of public order occurred during the demonstration and private property was damaged), the Committee requests the Government to take measures to carry out an independent, in-depth investigation of the events that occurred and to keep it informed in this respect.

902. As regards the allegations that arrest warrants were issued against the leaders who organized the protest of 14 March 2005, the Committee notes that the Government denies that it issued warrants, given that this is done by the courts. In this regard, the Committee requests the Government to provide information as to whether the judicial authority had indeed issued arrest warrants and, if so, to provide information on the status of the trials of the persons involved.
903. As regards the alleged repression on 15 March 2005 by members of the national army and of the national civil police of demonstrators from trade unions and other organizations, on the SELEGUA V Bridge at kilometre 287.5 of the Interamerican highway, in the village of Los Naranjales, municipality of Colotenango, Department of Huhuetenango, killing Juan Esteban López, leader of the Committee of Peasant Unity and member of the National Coordination of Peasant Organizations and the workers José Sánchez Gómez, Pedro Pablo Domingo García and Miguel Angel Velásquez Díaz, and gravely wounding a further 11 workers (Esteban Velásquez Jiménez, Alfonso Ramiro García López, Marcos Pérez Ramos, Santiago Pablo Morales, Domingo Ramos Gabriel, Ricardo Leiva, Julián García Mendoza, Pascual Sales Méndez, José Sánchez Gómez, Pedro Pablo Domingo García and Miguel Angel Velásquez Díaz), the Committee notes that the Government states that the alleged murder of Juan Esteban López must be established in a criminal trial, brought by the prosecution service, subsequent to the corresponding investigation. In this regard, the Committee regrets that the Government has not sent specific information on these serious alleged cases of violence. The Committee recalls that it has emphasized on several occasions that "in cases in which the dispersal of public meetings or demonstrations by the police for reasons of public order or other similar reasons has involved loss of life or serious injury, [it] 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" and that "the authority should resort to the use of force only in

situations where law and order is seriously threatened. The intervention of the forces of law and order should be in due proportion to the danger to law and order that the authorities are attempting to control and the government 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., paras. 148 and 137]. Consequently, the Committee deplors the death of the leader and other workers and the injuries suffered by a number of demonstrators and urges the Government to take the necessary measures to conduct promptly an independent inquiry into the alleged facts in order to ascertain where responsibility lies and, where appropriate, to punish those responsible and to keep it informed in this respect.

- 904.** As regards the alleged disrespectful statements by the President of the Republic in the media about trade union leaders and violence against participants in the demonstrations, the Committee, observing the contradictory statements made, requests the Government to carry out an independent investigation into these allegations and to keep it informed in this respect.
- 905.** As regards the allegation that the coordinator of the UNSITRAGUA Commission and Legal Office was prevented from leaving the country on 16 March 2005, the Committee regrets that the Government has not sent any comment. It requests the Government to carry out an investigation and to send its observations on this allegation.
- 906.** As regards the allegations in respect of the appeal lodged by the enterprise to revoke the resolution recognizing legal personality and adopting the articles of incorporation of the Trade Union of Workers of the finca El Cobano Ingenio Magdalena S.A. (SITRAFECIMASA) where the Ministry of Labour, ignoring rules of due process, decided to modify the name of the trade union by deleting the reference to Ingenio Magdalena S.A., the Committee notes the Government’s statement that the enterprise Ingenio Magdalena argued in the appeal for revocation that the workers who had established the trade union in question were not employees of the enterprise and that this was confirmed by means of an inspection, for which reason the change in the trade union name was ordered.
- 907.** Lastly, the Committee regrets that the Government has not sent its observations regarding the following allegations: (1) the dismissal of 23 workers who attempted to establish a trade union in the finca El Cóbano (it is alleged that court orders exist for reinstatement that have been ignored by the enterprise); (2) dismissal of five workers belonging to the Trade Union of Workers of the municipality of San Juan Chamelco, department of Alta Verapaz (it is further alleged that the judicial authorities ordered the reinstatement of the dismissed workers, but that the municipality refused to comply with the order); (3) dismissal of a worker belonging to the Trade Union of Workers of the San Vicente Tuberculosis Sanatorium, in violation of the provisions of the collective agreement; (4) dismissal of two workers belonging to the Trade Union of Workers of the municipality of El Tumbador, San Marcos, in the context of a collective dispute during the negotiation of a collective agreement on working conditions; and (5) lockout at Bocadelli S.A. following the submission of a draft collective agreement by the enterprise’s trade union. In this respect, the Committee requests the Government: (1) where orders exist for the reinstatement of dismissed trade union members, to take steps to ensure that these orders are immediately enforced; and (2) promptly to send its observations on all pending allegations.

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## The Committee's recommendations

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

- (a) Given the contradictory accounts of the events that occurred during the demonstration of 14 March 2005 (according to the complainant, the national civil police intervened during the event and started to fire tear gas at the demonstrators while, according to the Government, a disturbance of public order occurred during the demonstration and private property was damaged), the Committee requests the Government to take measures to carry out an independent, in-depth investigation of the events that occurred and to keep it informed in this respect.*
- (b) As regards the alleged arrest warrants against the leaders who organized the protest of 14 March 2005, the Committee requests the Government to provide information as to whether the judicial authority had indeed issued search warrants and, if so, to provide information on the status of the trials of the persons involved.*
- (c) As regards the alleged repression on 15 March 2005 by members of the national army and of the national civil police of demonstrators from trade unions and other organizations, on the SELEGUA V Bridge at kilometre 287.5 of the Interamerican highway, in the village of Los Naranjales, municipality of Colotenango, Department of Huhuetenango, killing Juan Esteban López, leader of the Committee of Peasant Unity and member of the National Coordination of Peasant Organizations and the workers José Sánchez Gómez, Pedro Pablo Domingo García and Miguel Angel Velásquez Díaz, and gravely wounding a further 11 workers (the complainant organization lists their names), the Committee deplors the death of a leader and other workers and the injuries suffered by a number of demonstrators and urges the Government to take the necessary measures to conduct promptly an independent inquiry into the alleged facts in order to ascertain responsibilities and, where appropriate, to punish those responsible and to keep it informed in this respect.*
- (d) As regards the alleged disrespectful statements by the President of the Republic in the media about trade union leaders and violence against participants in the demonstrations, the Committee, observing the contradictory statements made, requests the Government to carry out an independent investigation into these allegations and to keep it informed in this respect.*
- (e) As regards the allegation that the coordinator of the UNSITRAGUA Commission and Legal Office was prevented from leaving the country on 16 March 2005, the Committee requests the Government to carry out an investigation and to send its observations in regard to this allegation.*
- (f) Lastly, the Committee regrets that the Government has not sent its observations on the following allegations: (1) the dismissal of 23 workers who attempted to establish a trade union in the finca El Cóbano (it is alleged that court orders exist for reinstatement that have been ignored by the*

*enterprise); (2) dismissal of five workers belonging to the Trade Union of Workers of the municipality of San Juan Chamelco, department of Alta Verapaz (it is further alleged that the judicial authorities ordered the reinstatement of the dismissed workers, but that the municipality refused to comply with the order); (3) dismissal of a worker belonging to the Trade Union of Workers of the San Vicente Tuberculosis Sanatorium, in violation of the provisions of the collective agreement; (4) dismissal of two workers belonging to the Trade Union of Workers of the municipality of El Tumbador, San Marcos, in the context of a collective dispute during the negotiation of a collective agreement; and (5) lockout at Bocado S.A. following the submission of a draft collective agreement by the enterprise's trade union. In this respect, the Committee requests the Government: (1) where orders exist for the reinstatement of dismissed trade union members, to take steps to ensure that these orders are immediately enforced; and (2) promptly to send its observations on all pending allegations.*

CASE NO. 2431

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

### **Complaint against the Government of Equatorial Guinea presented by**

- the Trade Union of Workers of Equatorial Guinea (UST)
- the Teachers' Trade Union Association (ASD)
- the Agricultural Workers' Organization (OTC) and
- the International Confederation of Free Trade Unions (ICFTU)

*Allegations: The complainants allege that the administrative authorities refuse to register the Teachers' Trade Union Association (ASD) and the Agricultural Workers' Organization (OTC)*

- 909.** The complaint is contained in a communication dated 23 May 2005 presented by the Trade Union of Workers of Equatorial Guinea (UST), the Teachers' Trade Union Association (ASD) and the Agricultural Workers' Organization (OTC).
- 910.** The International Confederation of Free Trade Unions (ICFTU) associated itself with the complaint in a communication dated 1 July 2005.
- 911.** The Government sent its observations in a communication dated 2 September 2005.
- 912.** Equatorial Guinea 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**

- 913.** In their communication dated 23 May 2005, the Trade Union of Workers of Equatorial Guinea (UST), the Teachers' Trade Union Association (ASD) and the Agricultural Workers' Organization (OTC) allege that on 30 July 2004 the Government refused to grant

the request for legal recognition made by the ASD and the OTC on 15 June 2004, in accordance with section 6 of Act No. 12/1992 on trade unions and collective labour relations. In 1998, through the then Ministry of Labour and Social Security, the public administration had already refused to grant the ASD legal recognition, arguing that Act No. 12/1992 did not allow public officials to unionize.

- 914.** The complainants state that, according to the Government, the by-laws of the trade union organizations did not comply with sections 12, 19, 20 and 21 of Act No. 12/1992 on trade unions and collective labour relations but without explaining the grounds. The trade union organizations submitted new requests for legalization on 24 August 2004 which fully met the provisions of sections 12, 19, 20 and 21 mentioned above. However, these requests were refused on 27 August of the same year for failure to comply with section 11 of Act No. 12/1992 which stipulates that founding documents must be drawn up in a notarial certificate.
- 915.** The ASD requested that its file be returned so that it could take the necessary steps with the notary. However, the notary verbally refused to issue the notarial certificate and stated that trade unions did not exist in Equatorial Guinea.

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

- 916.** In its communication of 2 September 2005, the Government states that, with regard to the ASD, the organization requested recognition and legalization, but after having examined the request, the Ministry of Labour observed that the presented by-laws did not comply with sections 12, 19, 20 and 21 of Act No. 12/1992 on trade unions and collective labour relations, and were therefore returned on 30 July 2004 so that they could be redrafted accordingly.
- 917.** On 24 August, it resubmitted its file to the Ministry, which this time observed that the request did not in comply with section 11 of the Act mentioned above which stipulates that the founding document must be notarially attested. In order to rectify this, the trade union organization asked for the file containing its request to be returned, as it subsequently was on 20 September 2004.
- 918.** With regard to the OTC, the Government states that on 27 May 2004 the organization requested recognition, but as with the previous case, the Ministry observed that the request did not comply with sections 12, 19, 20 and 21 of Act No. 12/1992. On 30 July 2004, the by-laws were returned so that they could be redrafted accordingly. On 13 August 2004, the trade union organization submitted a new request for recognition, which was refused again on 13 September 2004 for failure to meet the requirements of section 11 of Act No. 12/1992. Lastly, the Government states that the failure of the complainants to meet legal requirements illustrates their lack of genuine interest in gaining recognition.

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

- 919.** *The Committee notes that this case concerns the repeated refusal to register the Teachers' Trade Union Association (ASD) and the Agricultural Workers' Organization (OTC). The Committee observes that the ASD was initially refused registration in 1998 because it was a trade union organization for public servants. Indeed, the Committee observes that section 6 of Act No. 12/1992 stipulates that "the unionization of public administration officials will be governed by a specific law", which still has not been approved. The Committee notes that in July 2004, following a new request for registration made by each of the trade union organizations, the Ministry of Labour rejected registration again for failure to meet the requirements of sections 12, 19, 20 and 21 of Act No. 12/1992 on trade unions and collective labour relations which refer to the content of by-laws and the bodies of trade unions. The Committee notes that, following a new request, which duly complied*

with the sections mentioned above, recognition was refused again for failure to meet section 11 of Act No. 12/1992 which, according to the Ministry of Labour, states that by-laws must be drawn up in a notarial certificate.

920. The Committee also notes that, according to the complainants, when the ASD contacted the notary with a view to obtaining a certified document containing the by-laws, he refused and stated that trade unions did not exist in Equatorial Guinea.
921. The Committee notes that, according to the Government, the failure of the trade union organizations to meet legal requirements illustrates their lack of interest in actually doing so.
922. First, the Committee recalls that all public service employees (with the sole possible exception of the armed forces and the police, as indicated in Article 9 of Convention No. 87), should, like workers in the private sector, be able to establish organizations of their own choosing to further and defend the interests of their members [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 206]. In this regard, the Committee requests the Government to take the necessary measures to amend the legislation so as to guarantee that public officials' organizations have the right to organize or to adopt, without delay, a specific law for this purpose, as prescribed by Act No. 12/1992.
923. With regard to the refusal of the Ministry of Labour to register the trade union organizations because their by-laws were not drawn up in a notarial certificate, as required by the provisions of section 11 of Act No. 12/1992, and the statement of the public notary that trade unions did not exist in Equatorial Guinea and his refusal to issue the notarial certificate containing the by-laws, the Committee observes that it is actually section 10 of the Act which stipulates that, in order to legalize a trade union organization, the organization must submit a request to the Ministry of Labour and Social Development, along with a "certified copy of the founding document and the by-laws". The Committee considers that the requirement of a notarial certificate should not lead to delays in the registration of trade unions, especially given that the law requires the submission of a certified copy, which could not only take the form of a notarial certificate, but could also be through certification by the legal authority or an administrative authority. Moreover, the notary's refusal to issue a notarial certificate containing the by-laws of the trade union organization constitutes an infringement of the right of workers to establish or join the organization of their own choosing. In this regard, the Committee recalls that the formalities prescribed by law for the establishment of a trade union should not be applied in such a manner as to delay or prevent the establishment of trade union organizations. Any delay caused by the authorities in registering a trade union constitutes an infringement of Article 2 of Convention No. 87 [see **Digest**, op. cit., para. 251]. Consequently, the Committee requests the Government to conduct an investigation into the notary's alleged refusal to issue a certificate containing the by-laws of the trade union and, should the allegations prove to be substantiated, to take measures to ensure that public notaries duly issue notarial certificates, in keeping with the requirements provided for by the law. The Committee also requests the Government to take measures for the expeditious recognition of the ASD and the OTC, and to keep it informed in this regard.

## The Committee's recommendations

924. **In light of its foregoing conclusions, and noting with concern the repeated refusals of the Government to register the Teachers' Trade Union Association (ASD) and the Agricultural Workers' Organization (OTC), the Committee invites the Governing Body to approve the following recommendations:**

- (a) *The Committee requests the Government to take the necessary measures to amend the legislation so as to guarantee that public officials' organizations have the right to organize or to adopt a specific law for this purpose, as prescribed by Act No. 12/1992.*
- (b) *The Committee requests the Government to conduct an investigation into the notary's alleged refusal to issue a certificate containing the by-laws of the trade union and, should the allegations prove to be substantiated, to take measures to ensure that public notaries duly issue notarial certificates, in keeping with the requirements provided for by the law.*
- (c) *The Committee also requests the Government to take measures for the expeditious recognition of the Teachers' Trade Union Association (ASD) and the Agricultural Workers' Organization (OTC) and to keep it informed in this regard.*

CASES NOS. 2177 AND 2183

INTERIM REPORT

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

#### *Case No. 2177*

- **the Japanese Trade Union Confederation (JTUC-RENGO)**
- **the RENGO Public Sector Liaison Council (RENGO-PSLC)**
- **Public Services International (PSI)**
- **the International Transport Workers' Federation (ITF)**
- **the International Federation of Building and Wood Workers (IFBWW)**
- **Education International (EI)**
- **the International Federation of Employees in Public Services (INFEDOP) and**
- **Union Network International (UNI)**

#### *Case No. 2183*

- **the National Confederation of Trade Unions (ZENROREN) and**
- **the Japan Federation of Prefectural and Municipal Workers' Unions (JICHIROREN)**

*Allegations: The complainants allege that the upcoming reform of the public service legislation, developed without proper consultation of workers' organizations, further aggravates the existing public service legislation and maintains the restrictions on the basic trade union rights of public employees, without adequate compensation*

**925.** The Committee examined these cases at its November 2002 and June 2003 meetings, where it presented interim reports, approved by the Governing Body at its 285th and 287th Sessions [see 329th Report, paras. 567-652; 331st Report, paras. 516-558].

- 926.** The Japanese Trade Union Confederation (JTUC-RENGO) (Case No. 2177), submitted additional information in communications dated 6 September 2004, 5 January and 5 September 2005, and 6 and 19 January 2006.
- 927.** The National Confederation of Trade Unions (ZENROREN) (Case No. 2183), submitted additional information in communications dated 17 February 2004, and 14 January, 1 and 13 December 2005.
- 928.** The Government submitted its observations in communications dated 3 June and 14 October 2004, 18 May and 22 September 2005, and 4 and 24 January 2006.
- 929.** Japan 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). It has not ratified the Labour Relations (Public Service) Convention, 1978 (No. 151).

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

**930.** At its June 2003 meeting, the Committee made the following recommendations:

- (a) The Committee strongly requests once again the Government to reconsider its stated intention to maintain the current restrictions on the fundamental rights of public employees.
- (b) The Committee strongly requests once again the parties to make efforts with a view to achieving rapidly a consensus on the reform of the public service and on legislative amendments that are in conformity with the freedom of association principles embodied in Conventions Nos. 87 and 98, ratified by Japan, and to keep it informed in this respect. Consultations should notably address the following issues:
  - (i) granting the right to organize to fire-fighters and prison staff;
  - (ii) ensuring that public employees at local level may establish organizations of their own choosing, without being subject to excessive fragmentation as a result of the operation of the registration system;
  - (iii) allowing public employees' organizations to set themselves the term of office of full-time union officers;
  - (iv) ensuring that public employees have the rights to bargain collectively and to conclude collective agreements, and that those employees whose such rights can be legitimately curtailed enjoy adequate compensatory procedures, all of which should be in full conformity with freedom of association principles;
  - (v) ensuring that public employees are given the right to strike, in conformity with freedom of association principles, and that union members and officials who exercise legitimately such right are not subject to heavy civil or criminal penalties;
- (c) The Committee requests the Government to engage in meaningful dialogue with the trade unions concerning the scope of bargaining matters in the public service.
- (d) The Committee requests the Government to indicate whether public employees who have resorted to strike action in the past have been subjected to sanctions other than prison, e.g. fines.
- (e) The Committee requests the Government to provide it with the text of any legislation amending the public service labour relations system.
- (f) The Committee requests the Government to provide it with the final judgement in the Ouda-cho case once it is rendered.
- (g) The Committee requests the Government to provide its comments on the allegations concerning the differential treatment of unfair labour practices in the case of Ariake-cho.



- (h) The Committee requests the Government and the complainants to provide information on the consequences of the reorganization on the collective bargaining rights of workers transferred to independent administrative institutions (IAIs) and their trade unions.
- (i) The Committee requests the Government to keep it informed of developments on all the above issues.
- (j) The Committee reminds the Government that it may avail itself of the technical assistance of the Office, if it so desires.

## **B. Additional information from the complainants**

### ***Additional information from JTUC-RENGO (Case No. 2177)***

- 931.** In its communication of 6 September 2004 JTUC-RENGO states that in November 2003 it established along with RENGO-PSLC, a “study group on the public service system reform”, with the mandate to consider an appropriate system reform proposal. Following discussions at 14 meetings, the Study group issued an “interim report” on 23 June 2004. Following repeated demands from JTUC-RENGO and two recommendations by the ILO Committee on Freedom of Association, a table for union-government consultation for “full, frank and meaningful” consultations at the ministerial level was established, under which a working party for negotiation was also set up with director-level participants. Three meetings were held: one at ministerial level and two at director level.
- 932.** Following recommendations of the study group, interim report, JTUC-RENGO and RENGO-PSLC made the following concrete proposals to the consultation table mentioned above. No concrete or meaningful reply was received from the Government:
- (a) The Government should officially state that it would grant fundamental trade union rights to public servants and implement concrete measures to reform the public service system in line with the international labour standards adopted by the ILO, including, among others, abolishment of restriction on terms of office of full-time union officers, and granting the right to organize to firefighters and prison staff.
  - (b) Under the current National Personnel Authority (NPA) system, a union-government consultation system should be instituted to ensure the participation of public servants and their organizations to the decision-making process.
- 933.** In its communication of 5 January 2005 JTUC-RENGO stated that the complainant unions have been conducting negotiations with the Government and ruling parties in various forums, but no conclusions have been agreed. In a last effort, RENGO resorted to propose, inter alia, “the minimum demands” on 3 September 2004:
- (1) As for the reform of the labour-management relations in the public sector, the Government should adopt concrete measures to bring the public service system closer to the international labour standards based on the Committee on Freedom of Association recommendations. At the same time, the Government should clearly state its intention to grant fundamental trade union rights to public service employees, and present proposals.
  - (2) In order to reform the personnel management system into one focusing on individuals’ competence and achievement by introducing a new evaluation system, and to make it work, it is indispensable to establish a labour-management consultation system for said evaluation system. Meanwhile, until the granting of fundamental trade

union rights, the NPA system should be improved so as to ensure the participation of workers' organizations.

**934.** Negotiations continued after the ruling Liberal Democratic Party (LDP) proposed countermeasures on 12 November 2004, which were unacceptable to RENGO. The unions, therefore, issued their final statement on 18 November 2004, stating:

- (1) RENGO and RENGO-PSLC recognize that the drastic reform of the public service system is a pressing and urgent issue, which requires the establishment of a coherent new labour-management system, in accordance with international labour standards.
- (2) The short-term position of RENGO and RENGO-PSLC is as stated in the "minimum demands" issued on 3 September 2004. The measures proposed by the ruling LDP do not sufficiently respond to RENGO's demands, and are, thus unacceptable.
- (3) The reform of the public service system, which is the basic component of the national and local autonomous bodies, requires appropriate and adequate procedures and substance. RENGO and RENGO-PSLC strongly oppose a unilateral proposition of bills to revise related legislations to the Diet by the Government and/or the ruling parties.
- (4) RENGO and RENGO-PSLC strongly request the Government and the ruling parties, in order to implement a reform based on the national consensus: to correct the initial procedural violation; to close down the Reform Promotion Division for Civil Service System of the Administrative Reform Promotion Office of the Cabinet Secretariat; and to exercise their firm leadership to establish a new framework.
- (5) RENGO and RENGO-PSLC appreciate that negotiations with officials in charge have been serious and sincere; they express their regret that no agreement has yet been reached, and hope that meaningful sincere negotiations will continue for promotion of the reform.

**935.** At a Cabinet meeting held on 24 December 2004, the Government decided on a "future policy for administrative reform" which stated "the Government will consider the proposition of bills at a future date following materializing of system designing and coordination between parties concerned". According to RENGO, the decision of the Government on 24 December meant that it was shelving the General Principles for Civil Service System Reform adopted by Cabinet on 25 December 2001. The Government abandoned the "reform" itself, including possibilities to improve it in line with the recommendations of the Committee on Freedom of Association, and made clear, once again, that the current restrictions on the fundamental trade union rights of public servants, as indicated in the 331st Report issued in June 2003 would be maintained (right to organize of firefighters and prison staff; registration system; term of office of full-time union officers; right of public employees to bargain collectively and to conclude collective agreements; right to strike and penalties). RENGO and RENGO-PSLC recognized it as a certain success that the Japanese trade union movement has held back, with support and assistance from the international trade union movement as well as the Committee on Freedom of Association, the Government's original intention to aggravate the situation in the public service system, which is, even in its current form, in violation of ILO Conventions.

**936.** In its communication of 5 September 2005, JTUC-RENGO indicated that on 25 May, its President met with the Prime Minister to discuss the issues. RENGO requested the Prime Minister to provide civil service workers with fundamental trade union rights in accordance with ILO Conventions Nos. 87 and 98, and to push through reforms of the public service system. The Minister of Health, Labour and Welfare expressed the

Government's position, as follows: "the government will continue to secure the framework of government-trade union consultation to address reforms of the public service system". However, there were no government-union consultations. The Government continued to contravene ILO Conventions Nos. 87 and 98, and was trying to go ahead with changes in the public service system, lowering wages and other working conditions.

- 937.** In its communication of 6 January 2006, RENGO states that on 14 November 2005, the Government (Council on Economic and Fiscal Policy) formulated a "Basic Policy for reforms of overall employment costs for civil servants" ("Basic Policy"). That Policy advocates: (a) reducing the authorized number of national government employees by 5 per cent or more over the next five years; (b) halving the ratio of overall employment costs for national government employees to GDP over the next decade; and (c) likewise, calling on local governments to reduce the authorized number of local government employees by 4.6 per cent or more over the same period.
- 938.** On 16 December 2005, talks were held between the Prime Minister and JTUC-RENGO president, who called on the Prime Minister: (a) not to make the planned reduction in the authorized number of, and employment costs for civil servants, an end in itself; (b) not to lightly undercut the quality and level of public services; (c) to assure civil servants of their basic labour rights in compliance with ILO Recommendations and to create a democratic and transparent public servant system accordingly and, to this end, have the Government present a well-defined course toward granting basic labour rights to civil servants; and (d) regarding the aforementioned issues in (a), (b) and (c), to instruct the Government to enter into governmental labour consultations and effective individual talks and consultations with trade unions concerned. The Prime Minister replied: "The problems of the public servant system are an important political agenda for the Government, and we wish to adequately discuss them with labour. Specifically, RENGO should talk to Deputy Cabinet Secretary." In response to this suggestion, JTUC-RENGO and its Public Sector Liaison Council (RENGO-PSLC) approached the Government to set up a working-level government-labour consultation panel in order to ensure that substantive talks were held between the two on a continuous basis.
- 939.** At a Cabinet meeting on 24 December 2005, the Government set the "Essential Policy for administrative reform" (the "Essential Policy"), where the Government stated that it would carry out reforms on the basis of the Basic Policy formulated on 14 November and that: (a) "with regard to reforms of the public servant system from the viewpoint of the thorough implementation of personnel management based on a merit system and fair management of re-employment, the Government will carry out frank dialogue and adjustment with the parties concerned, based on the progress of reforms of overall employment costs, and thus will put these reforms into shape as early as possible"; and (b) "the Cabinet secretariat will conduct a broad review of the public servant system, including the basis labour rights of civil servants and the National Personnel Authority (NPA) system, the way of setting salaries for civil servants, treatment based on a merit system and performance evaluations and the career system. In doing so, it will take into account public awareness and progress in reforms of the existing salary system".
- 940.** According to RENGO, the Essential Policy represents a major switch from the "General principles for civil service system reform" (Cabinet decision of December 2001), which aimed to keep reforms within the existing framework of the public servants system, which places restraints on the basic labour rights of civil servants. The Government plans to introduce, during the 2006 ordinary session of the Diet, an "Administrative Reform Promotion Bill" based on the aforementioned Essential Policy, which will become the basic law for administrative reforms. However, with regard to the reforms of the public servant system, the arguments have focused exclusively on cutting the overall employment

costs of civil servants whilst retaining the existing public servant system, and the Government has yet to propose a policy that would grant them basic labour rights.

- 941.** According to RENGO, the Government's adoption of the Essential Policy at the Cabinet meeting on 24 December indicates that it has withdrawn the "General principles for civil servants system reform" (the Cabinet decision in December 2001), which advocated the retention of restrictions on basic labour rights for civil servants. However, it is still unclear whether the Government will grant basic labour rights to civil servants. While JTUC-RENGO and its Public Sector Liaison Council (RENGO-PSLC) see the latest policy turnaround by the Japanese Government as a change for the better, they intend to further intensify their lobbying efforts to have it completely and promptly implement the ILO Recommendations, which have been issued twice already.
- 942.** Under this new situation, characterized by the policy turnaround by the Japanese Government, JTUC-RENGO and its Public Sector Liaison Council (RENGO-PSLC) strongly ask the Government to initiate effective government-labour talks based on the ILO recommendations as quickly as possible and in good faith. For this reason, they request that the Committee on Freedom of Association strongly recommend that the Japanese Government convene effective government-labour talks on this matter at an early date and to carefully monitor possible developments from the expected government-labour talks.
- 943.** In its communication of 19 January 2006, JTUC-RENGO states that a high-level consultation took place on 16 January 2006, where it was reconfirmed that the Government would amend its policy and consider the possibility of granting basic labour rights in the public service; the two parties therefore recognized the necessity to improve the labour-management relationship in the public service in line with socio-economic changes. In addition, and although there are differences between the parties' positions on the issue of the total expenditure for public service personnel, the Government stated that it would secure employment for public service workers; the Minister of Regulatory Reform will be in charge of reshuffling the public service, and the Government would hold adequate consultations with RENGO-PSLC for practical negotiations, including at preparatory level. A further meeting has been tentatively set for March 2006. The trade union side emphasized the need to carry out urgently a drastic reform of the public service personnel system, with a view to improving the labour-management relationship through granting basic labour rights to public servants. It also proposed to establish as soon as possible a "place for consideration" ("kento noba"); the Government agreed that such a "place for consideration" was necessary but stated its appropriate form needed careful examination, taking into account such factors as deliberations in the National Diet. It was ultimately agreed that the two parties would further consult on this issue.

***Additional information from ZENROREN  
(Case No. 2183)***

- 944.** In its communication of 17 February 2004, ZENROREN stated that it had made repeated requests to the Government for negotiations with the Minister in Charge on 15 April and 29 May 2003, but no concrete reply was received; negotiations had been refused not only with the Minister in Charge but also with the secretary-general of the Office for Promotion of Administrative Reform. The Minister in Charge and the personnel of the office were changed after the general election in November 2003. ZENROREN renewed their demand for negotiations but no progress has been made due to the lack of Government response. Further, there have been frequent consultations and negotiations between RENGO and the Chief Cabinet Secretary and the Minister in Charge. The Government's refusal to negotiate with ZENROREN is unfair and unjust. It totally neglects the recommendations made twice by the Committee and constitutes discrimination among trade unions.

- 945.** In its communication of 14 January 2005, ZENROREN provided its view of the decisions made by the Government at the Cabinet meeting on 24 December 2004. ZENROREN expresses its serious concern at these decisions, since they made it clear that the Government was now going to conduct the reform of the public personnel system within the limits of the existing laws, which in turn meant that the Government would suspend the work for establishing a new legal framework. These decisions actually aimed at setting aside the revived debate in favour of guaranteeing basic labour rights to public employees and maintaining the current restrictions on these rights into the future. In addition, when making these decisions, the Government failed to consult or negotiate with ZENROREN, one of the parties directly concerned by these decisions.
- 946.** On 9 June 2004 the Government resumed the work for amending the existing laws related to the public personnel management, following the recommendations of the consultative body on administrative reform set up by the ruling parties to focus the planned reform on the introduction of “ability-based personnel grading system” and on “finding appropriate jobs for public workers after their retirement”. In that context, on 7 August 2004, ZENROREN submitted “immediate concrete demands of public workers for basic labour guarantees” to the Government. These demands consisted of requesting the Government to implement a reform that would be in line with the two ILO “interim reports and recommendations”. However, the Government did not respond to ZENROREN’s request; it never agreed officially to consult or negotiate with ZENROREN on the concrete labour demands before making decisions at the end of 2004. Against ZENROREN’s complaints, the then Minister of Health, Labour and Welfare, when he visited the ILO in April 2003, stated that he would commit himself to hold “consultations and negotiations in good faith with the concerned workers’ unions” (in view of concretizing the ILO’s “interim reports and recommendations”), and, Government representatives have made similar statements at the International Labour Conference every year since 2001.
- 947.** The Government has adopted an extremely negative attitude towards the acceptance of the Committee’s recommendations. ZENROREN considers that once the Government has made an international commitment to consult and negotiate with the concerned parties in good faith, it should keep that commitment by taking concrete actions. Nevertheless, there has not been any consultation or negotiation on the basis of the “interim reports and recommendations” at least between the Government and ZENROREN. During the last period, ZENROREN has been the one that has unilaterally pressed for a public personnel reform in line with the ILO “interim reports and recommendations”.
- 948.** When taking the decisions concerning the public personnel reform at the end of 2004, the Government did not say anything about how it would deal with the ILO “interim reports and recommendations” and did not give any consideration about the demand of public workers for revising the restrictions currently placed on their basic labour rights. It instead declared that it would experiment with an “ability-based personnel grading under the present system”. ZENROREN cannot accept the testing of such a grading system if that means shelving the democratization of the public personnel system that should be achieved by the reform. ZENROREN strongly fears that the recent governmental decisions concerning the reform will put off to a distant future the task of making the Japanese public personnel system in conformity with principles of freedom of association, as recommended by the ILO.
- 949.** In recent years, the Government has intensified its moves to disengage from the areas placed under its executive authority by transforming a number of governmental agencies into independent administrative institutions and contracting out certain public services and administrative matters to private companies. This process has already caused abusive dismissals of public workers and degradation of working conditions imposed on employees. The Japanese Government repeatedly claims that such disengagement, while

reducing the areas under governmental responsibility, will contribute to extend freedom of association to more workers. This, however, is one of many phenomena resulting from a process that is driving an increasing number of workers out of the public personnel system, exposing them to suffering and pain caused by job insecurity and poorer working conditions. ZENROREN believes that what is most needed now is to increase pressure both internationally and within Japan to force the Government to seriously work on the public personnel reform, assigning itself the major objective of improving the current system to fit the principle of freedom of association. Once again, ZENROREN strongly urges the ILO to take resolute actions towards the Japanese Government, including by sending a fact-finding mission to Japan.

**950.** Cutbacks in the employment of public servants and a review of their wage and other working conditions have become important points of contention. The ruling coalition had shown no intention to reform the one-sided labour-management relations that constrain the fundamental trade union rights of civil service workers. Worse, the Secretary-General of the LDP had made remarks in the Diet that were hostile toward public service unions and rejected labour-management relations in the public sector.

**951.** In its communication of 1 December 2005, ZENROREN states that its affiliate, the Japan Federation of Prefectural and Municipal Workers' Unions (JICHIROREN) and the National Network of Firefighters (FFN) are pursuing their efforts to obtain the right to organize for firefighters. Some changes have taken place in the standards of organization and management of the fire defence personnel committees on 1 August 2005. The Tohbi Council of Firefighters, in Okayama prefecture, on 5 September 2005, filed a lawsuit in Okayama District Court against the local fire defence authority for the suppression of volunteer activities of fire personnel. The problems resulting from the partial revision of the organization and management of the fire defence personnel committees are as follows:

- The revision allows the fire defence committees to meet when necessary, in addition to their regular meetings. The fire defence authority once a year circulates a notice among the personnel calling for opinions they wish to be taken up by the fire defence personnel committee meeting. However, the authority fails to remind the personnel that they may submit their opinions to the authority any time without waiting for the notice.
- The fire defence authority has now the obligation to inform the personnel about the result of examination of their opinions by the committee. This in turn means that some fire defence authorities have not informed the personnel of the result of the examination of the opinions submitted by the personnel.
- The revision has established the post of “coordinator of opinions”. Before the revision, the personnel submitted their opinions directly to the secretariat of the fire defence personnel committee, but now, they have to present their opinions to the “coordinator”. However, the fire defence authority has not explained to the personnel about the true significance of such “coordination”. If the coordinator is a managerial employee, some employees could feel uncomfortable to submit their opinions.
- A coordinator of opinion, while being the one to actually collect the opinions of the personnel, cannot attend the fire defence committee meetings. It was demanded that the “coordinator” be allowed to participate in the committee meeting to present the opinions of the personnel.
- The creation of the post of “coordinator” is a means to “prolong the life of the fire defence personnel committees” so as to avoid giving the guarantee of the right to organize to the firefighters. The so-called “coordination” only makes the management

of the committees more complicated and represents no advantage for the fire defence personnel.

**952.** As regards the lawsuit filed by the Tohbi Council of Fire Defence Personnel:

- After the establishment of the Council, some ten members petitioned the director of fire defence headquarters for a package of proposals: five items for providing better emergency services to the population and three items for improving the treatment of the fire defence personnel. The director told them that he would neither discuss with them nor would he give any reply to their demands. Since this incident, the Council has repeatedly requested the director to meet with its representatives, but the director has refused to meet them saying that he “does not consider them as his employees”.
- The Council proposed various positive measures to be taken by the fire defence headquarters for resolving immediate problems concerning the safety of the population as well as fire defence personnel including an increase in staff to enable the firefighting service to cope with major natural disasters, early introduction of high-standard ambulances at every fire station, selection of emergency life-saving agents, pay raise, etc., but these proposals were not accepted by the fire defence authority, which decided that they were not “appropriate to be implemented”.
- The Council publishes a monthly newsletter and distributes it to all the firefighters to raise their awareness about the workers’ rights, treatment of fire defence personnel, law violations, unfair labour practices, etc.
- The Council, on 6 November 2002, submitted to the Okayama prefectural public personnel committee a list of demands for correcting unfair practices including obstructions made to the personnel in taking annual paid leave, non-payment of overtime work allowances and restrictions on taking sick leave. The Okayama prefecture public personnel committee, on 20 August 2003, issued a decision approving a part of overtime work allowances demanded by the Council.
- The Tohbi fire defence authority has promoted the employees who are critical to the volunteer organization and intentionally excluded those who are members of the Council. Because of this, the employees are keeping distance with the Council members. The head of the life-saving troop has tried to isolate the Council members by saying that he “cannot conduct training with the Council members”.

**953.** As the Tohbi fire defence headquarters did not correct the discriminatory practices mentioned above, the Tohbi Council of Firefighters, on 5 September 2005, filed a suit in Okayama District Court emphasizing that the lawsuit is about the denial of the right to organize for the fire defence personnel. JICHIROREN believes that ensuring good working conditions to firefighters is essential for effectively protecting the lives and properties of citizens from disasters. Unfortunately, the officers and the administrative managers of the Tohbi fire defence headquarters do not share this view and have done everything to suppress the voice of the firefighters calling for the improvement of their working conditions. The conflict between the managers and the employees in the Tohbi fire defence headquarters is not an isolated case in the Japanese fire defence workplaces. The attitude of the officers and the administrative managers of the Tohbi fire defence headquarters and the actions they have taken regarding the issue are linked with the refusal by the Japanese Government to accord the right to organize to the firefighters. In other words, the basically narrow and closed attitude of the fire defence managers who are reluctant to take up and implement constructive opinions presented by the firefighters in the workplaces is similar in nature to the intent of the Japanese Government to prevent the extension of union organizing in the fire defence service.

- 954.** In their communication of 13 December 2005, ZENROREN and JICHIROREN state that the Government has failed to follow the ILO recommendations and that the industrial consultations that are indispensable for the re-establishment of the fundamental rights of public personnel are in a deadlock. In addition, the Government is implementing another reform with the aim to impose major changes in working conditions that will be detrimental to public employees without hearing the opinions of workers concerned and without consulting with them.
- 955.** The Government decided at a Cabinet meeting held in December 2004 the “Guidelines for Future Administrative Reform” and the “New Guidelines for Local Administrative Reform” that would considerably affect the working conditions of public employees, including reduction in the number and total personnel cost of public personnel, privatization and contracting out of state and public services and introduction of a performance-based personnel evaluation and remuneration systems. In addition, the Government, in June 2005, adopted the “2005 Orientation regarding Economic and Financial Management” (hereafter referred to as “05 Basic Orientation”) for the elaboration of the national budget for fiscal year 2006. One of its major axes is “cuts in the total personnel cost” which was concretized in November 2005 by the “Guidelines for Total Personnel Cost Reform” (hereafter referred to as “Guidelines”). The “Guidelines” that will have serious effects on the employment and working conditions of public workers include: (1) 50 per cent reduction in the total labour cost of state employees in terms of GDP ratio within ten years; (2) 5 per cent reduction in the number of state employees within five years; and (3) to set numerical goal for reduction of the number of local public employees with the aim to contribute to the reduction of total personnel cost.
- 956.** According to ZENROREN, what is even more serious is that these governmental decisions unilaterally introduce disadvantageous changes in wages and working conditions of public servants while shelving the question of the guarantee of fundamental labour rights of public personnel. These decisions were taken with the participation of many representatives of the Japan Keidanren, made up of large Japanese enterprises, while keeping out from the decision-making process the representatives of public employees who “have their basic rights restricted” and without any negotiations or consultations with public workers’ unions. This constitutes a serious violation of the right to association of the public employees and a proof that the Government had no intention to follow the ILO recommendations.
- 957.** The Government has repeatedly “requested” the NPA to issue recommendations that match with the governmental “Orientation”. The NPA, in August 2005, faithfully followed the governmental “request” and made a recommendation to “drastically revise the wage system for the public employees”. The 2005 NPA recommendations include: (1) 4.8 per cent across-the-board wage cut for the state employees’ wages from the fiscal year 2006; (2) the wage cut will be accompanied with the creation of a “local residence allowance” that varies from 0 per cent to 18 per cent of the salary; (3) the most drastic revision of wage system in the last 50 years, consisting of a revision of wage structure by introducing “evaluation-based wage rise system” to allow for the principle of ability- and performance-based remuneration. Through this “drastic revision of wage system”, the State can reduce 180 billion yen and local governments 600 billion yen in their total labour cost. The lifetime earnings of state employees who do not receive “local residence allowance” and of a majority of local public employees whose wages are linked with the NPA wage recommendations will be reduced by as much as 12.9 million yen per person (according to an NPA estimate). The “drastic revision of wage system” is based on a series of decisions taken by the Government: the orientation of cutting state expenditures decided by the Cabinet meeting in June 2002 (“02 Basic Orientation”) that called for “efforts of the NPA and local personnel committees of local public organizations to quickly revise mechanisms



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of wage system in accordance with local realities” and the introduction of an ability- and merit-based wage system based on the “Principles of Civil Service Reform”.

- 958.** The opinions of employees’ representatives or of unions have never been taken into consideration in the elaboration of these policies. Before issuing the recommendations, the NPA met with the unions of state employees, but the basic framework of its planned recommendations were not changed. In addition, despite a strong opposition of all public unions, it recommended a “drastic revision of wage system” that imposed significantly disadvantageous changes in working conditions. The meeting between the NPA and unions does not constitute “negotiation or consultation” supposed by the ILO as stated in the 278th interim report of the Committee on Freedom of Association, but a mere hearing of their opinions. The NPA issued recommendations that were entirely in line with the intention of the Government under a system that can by no means compensate for the restrictions placed on the basic labour rights. This act itself violates the freedom of association of public employees.
- 959.** The wage levels of local public employees in Japan are governed by the principle of the Local Public Personnel Law (article 24-3): “their wages must be determined taking into account the cost of living, the wages of state employees and of employees of other public organizations as well as the wages of the private sector operators”. At the same time, local personnel committees, as a compensatory mechanism for the restricted basic labour rights that is independent from the NPA which is a state organ, are set up in some local bodies (47 prefectures, 14 specially designated large cities, one special district and two cities) and make “recommendations”. The “principle of local autonomy” means that wage levels as well as working conditions of local public personnel agreed upon between local authorities and local public employees’ unions through collective negotiations are to be made into an ordinance through a voting in the local assembly. In recent years however, the Japanese Government has been intervening in and strongly interfering with the determination of wages of local public employees that in principle is independent from the State by virtue of “local autonomy”. Through these interventions and interferences that have been made using the financial advantage the State has on the municipalities, the Government has repeatedly demanded the local governments to conform to the NPA recommendations and not to exceed wage levels of state employees or even to fix lower wage levels, by convoking the responsible managers for wages of major municipalities and local personnel committees. As a result, 57 per cent of local autonomous bodies have lowered the wage levels of their employees disregarding the recommendations of local personnel committees or the NPA recommendations on the pretext of local public financial crisis. The local personnel committees have their function distorted by the State and the wage levels of local public employees continue to decline in comparison with those of state employees.
- 960.** Regarding wage determination of local public personnel, the Government this year demanded the local personnel committees to “conform to” the 2005 NPA recommendation for a “drastic revision of wage system” for state employees and press the municipalities to conform to the state standards. These actions constitute a threat to the “principle of local autonomy” and intervention into the collective bargaining of local public workers. Moreover, even before the local personnel committees had issued the recommendations to the employers, and before the local authorities had negotiated or consulted with unions, the Government decided at a Cabinet meeting “partial modification” of the law on local autonomy (28 September 2005) and pushed through the Diet a bill for amending the law on wages of local public service employees. The “partial amendment” of the law on local autonomy modifies a clause that defines the “allowances” paid to local public employees and abrogates the “adjustment allowance” on the premise of 4.8 per cent across-the-board cut in public personnel wage and introduction of “local residence allowance” to be created. It is thus aimed at forcing the municipalities to “conform to” the NPA recommendations. It has in fact imposed a significant wage cut on prefectural and municipal workers and near

20 per cent wage discrepancy among them through the creation of “local residence allowance”.

- 961.** The Government decided to amend the local autonomy law through a Cabinet meeting even before the recommendation of the local personnel committees that are set in place to compensate for the restriction of basic labour rights. It imposed disadvantageous changes in working conditions of local public personnel by significantly lowering wage levels. In addition, it rushed the amendment bill through Parliament before negotiating or consulting with concerned unions. This forced revision of the local autonomy law disregards the existence of the local personnel committees that are compensatory mechanisms for the denial of the basic labour rights. Above all, it constitutes a blunt violation of the basic labour rights namely the right to organize and the right to collective bargaining of local public employees.
- 962.** The complainants consider that the “drastic revision of wage structure” and “reduction of the total personnel cost” decided by the Government while maintaining the “restrictions on the fundamental labour rights” constitute a serious violation concerning the basic labour rights of public employees. First, although these decisions impose considerable disadvantageous changes in the working conditions of local public personnel, the employees concerned have been given no right and no opportunity to participate in the process of decision-making. They are also denied the opportunity to participate in the decision-making in the NPA or in local personnel committees. Second, the recommendations of both the NPA and local personnel committees as compensatory measures for the restrictions placed on the basic rights do not reflect the opinions of workers but faithfully follow the “demands of the Government as the employer”. Evidently, they cannot be considered as compensatory measures for the “restricted basic labour rights”. Third, the Government has repeatedly intervened in and interfered with local personnel committees that are local governments’ bodies that are independent from the State and are set in place to compensate for the basic labour rights restriction, in order to press them to conform to the NPA recommendations that concern state employees, constitute a twofold violation of the fundamental labour rights of local public personnel. Fourth, a unilateral revision of the local autonomy law before the recommendations of local personnel committees and before the industrial negotiation of local public employees also constitutes a violation of the basic rights of local public personnel.
- 963.** For the complainants, the claim set forth by the Government to maintain the restrictions on the basic labour rights of public personnel on the basis that “the public employees, while their basic labour rights are restricted, have adequate compensatory measures ensured, including the recommendations of the NPA” is not valid. In the new context where the Government is trying to implement disadvantageous changes in various working conditions of public personnel in line with the policy of “reducing the total public personnel cost” while shelving the indispensable guarantee of their basic labour rights and without open negotiation and consultation with the concerned unions, it has become even more urgent that the Government comply with the ILO recommendations by changing national laws.

### **C. The Government’s replies**

- 964.** In its communications of 3 June and 14 October 2004, the Government stated that it had been continuing negotiations and consultations in good faith with labour representatives. RENGO and officials at the director-general level met on 26 February, 11 and 26 March, and 9 April 2004. In addition, on 13 May 2004, the Minister in Charge of Administrative Reform, along with other ministers, met with RENGO to exchange views. Both sides agreed on the value of continued discussions and that other meetings should be held in the

near future to discuss how to make progress on the issue. Both sides were to discuss the situation at the 2004 International Labour Conference.

- 965.** Other meetings were held on 15 June and 16 July 2004. JTUC-RENGO and government officials exchanged views on various issues concerning the civil service reform and confirmed that they should continue to consult at various levels. At the meeting of 16 July, JTUC-RENGO explained its “interim report” prepared by the “study group on the public service system reform” and the members exchanged frank views concerning labour-management relations in the public sector. Since 5 August 2004, the Government had shown materials for discussion to the parties concerned, including the employees’ organizations, to prepare a bill on the civil service reform. Several rounds of exchanges of views between the Government and the employees’ organizations have been held at different levels, and the Government was considering concrete ways to implement civil service reform, while consulting with the parties concerned.
- 966.** In its communication of 18 May 2005, the Government stated that it has been continually exchanging views at various levels with the parties concerned including employees’ organizations. JTUC-RENGO decided to discuss the issue of fundamental labour rights not only with the Government but also with the ruling party as well. Consequently, extensive discussions and efforts for coordination took place between them, but they have not resulted in a final agreement.
- 967.** Since coordination with the parties concerned, including employees’ organizations, did not advance sufficiently, the Government decided that it would not submit the bills for civil service reform to the Diet and adopted the “Future policy for the reform” (the “Future policy”) in December 2004, which stated that the Government would consider submission of those bills to the Diet while making further efforts of coordination with the parties concerned. The Government, in the process of making this policy decision in December, had exchanged opinions with the director-general of employees’ organizations and a meeting was also held between the Minister of State for Administrative Reform and representatives of Komu-rokyo (Public Sector Liaison Council). Upon the request of Komu-rokyo to maintain a framework of “government-labour meeting” between the ministers concerned and the labour representatives, the Minister of State for Administrative Reform indicated that maintenance of such a framework was desirable and therefore he would consult other ministers concerned.
- 968.** As regards the revision of the Fire Defence Personnel Committee system, the Government explains that in Japan, where the right to organize of fire defence personnel is restricted, the Government and the All-Japan Prefectural Municipal Workers’ Union (JICHIRO), which represents the local government personnel employees’ organizations, agreed on the introduction of the Fire Defence Personnel Committee system in 1995. At the 82nd Session of the International Labour Conference, the Committee on the Application of Standards welcomed the agreement with satisfaction. The Fire Defence Personnel Committee system came into force after the revision of the Fire Defence Organization Law in 1996. The system guarantees the participation of the fire defence personnel in the process to decide their working conditions, complies with the spirit of protecting their rights, and at the same time can be supported by national consensus. In October 2004, eight years since the establishment of the system, an agreement was made during a regular meeting between the Minister of Internal Affairs and Communications and the Commissioner of JICHIRO, on having meetings between the Government and trade union to exchange their views on the effort and practice of the Fire Defence Personnel Committee. A committee was set up and held five meetings from November 2004 to March 2005: its members are the director of the local Public Personnel Division, the director of the Fire Defence Division of the Fire and Disaster Management Agency from the Ministry, the director of the Wages/Conditions Department and the director of the

Organizational Management Department from JICHIRO. In that committee, the Fire and Disaster Management Agency reported the results of a survey on: the number of discussion sessions held by fire defence headquarters; the number of opinions submitted by personnel; the substance of the discussion at the committee, etc. JICHIRO reported the problems raised by personnel. Also, directors and personnel of three fire defence headquarters exposed the actual practice of the Fire Defence Personnel Committee.

**969.** According to the Government, JICHIRO made three requests for improvement before the Committee:

- (1) In the fire defence headquarters, the Fire Defence Personnel Committee should be held every year, at an appropriate time.
- (2) All the personnel should be informed of the significance and effects of the committee system and the contents of discussions of the committee.
- (3) The committee should be administered democratically with personnel's opinion discussed more appropriately.

**970.** As a result of consultations, the following points were agreed between the Ministry and JICHIRO:

- (1) Committee sessions shall be held in the first half of the fiscal year (from April to September) in time for budget making. Holding the session in the first half of the fiscal year and notifying the fire chief of the result of the discussions earlier will help him submit budget requests. This could give more chances for implementation of the personnel's opinions.
- (2) The committee shall inform each personnel who submitted opinions of the result of the discussion and its reason. The committee shall also notify all the personnel of the summary of the discussion, the results reported to the fire chief and the fire chief's decision. Notifying the personnel of the result of the discussion, etc. could make the system fairer and more transparent. This could encourage personnel to submit their opinions with more comprehension and reliance on the committee system.
- (3) A "liaison facilitator" system shall be introduced to the Fire Defence Personnel Committee system. In the new system, four "liaison facilitators" shall be ordinarily named from fire defence personnel on the basis of recommendations by the personnel. A liaison facilitator can make a supplementary explanation on the opinions and make comments on the operation of the committee (e.g. improvement of the way to solicit opinions). The committee shall in advance notify the personnel who submitted opinions and liaison facilitators of whether their opinions will be discussed by the committee. The liaison facilitator system, where liaison facilitators, as representatives of personnel, submit personnel's opinions together with their supplementary explanation on the opinions and comments, on the operation of the committee, could help the committee system be administered more effectively and democratically by taking the personnel's views into account.

**971.** According to the Government, JICHIRO and JTUC-RENGO highly appreciated the contents of the agreement as "practical and constructive". The liaison facilitator system, which gives fire defence personnel the opportunity to have their representative make comments to the committee on behalf of fire defence personnel to make the committee system more effective and democratic, is a quite remarkable mechanism in the light of further improvement of the committee system. The Government considers that this reform is in accordance with the "Guidelines on social dialogue in public emergency services (PES) in a changing environment" adopted by the ILO in 2003, which says "it should be

the overall aim of PES employers and workers to institute effective social dialogue mechanisms to ensure that PES are well run, efficient, accountable and provide quality service". Based on the above agreement, the Government revised the "Order of the organization and operation of the Fire Defence Personnel Committee" in May 2005. The revised Order is to come into force in August 2005. All the fire defence headquarters will implement the reform with their best efforts. The Government is determined to make every effort to implement the reform successfully so that the new Fire Defence Personnel Committee system is utilized effectively for further improvement of the working conditions of fire defence personnel.

- 972.** In its communication of 22 September 2005, the Government mentioned that it adopted in December 2004 a "Future Policy for Administrative Reform" stating that it would make further efforts to discuss the matter with the parties concerned and consider submitting bills for Civil Service reform. During a meeting in May 2005 between the Prime Minister, other Ministers and JTUC-RENGO, the Government also acknowledged that it was necessary to continue meetings to discuss the reform. During the recent months, circumstances did not lend themselves to conducting talks on the reform of public service, since public debate centred on the privatization of postal services; with a final conclusion expected on that issue at the special session of the Diet summoned in September 2005, the Government felt that conditions would improve to resume discussion of other important political issues.
- 973.** In its communication of 4 January 2006, the Government stated that it has been continually exchanging views at various levels with the parties concerned, regarding the civil service reform, including employees' organizations. In May 2004, a "Government-labour meeting" was held between the Minister of State for Administrative Reform together with other related ministers and labour representatives; views were exchanged on various issues concerning the civil service reform and it was agreed that it would be meaningful to hold further meetings and continue discussions. Thereafter, working level meetings took place and frank exchanges of views were conducted concerning the issues including fundamental labour rights. Further, following a decision of JTUC-RENGO, discussion and coordination on the issue of fundamental labour rights took place at a political level between not only the Government, but also the ruling party and JTUC-RENGO. Unfortunately, they did not reach a final agreement. Since coordination with the parties concerned including employees' organizations did not advance sufficiently, the Government concluded at the time that it would defer submitting the bills for civil service reform to the Diet and the Cabinet approved "Future Policy for the Administrative Reform" at its meeting in December 2004. The Cabinet decision stated that the Government would consider submitting those bills to the Diet while making further efforts of coordination with the parties concerned, and also that the reforms, the trial implementation of personnel appraisal, etc. which could be implemented within the framework of current legislation should be tried to be put into practice at an earlier stage for a steady promotion of reform. When the Government made this policy decision, a meeting was held between the Minister of State for Administrative Reform and the representatives of Public Sector Liaison Council (Komu-rokyo). Having been requested by the Komu-rokyo to maintain the framework of having the "Government-labour meeting" between the Minister of State for Administrative Reform together with other related ministers and labour representatives, the Minister of State for Administrative Reform stated in the meeting that it was desirable to maintain such a framework, and that he would consult with other related ministers on this issue. Further, the Government recognized that it was necessary to continue meeting with JTUC-RENGO on this subject in a meeting between representatives of JTUC-RENGO and the Prime Minister and other ministers in May 2005 and, in another meeting on 16 December 2005, the Government expressed its intention to communicate with the labour side on the civil service reform.

- 974.** Regarding the reform of remuneration system for public service employees, the NPA, a neutral third-party organization, has been established as a compensatory measure for the restriction of the fundamental labour rights for national public service employees in the regular service. In making recommendations on remuneration, etc., to the Diet and the Cabinet, it hears employees' organizations' opinions or requests through meetings and reflects these in its recommendations, etc. In 2005, the NPA held 212 official meetings with employees' organizations to hear their opinions and exchange views with them on various matters including the reform of the remuneration structure for national public service employees from January through 15 August when the NPA recommendation was submitted to the Diet and the Cabinet. The recommendation included, in addition to a revision of remuneration levels, a proposal for a thorough reform of the whole remuneration system including the salaries and allowances. Main components of the proposed reform are: (a) to revise the regional apportionment in order that local private sector wage levels be reflected in the remuneration of national public service employees; (b) to control the seniority-based remuneration increase and the change of the salary system to a new one corresponding to duties and responsibilities; and (c) to reflect each employee's performance in his/her remuneration. Receiving the recommendations, the Government has revised the remunerations of national public service employees in the regular service, hearing the opinions of employees' organizations. Also for 2005, the Government examined, hearing the opinions of the employees' organizations, an Amendment Bill of the Law concerning the Remuneration of Regular Service Employees and submitted it to the Diet to revise the remunerations exactly as recommended by the NPA, which was subsequently approved by the Diet. As for the local public service employees, a reform of the remuneration system for the employees in each local government is determined by the ordinance approved by each local assembly in accordance with a recommendation of the personnel committee of each local government, taking into consideration the reform of remuneration system for the national public service employees. The Government regards it as very important that it provides the local governments with information and advice concerning the reform of the remuneration system for the national public service employees. The Government had extensive discussion with the employees' organizations concerned in advance of the submission of the amendment bill of the Local Autonomy Law to the latest session of the Diet. This amendment was to revise one of the available options of the remuneration system for the local public service employees, and was necessary, together with the amendment of the Law concerning the Remuneration of Regular Service Employees, for execution of the new system.
- 975.** As regards the trial implementation of a personnel appraisal system in accordance with the "Future Policy for Administrative Reform", the Government exchanged views sufficiently with employees' organizations, and decided to start it in January 2006. The trial is applied to some employees in the headquarters of ministries. The Government intends to exchange views continuously with employees' organizations on the review of the trial, etc.
- 976.** As regards the major directions for administrative reform, considering that both the central and local governments are facing enormous deficit, it was regarded as urgent policy issues to make the government smaller and more efficient by promoting a reform of balanced expenditure and revenue. Therefore, the Government adopted "the Major Directions on the Administrative Reform" at a Cabinet meeting on 24 December 2005, which determined reform measures to be taken immediately (Action Plan for a global reform) with a view to making concrete proposals as early as possible and examining the major issues of the civil service system from a wider perspective.
- 977.** While elaborating the "Major Directions on the Administrative Reform", the Government examined both the contents and the process of the reform policy, bearing in mind the

numerous exchanges of views on civil service reform in recent years between the Government and the labour representatives, as follows:

- First, in making the Directions, the Minister of State for Administrative Reform held a meeting with the president of the JTUC-RENGO and asked for their cooperation to achieve the reform; several meetings were held with labour representatives at various levels, including at ministerial level. Further, in promoting the reform of total personnel costs in the public sector, the Government designated the Minister of State for Administrative Reform as Government focal point, when exchanging views with labour representatives.
- Second, with regard to civil service reform, the Directions state that considering the national feeling and the progress in reforming the remuneration system for public service employees, “the Government will examine the civil service system from a wide spectrum of views, including the fundamental labour rights of public service employees, the NPA system, the remuneration system and the personnel system of public service employees, such as ability and performance-based treatment and career system, with the Cabinet secretariat as the centre of the discussion”. This means that the Government has expressed that it will pursue a policy to re-examine the public service employees system in general, including what the fundamental labour rights for public service employees should be, in the context of promoting the important issues of administrative reform, with a view to securing trust in the administration, as well as to making the government budget healthier. In order to build up an ability and performance-based personnel management and more appropriate control of the employment of the retired employees, the Government has also decided to “have a frank exchange of views with the parties concerned, to coordinate their interests” and “to make an effort to make concrete proposals as early as possible”.
- Third, the Government, attaching importance on the employment issue associated with the reform, will consider establishing a long-term strategy for recruitment in the public sector and preparing a safety net for retired public servants. The Government will make efforts to achieve a fruitful civil service reform through “frank exchanges of views” based on the Major Directions. The Government would greatly appreciate it if the ILO would duly understand the sincere approach of the Government and the domestic developments in Japan, and will continue to provide the ILO with relevant information in this regard.

**978.** As regards the granting of fundamental labour rights to employees after the transformation of their employers into Independent Administrative Institutions and after the Privatization of the Postal Administration [331st Report, para. 558(h)], the Government states that it is restructuring some of its administrative units into independent administrative institutions (IAIs), which are organizationally independent from the Government with an aim to improve the quality of service. The IAIs are classified into two types, “specified IAIs” and “non-specified IAIs”, according to the nature of business, such as whether the discontinuation of their business is likely to affect the stability of national life, society or economy. The employees of specified IAIs are fully granted the right to organize, as well as the right to bargain collectively (including the right to conclude collective agreements). Employees of non-specified IAIs are guaranteed the right to strike, as well as the right to organize and the right to bargain collectively (including the right to conclude collective agreements) just like employees in private companies. Employees of national universities are, just like employees of non-specified IAIs, fully guaranteed the fundamental labour rights including the right to strike since those universities were incorporated. So far, following the transformation to IAIs, 122,000 employees have changed their labour law status to IAIs (71,000 employees to specified IAIs, and 51,000 employees to non-specified IAIs), and 118,000 employees of national universities have changed their status. This means that almost 30 per cent of national public service employees in regular service, who

comprised 818,000 people in March 2001 just before the introduction of the IAIs, have now been given the right to conclude collective agreements.

- 979.** Moreover, Japan Post, a public corporation established in April 2003 whose workers are national public service employees, is scheduled to be privatized in October 2007; its 262,000 employees (as of 2005) will become non-public service employees. They will be fully guaranteed fundamental labour rights, including the right to strike. It means that approximately 60 per cent of national public service employees that existed in March 2001 have been granted the right to conclude collective agreements, or full fundamental labour rights. The Government submits that these actions taken are in conformity with the recommendations of the Committee on Freedom of Association [Case No. 1348, 243rd Report, para. 289].
- 980.** Although the complainant mentioned that the employees' organizations were forced to restructure their organizations to "employees' organizations" for the national public service employees in the non-operation sector and "trade unions" for the employees of IAIs, and that their freedom of association is violated, it is possible for both organizations to form a confederation and it is left with the relevant employees' organizations to decide what kind of organizational structure they choose after the transformation to IAIs.
- 981.** As regards the right to organize of fire defence personnel [331st Report, para. 558(b)(i)], the Government refers to its additional information of May 2005. It should be noted that both the All-Japan Prefectural Municipal Workers' Union (JICHIRO) and the JTUC-RENGO expressed to the ILO that they highly appreciated the contents of the improvement in the Fire Defence Personnel Committee System as "effective and meaningful". In October 2005, the representative of JICHIRO also made a similar comment to the Minister of Internal Affairs and Communications. The revision of the order of the Fire and Disaster Management Agency for the improvement came into effect on 1 August 2005, and the Fire and Disaster Management Agency is striving to achieve a smooth introduction of the new system through providing information on occasions such as briefing sessions targeted for fire defence headquarters all over the country. According to the survey done by the Fire and Disaster Management Agency in December 2005, liaison facilitators would be appointed at 96 per cent of fire defence headquarters nationwide by March 2006. The Government considers that this shows that the new system will be enforced smoothly, and that the improvement will lead to more effective utilization of the system and improvement of working conditions of fire defence personnel.
- 982.** Regarding the employees of penal institutions, the Government refers to its additional information submitted to the ILO in March 2003.
- 983.** With respect to the registration system of employees' organizations [331st Report, para. 558(b)(ii)], the Government states that local public service employees can set up an employees' organization of their own choosing without obtaining authorizations in advance or taking other similar procedures; they are only required to register the organization. The registration system of employees' organizations is a system to officially certify that employees' organizations are independent and democratic bodies fulfilling the requirements of the Local Public Service Law, and does not impose any restriction on the establishment of employees' organizations. Moreover, whether employees' organizations are registered does not cause any substantial difference for the organizations in the acquisition of corporate status and the capacity to negotiate, thus, it does not invite any essential discrimination between the two. The Committee of Experts of the ILO has itself admitted that the system in Japan is in conformity with the context and spirit of the ILO Convention (1983 and 1994 observations, etc.).



- 984.** As regards the system of leaves of absence for full-time union officers for employees' organizations [331st Report, para. 558(b)(iii)], the Government explains that an employees' organization can elect the employees or persons other than the employees as officers of their organizations without the intervention by the employers. It can freely decide the officer's term of office. Those workers that engage exclusively in affairs of employees' organizations as officers of such organizations do not need to work as a public sector employee, but they retain the status as such. It thus merely gives employees' organizations additional conveniences. Even without the approval of the authorities for admitting leaves of absence to an employee, nothing prevents him/her from taking up the position of a union officer, and the system of leave of absence for full-time union officers in Japan does not limit the terms of officers of employees' organizations. The Government submits that the ILO itself admitted that the system of leaves of absence for full-time union officers in Japan would cause no problem [54th Report of the Committee on Freedom of Association, Dreyer report, August 1965].
- 985.** Regarding the promotion of rights to bargain collectively of public service employees [331st Report, para. 558(b)(iv)], the Government states that the fundamental labour rights of the public service employees of Japan are indeed subject to some restrictions, due to the special character of their status and the public nature of the functions performed by them, in order to ensure the common public interests. On the other hand, public service employees benefit from the NPA Recommendation System and other compensatory measures, which have been functioning effectively. The organizations established by national and local public service employees in the regular service have the right to bargain collectively with relevant authorities on their working conditions. In the course of collective bargaining, employees' organizations lodge complaints about their working conditions against relevant authorities and request them to take appropriate measures, and the relevant authorities are to discuss sincerely their requests with those employees' organizations. Both parties are expected to sincerely implement the matters agreed upon.
- 986.** As regards the right to strike by public service employees [331st Report, para. 558(b)(v)], the Government states that the fundamental labour rights of the public service employees of Japan are indeed subject to some restrictions, due to the special character of their status and the public nature of the functions performed by them, in order to ensure the common public interest. However, the public service employees have rights to live as workers and benefit from the NPA Recommendation System and other compensatory measures. The Supreme Court has maintained throughout its judgements that the prohibition of acts of dispute by public service employees is constitutional, holding that "the provisions of laws prohibiting acts of dispute by public service employees are not unconstitutional because, while the provisions of article 28 of the Constitution guaranteeing the fundamental labour rights shall also apply to public service employees, the right cannot be an exception to restrictions imposed from the standpoint of ensuring the common public interests of the people, and also because appropriate measures have been implemented to compensate for the restrictions on their fundamental labour rights". Public service employees in Japan are prohibited by laws from staging a strike, and therefore, it is inevitable that proper disciplinary actions are applied in accordance with the law, to those who participated in a strike in violation of such prohibition. In applying disciplinary actions, the respective authority concerned has taken such matters into consideration as the length, scale, manner, situation of employees involved and other relevant matters of strike, and has appropriately made judgement on whether to take disciplinary actions or not, or which disciplinary sanctions to take. Also, the persons who conspire, instigate or incite other public service employees to strike or make such an attempt are the key persons of the illegal act. In addition, their act to cause other public service employees to undertake illegal act is in itself of high illegality, and therefore penal sanctions, including a penalty of imprisonment (imprisonment not exceeding three years or fines not exceeding ¥100,000), may be

imposed upon them under the National Public Service Law or the Local Public Service Law. Thus, only the key persons of illegal acts are penalized.

**987.** As regards the court decision on the case at Oouda-cho [331st Report, para. 558(f)], the Government indicates that the Equity Commission of Oouda-cho appealed to the Supreme Court on 24 May 2004 where the case is still pending. The Government will inform the Committee of the final settlement of this case once it is rendered.

**988.** As regards remedial measures with the employees' organizations (the case at Ariake-cho) [331st Report, para. 558(g)], the Government states that the working conditions of local public service employees are determined at local assemblies by the representative of the residents of local governments through a democratic procedure. The Government considers that the statement by the complainant that "(T)he change of the working conditions is forced one-sidedly" is groundless. It should be noted that, despite the fact that there was a conflict between employees and employers on this issue at the beginning of 1996, no problems have occurred since then, and a good labour-employer relationship has been kept until now.

**989.** In its communication of 24 January 2006, the Government confirms the decisions made at the Cabinet meeting in December 2005, and explains that, at the meeting with JTUC-RENGO on 16 January 2006, it conveyed its key principles of reform, as well as its basic approach to exchanging views with the labour side. At that meeting, the Minister of State for Administrative Reform, the Minister of Internal Affairs and Communications and the Minister of Health, Labour and Welfare on the one hand and labour representatives on the other exchanged views on a wide range of themes, including the basic ideas and issues to be discussed on civil service reform and total personnel cost reform. They agreed on the following points.

- (a) The labour-employer relationship in the public sector needs to be changed according to changes in the social and economic situation.
- (b) The Government and JTUC-RENGO confirmed their willingness to continue exchanges of views and coordinate their interests on civil service reform. They also agreed to exchange views before the ILO Committee on Freedom of Association and the International Labour Conference, and would hold a meeting in March 2006.
- (c) Consideration of issues from a wide spectrum is needed, including a possibility of granting fundamental labour rights to public service employees.
- (d) In promoting total personnel cost reform, which is the most pressing issue, the Government and JTUC-RENGO will consult on the way to implement rearrangement of public service employees, recognizing the importance of employment security.

**990.** The Government and JTUC-RENGO also agreed to coordinate at working level the modalities of future meetings, including schedule. The Government's approach is based on the idea that frank exchanges of views and coordination are necessary, as referred to in the Major Directions. It will do its utmost to make the discussion meaningful and achieve a fruitful civil service reform, and requests the ILO to understand the sincerity of its efforts in this matter.

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

**991.** *The Committee recalls that these cases, initially filed in March 2002, concern the current reform of the public service in Japan.*

992. *The Committee notes that there have been a number of meetings and discussions at various levels, both administrative and political, over the last few months. The Committee notes in particular the contents of the meeting of 24 December 2005 which, following consultations and discussions with JTUC-RENGO, resulted in the issuing of the “Essential Policy for Administrative Reform”.*
993. *The Committee further notes with interest that a high-level consultation took place on 16 January 2006, where, according to the complainant organization, it was confirmed that the Government had withdrawn the general principles for civil servants system reform of 2001, which advocated maintaining the restrictions on basic labour rights for civil servants, and would now consider the possibility of granting these rights in the public service. From the information provided by both the Government and the complainant the two parties therefore recognized the necessity to improve the labour-management relationship in the public service in line with socio-economic changes. The Committee also notes that the two parties agreed that: the Government and JTUC-RENGO would continue to exchange views and coordinate their interests on civil service reform; consideration of issues from a wide spectrum is needed, including a possibility of granting fundamental labour rights to public service employees; in promoting total personnel cost reform, which is the most pressing issue, the Government and JTUC-RENGO will consult on the way to implement rearrangement of public service employees, recognizing the importance of employment security; a further meeting will be held in March 2006. According to JTUC-RENGO, the trade union side proposed to establish a “place for consideration” (“kento noba”) and that further consultations will take place on this matter. Noting that, according to JTUC-RENGO, this new policy represents a significant departure from the general principles decided in December 2001, the Committee welcomes these developments and strongly encourages the parties soon to make further steps in that positive direction.*
994. *The Committee notes however that some important policy matters are still to be decided, notably the fundamental issue of the basic labour rights of public servants. The Committee trusts that the current talks will result in clear steps being taken to ensure that public servants may freely exercise these basic rights. In addition, whilst noting the indications given by the Government concerning firefighters and employees of penal institutions, the Committee observes that these workers are still deprived of the right to organize. Noting that discussions are currently taking place on the reform of public service, the Committee recommends that the Government takes this opportunity to ensure that firefighters and employees of penal institutions enjoy the right to organize. The Committee also welcomes with interest the reform of the fire defence personnel system. It requests the parties to keep it informed of the results of such discussions.*
995. *Noting further that the Government plans to introduce during the 2006 regular session of the Diet an Administrative Reform Promotion Bill, based on the Essential Policy of December 2005, the Committee requests the Government to ensure that that bill is in conformity with freedom of association principles as expressed in its earlier recommendations, whose main aspects are recalled in the recommendations below. The Committee reminds the Government that it may avail itself of ILO technical assistance in this respect and invites it to provide it with a copy of the bill once it is drafted.*
996. *The Committee takes note of the Government’s observations concerning the transformation of public entities into Independent Administrative Institutions (IAIs), and the forthcoming privatization of Japan Post. Whilst it can examine allegations concerning restructuring processes, whether or not they imply redundancies or the transfer of services from the public to the private sector only in so far as they might have given rise to acts of discrimination and interference against trade unions and their members [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996,*

para. 935] the Committee recalls 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, and staff reduction processes. Trusting that these principles will be respected, the Committee requests the Government and the complainants to continue to keep it informed of the consequences of the reorganization on the collective bargaining rights of workers transferred to IAs.

**997.** *The Committee notes the information provided as regards the Oouda-cho case and requests the Government to keep it informed of the final decision once it is issued.*

**998.** *The Committee takes note of the information provided as regards the Ariake-cho case and that, according to the Government, good labour-employer relations have been maintained in this context. The Committee will not pursue this aspect of the case unless the complainant provides further information.*

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

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

- (a) Noting with interest the establishment of dialogue between the parties, the Committee strongly encourages the parties to pursue their ongoing efforts with a view to achieving rapidly a consensus on the reform of the public service and on legislative amendments that are in conformity with the freedom of association principles embodied in Conventions Nos. 87 and 98, ratified by Japan. Consultations should notably address the following issues:*
  - (i) granting basic labour rights to public servants;*
  - (ii) granting the right to organize to firefighters and prison staff;*
  - (iii) ensuring that public employees not engaged in the administration of the State have the right to bargain collectively and to conclude collective agreements, and that those employees whose such rights can be legitimately curtailed enjoy adequate compensatory procedures;*
  - (iv) ensuring that those public employees who are not exercising authority in the name of the State can enjoy the right to strike, in conformity with freedom of association principles, and that union members and officials who exercise legitimately this right are not subject to heavy civil or criminal penalties;*
  - (v) the scope of bargaining matters in the public service.*
- (b) The Committee requests the Government to provide it with the text of the Administrative Reform Promotion Bill, once it is drafted.*
- (c) The Committee requests the Government to provide it with the final judgment in the Oouda-cho case once it is rendered.*
- (d) The Committee requests the Government and the complainants to continue to keep it informed on the consequences of the reorganization on the*

*collective bargaining rights of workers transferred to independent administrative institutions (IAIs).*

- (e) *The Committee requests the Government to keep it informed of developments on all the above issues.*
- (f) *The Committee reminds the Government that it may avail itself of the technical assistance of the Office, if it so desires.*

CASE No. 2416

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

**Complaint against the Government of Morocco  
presented by  
the Moroccan Labour Union (UMT)**

*Allegations: The complainant alleges that the local authorities in the town of Bouznika used force to intervene following a protest strike held by a local trade union protesting against the suspension of its general secretary, without prior notice and in violation of existing procedure, shortly after the union had been established. Armed with a pistol, the town governor led the police intervention, which resulted in several people being injured and the arrest of nine union officials*

- 1000.** The complaint is contained in communications from the Moroccan Labour Union (UMT) dated 20 April and 23 May 2005.
- 1001.** The Government sent its observations in communications dated 24 June and 20 July 2005.
- 1002.** Morocco has ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), as well as the Workers' Representatives Convention, 1971 (No. 135). It has not ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).

**A. The complainant's allegations**

- 1003.** In its communications of 20 April and 23 May 2005, the Moroccan Labour Union (UMT) explains that its complaint concerns a collective labour dispute at Valeo (a car parts manufacturer in Ben Slimane province), located in the town of Bouznika. The complainant alleges failure to recognize the UMT's primary organization at the enterprise and the discriminatory dismissal of the general secretary of the trade union committee, which resulted in a general show of solidarity from all the workers at the factory, and led to brutal police intervention and to the arrest of nine members of the factory's trade union committee.

- 1004.** On 30 March 2005, elections were held for nine workers' representatives after the workers at the factory decided to join the UMT. On 12 April 2005, the national secretary of the UMT sent a message to the factory management, assuring them that the union would work towards labour relations based on mutual respect and social dialogue.
- 1005.** On the evening of 19 April 2005, the general secretary of the factory union, Mr. Essemlali Abdelghafour, was unable to go to work, the management having informed him at the factory door that he had been suspended. The UMT alleges that this suspension took place without any prior notice and was contrary to all regulations. Following this suspension, the night team decided to hold a work stoppage from 10 p.m. in protest.
- 1006.** On 19 April, at 11 p.m., the town governor of Bouznika arrived at the factory site in person at the head of the police officers called by the factory management in response to the work stoppage. Furthermore, the complainant alleges that, according to numerous witnesses, the town governor was clearly in a state of inebriation, brandishing a weapon at the workers. In the complainants' view, this intervention was brutal, leaving several workers injured and hospitalized. In addition, the UMT stresses that the personal support of the governor of Bouznika for these events was extremely serious and involves the direct responsibility of the Moroccan Government.
- 1007.** This intervention also led to the arrest of nine members of the trade union committee at the factory: Ms. Nadia Raihan, Mr. Jawad Gennoni, Mr. Khairat Hassan, Mr. Hassan Elkafi, Mr. Aziz Rzouzi, Mr. Jilali Fawdsi, Mr. Wardi Echouali, Mr. Abdellah Zarouf and Mr. Saïd Janati. On 25 April 2005, these individuals were brought before the court of first instance of Ben Slimane and charged with obstructing the freedom to work, an offence punishable under section 288 of the Moroccan Penal Code by one month to two years' imprisonment and a fine. According to the complainant, such charges are often fabricated in order to prosecute and incarcerate trade unionists; which is why the UMT consistently denounces this section of the Penal Code, considering that it contravenes Conventions Nos. 87 and 98. Finally, in view of the flimsiness of the charges and the weight of the evidence submitted by the lawyers defending the trade unionists, the court postponed the hearing until 2 June 2005.
- 1008.** At the time of the complainant's last communication (23 May 2005), the delegate of the Ministry of Labour to Ben Slimane province had issued a advisory notice in which he recognized the illegality of the suspension of the union official. The complainant had also informed the company's head office (situated in Paris) of the events, negotiation meetings between the two parties had been organized and a solution to the social issues had been reached, with the signature of a draft agreement (copy enclosed in the communication). The complainant stresses that the legal charges brought against the nine trade unionists are still pending and are in the hands of the authorities.
- 1009.** In more general terms, the complainant alleges that the use of the police forces in reprisals against the workers at the site, during the solidarity strike which followed the suspension of the general secretary of the UMT at the factory, constitutes a flagrant violation of the fundamental Conventions of the ILO on freedom of association and the right to collective bargaining.

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

- 1010.** In a communication dated 24 June 2005, the Government enclosed a letter of 6 June 2005 signed by the provincial employment delegate for Ben Slimane and addressed to the Minister of Employment and Vocational Training; the letter contains a report on the collective labour dispute arising at the Valeo factory in Bouznika. The factory has a staff of 1,800, of whom 60 per cent are women.

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### **Use of force and arrests during the events of 19 April 2005**

- 1011.** The provincial delegate explains that, on 19 April 2005, after midnight, the town governor requested him by telephone to come to the company's site. There, he informed him that the 600 workers on the third shift, working from 10 p.m. until 6 a.m., had stopped work in protest at the decision, announced that evening, to suspend Mr. Essemlali Abdelghafour, the general secretary of the primary organization of the UMT at the factory. The strikers were chanting slogans demanding the reinstatement of the dismissed union official and refusing any dialogue until this demand had been met. Faced with this situation, and in order to guarantee freedom to work, the governor ordered the police to intervene to evacuate the premises. As a result, nine workers were arrested by the police and then released on 20 April 2005; nine workers have been charged with obstructing the freedom to work.
- 1012.** On 21 April, at 10 p.m., the night shift finally resumed work. In his report, the provincial delegate points out that this stoppage occasioned the loss of 7,488 work hours, i.e. 936 workdays.

### **Inquiry and conciliation between the parties organized by the Ben Slimane employment delegation**

- 1013.** In order to find a solution to the dispute, the Ben Slimane employment delegation organized meetings within the framework of a provincial commission of enquiry and conciliation. During a meeting on 25 April 2005, chaired by the governor of the province, in the presence of the provincial employment delegation, officials from Valeo, UMT officials and representatives of the trade and industry delegation, the parties expressed their points of view with regard to the collective labour dispute.
- 1014.** According to the provincial employment delegate, the governor confirmed that intervention by the authorities was essential to protect the freedom to work, which had been seriously jeopardized by the events of 19 April 2005, notably because the strikers categorically refused to enter into discussions on the premises where they were striking. The enterprises' management emphasized the unacceptable behaviour of the chief secretary of the union, who had received several warnings during the period when he led a primary trade union organization affiliated to the General Union of Workers of Morocco (UGTM); his suspension would only have been a matter of time, and was not intended to infringe the right to freedom of association or target the UMT as a trade union.
- 1015.** The representatives of the UMT pointed out that the founding documents of the staff trade union of the factory had been submitted on 30 March 2005 to the Bouznika local labour authority, which had attempted to evade its obligation to provide a receipt or make a certified copy of the documents. Furthermore, they vehemently denounced the intervention of the authorities and the aggressive attitude of the employer, which had led to an infringement of trade union rights, the right to freedom of association and the legitimate right of workers to strike. Lastly, they demanded the reinstatement of the dismissed union official and the respect for freedom of association as *sine qua non* conditions for improving the labour relations climate within the factory.
- 1016.** For its part, the provincial employment delegation recounted the various stages of the dispute to the parties, and pointed out that it considered that the decision to dismiss the general secretary of the trade union committee was irregular in that it had not been taken in accordance with the procedure specified in section 62 (the right to defend oneself) and section 65 (time limit for bringing an action for dismissal before the courts) of the Labour

Code. Furthermore, the provincial delegation drew the employer's attention to its obligation to act in accordance with Article 1 of Convention No. 135, on protection for workers' representatives against any act prejudicial to them.

### ***Recognition of the primary organization of the UMT at Valeo***

**1017.** With regard to the legitimacy of the primary organization in question, the provincial delegation recognizes that it did indeed receive, on 1 April 2005, a copy of the founding documents of the primary organization, submitted to the offices of the Bouznika local authority on 30 March 2005, in accordance with sections 414 and 415 of the Labour Code. Acting on the recommendations of the meeting held on 25 April 2005, the provincial commission held a second meeting on 3 May at the Ben Slimane provincial head office, chaired by the governor of the province. At the end of this meeting, a draft agreement on labour relations, mechanisms of dialogue and consultation between the primary organization of the UMT at Valeo and the enterprise management was concluded between the parties. This agreement, which came into effect on 5 May 2005, guarantees that workers shall be able to exercise the right to freedom of association, and deals in particular with the facilities provided to workers' representatives to enable them to carry out their functions.

### ***Dismissal of the general secretary of the trade union at the Valeo factory***

**1018.** At the end of the meeting of 25 April 2005, the provincial commission of enquiry and conciliation assigned the provincial employment delegation the task of issuing a notice concerning the dismissal of the union official. On 2 May 2005, the delegation issued the requested notice, according to which the decision to dismiss the general secretary of the trade union at the factory on 19 April 2005 had not been made in accordance with the procedure applicable to the case. Consequently, on 3 May 2005, during the second meeting with the provincial commission, an agreement allowing his reinstatement as of 6 May 2005, was concluded between the parties. In addition, the official himself signed a document setting out his obligations as a worker and his rights as a union official.

### ***Charges against the union officials arrested on 19 April 2005 during the dispute at the Valeo factory***

**1019.** In a communication of 20 July 2005, the Government sent a letter of 2 July 2005 from the provincial employment delegate, addressed to the Minister of Employment, concerning the verdicts given on the nine workers charged with obstructing the freedom to work (Cases Nos. 876 and 877, Ben Slimane Court). This letter states that, on 16 June 2005, the court of first instance of Ben Slimane gave two verdicts in respect of the nine workers at Valeo charged by the office of the public prosecutor with obstructing the freedom to work.

**1020.** The first verdict (Case No. 877) acquitted eight of the workers charged with obstructing the freedom to work. With regard to the second verdict (Case No. 876), given the same day, Mr. Hassan Elkafi was also acquitted of the charge of obstructing the freedom to work, but was given a one-month suspended prison sentence and a fine of 200 dirhams for stealing adhesive tape belonging to his employer, which was found at his home and in his pockets. On 21 June, the King's Prosecutor appealed against these two rulings; for its part, the defence lodged an appeal against the guilty verdict given in respect of Mr. Elkafi.



## The Committee's conclusions

**1021.** *The Committee notes that the allegations in this complaint concern the failure to recognize the primary organization of the UMT at the Valeo factory and acts of anti-union discrimination, in particular the dismissal of the general secretary of the UMT trade union at the factory, shortly after the union was established, without prior notice and in violation of existing procedure, which led to a protest strike by the local union. The complainant further alleges that the town governor, armed with a pistol, led the police intervention, which left several people injured and resulted in the arrest of nine members of the trade union committee at the Valeo factory. The Government, for its part, acknowledges the intervention by the police on 19 April 2005 and points out that it has taken measures aimed at drawing the parties closer, bringing them to the bargaining table and improving the labour relations climate within the factory.*

### **Failure by the factory management to recognize the primary organization of the UMT**

**1022.** *With regard to recognition of the primary organization of the UMT at the factory, the Committee notes that, according to the complainant's allegations, despite the founding documents having been submitted to the local labour authority and a communication from the national secretary of the UMT seeking to initiate dialogue, the union has encountered many difficulties in obtaining recognition from and engaging in discussions with the employer. While noting that the provincial employment delegation intervened to enable dialogue between the parties and to guarantee recognition of the UMT organization at the factory, in particular through the conclusion of a draft agreement on labour relations, mechanisms for dialogue and consultation between the UMT trade union committee at the factory and the enterprises' management, the Committee recalls that employers should recognize for collective bargaining purposes the organization's representative of the workers employed by them, since this recognition is the very basis for any procedure for collective bargaining on conditions of employment in the undertaking [see **Digest of decisions and principles of the Freedom of Association Committee**, 1996, 4th edition, paras. 821 and 822]. The Committee trusts that the primary organization of the UMT at the Valeo factory will be able to continue to carry out its trade union activities unhindered.*

### **Dismissal of the general secretary of the UMT union at the factory**

**1023.** *With regard to the dismissal of the general secretary of the UMT at the factory, the Committee notes that the complainant alleges that the action in question was discriminatory, since it took place shortly after the election and establishment of the trade union committee at the factory. The Committee further notes that the Government has not denied the link between the election of the trade union organization at the factory and the dismissal of its general secretary, nor that this decision was related to the trade union activities of the official in question. While noting that Mr. Essemli Abdelghafour was reinstated in his post as of 6 May 2005, particularly thanks to the intervention of the provincial delegation, the Committee recalls that no person shall be prejudiced in his employment by reason of his trade union membership or legitimate trade union activities [see **Digest**, op. cit., para. 690], and that adequate protection is particularly desirable in the case of trade union officials 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**, op. cit., para. 724]. The Committee trusts that these principles will be respected in the future.*

## **Intervention by the police on the evening of 19 April 2005**

- 1024.** *With regard to the allegations of excessive use of force by the police, the Committee notes from the provincial delegates' report that, the governor of the province considered this intervention by the authorities to be essential to the protection of the freedom to work, which he considered was seriously jeopardized by the events of 19 April 2005. The Committee further notes the Government's statement that the strikers simply chanted slogans demanding the reinstatement of the dismissed union official and refusing to resume work or to initiate any dialogue until this demand had been met. The Committee recalls that, in cases of strike movements, the authorities should only resort to the use of force in situations where law and order is seriously threatened [see **Digest**, op. cit., para. 580], and that the intervention of the police should be in proportion to the threat to public order [see **Digest**, op. cit., para. 582]. The Committee requests the Government to ensure that these principles are respected in the future.*
- 1025.** *The Committee observes that the Government has not responded to the complainant's allegations that several people were injured during the events of 19 April 2005, some of whom had to be hospitalized. Recalling that governments should take measures to ensure that the competent authorities receive adequate instructions so as to avoid the danger of excessive violence in trying to control demonstrations that might undermine public order [see **Digest**, op. cit., para. 582], the Committee requests the Government to carry out an independent inquiry into these incidents promptly and to keep it informed of the outcome.*

## **The protest strike of 19 April 2005**

- 1026.** *As regards the legality of the strike held by the workers at the Valeo factory on the evening of 19 April 2005, the Committee recalls that it has always regarded the right to strike as constituting a fundamental right of workers and of their organizations, in so far as it is utilized as a means of defending the social and economic interests of their members. In this case, the work stoppage carried out by workers at the Valeo factory in protest at discriminatory measures against the principal secretary of the UMT union at the factory constituted a legitimate union action. The Committee notes that, according to the information supplied by the complainant and the Government, both the police intervention and the arrests and proceedings that followed were based on section 288 of the Penal Code on "obstructing the freedom to work". The Committee notes that, under the terms of section 288 of the Penal Code, "any person who, by violence, assault, threats or fraudulent activity, instigates or prolongs, or attempts to instigate or prolong, a stoppage of work, with the aim of forcing an increase or decrease in salaries or to obstruct the free exercise of labour or industry, shall be liable to a prison sentence of between one month and two years or a fine of between 120 and 5,000 dirhams, or both". Noting that, in practice, this provision could be applied in such a way as to restrict freedom of association and the right to collective bargaining, the Committee requests the Government to ensure that section 288 of the Penal Code is not used in the future in a manner incompatible with the principles of freedom of association.*

## **Arrest of nine members of the trade union committee at the factory**

- 1027.** *With regard to the arrest of trade unionists during the events of 19 April 2005, the Committee stresses that the arrest, even if only briefly, of trade union leaders and trade unionists for exercising legitimate trade union activities constitutes a violation of the principles of freedom of association [see **Digest**, op. cit., para. 70]. Emphasizing that such measures entail serious risks of abuse and a grave danger to freedom of association, the*

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*Committee requests the Government to ensure that in future the authorities do not use arrest and imprisonment in the case of organizing or participating in a peaceful strike.*

**1028.** *The Committee notes that the trade unionists arrested were charged with “obstructing the freedom to work” and acquitted on 16 June 2005. It further notes that, on that occasion, Mr. Elkafi was convicted of simple theft and given a one-month suspended prison sentence and fined 200 dirhams. Noting that the King’s Prosecutor has appealed against these two verdicts, and that the defence has lodged an appeal in respect of the guilty verdict against Mr. Elkafi, the Committee requests the Government to send it a copy of the appeal verdicts as soon as they are given.*

**1029.** *The Committee notes that, according to the information sent, it seems that there has been a problem as regards labour relations within Valeo, but that the climate at the factory has now improved, mainly as a result of government intervention enabling a draft agreement to be concluded between the parties and the general secretary of the primary organization of the UMT at the factory to be reinstated. The Committee hopes that, in the future, officials and members of the primary organization in question will be able to carry out their legitimate trade union functions in full respect for the principles of freedom of association.*

### **The Committee’s recommendations**

**1030.** *In light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) The Committee requests the Government to promptly carry out an independent inquiry to determine whether, during the police intervention on 19 April 2005, there were any casualties, including any requiring hospitalization, and to keep it informed of the outcome.*
- (b) The Committee requests the Government to ensure that section 288 of the Penal Code, on the offence of “obstructing the freedom to work”, will not be used in the future in a manner incompatible with the principles of freedom of association.*
- (c) The Committee requests the Government to keep it informed of the appeal verdicts given by the relevant courts in respect of the nine members of the trade union committee charged with “obstructing the freedom to work”, as well as the appeal verdict in respect of the verdict finding Mr. Elkafi guilty of simple theft.*

CASE NO. 2393

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

**Complaint against the Government of Mexico  
presented by  
the Trade Union of Employees of the Electrical Component  
Manufacturing Company of Mexico S.A. of C.V. (STEMCEM)**

*Allegations: The complainant organization alleges: (1) refusal by the authorities to register the organization despite the fact that it has complied with legal requirements; (2) existence of a clause in the collective agreement of the MACOELMEX maquiladora enterprise with another trade union which makes membership of the latter union a condition for hiring workers and requires the company to dismiss workers who renounce membership or who are expelled from that trade union; and (3) dismissal of workers and trade union members during the process of establishing the complainant trade union, threats and intimidation by the company and acts of violence by members of the other existing trade union*

**1031.** The complaint is contained in a communication from the Trade Union of Employees of the Electrical Component Manufacturing Company of Mexico S.A. of C.V. (STEMCEM) dated 29 July 2004. The Government sent its observations in a communication dated 22 September 2005.

**1032.** Mexico 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. The complainant's allegations**

**1033.** In its communication dated 29 July 2004, the Trade Union of Employees of the Electrical Component Manufacturing Company of Mexico S.A. of C.V. (STEMCEM) states that it is a workers' organization that represents and defends the rights and interests of its members in the Electrical Component Manufacturing Company of Mexico S.A. of C.V. (MACOELMEX), owned by Alcoa, in Piedras Negras, Coahuila. The trade union was established by the employees of MACOELMEX in a general assembly on 30 April 2002. During the assembly, the articles of incorporation were formally signed, an executive committee was elected, and the rules of procedure were adopted. During the same assembly, 502 MACOELMEX employees joined the trade union and signed a registration application in the presence of the Local Conciliation and Arbitration Board.

- 1034.** The complainant trade union explains that previously, in early 2002, Javier Carmona, Rafael Salinas and other employees of the MACOELMEX plants, owned by Alcoa, in Piedras Negras, Coahuila, Mexico, began to organize with a view to establishing a new MACOELMEX trade union, which would be independent of the existing trade union (Trade Union of Assembly Industry Workers in the State of Coahuila, CTM). The workers wished to establish a trade union that would represent the interests of the majority of workers of the four MACOELMEX plants (plant No. 1, plant No. 2, Subaru plant and Bodega plant), owned by Alcoa in Piedras Negras.
- 1035.** The complainant trade union explains that the collective labour agreement between MACOELMEX and the CTM trade union, dated 3 January 2000, contains an exclusion clause which makes membership of the CTM union a condition for obtaining permanent employment in MACOELMEX. The exclusion clause also requires the company to dismiss employees who are expelled from the CTM trade union. This clause, which is permitted under articles 395 and 413 of the federal Labour Law, provides that “the employer shall dismiss members who renounce membership or are expelled from the contracting trade union”. The complainant states that the Supreme Court of Justice of the Nation has ruled on several occasions that the exclusion clause is unconstitutional; in practice, this is not observed.
- 1036.** In Mexico, so-called protection contracts are common practice in the *maquila* industry of which MACOELMEX is a part; they are concluded between companies and trade unions, generally before the company hires workers and commences operations. When workers seek to organize a trade union to then be able to assume the administration of their own contract, they are threatened with the exclusion clause which is frequently invoked in practice to have workers dismissed. Application of the exclusion clause infringes the rights of workers to establish and join organizations of their own choosing, and to seek to administer their contract. The combined impact of these restrictions is to deny the right to negotiate a collective agreement collectively.
- 1037.** On 22 February 2002, the employees of the company’s plant No. 2 held a general assembly in the Piedras Negras community centre, during which it was decided that the leadership of Leocadio Hernández, Secretary-General of the CTM trade union, would not be recognized and that steps would be taken to establish a new trade union. Mr. Hernández, accompanied by approximately ten of his supporters, sought to terminate the assembly by force, but the majority opposed him. As they left the meeting, Mr. Hernández and his supporters attacked Ms. Amparo Reyes, an employee of the company’s plant No. 1, who had come to support the workers from plant No. 2. Four women from Mr. Hernández’ group struck and insulted Ms. Amparo Reyes. When the latter tried to evade them, they threw her to the ground, kicked her and pulled her hair. In addition, on Monday, 25 February 2002, supporters of the CTM trade union entered plant No. 2 and attacked several of the workers. One of them, Bruno Meléndez, required stitches to a head wound.
- 1038.** On 26 February 2002, the MACOELMEX company, at the request of the CTM trade union, evoked the exclusion clause to dismiss six employees from plant No. 1 who had helped employees from plant No. 2 to organize the assembly of 22 February 2002. Representatives of the company explained to these workers that they were being dismissed because the collective labour agreement between MACOELMEX and the CTM trade union authorized the union to expel workers and request MACOELMEX to rescind their contracts.
- 1039.** On 4 March 2002, an election was held to renew the sectional trade union committee for plant No. 2. On that occasion, workers could opt to vote for candidates on an independent list or for a list supported by the CTM union. On the morning of the election, the MACOELMEX supervisors threatened workers that MACOELMEX would move to

Piedras Negras if they did not vote for the CTM list. The representatives of the CTM trade union and MACOELMEX managers launched a campaign against the independent list and intimidated workers by looking over their shoulder to see how they voted. Despite the threats by the MACOELMEX managers and the CTM trade union, the independent list won by a large majority and the Local Conciliation Board confirmed that employees of plant No. 2 had elected the new sectional trade union committee by a vote of 892 against 592 (in Mexico, each state of the Republic has a Local Conciliation and Arbitration Board to deal with labour disputes that are not subject to federal jurisdiction. The governor of the state oversees the Local Conciliation and Arbitration Board).

- 1040.** On 30 April 2002, a general assembly was held for all trade union members working in plant No. 2 and in the Subaru plant. The purpose of the assembly was formally to establish a trade union that was independent from the CTM and which would genuinely represent the interests of workers. This meeting became the constituent assembly of the MACOELMEX trade union, and the 502 employees who attended the assembly adopted the rules of procedure of the MACOELMEX trade union and elected Carlos Briones, José Luis Rodríguez and Bruno Meléndez to the executive committee.
- 1041.** On 3 and 4 October 2002, MACOELMEX dismissed some 16 MACOELMEX plant No. 1 employees who had expressed an interest in joining the new trade union. In addition, MACOELMEX dismissed Carlos Briones, José Luis Rodríguez, Bruno Meléndez and Guadalupe Rivera, four of the five leaders of the new trade union in plant No. 2.
- 1042.** According to the complainant, in Mexico, workers' organizations are required to register with the relevant Conciliation and Arbitration Board in order to obtain formal recognition as a trade union. The federal Labour Law, article 366, provides that the Conciliation and Arbitration Board cannot refuse to officially register a trade union if it meets all the requirements laid down in article 365 of that law. The complainant trade union states that it met the requirements: (1) to have at least 20 members; (2) its purpose was to study, improve and defend the interests of workers; and (3) it submitted, together with its application for official registration: (a) an authoritative record of the constituent assembly; (b) an authoritative copy of the records of the election of the executive committee; (c) its rules of procedure; and (d) a list of the total number, names and addresses of its members. The trade union applied for registration by the Local Conciliation and Arbitration Board in Piedras Negras on 27 June 2002. However, the Local Conciliation and Arbitration Board decided, on 23 August 2002, to refuse registration. The Board cited problems in connection with the registration but never sought to consult the trade union to clarify or resolve doubts regarding the registration application and did not give the trade union an opportunity to correct or clarify any such matters. Subsequently, on 2 September 2002, the trade union brought an action for constitutional protection (*amparo*) before the Third District Court of the Eighth Circuit in respect of the decision of the Local Conciliation and Arbitration Board but, on 22 October 2002, the court refused the trade union's application for constitutional protection. The trade union then brought an *amparo* action before the Collegiate District Court in the City of Torreón, Coahuila.
- 1043.** On one occasion, the president of the Local Conciliation Board intervened directly in the process of registering the complainant trade union when he approached the organizers of the trade union at about midnight on 25 September 2002 and warned them not to try and set up an independent trade union. He threatened the workers, saying that it was not appropriate that they should be so open and vocal about their disagreement with the CTM trade union.
- 1044.** Moreover, Mr. José Angel Aranda Hernández, a CTM leader, sat as the worker representative on the Local Conciliation and Arbitration Board which refused to register the complainant trade union. The Local Conciliation and Arbitration Board has a tripartite

structure composed of a government representative, an employer representative and a worker representative, but the federal Labour Law, article 707, provides that the members of the Local Conciliation and Arbitration Board cannot intervene in any decision in which they are personally involved.

- 1045.** The complainant trade union is of the view that the facts of this case violate Conventions Nos. 87 and 98, including acts of interference and anti-union discrimination.

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

- 1046.** In its communication dated 22 September 2005, the Government states that it assumed a commitment to comply with the provisions of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), which was ratified on 1 April 1950, and that it has not ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). The Constitution of the International Labour Organisation imposes upon member States, an obligation to recognize the principle of freedom of association, which is reflected in the Manual on procedure in regard to international labour Conventions and Recommendations. Hence, the Committee on Freedom of Association can only review cases in which the alleged violation of the principle of freedom of association derives from acts by the Government.
- 1047.** Consequently, the following comments address the matters raised in the communication from the complainant trade union relating to acts by the authorities in connection with the principle of freedom of association and protection of the right to organize as embodied in ILO Convention No. 87.
- 1048.** In regard to the statement by the complainant that the competent Local Conciliation and Arbitration Board allegedly violated ILO Convention No. 87, in refusing to carry out registration, the government states that the complaint is not of a nature to constitute non-compliance by the government of the principle of freedom of association and the right to organize embodied in ILO Convention No. 87.
- 1049.** The complainant does not state in its communication that it has been prevented from freely exercising its right to organize, with legal personality and own assets, to defend members' interests, in a manner deemed appropriate. Neither has it been prevented from exercising its right to draw up its constitution and rules, to elect its representatives in full freedom, to organize its administration and activity and to formulate its programmes.
- 1050.** Likewise, the complainant was not left without recourse, since the Mexican legal system provides the opportunity to exercise rights through the appropriate channels to challenge and pursue legal remedies against the decision of the competent Local Conciliation and Arbitration Board. As the complainant trade union states in its communication, it has been able to take legal action and lodge the challenges it deems appropriate, before the competent jurisdictional and administrative authorities.
- 1051.** In all events, in Mexico, registration of trade unions does not grant them status; it serves to render such organizations public.
- 1052.** The Committee on Freedom of Association has acknowledged that there appears to be no obvious infringement of ILO Convention No. 87 when registration of trade unions is merely a formality subject to conditions which do not jeopardize the guarantees provided for by the Convention.
- 1053.** It may be noted that the complainant trade union may, and has the right to, reapply for registration, which will be granted when the authority declares that it has complied with

the corresponding legal requirements, without detriment to its rights to establish itself as a trade union association, draw up its rules of procedure and elect its representatives.

- 1054.** The MACOELMEX trade union is of the view that the Mexican Government has allegedly violated its obligations to the ILO, in authorizing a tripartite structure in the Local Conciliation and Arbitration Board, which allowed a representative of the rival trade union, that is, a member of the CTM, to sit on the Board and that his intervention was decisive in the refusal to register the MACOELMEX trade union.
- 1055.** The federal Labour Law, articles 648 to 667, embodies the electoral procedure to be followed by representatives of workers or employers on Federal or Local Conciliation and Arbitration Boards, together with the requirements to be met in order to be able to act in this capacity. This procedure takes the form of assemblies to be convened either by the Secretary for Labour and Social Security, by the Governor of the State or by the Head of the Federal District Department, during which the representatives of duly registered trade unions or employer organizations, free workers or independent employers elect both worker or employer representatives, in proceedings to be held by each special board. In the light of the above, it is clear that the procedure for electing worker and employer representatives on the Federal and Local Conciliation and Arbitration Boards is transparent and clear, and that it is properly regulated by labour legislation. Any legal impediment in regard to one or more members of the Local Conciliation and Arbitration Board to which the complainant organization applied for trade union registration, under federal Labour Law, article 707, should in due time have been brought to the attention of the authorities specified in federal Labour Law, article 709, as laid down specifically in article 710 of this Law. Therefore, the MACOELMEX trade union was in a position to challenge one or more members of the competent Local Conciliation and Arbitration Board who could thereby have been prevented from participating in the decision in question, and the complainant is solely responsible for not doing so; any failure to take action in this regard cannot be imputed to the Government, nor can it be argued that the tripartite structure of the boards is detrimental to the complainant's interests since, it is repeated, this composition adheres to provisions of law and is intended to ensure that the collegiate decision of the body is as fair and impartial as possible.
- 1056.** The Government concludes by stating that: (1) the matters raised by the complainant trade union in its communication are not of a nature to constitute non-compliance by the Government of Mexico with the principle of freedom of association and the right to organize embodied in ILO Convention No. 87; (2) the complainant trade union has brought its complaints before the administrative and jurisdictional authorities, it has been heard and has received a response, meaning that the corresponding legal channels and procedures have been used; and, (3) the complainant trade union has been able to exercise its rights before the competent adjudicatory authorities, pursuing the corresponding legal action and, where appropriate, the remedies and challenges provided for in the national juridical system, for the purpose of ensuring that the authorities comply with the obligations incumbent upon them under the relevant laws, as well as those deriving from decisions by the adjudicatory bodies.

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

- 1057.** *The Committee observes that, in the present case, the complainant (established in the MACOELMEX company) alleges that: (1) the Local Conciliation and Arbitration Board turned down its application for registration, despite the fact that it had complied with the legal requirements and that the trade union had 502 members; (2) a collective labour agreement existed between MACOELMEX and the CTM trade union containing an exclusion clause which makes membership of the CTM union a condition for obtaining permanent employment in MACOELMEX and further requires the company to dismiss any*



*employee who is expelled from the CTM trade union. This clause, which is permitted under articles 395 and 413 of the federal Labour Law, applies to the maquila industry although the Supreme Court of Justice of the Nation has ruled on several occasions that the exclusion clause is unconstitutional; (3) under the exclusion clause contained in the collective agreement, six workers were dismissed during the course of establishing the complainant trade union and acts of violence were directed against workers by members of the CTM trade union, as well as threats and intimidation by company representatives; (4) after the complainant trade union had been established, MACOELMEX dismissed some 16 MACOELMEX employees who had expressed an interest in joining the new trade union. In addition, MACOELMEX dismissed four of the five leaders of the new trade union (Carlos Briones, José Luis Rodríguez, Bruno Meléndez and Guadalupe Rivera); and (5) the complainant trade union's registration application was turned down by the Local Conciliation and Arbitration Board, which has a tripartite structure consisting of three members, one of whom was a leader of the CTM trade union who failed to recuse himself despite the existing conflict of interest; in addition, several months later, the chairman of the Board attempted to dissuade the organizers of the complainant trade union from establishing an independent union. The Committee notes that these allegations date from 2002 and that the judicial authorities ruled against registration of the complainant trade union on first appeal and that the trade union submitted a further appeal to the Collegiate District Court in the City of Torreón, Coahuila.*

**1058.** *In regard to the Local Conciliation and Arbitration Board's refusal to register the complainant trade union and the alleged lack of impartiality by one of its members and the opposition by the chairman of the Board to the trade union, the Committee notes the Government's statements that: (1) the Local Conciliation and Arbitration Board's refusal to register the trade union is not of a nature to constitute non-compliance by the Government of the principle of freedom of association and the right to organize embodied in ILO Convention No. 87; (2) in Mexico, registration of trade unions does not grant them status; it serves to render such organizations public; (3) the complainant trade union may and has the right to renew its application for registration when it complies with the legal requirements; (4) the complainant trade union does not state in its complaint that it has been prevented from freely exercising its right to establishment, or its right to draw up its constitution and rules, to elect its representatives in freedom, to organize its administration and activities and to formulate its programmes; (5) the complainant organization has availed itself of the legal remedies and challenges that exist in the national legal system; (6) the federal Labour Law, articles 648 to 667, lays down the electoral procedure to be followed by representatives of workers or employers on Federal or Local Conciliation and Arbitration Boards, together with the requirements to be met in order to be able to act in this capacity. This procedure takes the form of assemblies to be convened either by the Secretary for Labour and Welfare, by the Governor of the State or by the Head of the Federal District Department, during which the representatives of duly registered trade unions or employer organizations, free workers or independent employers, elect both worker or employer representatives, in proceedings to be held by each special board; (7) the MACOELMEX trade union was in a position to challenge one or more members of the competent Local Conciliation and Arbitration Board who could thereby have been prevented from participating in the decision in question, and the complainant is solely responsible for not having done so; any failure to take action in this regard cannot be imputed to the Government; and (8) the Committee on Freedom of Association can only review cases in which the alleged violation of the principle of freedom of association derives from acts by the Government.*

**1059.** *The Committee notes that, on 22 October 2002, the judicial authority rejected an appeal submitted by the complainant trade union but states that it is concerned that a further appeal submitted by the complainant trade union to the District Collegiate Court of Torreón remains pending. The Committee deplores this delay of several years,*

*emphasizing that justice delayed is justice denied and requests the Government to forward a copy of the Court's decision. The Committee notes that the Local Conciliation and Arbitration Board (competent with respect to registraton) did not consult representatives of the trade union in order to resolve possible legal problems. The Committee further refers to earlier cases involving Mexico in which connection the Committee has requested the Government to take measures to ensure that, if the body responsible for registering organizations concludes that irregularities exist in the documentation submitted, the organizations in question are given the opportunity to rectify the irregularities [see, for example, 334th Report, Case No. 2282, para. 638, and 337th Report, Case No. 2346, para. 1056].*

- 1060.** *In regard to allegations concerning the ("exclusion") clause in collective contracts which makes membership of a union a condition for obtaining permanent employment and requires the company to dismiss employees who are expelled from the union, the Committee notes that the Government makes no specific comment on the subject. The Committee further notes that these clauses are permitted under articles 395 and 413 of the federal Labour Law and that, according to the complainant, they are applied to the maquila industry notwithstanding the fact that the Supreme Court of Justice of the Nation has ruled on several occasions that they are unconstitutional. The Committee observes that the provisions in question read as follows:*

*Article 395. The collective contract may provide that the employer will hire only workers who are members of a contracting trade union. This clause and any others that provide for privileges in its favour may not be applied in detriment to workers who do not belong to the trade union and who are already working for the company or establishment prior to the date on which the trade union requests that a collective contract be concluded or reviewed and the exclusion clauses included in it. It may also be provided that the employer will dismiss members who have renounced or been expelled from the contracting trade union.*

*Article 413. The clauses referred to in article 395 may be included in the Contract-Law. It will be applied by the trade union administering the Contract-Law in each company.*

*Under these circumstances, the Committee requests the Government to inform it of the implementation of the ruling of the Supreme Court of Justice concerning articles 395 and 413 of the federal Labour Law.*

- 1061.** *In regard to the alleged act of anti-union discrimination in connection with the establishment of the complainant trade union (dismissal of six employees from plant No. 1 who had helped employees from plant No. 2 to organize the assembly of 22 February 2002, and the dismissal of four of the five trade union leaders and of 16 workers who had shown an interest in becoming members), the alleged acts of violence by persons connected with the other trade union against workers who decided to take steps to establish the complainant trade union during the assembly of 22 February 2002 and the alleged acts of intimidation by the company and threats that the company would leave Piedras Negras if the workers did not vote for the representatives of the existing trade union, the Committee regrets that the Government has made no specific observations on these allegations and that it has merely stated in general terms that the complainant trade union can exercise its rights through the remedies and challenges provided for in the legal order.*
- 1062.** *Under these circumstances, the Committee strongly urges the Government to take measures to carry out an investigation into these allegations and in the event that the alleged facts are confirmed, that it ensure that reparation is forthcoming for any anti-union conduct and, specifically, that the dismissed workers are reinstated and, if this is not legally possible, that they are compensated fully without loss of benefits and such compensation shall include penalties that represent sufficiently dissuasive sanctions against the employer for such anti-union conduct. The Committee requests the Government to keep it informed of developments. In general terms, the Committee recalls that no*

*individual shall be prejudiced in his employment by reason of his trade union membership or legitimate trade union activities, whether past or present [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 690], that pursuant to the principle contained in Convention No. 98, article 2, employers shall abstain from any pressure or threat against workers engaging in trade union activities and that the rights of workers' and employers' organizations can only be exercised in a climate that is free from violence, pressure and 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**, op. cit., para. 47].*

## **The Committee's recommendations**

**1063.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) In regard to the Local Conciliation and Arbitration Board's refusal to register the complainant trade union, the Committee observes that on 22 October 2002 the judicial authority rejected an appeal submitted by the complainant trade union and is concerned that a further appeal submitted by the complainant trade union to the District Collegiate Court of Torreón remains pending. The Committee deplors this delay of several years, emphasizing that justice delayed is justice denied and requests the Government to forward a copy of the Court's decision.*
- (b) The Committee requests the Government to inform it of the implementation of the ruling of the Supreme Court of Justice concerning articles 395 and 413 of the federal Labour Law.*
- (c) The Committee regrets that the Government has not sent specific information on: (1) the alleged act of anti-union discrimination in relation to the establishment of the complainant trade union (dismissal of six employees from plant No. 1 who had helped to organize the assembly of 22 February 2002 and the dismissal of four of the five trade union leaders and of 16 workers who had shown an interest in becoming members); (2) the alleged acts of violence by persons connected with the other trade union against workers who decided to take steps to establish the complainant trade union during the assembly of 22 February 2002; and (3) the alleged acts of intimidation by the company and threats that the company would leave Piedras Negras if the workers did not vote for the representatives of the existing trade union.*
- (d) The Committee strongly urges the Government to take measures to carry out an investigation into these allegations and, in the event that the alleged facts are confirmed, that it ensures that reparation is forthcoming for the anti-union conduct and, specifically, that the dismissed workers are reinstated and, if this is not legally possible, that they are compensated fully without loss of benefits and such compensation shall include penalties that represent sufficiently dissuasive sanctions against the employer for such anti-union conduct. The Committee requests the Government to keep it informed of developments.*

CASE NO. 2268

INTERIM REPORT

**Complaint against the Government of Myanmar  
presented by  
the International Confederation of Free Trade Unions (ICFTU)**

*Allegations: (1) allegations relating to legislative issues: unclear legislative framework on 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 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*

- 1064.** The Committee examined this case at its May-June 2005 meeting and submitted an interim report to the Governing Body [see 337th Report, paras. 1058-1112, approved by the Governing Body at its 293rd Session (June 2005)].
- 1065.** The Government sent new observations in communications dated 1 and 14 September 2005.
- 1066.** 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

**1067.** At its May-June 2005 meeting, the Committee made the following recommendations in relation to this case [see 337th Report, para. 1112]:

- (a) The Committee strongly urges the Government to enact legislation whereby the respect for, and the realization of, freedom of association is guaranteed for all workers, including seafarers, and employers; to include in that legislation specific measures whereby other legislation, including Orders Nos. 2/88 and 6/88, will be abolished 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 public authorities, including the army; and to ensure that any such legislation so adopted is made public and its contents widely diffused. The Committee further urges the Government, once again, to take advantage of the technical assistance of the Office to remedy the legislative situation and to bring it into line with Convention No. 87 and collective bargaining principles. The Committee requests the Government to keep it informed of all developments in respect of legislation enacted or envisaged.
- (b) 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 seafarers' organizations and organizations which operate in exile 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.
- (c) The Committee once again firmly requests the Government to convene as a matter of urgency an independent and impartial panel of experts to investigate the death of Saw Mya Than and to keep it informed in this regard.
- (d) Expressing its deep concern at the paucity and nature of the evidence provided by the Government aimed at proving that the criminal charges brought against the General Secretary of the FTUB were unrelated with his trade union activities, the Committee once again requests the Government to provide copies of the decision by which the General Secretary had been found guilty under section 122 of the Penal Code, and any documentation relating to the case the Government explained had been filed against him under the Public Preservation Law, 1947.
- (e) Deploring the Government's failure to take any steps to ensure the immediate release of Myo Aung Thant and Khin Kyaw, the Committee urges the Government to do so as a matter of urgency and to keep it informed in this regard.
- (f) The Committee once again requests the Government to submit a detailed reply on the allegations of anti-union discrimination relating to Shwe Tun Aung's case and, in particular, the allegations that before taking his first position as a seafarer, the Seaman Employment Control Division (SECD) obliged Shwe Tun Aung to sign a document warning against union membership; that other M/V Great Concert crew members who returned to Myanmar were forced by the SECD to refund wages increased by the union action, fined heavily and forbidden to leave the country for three years; and that, following his trade union activities, Shwe Tun Aung's name was on a Government "blacklist". The Committee further requests the Government to provide a copy of any contract or document that Myanmar seafarers in general are currently obliged to sign prior to taking up their first work assignment. If these allegations relating to anti-union harassment are found to be true, the Government is requested to take immediate measures so that Shwe Tun Aung and all Myanmar seafarers are free to join the trade union of their own choosing.
- (g) Pending the adoption of legislation that protects and promotes freedom of association, the Committee requests the Government to take measures to ensure the freely chosen representation of employees and employers in cases conciliated by the various disputes

resolution committees operating in Myanmar and to keep it informed of the measures taken in this regard.

- (h) Taking account of the figures contained in the table provided by the Government for the Motorcar tyre factory, the Committee requests the Government to provide due explanations of the differences in the total workforce on 9 and 31 March 2001 and, in particular, to provide details concerning the cases of those three workers whose employment at the factory ceased during that period of time as well as an indication as to whether any other workers left their employment at the factory during this period, but were replaced. If it is found that the dismissals in question were due to legitimate trade union activities, the Committee requests the Government to take the appropriate steps with a view to their reinstatement or, if reinstatement is not possible, that they are paid adequate compensation so as to constitute sufficiently dissuasive sanctions.
- (i) The Committee once again requests further details in relation to the case of 77 night shift workers who were dismissed from the Unique Garment Factory following a dispute on 10 July 2001 during their probationary period and following a conciliation by the TWSC including, in particular, a copy of the conciliation agreement reached under the authority of the TWSC to which the Government referred to in its previous observations. If it is found that the dismissals in question were due to legitimate trade union activities, the Committee requests the Government to take the appropriate steps with a view to their reinstatement or, if reinstatement is not possible, that they are paid adequate compensation so as to constitute sufficiently dissuasive sanctions.
- (j) The Committee requests the Government to provide a copy of the agreement to which it referred to in its previous observations concerning a dispute between 300 workers and the Myanmar Texcamp Industrial Ltd. that arose on 5 July 2003 and that was conciliated by the Department of Labour, as well as information indicating the criteria upon which the 340 workers who were laid off for economic reasons on 1 August 2003 were chosen from the total workforce of 581 workers. If it is found that the dismissals in question were due to legitimate trade union activities, the Committee requests the Government to take the appropriate steps with a view to their reinstatement or, if reinstatement is not possible, that they are paid adequate compensation so as to constitute sufficiently dissuasive sanctions.
- (k) The Committee requests the Government to establish an impartial investigation into this matter and to keep it informed in this regard. It further requests the Government to provide a copy of the agreement at the Myanmar Yes Garment Factory dated 16 September 2002 and any further information that the Government may have in relation to the dismissal of Mg Zin Min Thu.

## **B. The Government's new observations**

**1068.** The Government submitted further information in response to the Committee's recommendations in communications dated 1 and 14 September 2005.

### ***Legislative issues***

**1069.** With regard to the issues raised in point (a) of the Committee's recommendations, the Government indicated that the basic principles for the social sector, including the rights of the workers, would provide the framework under which detailed provisions would be developed in drawing up the new Constitution. According to the Government, the National Convention was convened for the first time from 17 May to 9 July 2004. Concrete measures have been taken to achieve success in the implementation of the Seven-Point Road Map for the emergence of a peaceful, modern, developed and discipline-flourishing democratic nation. The National Convention had adopted by consensus a total of 104 basic principles and laid down that "the State shall enact necessary laws to protect the rights of the Workers". This first National Convention also laid down the detailed basic principles for the social sector to be embodied in the union legislative list as regards the sharing of legislative power. The second National Convention laid down the detailed basic principles

for the social sector to be embodied in the union legislative list. The third National Convention would be held in December 2005 and, after that, the detailed basic principles of the social sector to be embodied in the union legislative list would be adopted. Thus, the Government assured that after the Seven-Step Road Map was implemented, the legislative issue would be definitely solved in the very near future. Moreover, during the transitional period the workers were well protected by the existing labour laws.

### ***Factual issues***

#### **Death of Saw Mya Than**

**1070.** With regard to the issue raised in point (c) of the Committee's recommendations, the Government indicated that it had already replied on this issue and that it had never neglected or ignored any person who had the right to get compensation under the prevailing labour laws. The Government reiterated that it had already made systematic consultations and investigations about the case and that a thorough investigation had been conducted with the concerned ministries and departments. Saw Mya Than's family themselves had already accepted the compensation with satisfaction.

#### **Conviction of the General Secretary of the FTUB**

**1071.** With regard to the issues raised in point (d) of the Committee's recommendations, the Government attached the untranslated text of certain legal documents, including a police complaint and the decision of the respective court.

#### **Response concerning the imprisonment of Myo Aung Thant and Khin Kyaw**

**1072.** With regard to the issues raised in point (e) of the Committee's recommendations, the Government indicated that it always tried to follow all the requests of the Committee but if the issue was a serious one involving the security of the country, it could not fulfil the request. As a result, Myo Aung Thant was still in prison. As already indicated in the Government's previous report, Khin Kyaw had received a conditional pardon since 1997 according to section 337 of the Criminal Procedure Code (CPC), under the order of the Additional Divisional Judge of the Western District Court.

#### **Discrimination against Shwe Tun Aung**

**1073.** Concerning the issues raised under point (f) of the Committee's recommendations, the Government indicated that according to the latest information in Shwe Tun Aung's file in the SECD, this person had left Myanmar since 14 March 1996 on assignment as a deck cadet on M/V Haitum Ocean, owned by the Petrolserve company. From that date, he had never come back to Myanmar. He had been assigned as an oiler and had signed his contract with M/V Great Concert owned by CTM Trading Co., Ltd., in Bangkok. The agreement was neither related to the Department of Marine Administration nor the Government, but only to the individual parties.

**1074.** The Government also recalled the communication it had sent to the Committee in the framework of Case No. 1752 based on allegations by the International Transport Workers' Federation (ITF), concerning the treatment of Myanmar maritime workers serving aboard foreign vessels. At that time, the Department of Labour had held discussions with high officials of the concerned ministries and the following steps had been taken so as to implement the recommendations of the Committee in this case. (1) The SECD (under the Ministry of Transport) had promptly revoked the requirement for Myanmar seafarers to sign an affidavit before leaving the country with effect from 9 February 1995.

(2) Necessary measures had already been taken so that Myanmar seafarers were free to take care of their own affairs and interests. The Government had no anti-union discrimination practices whatsoever against seafarers. (3) The SECD formally issued a departmental instruction dated 1 February 1995, mentioning that there would be no more deduction of 25 per cent out of family remittances of Myanmar seafarers in exchange for local currency with effect from 1 December 1994. (4) The Constitution of the Myanmar Overseas Seafarers' Association (MOSA) was legislated after consultations, coordination and cooperation with the seafarers and responsible officials from the ITF. The outcome was the establishment of MOSA in May 2002. This showed the goodwill and good intentions of the Myanmar Government. Since 1995, the Government had thus already implemented the recommendations of the Committee reached in Case No. 1752 in relation to the obligation to sign a contract with the company concerned before seafarers could take up their first work assignment. The Government attached a model contract between the SECD and shipping companies.

- 1075.** Concerning the seafarers from M/V Great Concert, the Government indicated that only three had come back to Myanmar. No one had been forced by the SECD to refund wages increased by union action nor fined heavily and forbidden to leave the country. The Government never forbade the seafarers who made complaints to any union. If any union gave a salary in excess of that contained in the contract, the Government had no objection to its citizens enjoying a better wage. But if anyone violated the provisions under the contract, for example, holding of false documents, then he would be punished.

Response concerning alleged labour unrest  
and dismissals of workers

(a) *Disputes resolution*

- 1076.** With regard to the issues raised in point (g) of the Committee's recommendations, the Government drew attention to the existence of detailed instructions in the guide book of the Township Workers' Supervisory Committees (TWSC) with regard to the scope and nature of the guide book, the duties and functions of the TWSC, the power of conciliation, the procedures to follow in the respective sectors and the activities of the TWSC. The Government also drew attention to the existence of detailed instructions in the 1976 directive of the Central Trade Dispute Committee (CTDC) issued by the Ministry of Labour. The directive included the instructions of the CTDC on the methods of solving disputes, the various trade disputes on which committees are formed under the existing labour laws, the responsibilities and the activities of the head office of the CTDC in solving the disputes smoothly, the establishment of the CTDC, the State/Division Appeal Dispute Committees, and the Township Trade Dispute Committees, the duties and functions of these committees, the duties and functions of their secretaries, their procedures, the references to be provided and general provisions. Detailed instructions were also included in the procedures of the State/Division Trade Dispute Committees and Township Trade Dispute Committees, issued by the CTDC under the Ministry of Labour.

(b) *Motorcar tyre factory*

- 1077.** With regard to the issue raised in point (h) of the Committee's recommendations, the Government indicated that the payroll of February 2001 showed a decrease of three persons and an increase of one which can be explained as follows. Min Than Win, work register No. Ta-2/1187, was working in the payment category 5400-100-5900. He was absent from the factory without prior permission and without leave for over 21 days. He was dismissed on 27 February 2001 because of continuous absence from work for more than 21 days without leave under the provisions of the Fundamental Rules and the Services Rules. Worker Aung Myo Win, work register No. Ta-2/1098, was working under the



payment category 3000-100-3500. He had stolen three goats from the Workers' Welfare Animal Husbandry Compound. He was sentenced under section 379 of the Penal Code to prison for one month with hard labour. Because of the sentence passed by the Township Justice Court, he was removed from work on 18 January 2001. This kind of action was taken on any service man from the government sector under the Fundamental Rules and the Services Rules. As these two persons were dismissed from work according to the provisions of the existing laws, there was no way they could be reinstated. According to the provisions of the Workmen's Compensation Act, 1923, they were not entitled to any compensation either. In February 2001, Daw Cho Cho Win, work register No. Ta-2/0547, was promoted and was included in the payment category 5400-100-5900. She was transferred from the head office of the Myanmar Tyre and Rubber Industries to the Motorcar tyre factory, Thahtone.

(c) *Unique Garment Factory*

**1078.** With regard to the issues raised in point (i) of the Committee's recommendations, the Government attached the agreement of 10 July 2001 reached under the authority of the TWSC and added that, because of unexpected problems, part of the production of the Unique Garment Factory was stopped and the workers who worked in that part of the production during their probation period were retrenched. Seventy-seven of the night shift workers who were working during their probation period were retrenched and received the payable compensation. On 31 August 2003, the Unique Garment Factory was closed because of the suspension of orders from buyers (as a result of trade sanctions) originating in the United States, Germany and Mexico (the main export products were children's jackets and polo shirts). The Government added that the employers of the Unique Garment Factory had compensated the workers according to the provisions of the existing labour laws. The Government attached the document of agreement dated 1 September 2003 and the receipt of the compensation signed by the workers.

(d) *Myanmar Texcamp Industrial Ltd.*

**1079.** With regard to the issue raised in point (j) of the Committee's recommendations, the Government indicated that a complaint was made by approximately 300 workers on 5 July 2002 and an agreement was reached on 1 August 2002 (not 5 July 2003 as previously indicated). The Government attached the text of this agreement adding that although the complaint involved 300 workers, the employer gave compensation not only to these workers, but to all 504 workers in the factory.

**1080.** The Government added that in July 2003, the Myanmar Texcamp Industrial Ltd., sent letters (dated 24 and 30 July 2003) to all departments concerned, mentioning that due to the suspension of orders from buyers (due to trade sanctions) part of the production would be stopped and inevitably they would have to retrench the workers in that line of production. The untranslated text of these letters was attached to the Government's response. After the said communication had been sent to the concerned departments and organizations, an agreement was signed between the employer and 340 workers on 1 August 2003 (and not 1 August 2002 as previously indicated). The Government attached the said agreement.

(e) *Myanmar Yes Garment Factory*

**1081.** With regard to the issues raised in point (k) of the Committee's recommendations, the Government indicated that Maung Zin Min Thu's service was just five months and he was still on probation. Within the framework of the employment contract, it was mentioned that a worker who was undergoing the probation period could be dismissed. Moreover, a worker could be dismissed if he breached the discipline rules laid down by the factory and

the provisions of the employment contract. The worker in question was entitled to compensation of one month under articles 6(1)(8) and 68(6)(8) of the Law of 1964 defining the fundamental rights and responsibilities of workers, and Notification No. 55 issued by the Ministry of Labour dated 31 December 1976. The employer gave him compensation for two months but the worker in question refused to accept it. The Government added that on 16 September 2002, Maung Zin Min Thu sought advice on his case and went to the Labour Office at 9.40 a.m. as he wished to make a complaint. On that very same day at 12.15 p.m., Min Min Htwe and five other workers made a complaint against the employer concerning their own grievances. The complaint by Min Min Htwe and five other workers had nothing to do with that of Zin Min Thu. It was moreover pure coincidence that Min Min Htwe and five other workers received compensation (on the basis of the agreement of 16 September 2002).

### C. The Committee's conclusions

**1082.** *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 Federation of Trade Unions of Burma (FTUB), the arrest, imprisonment and death of trade unionists, and threats against, and dismissals and arrests of, workers who pursue labour grievances.*

#### Legislative issues

**1083.** *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. In particular, the Committee had noted that the absence of any legislative guarantee on freedom of association as well as the existence of Order No. 6/88 that subjects the establishment of unions to previous authorization by the Ministry of Home and Religious Affairs and bans organizations on broad terms, gives rise to a situation which is clearly in breach of Convention No. 87 as it renders the exercise of the right to organize impossible. The Committee thus requested the Government: (i) to enact legislation guaranteeing freedom of association rights to all workers, including seafarers, and employers; (ii) abolish existing legislation which undermines the guarantees related to freedom of association and collective bargaining, including Orders Nos. 2/88 and 6/88; (iii) explicitly protect workers' and employers' organizations from interference by the authorities, including the army; (iv) ensure that any such legislation so adopted is made public and its contents widely diffused. The Committee also urged the Government to take advantage of the technical assistance of the Office so as to remedy the legislative situation.*

**1084.** *The Committee notes with deep regret, that in reply to this long list of recommendations, the Government has confined itself to an update of the steps taken with a view to adopting "basic principles for the social sector, including the rights of the workers", which, it states, would eventually constitute a framework under which detailed provisions would be developed in drawing up the new Constitution. The Committee notes in particular, that according to the Government, the National Convention was convened for the first time from 17 May to 9 July 2004 in the framework of the implementation of the Seven-Point Road Map which is to eventually lead to the adoption of a new Constitution. The National Convention adopted by consensus a total of 104 "basic principles" and laid down that "the State shall enact necessary laws to protect the rights of the workers". The third National Convention was to be held in December 2005 and after that, the detailed basic*

*principles of the social sector to be embodied in the union legislative list would be adopted.*

- 1085.** *While taking due note of the Government's assurances that once the Seven-Step Road Map is implemented the legislative issue will be definitely solved in the very near future, the Committee must also note that the Seven-Step Road Map process goes as far back as 1993 and has yet to render any concrete results. In the meantime, the right to organize remains subject to severe measures of repression both in law and in practice. The Committee notes moreover that the "detailed principles" adopted so far are no more than generic phrases such as "labour disputes" and "labour organizations" which provide no indication whatsoever as to the concrete content and scope of any future legislation or the timetable for its adoption. The Committee must also reiterate that the absence of a new Constitution should not prevent the adoption of legislation in conformity with Convention No. 87 as it has apparently not prevented the Government from adopting legislation (like Order No. 6/88) which directly contradicts this Convention.*
- 1086.** *Given 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 whatsoever in this regard. The Committee deeply regrets that the Government has still not given any concrete indication of steps taken or contemplated so as to establish a legal basis enabling workers to exercise the right to organize as requested by the Committee. The Committee must 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 50 years ago.*
- 1087.** *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**

### **Workers' welfare associations and Myanmar Overseas Seafarers' Association**

- 1088.** *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.*
- 1089.** *The Committee notes with regret that the Government does not provide any information in this respect. It recalls from the previous examination of the case the Government's own submission that no trade unions exist in Myanmar which fulfil the requirements of*

Convention No. 87. The Committee therefore 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

**1090.** *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. The Committee regrets to note 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**, 4th edition, 1996, paras. 47 and 51]. 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

**1091.** *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. In this regard, the Committee takes note of certain untranslated legal documents provided by the Government, which it will examine once a translation is available. Given that this case was brought against Maung Maung in absentia, the Committee has also provided the relevant documents to the complainant for any comments or observations they may wish to make thereon.*

#### Imprisonment of Myo Aung Thant and Khin Kyaw

**1092.** *In its previous recommendations the Committee deplored the Government's failure to take any steps to ensure the immediate release of Myo Aung Thant and Khin Kyaw, who had allegedly been convicted to heavy prison sentences for their trade union activities pursuant to a secret trial without freely chosen legal representation and confessions obtained under torture, and urged the Government to do so as a matter of urgency. The Committee notes that according to the Government, Khin Kyaw received a conditional pardon by order of*

*the Additional Divisional Judge of the Western District Court under section 337 of the Criminal Procedure Code. While taking due note of the Government's latest indication that Khin Kyaw has been pardoned, the Committee is deeply concerned about the vacillation of the information provided by the Government in this regard as in its last communication it had indicated that there was no record of Khin Kyaw's imprisonment.*

- 1093.** *The Committee also notes with regret from the Government's reply that it refuses to consider the release of Myo Aung Thant for national security reasons (according to information previously provided by the Government, he has been convicted to 20 years' imprisonment under the Penal Code, the Emergency Provision Act and the Unlawful Association Act). The Committee notes with regret that the Government has still not given any specific response to the allegations that Myo Aung Thant was persecuted because of his trade union involvement, that his trial was unfair and devoid of basic guarantees of due process and that his conviction relied on a confession obtained under torture.*
- 1094.** *The Committee 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. 35 and 71]. It also wishes to emphasize that as regards allegations of the physical ill-treatment and torture of trade unionists, the Committee has recalled that governments should give precise instructions and apply effective sanctions where cases of ill-treatment are found, so as to ensure that no detainee is subjected to such treatment. It has also emphasized the importance that should be attached to the principle laid down in 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. 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., paras. 59 and 102]. In these circumstances, 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.*

#### Seafarer Shwe Tun Aung

- 1095.** *In its previous recommendations, the Committee requested the Government to: (1) submit a detailed reply on the serious allegations of anti-union discrimination relating to Shwe Tun Aung's case and, in particular, the allegations that before taking his first position as a seafarer, the SECD obliged Shwe Tun Aung to sign a document warning against union membership; that after Shwe Tun Aung initiated trade union action aboard the M/V Great Concert which led to the payment of outstanding fair wages to the crew, the SECD forced those crew members who returned to Myanmar to refund wages increased by the union action, fined them heavily, and forbade them to leave the country for three years; and that, following his trade union activities, Shwe Tun Aung's name was on a government "blacklist" which prevented him from obtaining a passport for some time; (2) provide a copy of any contract or document that Myanmar seafarers in general were currently obliged to sign prior to taking up their first work assignment; (3) if the allegations of anti-union harassment were found to be true, to take immediate measures so that Shwe Tun Aung and all Myanmar seafarers were free to join the trade union of their own choosing.*

- 1096.** *The Committee notes with deep regret that in reply to the above request, the Government once again confines itself to general information confirming that Shwe Tun Aung had left the country in 1996 and never returned, and that the agreement signed between Shwe Tun Aung and M/V Great Concert pertained to the individual parties and not the Government. The Government also indicates that pursuant to the conclusions and recommendations reached in Case No. 1752 [see 295th Report, paras. 87-119], it has revoked with effect from 9 February 1995 the requirement for Myanmar seafarers to sign an affidavit before leaving the country. In response to the Committee's request for a copy of any contract or document that Myanmar seafarers in general may be obliged to sign prior to taking up their first work assignment, it attaches a copy of a model agreement between the SECD and shipping companies.*
- 1097.** *The Government also indicates that it took steps to ensure that seafarers may take care of their own affairs, in particular, by enacting the Constitution of the Myanmar Overseas Seafarers' Association (MOSA) after consultations, coordination and cooperation with responsible officials from the ITF. The Committee recalls, however, that the ITF categorically refuted, in a communication dated 14 April 2004, the Government's statement already made in previous communications, that the Department of Marine Administration had reached an agreement with the ITF and that MOSA was affiliated to the ITF [see 333rd Report, para. 716, and 337th Report, para. 1059].*
- 1098.** *Finally, the Committee notes with regard to the allegations of anti-union discrimination against the M/V Great Concert crew who returned to Myanmar, that the Government generally refutes that it has a policy of anti-union discrimination and that it took measures of retaliation against the three seafarers who returned to Myanmar. The Committee notes that the Government's additional statement concerning other reasons for punishment implies however, that these seafarers might have been punished for the holding of false documents.*
- 1099.** *The Committee recalls the conclusions and recommendations reached in Case No. 1752 in which it had requested the Government: (1) to withdraw the SECD requirement that Myanmar seafarers must sign an affidavit restricting their right to affiliate with or contact the International Transport Workers' Federation (ITF) for assistance; (2) to end the practice of double payroll (on each pay day the seafarers were given two lists to sign, an official ITF salary list, and the SECD salary list with considerably lower wages) which was according to the Committee a reprehensible way of evading the terms of collective agreements; (3) to guarantee and respect the right of seafarers to form an independent trade union in Myanmar for the defence of their basic rights and interests if they so wish; (4) finally, to refrain in the future from having recourse to acts of anti-union discrimination against Myanmar seafarers who pursue their legitimate grievances through the ITF and/or its affiliated trade unions (revocation of seafarers' registration, confiscation of their passports, threat of imprisonment, in the event that seafarers accepted or received an ITF settlement and refused to hand back their back-pay settlements to the SECD). The Committee notes that during the follow-up to this case, the Government had indicated that it had abolished the requirement for seafarers to sign an affidavit restricting their right to affiliate with or contact the ITF for assistance. The Committee notes however, that the Government never reported on any measures conducive to genuine trade union representation, steps taken to end the practice of double payroll so as to stop evading the terms of collective agreements, and concrete action taken to prevent anti-union discrimination in case seafarers accepted or received a settlement. As for the establishment of MOSA as a way to ensure the representation of seafarers' interests, the Committee once again recalls that this entity, which is an example of a workers' welfare association, is not a substitute for free and independent trade unions since it is by law the sole association representing seafarers and paragraph 5 of Chapter 4 of its rules explicitly*

limits seafarers' right to establish and join associations of their own choosing [see 333rd Report, para. 741; 337th Report, para. 1089].

- 1100.** *As for the text of the model agreement between the SECD and shipping companies forwarded by the Government, the Committee notes with concern that the provisions of this agreement, under which the SECD agrees to supply and the company agrees to employ Myanmar seafarers who are registered with the SECD: (i) exclude the possibility of introducing improvements to the terms and conditions of employment of seafarers through negotiations or the conclusion of a collective agreement; (ii) prevent trade unions from representing Myanmar seafarers in case of grievance; and (iii) do not afford guarantees against acts of anti-union discrimination and retaliation in case seafarers engage in trade union activity. In particular, the Committee notes that section C.1 of the model agreement provides that “the wages and remuneration for Officers and ratings who have entered into this agreement shall be as mentioned against their names in the agreement and stated herein, and it has been clearly understood that they shall not be entitled to any other payment or compensation whatsoever, except as stated in this agreement. Deck cadets and junior engineers may be required to sign articles in other ranks or occupations as required by the Company or by the national requirements of the registry. **Such changes in capacities shall not entitle them to any additional wages and/or terms of employment**”. 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 seaman, not later than two months before 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 the initial agreement, if the extension is requested by the Company and **Extension Allowance will not be paid if requested by Crew**”. Section E.2 provides that “the Seamen agree to carry out all works on board as required by the Company, the Charterers and the Master ... **They shall be paid for such extra work in accordance with agreements in charter parties or at rates laid down by the Company from time to time**”. With regard to the procedure for complaints and grievances, the Committee notes that section E.3 provides the following: “The Seamen agree to represent to the Master through respective head of department, any complaint or grievances including any alleged breach of this agreement, in a quiet and orderly manner. If the Seaman is unsatisfied with the decision or action of the Master, he may forward his complaint through the Master to the Company, with a copy to the SECD Yangon. The Company will advise its decision to the Master and to SECD, Yangon. If the Seamen (sic) is still unsatisfied with the decision of the Company, he may forward his views to the SECD, Yangon through the Company, who will refer to SECD, Yangon. **The Company shall not take any action concerning any complaint from the Seaman which is not represented through the Company.**” Section E.9 adds: “**The Company reserves the right to discharge any of the Seaman at any port due to insobriety, misconduct, neglect of duty, insubordination of a criminal act, failure to rejoin, and unruly behaviour detrimental to maintaining discipline onboard, in which case the Seaman shall forfeit all claims to balance of wages and savings as well as any other rights under this agreement. The Company will advise SECD, Yangon full particulars of such cases duly supported by extracts from official ship’s log book and other evidence.**”*
- 1101.** *Finally, with regard to the Government’s statement that it did not take anti-union measures against the crew of M/V Great Concert who returned to Myanmar after having received a settlement, but might have punished them if they were holding false documents, the Committee recalls that in Case No. 1752, the Government had stated that four of the seafarers concerned by the complaint were carrying fake passports and CDCs [see 295th Report, para. 105]; however, according to the allegations in that case, it was the Myanmar authorities that confiscated the passports of the seafarers concerned (after they had accepted back-pay as a result of a settlement and signed off the ship to return to Asia) upon their arrival to Bangkok, prompting the Thai authorities to declare them illegal*

*immigrants and to request that they be returned to Myanmar as soon as practicable [see 295th Report, para. 98].*

- 1102.** *The Committee therefore notes with deep regret that the allegations made in the case of Shwe Tun Aung and the other crew of M/V Great Concert exemplify all the elements of anti-union harassment and denial of freedom of association found in the earlier Case No. 1752 and that the Government's reply does not provide any specific information indicating that the allegations are unfounded. On the contrary, the text of the model agreement furnished by the Government contains provisions which are in blatant violation of seafarers' freedom of association and collective bargaining rights as it prevents any negotiation over the terms and conditions of employment of Myanmar seafarers and any representation by trade unions in case of a grievance, leaving open the possibility of anti-union reprisals in case of trade union action. The Committee deplores the fact that more than ten years after the filing of the complaint in Case No. 1752 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 (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.*

#### Disputes resolution mechanisms

- 1103.** *In its previous recommendations, the Committee requested the Government, pending the adoption of legislation that protects and promotes freedom of association, to take measures to ensure the freely chosen representation of employees and employers in cases conciliated by the various disputes resolution committees operating in the country. The Committee notes with regret that the Government does not provide any information on this point, and confines itself to a general reference to the existence of detailed instructions in the guidebook concerning the Township Workers' Supervisory Committee, in the 1976 directive of the Central Trade Dispute Committee, and in the procedures of the State/Division Trade Dispute Committees and Township Trade Dispute Committees. 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

- 1104.** *The Committee recalls from the 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. With regard to the Motorcar tyre factory, the Committee had noted that the Government had refuted the allegations that 19 workers were arrested on 9 and 10 March 2001 and that arrests at the factory continued on 11 March 2001. The Committee had also noted however, from a list indicating the number of employees on 9 and 31 March 2001 that the total number of workers had fallen by three and increased*



by one during that period. The Committee had therefore requested the Government to provide due explanations of the differences in total workforce on these two dates and, in particular, to provide details concerning the cases of those three workers whose employment at the factory ceased during that period of time, as well as an indication as to whether any other workers left their employment at the factory during this period, but were replaced. If it were found that the dismissals were due to legitimate trade union activities, the Government was requested 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.

- 1105.** *The Committee notes that the Government provides information on two of the dismissed workers, Min Than Win and Aung Myo Win, indicating that their dismissal was due to their own conduct (absence without permission for over 21 days and conviction for theft respectively). Given these grounds, the Government indicates that their reinstatement or the payment of compensation is not possible. The Government also provides information on another person who was promoted to the plant in question during the same period. While taking note of this information, the Committee also notes that the conduct of these two workers should normally be reflected in public records, for instance, the absence records of the company and the court decision which convicted Aung Myo Win. The Committee therefore 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. The Committee requests to be kept informed in this respect.*

#### Unique Garment Factory

- 1106.** *In relation to the Unique Garment Factory, 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 shift workers who had been dismissed two years earlier, on 10 July 2001, during their probationary period following a dispute, and requested further details in relation to these dismissals, including in particular a copy of the conciliation agreement reached under the authority of the TWSC. It requested the Government to take the appropriate steps (reinstatement or if not possible, adequate compensation constituting sufficiently dissuasive sanctions) if it was found that the dismissals in question were due to legitimate trade union activities. The Committee notes that the Government attaches to its reply a copy of the agreement of 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. While taking note of this information, the Committee observes that the Government does not indicate the exact criteria for the selection of the workers who were dismissed. The Committee therefore 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 shift workers 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.*

#### Myanmar Texcamp Industrial Ltd.

- 1107.** *In relation to the Myanmar Texcamp Industrial Ltd., the Committee had taken note of information provided by the Government on 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 to economic sanctions, which led to the dismissal of 340 out of 581 workers on 1 August 2003 with due compensation paid. The Committee expressed concern at the number of workers laid off for economic reasons at the Myanmar Texcamp Industrial Ltd. which seemed approximately equal to the number that had been involved in a labour dispute three weeks earlier. The Committee therefore requested the Government to provide a copy of the agreement which emerged from the conciliation by the Department of Labour, as well as information indicating the criteria upon which the 340 workers who were laid off for economic reasons were chosen from the total workforce of 581 workers. It also requested the Government to take the necessary measures (reinstatement or where not possible payment of adequate compensation constituting sufficiently dissuasive sanctions) if it was found that the dismissals in question were due to legitimate trade union activities.

- 1108.** *The Committee notes that the Government indicates in its reply that a complaint was made by approximately 300 workers on 5 July 2002 and an agreement was reached on 1 August 2002 and not 5 July 2003 as previously indicated. It adds that in July 2003, the Myanmar Texcamp Industrial Ltd. sent letters to all departments concerned mentioning that part of the production would be stopped due to trade sanctions and workers in that line of production would have to be retrenched. The Government attaches a copy of an agreement signed between the employer and 340 retrenched workers on 1 August 2003. The agreement indicates that part of the production will be stopped because of unexpected problems and compensation will be given to 340 workers who agree to their retrenchment. While taking note of the text of the agreement and the information provided by the Government, the Committee also observes that the Government provides no information as to the specific criteria on the basis of which 340 workers were selected for retrenchment as previously requested by the Committee. The Committee therefore requests the Government to conduct an inquiry in this regard 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.*

#### Myanmar Yes Garment Factory

- 1109.** *In relation to the Myanmar Yes Garment Factory, the Committee had noted the information provided by the Government concerning a dispute of 16 September 2002 which had apparently resulted in an agreement concluded under the TWSC; the dispute had apparently commenced with the dismissal of Mg 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 about which an agreement was reached under the authority of the TWSC with which all workers were satisfied; according to the Government, Mg Zin Min Thu did not attend those negotiations nor had he since been to the factory to receive his dismissal compensation. The Committee requested the Government to establish an impartial investigation into this matter to provide a copy of the agreement dated 16 September 2002 reached under the authority of the TWSC.*
- 1110.** *The Committee notes that the Government provides in its reply a copy of the agreement of 16 September 2002 which indicates inter alia that it concerns the administration of the factory, workers' hours, overtime, welfare, lunch time, etc. without however indicating the substance of the agreed terms. Moreover, the Committee notes that the Government does not provide any information in its reply as to whether an impartial investigation has taken place into the dismissal of Mg Zin Min Thu and the specific reasons which led to his dismissal. Furthermore, the Government seems to give a different version of the facts than the one given in its last communication concerning the organizing of five workers by*

*Mg Zin Min Thu so as to submit a complaint to the TWSC. The Government emphasizes in its latest report that 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, was pure coincidence; so was also the fact that Min Min Htwe and the five workers received compensation on the basis of the agreement of 16 September 2002. 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 of developments in this respect.*

- 1111.** *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 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.*

## **The Committee's recommendations**

- 1112.** *In light of its foregoing interim 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. 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.*

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- (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 shift workers 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.*

CASE NO. 2412

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

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

- **the International Confederation of Free Trade Unions (ICFTU) and**
- **the Nepal Government Employees' Organization (NEGEO)**

*Allegations: The complainants allege that after a royal coup in Nepal in February 2005, all civil liberties were suspended by the state of emergency, all trade union rights were suspended and meetings of more than five persons were banned, leading to a climate of fear, which has forced many of the members, activists and leaders of the Nepali trade union movement to go into exile, fearing arrest. The complainants further allege arrests of several trade union leaders, unwarranted searches of trade union offices and acts of harassment and intimidation by the Minister of Education against the teachers' unions, the Nepal National Teachers' Association (NNTA) and the Nepal Teachers' Association (NTA). Finally, it is alleged that all public sector unions were suspended and that the amendment of the Civil Service Act banned the activities of the NEGEO*

- 1113.** The complaint is set out in a communication by the International Confederation of Free Trade Unions (ICFTU) dated 15 March 2005 and communications dated 2 June and 23 August 2005 from the Nepal Government Employees' Organization (NEGEO).
- 1114.** The Government forwarded its observations in communications dated 12 April, 18 August and 19 September 2005.
- 1115.** Nepal has ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), but has neither ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), nor the Labour Relations (Public Service) Convention, 1978 (No. 151).

**A. The complainants' allegations**

- 1116.** In its communication dated 15 March 2005, the International Confederation of Free Trade Unions (ICFTU) alleges that following the dismissal of the Government by the King, a decree promulgated on 31 January 2005 suspended all trade union rights and banned meetings of more than five persons. Since then, a climate of fear has gripped members, activists and leaders of the Nepali trade union movement, many of whom have gone into hiding, fearing arrest. It has been reported that the names of many top leaders of the Nepal

Trade Union Centre (NTUC), the General Federation of Nepalese Trade Unions (GEFONT) and the Democratic Confederation of Nepalese Trade Unions (DECONT) were listed among 1,400 persons the Government intended to arrest or place under close surveillance. According to the ICFTU, a total of about 25 trade unionists had reportedly been arrested since the Royal Proclamation of 1 February, some of whom were detained for up to three months and some were ill-treated while in detention.

- 1117.** The ICFTU further alleges that several trade union leaders were forced into exile. That was reportedly the case for Mr. Laxman Basnet, the President of the NTUC. On 1 February 2005, he participated in the executive board meeting of the ICFTU-APRO (EB) at the Soaltec Crown Plaza Hotel. Following the Proclamation of the King at 10 a.m., at 11 a.m., the army came to the NTUC's office. The police then came to the hotel but due to the presence of many international labour leaders, did not enter the hotel, but rather posted their officers outside and in front of Mr. Basnet's car. However, Mr. Basnet managed to leave the hotel unseen and had to go into hiding. Police came to his house on three occasions and on two of them they searched his house.
- 1118.** In addition to the threats of arrest of trade union leaders or anybody actively organizing trade union activities, the ability of the unions to function was also undermined by a range of restrictions imposed by the Royal Proclamation of 1 February. Trade union meetings could be held exclusively in union offices, which were often too small to host such gatherings (unions wishing to meet elsewhere needed prior permission from the chief district officers). Furthermore, procedures for the registration of unions or renewal thereof imposed by the Royal Proclamation lacked clarity. Sanctions were provided for violations of the Royal Proclamation of up to one year of imprisonment.
- 1119.** The ICFTU further states that it has received reports of army raids on trade union offices. Army soldiers have reportedly entered and searched the offices of the NTUC several times. Trade union documents have been seized. The offices of the GEFONT have been under surveillance. On 15 and 16 February, security officers visited the GEFONT's office and, on 17 February, conducted a search, without a search warrant. Finding nothing, they closed the union office and returned the key only in the evening.
- 1120.** According to the ICFTU, a general atmosphere of fear reigns among all trade unionists, and members of journalists' trade unions feel particularly targeted because the King has taken measures to take control over the media and telecommunications. The President of the Federation of Nepalese Journalists, Tara Nath Dahal, and other journalists have gone into hiding or exile to avoid arrest.
- 1121.** The ICFTU further reports on harassment and intimidation by the Minister of Education against Nepali teachers' unions, the Nepal National Teachers' Association (NNTA) and the Nepal Teachers' Association (NTA). On 7 March, through the media, the Minister accused the unions of political affiliation and added that teachers should not engage themselves in politics. According to the complainants, the Government expressed its opinion that there should only be one common union for teachers, if one should exist at all.
- 1122.** The ICFTU further states that it has been informed that the joint Trade Union Committee for Gender Equality (TUC-GEP) of the three national centres, the GEFONT, the NTUC and the DECONT, had obtained permission to celebrate International Women's Day with a rally and a seminar on women's rights on 8 March. However, on 7 March after 6 p.m., the authorities called the trade union offices to withdraw their permission and banned the event. They also threatened women organizers. However, the unions were allowed to hold a meeting at a hotel under the condition that they restrict themselves strictly to the subjects of equality and gender policy. The meeting was held in the presence of a security officer. Women's Day rallies were held by other organizations and individual trade union

members. Security forces were dispatched to survey the rallies. All over the country, 226 arrests took place: 36 in Kathmandu, 97 in Janakpur, 23 in Pokhara, 35 in Tanahu, seven in Dhangadhi and 28 in Chitwan. In Pokhara, police attacked a rally and two trade unionists were injured. In Butwal, following a rally and a mass meeting, police threatened to arrest Mr. Kamal Gautam, the GEFONT zonal head. In Mahendranagar, police searched for and threatened to arrest a newly elected GEFONT zonal head, Dharmanda Pant, after he had hosted a conference on International Women's Day.

**1123.** Finally, the ICFTU submits that a Royal Notice, published on 7 February, ordered all public sector unions to close down temporarily. In its communications of 2 June and 23 August 2005, the Nepal Government Employees' Organization (NEGEO), established in 1990 and recognized by the Government through the Civil Service Act, further submits that by adopting the ordinance to amend this Act and, in particular, section 53, the Government has eliminated the provisions allowing for a national level organization of government employees and banned the activities of the NEGEO. The NEGEO expressed its concern that the new approach to organizing according to profession is aimed at creating fragmentation in the trade union movement of civil servants. In addition, the complainant alleges that the Minister of General Administration had announced that the amendment was aimed at bringing the new organizations under the Government's control. He blamed the existing organization for being politically involved and stated that the Government needed to change this situation.

**1124.** Following the adoption of the Ordinance, the District Administrative Office in Kathmandu published, on 3 August 2005, a notice to the effect that all types of organizations of civil servants were deregistered. The NEGEO filed a petition to the Supreme Court against this unconstitutional ban. The chief district officer in Bajhang district of the far western region locked the district office of the NEGEO and confiscated everything from it. The NEGEO alleges that the amendment of the Civil Service Act, which also negatively affects the social security system and other important workers' rights, was adopted without consulting the social partners and the Government had even ignored their submissions. The amendments provide for "guided associations" of employees, based on number of divisions (accounting, general administration, legal, etc.) creating therefore a dozen associations. Moreover, according to the complainant, the right to organize is granted, under the new Ordinance, to non-officer employees, who favour the Royal Government.

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

**1125.** In its communications dated 12 April and 19 September 2005, the Government, with reference to the allegations brought by the ICFTU, indicates that the recent political developments in Nepal cannot be understood without reference to the broader political realities that have evolved in the Kingdom during the past few years. Terrorist groups were carrying out violent subversive activities in different parts of the country instigating anarchy and jeopardizing the lives of millions. The events of 1 February were aimed at protecting people from the perpetrators of violence, improving law, ensuring essential supplies and restoring the sense of security. The Government submits that emergency situations are different from normal times and demand more stringent measures. However, it draws the Committee's attention to the fact that since then, the state of emergency has been lifted.

**1126.** The Government disagrees with the allegation that all civil liberties were suspended. It further states that it finds it difficult to see how one can enjoy liberties in a state of terror created by insurgency. The first and foremost condition for the prevalence of civil liberties is that the normal political process operates and people can lead a normal peaceful life. However, even during the state of emergency, article 12(c) of the Constitution, which guarantees freedom of association was not suspended, which meant that trade unions could



operate during this period. The Government understands that the state of emergency affects the freedom of all layers of society, including trade unions. However, the Government refutes the allegation that 1,400 people were being targeted for arrest or close surveillance and states that a general surveillance was in fact needed to ensure that innocent people were not victimized and such surveillance was not prejudicial to or directed against trade unions. While there have been very few cases of arrests and detention following the lifting of the state of emergency, there has been no report of any arrest or detention carried out simply or solely on the grounds of trade union activities or membership. There has been no report of ill-treatment, torture or hardship. Moreover, special attention was given to make the period of detention as short as possible. Presently, there are no trade union activists in detention. Most of the detainees were released long before the state of emergency was lifted after preliminary investigations. The Government expressed its belief that neither the Constitution of the ILO nor the relevant Conventions or Recommendations rule out the possibility of application of some restrictions if the situation so demands. The Government considers that as the state of emergency has long been lifted, all the allegations made in connection with it have lost their relevance.

- 1127.** The Government submits that the process of social dialogue was not interrupted, notwithstanding the state of emergency. The Ministry of Labour and Transport Management was in constant touch with trade union leaders during this period. Tripartite consultations on various legislative and labour-related matters went on without disturbance. Representatives of all national trade union federations were freely taking part in those consultations. Labour offices responsible for administration of trade union activities were instructed to carry out their regular activities such as registration of trade unions.
- 1128.** With regard to the allegations brought by the NEGEO, the Government, in its communication of 18 August 2005 confirms that the Civil Service Act was amended on 14 July 2005. It indicates that the amendment of the Act constitutes an integral part of the overall reform programme, which has long been on a national agenda needed to improve the efficiency and effectiveness of government administration taking into account the socio-economic situation of the country. There is nothing conspiratorial in the reform efforts; rightsizing of the civil service is a regular function and a legitimate right of a government. Reform in the social security schemes, including pensions, was dictated by economic reasons and unsustainably swelling pension bills. Accordingly, a new and more sustainable scheme has been introduced based on contributions by both employees and the Government, which is an internationally accepted practice. Moreover, the amended Act in no way interferes with job security.
- 1129.** The Government submits that while it is aware of the right to form and join organizations for the promotion and defence of their occupational interests by public servants, Article 6 of Convention No. 98, ratified by Nepal, stipulates that the Convention does not deal with the position of public servants engaged in the administration of the State. It further clarifies that the Civil Service Act applies only to the government employees engaged in the administration of the State. There are separate laws governing the employees in other sectors and public enterprises. However, the amended Civil Service Act does not restrict civil servants engaged in the administration of the State from constituting their professional organizations. Rather, the amendment allows these employees to form professional organizations based on their respective professional interests. Section 53(1) of the amended Act explicitly mentions that “civil servants can form their organizations based on diversity of professions”. Similarly, in accordance with section 53(2) of the Act, these organizations can present their suggestions to the Government pertaining to the policy and legal reforms and thus protect their right to organize. In the meantime, the Government, in consultation with civil servants, will draft detailed provisions in the Civil Service Regulations on the procedure for establishing organizations. The Government further adds

that this reform or amendment in no way interferes with the Labour Act and Trade Unions Act. Hence, the allegation of the NEGEO of having “guided organizations” is not valid. Further, the allegation that the right to organize will be granted to those non-officer employees who are in favour of the Government is unfounded.

- 1130.** With regard to the dissolution of the NEGEO, the Government states that it was necessary for the transition to the new arrangement of having professional organizations. This was done not to restrict the right to organize, but to make space for a meaningful organization and a collaborated dialogue based on professional interests of employees concerned.
- 1131.** The Government further informs that the amended Civil Service Act, besides ensuring the right to organize of civil servants, also provides for additional measures of grievance handling and redress, and therefore makes the Act more responsive to the employees’ needs.

### C. The Committee’s conclusions

- 1132.** *The Committee notes that the complainants in this case, the International Confederation of Free Trade Unions (ICFTU) and the Nepal Government Employees’ Organization (NEGEO), allege that after a royal coup in Nepal in February 2005, all civil liberties were suspended by the state of emergency, all trade union rights were suspended and meetings of more than five persons were banned, leading to a climate of fear, which had forced many of the members, activists and leaders of the Nepali trade union movement to go into exile, fearing arrest. The complainants further allege arrests of several trade union leaders, unwarranted searches of trade union offices and acts of harassment and intimidation by the Minister of Education against the teachers’ unions, the Nepal National Teachers’ Association (NNTA) and the Nepal Teachers’ Association (NTA). Finally, it is alleged that all public sector unions were suspended and that the amendment of the Civil Service Act banned the NEGEO’s activities.*
- 1133.** *The Committee notes the allegations concerning suspension of civil liberties and trade union rights, including the organization of public meetings, during the state of emergency, submitted by the ICFTU in a communication of 15 March 2005. According to the complainants, the Royal Proclamation of 1 February 2005 imposed a range of restrictions on registration and functioning of trade unions. The complainants allege that while this Proclamation lacked clarity, the violation thereof was to be sanctioned by up to one year of imprisonment. The Government provides no information in this respect and only states that the process of social dialogue was never interrupted during the state of emergency. While considering that the enactment of emergency regulations which empower the Government to place restrictions on the organization of public meetings and which are applicable not only to public trade union meetings, but also to all public meetings, and which are occasioned by events which the Government considered so serious as to call for the declaration of a state of emergency, does not in itself constitute a violation of trade union rights, the Committee would also recall that where a state of emergency exists, it is desirable that the Government in its relations with occupational organizations and their representatives, should rely, as far as possible, on the ordinary law rather than on emergency measures which are liable, by their very nature, to involve certain restrictions on fundamental rights [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, paras. 188 and 190]. The Committee notes the Government’s statement to the effect that the state of emergency has since been lifted and trusts that the Government will bear these basic principles in mind in the future should such an emergency situation recur.*
- 1134.** *As concerns the allegations of unwarranted searches of trade union premises of the Nepal Trade Union Centre (NTUC) and the General Federation of Nepalese Trade Unions*

(GEFONT), as well as of the house of Mr. Basnet, the President of the NTUC, and confiscation of trade union documents from the NTUC's office, the Committee notes that no specific information was provided by the Government in this respect. The Committee considers that a state of emergency cannot be invoked to justify the entry by police or army into trade union premises without a judicial warrant. The Committee requests the Government to take the necessary measures so as to ensure that all documents seized from the NTUC's office are returned without delay and to keep it informed in this respect.

- 1135.** *The Committee further notes the allegations of threats of arrest, arrest and ill-treatment of those detained, following the events of 1 February 2005, as well as in relation to the rallies held on 8 March. The Committee notes that according to the ICFTU, 25 trade unionists were arrested following the Royal Proclamation of 1 February. The ICFTU alleges that some of them were detained for up to three months, some were ill-treated while in detention and some, fearing arrest, were forced into exile, as was the case with Mr. Basnet, the President of the NTUC, and trade union leaders of the Federation of Nepalese Journalists. Furthermore, 226 arrests took place following Women's Day rallies. The Committee notes the Government's statement that while there have been very few cases of arrest and detention, there has been no report of any arrest or detention carried out simply or solely on the grounds of trade union activities or membership. Nor had there been reports of ill-treatment, torture or hardship. According to the Government, special attention was given to make the period of detention as short as possible. The Government states that presently, there are no trade union activists in detention. Most of the detainees were released before the state of emergency was lifted, after preliminary investigations.*
- 1136.** *In this respect, the Committee would firstly recall that measures of preventive detention should be limited to very short periods intended solely to facilitate the course of a judicial inquiry [see **Digest**, op. cit., para. 195]. In light of the contradictory information submitted by the complainants and the Government as to the question of ill-treatment and detention lasting up to three months, as well as the allegedly continuous threats of arrest that had forced trade unionists into exile, the Committee requests the Government to carry out an independent inquiry into these matters so that appropriate measures may be taken, including compensation for damages suffered and sanctioning of those responsible. Furthermore, if, following the independent inquiry, the allegations of continued threats of arrests are confirmed, the Committee requests the Government to take steps to ensure that the authorities concerned receive appropriate instructions not to interfere in the legitimate exercise of trade union activities through the threat of arrest, so that trade union leaders may freely exercise their trade union rights. The Committee requests the Government to keep it informed of the outcome of the independent inquiry.*
- 1137.** *The Committee further notes the allegation of harassment and intimidation by the Minister of Education against Nepali teachers' unions, the NNTA and the NTA. According to the complainants, on 7 March, through the media, the Minister accused the unions of political affiliation and expressed the opinion that there should only be one common union for teachers, if one should exist at all. The Government provides no reply to this allegation. Considering that such statements made by the authorities constitute serious acts of interference in trade union internal affairs and are therefore incompatible with the principles of freedom of association, the Committee requests the Government to refrain from such undue interference and to issue appropriate instructions to the relevant authorities to ensure that such acts do not occur in the future. It requests the Government to keep it informed in this respect.*
- 1138.** *The Committee notes the NEGEO's allegation that the amendment of the Civil Service Act was adopted without consulting the social partners. According to the complainants, the amendments provide for "guided associations" of employees, open the way for fragmentation of associations and grant the right to organize only to those in favour of the*

Royal Government. In its reply, the Government refutes these allegations and states that the Civil Service Act applies only to the government employees engaged in the administration of the State and that there are separate laws governing the employees in other sectors and public enterprises. However, even as amended, the Civil Service Act does not restrict civil servants engaged in the administration of the State from constituting their professional organizations. Rather, the amendment allows these employees to form professional organizations based on their respective professional interests. The Government further adds that this reform or amendment in no way interferes with the Labour Act and Trade Unions Act.

- 1139.** *The Committee regrets that the NEGEO was not consulted during the drafting of the amendments to the Civil Service Act. The Committee draws the attention of the Government to the importance of prior consultation of workers' organizations before the adoption of any legislation affecting their rights [see **Digest**, op. cit., paras. 929 and 930], and requests the Government to ensure the application of this principle in the future.*
- 1140.** *The Committee notes the amendment of the Civil Service Act, which appears only to permit organizations in the civil service to form organizations along professional groups. The Committee further notes that as the direct result of this amendment, the activities of the NEGEO were banned and its assets were confiscated. According to the Government, such measures were necessary for the transition to the new arrangement of having professional organizations. This was done not to restrict the right to organize, but to make space for a meaningful organization and collaborated dialogue based on professional interests of employees concerned. Moreover, the Government has not replied to the allegations that the NEGEO's assets were confiscated. The Committee considers that the reasons invoked by the Government do not justify the banning of activities of a trade union organization. In addition, the Committee recalls that public servants, like all other workers, without distinction whatsoever, have the right to form and join organizations of their own choosing, without previous authorization, for the promotion and defence of their occupational interests [see **Digest**, op. cit., para. 213]. The Committee further recalls that organizations of public servants should not be restricted to employees of any particular ministry, department or service and that they should have a right to join federations and confederations of their own choosing. Considering that the wording of the amended Civil Service Act, and the subsequent ban on the NEGEO's activities, amounts to a restriction on setting up organizations of any other type than along professional lines seriously interferes with the rights of these workers and their organizations to form national cross-professional organizations in defence of their interests, the Committee urges the Government to take the necessary measures, including the amendment of the Act, so as to ensure that public servants are allowed to establish such organizations and join federations and confederations of their own choosing, and to ensure that the NEGEO may freely exercise its activities once again and that its assets are returned without delay. It requests the Government to keep it informed in this respect.*
- 1141.** *The Committee requests the Government to examine the possibility of a direct contacts mission being undertaken to the country in order to promote the full implementation of freedom of association.*

## **The Committee's recommendations**

- 1142.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *The Committee recalls that where a state of emergency exists, it is desirable that the Government in its relations with occupational organizations and their representatives, should rely, as far as possible, on the ordinary law*

*rather than on emergency measures which are liable, by their very nature, to involve certain restrictions on fundamental right. It trusts that the Government will bear these basic principles in mind in the future should such an emergency situation recur.*

- (b) The Committee requests the Government to take the necessary measures so as to ensure that all documents seized from the NTUC's office are returned without delay.*
- (c) With regard to the allegations of ill-treatment of detainees, arrest and threats of arrest:*
  - The Committee requests the Government to carry out an independent inquiry into these matters so that appropriate measures may be taken, including compensation for damages suffered and sanctioning of those responsible.*
  - Furthermore, if, following the independent inquiry, the allegations of continued threats of arrest are confirmed, the Committee requests the Government to take steps to ensure that the authorities concerned receive appropriate instructions not to interfere in the legitimate exercise of trade union activities through the threat of arrest, so that trade union leaders may freely exercise their trade union rights.*
  - The Committee requests the Government to keep it informed of the outcome of the independent inquiry.*
- (d) The Committee requests the Government to refrain from any undue interference in trade union affairs and to issue appropriate instructions to the relevant authorities to ensure that acts of interference in trade union internal affairs do not occur in the future.*
- (e) The Committee regrets that the NEGEO was not consulted during the drafting of the amendments to the Civil Service Act and draws the attention of the Government to the importance of prior consultation of workers' organizations before the adoption of any legislation affecting their rights. It requests the Government to ensure the application of this principle in the future.*
- (f) The Committee urges the Government to take the necessary measures, including the amendment of the Civil Service Act, so as to ensure that public servants are allowed to establish national cross-professional organizations and join federations and confederations of their own choosing, and to ensure that the NEGEO may freely exercise its activities once again and that its assets are returned without delay.*
- (g) The Committee requests the Government to keep it informed of the measures taken in respect of its recommendations above.*
- (h) The Committee requests the Government to examine the possibility of a direct contacts mission being undertaken to the country in order to promote the full implementation of freedom of association.*

CASE NO. 2354

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

**Complaint against the Government of Nicaragua  
presented by**

— **the General Confederation of Education Workers of Nicaragua  
(CGTEN-ANDEN)**

**supported by**

— **the International Confederation of Free Trade Unions (ICFTU) and  
— Education International (IE)**

*Allegations: The complainant alleges anti-union persecution of its officials, failure to comply with orders for the reinstatement of union leaders, discrimination in the provision of union premises, refusal to allow union leaders access to schools, etc.*

**1143.** The Committee last examined this case at its March 2005 session and presented an interim report to the Governing Body [see 336th Report, paras. 655-685]. The General Confederation of Education Workers of Nicaragua (CGTEN-ANDEN) presented additional information in communications dated 6 June 2005 and 10 January 2006.

**1144.** The Government sent its observations in a communication dated 14 July 2005.

**1145.** 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. Previous examination of the case**

**1146.** After examination of this case at its meeting in March 2005, the Committee made the following recommendations [see 336th Report, para. 685]:

- (a) The Committee requests the Government to keep it informed: (1) on the work situation of union leader Mr. Julio Jimmy Hernández Paisano (specifically, whether he has been dismissed for dereliction of duty) and on whether he has lodged an appeal in this respect; and (2) on the result of the appeal made by union leader Mr. Norlan José Toruño Araúz against the administrative decision to authorize the termination of his contract. In addition, the Committee requests the Government to carry out an investigation in relation to the work situation of union official Mr. José Ismael Rodríguez Soto, with respect to whom it was also alleged that the termination of his contract had been requested, and to keep it informed in this respect.
- (b) With regard to the allegation that union leader Mr. Manuel Sebastián Mendieta Martínez was the victim of anti-union persecution, having had a person assigned to watch his movements, the Committee requests the Government to take steps to carry out an investigation into these allegations and to send its observations in this respect.
- (c) As regards the alleged failure to implement judicial orders for the reinstatement of union officials and the payment of outstanding wages (the complainant organization refers by name to the officials concerned), the Committee requests the Government to ensure that the union officials named above by the complainant organization may opt freely for the

implementation of the judicial decision or to accept the said indemnity. The Committee requests the Government to keep it informed in this respect.

- (d) With regard to the allegation concerning the Government's refusal to allow CGTEN-ANDEN to participate in the National Education Commission, the Committee requests the Government, if CGTEN-ANDEN formally applies for membership, to take steps to allow its admission.
- (e) With respect to the allegations concerning the written orders from the MECD to educational establishments to bar entry to CGTEN-ANDEN leaders, the Committee requests the Government to take steps to ensure that CGTEN-ANDEN officials can have access to educational establishments in the context of the exercise of their union duties. The Committee requests the Government to keep it informed in this respect.
- (f) Concerning the alleged preferential treatment of certain unions by the MECD, providing office facilities and other benefits such as the use of telephones in return for supporting the Government, the Committee requests the Government to take measures to guarantee that, in compliance with the undertaking mentioned above, the complainant organization may enjoy the same benefits as the other unions of the sector. The Committee requests the Government to keep it informed in this respect.
- (g) As regards the allegations concerning the refusal of the MECD to grant paid union leave to officials of the complainant organization, the Committee requests the Government to ensure that, in accordance with the terms of the collective agreement, the officials of the complainant organization can avail themselves of paid union leave. The Committee requests the Government to keep it informed in this respect.

## B. Additional information from the complainant

**1147.** In its communications of 6 June 2005 and 10 January 2006, the General Confederation of Education Workers of Nicaragua (CGTEN-ANDEN) made the following claims relating to the recommendations made by the Committee upon their examination of the case in March 2005:

- regarding subparagraph (a)(1): union leader Julio Jimmy Hernández Paisano has been reinstated to his post and paid wage arrears because he made a legal appeal for protection of his constitutional rights (*amparo*) before the Court of Appeal;
- regarding subparagraph (a)(2): union leaders Norlan José Toruño Araúz and José Ismael Rodríguez Soto were reinstated in 2004, but have again been dismissed for the same reasons as cited the first time and their wages are still being withheld. The Court of Appeal has ruled in favour of the union leaders, admitting their appeal for *amparo*, but the Government, through the Ministry of Education, has not complied with it;
- regarding subparagraph (b): union leader Manuel Sebastián Mendieta has been reinstated to his post and paid wage arrears. This reinstatement was made because the Court of Appeal ruled in his favour;
- regarding subparagraph (c): union officials José Antonio Zepeda and Róger Benito Acevedo Jiménez were reinstated in their posts with back-pay; trade union leaders Miriam Olivas Ardón and Miriam Gutiérrez García have been paid wage arrears;
- regarding subparagraph (d): after the strike and once the Labour and Wage Committee had been set up, the complainant organization was admitted to the National Education Commission on 6 April 2005 and now participates in its sessions;
- regarding subparagraph (e): the Government, through the Ministry of Education, allows access to schools by leaders of the complainant organization;
- regarding subparagraph (f): the complainant states that the Government has taken measures so as not to grant an economic advantage to other trade unions;

- regarding subparagraph (g): the Government has complied, through the Ministry of Education, with the obligation to grant union leave to its leaders.

### C. The Government's reply

**1148.** In its communication of 14 July 2005, the Government states the following regarding the Committee's recommendations following the previous examination of the case:

- Recommendation (a): (1) At the start of the 2005 academic year, Mr. Julio Jimmy Hernández returned to his classroom as a result of the ruling handed down by the Supreme Court of Justice. He currently has leave authorized by the Ministry of Education, Culture and Sport (MECD); (2) regarding Mr. Norlan José Toruño Araúz and Mr. José Manuel Rodríguez Soto, authorization was sought from the departmental labour inspectorate to terminate their contracts of work. In accordance with the procedure established in Law No. 185 of the current Labour Code, the termination of both contracts was granted. Later, the workers appealed to the labour courts for reinstatement; their cases are currently pending;
- Recommendation (b): Mr. Manuel Sebastián Mendieta Martínez is currently carrying out his teaching duties. There has been no persecution whatsoever from the MECD against him or any other official;
- Recommendation (c): As regards the issues addressed in this paragraph, the High Directorate of the MECD has instructed all departmental and municipal delegates and directors of centres in the national education system that they should comply strictly with the judicial rulings. To date, this instruction from the High Directorate of the Ministry of Education, Culture and Sport has been fully complied with;
- Recommendation (d): CGTEN-ANDEN leaders are part of the National Education Commission;
- Recommendation (e): In the context of the exercise of their union duties and with complete freedom of association, access to educational centres has been guaranteed to leaders of CGTEN-ANDEN and all union leaders, in the free exercise of their rights, on the proviso that they respect class times and avoid interrupting the school timetable;
- Recommendation (f): At present, the MECD treats all trade union organizations (including the complainant) equally and they all enjoy the same social benefits as in the education sector; and
- Recommendation (g): Clause 19, paragraph 2, of the collective agreement is being complied with, according to which, 60 working days are given to each organization that has signed the agreement and that has legally established and registered its board of directors with the Ministry of Labour.

### D. The Committee's conclusions

**1149.** *The Committee recalls that on examining this case at its March 2005 session, it requested the Government to keep it informed of the ongoing legal cases regarding the dismissal of union leaders, the work situation of union members, the failure to implement judicial orders for reinstatement, the inability of CGTEN-ANDEN to participate in the National Education Commission, the refusal to allow CGTEN-ANDEN leaders to access the academic establishments or to benefit from union leave, and the preferential treatment for other trade unions in the sector. Recalling that in the past it had observed problems of cooperation in relation to the submission of complete information by the Government, the Committee notes with interest the efforts now carried out in order to respond to its requests.*



**Recommendation (a)(1)**

**1150.** *Regarding the work situation of union leader Mr. Julio Jimmy Hernández, the Committee is satisfied to note that the Government and the complainant have reported that he has been reinstated to his post and paid wage arrears.*

**Recommendation (a)(2)**

**1151.** *Regarding the professional situation of trade union leader Norlan José Toruño Araúz and José Ismael Rodríguez Soto, the Committee notes that, according to the complainant organization, these workers have been reinstated in 2004, but dismissed again. According to the Government, both officials appealed the decision to terminate their contracts to the judicial authority. In these circumstances, the Committee requests the Government to keep it informed of the judicial decisions that will be issued in respect of these two union officials and to take effective measures to reinstate them immediately, if the court directs it.*

**Recommendation (b)**

**1152.** *With regard to the allegation that union leader Mr. Manuel Sebastián Mendieta Martínez was the victim of anti-union persecution, the Committee is satisfied to note that the official in question has been reinstated to his post and paid wage arrears.*

**Recommendation (c)**

**1153.** *As regards the alleged failure to implement judicial orders for the reinstatement of union leaders and the payment of outstanding wages (José Antonio Zepeda, Róger Benito Acevedo Jiménez, Miriam Olivas Ardón and Miriam Gutiérrez García), the Committee is satisfied to note that, according to the complainant organization, trade union leaders José Antonio Zepeda and Róger Benito Acevedo Jiménez have been reinstated in their posts with back-pay, and that officials Miriam Olivas Ardón and Miriam Gutiérrez García have received their salary and do not want to resume their duties.*

**Recommendation (d)**

**1154.** *With regards to the allegation concerning the Government's refusal to allow CGTEN-ANDEN to participate in the National Education Commission, the Committee is satisfied to note that the Government and the complainant report that since April 2005, CGTEN-ANDEN has participated in the National Education Commission.*

**Recommendation (e)**

**1155.** *With respect to the allegations concerning written orders from the MECD to educational establishments to bar entry to CGTEN-ANDEN leaders in the context of the exercise of their union duties, the Committee is satisfied to note that, according to the information provided by the complainant organization and the Government, these leaders can now access education establishments.*

**Recommendation (f)**

**1156.** *Concerning the alleged preferential treatment of certain unions by the MECD, providing office facilities and other benefits such as the use of telephones in return for supporting the Government, the Committee is satisfied to note that according to the complainant*

*organization and the Government, the latter has ceased giving preferential economic treatment to other trade unions. The Committee also notes the Government's indication that the MECD currently treats all trade union organizations equally and that they all enjoy the same social benefits as in the education sector.*

### **Recommendation (g)**

**1157.** *As regards the allegations concerning the refusal of the MECD to grant paid union leave to officials of the complainant organization, the Committee is satisfied to note that according to the complainant organization and the Government, the latter complies with its obligation to grant trade union leave to its leaders.*

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

**1158.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendation:*

*The Committee requests the Government to keep it informed of the court judgement concerning the dismissal of trade union leaders Norlan José Toruño Araúz and José Ismael Rodríguez Soto and, if the court so directs, to take the necessary effective measures to comply with the reinstatement order immediately.*

CASE NO. 2394

DEFINITIVE REPORT

### **Complaint against the Government of Nicaragua presented by the Trade Union of Employees in Higher Education "Ervin Abaraca Jimenes" (SPIRES-UNI-ATD)**

***Allegations: Refusal by the administrative authority to register changes in the executive committee of the complainant organization***

**1159.** The complaint is contained in a communication from the Trade Union of Employees in Higher Education "Ervin Abaraca Jimenes" (SIPRES-UNI, ATD) dated 26 October 2004.

**1160.** The Government sent its observations in communications dated 16 February and 2 March 2006.

**1161.** 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 complainants' allegations**

**1162.** In its communication dated 26 October 2004, the Trade Union of Employees in Higher Education "Ervin Abaraca Jimenes" (SIPRES-UNI, ATD) alleges that on 4 February 2003, the executive committee of the trade union called elections for a new executive committee, which were carried out under the supervision of a labour inspector, who attested the legal

act of the election, for a term lasting from 5 March 2003 to 4 March 2004, of the executive committee consisting of: Mr. Julio Noel Canales, General Secretary and legal representative; Mr. Jorge Guevara Balladares, Organizing Secretary; Mr. Elías Martínez Rayo, Secretary for Labour Matters; Mr. Héctor Doña Miranda, Finance Secretary; Mr. Ervin Lezcano Carcache, Secretary for Academic Matters; and Mr. Richard Zamora Navarro, Cultural Secretary. On 7 February 2003 the union applied for registration of the change of executive committee to the Trade Union Associations Directorate of the Ministry of Labour. On 4 March 2003 the Directorate replied to the request declaring it “dismissed”, in complete contradiction with the provisions of the law.

- 1163.** Faced with this refusal, the union filed an appeal with the General Labour Inspectorate on 4 March 2003 and on the following day, in Decision No. 051-03, the General Labour Inspector upheld the appeal and ordered the Trade Union Associations Directorate to register the change in the executive committee.
- 1164.** The complainant adds that on 6 March 2003, when the general secretary of the trade union went in person to the Trade Union Associations Directorate to request an extension of certification registering the change in the executive committee, as ordered by the General Labour Inspector, the Director of Trade Union Associations refused to extend it, stating that he did not recognize the General Labour Inspector’s decision, on the grounds that it was totally illegal, and also refused to issue a written declaration to that effect.
- 1165.** The complainant states that the hierarchical superiors of the Director of the Trade Union Associations Directorate, such as the Director of Labour Relations of the Ministry of Labour and the Minister of Labour, as well as the President of the Republic, have been notified of the refusal, but have ignored the trade union’s requests.
- 1166.** Lastly, the complainant points out that the failure to register its executive committee has prevented the trade union from negotiating salary increases in 2003 and 2004, as well as a list of demands submitted with a view to a collective agreement in January 2002, and resulted in its representatives on the collegiate bodies of the National University of Engineering being expelled for not having the certification that the Director of the Trade Union Associations was supposed to have issued. Attachments sent by the complainant include a letter from the Minister of Labour dated 24 August 2004 to the Permanent Commission on Human Rights, linking the refusal to register the new executive to an inter-union problem, as well as the decision on the appeal filed by the complainant, handed down by the General Labour Inspector on 7 February 2003.

## **B. The Government’s reply**

- 1167.** In its communications of 16 February and 2 March 2006, the Government mentions that the dispute in this case concerns the renewal of the registration of the “Ervin Abarca Jimenes” trade union executive committee, submitted by Mr. Julio Noel Canales to the Trade Unions Registry of the Labour Ministry; the term of that executive committee had expired on 4 September 2002 and another group of workers from the same organization decided to hold a general meeting to elect a new executive committee, different from the one led by Mr. Canales.
- 1168.** According to the Government, the complainants expressly recognize that throughout this matter, their rights have been respected and that they enjoyed adequate and effective remedies. However, the fact that such remedies exist does not necessarily mean that the judicial or administrative decision will be issued in favour of applicants. They admit that several criminal or appellate jurisdictions have dismissed some of their requests, while others are still pending. The Ministry of Labour considers that the various judicial and administrative jurisdictions have acted in conformity with national laws.

- 1169.** The national legislation in place recognizes trade unions as any other workers' or employers' association as regards representation and the defence of interests. States have the right to establish in their legislation those conditions that are necessary for the regular functioning of organizations. That being so, conditions specified in the regulations concerning the establishment and functioning of workers' organizations are compatible with the right to associate, provided that the regulation does not impede the full exercise of freedom of association and collective bargaining.
- 1170.** Trade unions may be established without prior authorization and the Trade Unions Registry grant them legal personality. Registration is optional and does not interfere in the establishment of trade unions. It strengthens the exercise of basic rights of association, even where registration is denied. The Trade Unions Registry will only deny registration in the following cases if: (a) the trade union objectives are not in line with the provisions of the Labour Code; (b) the trade union does not have the number of members required by the law; and (c) it is proven that the signatures are forgeries, or that the registered persons do not exist.
- 1171.** These are not absolute prerequisites, and these conditions may be complied with a posteriori by organizations, in which case the Registry will proceed with the registration according to the law. If the registration is denied, the decision is subject to appeal or *amparo* proceedings.
- 1172.** The existence of two alleged executive committees in the same trade union has been the source of a series of administrative and judicial proceedings: the Directorate of Trade Unions, the General Directorate of Labour Relations, the departmental and the general inspectorates of labour, in the administrative sphere; and the labour, civil and penal jurisdictions in the judicial sphere. That situation has led to jurisdiction disputes, since administrative authorities cannot intervene in issues of a strictly judicial nature and must apply court decisions. In the circumstances, the complaint in the present case is an issue that concerns the Directorate of Trade Union Associations, rather than a possible fault or negligence of the Government as alleged by the complainants.
- 1173.** The Government indicates that, in its judgement of 10 October 2002, Judge Olga Maria Brenes of the Managua second court district has ordered the Directorate of Trade Union Associations of the Labour Ministry to desist from the case concerning the "Ervin Abarca Jimenes" trade union and to transmit all exhibits and evidence concerning that organization. All proceedings taken by the complainant will henceforth be considered as null and void, under the court decision of Judge Brenes. Finally, the Government sent a report on this case by the Directorate of Trade Union Associations of the Ministry of Labour dated 6 December 2005, with the various incidents, decisions and appeals. This report concludes by indicating that on 20 September 2005, Mr. Noel Canales requested the Directorate of Trade Union Associations, in conformity with Decision No. 051-03 issued by the General Labour Inspectorate, to register the executive committee of his organization; copies of the official records and the ruling of the First Civil Court of the Managua District, issued on 25 August 2005, were annexed to the communication.

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

- 1174.** *The Committee observes that in this case the complainant alleges the refusal by the Trade Union Associations Directorate to register the executive committee of the complainant trade union elected in February 2003 for a one-year term and to register it accordingly, notwithstanding a decision of 5 March 2003 by the General Labour Inspector ordering its registration. The Committee emphasizes that the complaint presented by the complainant is dated 26 October 2004, and thus the facts at issue in the complaint relate to earlier situations that no longer exist.*

- 1175.** *The Committee notes the Government's observations that the complaint results from an inter-union dispute within the "Ervin Abarca Jimenes" trade union and that a court, on 10 October 2002, i.e. even before the facts stated in the complaint, ordered the Directorate of Trade Union Associations of the Labour Ministry to desist from this case and to transmit all exhibits and evidence concerning that organization. The Committee notes that this case was decided by the courts in August 2005 in favour of the complainant organization.*
- 1176.** *The Committee would like to refer to some of the attachments sent with the complaint which provide additional information. In particular, it is clear from the decision handed down by the General Labour Inspector on 7 February 2003 that judicial proceedings were pending at that time in which the trade union authority was requested to declare the elected executive committee null and void. In addition, a letter from the Minister of Labour dated 24 August 2004 refers to the existence of an inter-union problem since 2002.*
- 1177.** *In these circumstances, the Committee draws the Government's attention to the principle that, in order to avoid the danger of serious limitations on the right of workers to elect their representatives in full freedom, cases brought before the courts by the administrative authorities involving a challenge to the results of trade union elections should not – pending the final outcome of the proceedings – have the effect of paralysing the operations of trade unions [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 406]. Accordingly, the Committee regrets that the Trade Union Associations Directorate of the Ministry of Labour has not enforced the decision of the General Labour Inspectorate of 7 February 2003 concerning the appeal, ordering the registration of the executive committee of the complainant trade union, and that the Trade Union Associations Directorate has not extended certification to that executive, thus preventing the complainant trade union from defending its members' interests, in particular through collective bargaining. The Committee regrets the administrative delays which occurred in this case and requests the Government to execute the ruling of the judicial authority dated 25 August 2005, mentioned by the Government, which ordered the registration of the executive committee of Mr. Julio Noel Canales. The Committee expects the Government in future to guarantee fully the right of workers' organizations to elect their representatives in full freedom, in accordance with Article 3 of Convention No. 87, as well as the principle mentioned above.*

## **The Committee's recommendations**

- 1178.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *The Committee regrets that the Trade Union Associations Directorate of the Ministry of Labour has not enforced the appellate judgement against the General Labour Inspectorate decision of 7 February 2003, ordering the registration of the executive committee of the complainant trade union, and that the Trade Union Associations Directorate has not extended certification to that executive, thus preventing the complainant trade union from defending its members' interests, in particular through collective bargaining. The Committee regrets the administrative delays which occurred in this case, and requests the Government to execute the ruling of the judicial authority dated 25 August 2005, mentioned by the Government, which ordered the registration of the executive committee of Mr. Julio Noel Canales.*

- (b) *The Committee expects the Government in future to guarantee fully the right of workers' organizations to elect their representatives in full freedom, in accordance with Article 3 of Convention No. 87, as well as the principle that "in order to avoid the danger of serious limitations on the right of workers to elect their representatives in full freedom, cases brought before the courts by the administrative authorities involving a challenge to the results of trade union elections should not – pending the final outcome of the proceedings – have the effect of paralysing the operations of trade unions".*

CASE NO. 2429

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

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

- **the Confederation of Workers of Niger (CNT)**
- **the Democratic Organization of African Workers' Trade Unions (DOAWTU)**  
**and**
- **the World Confederation of Labour (WCL), which supported the complaint**

*Allegations: The complainant organizations allege that the Niger Electricity Company (NIGELEC) dismissed the General Secretary of the Niger Electricity Workers' Union (SYNTRAVE) for reasons of anti-union discrimination, in violation of national legislation protecting the workers' representatives, and that it hampers SYNTRAVE's legitimate trade union activities, specifically by opposing the freedom of workers to join the union and by discriminating against it*

- 1179.** The complaint appears in a communication from the Confederation of Workers of Niger (CNT) and the Democratic Organization of African Workers' Trade Unions (DOAWTU), dated 19 May 2005, supported by the World Confederation of Labour (WCL) in a communication dated 23 May 2005. The WCL sent additional information in July 2005 and February 2006.
- 1180.** The Government sent its reply in a communication dated 26 October 2005.
- 1181.** Niger 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 complainants' allegations**

- 1182.** In their communications dated 19 May and July 2005, the complainant organizations explain that the Niger Electricity Workers' Union (SYNTRAVE) held its constituent

assembly on 29 November 2003 and that it was registered by the authorities on 4 December 2003. At the time, there were two trade unions operating within the Niger Electricity Company (NIGELEC): the National Water and Energy Workers' Union (SYNATREEN), which existed previously, and the newly constituted SYNTRAVE.

- 1183.** According to the complainant organizations, the NIGELEC management has constantly and repeatedly exercised discrimination between the two organizations, for example: by only recognizing SYNATREEN; by systematically omitting SYNTRAVE from all circulars and official memoranda; by openly taking SYNATREEN's side on the 1 May holiday (distribution of sarongs for the procession, company car park privileges for members of SYNATREEN only); and by organizing elections on behalf of SYNATREEN only.
- 1184.** The complainant organizations also allege that the company has arbitrarily transferred numerous SYNTRAVE activists and executive committee members in order to destabilize the organization, including Mr. Ibrahim Woussi, Information Secretary, transferred to Dosso (140 km from the SYNTRAVE headquarters); Mr. Abdourhamane Garba, Union Training Secretary, transferred to Bagaroua (400 km from headquarters); Mr. Assoumane Issoufou, Organizational Secretary, transferred to Keita (500 km from headquarters); Mr. Issoufou Bah, Disputes and Negotiations Secretary, transferred to Arlit (1,200 km from headquarters); Mr. Mohamed Goumar, Financial Secretary, transferred to Agadez (1,000 km from headquarters); M. Abdou Namata, Deputy Disputes and Negotiations Secretary, transferred to Dolbel (200 km from headquarters); and many other workers.
- 1185.** In addition, the Electrical Trades Centre (CME), the mass of whose staff joined SYNTRAVE, was promptly closed down and its employees gradually relocated in other departments. The members and officers of SYNTRAVE who were transferred have all been placed under the direct authority of SYNATREEN officials. Moreover, the members of SYNTRAVE are constantly being harassed: Mr. Assoumane Issoufou, for instance, whose immediate supervisor had granted 72 hours' leave of absence to collect his wages, was subsequently refused permission by the company administrator's delegate.
- 1186.** On 10 December 2003, Mr. Diamyo El Hadj Yacouba (General Secretary of SYNTRAVE, staff representative and member of the works' committee, counting 22 years with the company including 15 as staff representative) wrote to the administrator's delegate in his capacity as General Secretary to complain, inter alia, that he had informed the staff representatives that he would not accept the presence of two unions at NIGELEC and had ordered his collaborators to use their influence to ensure that none of the workers joined SYNTRAVE. On 29 December 2003, Mr. Diamyo was informed of his administrative suspension pending the labour inspectorate's response to the administrator's delegate's request for authorization to dismiss him. Also at the request of the administrator's delegate, Mr. Diamyo was summoned to appear on 12 January 2004 before the magistrate's court on a libel charge arising out of the same circumstances. On 4 February 2004, the labour inspectorate declared the request for dismissal irreceivable on the grounds that, since penal proceedings took precedence over civil proceedings, the matter would have to be ruled upon by the magistrate's court. On 9 February 2004, the administrator's delegate informed Mr. Diamyo that he was dismissed as from 10 February 2004 for committing a serious offence. On 12 February 2004 the Minister of the Public Service and of Labour, Chairman of the Inter-ministerial Negotiating Committee, informed the administrator's delegate in writing that he considered the dismissal inopportune inasmuch as negotiations were under way regarding Mr. Diamyo's reinstatement. Following an appeal by Mr. Diamyo, the Niamey regional tribunal ordered that his work contract be upheld, subject to a fine of 100,000 CFA per day of non-compliance, on the grounds that, under section 216 of the Labour Code, "Any dismissal of an elected representative of the staff, for whatever reason, shall be submitted for approval to the labour inspectorate. An employer who dismisses

such an elected representative thereby commits an act of infringement of his or her civil liberties and a grave disturbance of the peace that must be corrected” (summary Order No. 66 of 13 April 2004). The Niamey Court of Appeal (Civil Chamber, Judgement No. 10 of 6 February 2006) ruled that Mr. Diamyo’s dismissal was null and void, and that he should be reinstated in his previous job and circumstances, also subject to a fine of 100,000 CFA per day for non-compliance. In spite of these rulings, Mr. Diamyo has not yet been reinstated.

**1187.** The Minister of Labour wrote to LEGELEC on 17 February 2006 to inform it that the Inter-ministerial Committee, upon being informed of the Appeal Court’s judgement, had decided to request NIGELEC “to take necessary measures to implement the Court’s decision”.

**1188.** The complainant organizations maintain that the attitude of the NIGELEC management constitute clear acts of anti-union discrimination and favouritism, in violation of the interoccupational collective agreement, of national legislation and of the international Conventions of the ILO.

## **B. The Government’s reply**

**1189.** In its communication dated 26 October 2005, the Government states that the case of Mr. Diamyo El Hadj Yacouba’s dismissal has followed almost all the steps provided for under the regulations and agreements currently in force; internal procedures, in accordance with the plant rules and staff regulations; request for authorization to dismiss; libel action brought by the administrator’s delegate before the Niamey regional tribunal; NIGELEC’s decision to dismiss; Mr. Diamyo’s summary appeal against the decision; the authorities’ intercession with NIGELEC on his behalf. The Court of Appeal of Niamey has ruled twice on the case, which is currently pending before the Supreme Court following Mr. Diamyo’s appeal.

**1190.** The Government emphasizes that Mr. Diamyo’s dismissal harks back to another problem that is equally important, namely the rivalry between SYNATREEN and SYNTRAVE. However, while taking care not to interfere in the judicial process under way, the Government is examining every means of reaching an equitable settlement of this dispute, so as to maintain a permanent dialogue with the social partners.

**1191.** With its communication, the Government attached the ruling of the magistrate’s court of Niamey (10 February 2004) recognizing that Mr. Diamyo was guilty of libel; the summary order issued by the regional tribunal of Niamey (13 April 2004) upholding Mr. Diamyo’s contract; the judgement of the Niamey labour tribunal (25 May 2004) denying Mr. Diamyo’s request that his dismissal be voided, on the ground that it was not covered by section 216 of the Labour Code (prohibiting the dismissal of staff representatives without prior authorization from the labour inspector).

## **C. The Committee’s conclusions**

**1192.** *The Committee notes that the complaint concerns several allegations of anti-union discrimination, at a time of inter-union rivalry within the Niger Electricity Company (NIGELEC) between the Water and Energy Workers’ Union (SYNATREEN) and the Niger Electricity Workers’ Union (SYNTRAVE). The complainant organization alleges: acts of favouritism by the company towards SYNATREEN; the refusal of NIGELEC to recognize SYNTRAVE; a large number of arbitrary transfers of members and officers of SYNTRAVE; and the dismissal of Mr. Diamyo El Hadj Yacouba, General Secretary of SYNTRAVE, staff representative and member of the works’ committee.*



- 1193.** *The Committee recalls first of all that a matter involving no dispute between the government and the trade unions, but which involves a conflict within the trade union movement itself, is the sole responsibility of the parties themselves, and that it is not competent to make recommendations on internal dissensions within a trade union organization [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, paras. 962-963].*
- 1194.** *The Committee notes, however, that based on the information supplied by the complainant organizations to which the Government has not responded, the management of NIGELEC appears to have shown favouritism towards the pre-existing organization: recognition of SYNATREEN alone; failure to communicate circulars and official memoranda to SYNTRAVE, favouritism towards SYNATREEN during the 1 May holiday; systematic placing of SYNTRAVE members under the authority of SYNATREEN officers; organizations of elections on behalf of SYNATREEN alone. Observing that SYNTRAVE, after meeting all the requirements of the law, was duly registered by the authorities, the Committee considers that a government, especially when it has ratified the relevant Conventions, must ensure that employers abide by legislative provisions designed to guarantee equal treatment of trade union organizations and do not discriminate in favour of any particular workers' organization. The Committee calls on the Government to issue appropriate instructions rapidly to the management of NIGELEC to respect this principle, and asks to keep it informed of the steps taken to this end.*
- 1195.** *The Committee notes with regret that the Government has provided no information on the abusive transfers to which several members and officers of SYNTRAVE have allegedly been subjected. Stressing that measures of this kind constitute very serious violations of freedom of association, in that they can seriously undermine the viability and future existence of a workers' organization, the Committee recalls that no person should be prejudiced in his or her employment by reason of trade union membership, even if that trade union is not recognized by the employer as representing the majority of workers concerned [see **Digest**, op. cit., para. 701] and that a deliberate policy of frequent transfers of persons holding trade union office may seriously harm the efficiency of trade union activities [see **Digest**, op. cit., para. 712]. The Committee calls on the Government to undertake rapidly an independent enquiry into these allegations and, should they prove to be grounded, to take the necessary action to ensure that appropriate corrective steps are taken swiftly. The Committee requests the Government to keep it informed of developments in this situation.*
- 1196.** *Regarding Mr. Diamyo El Hadj Yacouba's dismissal, the Committee notes his claim that he was dismissed for reasons of anti-union discrimination; the employer argues that he was in fact dismissed for committing a serious offence by sending an open letter containing libellous comments regarding the company administrator's delegate. The Committee observes that the injunction issued at the time ordered that Mr. Diamyo's contract be upheld on the ground that his dismissal, for whatever reason, could not take place without prior authorization by the labour inspectorate, inasmuch as he was entitled to the additional protection afforded under section 216 of the Labour Code to elected staff representatives; the labour court, however, decided otherwise on the ground that Mr. Diamyo was not covered by section 216. The Committee finally notes that the Appeal Court of Niamey has ruled that Mr. Diamyo El Hadj Yacouba should be reinstated with status quo ante, and that the Inter-ministerial Committee has requested NIGELEC to implement the Court's decision.*
- 1197.** *In the light of the circumstances of the case, noting the authorities' efforts to intercede in this matter and, bearing in mind both the spirit and the letter of section 216 of Niger's Labour Code, as well as the provisions of the Workers' Representatives Convention, 1971 (No. 135), which Niger has ratified and which deals specifically with this kind of situation,*

*the Committee trusts that NIGELEC will implement rapidly the judgement of the Niamey Appeal Court. The Committee requests the Government to keep it informed of developments in this respect.*

## **The Committee's recommendations**

**1198.** *In the light of the foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) The Committee calls on the Government to issue appropriate instructions rapidly to the management of NIGELEC to respect the legislative provisions designed to guarantee equal treatment of trade union organizations legally present within an enterprise, and not to discriminate against SYNTRAVE. The Committee requests the Government to keep it informed of developments in this respect.*
- (b) The Committee calls on the Government to undertake rapidly an independent inquiry into the alleged arbitrary transfers of several members and officers of SYNTRAVE and, should they prove to be grounded, to take the necessary action to ensure that appropriate corrective steps are taken swiftly. The Committee requests the Government to keep it informed of developments in this situation.*
- (c) Regarding the dismissal of Mr. Diamyo El Hadj Yacouba, the Committee trusts that the NIGELEC company will implement rapidly the judgement of the Niamey Appeal Court, ordering reinstatement with status quo ante, and requests the Government to keep it informed of developments in this respect.*

CASE NO. 2400

INTERIM REPORT

### **Complaint against the Government of Peru presented by the General Confederation of Peruvian Workers (CGTP)**

*Allegations: Dismissal of trade union leaders and members in several enterprises, acts of harassment against the establishment of trade unions, challenge against the registration of a trade union and refusal to negotiate lists of demands*

**1199.** The complaint is contained in a communication from the General Confederation of Peruvian Workers (CGTP) dated 17 November 2004. Subsequently, the CGTP sent further allegations in communications dated 3 January, 3 February and 11 August 2005.

**1200.** The Government sent its observations in communications dated 16 March and 9 May 2005 and 16 January 2006.

- 1201.** 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**

- 1202.** In its communication dated 17 November 2004, the General Confederation of Peruvian Workers (CGTP) alleges that, from the time that the employees of the enterprise Gloria S.A., situated in the city of Lima, set up a trade union in 2001, the enterprise began a campaign of harassment (increased working hours, ill-treatment and suspension of workers) against the trade union and that this campaign was intensified in response to a change in the trade union leadership. According to the complainant, since Felipe Fernández Flores' nomination to the position of secretary-general, two workers (Rubén Darío Villegas Vásquez and Fernando Paholo Trujillo Ramírez) who had recently become trade union members were dismissed and a series of acts of harassment were directed against the trade union's Secretary for defence and organization, with a view to destroying the trade union. In its communication dated 11 August 2005, the complainant adds that, after submitting the complaint to the ILO, the enterprise Gloria S.A. continued its harassment campaign against the trade union and dismissed the secretary-general, Felipe Fernández Flores, the secretary for organization, Miguel Moreno Avila and the secretary for defence, Gilver Arce Espinoza. According to the complainants, the justification invoked for dismissing them was that they had denounced wage increases granted to employees in positions of trust.
- 1203.** In its communication dated 3 January 2005, the CGTP states that the enterprise Petrotech Peruana S.A. belongs to the transnational enterprise Petrotech International Inc. The complainant adds that, since the trade union was established in December 2002, the enterprise has engaged in a campaign against the trade union and its members to obtain its dissolution. This campaign has taken the form of harassment of members to make them leave the organization, and acts of discrimination and dismissals of trade union leaders. These actions were disguised as penalties for supposed contraventions of the enterprise's internal rules. In this case, the complainant alleges that, in violation of the trade union immunity provided for under the Peruvian Law of Labour Relations enacted pursuant to D.S. 010-2003-TR as well as under the Peruvian Constitution, Segundo Adán Robles Nunura who on 16 January 2004 was elected chairman of the bargaining committee for the list of demands 2004-05, was dismissed.
- 1204.** The complainant adds that the enterprise's trade union, in the exercise of its right to representation as provided in the legislation, has engaged in a campaign to improve safety conditions in the workplace. The trade union requested the Piura Regional Department of Labour to carry out an inspection of the enterprise's installations with a view to ascertaining the conditions in which the labour force carries out its work. This inspection visit was carried out during the morning of 16 January 2004 and, exercising the right of any trade union organization, its representatives Segundo Adán Robles Nunura and secretary-general Cléber Céspedes Zarante took part in the inspection of the enterprise installations. However, the enterprise Petrotech Peruana S.A. sought to deny the leaders in question this right, arguing that they could not enter the premises for security reasons. It should be noted that the enterprise refused to provide the security equipment to the leaders who were to accompany the inspection, although it did provide it to the labour inspector.
- 1205.** The complainant adds that, in pursuit of its anti-union policy, the enterprise Petrotech Peruana S.A. sent a warning letter, on 19 January 2004, to Segundo Adán Robles Nunura, for attempting to participate in the inspection visit in question. He was further ordered, in the same document, to refrain from engaging in such acts in the future. A similar letter was received by secretary-general Cléber Céspedes Zarate, for the same reasons.

Simultaneously, as previously stated, on 16 January 2004, an assembly of the elected trade union leader Segundo Adán Robles Nunura as president of the committee to negotiate the 2004-05 list of demands. Following these events, the individual in question continued to work as normal until 25 January 2004 when he cleaned and checked the parts of a compressor located on platform LT-1 Litoral Mar.

- 1206.** The CGTP states that, upon completion of maintenance work, the compressor was switched on and functioned normally but later broke down during the night. The enterprise therefore decided that it should be checked the following day. On 27 January 2004, the enterprise sent the leader in question a letter giving him prior notice of dismissal, accusing him of negligence when he carried out the maintenance of the aforementioned compressor on platform LT-1 in the Litoral Mar area. In addition, the trade union leader was given a period of six days to offer a defence against the facts alleged against him. He was further relieved from reporting to his place of work. Lastly, on 5 February 2004, the enterprise sent him a dismissal letter charging him with serious faults contained in article 25, subparagraph (a) of Supreme Decree No. 03-97-TR, TUO of Legislative Decree No. 728 (Labour Productivity and Competitiveness Act). He was accused in general terms of negligence, breaching good faith in employment and non-observance of internal work rules.
- 1207.** The complainant states that Segundo Adán Robles Nunura was dismissed in reprisal for his trade union activity, and that it is therefore illegal to allege any grave breach. As a result, and in the legitimate exercise of his rights, the trade union leader in question has submitted the respective labour demand to the judiciary requesting that his dismissal be declared void and that his reinstatement be ordered, subsequent to the breach of Peruvian labour standards contained in D.S. 003-97-TR, section 29; D.S. 010-2003-TR, sections 31 and 32; and D.S. 011-92, section 12.
- 1208.** In its communication of 3 February 2005, the CGTP alleges that the trade union rights of leaders and members of the Unified Trade Union of Employees of the Banco del Trabajo (SUTRABANTRA) have been violated by the exercise of practices that are contrary to ILO Conventions and Recommendations, including non-recognition of SUTRABANTRA's status as representative in conducting collective bargaining, and dismissal of trade union leaders.
- 1209.** The CGTP states that, in 2004, in the exercise of its legitimate right, a group of workers from the enterprise Banco del Trabajo decided to establish a trade union. The organization was registered by the Regional Department of Labour of Piura, under No. 473-2004-DRPPE-PIURA-DPSC-SDRGPDGAT, pursuant to a decision issued on 17 March 2004. From that time onwards, the enterprise initiated a series of actions to prevent registration of the trade union and its affiliations, and to incite workers belonging to the trade union to give up membership. Consequently, a letter was submitted on 30 March 2004 in which the enterprise Banco del Trabajo challenged the organization's registration as a trade union before the administrative authority. On 2 July 2004, the enterprise submitted a demand to the court for the dissolution of the trade union organization, alleging as justification that it did not have the legally required number of members.
- 1210.** The complainant adds that, simultaneously, the Banco del Trabajo launched a campaign against the trade union leaders of the new organization, with a view to weakening or liquidating the trade union. The prime example of the anti-union policy conducted by the enterprise was the dismissal of the newly-elected secretary-general, Efraín Calle Flores, on 13 March 2004. This act by the enterprise was blatantly illegal, since it failed even to observe the formalities of national legislation which require the enterprise to send a letter of prior notice, and to receive the worker's defence, in regard to the fault invoked as cause for dismissal. The trade union leader in question, in the exercise of his right, submitted a

request to the Labour Tribunal to overturn the dismissal, and for subsequent reinstatement in his job. This request was submitted on 12 April 2004 and remains pending.

- 1211.** The CGTP alleges that the enterprise Banco del Trabajo pursued its policy of dismissing leaders and dismissed the secretary for defence and human rights, Pedro Daniel León Morales on 20 May 2004 and the secretary for culture and sport, Manuel Eduardo Albirena García, on 5 June 2004.
- 1212.** During the brief existence of the enterprise's trade union, it has suffered repeated attacks against leaders and members to force them to renounce membership and ultimately to liquidate the organization. These facts were publicly and repeatedly denounced and cases where sufficient evidence existed were reported to the administrative authorities and to the judge for labour disputes. In addition, the complainant organization adds that the enterprise engaged in an intimidation campaign against the trade union members, which took the form of harassment and dismissal of a large group of members during the months of March, April, May and June 2004. Specifically, the following members of the trade union were dismissed: (a) Carmen Ana Lozada Chulli, on 16 May 2004; (b) Eulogia Nedita Arcela Rey, on 16 May 2004; (c) Leda Marcel Carbonell Ugaz, on 5 June 2004; (d) Flavio Enrique Rodríguez Rosas, on 5 June 2004; and (e) Maritza Tello Castillo, on 20 May 2004. Likewise, Jorge Rafael Borazino Salazar and Martín Rojas Roque were forced to accept "voluntary resignation". As a result, they were obliged to withdraw from the trade union organization.
- 1213.** In addition, the CGTP alleges that the enterprise has repeatedly refused to negotiate the list of demands submitted by the trade union for the 2004 period and, in this connection, has benefited from the passive stance of the labour authority which, through its inaction, has effectively supported the illegal action by the enterprise. The list drawn up by the trade union organization was submitted to the enterprise on 21 April 2004, thereby formally initiating the collective bargaining process for the current year. However, the Banco del Trabajo refused to receive the document containing the trade union's list of demands. Subsequently, the trade union resubmitted the list to the enterprise on two occasions. On 14 May 2004 the document was again submitted and the enterprise returned it on 18 May. Subsequently, the trade union attempted again to submit the list of demands to the enterprise on 11 June and the enterprise returned it on 17 June 2004. The enterprise maintains that the trade union organization was established illegally, and that it is therefore not obliged to discuss the list. But the action by the enterprise disregards the fact that under the Peruvian legal system only the judge can decide, in a normal case, that a trade union has failed to meet the requirements whereby it can represent the workers in an enterprise.
- 1214.** Lastly, as regards the submission to the enterprise of the list of demands, the complainant alleges that both parties have explained their positions to the administrative labour authority and that the enterprise has requested cancellation of the summons to the conciliation meeting. The complainant emphasizes that the administrative labour authority unexpectedly, and in the absence of any court decision, ruled on 17 August 2004 that the collective bargaining process between the enterprise Banco del Trabajo and the trade union of workers was suspended. The parties were notified of this decision on 10 September 2004.

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

- 1215.** In its communication dated 16 March 2005, the Government states that in Peru the right to freedom of association, as embodied in ILO Conventions Nos. 87 and 98, is expressly recognized in article 28, paragraph 1 of the political Constitution. This right is further developed in Supreme Decree No. 010-2003-TR, section 2, single consolidated text of the law on collective labour relations. Likewise, the protection of freedom of association is

regulated by the law on collective labour relations, which provides for the mechanisms best suited to defend it. Such protection guarantees that worker representatives have the right not to be dismissed or transferred to other establishments belonging to the same enterprise, without just cause that is duly demonstrated or without their acceptance. It should be noted that it is provided in the single consolidated text of Legislative Decree No. 728 (law on labour productivity and competitiveness) enacted pursuant to Supreme Decree No. 003-97-TR (hereafter called LPCL), that any dismissal motivated by trade union membership or participation in trade union activities is void. In such an event, once the cause has been proved, the judge will order the reinstatement of the worker in his job. Hence, the Peruvian regulations provide for reinstatement of the dismissed worker in cases of anti-union dismissal, unless compensation payable in cases of arbitrary dismissal is preferred; the dismissal will stand only in cases of just cause.

- 1216.** The Government adds that the LPCL meanwhile provides that workers who are of the view that they have been the target of hostility by their employer during the employment relationship may choose between: (i) applying for cessation of hostilities before the respective jurisdictional body, with an order for the payment of the appropriate fine; or (ii) termination of the employment contract, in which case the worker would be entitled to compensation. It should be noted that, at the administrative level, the Ministry of Labour and Job Promotion is responsible for effective compliance with labour standards through labour inspection, which may be triggered by a complaint from any worker who considers himself to be affected. Peruvian labour legislation offers guarantees to workers whose rights are infringed. Workers have the right to request the intervention of the inspection services or to apply to the appropriate jurisdictional bodies if they consider that their employment rights have been infringed.
- 1217.** The Government states that, on 3 November 2004, the Single Trade Union of Workers of Gloria S.A. requested an inspection visit to the enterprise in question. Consequently, on 6 November 2004, the deputy director for inspection of labour health and safety issued an inspection order for 22 November 2004. Following the inspection, Gloria S.A. was fined the sum of 800 new soles, pursuant to the deputy director's resolution 414-2004-DRTPELC/DPMSST/DSISST for breaches of labour health and safety. Also, two of the alleged prejudiced workers have, of their own initiative, initiated judicial proceedings as to protect their rights. It should be noted that decisions regarding complaints submitted by workers can only be taken by the courts which are the appropriate mechanisms to provide redress for any violation of rights that may have occurred. The jurisdictional function is independent of other State bodies, for which reason the Ministry of Labour and Employment Promotion cannot intervene in the proceedings involving Gloria S.A. employees. However, the Government will be attentive to the outcome of these proceedings in order to be able to inform the committee of the final decision.
- 1218.** The Government adds that, prior to these proceedings, the CGTP had twice requested the Ministry of Labour and Employment Promotion to step in as mediator to seek an agreement between Gloria S.A. and its employees in matters relating to the disputes occurring in the enterprise. The National Directorate of Labour, within the Ministry of Labour and Employment Promotion, twice summoned the parties, but the enterprise failed to attend. Subsequently, the trade union applied to the courts. Consequently, the Government is of the view that it is premature to conclude that the right to freedom of association has been infringed, since court proceedings in this regard are still ongoing.
- 1219.** In its communication of 16 January 2006, the Government states that trade union leaders, Felipe Fernández Flores, Miguel Moreno Avila and Gilver Arce Espinoza have initiated a court action in relation to their dismissal. The Government finds it safer to await the court's decision in this regard.

- 1220.** The Government enclosed, with its response, a communication from the enterprise Gloria S.A. in which it declares it has not violated any freedom of association right against any worker, trade union leader or not. As regards the allegation according to which, from the time the employees set up a trade union, the enterprise began a relentless campaign of harassment, dismissals and alleged provocations towards the trade union, the enterprise informs it has had a trade union for more than 30 years and that the freedom of affiliation has been respected since the start of the enterprise. Concerning the dismissals of the workers mentioned by the complainant, meaning Rubén Darío Villegas Vásquez and Fernando Paholo Trujillo Ramírez, they are absolutely without connection with their affiliation to the trade union organization. As regards Fernando Paholo Trujillo Ramírez, the worker was dismissed for a serious mistake, in accordance with paragraphs (a) and (b) of section 25 of D.S. 003-97-TR, approved by the single consolidated text of Legislative Decree No. 728 of the law on labour productivity and competitiveness, which corresponds to the breach of obligation resulting in the violation of good faith at work, to repeated resistance to the carrying out of tasks, the non-observance of internal labour regulation, as well as the deliberate reduction of efficiency and work quality of the concerned worker. Such breaches are considered, in the juridical view, as a just cause for dismissal, linked to the worker's behaviour, in accordance with section 24, paragraph (a), of the aforementioned purview. In this case, a trial is in progress and the enterprise has answered the complainant's allegations. As regards Rubén Darío Villegas Vásquez, his dismissal does not result from a serious misconduct, which is why a sum corresponding to a month and a half's salary per year of service, in addition to social benefits, was paid to him, in accordance with the law. Furthermore, the worker in question, on 30 November 2004, has withdrawn from his legal action in protection lodged before the court, on the grounds that the enterprise has paid him his social benefits in full, in accordance with the law. The enterprise adds that it is untrue that the dismissal of two workers was, in effect, to increase the workload of officials in charge of the defence and organization of the trade union. The thesis put forward by the CGTP is absolutely unfounded, so far as no enterprise would promote its own ineffectiveness and that affects its own productivity. There is no, and never was any, bad treatment nor unjust suspension. The suspension measures taken by the enterprise have been taken in strict respect of internal standards, provided in the internal labour regulation as approved by the Ministry of Labour and employment promotion.
- 1221.** In its communication of 9 May 2005, the Government refers to the allegations presented by the complainant against the enterprise Petrotech Peruana S.A., in connection with the dismissal on 5 February 2004 of Segundo Adán Robles Nunura, who is the trade union leader and member of the negotiating committee for the 2004-05 list of demands, accusing him of grave misconduct in the nature of insufficient productivity and negligence in the discharge of his duties. According to the complainant organization, the real motive for his dismissal was his involvement in trade union activities.
- 1222.** In this regard, the Government states that freedom of expression is protected in different ways in the domestic legal order. Two of these are closely interlinked. The Government states that it is necessary, in this context, to distinguish: (1) between the institution of trade union immunity; and (2) that of invalid dismissal. The former provides a guarantee to certain workers (including trade union leaders and workers belonging to committees responsible for negotiating a list of demands) that they will not be dismissed or transferred to other establishments belonging to the same enterprise, without duly proven just cause or without due prior notice. The latter renders invalid a dismissal motivated by, among other causes, participation in trade union activities.
- 1223.** The Government states that, in the case in question, the controversy surrounding the dismissal of Segundo Adán Robles Nunura may be settled only by determining whether this act was motivated by grave misconduct as imputed to the worker in question by the undertaking (insufficient productivity or negligence); or, on the contrary, that it was

motivated by the fact that he was a trade union leader and engaged in trade union activities (specifically, his attempt to participate in the inspection visit by the labour authority to the undertaking in January 2004). The former situation would constitute justified dismissal while the latter would constitute an infringement of trade union community and an invalid dismissal.

- 1224.** The Government goes on to state that the substance of the complainant reveals that the worker involved in the disciplinary measure adopted by the undertaking Petrotech Peruana S.A. has brought a case before the courts challenging the validity of his dismissal and seeking reinstatement. This makes it clear that the worker in question has activated the mechanism provided for by the national juridical order to give effect to protection, with the result that it may be concluded that he is not without a means of defence. Consequently, the judiciary, under its responsibility for the administration of justice, will have the task of deciding on how to settle this dispute.

### The Committee's conclusions

- 1225.** *The Committee notes that in the present case the complainant organization submits allegations regarding anti-union dismissals and a harassment campaign against members of the trade union in the enterprise Gloria S.A., anti-union dismissal of the president of the negotiating committee for the 2004-05 list of demands in the enterprise Petrotech Peruana S.A. and anti-union dismissals in the Banco del Trabajo (SUTRABANTRA) and refusal to negotiate the list of demands.*
- 1226.** *As regards the allegations concerning the anti-union dismissals (initially of trade union members Rubén Darío Villegas Vásquez and Fernando Paholo Trujillo Ramírez, and subsequently of secretary-general Felipe Fernández Flores, and of the secretary for organization, Miguel Moreno Avila and the secretary for defence, Gilver Arce Espinoza), and the campaign of harassment (increased working hours, ill-treatment and suspension of workers) in the enterprise Gloria S.A. after a trade union was established, the Committee notes the Government's statements to the effect that: (1) in Peru, the right to freedom of association is expressly recognized and protection of freedom of association is regulated by the law on collective labour relations; (2) workers who are of the view that they have been the target of hostility by their employer during the employment relationship can apply for cessation of hostilities before the respective jurisdictional body, with an order for the payment of the appropriate fine or termination of the employment contract, in which case the worker would be entitled to compensation; (3) the National Directorate of Labour, within the Ministry of Labour and Employment Promotion, twice summoned the representatives of the enterprise and of the trade union with a view to finding a settlement to the disputes that had arisen, but the enterprise failed to attend; and (4) the employees of the enterprise Gloria S.A. with alleged grievances, Rubén Darío Villegas Vásquez and Fernando Paholo Trujillo Ramírez, and trade union leaders Felipe Fernández Flores, Miguel Moreno Avila and Gilver Arce Espinoza, voluntarily sought protection of their rights by the jurisdictional bodies and information will duly be sent on the outcome of these cases.*
- 1227.** *In this regard, the Committee takes note of the information submitted by the enterprise, through the Government, according to which: (1) it is untrue that a campaign of harassment against the trade union and its leaders was launched following the set up of the trade union organization, the right to associate having been respected for the 30 years of the enterprise's existence; (2) the dismissal of the worker Fernando Paholo Trujillo Ramírez is a result of grave misconduct on his behalf and a judicial action is in process; (3) the dismissal of Rubén Darío Villegas Vásquez does not result from a grave misconduct he committed, and, therefore, a sum corresponding to a month and a half's salary per year of service, in addition to social benefits, was paid to him and he decided to withdraw*



himself from the lawsuit he initiated, considering he had received his social benefits in full; (4) there were no bad treatments nor unjust suspensions; the suspension measures taken have respected the internal standards provided for in the internal labour regulation approved by the Ministry of Labour.

- 1228.** *The Committee further observes that the Government does not deny the allegations of a harassment campaign conducted by the undertaking following the establishment of the trade union. The Committee recalls that “the dismissal of workers on grounds of membership of an organization or trade union activities violates the principles of freedom of association” and that “cases concerning anti-union discrimination contrary to Convention No. 98 should be examined rapidly, so that the necessary remedies can be really effective”. An excessive delay in processing cases of anti-union discrimination, and in particular a lengthy delay in concluding the proceedings concerning the reinstatement of the trade union leaders dismissed by the enterprise, constitute a denial of justice and therefore a denial of the trade union rights of persons concerned [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, paras. 702 and 749]. Under these circumstances, the Committee requests the Government to keep it informed of the outcome of the judicial actions in process concerning the dismissal of Fernando Paholo Trujillo Ramírez, the secretary-general Felipe Fernández Flores, and of the secretary for organization, Miguel Moreno Avila and the secretary for defence, Gilver Arce Espinoza, and that, if the dismissals of trade union leaders are ascertained to have been of an anti-union nature, the Committee requests the Government to take measures to ensure that they are reinstated in their posts, and if that is not legally possible, that they are fully compensated; such compensation should include sufficiently dissuasive sanctions against the employer for such anti-union conduct.*
- 1229.** *In regard to the alleged anti-union dismissal of Segundo Adán Robles Nunura by the enterprise Petrotech Peruana S.A. following his nomination as president of the negotiating committee for the 2004-05 list demands, the Committee notes that, according to the Government: (1) in this situation, it is necessary to determine whether the dismissal was motivated by the serious faults imputed to the employee by the undertaking or whether, on the contrary, it was motivated by his position as trade union leader, and (2) as stated by the complainant organization, the worker involved has brought a case before the courts challenging the validity of his dismissal and, consequently, the judiciary will have the task of deciding on how to settle this dispute. In this respect, the Committee expects that the judicial authority will promptly reach a decision regarding the dismissal of the trade union official in question and requests the Government to keep it informed of the judgement.*
- 1230.** *Lastly, the Committee regrets to note that the Government has failed to send its observations concerning allegations regarding dismissals of trade union officials and members of the Unified Trade Union of Workers of the Banco del Trabajo (SUTRABANTRA) in the context of a harassment campaign conducted by the Banco del Trabajo, and allegations that the enterprise in question has challenged the trade union’s registration and refused to negotiate the list of demands. In this regard, the Committee urges the Government promptly to send its observations regarding these allegations.*

## **The Committee’s recommendations**

- 1231.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *Concerning the allegations related to the enterprise Gloria S.A., the Committee asks the Government to keep it informed of judicial proceedings as regards Fernando Paholo Trujillo Ramírez, the secretary-general Felipe*

*Fernández Flores, the secretary for organization, Miguel Moreno Avila and the secretary for defence, Gilver Arce Espinoza, and that, if the dismissals of trade union leaders are ascertained to have been of an anti-union nature, the Committee requests the Government to take measures to ensure that they are reinstated in their posts and if that is not legally possible, that they are fully compensated; such compensation should include sufficiently dissuasive sanctions against the employer for such anti-union conduct.*

- (b) *In regard to the alleged anti-union dismissal of Segundo Adán Robles Nunura by the enterprise Petrotech Peruana S.A., following his designation as president of the negotiating committee for the 2004-05 list of demands, the Committee expects that the judicial authority will promptly reach a decision regarding the dismissal of the trade union official in question and requests the Government to keep it informed of the judgement.*
- (c) *Regretting that the Government has failed to send its observations concerning allegations regarding dismissals of trade union officials and members of the Unified Trade Union of Workers of the Banco del Trabajo (SUTRABANTRA) in the context of a harassment campaign conducted by the Banco del Trabajo, and allegations that the enterprise in question has challenged the trade union's registration and refused to negotiate the list of demands, the Committee urges the Government promptly to send its observations regarding these allegations.*

CASE NO. 2415

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

### **Complaint against the Government of Serbia and Montenegro presented by**

- the Aircraft Engineers International (AEI) and
- the SSVMS Trade Union of Aircraft Engineers of Serbia

*Allegations: The complainant alleges that the Government, considering aviation as an essential industry, has used, as the owner of JAT Airways, threats of dismissal or suspension without pay, in order to prevent the employees from taking industrial action*

- 1232.** The complaint is contained in communications dated 23 March and 1 April 2005 from the Aircraft Engineers International (AEI) and the SSVMS Trade Union of Aircraft Engineers of Serbia.
- 1233.** The Government sent its observations in a communication dated 22 September 2005.
- 1234.** Serbia and Montenegro 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).

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**A. The complainants' allegations**

- 1235.** By communications dated 23 March and 1 April 2005, the Aircraft Engineers International (AEI) and the SSVMS Trade Union of Aircraft Engineers of Serbia indicate that a number of strikes and other industrial actions were held at the premises of the public airline company "JAT Airways", Belgrade, in order to claim some basic labour conditions. A first strike was organized in October 2004, which ended after a couple of days with an agreement reached and promises made by the company management that the financial standing of employees would be significantly improved in the following period.
- 1236.** After the strike ended in October 2004, the management and the owner of JAT Airways (Serbian Government) exhausted the workers mentally and financially, and in January 2005 the advance payment for January salaries was paid out in a symbolic amount. In February, the salaries for November and December were paid out to employees, also in symbolic amounts, but with the promise made by the company management that full compensation would be paid along with the payment of the following salary, according to the agreement reached by the management and the Trade Union of Aircraft Engineers. However, the payment of salaries, although promised, was not effected.
- 1237.** In these circumstances, the workers started to gather spontaneously and on 18 March 2005 they went on a new strike in which over 90 per cent of trade union members took part. The salaries for January and February 2005 were paid out after employees had gone on strike, but reduced by over 60 per cent, in comparison to the previous salaries.
- 1238.** As from the first day of the strike, JAT Airways management exerted mental pressure on the strikers and intimidated them with threats of dismissals and suspension without pay and other repressive measures, including police force threat, whilst at the same time it was refusing to pay the staff.
- 1239.** The complainant organizations allege that the Serbian Government ignored each and every request of the trade union representative to enter into negotiations regarding the employees' requests and peaceful settlement of the dispute.
- 1240.** On 22 March 2005, the General Manager of JAT Airways decided to suspend the employees on strike for a three-month period as from 22 March 2005, with an option for the employer to decide, during that three-month period, whether the employee will be allowed to return to work or his employment contract will be terminated. In explanation, the employer stated that the decision was made on account of the employees' participation in the work/service interruption, which was not in conformity with the strike act and the Regulation on the minimum operational service during a strike in the public company JAT Airways.
- 1241.** On 22 October 2004 the Trade Union of Aircraft Engineers of Serbia submitted to the Court of Serbia and Montenegro, a request for establishing that the provisions of the strike act (*Official Gazette* of the FRY, issue No. 29/96) and the Regulation on the minimum operational service during a strike in the public company JAT Airways (*Official Gazette* of the Republic of Serbia, issue No. 119/2003) are not in conformity with the Constitutional Charter of Serbia and Montenegro and the ratified Conventions of the International Labour Organization and generally accepted rules of international law.
- 1242.** By article 10 of the federal strike act, it is provided that employees in the services of public interest/essential services, specified under article 9 of the Act, may go on strike if the minimum operational service, defined in the regulation of the Serbian Government, is provided. Article 11 of the strike act provides that the decision (prior notice) on going on

strike must be given to the employer and the founder not later than ten days before the beginning of the strike for services of public interest/essential services listed in article 9.

- 1243.** By the regulation on the minimum operational service during a strike in the public company JAT Airways, it is provided that during a strike international traffic services must be provided in full scope and, as for domestic traffic, 30 per cent of planned scope.
- 1244.** Considering the small territory of Serbia and Montenegro and the low number of domestic flights in comparison to international flights, the service interruption and cancelling of 70 per cent of domestic flights makes the effect of the strike almost insignificant, or in other words, the complainants allege that the Regulation on the minimum operational service during a strike in the public company JAT Airways can be interpreted as the strike prohibition within the air transportation service.
- 1245.** For the complainants, the regulation according to which the strikers are obligated to give prior notice of the strike to the employer ten days before the strike begins, allows the employer to increase the number of domestic flights in the period until the strike begins, and thus the strike does not have any effect on the company's business operations.
- 1246.** The complainant organizations are of the opinion that by threats of repressive measures such as the suspension of employees who were on strike, on the basis of the regulation on the minimum operational service during a strike in the public company JAT Airways and the strike act, the employer violated the ILO Conventions ratified by Serbia and Montenegro.
- 1247.** The complainant organizations request the Committee to establish that the repressive measures against participants in the strike organized by the Trade Union of Aircraft Engineers of Serbia in the public company JAT Airways, violate the provisions of the Conventions on Freedom of Association, and to urge the Government and the management of the company to cancel the repressive measures together with their consequences and pay the indemnification to the Trade Union of Aircraft Engineers of Serbia. They consider that the issues raised in their complaint are symptomatic of the prevailing situation in JAT Airways, during and after the strikes, which is not in line with national and international labour and human rights.

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

- 1248.** In its communication of 22 September 2005, the Government indicates that, according to article 10 of the strike act (*Official Gazette* of FRY, issue No. 29/96), employees in services of public interest, including transport, may commence a strike if the minimum operational service is provided, ensuring the safety of the population and security of property and representing the indispensable condition for the life and work of citizens or the condition for operation of a company or a legal entity or physical person carrying out business or other activity or service. In conformity with the strike act, the Government has adopted a Regulation on the minimum operational service during a strike in public company JAT Airways (*Official Gazette* of FRY, issue No. 119/2003).
- 1249.** The Government also refers to article 11 of the strike act according to which, in services of public interest, the employer, founder, competent public authority and competent local self-government body must be given prior notice of the strike no later than ten days before the beginning of the strike, in a form of the decision on going on strike and the statement on the method to be used to provide the minimum operational service.
- 1250.** The Government further indicates that article 14, paragraphs 1 and 2, provide that the organization of or participation in the strike under the conditions set by the Act, shall not

be deemed a violation of work obligation, shall not be grounds for initiating the proceedings for establishing the employee's disciplinary and financial responsibility and shall not result in the employment termination. Employees participating in the strike shall exercise their basic employment rights, except their right to salary, and they shall exercise their social security rights in accordance with the social security regulations. According to paragraph 3 of article 14, the organizers of and participants in the strike that has not been organized in conformity with this Act, shall not enjoy protection provided for by paragraphs 1 and 2 of this article.

1251. The Government also refers to the report from the Labour Inspectorate annexed to its reply (No. 117-00-3826/2005-04) that indicates that an inspection was carried out on 21 March 2005 and concluded that the Trade Union of Aircraft Engineers and the workers participating in the strike had not respected the provisions of the strike act (articles 3-11) and therefore could not avail themselves of the protection provided for in paragraphs 1 and 2 of article 14 of the Act.

### C. The Committee's conclusions

1252. *The Committee notes that this case concerns limitations of strike action in the public company JAT Airways, which is considered by the Government as an essential industry. The Committee notes that the allegations concern: (1) the minimum service requirements established by the Regulation on the minimum operational service during a strike in the public company JAT Airways; (2) the obligation to give a ten-day period of notice for exercising the right to strike; and (3) the use by management of intimidation and threats of dismissal or suspension without pay, in order to prevent the employees of JAT Airways from taking industrial action.*
1253. *The Committee also notes the reply from the Government according to which the workers on strike did not respect the provisions laid down in the strike act (**Official Gazette** of the FRY issue No. 29/96) and the Regulation on the minimum operational service during a strike in the public company JAT Airways (**Official Gazette** of the Republic of Serbia issue No. 119/2003).*
1254. *The Committee notes that the Regulation on the minimum operational service during a strike in the public company JAT Airways provides that, during a strike, full international traffic services must be provided and on a full-time basis and, as for domestic traffic, 30 per cent of planned services. The Committee further notes from the text of the Regulation that the following services must be provided "in full scope": charter flights; traffic centre; technical maintenance of aircrafts; handling of aircrafts, passengers, luggage, cargo; booking service; representative offices of JAT Airways abroad and in the country; financial operations (cash desk); medical service; safety of people and the company's facilities and equipment; and fire-fighting service. The Committee recalls that transport services are not essential services in the strict sense of the term, i.e. services the interruption of which would endanger the life, personal safety or health of the whole or part of the population [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 545]. It has also considered that public servants in state-owned commercial or industrial enterprises should enjoy the right to strike, provided that the interruption of services does not endanger the life, personal safety or health of the whole or part of the population [see **Digest**, op. cit., para. 532]. The Committee nevertheless has considered that the transportation of passengers is a public service of primary importance where the requirement of a minimum service in the event of a strike can be justified [see **Digest**, op. cit., para. 566].*
1255. *In view of the above, the Committee is of the opinion that a minimum operational service requiring that all services must be provided "in full scope" and on a full-time basis, except*

for domestic traffic services, where 30 per cent of planned services must be provided, leaves insufficient space for strike action, as it may de facto lead, as in the field of international traffic, to a total prohibition of strike actions. The Committee also considers that a number of the ground services to be provided in full in the Regulation also excessively restrict the right to strike, with the exception of the traffic centre (air traffic controllers), medical service and fire-fighting service which may be considered as essential services in the strict sense of the term. Recalling that a minimum service should be limited to the operations that are strictly necessary to meet the basic needs of the population or the minimum requirements of the service, while maintaining the effectiveness of the action brought to bear, the Committee requests the Government to take the necessary steps to amend the regulation in question, in consultation with the relevant workers' and employers' organizations. In this connection, the Committee also recalls that, since this system restricts one of the essential means of pressure available to workers to defend their economic and social interests, the determination of minimum services and the minimum number of workers providing them should involve not only the public authorities, but also the relevant employers' and workers' organizations. This not only allows a careful exchange of viewpoints on what, in a given situation, can be considered to be the minimum services that are strictly necessary, but also contributes to guaranteeing that the scope of the minimum service does not result in the strike becoming ineffective in practice because of its limited impact, and to dissipating possible impressions in the trade union organizations that a strike has come to nothing because of over-generous and unilaterally fixed minimum services [see *Digest*, op. cit., para. 560].

- 1256.** Furthermore, in those services that are legitimately restricted, workers should have compensatory guarantees. Restrictions on the right to strike should be accompanied by adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage and in which the awards, once made, are fully and promptly implemented. In mediation and arbitration proceedings it is essential that all the members of the bodies entrusted with such functions should not only be strictly impartial but they should also appear to be as such both to the employers and to the workers concerned [see *Digest*, op. cit., paras. 547 and 549].
- 1257.** As regards the ten-day notice to be given prior to the commencement of strike action (article 11 of the strike act), the Committee recalls that, in conformity with its principles, the obligation to give prior notice to the employer before calling a strike may be considered acceptable, provided that the notice is reasonable [see *Digest*, op. cit., paras. 498 and 502]. The Committee therefore considers that as regards the provision concerning services of public interest that is objected to by the complainant organization, the requirement that a ten-day period of notice be given is not a violation of the principles of freedom of association.
- 1258.** The Committee nevertheless considers that the threats of dismissals and suspension without pay alleged in this case, and not refuted by the Government, entail serious consequences for the workers concerned, who started their industrial action in this particular case within the context of the non-payment of their wages.
- 1259.** While noting that the Government considers that the workers were not governed by the protection afforded for legitimate strike action because the strike was not organized in conformity with the strike act, the Committee recalls that sanctions for strike actions should be possible only where the prohibitions in question are in conformity with the principles of freedom of association, whereas the workers were apparently sanctioned by the public enterprise management in particular for not having assured the so-called minimum service that covers 100 per cent of international flights and most ground services. The Committee therefore requests the Government to review the situation of the workers at JAT Airways who may have been suspended or suffered other sanctions for their participation in a legitimate strike action with a view to ensuring that they have not been

*disproportionately punished on the basis of legislation that is incompatible with the principles of freedom of association and to ensure that their situation is appropriately redressed.*

**1260.** *The Committee draws the legislative aspects of this case to the attention of the Committee of Experts on the Application of Conventions and Recommendations.*

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

**1261.** *In light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) Recalling that a minimum service should be limited to the operations that are strictly necessary to meet the basic needs of the population or the minimum requirements of the service, and so as to ensure that the scope of the minimum service does not result in the strike becoming ineffective in practice because of its limited impact, the Committee requests the Government to take the necessary steps to amend, in consultation with the relevant workers' and employers' organizations, the Regulation on the minimum operational service during a strike in the public company JAT Airways (Official Gazette of the Republic of Serbia, issue No. 119/2003).*
- (b) The Committee requests the Government to review the situation of the workers at JAT Airways who may have been suspended or suffered other sanctions for their participation in a legitimate strike action with a view to ensuring that they have not been disproportionately punished on the basis of legislation that is incompatible with the principles of freedom of association and to ensure that their situation is appropriately redressed.*
- (c) The Committee draws the legislative aspects of this case to the attention of the Committee of Experts on the Application of Conventions and Recommendations.*

CASE NO. 2380

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

### **Complaint against the Government of Sri Lanka presented by the International Textile, Garment and Leather Workers' Federation (ITGLWF)**

*Allegations: The complainant alleges that Workwear Lanka, located in the Biyagama Free Trade Zone, has undertaken a campaign of intimidation and harassment, including the dismissal of 100 workers suspected of trade union membership, in order to prevent its workers from setting up a branch of the Free Trade Zones and General Services Employees Union*

**1262.** *The Committee last examined this case at its March 2005 meeting [see 336th Report, paras. 778-797, approved by the Governing Body at its 292nd Session in March 2005].*

**1263.** The Government forwarded its observations in communications dated 31 August and 1 September 2005.

**1264.** Sri Lanka 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**

**1265.** At its March 2005 session, the Governing Body approved the following recommendations in the light of the Committee's interim conclusions:

- (a) The Committee urges the Government to take without delay the necessary steps to ensure that a procedure on the allegations of anti-union discrimination be opened and be brought to a speedy conclusion in a fully impartial manner and to keep it informed in this respect. Further, if the allegations are found to be justified, the Committee requests the Government to ensure in cooperation with the employer concerned that: (i) the workers dismissed as a result of their legitimate trade union activities are reinstated without loss of wages and without delay or, if reinstatement in one form or another is not possible, that they are paid adequate compensation which would represent sufficient dissuasive sanctions for such anti-trade union actions; (ii) the workers demoted as a result of their legitimate trade union activities are restored to their former posts without delay; and (iii) the workers under suspension because of their legitimate trade union activities are allowed to resume work without delay and are paid wages for the period when they were unjustly denied work. The Committee requests the Government to keep it informed in this regard.
- (b) The Committee requests the Government to solicit information from the employers' organization concerned, with a view to having at its disposal its views, as well as those of the enterprise concerned, on the questions at issue.

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

**1266.** In its communications of 31 August and 1 September 2005, the Government indicates that out of the eight workers, whose services were suspended or terminated, two have resigned. While the Ministry of Labour Relations and Foreign Employment was making arrangements to refer the cases of other six workers to the Labour Tribunal Arbitration under the terms of the Industrial Disputes Act, the workers concerned have applied to the Labour Tribunal. The application of Ms. A.P. Chathurika Sanjeevani (the only worker whose services were terminated) was dismissed by the Labour Tribunal. The hearings of other five cases have been scheduled for 15 September 2005.

**1267.** The Government further indicates that according to the opinion of the officers who carried out the investigation, the establishment of the union had taken place after the disciplinary actions were imposed on the eight workers. The establishment of the union was an immediate result of the dispute and not the cause of the dispute. According to the Government, it appeared from the statements made by the trade union members and worker members of the Employees' Council that the dispute was not a result of the intervention by the management in the establishment of the trade union.

**1268.** During the discussions the Department of Labour held with the management and the union, it was made clear that if the trade union could prove that it had the adequate number of members in accordance with the Industrial Disputes Act, it would be recognized. Previously, the trade union refused to hold a referendum under the terms of the above Act. However, the union has now agreed to hold a referendum in order to ascertain its representativeness. The referendum was scheduled for 15 September 2005.



- 1269.** The Government further indicates that workers who are not members of the Free Trade Zone and General Services Union but are members of the Employees' Council have formed their own trade union and have applied for registration. According to the Registrar of trade unions, the application is in conformity with all legal requirements and the union will therefore be registered under the Trade Union Ordinance.

### The Committee's conclusions

- 1270.** *The Committee recalls that this case concerns allegations of anti-union discrimination by an employer in a free trade zone and more particularly, of a campaign of intimidation and harassment, including the dismissal of 100 workers suspected of trade union membership, undertaken by an employer, in order to prevent the workers from setting up a branch of the Free Trade Zones and General Services Employees Union.*
- 1271.** *The Committee further recalls that when it examined this case at its March 2005 meeting it urged the Government to take without delay the necessary steps to ensure that a procedure on the allegations of anti-union discrimination be opened and be brought to a speedy conclusion in a fully impartial manner. Further, if the allegations were found to be justified, the Committee requested the Government to ensure in cooperation with the employer concerned that: (i) the workers dismissed as a result of their legitimate trade union activities were reinstated without loss of wages and without delay or, if reinstatement in one form or another was not possible, that they were paid adequate compensation which would represent sufficiently dissuasive sanctions for such anti-trade union actions; (ii) the workers demoted as a result of their legitimate trade union activities were restored to their former posts without delay; and (iii) the workers under suspension because of their legitimate trade union activities were allowed to resume work without delay and were paid wages for the period when they were unjustly denied work. The Committee also requested the Government to solicit information from the employers' organization concerned, as well as those of the enterprise concerned, on the questions at issue.*
- 1272.** *The Committee regrets that no information from the employers' organization and the enterprise concerned has been provided. The Committee expects that the Government will ensure in the future that when a complaint concerns a private undertaking, it solicits the relevant information from the employers' organization and the enterprise concerned.*
- 1273.** *The Committee regrets that no information was provided by the Government on the alleged termination of services of about 100 workers following their participation in the strike. At the same time, the Committee notes the Government's indication that out of the eight workers, whose services were suspended or terminated, two have resigned and the other six workers have applied to the Labour Tribunal. While the application of one was dismissed by the Tribunal, the hearings of the other five cases were scheduled for 15 September 2005. The Committee trusts that these cases will be examined rapidly so that the necessary remedies can be applied effectively and requests the Government to keep it informed of the decisions reached by the Tribunal. It requests the Government to transmit copies of the decisions as soon as they are handed down by the Tribunal, as well as to provide information on the grounds on which an application to the Tribunal by one worker was dismissed. With respect to the remaining workers, the Committee reiterates its previous recommendation and urges the Government to take the necessary steps without delay to ensure that a procedure on the allegations of anti-union discrimination be opened and be brought to a speedy conclusion in a fully impartial manner and to keep it informed in this respect. Furthermore, if the allegations are found to be true, the Committee requests the Government to ensure in cooperation with the employer concerned that: (i) the workers dismissed as a result of their legitimate trade union activities are reinstated without loss of wages and without delay or, if reinstatement in one form or another is not possible, that*

they are paid adequate compensation which would represent sufficiently dissuasive sanctions for such anti-trade union actions; (ii) the workers demoted as a result of their legitimate trade union activities are restored to their former posts without delay; and (iii) the workers under suspension because of their legitimate trade union activities are allowed to resume work without delay and are paid wages for the period when they were unjustly denied work. The Committee requests the Government to keep it informed in this regard.

- 1274.** *The Committee notes the Government's statement to the effect that if following a referendum (scheduled for 15 September 2005), it is revealed that the union represents an adequate number of members in accordance with the Industrial Disputes Act, it will be recognized. The Committee understands that the reference is made to the recognition of the union for collective bargaining purposes. The Committee further notes that according to section 32A(g) of the Industrial Disputes (Amendment) Act No. 56 of 1999, no employer shall refuse to bargain with a trade union, which has in its membership not less than 40 per cent of the workmen on whose behalf such trade union seeks to bargain. The Committee considers that if no trade union covers more than 40 per cent of the workers, collective bargaining rights should be granted to all the unions in the unit so that they may negotiate at least on behalf of their own members [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 830]. The Committee therefore requests the Government to ensure and to amend the legislation, if needed, that if the branch of the Free Trade Zones and General Services Employees Union at the Workwear Lanka does not represent 40 per cent of the workers, this does not preclude the union from exercising its activities and that, if no other trade union at the enterprise covers more than 40 per cent, the union could bargain collectively at least on behalf of its members. The Committee requests the Government to keep it informed in this respect.*

## **The Committee's recommendations**

- 1275.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) *With regard to the allegation of anti-union dismissals, suspensions or termination of services, the Committee:*
- *regrets that no information was provided by the Government on the alleged termination of services of about 100 workers following their participation in the strike;*
  - *trusts that the five appeals lodged before the Labour Tribunal by the dismissed workers will be examined rapidly so that the necessary remedies can be applied effectively and requests the Government to keep it informed of the decisions reached by the tribunal. It requests the Government to transmit copies of the decisions as soon as they are handed down by the Tribunal, as well as to provide information on the grounds on which an application to the Tribunal by one worker was dismissed;*
  - *in respect of the remaining aggrieved workers, the Committee once again urges the Government to take the necessary steps without delay to ensure that a procedure on the allegations of anti-union discrimination be opened and be brought to a speedy conclusion in a fully impartial manner and to keep it informed in this respect. Furthermore, if the allegations are found to be true, the Committee requests the*

*Government to ensure in cooperation with the employer concerned that: (i) the workers dismissed as a result of their legitimate trade union activities are reinstated without loss of wages and without delay or, if reinstatement in one form or another is not possible, that they are paid adequate compensation which would represent sufficiently dissuasive sanctions for such anti-trade union actions; (ii) the workers demoted as a result of their legitimate trade union activities are restored to their former posts without delay; and (iii) the workers under suspension because of their legitimate trade union activities are allowed to resume work without delay and are paid wages for the period when they were unjustly denied work. The Committee requests the Government to keep it informed in this regard.*

- (b) The Committee requests the Government to ensure and to amend the legislation, if needed, that if the branch of the Free Trade Zones and General Services Employees Union at the Workwear Lanka does not represent 40 per cent of the workers, this does not preclude this union from exercising its activities and that, if no other trade union at the enterprise represents more than 40 per cent, the union could bargain collectively at least on behalf of its members. The Committee requests the Government to keep it informed in this respect.*

CASE No. 2419

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

**Complaint against the Government of Sri Lanka  
presented by  
the International Textile, Garment and Leather  
Workers' Federation (ITGLWF)**

*Allegations: The complainant alleges that the management of the New Design Manufacturing Ltd. factory dismissed 250 workers for having participated in a strike and refused to reinstate them as advised by the Commissioner General of Labour. It therefore alleges failure of the Government to uphold workers' right to strike and to ensure protection against anti-union discrimination*

- 1276.** The complaint is set out in a communication by the International Textile, Garment and Leather Workers' Federation (ITGLWF) dated 12 May 2005.
- 1277.** The Government forwarded its observations in a communication dated 31 August 2005.
- 1278.** Sri Lanka 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**

- 1279.** In its communication dated 12 May 2005, the International Textile, Garment and Leather Workers' Federation (ITGLWF), on behalf of its affiliate, the Free Trade Zone and General Services Employees' Union, alleges failure of the Government to uphold workers' right to strike and to ensure protection against anti-union discrimination.
- 1280.** The events that gave rise to the present complaint could be summarized as follows. On 11 January 2005, three workers employed as supervisors at the New Design Manufacturing Ltd. were dismissed without being given either prior notice or a valid reason. Protesting at what they felt was an unlawful and arbitrary decision on the part of the management, workers decided to take collective action and stopped work to demand the reinstatement of the three dismissed workers. As the management was showing no sign of its intention to open a dialogue, workers decided, on 13 January 2005, to file a complaint with the Commissioner General of Labour of the Department of Labour of Colombo. The Commissioner advised the workers to report for work the next day and informed them that he would call the management for a meeting on 17 January. However, when workers reported for work on Monday (17 January) they were told they would need to attend an interview with the management because the company had decided to employ them as new recruits. When the workers refused, management locked them out.
- 1281.** On the same day, workers approached the Free Trade Zone and General Services Employees' Union's office, seeking to become members of the Federation and asking that it represent them at the meeting convened by the Commissioner General of Labour. However, on 17 January, the management of the company failed to attend the meeting called by the labour authority and continued the illegal lockout.
- 1282.** On 18 January, the three dismissed workers received a letter, dated 6 January 2005, informing them that their services were terminated with immediate effect. The letter stated that they had been fired for instigating a strike a few weeks earlier. According to the workers, however, the management presented a plan to introduce a new piece-rate pay system, but workers had rejected the idea on the grounds that it was contrary to regulations prevailing in the industry, and that it would reduce their earnings. They therefore protested by stopping work.
- 1283.** During a meeting held on 19 January 2005, the Commissioner General of Labour suggested to the company that it put an end to the illegal lockout and reinstate workers immediately, including the three workers dismissed on 11 January, as the company had failed to comply with the disciplinary procedure laid down by the Board of Investment of Sri Lanka as regards the dismissal of workers.
- 1284.** The company did not comply. On 6 February 2005, it advertised vacancies in the local newspaper and started recruiting new employees. Some employees reported for work over the following days but were not reinstated. The workers reported that the management assigned two supervisors to determine whether those who showed up for work were trade union members.
- 1285.** During a discussion held on 11 February 2005, the management of the company informed the Commissioner General of Labour that it would not allow the workers to report for work unless they accepted to be rehired under new labour contracts, as newly recruited workers. The Commissioner General of Labour reiterated his advice to the management of the company to allow the whole workforce to report for work immediately without any conditions. On the date of the complaint, 250 of the 300 workers were still being locked out and unemployed.

## B. The Government's reply

- 1286.** In its communication of 31 August 2005, the Government does not dispute the merits of the complaint. It submits that the New Design Manufacturing Ltd. had served the notices of termination of employment by letters dated 6 January 2005 to three workers who were working as line supervisors. The workers of the factory had gone on strike on 11 January to protest against the termination the services of the three workers and on 12 January, complained to the Commissioner of Labour of the Department of Labour in Colombo.
- 1287.** On the instruction of the Commissioner of Labour, the workers had agreed to come back to work on the following day, i.e. 13 January 2005. On 20 January, the workers reported to the Commissioner that the employer had refused to offer them work when they reported for work, as instructed by the Commissioner. The employer had stated that the three workers who were terminated had instigated the disturbances on 3 December 2004 and therefore could not be reinstated on disciplinary grounds. The management was of the view that the strike held on 11 January 2005 was unreasonable and that it would be prepared to offer jobs to the dismissed workers only if they undertook in writing to not have recourse to such actions in the future. The workers insisted that the three terminations were unreasonable and the dismissed workers should be reinstated unconditionally.
- 1288.** On 1 February 2005, the Commissioner of Labour had requested the management to reinstate the workers but the management refused. At that point, the trade union had requested the management to offer work to the other workers until the dispute of the three workers concerned was settled. No positive response was received from the management.
- 1289.** Since the dispute could not be settled through conciliation, the Commissioner of Labour had recommended to the Minister of Labour Relations and Foreign Employment to refer the dispute for arbitration in terms of section 4(1) of the Industrial Disputes Act, with the agreement of either party. Accordingly, on 7 July 2005, the Minister of Labour Relations has referred the dispute for arbitration to inquire: (a) whether the termination of services with effect from 6 January 2005 of the three workers was justified and, if not, to what relief each of them was entitled; and (b) whether the refusal to offer work from 15 January 2005 by the New Design Manufacturing Ltd. to 179 employees was justified and if not, to what relief each of them was entitled. The Government assures that it will report the outcome of the arbitration proceedings on the above two matters.

## C. The Committee's conclusions

- 1290.** *The Committee notes that the complainant in this case alleges failure of the Government to uphold workers' right to strike and to ensure protection against anti-union discrimination. The Committee notes that the present complaint results from the refusal of the management of the New Design Manufacturing Ltd. to allow 250 workers to return to work following their participation in a strike.*
- 1291.** *The Committee notes that the Government does not dispute the facts of the case. It further notes the following events, which led to the present complaint. On 6 January 2005, the management of the company dismissed three workers, allegedly for having instigated a strike on 3 December 2004. According to the complainant, workers in fact protested against the new pay system the management was trying to introduce by stopping work. To protest against the dismissal of three workers, about 300 workers went on strike on 11 January 2005 and, on 12 January, lodged a complaint with the Commissioner of Labour who advised workers to report back to work. When the workers reported back to work, they were locked out. The management ignored the advice of the Commissioner of Labour to allow the workers to return to work and started hiring a new workforce.*

*According to the workers, particular attention was paid to whether those who reported for work were members of a trade union.*

- 1292.** *The Committee further notes that the dispute was referred for arbitration and notes the Government's assurance that it will report the outcome of the arbitration proceedings.*
- 1293.** *Considering that the dismissal of workers because of a strike, which is a legitimate trade union activity, constitutes serious discrimination in employment and is contrary to Convention No. 98 [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, paras. 591 and 704], the Committee draws the attention of the Government to its responsibility to prevent all acts of anti-union discrimination and its obligation, under the Convention, to ensure that complaints of anti-union discrimination are examined in the framework of national procedures which should be prompt and effective [see **Digest**, op. cit., paras. 738 and 739]. Noting that the workers were dismissed over a year ago, the Committee recalls that cases concerning anti-union discrimination contrary to Convention No. 98 should be examined rapidly, so that the necessary remedies can be really effective. 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**, op. cit., paras. 749 and 754].*
- 1294.** *The Committee notes that the complainant refers to 250 still unemployed workers while the arbitration procedure concerns 179 cases of dismissal. The Committee requests the Government to carry out an inquiry into the exact number of workers who remain locked out of their employment and the circumstances of the lock-out and to take the necessary measures to ensure that they are able to return to their posts with full compensation for lost wages and to ensure the application of the corresponding legal sanctions against the enterprise concerned. It requests the Government to keep it informed of the measures taken in this regard.*
- 1295.** *With regard to the allegation that, apparently, the enterprise would hire only non-unionized workers, the Committee recalls that such a policy constitutes a serious threat to the free exercise of trade union rights and requests the Government to take stringent measures to combat such practices if this allegation is confirmed following an independent inquiry.*

## **The Committee's recommendations**

- 1296.** *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 carry out an inquiry into the exact number of workers who remain locked out of their employment and the circumstances of the lock-out and to take the necessary measures to ensure that they are able to return to their posts with full compensation for lost wages and to ensure the application of the corresponding legal sanctions against the enterprise concerned. It requests the Government to keep it informed of the measures taken in this regard.*
- (b) *With regard to the allegation that, apparently, the enterprise would hire only non-unionized workers, the Committee recalls that such a policy constitutes a serious threat to the free exercise of trade union rights and requests the Government to take stringent measures to combat such practices if this allegation is confirmed following an independent inquiry. It requests the Government to keep it informed in this respect.*

CASE NO. 2351

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

**Complaint against the Government of Turkey  
presented by  
the United Metalworkers' Union (BIRLESİK METAL-IS)**

*Allegations: The complainant organization alleges that the Colakoglu Metallurgy Enterprise forced approximately 700 workers to resign from the complainant and join the Turkish Metal Union; consequently, the complainant lost its status as competent union for collective bargaining purposes and was prevented from having access to the workplace in order to perform its activities. It is also alleged that in Grammer A.S., 54 members of the complainant organization were dismissed, while other workers were hired in their place, and other members were threatened with dismissal or forced to resign from the union, in order to prevent the complainant from obtaining recognition for collective bargaining purposes*

- 1297.** The United Metalworkers' Union (BIRLESİK METAL-IS) submitted the complaint in a communication dated 31 May 2004 to which was appended a letter from the complainant organization to the ILO Office in Ankara dated 22 March 2004. The complainant sent additional information in a communication dated 1 June 2005.
- 1298.** The Government provided its observations in a communication dated 30 August 2004 to which a number of documents in Turkish were appended, including observations from the employers' organization concerned, which is the Turkish Union of Metal Industrialists (MESS). It submitted additional information in communications dated 7 January and 23 September 2005.
- 1299.** Turkey 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**

***Colakoglu Metallurgy enterprise***

- 1300.** The complainant organization indicates that there are around 1,000 workers in the Colakoglu Metallurgy enterprise which is located in Gebze. The enterprise is a member of the Turkish Union of Metal Industrialists (MESS). At the time the events challenged in the complaint took place, the enterprise was covered by a collective labour agreement concluded between MESS and the complainant organization; in fact, collective agreements had been signed between those two organizations for a number of years.

- 1301.** The complainant organization contends that during the night of 11 March 2004, workers who had just completed the night shift were stopped on their way to get the bus to go home because of the closure of the plant's gates. The employer asked these workers to gather in the dining hall inside the factory. In the hall, the fifth public notary of Gebze, invited by management, with representatives of another union, the Turkish Metal Union, awaited the workers. The complainant organization asserts that the night shiftworkers together with the workers arriving to take up their duties for the next shift were all forced to resign from it and to affiliate to the Turkish Metal Union. Seven hundred workers were thus forced to sign 12 forms: six forms for their resignation and six forms for their registration. These transactions were concluded within only ten hours.
- 1302.** The complainant organization states that it requested the Labour Court in Gebze to immediately undertake a legal investigation with a view to "fixing the proofs" and, to that end, a lawyer was designated by the Court and went to the scene of the events. The complainant proceeds to quote what it presents as being the expert's statement. According to the quotation in the text of the complaint, the expert explains that he arrived, together with the labour judge in Gebze and other persons, at 4.45 p.m. They saw 50 persons waiting outside the plant and that the buses had not departed despite the fact that the official working time was over. The secretary of the fifth public notary in Gebze was inside the dining hall of the plant with 50 other persons. The staff of the public notary was handling a number of printed documents. These documents consisted of six resignation forms and six affiliation forms per worker. The logo, the name, address, telephone, branch of activity and number of dossier of the Turkish Metal Union were printed on these forms. The expert and his colleagues checked the transactions undertaken by the public notary, and reported that the resignation forms contained no specification as to the workers' names, the company's name and address; further, the necessary information regarding the workers' identifications was not filled in. On the other hand, the following sentence was printed on the forms: "I confirm that I resign from the abovementioned union; I request the required transactions to be done according to Trade Union Law No. 2821. Date/signature." Workers only signed these documents. The forms contained no other statements or confirmation. Likewise, the affiliation forms had not been filled out and especially the rubrics to be completed by workers. The affiliation forms bore their signature under the following printed sentence: "I read the constitution of your union, there is no obstacle for me to become a member in your union, please accept my membership. Date/signature." Copies of the workers' identification cards were not attached. A total of 614 sets of documents had been dealt with. When the expert and his colleagues arrived, but also when they left, workers inside the plant protested against other persons' manipulation.
- 1303.** According to the complainant organization, the expert's report demonstrated that the procedure followed by the public notary violated the Public Notary Law on two accounts. First, a public notary commits an offence if he goes to the scene of events to collect the necessary papers and documents at the request of an interested party. Public notaries must perform their duties in their offices. Second, the deeds carried out by the public notary were not registered in "the official daybook of notary". The complainant organization therefore applied to the Labour Court in Gebze; it was eventually established that the transactions' registration had been delayed by one day.
- 1304.** Further, the complainant organization asserts that the fact that the employer delayed the buses' departure shows that its members had been illegally forced to resign from it and to affiliate with another union. The fact that 100 workers were waiting both outside and inside the plant is another clear demonstration of the employer's intention. The complainant organization reiterates in this respect that its members, who were on the night shift, were prevented from going home and were locked in the factory until the next morning. They were forced to gather in the dining hall with the workers assigned to the day shift. The Turkish Metal Union leaders and the employer threatened all these workers



with dismissal. The latter were thus compelled to resign from their union and to register with the Turkish Metal Union.

- 1305.** The complainant organization also refers to a declaration made by the plant manager under which, according to the complainant organization, workers who decided to change unions would not lose their rights and would not be dismissed. According to the complainant organization, the plant manager specifically declared that: “As I announced before too, I personally guarantee the job security of our workers. Now, in our workplace, a peaceful environment will be established.” The complainant considers that when an employer uses such words, they must be understood as a clear threat. This declaration is a proof of the employer’s level of involvement in the case.
- 1306.** The complainant organization also contends that weapons (described, in the 22 March 2004 letter, as being three guns and ten thick sticks) were found in the car of the President of the Sakarya Branch of the Turkish Metal Union. The presence of these weapons was recorded in an official document of the police. A lawsuit has been brought before the courts; during the trial the defendants alleged that they were going to Adapazari although, according to the complainant organization, they were arrested on their way to the Colakoglu plant. In its letter of 22 March 2004, the complainant organization gave to understand that the “men with guns from the Turkish Metal Union” were present during the resignation and affiliation processes. The complainant organization contended that they were in such a hurry that they did not ask for workers’ identity cards, knowing perfectly well that they would be able to complete the membership forms by obtaining all the necessary information from the employer.
- 1307.** The complainant organization underlines that under the Collective Labour Agreement, Strike and Lockout Act No. 2822, the competence of a union lasts until the expiry of the collective agreement period. In the Colakoglu Metallurgy enterprise, such a union was the complainant organization until September 2004. Despite this, its representatives were prevented from performing their duties and in particular to enter the plant, contrary to the provisions of the collective agreement in force. On the other hand, the Turkish Metal Union could organize meetings in the plant with the consent and the approval of the employer. The complainant organization takes the view that this clearly shows that the employer sided with one union to the detriment of another.
- 1308.** The complainant states that it started a legal procedure at the national level and had been waiting for the conclusions of the Ministry of Labour and Social Security’s examination. Despite all the evidence brought forward by the complainant organization, the Ministry recognized the competence of the Turkish Metal Union. In the letter of 22 March 2004, the complainant organization asserted that the workers of the Colakoglu Metallurgy enterprise started to back the complainant organization one by one again.
- 1309.** In its communication dated 1 June 2005, the complainant adds that a representative of the Colakoglu Metallurgy Enterprise declared in his testimony to the labour inspector on 22-23 July 2004 that the management had asked for help from the security forces during the events of 11 March 2004, in order to prevent the executive board of the complainant union from entering the factory (despite the fact that the complainant was entitled to have access to the workplace as the representative union at that time). Thus, there was an intervention from the employer’s side to force workers to resign from the union. The complainant also attaches a letter in which it raises questions with regard to the answers provided by the Colakoglu enterprise to the International Metalworkers’ Federation (for instance, why did the employer lock the doors of the factory and collect the workers in the dining hall? Who decided that the service vehicles would have to wait for hours? What was the role of gangs placed in front of the factory gates? Why two guns were found by the police in a car along with the President of the Turkish Metal Union branch (the

complainant alleges to have relevant court records)? Who called the public notary in the factory, given that public notaries must perform their functions in their offices except in extraordinary conditions? Why a single worker did not go to the notary in order to resign from the union if it was their own will? Why the representatives of the legally competent union are not recognized and allowed to enter the factory in accordance with the collective agreement? Why did the director of the factory write an announcement stressing that the job security of the workers was under his protection? Isn't that evidence of a threat? Why does the employer express himself positively in relation to Turk Metal and negatively in relation to the complainant in this letter? Doesn't the fact that the employer mentions an atmosphere of peace and security emerging after the events constitute an expression of the opinion of the employer?).

### **Grammer A.S.**

- 1310.** In its letter of 22 March 2004 to the ILO Office in Ankara, appended to the complaint, the complainant organization contended that violations of trade union rights occurred in a plant located in Bursa and owned by a European German MNC company named Grammer A.S. The complainant organization explained that it had begun to organize workers in this company. It asserted that the manager had begun to dismiss workers involved in organizing trade union activities and made an announcement to the effect that he would continue to dismiss workers if they had contacts with the complainant organization. Fifty-four workers had been dismissed at the time of the complainant organization's letter to the ILO Office in Ankara. The complainant organization also stated that, according to the news it had received, workers were subsequently forced to go to the public notary by bus to resign from it. The police was called to support the company's management when workers started to resist getting into the buses.
- 1311.** In its communication dated 1 June 2005, the complainant attaches a letter from the Chief Executive Officer of Grammer A.G. to the General Secretary of the European Metal Workers' Federation dated 20 April 2004, in which the management of Grammer A.G. acknowledges that there was a violation. The Chief Executive Officer said that he had been disturbed by the alleged violation in their subsidiary company Grammer A.S., and in order to understand the situation, they had supported the local management team with additional resources. He also stated that the steps taken by Grammer A.S. were inappropriate and that they were developing and implementing plans to correct the situation, including through the reinstatement of the workers who had been dismissed. The complainant also attaches a Protocol of Agreement signed between the complainant and Grammer A.S. on 26 March 2004, just before the letter of the Chief Executive Officer mentioned above. Section 4 of the agreement provided that "the employees previously dismissed will call on their jobs on 29 March 2004 and in addition to this, from the date of 1 April 2004, DISK BIRLESİK METAL-IS and the employer GRAMMER will make joint negotiations with a small portion of these workers".
- 1312.** The complainant believes that the letter and Protocol of Agreement fully contradict the investigation report of the labour inspector which concluded that the only violation was the termination of three employment contracts without valid reason.
- 1313.** The complainant alleges that the so-called plans to correct the situation were not realized except for the reinstatement of the workers. The Grammer A.S. management had employed 238 new workers on the same date that 54 members of the complainant were dismissed, that is, on 18 March 2004. According to the complainant, this was done in order to increase the level of competence for collective bargaining in the workplace and prevent the union from getting the majority representation required. In order to get certification, the union withdrew its application and reintroduced it on 29 March 2004. The management however continued its efforts to prevent the union from organizing by dismissing 16 workers and

hiring 39 new ones in violation of the Social Insurance Act, as a result of which the employer paid a 34,686,000,000 TL administrative fine. Consequently, the Ministry of Labour and Social Security gave certification as majority union to the Turkish Metal Union which prior to the problems with the management of Grammer had only 15 members in the workplace. The case had been pending before the court for 15 months.

- 1314.** A lawsuit filed against the former Director of Personnel (who had been dismissed by Grammer) was rejected and the court, which decided that he was not responsible for the decision to hire new workers and fire others so as to prevent the activities of the union and support another one (text enclosed in Turkish). Nevertheless, a handwritten statement of Ihsan Sur, attached to the complaint in Turkish, was of particular importance according to the complainant in order to indicate the violations which had taken place in Grammer. The statement indicated that when Ihsan Sur went to the factory to start work he was given a list of documents to be filled. At the same time, he was told that he should be a member of Turk Metal, otherwise, he could not begin working. Because he needed a job, he and another group of 20-25 newly recruited workers, were taken on 9 April 2004 from the factory to the Public Notary No. 14 with the service vehicles of the firm. He went involuntarily and under coercion by Mural Altiparmak (his function is not specified). In the bus there were men who introduced themselves as Turkish Metal Union officials who were not employees of the factory. Mural Altiparmak gave the order to take them to the notary and carry out their affiliation to Turk Metal. In the notary's office, most of the new recruits, with fear and involuntarily, signed certain documents. One was a form which had six pages and concerned membership. He also signed empty resignation forms. The complainant adds that another important piece of evidence is the petition of the lawyers of Grammer to the 1st Labour Court of Bursa filed on 17 August 2004. In this document they accepted that there were efforts by certain managers to force newly recruited workers to become members of another union (text enclosed in Turkish).

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

### ***Colakoglu Metallurgy enterprise***

- 1315.** In its communication of 30 August 2004, regarding the allegations made in respect of the Colakoglu Metallurgy enterprise, the Government indicates that the applicable procedure to acquire the "certificate of competence" necessary for a union to conclude a collective agreement is governed by the second chapter of the Collective Labour Agreement, Strike and Lockout Act No. 2822. The Government underlines that all the information sent by trade unions, employers and public notaries to the Ministry of Labour and Social Security is processed electronically by the competent department. For this reason, no "false evaluation" can occur in the process applicable to the determination of the competence of a particular trade union and in particular that of the complainant organization. The Government adds that, in any case, the latter raised an objection with the Second Labour Court of the Province of Kocaeli and that the case is pending.
- 1316.** The Government asserts that the allegations are not supported by any evidence. In support of its assertion, the Government produced several documents, which will be summarized hereafter, and which are the following: (1) the observations received from the employers' organization concerned, i.e. MESS, presented in a communication of 30 July 2004; (2) two notices of the enterprise's management, one of which is dated 25 March 2004; (3) a report dated 9 July 2004 containing the analysis of the head labour inspector following his visit to the company on 10 and 11 June 2004; (4) the 22 and 23 July 2004 minutes of the chief labour inspector; and (5) the 2 April 2004 report of the expert appointed by the Labour Court in Gebze to check the process followed by the public notary in respect of union membership.

**1317.** In a communication dated 23 September 2005, the Government indicated that the validity of the resignations of the workers from the complainant trade union and their joining of Turkish Metal Union is contested before the Labour Court of Gebze. The decision of the Ministry of Labour and Social Security recognizing the competence of the Turkish Metal Union to bargain at the said workplace has also been taken to the 2nd Labour Court of Kocaeli by the complainant. Both cases are still pending. The Government will act in accordance with the verdict when it is handed down.

#### Observations from the Turkish Union of Metal Industrialists (MESS)

**1318.** MESS explains that the Colakoglu Metallurgy Joint Stock Company (JSC) was founded in 1966 and has been a member of MESS ever since 1989. Collective agreements have been concluded since 1974. Never during 30 years has the enterprise shown any preference regarding the authorized union in the workplace. The employers' organization states that there are few differences between "the group collective agreements" – and no numeric difference regarding the financial clauses – which it has concluded with three workers' organizations, among which are both the complainant organization and the Turkish Metal Union. This is evidenced by the contents of the agreements concluded between MESS, on the one hand, and the complainant organization and the Turkish Metal Union, on the other. Thus, there is no reason for the Colakoglu Metallurgy JSC to prefer the Turkish Metal Union and therefore to put pressure on its workers to affiliate to this union.

**1319.** With respect to the particular case at hand, MESS confirms that on 11 March 2004, there was a collective resignation from the complainant organization followed by a collective affiliation to the Turkish Metal Union. According to the employers' organization, this was caused by internal difficulties encountered by the complainant organization. There was no pressure exercised by the Colakoglu Metallurgy JSC on its workers to change union. In support of its assertions, the employers' organization refers to the minutes of the labour inspection dated 22 and 23 July 2004 (attached to the Government's reply and summarized below). In this respect, the employers' organization states the following. The workplace union representatives of the company submitted their candidature in the elections of the headquarters' complainant organization held in December 2003 and, at the same time, supported other candidates. These candidates were eventually not elected and the new administration of the complainant organization refused to work with the union representatives of Colakoglu Metallurgy JSC and tried to appoint its own representatives. Workers resisted these attempts during ten days and eventually decided to resign from the complainant organization. The latter exercised some pressure to have the workers reconsider their position and, as a result, some actions, which took place outside the workplace, began to threaten the enterprise's peaceful functioning. Nonetheless, the enterprise management remained impartial and did not intervene at all in union matters.

**1320.** MESS rejects the specific allegation that workers were locked inside the factory and were compelled to resign from the complainant organization. It indicates that, on the contrary, management informed workers that they had the right to affiliate to the union of their choice and that this right was enshrined in the Constitution; hence, the exercise of this right could not result in any loss of right or dismissal and job security was guaranteed by the company. The employer made this announcement not to have some bearing on the workers' choice but to preserve a peaceful work environment and production.

**1321.** Finally, MESS contends that the public notary was invited by the workers themselves to come to the workplace in order to process the necessary formalities in respect of union membership. The presence of the public notary did not involve any interference on the part of the employer. On the other hand, the employers' organization indicates that because of the conflict between the workers and the complainant organization, the latter was not

authorized to access the workplace, while the public notary was processing the resignations and the consequent affiliations.

#### The management's notices

- 1322.** The first notice, dated 25 March 2003, is issued under the company's name with the signature of the factory's head. In the notice, it is acknowledged that workers have exercised "their constitutional right" by resigning from the complainant organization and affiliating to the Turkish Metal Union, and that "the job security [...] depends on the company Colakoglu Metallurgy JSC where [workers] have worked peacefully for years. The job security of all our honest colleagues is guaranteed". The company calls on its employees not to yield to "those who [...] want to disrupt peace". The notice ends with this statement: "We believe that all our workers will show the necessary sensitivity on the subject".
- 1323.** The second notice is issued under the name and signature of the factory's head. The latter underlines that the change in union membership will not result in any loss of right and/or any dismissal. Referring to the previous notice, he reiterates that he guarantees the jobs of all of the workers. The factory's head refers to the pressure exerted by outsiders with a view to disrupting the peace of the workplace. Recalling that the workplace has always been a peaceful and secure work environment, he expresses the belief that workers will continue to attend their job "with the same loyalty and determination as before".

#### Analysis by the head labour inspector following his visit to the company on 10 and 11 June 2004 (report dated 9 July 2004)

- 1324.** In its communication, the Government indicates that the complainant organization made representations, among others, to the Ministry of Labour and Social Security. Upon receipt of these representations, the head labour inspector of the Ministry, Mr. Mehmet Gökçay, carried out an analysis of the situation and visited the enterprise to that end on 10 and 11 June 2004. The terms of reference of the labour inspector's mission were to determine whether pressure for anti-union reasons had been exerted on the workers. The labour inspector held discussions with union representatives and the employer. The report is summarized below.
- 1325.** At the outset, the report indicates that the enterprise employs 966 workers. It refers to the complainant organization as being the competent union and confirms that a "group collective labour agreement" is applicable for the period 2002-04 to the enterprise, with the exception of 164 workers. The employer's representative assured the labour inspector that the company in no way caused the collective resignation from the complainant organization or interfered with the affiliation to the Turkish Metal Union. The labour inspector interviewed on 21 May 2004 the head union representative who explained that before 11 March 2004 he was the representative of the complainant organization. He indicated that about 650 workers resigned freely from this organization to join the Turkish Metal Union (a copy of the head union representative's statement, as it was recorded by the labour inspector, has been transmitted by the Government). Two workplace representatives confirmed this and one of them underlined that one worker maintained its membership with the complainant organization, without being dismissed.
- 1326.** The report indicates that after the labour inspector's visit, a communication signed by 166 workers was sent to the Labour Inspection Office of the Ministry of Labour and Social Security. In this communication, the signatories declared that they wished to let it be known to the Labour Inspection Office that they resigned from the complainant organization and joined the Turkish Metal Union, freely and willingly. In its evaluation, the head labour inspector indicates that "a view has been reached that workers who were

members of the [complainant organization] left on 11.3.2004 and became members of the Turkish Metal Union [...] freely and of their own accord”.

- 1327.** In the light of his analysis, and of the petition signed by 166 workers, the labour inspector concludes that no pressure had been exerted on the workers for anti-union reasons.

#### Minutes of the chief labour inspector of 22 and 23 July 2004

- 1328.** These minutes were drafted on the basis of another analysis carried out by the chief labour inspector, Mr. Canpolat Ceran, on 22 and 23 July 2004. It seems that this second analysis was undertaken following the transmission to the Government of the complaint lodged before the Committee. At the outset, the chief labour inspector indicates that the group collective labour agreement, agreed between MESS and the complainant organization, was still in force at the time of the inspection since it was concluded for the period from 1 September 2002 until 30 August 2004.
- 1329.** The chief labour inspector indicates that since November 1974, when collective agreements began to be concluded in the company, these agreements have applied without any interruption (with the exception of a 15-day strike in 1989). According to the chief labour inspector, industrial relations in the company are characterized by a “very positive mutual understanding”.
- 1330.** The chief labour inspector explains that he has established the following facts. After the Gebze branch elections in October 2003, headquarters elections were held in December 2003. Workplace union representatives were candidates in these elections and/or supported some candidates who eventually lost both the branch and the headquarters elections. After the elections, the new union administration tried to appoint other workplace representatives. The representatives at the time and the workers became uncomfortable with this situation. To put an end to the union internal disagreements, the workers invited the Gebze fifth public notary on 11 March 2004. The same day about 640 workers resigned from the complainant organization and became members of the Turkish Metal Union. At the same time, the complainant organization lodged a complaint with the Gebze Labour Court alleging the employer’s pressure to its detriment and infringements to the law applicable to public notary. The chief labour inspector refers to the report written by the expert designated by the court which, according to the him, did not tackle the issue of pressure and therefore cannot constitute evidence to that end. In fact, the expert’s report simply reviewed the procedure followed by the public notary.
- 1331.** The chief labour inspector indicates that on 4 May 2004, the Turkish Metal Union submitted a request to the Ministry of Labour and Social Security to be recognized as the competent union to participate in collective bargaining. On 17 May 2004, in accordance with section 13 of Act No. 2822, the Ministry recognized the competence of this union because it met the criteria relating to the representative status. The Ministry so informed all the parties concerned. Upon being notified of the Ministry’s decision, the complainant organization raised an objection before the court questioning both the recognition of the Turkish Metal Union’s competence and the events surrounding this recognition. The inspector indicates that the case is pending.
- 1332.** The chief labour inspector indicates that two workers out of 966 decided to maintain their membership with the complainant organization and therefore a “membership subscription fee” is deducted from their salaries for this union. The chief labour inspector adds that no “membership subscription fee” is deducted from the salaries of the other workers in relation to the membership of the other union. The chief labour inspector states that the collective labour agreement concluded between MESS and the complainant organization

continues to apply to workers who resigned from the latter and join the Turkish Metal Union.

- 1333.** The chief labour inspector then proceeds to quote a statement from the employer's representative. In this statement, it is reiterated that no pressure was exerted by the employer on the workers to change union membership and that the matter stems solely from an internal conflict. It was the workers who invited the fifth public notary to the workplace in order to process their resignations and affiliations. The management did not object to the presence of the public notary. The employer's representative is of the view that there was no denial of trade union rights since the workers were able to join freely the union of their choice. The employer's representative explains that in order to prevent outsiders from accessing the factory while the resignation and affiliation processes took place, help was sought from the Gebze province and the chief of the security department; as a result, the security forces took the necessary steps. The employer's representative reiterated that, since 11 March 2004, no employee was dismissed and termination of contracts only occurred through retirement or resignation.

Report of 2 April 2004 prepared by the expert  
appointed by the Labour Court

- 1334.** The Government underlines that the report is limited to the issue of the processes carried out by the public notary, at the exclusion of any other issue. A copy of the report has been attached to the Government's reply and can be summarized as follows.
- 1335.** The report written by a lawyer is addressed to the Office of the judge of the Labour Court in Gebze. The expert took down the declaration of the public notary concerning the change in union membership of 613 workers. Thus, the latter indicated that workers' names and signatures appeared on the resignation and affiliation forms and that the other sections to be filled out were empty. The public notary indicated that "I took it upon myself to fill in the [...] empty sections". The expert notes in his report that the public notary did not record the resignations and the affiliations on the day they were undertaken and that this constituted a violation of the law on public notary. It seems that this defect was rectified the following day. The expert's report contains no information on any other issue.

### **Grammer AS**

- 1336.** In its communication of 7 January 2005, the Government indicates that, following representations made by the complainant organization on 22 March 2004 to the Labour Directorate of the Province of Bursa (where the enterprise is located), a labour inspector undertook an examination of the situation and notably of a number of documents and records submitted by the employer. The labour inspector's report, dated 30 April 2004, is appended to the Government's communication and can be summarized as follows.
- 1337.** At the outset, the report gives some general information on the company, which employs 856 workers, in particular by indicating that there is no recognized union. The following facts established by the labour inspector should be highlighted:
- the enterprise is not covered by any collective agreement;
  - 54 workers' contract were terminated on 18 March 2004 under section 25/II of Labour Law No. 4857, on the grounds that: the workers' actions and behaviour caused a decrease of production; they had threatened other workers and had continued to have an aggressive and disruptive attitude despite several warnings; and their performance was not up to the level;

- apart from the letters of termination, there is no document relating to the grounds on which the 54 terminations had been decided, further, the employer did not inform the competent authorities of the dismissals;
- of the 54 workers, 51 challenged the dismissals before the 3rd Bursa Labour Court: 47 workers requested their reinstatement while the remaining 4 requested the payment of compensation;
- three workers did not bring any lawsuit and the employer, as of 13 April 2004, recruited two of them again.

**1338.** The employer's representatives declared to the labour inspectors, among other things, that the union membership had no influence whatsoever on the terminations of contracts and no pressure was exerted on workers to get into buses to go to the public notary in order to resign from the complainant organization. Indeed, according to the employer's representatives, it is not possible to identify neither the workers who are union members and nor the unions concerned. The employers' representatives assured the labour inspector that the workers are free to join the union of their own choosing and that they were verbally so informed by the workplace representatives.

**1339.** On the basis of his examination, the labour inspector reached, in particular, the following conclusions:

- No administrative action could be taken at this stage concerning the 51 workers who challenged their termination before the Bursa Labour court.
- With respect to the three workers who did not file a suite before the courts, the labour inspector considered that the employer did not provide any evidence in support of the terminations; the dismissals were unjustified and, in addition, the worker had not received prior notification of the termination of contract in violation of section 17 of the Labour Law; the labour inspector concluded that the three workers should each receive a payment in lieu notice amounting to eight weeks of their respective salaries as well as a severance payment (it should be added that, concerning the two workers who were re employed, the labour inspector considered that their employment had come to an end on 18 March 2004 and that the new contract of employment was concluded when they were recruited again on 13 April 2004).
- No "determination could be made" regarding the allegations on the anti-union nature of the terminations and the pressure exerted on workers to resign from the complainant organization; the labour inspector therefore decided that no administrative action was called for in this respect and informed the complainant organization that it could lodge a claim with the courts to challenge this conclusion.

**1340.** The Government indicates that the conclusions of the labour inspector's report were duly notified to the employer and the complainant organization through two letters dated 18 May 2004 (as copy of these letters have been communicated by the Government).

**1341.** In a communication dated 23 September 2005, the Government added that a labour inspection took place on 14 May 2004 at the request of the complainant and its rival Turkish Metal Union in order to determine the competence to conclude a collective agreement at the workplace. In accordance with the provisions of article 13 of Act No. 2822 concerning collective agreements, strikes and lockouts, the Ministry of Labour and Social Security determined that the rival union Turkish Metal Union had the majority of workers as members at the abovementioned workplace and issued the required certificate of competence to the said union, thus refusing the application of the complainant union for recognition of its competence to bargain at the workplace. The



complainant union filed two lawsuits before the labour court, requesting annulment of the decision of the Ministry refusing competence to the complainant and the decision recognizing the competence of the rival union. During the proceedings of the 1st Labour Court of Bursa, the employer's lawyer admitted that the subsidiary company in Bursa behaved in a way of which the mother company did not approve and informed that the dismissed workers had been reinstated (as regards the legal actions taken by the individual workers dismissed, according to the information obtained from the 3rd Labour Court of Bursa, some of the petitions remained only as applications since the plaintiffs did not follow up and all the other cases except for two were withdrawn by the plaintiffs). The 1st Labour Court of Bursa decided on 1 July 2005 that, in light of the irregularities in the recruitment of new workers and dismissal of others, there was simulation at the workplace and therefore the Ministry's decision to refuse the certification of the complainant was annulled and the competence of the complainant recognized. The Turkish Metal Union lodged an appeal on 27 July 2005. The second suit filed by the complainant union against the decision of the Ministry recognizing the competence of Turkish Metal Union is still pending before the Court and information will be transmitted to the ILO on new developments.

## The Committee's conclusions

**1342.** *The Committee notes that the present complaint concerns allegations that the Colakoglu Metallurgy Enterprise forced approximately 700 workers to resign from the complainant and join the Turkish Metal Union; consequently, the complainant lost its status as competent union for collective bargaining purposes and was prevented from having access to the workplace in order to perform its activities. It is also alleged that in Grammer A.S., 54 members of the complainant organization were dismissed, while other workers were hired in their place, and other members were threatened with dismissal or forced to resign from the union, in order to prevent the complainant from obtaining recognition for collective bargaining purposes.*

## Colakoglu Metallurgy Enterprise

**1343.** *The Committee notes that according to the complainant: (1) at the time the events took place, the enterprise was covered by a collective agreement concluded between the Turkish Union of Metal Industrialists (MESS – the employers' organization to which the Colakoglu Metallurgy Enterprise is affiliated) and the complainant organization; in fact, collective agreements had been signed between these two organizations for a number of years; (2) during the night of 11 March 2004, workers who had just completed the night shift were stopped on their way to get the service bus and were asked to gather in the dining hall by the employer; (3) in the hall, the fifth public notary of Gebze, invited by the employer, along with representatives of another union, the Turkish Metal Union, awaited the workers who had just finished their shift as well as the workers who had just arrived for the next shift; (4) approximately 700 workers out of 1,000 were forced to resign from the complainant union and to join the Turkish Metal Union; (5) the Turkish Metal Union leaders and the employer threatened all workers gathered in the dining hall with dismissal in order to compel them to resign from one union and join the other; (6) announcements made by the plant manager personally guaranteeing the job security of the workers after a peaceful environment was established in the enterprise, were indirect threats against the workers who might not want to leave the union; (7) weapons (three guns and ten thick sticks) were found in the car of the President of the Sakarya Branch of the Turkish Metal Union and this was recorded in an official document of the police (not provided); during the trial, the defendants alleged that they were going to Adapazari although according to the complainant, they were on their way to the Colakoglu plant; (8) men with guns were apparently present during the resignation and affiliation processes; (9) an expert who was*

sent by the Labour Court to examine the evidence reported that workers in the plant protested against manipulation; (10) since the change in membership, the representatives of the complainant organization were prevented from entering the plant, contrary to the provisions of the collective agreement in force, and the Collective Labour Agreement, Strike and Lockout Act No. 2822 which provides that the competence of a union lasts until the expiry of the collective agreement period; on the contrary, the Turkish Metal Union was allowed to organize meetings in the plant with the consent and the approval of the employer; (11) the procedure followed by the public notary violated the Public Notary Law because the notary did not perform his duties in his office and did not register the deeds in the official daybook of notary (it was eventually established that the registration was delayed by one day); (12) the complainant initiated legal proceedings against the Ministry of Labour and Social Security's decision to recognize the competence of the Turkish Metal Union for collective bargaining purposes.

- 1344.** *The Committee notes that in its reply the Government forwarded, inter alia, two labour inspection reports and the observations of the Turkish Union of Metal Industrialists (MESS). According to the Government's reply: (1) since 1974 when collective agreements started to apply in the Colakoglu Metallurgy Enterprise, the management has never shown any preference regarding the authorized union in the workplace; according to the chief labour inspector, industrial relations in the company have been characterized by a "very positive mutual understanding"; (2) "group collective agreements" have been signed between MESS and three workers' organizations including the complainant and the Turkish Metal Union with minimal differences among them (no financial difference); thus, there is no reason for the Colakoglu enterprise to prefer one union over another; (3) according to two labour inspection reports, the collective resignation from the complainant organization was due to internal difficulties of the complainant organization and no pressure was exerted by the employer; (4) in particular, in December 2003, the newly elected administration of the complainant organization refused to work with the previous union representatives in the Colakoglu Metallurgy Enterprise and tried to appoint new representatives – something that the workers opposed; (5) after resisting for ten days, workers eventually decided to resign from the complainant organization, which, in turn, exercised pressure to have the workers reconsider their position, leading to some actions outside the workplace which began to threaten the enterprise's peaceful functioning; (6) the enterprise management remained impartial and in order to ensure a peaceful environment and production, simply informed the workers that they had the constitutional right to affiliate with the union of their own choice, and that the exercise of this right would not lead to any loss of right or dismissal; (7) the public notary was invited by the workers themselves to come to the workplace on 11 March 2004 in order to proceed with the necessary formalities in respect of trade union membership; the employer did not object to his presence; (8) on that day, 640 workers resigned from the complainant organization and became members of the Turkish Metal Union; two workers out of 966 decided to maintain their membership with the complainant organization; (9) because of the conflict between the workers and the complainant organization, the latter was not authorized to access the workplace while the public notary was processing the resignations and relevant affiliations; (10) subsequently, 166 workers declared in writing to the labour inspector that they had resigned from the complainant organization and joined the Turkish Metal Union freely and willingly; (11) the complainant lodged a complaint with the Gebze Labour Court alleging employer pressure against it and infringements of the law concerning public notaries; (12) the report written by the expert designated by the court did not tackle the issue of pressure to quit the union and simply reviewed the procedure followed by the public notary (finding minor irregularities which had been rectified); (13) the validity of the resignations of the workers from the complainant trade union and their joining of Turkish Metal Union is still being contested before the Labour Court of Gebze; (14) following a request by the Turkish Metal Union dated 4 May 2004, the Ministry of Labour and Social Security decided on 17 May 2004 to*

recognize the competence of this union for collective bargaining purposes as the representativeness criteria had been met (section 13 of Act No. 2822); (15) after being notified of the Ministry's decision, the complainant raised an objection before the 2nd Labour Court of Kocaeli and the case is still pending.

- 1345.** *The Committee observes that this case would appear, on the basis of the elements available to it, to concern to a large extent a dispute within the trade union movement. It recalls that a matter involving no dispute between the Government and the trade unions, but which involves a conflict within the trade union movement itself, is the sole responsibility of the parties themselves. Conflicts within a trade union lie outside the competence of the Committee and should be resolved by the parties themselves or by recourse to the judicial authority or an independent arbitrator [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, paras. 962 and 972].*
- 1346.** *With regard to the allegations of employer interference and favouritism in the context of this dispute, the Committee observes that in light of the contradictory information provided by the complainant and the Government, it is not in a position to reach conclusions on this issue. The Committee observes however that two cases have been pending for almost two years now before the courts in relation to this complaint – one case concerning the validity of the resignations of the workers from the complainant organization and the joining of the Turkish Metal Union and another concerning the recognition of the Turkish Metal Union's competence for collective bargaining purposes. The Committee emphasizes the importance of examining the complaints arising from this case as quickly as possible so as to bring the relevant dispute to an end and expresses the hope that the courts will reach decisions on these matters without further delay. It requests the Government to keep it informed in this respect and to transmit a copy of the decisions as soon as they are handed down.*
- 1347.** *With respect to the complainant's allegation that its representatives were prevented from performing their duties and in particular entering the plant, the Committee recalls that minority trade unions that have been denied the right to negotiate collectively should be permitted to perform their activities and especially to speak on behalf of their members and to represent them in the case of an individual claim [see **Digest**, *op. cit.*, para. 313]. The Committee therefore requests the Government to take all necessary measures to ensure respect for this principle and to keep it informed in this respect.*

### **Grammer A.S.**

- 1348.** *The Committee notes that according to the complainant: (1) 54 workers involved in organizing trade union activities in Grammer A.S. were dismissed on 18 March 2004; (2) others were threatened with dismissal should they continue to have contact with the complainant organization; (3) these workers were subsequently forced by the company to go to a public notary with the help of the police in order to resign from the complainant organization; (4) one worker stated in a handwritten statement that he had been forced along with another 20-25 newly recruited workers to join the Turkish Metal Union on 9 April 2004; (5) the Chief Executive Officer of the main company based in Germany, Grammer A.G., indicated in his letter dated 20 April 2004 to the General Secretary of the European Metal Workers' Federation that "some of the steps taken by Grammer A.S. [Turkey] are not in line with labour laws and our Grammer standards of conduct. We are now developing and implementing plans to correct the situation, which includes the reinstatement of workers that were dismissed." (letter attached to the complainant's communication); (6) according to a Protocol of Agreement signed between representatives of Grammer A.G. and the complainant on 26 March 2004, all workers would be reinstated and joint negotiations would take place between the complainant and the employer from 1 April 2004 (text attached); (7) the 54 workers were reinstated; however, another*

238 workers had been hired on 18 March 2004, that is, the day when the 54 workers had been dismissed; moreover, 16 other workers were dismissed and 39 hired, in violation of the Social Insurance Act for which the employer had to pay an administrative fine; (8) as a result of these changes, the complainant was unable to get recognition as competent union for collective bargaining purposes; (9) the Turkish Metal Union was recognized instead as competent, despite the fact that prior to the incidents, it had only 15 members in the workplace; (10) the complainant brought a complaint before the courts and the case had been pending for 15 months before the 1st Labour Court of Bursa; (11) the lawyers of Grammer acknowledged before the court on 17 August 2004 that efforts had been made by certain managers to force newly recruited workers to become members of another union.

**1349.** *The Committee notes that according to the Government: (1) 51 of the 54 dismissed workers initially challenged their dismissals before the 3rd Labour Court of Bursa; (2) a labour inspector who investigated the relevant denunciations refrained from drawing any conclusions as regards these 51 workers whose case was pending before the court; (3) the labour inspector examined the case of the remaining three workers and found that their dismissals were unjustified because there had been no notification, but did not examine the issue of anti-union discrimination (he decided that the three workers should receive eight weeks of salary in lieu of notice as well as severance payment); in the meantime, two of these workers had been recruited again by the company as of 13 April 2004; (4) following a request from the complainant and the Turkish Metal Union to determine the competence to conclude a collective agreement at the workplace, the Ministry of Labour and Social Security found that the Turkish Metal Union had the majority of workers as members at the workplace and issued the required certificate of competence to the said union, thus refusing the application of the complainant; (5) the complainant filed two lawsuits before the labour court, requesting annulment of the decision of the Ministry refusing competence to the complainant and of the decision recognizing the competence of the rival union; (6) during the proceedings before the 1st Labour Court of Bursa, the employer's lawyer admitted that the subsidiary company in Bursa had behaved in a way of which the mother company did not approve and informed that the dismissed workers had been reinstated; their legal actions claiming reinstatement or compensation had been dropped; (7) the 1st Labour Court of Bursa decided on 1 July 2005 that in light of the irregularities in the recruitment of new workers and dismissal of others, the Ministry's decision concerning competence to carry out collective bargaining should be quashed and the complainant's competence recognized; (8) the Turkish Metal Union lodged an appeal on 27 July 2005; (9) the second lawsuit filed by the complainant against the decision of the Ministry recognizing the competence of the Turkish Metal Union is still pending and information will be transmitted to the ILO in this respect.*

**1350.** *While welcoming the recognition by the Grammer A.G. company of the acts of anti-union discrimination which took place in its Bursa subsidiary and the measures taken voluntarily to rectify the situation, including the reinstatement of all the dismissed workers, the Committee also notes with regret that the labour inspectorate initially entrusted with investigating the denunciations, refrained from addressing the issue of anti-union discrimination. The Committee recalls that no person should be dismissed or prejudiced in his or her employment by reason of trade union membership or activities, and it is important to forbid and penalize in practice all acts of anti-union discrimination in respect of employment [see *Digest*, op. cit., para. 696]. The Committee requests the Government to take all necessary measures to ensure that any effects that the acts of anti-union discrimination which took place in Grammer A.S. in March 2004 may have on the membership of the complainant organization will be fully rectified, including in the framework of the voluntary steps taken by the management to this effect, and to keep it informed in this regard.*

**1351.** *The Committee also notes that the 1st Labour Court of Bursa decided on 1 July 2005 that in light of the irregularities in the recruitment of new workers and dismissal of others, the Ministry's decision concerning competence to carry out collective bargaining should be quashed and the complainant's competence in this respect recognized and that the Turkish Metal Union lodged an appeal against this decision on 27 July 2005. It also notes that another suit filed by the complainant against the decision of the Ministry recognizing the competence of the Turkish Metal Union is still pending and information will be transmitted to the ILO in this respect. The Committee requests the Government to keep it informed of the outcome of the legal proceedings under way concerning the recognition of the trade union with competence for collective bargaining purposes in Grammer A.S.*

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

**1352.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) With regard to the two pending court cases concerning the validity of the resignations of the workers from the complainant organization and the joining of the Turkish Metal Union as well as the recognition of the Turkish Metal Union's competence for collective bargaining purposes in the Colakoglu Metallurgy Enterprise, the Committee expresses the hope that the courts will reach decisions on these matters without further delay and requests the Government to keep it informed in this respect and to transmit a copy of the decisions as soon as they are handed down.*
- (b) With regard to the complainant's allegation that its representatives were prevented from performing their duties, the Committee requests the Government to take all necessary measures to ensure respect for the principle that minority trade unions that have been denied the right to negotiate collectively should be permitted to perform their activities and especially to speak on behalf of their members and to represent them in the case of an individual claim, and to keep it informed in this respect.*
- (c) The Committee requests the Government to take all necessary measures to ensure that any effects that the acts of anti-union discrimination which took place in Grammer A.S. in March 2004 may have on the membership of the complainant organization will be fully rectified, including in the framework of the voluntary steps taken by the management to this effect, and to keep it informed in this regard.*
- (d) The Committee requests the Government to keep it informed of the outcome of the legal proceedings under way concerning the recognition of the trade union with competence for collective bargaining purposes in Grammer A.S.*

CASE NO. 2270

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

**Complaint against the Government of Uruguay  
presented by**

- **the Inter-Trade Union Assembly-Workers' National Convention (PIT-CNT)**  
and  
— **the National Ports Administration United Trade Union (SUANP)**

*Allegations: The complainant organizations allege that following the dockworkers' participation in the Labour Day celebrations, as a reprisal, the PLANIR S.A. company ceased hiring workers. A blacklist was also drawn up to prevent those workers finding work*

**1353.** The Committee last examined this case at its November 2004 meeting [see 335th Report, paras. 1379-1396]. On that occasion, it submitted an interim report to the Governing Body. At its November 2005 meeting, the Committee addressed an urgent appeal to the Government to send complete observations [see 338th Report, para. 11]. The Government sent its observations in a communication dated 24 February 2006.

**1354.** Uruguay 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**

**1355.** At its November 2004 meeting, the Committee observed that the complainant organizations alleged that, after participating in the May Day celebrations in 2002, several workers in the dock sector ceased to be hired by the PLANIR S.A. company and other companies belonging to a group, and that a blacklist was drawn up preventing the dockworkers on the list from obtaining work. On that occasion, the Committee made the following recommendation [see 335th Report, para. 1396]:

The Committee requests the Government to take measures to ensure that the investigation requested from the Inspectorate of Labour into the grave allegations submitted by the SUANP and the PIT-CNT is rapidly completed and expresses the hope that the investigation will cover all the matters mentioned by the complainants. The Committee requests the Government to send the results of the investigation in question so that it can pronounce itself on the basis of all the elements.

**B. The Government's reply**

**1356.** In its communication of 24 February 2006, the Government indicates that a negotiating table was set up under the auspices of the National Directorate of Labour (DINATRA) with representatives of the workers and the PLANIR S.A. enterprise and the further participation of the General Inspectorate for Labour and Social Security (IGTSS). This negotiating table functioned from 22 May 2002 to 14 June 2002. Faced with the unsuccessful results of the negotiations, the SUANP notified the IGTSS on 9 November 2004 of the complaint presented to the ILO and an administrative process was initiated in

order to clarify the denounced facts (file 10059/04). At that time, the PLANIR S.A. enterprise was sanctioned with a fine of 150 readjusted units by a resolution of the IGTSS dated 3 November 2005, for violating Conventions Nos. 87 and 98 and article 57 of the Constitution.

- 1357.** The Government indicates that the enterprise appealed against the abovementioned resolution claiming its reversal and hierarchical re-examination, but the resolution was confirmed by the IGTSS resolution of 28 November 2005 and the resolution of the Director-General of the Ministry of Labour and Social Security under the power vested in him on 26 January 2006. The means of administrative recourse were thereby exhausted. However, the enterprise still has the possibility to request the quashing of the administrative act, as well as its suspension (that is, the non-payment of the fine) before the Administrative Tribunal.

### C. The Committee's conclusions

- 1358.** *The Committee recalls that the complainant organizations had alleged that, after participating in the May Day celebrations in 2002, several workers in the dock sector had ceased to be hired by the PLANIR S.A. enterprise and other enterprises belonging to a group, and that a blacklist had been drawn up preventing the dockworkers on the list from obtaining work. At its November 2004 meeting, the Committee noted that the Government had requested the General Inspectorate of Labour to conduct an investigation into the allegations and, in that context, requested the Government to take measures to ensure that the investigation requested from the Inspectorate of Labour into the grave allegations submitted by the SUANP and the PIT-CNT was rapidly completed and expressed the hope that the investigation would cover all the matters mentioned by the complainants [see 335th Report, para. 1396].*
- 1359.** *In this respect, the Committee notes that the Government indicates that: (1) a negotiating table was set up under the auspices of the National Directorate of Labour (DINATRA) with representatives of the workers and the PLANIR S.A. enterprise and the further participation of the General Inspectorate for Labour and Social Security (IGTSS); this negotiating table functioned from 22 May 2002 until 14 June 2002; (2) faced with the unsuccessful results of the negotiations, the SUANP notified the IGTSS on 9 November 2004 of the complaint presented to the ILO and an administrative process was initiated in order to clarify the denounced facts; (3) the PLANIR S.A. enterprise was sanctioned with a fine of 150 readjusted units by a resolution of the IGTSS dated 3 November 2005, for violating Conventions Nos. 87 and 98 and article 57 of the Constitution; (4) the enterprise appealed against the abovementioned resolution claiming its reversal and hierarchical re-examination, but the resolution was confirmed by the IGTSS and the Director-General of the Ministry of Labour and Social Security; and (5) the means of administrative recourse were thereby exhausted. However, the enterprise still has the possibility to request the quashing of the administrative act, as well as its suspension (that is, the non-payment of the fine) before the Administrative Tribunal.*
- 1360.** *The Committee regrets the delay in the investigation of this case and requests the Government to inform it whether the enterprise has had recourse to the Administrative Tribunal against the fine imposed by the administrative authority and, if so, to inform it of the outcome. If no appeal has been made, the Committee expects that the fine will have been paid by the employer so as to serve as a dissuasive measure for any future acts of anti-union discrimination.*

## The Committee's recommendation

**1361.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendation:*

*Regretting the delay in the investigation of the allegations presented in this case, the Committee requests the Government to inform it whether the PLANIR S.A. enterprise has had recourse to the Administrative Tribunal against the fine imposed by the administrative authority and, if so, to inform it of the outcome. If no appeal has been made, the Committee expects that the fine will have been paid by the employer so as to serve as a dissuasive measure for any future acts of anti-union discrimination.*

CASE NO. 2411

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

**Complaint against the Government of the Bolivarian  
Republic of Venezuela  
presented by  
the Venezuelan Workers' Confederation (CTV)**

*Allegations: The complainant alleges that on 20 December 2004 the National Electoral Council enacted a new "Statute on the election of trade union officials" with which workers' organizations must comply in order legitimately to be able to conduct their business, and that on 3 February 2005 the Ministry of Labour issued a resolution giving trade union organizations 30 days to provide information on their administration and register of members in a form that includes each worker's complete identity, place of residence and signature; the Ministry of Labour has demonstrated its lack of impartiality and the members risk acts of anti-trade union discrimination; the CTV adds that on 12 January 2005, the National Electoral Council cancelled the 2001 elections of its executive committee*

**1362.** The Venezuelan Workers' Confederation (CTV) sent the complaint in a communication dated 25 February 2005. The Government sent its observations in a communication dated 31 October 2005.

**1363.** The Bolivarian Republic of Venezuela 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

- 1364.** In its communication of 25 February 2005, the Venezuelan Workers' Confederation (CTV) alleges that on 20 December 2004 the National Electoral Council enacted a new "Statute on the election of trade union officials" with which workers' organizations must comply in order legitimately to be able to conduct their business, and that on 3 February 2005 the Ministry of Labour issued a resolution giving trade union organizations 30 days to provide information on their administration and register of members in a form that includes each worker's complete identity, place of residence and signature; the Ministry of Labour has demonstrated its lack of impartiality and members risk acts of anti-trade union discrimination.
- 1365.** The CTV adds that on 12 January 2005, the National Electoral Council cancelled the 2001 elections of the CTV's executive committee.
- 1366.** The CTV states that the abovementioned events violate the principles of freedom of association enshrined in Convention No. 87. The new Statute infringes on the right of workers to draw up their own constitutions and rules and to elect their representatives in full freedom, without interference by the public authorities. For the Venezuelan State, the cancellation of the elections of the CTV's executive committee leaves the CTV leaderless and without representatives, and thus unable to conduct its trade union activities. Lastly, the Ministry of Labour's resolution undermines the ability of trade union organizations to function freely. This series of grave transgressions of the right of workers and their organizations to function freely has made the CTV a banned organization, the target of practices by state entities that lack the most basic impartiality for ruling on trade union matters.
- 1367.** The CTV further states that the abovementioned official conduct on national territory is also at odds with the information that is provided to ILO bodies and which frequently announces corrective measures. Indeed, in June 2004, in response to the CTV's denunciations, the National Executive pledged to the Committee of Experts of the International Labour Conference that it would take the requisite measures to enable trade union organizations to hold elections without interference by the National Electoral Council. Nonetheless, on the date indicated, the National Electoral Council enacted the abovementioned Statute and almost immediately thereafter suspended the elections of the CTV executive committee.
- 1368.** In conclusion, the CTV considers that the abovementioned events constitute grave violations of fundamental rights, in particular the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87).

## B. The Government's response

- 1369.** In its communication dated 31 October 2005, the Government declares that the complaint was submitted by a group of persons affiliated with the Venezuelan Workers' Confederation (CTV) whose arguments are based on alleged violations of freedom of association by the public authorities, executed by the National Electoral Council, in the form of the Statute on the election of trade union officials, the cancellation of the elections of the CTV executive committee and Ministry of Labour resolution No. 3538, published in the *Official Gazette* of the Bolivarian Republic of Venezuela, No. 38121, on 3 February 2005, in which information was requested on the register of members and the accounts.
- 1370.** The complainant alleges that Ministry of Labour resolution No. 3538 of 3 February 2005 is binding on trade union organizations. The allegation is worded as follows: "[...] the Ministry of Labour issued a resolution giving trade union organizations 30 days to provide

information on their administration and register of members in a form that includes each worker's full identity, place of residence and signature". The resolution in question was issued on that date by the Minister for Labour, acting within her authority, and is appended by the Government. It is based on the content of article 430 of the Organic Labour Act, which was published in the *Official Gazette* of the Bolivarian Republic of Venezuela, No. 4240, on 20 December 2005, and which stipulates that the obligations of trade union organizations towards the State are as follows:

*Article 430*

The trade unions shall:

- (a) communicate to the labour inspector within the following ten (10) days the amendments made to the statutes and append certified copies of the corresponding documents;
- (b) submit an annual detailed report to the labour inspector on their administration and complete register of members, with the indications given in article 424 of this Act;
- (c) provide the relevant labour officials with the information requested of them in respect of their legal obligations; and
- (d) fulfil any other obligations imposed by this or other laws.

**1371.** As can be seen, it is paragraph (b) of article 430 of the 1990 Organic Labour Act that explicitly establishes the obligation for trade union organizations to communicate general information on a yearly basis on their register of members and financial activities; that information is added to the corresponding Public Register of Trade Union Organizations. The purpose of this rule is to afford legal security to trade union activities and to protect the rights of their member workers; the nature of the information the trade unions must provide in no way prevents them from exercising their freedom of association, nor does it involve unlawful or arbitrary interference in their organization or activities. What is more, the labour inspectorate, which receives this information, does not rule on the substance; it simply verifies that the information meets the terms of the Act, i.e. whether it is complete or incomplete.

**1372.** In any event, the content of article 430 of the Organic Labour Act does not introduce a new legal rule, since it was first set out in article 188 of the Labour Act published on 16 July 1936, which, although now repealed, established that the register of members had to be presented every six months, in January and July of each year; at present it must be sent in only once a year.

**1373.** In addition, the information requested in article 430 of the Organic Labour Act is indispensable for the preparation of the national labour and trade union report and statistics published annually in the Ministry of Labour's Annual Report, as provided in article 587 *ejusdem*, transcribed below:

*Article 587*

The Ministry shall publish, within the first six (6) months of each year, a report on the previous year, said report to contain the series of statistics and other data that serve to provide up-to-date and detailed information on the labour market and the trends observed, with special emphasis on unemployment and employment, productivity and trade union membership, broken down by geographic area and sector of activity. The report shall be drawn up in such a way as to provide continuous information on each topic, in particular employment and the cost of living.

In addition, the Ministry shall periodically publish a bulletin containing the results of the surveys and statistical data processed during the period indicated.

**1374.** This rule explicitly establishes that the Ministry of Labour is obliged to draw up and present an annual report on unionization. The trade union organizations must therefore

discharge their shared responsibility and fulfil the obligations of article 430 of the Organic Labour Act, thereby enhancing the transparency of the Public Register of Trade Union Organizations provided for in the Act. Indeed, comparative law has shown that these rules are frequent and common, since they are part of the legal framework that the State should and is entitled to establish, under Article 8(1) of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), to protect trade union activities. Their purpose is to promote transparency in the exercise of freedom of association and to afford adequate guarantees to the members of trade union organizations.

- 1375.** On this point the Government recalls that the Committee of Experts on the Application of Conventions and Recommendations has analysed the Organic Labour Act in depth for over ten years and that during that time it has never made observations on articles 430 and 587, considering them at all times to be consistent with the ILO Conventions ratified by the Republic.
- 1376.** The problem in the Bolivarian Republic of Venezuela is that first, second and third-level trade union organizations, including the CTV, have often failed to meet this legal obligation. This state of affairs poses a serious threat to the right to freedom of association, the right to organize, the protection of that right and the promotion of voluntary collective bargaining, in that the Public Register of Trade Union Organizations contains errors and is incomplete. In this sense, the Government recalls that it agreed with various ILO bodies on the imperative need to strengthen the Public Register and to have information and statistics on the exercise of trade union rights. Indeed, it is because of this state of affairs and in view of the legal framework that the resolution in question was issued; it does no more than recall and require fulfilment of a rule set down in the Organic Labour Act, and establish a deadline for doing so.
- 1377.** The refusal of those claiming to represent the CTV to fulfil the obligations of article 430 of the Organic Labour Act should be interpreted more as an endeavour to justify the longstanding and repeated failure to fulfil this legal obligation. Indeed, it is noteworthy that second and third-level organizations affiliated to the CTV have fulfilled the obligation, within the deadline stipulated by the ministerial resolution. What is more, to date no application has been made to the competent courts impugning the resolution, in spite of the repeated public and media declarations made at the time by the persons who made this complaint.
- 1378.** On the contrary, the Government points out that the resolution set a deadline of 30 days to provide the information required by article 430 of the Organic Labour Act; however, in response to requests made by the trade union organizations at meetings held within the framework of the process of dialogue instigated by the Government, the deadline was extended to Friday, 29 April of this year, in resolution No. 3597 of 17 March 2005, which was published in the *Official Gazette* of the Bolivarian Republic of Venezuela, No. 38149. The Government appends copies of the documents recording the agreements of 31 March 2005, including one signed by a representative of the CTV, in which the signatory trade union organizations suggest that the Ministry of Labour extend said deadline (for submitting the registers of members) for a period of not less than two months; it also encloses press information on the matter.
- 1379.** In view of the above, the Government considers that the argument asserting that the resolution “undermines the ability of organizations to function freely” is groundless, given that, as has been demonstrated, the jurisdiction, legal basis, object, cause and purpose of this administrative text are consistent with the facts and the law. In no way, therefore, does it violate freedom of association. Lastly, the Committee on Freedom of Association should find it at least strange that the provisions of the Organic Labour Act to which objections are made in this complaint have been in force since 1936 and have never yet been

criticized or denounced by the trade union organizations, nor have those organizations impugned them before the courts. The Committee should note in particular that trade union organizations, including unions affiliated with the CTV, have provided the information required under article 430 of the Organic Labour Act in a timely fashion, in compliance with the resolutions in question, exercising in the fullest freedom their human rights of association and to organize.

- 1380.** Secondly, when it comes to the trade union elections of the complainant and the activities of the National Electoral Council in terms of such elections, a matter dealt with in a complaint (Case No. 2249) submitted by a group of people affiliated with the CTV, the Government is deeply concerned that a further procedure has been started in connection with events on which the Committee on Freedom of Association has previously ruled, in which there are repeated and clear rulings by the Supreme Court of Justice of the Bolivarian Republic of Venezuela on the proper interpretation of the rules in question and on this case in particular, and about which the various ILO bodies were informed in due course. This would appear to violate the human right not to be tried twice for the same offence and contravene the fundamental rules of due process and the rules and criteria governing the Committee's proceedings.
- 1381.** In any event, the Government repeats that the National Electoral Council, which is one of the Bolivarian Republic of Venezuela's electoral authorities, enjoys full and absolute independence from the other branches of government (legislative, executive, judicial and citizen), in accordance with the Constitution of the Bolivarian Republic of Venezuela. The National Electoral Council performs the functions of an electoral tribunal – its rectors (members) are appointed by the same body that selects the magistrates sitting on the Supreme Court of Justice – using similar requirements and procedures. Lastly, it should be remembered that, in accordance with the legal rules in force, the National Electoral Council's decisions can be appealed to the judicial authorities, namely the courts with jurisdiction over electoral disputes, in this case the Electoral and Constitutional Chambers of the Supreme Court of Justice.
- 1382.** In this case, the persons who submitted the complaint, although they did not agree with a decision by the National Electoral Council on their election process, did not appeal in a timely fashion and have not impugned that decision before the courts, as they have at other times. Since the parties concerned did not take the judicial steps set down in the existing legal order, the decision was confirmed and became final. Their failure to take such steps must be interpreted either as recognition of the decision's validity, as established by our legal order and the peaceful jurisprudence of constitutional *amparo* (enforcement of constitutional rights), or as manifest negligence on the part of those who claim to act on behalf of the CTV. For this reason, it is extremely strange that the complainant should turn to this distinguished Committee when it knows that it has already lost the procedural opportunity to challenge an election decision before the competent judicial authorities.
- 1383.** In addition, the Government repeats what it has already communicated to the various ILO bodies, namely that the CTV never complied with the rules set down in the Organic Labour Act and its own statutes in terms of trade union elections, including many that are strictly formal in content, thus comprising its validity and effectiveness. Lastly, the Government considers that consideration must be given to the CTV's own responsibility in this matter, given that its own omissions and activities outside the performance of the Organic Labour Act are root causes of what has happened, which the CTV attempts to cast as violations of freedom of association.
- 1384.** Last but not least, the Ministry of Labour expressly stated its position on the National Electoral Council's activities in connection with trade union elections in formal opinion

No. 13 issued on 30 May 2003 by its Legal Adviser's Office. Said opinion can be consulted on the Ministry's web site ([www.mintra.gov.ve](http://www.mintra.gov.ve)) and states:

An interpretation of the provisions of article 293(6) of the Constitution of the Bolivarian Republic of Venezuela in the light of article 33 of the Organic Electoral Authority Act tells us that trade union organizations, be they first, second or third-level, are independent and free to organize their internal elections; the National Electoral Council can therefore only intervene if requested to do so by the respective trade union organization. Furthermore, as concerns the Special Statute on the Election of Trade Union Executives, account must be taken of the fact that the Statute was enacted to govern the process by which trade union officials were re-elected by mandate of the Advisory Referendum of 3 December 2000, which implies that the Statute had a specific mandate and pre-established time frame, as stipulated in article 61 thereof. Consequently, the trade union executive having been elected and the Organic Electoral Authority Act having entered into force, it is this rule that must apply to subsequent trade union elections. Lastly, and in accordance with the terms of article 435 of the Organic Labour Act, once the executive of the trade union of which they are members reaches the end of its term of office, the workers are entitled to ask the labour judge to order new elections to be called.

- 1385.** As can be observed, it has been expressly stated at the highest level of the Ministry of Labour, in a formal and public document, that trade union organizations are independent and free to organize and carry out their electoral processes and that the participation of the National Electoral Council is optional, i.e. it only acts at the express request of the trade union organizations. This interpretation is entirely compatible with the content of the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), as consultations with the various ILO bodies with which the national Government has examined the matter have confirmed.
- 1386.** The Ministry of Labour's position has been repeated and confirmed in meetings held between various trade union organizations and officials, on the one hand, and the Deputy Minister of Labour, on the other, as recorded in the minutes of 9 November 2004 and 10 March 2005, which the Government appends. On both occasions, the views expressed by the Ministry were unequivocal and clearly in favour of respect for freedom of association, in confirmation of the opinion issued by its Legal Adviser's Office.
- 1387.** In addition, the draft Organic Law Reforming the Organic Labour Act, which is presently in second and final reading by the National Assembly, includes regulations on this point which expressly indicate that the participation of the National Electoral Council in trade union elections is absolutely optional and occurs at the request of the trade union organizations themselves, and that the Council's activities are limited to cooperation and technical support for the electoral process.
- 1388.** By virtue of the above, the Government considers that there is no call to continue examination of this case and that it should be agreed that the procedure be ended and set aside.

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

- 1389.** *The Committee observes that, in the present complaint, the complainant alleges that on 20 December 2004 the National Electoral Council enacted a new "Statute on the election of trade union officials" with which workers' organizations must comply in order legitimately to be able to conduct their business, and that, on 3 February 2005, the Ministry of Labour issued a resolution giving trade union organizations 30 days to provide information on their administration and register of members in a form that includes each worker's full identity, place of residence and signature; the Ministry of Labour has demonstrated its lack of impartiality and trade union members risk acts of anti-trade union*

*discrimination; the CTV adds that, on 12 January 2005, the National Election Council cancelled the 2001 elections of the executive committee of the Venezuelan Workers' Confederation (CTV).*

- 1390.** *As concerns the "Statute on the election of trade union officials" issued by the National Electoral Council, the Committee observes that the complainant asserts that said Statute violates Convention No. 87, specifically the right of workers to elect their representatives without interference by the public authorities, in that workers' organizations are obliged to comply with the Statute in order legitimately to be able to conduct their business and in that it subjects said organizations to the practices of state entities lacking the most basic impartiality with which to rule on trade union matters; the complainant states that the Government had pledged to the Committee of Experts on the Application of Conventions and Recommendations that it would adopt the requisite measures to enable trade union organizations to hold elections without the interference of the National Electoral Council. The Committee notes that, in response to these allegations, the Government declares that: (1) the National Electoral Council is one of the Bolivarian Republic of Venezuela's election authorities, is fully and absolutely independent of the other branches of government, performs the functions of an electoral tribunal (in fact, its rectors (members) are appointed by the same body that selects the magistrates for the Supreme Court of Justice), using similar requirements and procedures, and makes decisions that can be challenged before the judicial authorities (the Electoral and Constitutional Chambers of the Supreme Court of Justice); (2) the persons who submitted the complaint, in spite of the fact that they disagreed with a decision of the National Electoral Council on their electoral process, did not appeal that decision in a timely fashion and indeed did not file any court challenge, as they have at other times; the decision was therefore confirmed and became final; this failure to act must be interpreted as recognition of the decision's validity or, on the contrary, as manifest negligence on the part of those claiming to act on behalf of the CTV; (3) the CTV never fulfilled its obligations under the Organic Labour Act and its own statutes in terms of trade union elections, including many that are strictly a matter of form, thus compromising its validity and effectiveness; (4) the Ministry of Labour at the highest level has expressly stated, in a formal and public document, namely opinion No. 13 of the Ministry's Legal Advisor's Office, dated 30 May 2003, that trade union organizations are independent and free to organize and conduct their electoral processes and that the participation of the National Electoral Council is optional, meaning that it acts only at the express request of the trade union organizations themselves; (5) the Ministry of Labour has repeated that position and confirmed it in meetings between various trade union organizations and officials, on the one hand, and the Deputy Minister of Labour, on the other, as noted in the minutes of 9 November 2004 and 10 March 2005; and (6) the draft Organic Law Reforming the Organic Labour Act, which is presently in second and final reading in the National Assembly, includes regulations on this point in which it is expressly indicated that the participation of the National Electoral Council in trade union elections is absolutely optional and occurs at the request of the trade union organizations themselves, and that its activities are limited to cooperation and technical support for the election process.*
- 1391.** *The Committee nevertheless observes that, despite the Government's assertion that intervention by the National Electoral Council is optional, the Statute on the election of trade union officials of 20 December 2004 (see annex) contains very meticulous and detailed binding rules on elections in trade unions, federations and confederations, and that it gives the National Electoral Council a central role in the various stages of the election process, including the preparatory phase and the post-election phase; namely to rule on any appeals presented. In this respect, the Committee recalls that by virtue of Article 3 of Convention No. 87, workers' and employers' organizations have the right to draw up their constitutions and rules and to elect their representatives in full freedom, without interference from the public authorities (the Committee points out that the*

National Electoral Council is a public authority). The Committee draws the Government's attention to the fact that an excessively meticulous and detailed regulation of the trade union electoral process is an infringement of the right of such organizations to elect their representatives in full freedom, as established in Article 3 of Convention No. 87 [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 355].

- 1392.** *The Committee emphasizes that the regulation of procedures and methods for the election of trade union officials is primarily to be governed by the trade unions' rules themselves. The fundamental idea expressed in Article 3 of Convention No. 87 is that workers and employers may decide for themselves the rules which should govern the administration of their organizations and the elections which are held therein [see **Digest**, op. cit., para. 354]; in addition, provisions which involve interference by the public authorities in various stages of the electoral process are incompatible with the right to hold free elections [see **Digest**, op. cit., para. 400]. Lastly, the Committee has also stated that, in cases where the results of trade union elections are challenged, such questions should be referred to the judicial authorities in order to guarantee an impartial and objective procedure which should also be expeditious [see **Digest**, op. cit., para. 405].*
- 1393.** *In the circumstances, the Committee considers that in its present form the Statute on the election of trade union officials issued by the National Electoral Council constitutes a grave breach of Article 3 of Convention No. 87 and should be promptly amended so as to bring it into full conformity with Convention No. 87. The Committee requests the Government to communicate these conclusions to the National Electoral Council, trusts that the Statute will be amended without delay and asks the Government to keep it informed of developments in this matter. The Committee requests the Government to keep it informed of developments concerning the draft law before the National Assembly which grants the National Electoral Council the possibility to intervene in trade union elections only at the request of the trade union organizations.*
- 1394.** *Regarding the allegations concerning the Ministry of Labour's resolution of 3 February 2005 giving trade union organizations 30 days to provide information on their administration and register of members in a form that includes each worker's full identity, place of residence and signature, the Committee takes note of the Government's statements that: (1) the resolution in question is based on article 430 of the Organic Labour Act obliging the trade unions to provide the labour inspector with a yearly detailed report on their administration and complete list of members; (2) the purpose of the rule is to promote transparency, provide legal security for trade union activity and protect the rights of trade union members; (3) the Ministry of Labour must have this information in order to meet its obligation under article 587 of the Organic Labour Act to draw up the national labour report and statistics on unionization; (4) the Committee of Experts has never made observations on these provisions and they have never been challenged in the courts; (5) the first and second-level organizations affiliated to the CTV have complied with article 430 of the Organic Labour Act; and (6) one of the annexes sent by the Government includes a document signed inter alia by a representative of the CTV and indicting that (the signatory organizations) "suggest that the Ministry of Labour extend said deadline (for submitting the list of members) for a period of not less than two months"; in this document the trade union organizations "suggest that the requirement of the (member worker's) signature is not established, but that they can comply with it in order to cooperate with the Ministry of Labour in the updating of registers and databases"; another document (signed by four general unions but not the CTV) states that "said decision (to postpone the updating of the register of trade union organizations) took full account of the proposals made at the negotiations organized by the Ministry of Labour"; the Government appends a press clipping indicating that the CTV asked for a deferral of nine months to submit a series of data collected from the trade unions. In the*

*circumstances, taking into account the concern of the complainant that its affiliates may be exposed to acts of anti-trade union discrimination and the explanations and documents submitted by the Government, the Committee considers that the confidentiality of trade union membership should be ensured and recalls its conclusions in a similar case [see 320th Report, Case No. 2040 (Spain), para. 669] in which it stated the advisability of establishing, between trade unions, a code of conduct governing the conditions in which membership data is to be supplied, through appropriate means of personal data processing, with guarantees of absolute confidentiality.*

**1395.** *Regarding the cancellation of the 2001 elections of the CTV executive committee by the National Electoral Council resolution dated 12 January 2005, the Committee recalls that a challenge to the CTV leadership was first alleged within the framework of Case No. 2249. The Committee takes note, in addition to the Government's statements, that: (1) the National Electoral Council is one of the Bolivarian Republic of Venezuela's electoral authorities, enjoys absolute independence from the other branches of government, performs the function of an electoral tribunal and has members who are appointed by the same body that selects the magistrates sitting on the Supreme Court of Justice; (2) the persons submitting the complaint did not appeal the Council's decision in the Electoral and Constitutional Chambers of the Supreme Court of Justice; (3) the CTV has never complied with the regulations of the Organic Labour Act and its own statutes on trade union elections, including many that are merely a matter of form, thus comprising its validity and effectiveness.*

**1396.** *The Committee notes that the National Electoral Council is appointed by the National Assembly (legislative body). Article 296 of the Constitution of the Republic stipulates as follows:*

Article 296. The National Electoral Council shall consist of five members having no ties to organizations for political purposes; three of these shall be nominated by civil society, one by the schools of law and political science of the national universities, and one by citizen power. The three members nominated by civil society shall have six alternates in ordinal sequence, and each of the members designated by the universities and citizen power shall have respectively two alternates. The National Board of Elections, the Civil Status and Voter Registration Commission and the Commission on Political Participation and Financing shall each be presided over by a member designated by civil society. The members of the National Electoral Council shall hold office for seven years and shall be elected separately: the three nominated by civil society at the beginning of each term of office of the National Assembly, and the other two halfway through such term of office. The members of the National Electoral Council shall be designated by a two-thirds vote of the members of the National Assembly. The members of the National Electoral Council will designate their President among them in accordance with the law. The members of the National Electoral Council shall be subject to removal by the National Assembly, following a ruling of the Supreme Court of Justice.

**1397.** *The Committee points out in particular that on previous occasions it has objected to the role assigned by the Constitution and the law to the National Electoral Council in organizing and supervising trade union elections, including the power to cancel elections; it has considered that the organization of elections should be exclusively a matter for the organizations concerned, in accordance with Article 3 of Convention No. 87, and that the power to cancel elections should be given only to an independent judiciary, which alone can provide sufficient guarantees of the right to defence and due process [see, for example, 336th Report, Case No. 2353 (Venezuela), para. 864].*

**1398.** *Furthermore, the Committee observes that in its meeting of December 2005 the Committee of Experts on the Application of Conventions and Recommendations considered the matter of the suspension of the trade union elections of the CTV executive committee and stated as follows:*



The Committee [of Experts] previously urged the Government to recognize at once the executive committee of the CTV, particularly as in the union elections of 2001 this confederation had a representation rate of 68.73 per cent. The Government indicated in an earlier report that the election process had been impugned in the National Electoral Council (a non-judicial body), and the Committee of Experts endorsed the view of the Committee on Freedom of Association that challenging the results of trade union elections should not have the effect of suspending their validity pending the outcome of the judicial proceedings.

[...]

The Committee regrets that the National Electoral Council took so long in reaching a decision, which was taken in the last year of the term of office of the CTV's executive committee, which meant that it was too late for any judicial action; and the fact that the Council is not a judicial body and, in the Committee's view, it therefore lacks the authority to declare trade union elections null and void. In any event, the Committee regrets that in the last four years the Government has not recognized de jure the CTV.

- 1399.** *The Committee shares the conclusions of the Committee of Experts, considers that the cancellation of the elections of the CTV executive committee was a serious violation of Article 3 of Convention No. 87, and expects that the next trade union elections will be held without any interference by the National Electoral Council.*

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

- 1400.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) *The Committee considers that, in its present state, the Statute on the election of trade union officials adopted by the National Electoral Council constitutes a serious breach of Article 3 of Convention No. 87 and should be promptly amended so as to bring it into full conformity with Convention No. 87. The Committee also requests the Government to communicate these conclusions to the National Electoral Council, trusts that the Statute will be amended without delay, and asks the Government to keep it informed of developments in this matter. The Committee also requests the Government to keep it informed of developments concerning the draft law before the National Assembly which grants the National Electoral Council the possibility to intervene in trade union elections only at the request of the trade union organizations.*
- (b) *Regarding the allegations relating to the Ministry of Labour Resolution of 3 February 2005 giving trade union organizations 30 days to provide information on their administration and register of members in a form that includes each worker's full identity, place of residence and signature, the Committee considers that the confidentiality of trade union membership should be ensured and recalls that it would be advisable to establish, between trade unions, a code of conduct governing the conditions in which membership data is to be supplied, with the use of appropriate means of personal data processing, with guarantees of absolute confidentiality.*
- (c) *Regarding the cancellation of the 2001 elections of the executive committee of the Venezuelan Workers' Confederation (CTV) by a resolution of the National Electoral Council on 12 January 2005, the Committee observes that the CNE is not an independent judicial body which could afford sufficient guarantees of the right of defence and due process and,*

*consequently, it should not have the authority to declare trade union elections null and void. The Committee also observes that challenging the results of trade union elections should not have the effect of suspending their validity pending the outcome of the judicial proceedings. The Committee regrets that, in the last four years, the Government has not recognized de jure the CTV, considers that the cancellation of the elections of the CTV executive committee was a serious violation of Article 3 of Convention No. 87, and expects that the next trade union elections will be held without any interference by the National Electoral Council.*

## Annex

### Bolivarian Republic of Venezuela

#### *Electoral Authority*

National Electoral Council

*Resolution No. 041220-1710 Caracas, 20 December 2004  
194th and 145th*

The National Electoral Council, by virtue of its terms of reference under article 293.1.6 of the Constitution of the Bolivarian Republic of Venezuela and in accordance with the provisions of article 33.2.29 of the Organic Electoral Authority Act, issues the following:

#### RULES FOR THE ELECTION OF TRADE UNION OFFICIALS

##### CHAPTER I GENERAL PROVISIONS

##### SECTION I SCOPE OF APPLICATION

Article 1. The purpose of these Rules is to establish the constitutional terms of reference by virtue of which the National Electoral Council organizes the election process for trade union officials.

For the purposes of these Rules, trade union organizations are defined as primary trade unions, federations, confederations and general unions duly registered and constituted before the Ministry of Labour.

Article 2. The election processes for trade union officials subject to these Rules shall be governed by the Constitution of the Bolivarian Republic of Venezuela, the international treaties and agreements duly acceded to and ratified by the Bolivarian Republic of Venezuela, the Organic Labour Act, the Organic Suffrage and Political Participation Act and the other rules issued by the National Electoral Council.

They shall also be governed by the internal rules of the trade union organizations, which shall remain in force in so far as they do not violate constitutional principles.

Article 3. The purpose of these Rules is:

- (a) To guarantee the integrity of elections by applying standards and methods that are consistent with respect for the elector's will, the highest expression of the democratic system, and universal, secret and direct voting.
- (b) To guarantee that electors have the right freely to elect their officials in accordance with the provisions of article 95 of the Constitution of the Bolivarian Republic of Venezuela.
- (c) To guarantee the right to be a candidate, to be nominated and to be elected in accordance with the provisions of article 63 of the Constitution of the Bolivarian Republic of Venezuela.

- (d) To guarantee that election processes are carried out in conditions of equality and without discrimination.
- (e) To guarantee the impartiality, transparency, efficiency and reliability of election commissions and polling stations.
- (f) To develop mechanisms enabling the National Electoral Council to oversee and guarantee that the objectives set down in the election projects drawn up by the election commission of each trade union organization are fulfilled.

## SECTION II GENERAL PRINCIPLES

Article 4. The principles listed in this section are declarative and do not preclude the application of any other principle derived from the documents that make up the election processes regulated by these Rules.

Article 5. The trade union organizations are free to issue their own rules of procedure and administration. The National Electoral Council, in the discharge of its terms of reference, shall respect that freedom in accordance with the provisions of the Constitution of the Bolivarian Republic of Venezuela, other laws and these Rules.

Article 6. The election processes for trade union officials shall be governed by the principles of impartiality, transparency, efficiency, reliability, equality, publication of documents, good faith and procedural economy.

Article 7. The information on the statutes, internal rules and membership lists provided by the trade union organization to the National Electoral Council shall be considered final for procedural purposes once it has been validated by the Ministry of Labour under the terms established in the Organic Labour Act, without prejudice to its review by the National Electoral Council in order to ascertain that it is consistent with the precepts established in these Rules.

Article 8. The trade union organizations subject to these Rules shall cover the costs of their election processes, without prejudice to the cooperation and logistical support that the National Electoral Council may provide.

Article 9. In keeping with the principle of cooperation, the public authorities, private institutions or enterprises and any other individuals or bodies corporate shall provide support and shall furnish the information required by the National Electoral Council, for the purposes of conducting elections for trade union officials.

## SECTION III THE ELECTORS

Article 10. The electors of a trade union organization shall be the members listed on the final electoral roll of said organization.

Failure on the part of a member to pay union contributions or dues or any other labour-related debt shall not deprive said member of the right to vote.

Article 11. All electors shall have the right to elect, by means of universal, direct and secret vote, their trade union officials. The laminated identity card, whether expired or not, is the only valid document for exercising the right to vote.

## SECTION IV THE TERMS OF REFERENCE OF THE NATIONAL ELECTORAL COUNCIL

Article 12. The terms of reference of the National Electoral Council in the election process for trade union officials are:

1. To receive and process the request to call elections submitted by the trade union's officials or a group of its members at the end of the term of office for which the officials were elected or in accordance with the provisions of the organization's internal constitution or rules.
2. To authorize the elections to be called.
3. To review and process the election project.

4. To check that the trade union organization has presented its internal constitution or rules and list of members to the Ministry of Labour.
5. To generate the trade union organization's preliminary and final electoral roll.
6. To help the trade union organization prepare the poll books, it being understood that the organizations shall cover the costs of their election process.
7. To provide technical assistance and logistical support as required and in accordance with the Council's human and technical resources, in order to guarantee that election processes are as transparent, reliable and efficient as possible.
8. To adopt, at the request of the trade union's members, the measures required to guarantee the impartiality of the election commission when there are sufficient indications that it is partial.
9. To suspend a challenged document or to adopt the measures required when the execution of said document could cause irreparable harm to the person concerned or to the election process.
10. To hear and rule on appeals relating to documents, omissions, events and abstentions on the part of the election commission, in connection with the election process of trade union organizations.
11. To recognize the election processes carried out in accordance with these Rules.
12. To adopt the measures required to ensure that the various phases and the result of the election process of each trade union organization are transparent and conducted in accordance with the organization's internal rules, these Rules and any other applicable rules, and to adopt any measure required to fulfil that goal.

## CHAPTER II THE ELECTORAL BODIES

### SECTION I THE ELECTION COMMISSIONS

Article 13. The election commission is the trade union body designated to organize and direct the process of electing the organization's officials. It may be ad hoc or permanent in nature, depending on the provisions of the organization's internal constitution or rules.

Should the election commission be permanent, it must ensure that groups of electors that are not represented each have a representative on the commission.

Article 14. The election commission shall preferably be made up of more than five members, and in any event by an odd number of members. Said members shall be elected by the annual general meeting of trade union members. Each list or group shall be entitled to have one representative on the commission. In all events, representation shall be on the basis of the principle of equality.

When the annual general meeting of members is unable to agree on the membership of the election commission, the National Electoral Council may, if so requested by the trade union organization, appoint the commission's members from among each of the participating groups, so as to guarantee an impartial balance within the election commission.

Article 15. The election commission, whether ad hoc or permanent, shall be made up in such a way as not to favour a specific list, group of candidates or any candidate in particular. Its impartiality is one of the guarantees of the process's transparency. Failure to comply with this provision, at the start of or during the process, shall enable the National Electoral Council, at the request of the party, to adopt the measures required to guarantee the impartiality and balance of the election commission.

In the case of trade union organizations whose election commissions are permanent, the National Electoral Council may, if requested, adopt the measures required to guarantee that all groups are represented on them.

Article 16. The election commission shall be constituted at the time and in the place determined in accordance with the trade union organization's internal rules.

At the constituent meeting of the election commission, a president and a vice-president and their substitutes shall be elected, by simple majority and by means of direct and secret ballot. They

in turn shall appoint, by simple majority, a secretary and his or her substitute who are not already members of the commission.

The substitutes shall stand in for the principals when the latter are temporarily absent for periods not exceeding fifteen days; any absence lasting longer than fifteen days is a disqualifying error and the substitutes shall become the principals.

Permanent election commissions whose members have been designated but that have incorporated representatives in accordance with paragraph one of article 13 shall designate a secretary by simple majority who is not already a member of the commission.

Article 17. The election commission's duties are:

1. To submit to the National Electoral Council the document designating the members of the election commission and the document by which the election commission is constituted.
2. To submit for the consideration of the National Electoral Council the revision and procedures of the election project.
3. To implement the election project.
4. To provide the National Electoral Council with the trade union's list of members and the internal constitution or rules presented to the Ministry of Labour.
5. To publish the preliminary and final electoral roll generated by the National Electoral Council.
6. To hear and rule on challenges to the roll.
7. To provide credentials for the polling clerks and the scrutineers.
8. To hear and rule on challenges to its election-related documents, acts, abstentions or omissions.
9. To execute the record of total votes and their attribution.
10. To publish and notify the parties concerned and the National Electoral Council of the outcome of the election process.
11. To carry out any other activity provided for in the constitution or internal rules of the trade union organization.

## SECTION II THE POLLING STATIONS

Article 18. The polling station is an electoral body that is subordinate to the election commission. Its membership shall be consistent with the provisions of the constitution or internal rules of the trade union organization and it shall oversee the ballot. It shall be made up in such a way as to guarantee that its decisions are representative and impartial. It shall be wound up once the process of voting and counting the votes has ended.

Article 19. The trade union organization shall determine, in accordance with its internal constitution or rules, the number of polling stations to be involved in the voting and counting of votes and the number of their members.

The polling station shall be constituted once designated, in the place and at the time and date determined in the respective timetable of activities, in the presence of the polling clerks and the scrutineers.

## CHAPTER III THE TRADE UNION ELECTORAL ROLL

### SECTION I PRODUCING THE ROLL

Article 20. The National Electoral Council shall generate the trade union electoral roll and shall keep a supervisory roll of trade union organizations.

Article 21. The National Electoral Council shall generate the trade union electoral roll on the basis of the list of members submitted by the trade union organization, once published, challenged and finalized.

Article 22. The trade union organization shall provide the National Electoral Council, for the establishment of the supervisory roll of trade union organizations, with:

- (a) the constituent act and the most recent internal constitution or rules presented to the Ministry of Labour;
- (b) its registration form with the Ministry of Labour or the public authority that granted it legal personality;
- (c) the make-up of its current executive;
- (d) the up-to-date list of its members, signed by the trade union authority and provided to the Ministry of Labour. The list is to be provided on paper and in magnetic or digital format, preferably as an Excel spreadsheet. It shall contain the following data: identity number, surname(s), name, date of birth and nationality;
- (e) information on the trade union organization's headquarters, telephone and fax numbers, and email addresses, if any.

Article 23. The National Electoral Council shall make available to those concerned the information relating to the trade union electoral roll and the supervisory roll of trade union organizations.

Article 24. The trade union organizations must be registered on the supervisory roll of trade union organizations to conduct election processes and be recognized by the National Electoral Council.

#### CHAPTER IV ORGANIZATION OF THE ELECTORAL PROCESS

##### SECTION I START OF THE PROCESS

Article 25. The trade union officials or a group of members may ask the National Electoral Council to call elections for trade union officials once the term of office for which they were elected has expired.

Article 26. The request to call the elections shall contain:

- (a) a description of the offices to be filled;
- (b) the planned date of the election.

Should one of the above requirements be missing, the request shall be returned to the parties concerned so that they may append the missing documents within two working days of the notification.

Article 27. Once the terms of the above articles have been met, the National Electoral Council, within a period not exceeding fifteen consecutive days, shall authorize the elections to be called. The trade union organization shall publish the call for elections ninety days before the date on which they are to take place, as from the day the request was presented to the National Electoral Council. Publication must be in a national or regional newspaper, depending on the type of organization.

If for some reason the election cannot be held on the date foreseen, the trade union organization shall publish the modified date on which it will be held in the same medium.

Article 28. Once the trade union has been authorized to call the election, it shall, within three working days, convene the general meeting of members in order to appoint the election commission, and shall inform the National Electoral Council accordingly within two working days.

Article 29. Once the election commission has been constituted, the process will start of updating the list of the trade union's members and, at the same time, of drafting the election project, which shall be submitted to the National Electoral Council within ten consecutive days as from the day on which the commission was constituted.

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SECTION II  
THE ELECTION PROJECT

Article 30. The election project is the document drawn up by the trade union's election commission on the organization and implementation of the trade union's election process.

The National Electoral Council shall provide a project form for the use of those presenting the project. Should the trade union organization not use the form, the project document must cover each and every one of the phases of the process under the internal rules.

Article 31. The election project shall include:

1. The document by which the election commission was constituted and its members designated.
2. A schedule of the activities to be carried out during the election process, indicating each of the phases in the process and their respective time frames.
3. A description of the offices to be elected and the definition of the trade union leaders, indicating the electoral system provided for in the trade union organization's internal constitution or rules and the method used to add up the votes and attribute them to the candidates.
4. The constituent act and the most recent internal constitution or rules and list of members presented to the Ministry of Labour.
5. A description of the procedures for the different electoral acts, in accordance with the provisions of the trade union organization's internal constitution or rules and of these Rules.
6. A model voting paper to be used to vote.
7. A model record of votes cast and counted.
8. A model record of total votes and their attribution.
9. A model poll book.
10. An indication of the documents to be submitted by the candidates, in accordance with the provisions of the trade union organization's internal constitution or rules.
11. A description of the number of polling stations to be set up, their exact location, the number of electors that will vote at each one, the procedure by which they are constituted and established, with an indication of the manner in which their clerks are designated, in accordance with the trade union organization's internal constitution or rules.
12. An indication of the technological aids (manual or automatic) to be used to vote and to count and tally the votes in the electoral process.

Article 32. The National Electoral Council shall ascertain that the electoral project meets the requirements of the above article for the purposes of procedure. Should the project fail to do so, or should it meet only some of those requirements, the election commission shall be informed immediately so that it can obtain the missing documents or provide the information omitted, within two working days of the notification. If, after two working days, the missing documents or information omitted have not been provided, the process shall be suspended until the trade union organization has fulfilled its obligations. The delay shall in no case be attributable to the National Electoral Council.

Article 33. The National Electoral Council shall review and process the electoral project within five working days. Should said project be inconsistent with the rules and violate the constitutional, legal or statutory principles guaranteeing freedom of association, it shall be returned to the election commission, accompanied by an explanatory note, so as to enable said commission, within the following three working days, to make the changes required for the project to conform and be approved. Within the following five working days, the election commission shall publish the electoral project in the election journal of the trade union organization and shall endeavour to spread knowledge of it through an appropriate communication medium.

The parties concerned may, within three consecutive days as from the publication of the electoral project, make observations on it to the National Electoral Council, in reasoned written form.

### SECTION III UPDATING THE TRADE UNION ORGANIZATION'S ELECTORAL ROLL

Article 34. Once the electoral project has been processed, the election commission shall publish, no fewer than forty consecutive days before the voting is to take place, the preliminary roll of the trade union organization's electors generated by the National Electoral Council, in the organization's journal and in all the trade union offices over which it has jurisdiction.

Article 35. Once the preliminary roll of the trade union organization's electors has been published, those concerned may challenge it before the election commission within five working days of its publication in the organization's journal.

Article 36. Once the deadline for challenges to the roll has passed, the election commission shall add and delete names as appropriate and publish the final electoral roll generated by the National Electoral Council under article 21 of these Rules.

### SECTION IV FILING OF CANDIDACIES

Article 37. The process for filing candidacies for the organization's elections shall be opened within the time frame established in the schedule of the electoral project, once the trade union's preliminary electoral roll has been published.

Article 38. Candidates shall present their candidacies in writing, with one original and one copy, to the trade union organization's election commission.

Once the candidacy has been filed, it shall be reviewed to ensure it meets the requirements of the internal election regulations. Should this be the case, it shall be considered accepted and the election commission shall deliver a copy to the candidate without observations.

If the filing does not meet the requirements, the election commission shall return it, indicating to the person concerned that he or she has two working days in which to meet the missing requirements. Should the person fail to do so, the filing shall not be considered accepted.

Article 39. The members of the election commission may not be candidates and may not be nominated, unless they renounce their office before the filing phase begins.

Article 40. The election commission shall accept or reject filings within three consecutive days of their presentation and shall publish the filings it accepts or rejects in the organization's election journal, without prejudice to the personal notification it can make in respect of same.

Article 41. The parties concerned may challenge the election commission's acceptance or rejection of the filing, within three days following its publication in the organization's journal. The election commission shall rule on such challenges within three consecutive days as from the day they were made.

The parties concerned may appeal a ruling by the election commission to the National Electoral Council within three days of its notification. The National Electoral Board shall rule on appeals in respect of filings within five consecutive days as from the day the appeal was made.

Once the elections have been held, the filings may not be challenged except on grounds of ineligibility.

Article 42. Once the deadline allocated for filing candidacies has passed, the election commission shall draw up the report on the final list of candidates, said report to contain a list of all the candidates accepted. It shall publish the report in the organization's election journal, without prejudice to its publication in a national or regional newspaper, depending on the trade union organization's scope.

### SECTION V SCRUTINEERS

Article 43. The candidates, acting on their own initiative, and the participating lists or groups are entitled to designate a scrutineer to be present when the votes are cast, counted, tallied and attributed. Alliances shall be entitled to only one scrutineer.

Article 44. The scrutineers are entitled to demand that a record be kept of any incidents or irregularities observed when the votes are cast, counted, tallied and attributed. Those observations shall form part of the corresponding poll book.



## CHAPTER V

## SECTION I

## CASTING AND COUNTING THE VOTES

Article 45. How the votes are cast is governed by the electoral project, the trade union organization's internal constitution or rules and these Rules. Those appearing on the trade union's final electoral list shall be entitled to vote.

Article 46. The voting shall take place on the day and at the time set by the election commission, during working hours. The polling station shall be constituted with its clerks at the venue decided for that purpose, said constitution to be duly noted in the record of votes cast and counted.

Failure on the part of a member to pay union contributions or dues or any other labour-related debt shall not deprive said member of the right to vote.

Article 47. The polls shall close at the time stated by the election commission, unless electors are still waiting to vote, in which case they shall remain open for as long as there are electors present. The closing of the polls shall be announced out loud.

Article 48. Once the polls have closed, the votes shall be counted and the record of votes cast and counted executed, stating the time at which the poll closed, the number of electors who voted, the number of votes cast, the number of valid votes each candidate obtained, the number of invalid votes, and any observations. The president, the polling clerks and the scrutineers present must sign the record of votes cast and counted. The polling station shall give the scrutineers who are present a copy of the record if requested to do so.

Article 49. Each polling station shall give the election commission the corresponding record of votes cast and counted and the voting papers, within the deadline established in its statutes or internal rules or, in the absence of any such deadline, within the deadline established by the election commission.

The votes cast shall be conserved in containers that shall be closed, sealed and signed by the polling clerks and the scrutineers present.

Article 50. The votes cast shall be kept for forty-five days as from the day on which the election took place, or until the count is final in the event of an appeal. The members of the election commission are responsible for keeping the votes cast and shall therefore establish such mechanisms and procedures as are required to guarantee that they and the material used in each polling station are undamaged and identifiable.

## SECTION II

## TALLYING AND ATTRIBUTING THE VOTES PROCLAIMING THE RESULTS

Article 51. Once the record of votes cast and counted and the voting papers have been received, the election commission shall tally and attribute the votes and proclaim the results, in accordance with the provisions of the respective internal constitution or rules and the electoral project.

Article 52. Each trade union organization's election commission shall execute the record of total votes and their attribution, which shall be accompanied by the relevant documents, list the data recorded in every record of votes cast and counted and be submitted to the National Electoral Council within five consecutive days as from the proclamation of the results.

Article 53. Once the National Electoral Council has ascertained that the electoral project was carried out in accordance with the terms of these Rules, it shall certify the realization of the election process held by the trade union organization. Said certification shall be published in the *Electoral Gazette* of the Bolivarian Republic of Venezuela.

## SECTION III

CHALLENGES TO ELECTION-RELATED DOCUMENTS ACTS,  
ABSTENTIONS OR OMISSIONS

Article 54. Challenges to election-related documents, acts, abstentions or omissions may be filed with the trade union's election commission within five days as from the notification or

publication of the document or, as the case may be, the occurrence of the act, or from the day on which the act should have taken place in the case of an abstention or omission.

Article 55. The election commission shall rule on the challenge within no more than five consecutive days as from the day it was filed, and shall notify the challenger accordingly.

Article 56. Once the deadline referred to in the above article has passed, and if there has been no corresponding ruling or if the ruling went against the challenger, the challenger may apply to the National Electoral Council within five consecutive days as from the Commission's ruling or failure to rule.

Article 57. The written document of appeal to the National Electoral Council shall indicate:

- (a) The identity of the appellant or, as the case may be, of his or her representative, with names and surnames, place of residence, nationality, identity number and on what basis he or she is acting.
- (b) If documents are impugned, they shall be identified along with the complaints against them. When records of votes cast and counted are challenged, they must be identified by polling station and election, and the complaints against the process or the records clearly reasoned.
- (c) If omissions or abstentions are challenged, the acts constituting the infringement of the election rules shall be explained, accompanied by a copy of the documents justifying the obligation to rule within a specific time frame.
- (d) If material acts or acts of violence are challenged, they must be narrated and indications given of the evidence on which the challenge is based.
- (e) Indication of motions.
- (f) The address to which notifications must be sent.
- (g) Reference to the annexes appended.
- (h) The signature of the appellants or of their representatives.

Failure to fulfil the above requirements shall render the appeal inadmissible.

Article 58. The National Electoral Council shall hear and rule on appeals in accordance with the provisions of Chapter IX of the Organic Suffrage and Political Participation Act, except in respect of deadlines, which it can adapt in view of the nature of trade union affairs. In this respect, the Board's Legal Adviser's Office shall hear cases and unify the criteria to be applied in the settlement of challenges, whether in the case of national or regional trade union organizations.

Article 59. The appeal shall not suspend the execution of the document, however the National Electoral Council may, on its own initiative or at the request of the party, suspend the document or adopt such measures as are required when execution of the document could cause irreparable harm to the party concerned or to the election process.

Article 60. Once the deadline indicated in the previous articles has expired without a corresponding ruling from the National Electoral Council or should said ruling go against the appellant, the appellant may file an election dispute appeal with the Supreme Court of Justice, in accordance with the applicable rules.

#### TRANSITIONAL PROVISIONS

Article 61. Until such time as the National Directorate for Trade Union Affairs, Trade Unions and Professional Associations is established, the National Electoral Council may appoint commissions to deal with the processes of electing trade union officials.

#### FINAL PROVISIONS

Article 62. The penalties and sanctions for infringements of these Rules shall be applied in accordance with the System of Penalties established under Chapter X of the Organic Suffrage and Political Participation Act.

Article 63. Everything not provided for in these Rules, and the doubts and inconsistencies to which their application may give rise, shall be settled by the National Electoral Council.

Article 64. These Rules shall enter into force once they have been published in the *Electoral Gazette* of the Bolivarian Republic of Venezuela.

Resolution approved by the National Electoral Council at its session of twentieth (20) December two thousand and four. The negative vote of Rector Sobella Mejías Lizzettis is hereby recorded.

Done and published.  
Francisco Carrasquero López,  
President  
William A. Pacheco Medina,  
Secretary General

CASE NO. 2428

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

**Complaint against the Government of the  
Bolivarian Republic of Venezuela  
presented by  
the Venezuelan Medical Federation (FMV)**

*Allegations: Delays and obstacles to collective bargaining by public sector doctors in three public institutions*

- 1401.** The complaint is set out in a communication from the Venezuelan Medical Federation (FMV) of 31 May 2005.
- 1402.** The Government sent its observations in its communication of 25 October 2005.
- 1403.** The Bolivarian Republic of Venezuela 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**

- 1404.** In its communication of 31 May 2005, the Venezuelan Medical Federation (FMV) indicates that, by law, it is a professional association of a public nature consisting of the colleges of doctors of the Republic. It is a non-profit organization with legal personality, its own assets, for professional, scientific, trade union, ethical and wage claims purposes with its headquarters in the capital of the Bolivarian Republic of Venezuela. The FMV adds that, under articles 70(13) and 72 of the Practice of Medicine Act, it is the legitimate representative of all doctors at national level and its representativeness is restrictive and exclusive. It is also empowered to enter into collective agreements with public or private entities on behalf of doctors who provide medical services at national level, as laid down in the aforementioned article 72 of the Practice of Medicine Act and in exercise of the powers conferred on it by article 405 of the Organic Labour Act which provides that legally established occupational federations and confederations shall enjoy the right to exercise the same functions as workers' trade unions in representation of their members. Under section 13 of the abovementioned article 70 of the Practice of Medicine Act, the FMV's functions include representation of the medical profession with respect to all national public bodies in dealing with matters that affect professionals or their representative institutions.
- 1405.** Likewise, in accordance with article 72 above, the FMV is authorized to conclude collective agreements with public or private entities on behalf of doctors who provide

medical services in them. If the character of the contracting is local, the contract will be signed by the respective colleges of doctors, subject to prior approval by the Federation.

- 1406.** The FMV points out that the abovementioned articles 70 and 72 give sole and exclusive authority to the FMV to act in representation of doctors and conclude collective agreements with public and private entities on behalf of doctors employed by such entities, an authority which has been exercised by the FMV since its creation.
- 1407.** Based on the abovementioned constitutional and legal provisions, the FMV has been concluding collective agreements with the MDSO, a department of the central administration, the IVSS (an autonomous institution belonging to the Ministry of Labour) and the IPASME for many years, representing all doctors working for these organizations throughout the country.
- 1408.** The last collective agreement was signed with the MDSO on 26 October 2000, with the IVSS on 3 November 2000 and with the IPASME on 19 February 2002. These collective agreements establish a term of two years from the date of legal deposition and in them the parties undertake to begin bargaining for a new agreement within six months prior to their expiry.
- 1409.** The FMV alleges that, on 24 May 2003, the above collective agreements having expired, it convened the 137th Extraordinary Assembly of the FMV where the introduction of the draft collective agreements to be concluded with the MDSO and the IVSS was discussed and approved, and at the 142nd Extraordinary Assembly on 26 May 2004, the introduction of the draft collective agreement on conditions of work to be concluded with the IPASME was discussed and approved.
- 1410.** On 23 June and 8 October 2003 and 24 May 2004 respectively, pursuant to the mandate of the above assemblies, the FMV presented to the National Inspectorate and Department of Public Sector Collective Labour Affairs (under the Ministry of Labour) the draft collective agreements to be concluded with the MDSO, the IVSS and the IPASME. These draft collective agreements on conditions of work were duly accepted by the National Inspectorate and Department of Public Sector Collective Labour Affairs, after being revised to take account of the observations formulated in Administrative Decision No. 0804 dated 9 December 2003 by the Inspectorate of Labour.
- 1411.** Likewise, each and every one of the stages of the procedure established by law and regulation to begin discussion of these draft collective agreements were completed, namely: the Inspectorate sent the draft collective agreements to the employing bodies requesting comparative economic studies; the employing bodies sent the economic studies by electronic and physical means to the Inspectorate; the Inspectorate sent the respective economic studies and draft collective agreements to the Ministry of Planning and Development; and the Ministry of Planning and Development returned the results of the economic studies of the draft collective agreements to the Inspectorate of Labour.
- 1412.** In various letters to the National Inspectorate of Labour and requests and petitions to the employing bodies on various occasions, the FMV urged that discussion of the draft collective agreements should begin, requesting the Inspectorate of Labour to call the employing bodies to start discussion of the collective agreements, but no reply has been received to date.
- 1413.** On 7 March 2005, since the legal and regulatory time limits for starting discussions had expired, the FMV submitted a complaint to the Ombudsman's Office, the constitutional republican body for defending fundamental rights, requesting its intervention, in order to achieve immediate progress without delay, since it was a case of a violation of

fundamental constitutional rights, in requesting the MDSO, the IVSS, the IPASME and the National Inspectorate of Labour and Public Sector Collective Affairs to comply with the constitutional and legal provisions which had been violated and to commence discussions of the collective agreements to be concluded with the bodies concerned.

- 1414.** On 1 March 2005, the Executive Committee of the FMV, at its 147th meeting, determined by a majority of two-thirds of its members that the situation of the collective agreements constituted an emergency and approved the convening of an extraordinary meeting of the Assembly of the FMV for 8 March 2005, to consider the introduction of conciliation proceedings against the MDSO, the IVSS and the IPASME, acting in accordance with the relevant provisions of the Organic Labour Act and its regulations in order to begin the discussions of the draft collective agreements to be concluded with the bodies concerned.
- 1415.** On 8 March 2005, the 156th extraordinary meeting of the Assembly of the FMV took place, following convocation in accordance with article 19 of the Constitution of the FMV published in the newspaper *El Nacional* on 5 March 2005, at which it was unanimously decided: to lodge with the National Inspectorate of Labour an application for conciliation proceedings against the MDSO, the IVSS and the IPASME as laid down in the Labour Act and its regulations in order to require the National Inspectorate of Labour and Department of Public Sector Collective Affairs in the Ministry of Labour to begin discussions of the draft collective agreement with the employing bodies concerned.
- 1416.** On 12 May 2005, the FMV lodged the aforementioned application for conciliation proceedings against the said employing bodies with the Directorate of the National Inspectorate of Labour and Department of Public Sector Collective Affairs.
- 1417.** On 13 May 2005, in writs numbered 2005-0131, 0130 and 0129, the National Inspectorate of Labour and Department of Public Sector Collective Affairs formulated observations on the said applications which were rectified by the FMV in letters sent on 16 May 2005, in accordance with the provisions of article 200 of the Regulations to the Organic Labour Act.
- 1418.** On 17 May 2005, at 12 noon, the FMV submitted a notice of proceedings stating that there had been no decision by the Inspectorate of Labour, the observations thus being considered rectified and consequently the abovementioned application submitted on 12 May 2005 admitted, in accordance with the said article 200 of the Regulations to the Organic Labour Act.
- 1419.** The same day, 17 May 2005, the Directorate of the National Inspectorate of Labour and Department of Public Sector Collective Affairs in administrative orders numbered 2005-008, 007 and 009, issued at 4.32 p.m., stated that the proceedings initiated on 12 May 2005 by the FMV relating to the various applications for conciliation proceedings submitted, and the effects that might arise from them, were *terminated*.
- 1420.** On 30 May 2005, the FMV acting within the time limit stipulated in the abovementioned administrative orders lodged an appeal with the Minister of Labour against the administrative orders numbered 2005-008, 007 and 009 dated 17 May 2005, a decision on which must be given within ten consecutive days, as laid down in the abovementioned article 200 of the Regulations to the Organic Labour Act.
- 1421.** As of the present day, despite the proceedings lodged with the Ombudsman and having resorted to the alternative route of applying for conciliation proceedings to the Inspectorate of Labour as laid down in the Organic Labour Act and its Regulations for the peaceful solution of industrial disputes, no progress had been made in opening discussions of the collective agreements.

- 1422.** Thus two years and seven months have passed since the submission of the draft collective agreements concerned, which has been reflected in serious harm of all kinds, but fundamentally of an economic character caused to doctors working in the MDSD, the IVSS and the IPASME to the point where they continue to receive salaries which do not reflect the actual increase in the cost of living, since they have remained frozen since the expiry of the collective agreements concerned.
- 1423.** The complainant organization seeks the restoration to its members of the constitutional rights, which have been violated, to engage in collective bargaining with the employing bodies concerned.

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

- 1424.** In its communication of 25 October 2005, the Government states that the same communication sent by the complainant organization, supposedly in defence of its rights and those of its members, shows that the Practice of Medicine Act of 23 August 1982, published in the *Official Gazette* No. 3002, seriously violates Conventions Nos. 87 and 98, especially the provisions on functions and powers attributed to the Venezuelan Medical Federation (FMV). What is most shameful is that it is precisely on this Act that the complainant organization bases its arguments and allegations in seeking to show the alleged contravention by the Government of the Bolivarian Republic of Venezuela of the obligation laid down in Article 4 of Convention No. 98.
- 1425.** The Government states that, in accordance with article 68, and following, of the Practice of Medicine Act, the FMV is made up of all the colleges of doctors in the national territory. As clearly indicated by the complainant organization, it is a body of public nature which has powers specific to a public authority delegated by law to that professional body in a monopolistic and exclusive form. In turn, the colleges of doctors, regulated by article 54, and following, of the Act in question have the same nature and similar functions. Membership of the colleges of doctors is compulsory by express provision of article 4 of the Practice of Medicine Act, which states:
- Article 4. The following are requirements to practice the profession of doctor of medicine in the Republic:
- (1) Possession of the title of doctor in medical science or medical surgeon awarded by a Venezuelan university, in accordance with the special laws on the matter.
  - (2) Registration or inscription of the corresponding title in the public offices which establish the laws.
  - (3) Membership of the College of doctors in whose jurisdiction the profession is normally practised.
  - (4) Membership of the Doctors' Social Security Institute.
  - (5) Compliance with the other relevant provisions contained in this Act.
- 1426.** As can be seen expressly in the cited provision, the Government continues, all persons who wish to practise the profession of doctor are required by law to enrol in the corresponding college of doctors and, in so doing, the FMV. Indeed, those who do not comply with this compulsory enrolment may not legally practise the profession and, in turn, are subject to disciplinary, administrative and penal sanctions as laid down in article 115, and following, of the Act in question. Now, to recognize the rights inherent in freedom of association and especially the right to collective bargaining in a "restrictive and exclusive" form, as the FMV states literally in its letter, of a body of public nature, membership of which is compulsory for all doctors in the national territory on pain of penal sanctions, is a serious

violation of Articles 2, 5, 6 and 11 of Convention No. 87 as well as Articles 2 and 4 of Convention No. 98.

**1427.** The Government emphasizes that it is a clear violation of the right of workers freely to establish and to join organizations of their own choosing envisaged in Article 2 of Convention No. 87, due to the fact that:

- (a) it makes it compulsory for all medical workers to join colleges of doctors and the FMV, on pain of disciplinary, administrative and penal sanctions;
- (b) it creates by law a system of a single trade union, with compulsory membership, in an exclusive and excluding manner and monopolizes in a public body the exercise of trade union activities in representation of all medical workers;
- (c) the colleges of doctors and the FMV admit both men and women workers and employers, violating the purity principle, legislating for a single mixed or puppet union;
- (d) it establishes a legislative regulation which dates from 1982, which prevents trade union organizations other than the colleges of doctors and the FMV from representing workers in defence of their rights and interests;
- (e) it has established an absolute prohibition since 1982 on trade union organizations other than the colleges of doctors and the FMV from engaging in collective bargaining relating to collective agreements.

The Government refers in support of its assertions to the principles and decisions of the Committee on Freedom of Association on these subjects.

**1428.** The Government adds that the opinions of the Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations are clear, which establish, in a broad and peaceful manner, criteria for protection of the right to form trade unions and freedom of association to prevent systems of unity and favouritism relating to trade unions, as was previously laid down in law prior to the entry into force of the 1999 Constitution of the Bolivarian Republic of Venezuela. In consequence, aware beforehand of the opinions and conclusions in similar cases of the Committee on Freedom of Association, the Government formally requests the Committee to pronounce itself expressly on the conformity or otherwise to Convention No. 87 of:

- (a) the single trade union system laid down in the Practice of Medicine Act of 23 August 1982, which makes membership of colleges of doctors and the FMV compulsory for all medical workers on pain of disciplinary, administrative and penal sanctions, and concentrates and monopolizes in these bodies of a public nature the exercise of trade union activities in representation of all medical workers;
- (b) the regulations of the Practice of Medicine Act which assign to colleges of doctors and the FMV “restrictive and exclusive” representation of all workers in the sector in defence of their rights and interests, preventing other trade union organizations from representing them;
- (c) the regulations of the Practice of Medicine Act which grants colleges of doctors and the FMV “restrictive and exclusive” representation in collective bargaining relating to collective agreements, excluding other organizations from exercising this right;
- (d) the regulations of the Practice of Medicine Act which require compulsory membership of an organization which exercises trade union functions for all persons

who wish to practise medicine, on pain of imprisonment, as well as civil and disciplinary sanctions;

- (e) article 68, taken together with article 54, and following, of the Practice of Medicine Act of 23 August 1982 which requires all colleges of doctors in the national territory to be affiliated imperatively to the FMV, imposing a single trade union system, with trade union monopoly at the second level;
- (f) article 72 of the Practice of Medicine Act which provides that all collective agreements negotiated and concluded by colleges of doctors at local level *must be approved in advance by the FMV*, an additional regulation which forces colleges of doctors to affiliate to the FMV, thus imposing a system of compulsory affiliation.

The Government states that these last provisions constitute a blatant violation of the right of workers freely to establish and join federations and confederations of their choosing, envisaged in Articles 5 and 6 of Convention No. 87.

**1429.** In addition, the Government states that it is a blatant violation of the right of workers freely to establish and join federations and confederations of their choosing envisaged in Article 2 of Convention No. 98, that the Practice of Medicine Act of 23 August 1982 makes membership of colleges of doctors and the FMV compulsory for all persons who practise medicine, on pain of disciplinary, administrative and penal sanctions. This inevitably means that these bodies of a public character comprise at the same time:

- (a) workers providing services in an employment relationship, both in the public and private health sector;
- (b) employers, owners of health establishments where other medical professionals provide services;
- (c) independent professionals who carry out their activities autonomously.

**1430.** Now it is obvious that a law which requires the creation of a body of a public character comprising the abovementioned persons, which is “restrictively and exclusively” assigned the exercise of trade union activities in representation of workers including collective bargaining, is a blatant violation of the principle of purity of trade union organizations. Indeed, it legislates a single mixed or puppet trade union which is simultaneously made up of employers as well as workers, under the system of compulsory membership of all persons who wish to practise medicine, on pain of imprisonment, as well as civil and disciplinary sanctions. This means allowing, validating and promoting in law acts of anti-trade union interference, in clear violation of Article 2 of Convention No. 98.

**1431.** One merely has to consider that the executive organs of the colleges of doctors and the FMV, as is natural in a professional and corporate organization, are likely to include employers who are owners of health establishments among their members. It is clear that these executive bodies will have difficulty in legitimately representing the interests of workers practising medicine, in collective bargaining with employers especially when one of their members is an owner and employer involved in the bargaining process. It is for this reason, perhaps, that in the Bolivarian Republic of Venezuela there are practically no collective agreements for medical professionals in the private sector.

**1432.** The Government refers to the principles, decisions and conclusions of the Committee on Freedom of Association on this subject.

**1433.** As is clear, the Practice of Medicine Act, far from prohibiting, sanctioning and eradicating acts of anti-trade union interference, promotes and validates them, by creating a single



mixed or puppet trade union, which violates the principle of purity of trade union organizations as explained above. The Government requests the Committee on Freedom of Association to pronounce expressly on the conformity or otherwise of the legislative regulations indicated in the foregoing paragraphs with Article 2 of Convention No. 98.

- 1434.** The Government also underlines that it is a blatant violation of the obligation to promote voluntary collective bargaining envisaged in Article 4 of Convention No. 98, the fact that the Practice of Medicine Act grants colleges of doctors and the FMV “restrictive and exclusive” representation in collective bargaining relating to collective agreements, excluding other trade union organizations from the exercise of this right. A system of trade union monopoly in collective bargaining is created by an act which far from promoting it, restricts and impairs the right of any other trade union organization to engage in collective bargaining. In addition, article 72 of the Act concerned establishes an unacceptable limitation on the level of collective bargaining, when it lays down the power of the FMV to approve in advance all collective agreements concluded at local level by colleges of doctors. This Act provides that: “... If the character of the contracting is local, the contract will be signed by the respective colleges of doctors subject to prior approval by the Federation”.
- 1435.** The Government concludes by considering that the complaint should be rejected, and even better, promotion of legislative reform should be recommended so as to bring about conformity of the legislation concerned with international standards, and requests that the case should be closed, in view of the incompatibility between the laws and Conventions sufficiently mentioned in this document.

### C. The Committee’s conclusions

- 1436.** *The Committee observes that, in the present complaint, the Venezuelan Medical Federation (FMV) alleges delays and obstacles in the process of collective bargaining since following the expiry of the collective agreements signed in 2000 and 2002, draft collective agreements were submitted to the Ministry of Health and Social Development (MDS), the Venezuelan Social Security Institute (IVSS) and the Ministry of Education Staff Pensions and Welfare Institute (IPASME) on 28 June and 3 October 2003 and 24 May 2004 respectively. The FMV also alleges that the National Inspectorate of Labour and Department of Collective Labour Affairs in the Public Sector in administrative decisions numbered 2005-008, 007 and 009 declared concluded the proceedings (of peaceful settlement of disputes) initiated by the FMV in relation to various applications for conciliation proceedings, without the Inspectorate of Labour calling the employers’ side nor succeeding in opening discussion on the collective agreements. The FMV points out the seriousness of the situation since the doctors were continuing to receive salaries which did not reflect increases in the cost of living since they had remained frozen since the expiry of the collective agreements.*
- 1437.** *The Committee notes that the Government states that: (1) the complainant organization bases its complaint and arguments on a law (the Practice of Medicine Act of 23 August 1982) which seriously violates Conventions Nos. 87 and 98 by imposing compulsory membership of colleges of doctors and the FMV, grants exclusive representation for collective bargaining to the FMV and, subject to its approval, at local level to colleges of doctors, excluding other trade union organizations from exercising that right; (2) the legislation provides for a single mixed or puppet trade union made up simultaneously of workers and employers (the colleges of doctors and the FMV comprise public and private sector workers in an employment relationship, employers and owners of health establishments and independent professionals) which is in breach of Article 2 of Convention No. 98, and raises issues of legitimacy of representation in the collective bargaining process due to a clear conflict of interests.*

- 1438.** *The Committee shares the Government's view that the Practice of Medicine Act of 23 August 1982 contains provisions incompatible with the provisions of Conventions Nos. 87 and 98 and should be amended since, on the one hand, it establishes compulsory affiliation of doctors on pain of sanctions, as well as a single medical federation which includes colleges of doctors, workers and employers and/or owners of medical establishments and, on the other, endows the Federation and colleges of doctors with the exclusive right of representation for the purposes of collective bargaining, whether or not there are other trade union organizations, and makes agreements concluded at local level by colleges of doctors subject to approval by the FMV (the corresponding provisions are reproduced in the annexes and/or the Government's reply).*
- 1439.** *The Committee recalls, however, that the responsibility for aligning legislation with ratified Conventions belongs to the Government. The Committee observes that the FMV is a group of colleges of doctors for which affiliation is compulsory, which as professional bodies would to some extent fall outside the scope of Conventions Nos. 87 and 98 although not in other aspects since the legislation grants these bodies the rights of trade unions including their right to collective bargaining. In these circumstances, the Committee points out that in 2000 and 2002 the FMV had signed collective agreements and that the Government had not denied the failure of the Inspectorate of Labour to convene the employers' side nor that discussions of future collective agreements had never begun. The Committee finds that in the circumstances described above (inconsistent with and in violation of Conventions Nos. 87 and 98), the FMV has been representing and represents all doctors in the country. The Committee regrets that the Government has simply chosen to change its previous practice in relation to collective bargaining with the FMV apparently without informing the Federation of its new approach and without taking measures to correct the provisions in the legislation in a way which would fully assure the guarantees of freedom of association for the medical sector while promoting an effective collective bargaining mechanism. For all these reasons, it seems that the medical sector has been forced, for lack of action by the Government, to go several years without a collective agreement governing its conditions of employment.*
- 1440.** *The Committee requests the Government to take measures without delay, after full, frank and free consultations with the social partners, to amend the Practice of Medicine Act and to eliminate the inconsistencies with Conventions Nos. 87 and 98, which were recognized by the Government, and also to avoid gaps in professional relations and reminds the Government that ILO technical assistance is at its disposal. The Committee requests the Government in the meantime, until such time as it amends the Practice of Medicine Act, to promote collective bargaining between the FMV and the colleges of doctors with the employing bodies in the medical sector, including the MDSD, the IVSS and the IPASME. The Committee requests the Government to keep it informed in this respect.*

## **The Committee's recommendations**

- 1441.** *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 measures without delay, after full, frank and free consultations with the social partners, to amend the Practice of Medicine Act and to eliminate the discrepancies with Conventions Nos. 87 and 98, which have been recognized by the Government, and also to avoid gaps in professional relations and reminds the Government that ILO technical assistance is at its disposal.*

**(b) The Committee requests the Government in the meantime, until such time as it amends the Practice of Medicine Act, to promote collective bargaining between the FMV and the colleges of doctors with the employing bodies in the medical sector, including the MDSD, the IVSS and the IPASME.**

**(c) The Committee requests the Government to keep it informed in this respect.**

Geneva, 24 March 2006.

*(Signed)* Professor Paul van der Heijden,  
Chairperson.

<i>Points for decision:</i> Paragraph 262;	Paragraph 812;	Paragraph 1158;
Paragraph 273;	Paragraph 830;	Paragraph 1178;
Paragraph 293;	Paragraph 861;	Paragraph 1198;
Paragraph 308;	Paragraph 877;	Paragraph 1231;
Paragraph 327;	Paragraph 889;	Paragraph 1261;
Paragraph 372;	Paragraph 908;	Paragraph 1275;
Paragraph 432;	Paragraph 924;	Paragraph 1296;
Paragraph 457;	Paragraph 999;	Paragraph 1352;
Paragraph 620;	Paragraph 1030;	Paragraph 1361;
Paragraph 692;	Paragraph 1063;	Paragraph 1400;
Paragraph 781;	Paragraph 1112;	Paragraph 1441.
Paragraph 791;	Paragraph 1142;	