International Commission for Labor Rights
Critical Assistance for Working People and Trade Unions Worldwide

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Amicus Curiae Brief

Submitted by the International Commission for Labor Rights (ICLR)
and adhering organizations and individuals

Amparo en Revisión 67/2010

Case of the National Union of Mine, Metal, Steel and Allied Workers of the Mexican Republic

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I. Introduction

The case of the National Union of Mine, Metal, Steel and Allied Workers of the Mexican Republic (*Sindicato Nacional de Trabajadores Mineros, Metalúrgicos, Siderúrgicos y Similares de la República Mexicana*, the "Mineworkers' Union" or "the Union") is currently awaiting resolution by the full Supreme Court of Mexico under file 67/2010 (*Amparo en Revisión*).

This case deals with the application of the *toma de nota* ("taking of note" or legal acknowledgment) provisions in the *Federal Labor Law* by the Mexican Federal Government's Secretariat of Labor and Social Welfare ("STPS"), through its General Directorate of Registry of Associations ("DGRA").[1] In particular, this case deals with the DGRA's interpretation of the Union's Constitution in refusing to grant *toma de nota* to the duly elected General Secretary of the Mineworkers' Union, Napoleón Gómez Urrutia.

In its decision asserting jurisdiction over this case, the Second Chamber of the Supreme Court of Mexico framed the main issue to be decided as follows:

> [W]hether the General Directorate of Registry of Associations, in issuing resolutions regarding taking of note of the union leadership, has the authority to interpret the union statutes to the detriment of trade union autonomy, or if this corresponds to the Union itself, through its own internal authorities.[2]

In framing the issue, this Court's Second Chamber specifically noted that "it could be considered that freedom of association as a fundamental labor right is recognized in a series of international instruments, being expressly regulated by Convention 87 [of the ILO]…"[3]

Article 3 of *Convention No. 87 of the ILO on Freedom of Association and the Protection of the Right to Organize* ("*ILO Convention No. 87*") states: "Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programmes. The public authorities shall refrain from any interference which would restrict this right or impede the

[1] Article 377, section II of Mexico's *Federal Labor Law* ("*LFT*") requires unions to "communicate to the authority with whom they are registered, within a period of ten days, the changes of their leadership and modifications of the statutes, accompanied by two authorized copies of the respective documents." Article 692, section IV of the *LFT* states: "the representatives of the unions shall accredit their personality with the certification extended by the Secretariat of Labor and Social Welfare, or the Local Conciliation and Arbitration Board, once the union leadership has been registered." Within the Secretariat, it is the function of the General Directorate of Registry of Associations ("DGRA") to provide these certifications to interested parties and to "emit the observations that follow, when the documentation presented in the applications for union registration, the acknowledgement [*toma de nota*] of executive committees, list of members or modification of statutes does not comply with the requirements established by the Federal Labor Law and, where appropriate, those contained in the statutes of the trade union groups." Reglamento Interior de la Secretaria del Trabajo y Previsión Social, Diario Oficial, 14 November 2008, Article 20, Sections IV and X.

[2] Ruling of the Second Chamber of the Supreme Court of Mexico in the matter of A Request for the Exercise of the Supreme Court's Power to Assert Its Jurisdiction (*Solicitud de Ejercicio de la Facultad de Atracción*), File No. 85/2009 at 29-30. Requestor: Sergio Salvador Aguirre Anguiano (2 December 2009) [*Second Chamber Ruling*].

[3] *Ibid.* at 32.

lawful exercise thereof." Moreover, Article 4 of this Convention states: "Workers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority." Furthermore, Article 8 of *ILO Convention No. 87* states in its paragraph 2 that "The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention."

An important question in this case is whether this Court will apply *ILO Convention No. 87*, which Mexico has ratified. Given the global implications of the Court's decision, this *Amicus Curiae* or "friend of the Court" brief is being respectfully presented to this Court by the ICLR and a number of adhering organizations and individuals, whose statements of interest are appended to this brief.

II. Status of *Amicus Curiae* Briefs

The legal institution known as *amicus curiae* allows individuals and organizations who are not parties to a legal dispute but have an interest in its outcome to present legal argument and considerations to the judicial authority hearing the case. The purpose of an *amicus curiae* brief is to contribute to the better resolution of the dispute. An *amicus curiae* brief is a procedural tool which facilitates the participation of civil society in legal cases affecting the public interest.

The practice of filing *amicus curiae* briefs, commonplace in international human rights litigation, has been increasingly adopted by domestic legal systems, both in civil law and common law jurisdictions. *Amicus curiae* briefs have also been embraced by Mexico's civil society and their importance has been recognized by this Court.[4]

The proceedings of a broad national consultation on judicial reform, sponsored by Mexico's Federal Judiciary and published by this Court, note that *amicus curiae* briefs are "especially helpful when the issues being litigated may have important social consequences. This is particularly relevant when a constitutional tribunal is deciding cases which may have repercussions on the manner in which societal rights are defined."[5]

On this point, this Court's Second Chamber has recognized the great importance of the issues being decided in the Mineworkers' case. In applying the legal test for asserting jurisdiction over the case, the Second Chamber specifically noted the following:

> [The case] could be of great interest, given the conflict from which this case derives, regarding the extractive activities of two of the main mines nationwide, a fact that no doubt has an impact on the economy of the country, and has a superlative interest for it reflects the possible … alteration of social and political values, given the problems faced

[4] In a speech given on February 2, 2010, Chief Justice Guillermo I. Ortiz Mayagoitia made a number of remarks about the transparency mechanisms through which the Supreme Court of Mexico has opened its doors to civil society (e.g., public hearings), and how "the role of the so-called amicus curia" has been respected so that civil society voices "have an avenue of expression and communication" in those areas which may be of their interest. Transcript from Public Session of the Full Supreme Court of Mexico (2 February 2010) at 4.

[5] *Libro Blanco de la Reforma Judicial. Una agenda para la justicia en México* (Mexico, 2006: Suprema Corte de Justicia de la Nación) at 156.

by the mining industry in the recent years.

> All of the foregoing makes the instant case an exceptional and important one, due to the legal and factual consequences which could follow, thus necessarily requiring a decision from the Supreme Court of Mexico…[6]

The International Commission for Labor Rights ("ICLR") is a non-profit, non-governmental organization based in New York City, which coordinates the *pro bono* work of a global network of lawyers and jurists who specialize in labor and human rights law. ICLR's legal network also responds to urgent appeals for independent reporting on alleged labor rights violations.

The ICLR has an interest in the outcome of this case given its primary purpose of ensuring that the fundamental rights and freedoms of working people are effectively realized. The findings made by the members of its May 2010 delegation to Mexico,[7] particularly their concerns about violations by the Government of Mexico of its obligations under international law, especially *ILO Convention No. 87*, have compelled the ICLR to submit this *amicus curiae* brief. The outcome of the Mineworkers' case may have serious repercussions domestically and internationally, not only on the scope of trade union autonomy but on the broader issue of citizens' freedom to form and join democratic associations free of government interference and control.

III. Facts

(a) Background

In February 2006, the STPS, through its DGRA, withdrew its legal acknowledgment (*toma de nota*) from Napoleón Gómez Urrutia, duly elected General Secretary of the Mineworkers' Union. The *toma de nota* was withdrawn based on allegations of corruption made in a document supposedly signed by two members of the Union's General Council of Vigilance and Justice (one of the two signatures was later proven to have been forged).

The DGRA then recognized an alternative slate of officers, headed by an individual by the name of Elías Morales. In early 2008, the Second Collegiate Tribunal for Labor Matters ruled that the DGRA had acted illegally in withdrawing the *toma de nota* from Gómez Urrutia and ordered that it be reinstated.[8]

(b) Instant Facts

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[6] *Second Chamber Ruling*, *supra* note 2 at 33.

[7] Report of the International Commission for Labor Rights (ICLR), Delegation to Mexico (May 18 to 24, 2010).

[8] In June 2008, the ILO Committee on Freedom of Association found that "the acknowledgement or registration of the new executive committee by the authorities [thereby displacing the duly elected General Secretary Napoleón Gómez Urrutia], amounts to conduct that is not compatible with Article 3 of Convention No. 87 which establishes the right of workers to elect their leaders in full freedom." ILO CFA Report No. 350, Case No. 2478 (June 2008), para. 1392 [*ILO CFA Report No. 350*], in ILO, *Freedom of association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth (revised) edition, 2006, online: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_090632.pdf [*ILO, Freedom of Association Digest*].

On May 9, 2008, Gómez Urrutia was re-elected by delegates at the Union's 35th General Ordinary Convention, but, on June 24, 2008, the DGRA again denied Gómez Urrutia *toma de nota.* Gómez Urrutia appealed to the Sixth District Judge for Labor Matters, who denied his appeal on March 27, 2009. The case was then appealed to the Third Collegiate Tribunal of the First Circuit. On December 2, 2009 the Second Chamber of the Mexican Supreme Court decided to assert jurisdiction over the case and rule on it directly.[9]

In defining the issue as whether the DGRA "has the authority to interpret the union's statutes to the detriment of trade union autonomy," the Court specifically noted that "it could be considered that freedom of association as a fundamental labor right is recognized in a series of international instruments, being expressly regulated by Convention 87 [of the ILO]…"[10]

(c) Context

The denial of the *toma de nota* took place in the context of other government efforts to prevent Gómez Urrutia from acting as General Secretary. The Government has repeatedly filed criminal charges against Gómez Urrutia and other union leaders, accusing them of stealing money from a trust fund set up when the company purchased the mine from the Government in the late 1980s. One leader, Juan Linares Montufar, has been imprisoned since December 2008. However, an audit commissioned by the Geneva-based International Metalworkers' Federation ("IMF") accounted for the amounts in the trust, and Mexican courts have repeatedly dismissed cases against Gómez Urrutia and other officers of the Union regarding the disbursement of these funds. As a result of the Government's conduct, Gómez Urrutia sought refuge in Canada in 2006. The Government has frozen the Union's bank accounts, making it difficult for the Union to operate on a day-to-day basis and to represent its members.

IV. Law

A. Mexico's Official Commitment to International Law

Under Article 133 of the *Political Constitution of the United States of Mexico* (the "*Mexican Constitution*" or the "*Constitution of Mexico*"), the "supreme law of the Union" includes the "Constitution, the laws of the Congress of the Union enacted in pursuance thereof, and all treaties in accordance therewith [emphasis added]" ratified by the President with the approval of the Senate. The Supreme Court of Mexico has recognized the obligations imposed by these international instruments as binding law superior to obligations of federal and local law, as elaborated upon below.

Mexico is a signatory to many international treaties and conventions. Mexico participated in the Conference in Bogota which adopted the *American Declaration on the Rights and Duties of Man* in 1948, prior to ratifying the *Universal Declaration of Human Rights*. Mexico has acceded to

[9] The DGRA refused to recognize the results of the Union's Convention a third time on July 15, 2010. STPS Bulletin No. 117, http://www.stps.gob.mx/saladeprensa/boletines_2010/Julio/b117_stps.htm.
[10] *Second Chamber Ruling*, *supra* note 2.

the *American Convention on Human Rights* ("*Pact of San José*"), ratified the *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights* ("*Protocol of San Salvador*"), and accepted the adjudicatory jurisdiction of the Inter-American Court of Human Rights. In addition, Mexico has ratified the *International Covenant on Civil and Political Rights* ("*ICCPR*") and the *International Covenant on Economic Social and Cultural Rights* ("*ICESCR*"). Mexico has ratified many specific conventions prohibiting discrimination. These include *the Convention on the Elimination of all Forms of Discrimination against Women* ("*CEDAW*") the *International Convention on the Elimination of All Forms of Racial Discrimination*, and the *Convention on the Rights of the Child*. In addition Mexico has ratified the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*.

Many of the abovementioned international instruments reference the rights of workers to form and join unions for the purpose of promoting their interests. Specifically, with respect to workers' rights,[11] Mexico has ratified *Convention 87* of the ILO which protects workers' freedom of association. In addition, under the *North American Agreement on Labor Cooperation* ("*NAALC*"), the labor-side agreement reached pursuant to the *North American Free Trade Agreement* ("*NAFTA*"), Mexico agreed, *inter alia*, "to promote compliance with and effective enforcement... of its labor law...".

Under Article 9 of the *Constitution of Mexico*, protection is given to "the right to peacefully associate" or to "assemble for any licit purpose," and under Article 123, the Congress of the

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[11] For example: Article 22 of the *ICCPR* reads as follows: "Article 22:1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests. 2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others…3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention."

Article 8 of the *ICESCR* provides as follows: "Article 8:1. The States Parties to the present Covenant undertake to ensure: (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others; …(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;"

Article 16 of the *American Convention on Human Rights* states: "Article 16. Freedom of Association: 1. everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes. 2. The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others."

Article 8 of the *Protocol of San Salvador* provides: "Article 8. Trade Union Rights 1. The States Parties shall ensure: a. The right of workers to organize and to join the union of their choice for the purpose of protecting and promoting their interests. As an extension of that right, the States Parties shall permit trade unions to establish national federations or confederations, or to affiliate with that of their choice. The States Parities shall also permit trade unions, federations and confederations to function freely;"

Union is obliged to enact labor laws which, among other things, entitle workers in the private sector to organize themselves for the defence of their interests (Art. 123.A.XVI), and, in the public sector, to associate for the defence of their common interests (Art. 123.B.X).

Mexico has also pronounced its intent to incorporate international law as part of the corpus of law implemented at the domestic level, at the United Nations ("UN") and before international human rights treaty bodies. In its national report to the UN Human Rights Council Working Group on the Universal Periodic Review ("UPR"), dated November 10, 2008,[12] the Government of Mexico declared that, following a process of major change in the past decade, "Mexico has now fully embraced international human rights standards."[13] In particular, the Mexican Government noted as follows:[14]

> In Mexico, international treaties concluded by the President and approved by the Senate constitute the supreme law of the land, as established in article 133 of the Constitution. In its interpretation of this provision, the Supreme Court has ranked international treaties below the Constitution but above federal and state laws. Accordingly, once they are ratified by the Senate, international human rights treaties become domestic law and as such may be invoked before the courts.

A major priority identified by the Mexican Government is "to comply with obligations under International Labour Organization (ILO) conventions signed by Mexico."[15]

Furthermore, in its fifth annual report to the U.N. Human Rights Committee monitoring *ICCPR* compliance ("HCR"), submitted on September 24, 2008,[16] the Government of Mexico approvingly noted that the Mexican Supreme Court "has taken the view that freedom of association implies the autonomy of trade unions to develop their own rules, under which they can, without restrictions, establish guidelines to freely elect their representatives, determine their terms of office, as well as organize their administration, activities and programmes of action."[17]

B. Customary International Law: The Global Consensus on Freedom of Association

In addition to their treaty obligations, nations are also bound by customary international law, which represents the global consensus regarding fundamental and non-derogable norms.

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[12] Mexico, "National report submitted in accordance with paragraph 15(a) of the annex to human rights council resolution 5/1," HRC, 4th WG UPR, 10/11/2008, A/HRC/WG.6/4/MEX/1, online: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/167/45/PDF/G0816745.pdf?OpenElement

[13] *Ibid*. at para. 4.

[14] *Ibid*. at para. 20.

[15] *Ibid*. at para. 84.

[16] Mexico, "Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant – Fifth periodic report – Mexico," Human Rights Committee, CCPR/C/MEX/5, September 24, 2008, online: http://daccess-ods.un.org/access.nsf/Get?Open&DS=CCPR/C/MEX/5&Lang=E

[17] *Ibid*. at para. 809. In making this statement, the Mexican Government cited the following decision of the Supreme Court of Mexico: TRADE UNIONS. ARTICLE 75 OF THE FEDERAL LAW ON STATE WORKERS, WHICH PROHIBITS RE-ELECTION OF UNION LEADERS, CONTRAVENES TRADE-UNION FREEDOM ESTABLISHED BY ARTICLE 123 OF THE CONSTITUTION, Judicial Weekly of the Federation, ninth period, volume XII, August 2000, opinion P. CXXVII/2000, p. 149.

Freedom of association, specifically the right to form and join trade unions free of government interference, has long been held to be part of customary international law. The ILO Committee on Freedom of Association, in a leading case applying *ILO Convention No. 87* to a state party even though that state had not ratified the Convention, stated that "freedom of association has become a customary rule above the Conventions."[18] Domestic courts have also reached this conclusion. For instance, in the U.S. case of *Estate of Rodriguez v Drummond Inc*.,[19] a federal court found that *ILO Conventions 87 and 98* were to be considered customary international law.[20]

The most important judicial authority concerning workers' fundamental freedoms and the role of international law in defining the scope of those freedoms, *Demir and Baykara v. Turkey,* was issued by the European Court of Human Rights on November 12, 2008.[21] This decision, in which all eighteen judges of the Court's Grand Chamber concurred, is binding upon all states that are parties to the *European Convention on Human Rights and Fundamental Freedoms*. This Convention, which governs 800 million people, provides in Article 11 (as does the *Mexican Constitution* in its Article 9), that "everyone has the right to freedom of peaceful assembly and to freedom of association," including the right to form and join trade unions for the protection of the interests of workers.

Particularly significant in the European Court's decision are the following findings:

1. In determining the meaning of freedom of association, the Court must take into account "relevant rules and principles of international law" (para. 67), "relevant international treaties" (para. 69), "the interpretation of such elements by competent organs" (para. 85), "the consensus emerging from specialized international instruments and from the practice of contracting states" (para. 85);
2. "It is not necessary that a state had ratified the entire collection of applicable instruments; it is sufficient if relevant international instruments denote evolution in the norms and principles applied in international law" (para. 86);
3. The object of a guarantee of freedom of association is "to protect the individual against arbitrary interference by public authorities with the exercise of the rights protected" (para. 110);
4. It is a violation of freedom of association to refuse to recognize the legal personality of a union (paras. 113 and 116);
5. Any restrictions that affect the essential elements of trade union freedom, without which that freedom would become devoid of substance, are unacceptable (para. 144); and
6. "Limitations to human rights must be construed constructively, in a manner which gives practical and effective protection to human rights" (para. 146).

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[18] ILO Committee on Freedom of Association, Fact-Finding and Conciliation Commission Report, Chile, May 8, 1975.

[19] 256 F. Supp 2d 1250 (N.D. Ala, 2003).

[20] This case was brought under the *Alien Tort Claims Act* against Drummond Corporation alleging that it was complicit in the murders of Colombian trade unionists at the Drummond mines in Colombia and that the murders interfered with the union's associational and collective bargaining rights. Under the *Alien Tort Claims Act*, the tort alleged has to be a violation of the "laws of nations". "Laws of nations" has been interpreted to mean customary international law.

[21] Application No. 34503/97, online: http://www.ictu.ie/download/pdf/case_of_demir_baykara_v_turkey_apr_09.pdf

One of the key instruments referred to by the European Court of Human Rights is *ILO Convention No. 87*. The guarantee of freedom of association has been interpreted by the ILO Committee on Freedom of Association to include, *inter alia*, the following principles:

a) Governments should refrain from interfering in union elections;
b) **The registration of the executive boards of trade unions should take place automatically when reported by the trade union, and in cases of internal union disputes between two rival administrations, the supervision of trade union elections should be entrusted to the competent judicial authorities**;
c) The validity of union elections should not be suspended while the results are being challenged in court;
d) Where a trade union may be dissolved, that decision must be made by judicial authorities, respecting principles of due process, prior to any administrative action or dissolution;
e) The blocking of trade union funds should be taken through judicial and not administrative action to avoid any risk of arbitrary decisions; and
f) The suspension or dissolution of trade unions by administrative authorities should be eliminated from the legislation, or at least the legislation should provide that the administrative decision does not take effect until a reasonable time has been allowed for appeal and, in the case of appeal, until the judicial authority has ruled on the appeal made by the trade union organizations concerned.

To repeat, in construing international labor law instruments, it is necessary to examine and apply the interpretations of competent bodies established under those instruments. This was an essential finding of the European Court of Human Rights, and represents a global consensus on how international law should be applied.

To the same effect is a recent decision of the Supreme Court of Canada, which applied *ILO Convention No. 87*, and the rulings of the ILO Committee on Freedom of Association, in determining the scope of the guarantee of freedom of association in Article 2(d) of the *Canadian Charter of Rights and Freedoms*, part of Canada's *Constitution*. In that case, *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*,[22] decided in June 2007, the Court stated that "the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified."[23]

In this regard, the Supreme Court of Canada noted that "*Convention No. 87* has been the subject of numerous interpretations by the ILO's Committee on Freedom of Association, Committee of Experts and Commissions of Inquiry. These interpretations have been described as the 'cornerstone of the international law on trade union freedom and collective bargaining'…"[24]

[22] [2007] 2 S.C.R. 391. In its decision, the Supreme Court of Canada dealt with legislation that nullified collective agreement protections against contracting out bargaining unit work, thereby allowing public hospitals to lay off some 11,000 support staff; this legislation was quashed, and employees received compensation in the amount of $100 million.
[23] *Ibid*. at para. 70.
[24] *Ibid*. at para. 76.

Freedom of association is also explicitly protected by broader international and regional human rights instruments. Enforcement bodies such as the Human Rights Committee, which monitors implementation of the ICCPR, have spoken to freedom of association as applied to any organization, trade union or otherwise, finding that:

> [T]he Committee observes that the right to freedom of association relates not only to the right to form an association but also guarantees the right of such an association freely to carry out its statutory activities. The protection afforded by article 22 extends to all activities of an association, and dissolution of an association must satisfy the requirements of paragraph 2 of that provision.[25]

The Inter-American Court on Human Rights, looking to language from the ILO, made the following statements in deciding the case of *Baena, Ricardo et al.*:

> In considering whether or not … there was a violation of the freedom of association, it must be analysed in relationship with labour union freedom. In labour union matters, freedom of association consists basically of the ability to constitute labour union organizations, and to set into motion their internal structure, activities and action programme, without any intervention by the public authorities that could limit or impair the exercise of the respective right. On the other hand, under such freedom it is possible to assume that each person may determine, without any pressure, whether or not she or he wishes to form part of the association. This matter, therefore, is about the basic right to constitute a group for the pursuit of a lawful goal, without pressure or interference that may alter or denature its objective.[26]

The Inter-American Court further provided that "in trade union matters, freedom of association is of the utmost importance for the defence of the legitimate interests of the workers, and falls within the *corpus juris* of human rights."[27]

This Court on previous occasions has adopted an approach that is consistent with customary international law on freedom of association. According to this consensus, freedom of association under the constitutions of national states must be defined in accordance with the meaning given to such terms by competent authorities under international treaties to which those states have subscribed. This is the effect of the Mexican Supreme Court's very important decision in the secret ballot case, dated October 1st, 2008. In that decision, the Court held that a "recount" as an evidentiary means ordered by the labor authority must "be carried out through a procedure that guarantees, within the framework of a democratic system of union freedom, workers' right to a personal, free, direct and secret vote."[28] As a preamble to its decision, the Court noted:

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[25] *Korneenko et al v. Belarus*, Communication No. 1274/2004, Views adopted on 31 October 2006, para. 7.2.
[26] I/A Court H.R., *Case of Baena, Ricardo et al. v. Panama*. Merits, Reparations and Costs. Judgment of February 2, 2001. Series C No. 72 at para. 156, online: http://www.corteidh.or.cr/docs/casos/articulos/seriec_72_ing.pdf [*Baena case*].
[27] *Ibid.* at para. 158.
[28] "RECOUNT TO DETERMINE BARGAINING AGENT STATUS WITH RESPECT TO A COLLECTIVE AGREEMENT, PROVIDED FOR IN ARTICLE 931 OF THE FEDERAL LABOR LAW. CONCILIATION AND ARBITRATION TRIBUNALS MUST ORDER AND GUARANTEE THAT WORKERS' VOTE BE PERSONAL,

> Pursuant to the fundamental principles provided for in the Political Constitution of the Mexican United States, in international treaties and federal legislation which are, in accordance with article 133 of the Fundamental Charter, the Supreme Law of the Union, and pursuant to the general principles of law and social justice, applicable in the terms provided for by article 17 of the Federal Labor Act, workers have a right to express their opinion and preference in freely electing an organization to represent them, and to be protected against any act of discrimination.[29]

In a subsequent decision whereby judicial precedent was reversed so as to embrace the October 1st, 2008 decision, and particularly the secret ballot principle in the conduct of a recount, the Mexican Supreme Court specifically referred to Article 3 of *ILO Convention No. 87*, including its emphasis on workers' full freedom to choose their representatives:

> Trade union freedom, as a fundamental labor right, is recognized in a series of international instruments, it being expressly regulated by Convention No. 87…
>
> That convention enshrines workers' full right to freely choose their representatives, given that trade union freedom is a social guarantee established for the defence of the interests of workers, which imposes an obligation on states to respect the workers' decision to constitute those organizations as they see fit, by providing that public authorities must abstain from interfering […in a way which would] restrict [unions'] right to draw up their constitutions, and elect their representatives, among other activities.[30]

The instant case calls not only for an application of customary international law, namely the "global consensus" concerning the status of freedom of association, but an opinion that is consistent with the Court's prior rulings which show a full understanding of the importance of *ILO Convention 87*.

C. *ILO Convention No. 87*

Articles 3, 4 and 8.2 of *ILO Convention No. 87* read as follows:

> Article 3
>
> 1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.
>
> 2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.
>
> […]

FREE, DIRECT AND SECRET." Thesis of jurisprudence 150/2008. Approved by the Second Chamber of the Supreme Court of Mexico, in private session of October 1st, 2008. Novena Época, Semanario Judicial de la Federación y su Gaceta, XXVIII, October 2008, Page: 451, Thesis: 2ª./J., Registro No. 168569.

[29] *Ibid.*

[30] Supreme Court of Mexico, "Final Decision of the Second Chamber, Request for the Reversal of Jurisprudence 5/2009, of August 1, 2009," Novena Época, online: http://vlex.com/vid/69235778

> Article 4
>
> Workers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority.
>
> […]
>
> Article 8
>
> […]
>
> 2. The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention.

The ILO's Committee on Freedom of Association has made numerous findings and statements regarding state interference in the internal operations of trade unions.[31] With respect to the refusal to recognize the results of a union election, the Committee on Freedom of Association has stated that "as a general principle, governments should not interfere in union elections"[32] and "labour authorities shall not act in a discretionary manner to interfere in union elections."[33] The Committee has also observed that "[t]he registration of the leadership of unions shall be automatic upon filing of the union's notice and should only be challengeable upon request of the members of the union at issue."[34]

In the event that there is a dispute regarding the results of an internal union election, such dispute shall be adjudicated by the judiciary. The Government should not take a position on such issues. The ILO Committee on Freedom of Association states as follows:

> In connection with an internal conflict within the union between two rival managements, the Committee remembered that in order to assure impartiality and objectivity in the process, it proves convenient that union elections shall be controlled by the competent judiciary authorities.[35]
>
> In order to avoid impairing significantly the workers' right to choose their representatives freely, all complaints challenging the elections' results filed with the Labour courts through an administrative agency shall not derive in the suspension of the validity of such elections as long as the final resolution adopted by the relevant court is known.[36]

With respect to a Government's actions in seeking to control or restrict access to Union funds, the Committee has declared that "[r]estricting access to a union's accounts may constitute a serious interference of the authorities in union activities."[37]

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[31] *ILO, Freedom of Association Digest*, *supra* note 8.
[32] *Ibid*. at paras. 388-453.
[33] *Ibid*. at paras. 388-396.
[34] *Ibid*. at para. 403.
[35] *Ibid*. at para. 431.
[36] *Ibid*. at para. 441. See paras. 431, 439-443.
[37] *Ibid*. at para. 486.

In connection with the dissolution of a trade union and the refusal to recognize a union, the Committee on Freedom of Association has stated that "[s]uspension or dissolution measures adopted by the administrative authority represent material violations of union principles of freedom,"[38] and that "[u]nion dissolution through administrative methods represents a clear violation of Article 4 of Convention No. 87."[39]

In cases in which administrative authorities intend to dissolve a union, the Committee on Freedom of Association has made it clear that such actions shall not be allowed unless all judicial processes have been completed:

> **Even if certain circumstances justify the cancellation of union personality and blockage of union funds, <u>in order to avoid all discretionary risks such measures shall be adopted through judicial but not administrative methods</u>** [emphasis added].[40]
>
> For the appropriate application of the principles stating that a professional organization shall not be subject to suspension or dissolution through administrative methods, it is not enough that the law grants an appeal against such administrative decisions, but its effects shall not begin before the lapsing of the term to file an appeal or upon confirmation of such decisions by a judicial authority.[41]
>
> Law shall eliminate all possibilities of suspension or dissolution through an administrative resolution or at least provide that such resolution shall not become effective until a reasonable term to file an appeal has lapsed or, if any, until the judicial authority decides on the remedies filed by the affected union organizations.[42]

D. Application of *ILO Convention No. 87* and Customary International Law on Freedom of Association to the Instant Case

In the instant case, the position of the Executive is that it had the authority, through the DGRA, to determine whether the election conformed to the Union's constitution. The Union's position is that the labor authority's function was simply ministerial: it did not have the authority to refuse to acknowledge the actions of the Union Convention by asserting its own interpretation of the Union's constitution.

The position taken by the Mineworkers' Union is supported by international labor and human rights law, both customary and conventional. In this respect, the ILO Committee on Freedom of Association has interpreted *ILO Convention No. 87* to establish that, as a general principle, governments should refrain from interfering in union elections. The registration of the results of trade union elections should take place automatically when reported by the trade union, should be contested only at the request of the members of the trade union in question, and the decision should be left to the competent judicial authorities.

In reports issued in June 2008 and March 2010 (ILO Case No. 2478) with respect to a previous

[38] *Ibid*. at para. 683.
[39] *Ibid*. at para. 684. See paras. 677-78.
[40] *Ibid*. at para. 702
[41] *Ibid*. at para. 703.
[42] *Ibid*. at para. 704.

denial of *toma de nota* to the elected leadership of the Mineworkers' Union, the ILO's Committee on Freedom of Association found that "the acknowledgment or registration of the new executive committee by the authorities amounts to conduct that is not compatible with Article 3 of *Convention No. 87* which establishes the right of workers to elect their leaders in full freedom."[43]

In these circumstances, the DGRA's actions have breached Article 3 of *ILO Convention No. 87* by interfering not only with the Union's right to elect its representatives in "full freedom," but also with the elected representatives' exercise of their duties, and by in effect suspending the validity of such elections before a ruling by a competent judicial authority.

Further, the denial of certification (*toma de nota*) by the administrative authority has had the practical and legal effects of leaving Gómez Urrutia without authority to legally represent the union, to make demands, engage in negotiations or sign collective agreements, and has effectively removed him from office, in violation of Article 4 of *ILO Convention No. 87*.

The actions of the DGRA also violate the right to freedom of association as articulated in Article 22 of the *ICCPR*, Article 8 of the *ICESCR*, Article 16 of the *American Convention on Human Rights*, and Article 8 of the *Protocol of San Salvador*. As found by the Inter-American Court on Human Rights in the *Baena-Ricardo* case, "in labour union matters, freedom of association consists basically of the ability to constitute labour union organizations, and to set into motion their internal structure, activities and action programme, without any intervention by the public authorities that could limit or impair the exercise of the respective right."[44] It appears that the Mexican Government has done exactly the opposite in the case of the Mineworkers' Union.

V. Conclusion

Based on the foregoing, the Government's position that it had the authority, through the DGRA, to determine whether the election conformed to the Union's constitution cannot be sustained. Such an interpretation would stand in opposition to the customary and conventional international law on this issue as elaborated upon above.

VI. Request

We respectfully request that this Court follow the abovementioned global consensus in deciding the instant case, by applying both customary and conventional international labor and human rights law. In particular, we request that this Court apply Article 8, paragraph 2 of *ILO Convention No. 87*, which requires it to apply domestic labor law in a manner that does not impair the guarantees provided for in this Convention.

We emphasize the importance under international law of an effective remedy for aggrieved parties. This principle is enshrined not only in Article 8 of the *Universal Declaration of Human*

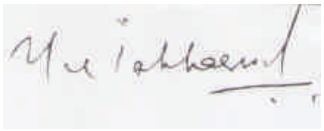
[43] *ILO CFA Report No. 350*, *supra* note 8 at para. 1392.
[44] *Baena case*, *supra* note 26 at para. 156.

Rights, but also in Article 25.1 of the *American Convention on Human Rights* and Article 2 of the *ICCPR*. This latter provision calls on State Parties "to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity."

We trust that this Court will take this obligation into consideration so as to grant a remedy which, as the European Court of Human Rights has framed it, "gives practical and effective protection to human rights."

Respectfully submitted,

For the International Commission for Labor Rights (ICLR):



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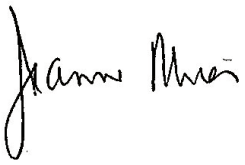

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4. European Association of Lawyers for Democracy & World Human Rights (ELDH) – Germany
5. Center for Constitutional Rights (CCR) – USA
6. Asociación Americana de Juristas – Americas
7. National Lawyers Guild (NLG) – USA
8. Asociación de Abogados de Buenos Aires (AABA) – Argentina
9. Asociación de Abogados Laboralistas – República Argentina (AAL) – Argentina
10. Canadian Association of Labour Lawyers (CALL-ACAMS) – Canada
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18. PROGRESS Lawyers Network – Belgium
19. Droit-Solidarité – France
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21. Canadian Union of Public Employees (CUPE) – Canada
22. Global Workers Justice Alliance – USA
23. National Employment Law Project (NELP) – USA
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