# EXECUTIVE SUMMARY

## REPORT OF THE INTERNATIONAL COMMISSION FOR LABOR RIGHTS (ICLR)

## DELEGATION TO MEXICO
## May 18 to 24, 2010

On October 11, 2009, the President of Mexico issued an executive decree liquidating *Compañía de Luz y Fuerza del Centro S.A.* (Central Light and Power, "LyFC") and transferring its assets to the other state-owned power and light company in Mexico, *Comisión Federal de Electricidad* (Federal Electricity Commission). Workers of LyFC were represented by the Mexican Electrical Workers' Union (*Sindicato Mexicano de Electricistas*, the "SME" or the "Electrical Workers"), a union that is independent of the Government of Mexico (the "Government" or the "Mexican Government"). As a result of the President's Decree, 44,000 workers were instantly terminated from their jobs and 22,000 retirees had their retirement benefits substantially reduced.

The National Union of Miners, Metalworkers and Allied Workers of the Republic of Mexico (*Sindicato Nacional de Trabajadores Mineros, Metalúrgicos y Similares de la República Mexicana*, the "Mineworkers" or "*Los Mineros*") have been on strike occupying several mines, particularly the Cananea mine, for over three years due to allegedly significant health and safety issues. This mine and others where smaller strikes are occurring are currently operated by Grupo Mexico. The Government of Mexico has refused to recognize the elected leadership of the Mineworkers' union and in fact has moved to forcibly evict the workers from the mines.

Issues arising from both of these cases are pending before the Supreme Court of Mexico. Various labor lawyers in Mexico requested the International Commission for Labor Rights ("ICLR") to investigate the adverse conditions facing these and other Mexican workers. The International Commission for Labor Rights 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.[1]

The ICLR delegation was composed of Justice Yogesh Sabharwal, retired Chief Justice of India; Judge Juan Guzmán Tapia, retired Judge of the Appellate Court in Santiago, Chile; Justice Gustin Reichbach, Justice of the New York Supreme Court; labor attorney Jeffrey Sack, from Toronto Canada; labor attorney Teodoro Sánchez de Bustamante, from Buenos Aires, Argentina;

[1] ICLR's legal network also responds to urgent appeals for independent reporting on alleged labor rights violations. The primary purpose of the Commission is to ensure that the fundamental rights and freedoms of working people are effectively realized.

Professor Sarah Paoletti from the Faculty of Law at the University of Pennsylvania; and labor attorney Jeanne Mirer from New York City, President of the Board of ICLR.

The delegation met with a large number of labor law experts, leaders of the SME and the Mineworkers, Chief Justice Guillermo I. Ortiz Mayagoitia of the Mexican Supreme Court, and with Ramón Jiménez, Member of the House of Representative for the Democratic Revolution Party.

The delegation has compiled a report based upon these first-hand accounts and extensive research. The delegation found that despite Mexico's official commitment to international law, which includes ratification of several international and regional treaties and conventions as well as the recognition by the Supreme Court of international instruments as binding law superior to obligations of federal and local law, the Government's performance does not match its stated commitments.

The findings are framed within the "global consensus" on international labor law, which includes jurisprudence by various enforcement bodies of the right to freedom of association, most notably articulated in *Convention No. 87 of the ILO on Freedom of Association and the Protection of the Right to Organize* ("*ILO Convention No. 87*"). In addition to the *ILO Convention No. 87*, the report identifies violations of the *International Convention on Civil and Political Rights*, *International Convention on Economic, Social, and Cultural Rights*, the *American Convention on Human Rights*, and the *Protocol of San Salvador*.

ICLR makes a number of recommendations based upon the specific facts of each case, including but not limited to: (i) recognition of union election results; (ii) restoration of bargaining rights and of the right to strike; (iii) reinstatement of employees; (iv) return of union funds; (v) cessation of abusive criminal prosecutions; (vi) compensation to unions and workers; and (vii) other appropriate relief.

# REPORT

## OF THE INTERNATIONAL COMMISSION FOR LABOR RIGHTS (ICLR) DELEGATION TO MEXICO

**May 18 to 24, 2010**

## I. The International Commission for Labor Rights

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 primary purpose of the Commission is to ensure that the fundamental rights and freedoms of working people are effectively realized.

## II. Reasons for the ICLR Delegation to Mexico

ICLR was requested by various labor lawyers in Mexico to send a delegation to investigate the adverse conditions facing many Mexican workers. ICLR was most interested in the cases of the Mexican Electrical Workers' Union (*Sindicato Mexicano de Electricistas*, hereinafter the "SME," the "Electrical Workers' Union" or the "Electrical Workers") and the National Union of Miners, Metalworkers and Allied Workers of the Republic of Mexico (*Sindicato Nacional de Trabajadores Mineros, Metalúrgicos y Similares de la República Mexicana*, hereinafter the "SNTMMSRM," the "Miners," the "Mineworkers" or "*Los Mineros*").

The SME was effectively dissolved as a union on October 11, 2009, after the President of Mexico issued an executive decree liquidating *Compañía de Luz y Fuerza del Centro S.A.* (Central Light and Power, hereinafter "LyFC") and transferring its assets to the other state-owned power and light company in Mexico, *Comisión Federal de Electricidad* (Federal Electricity Commission, "CFE"), which we were told has a union that is supportive of the government. Workers of LyFC were represented by the SME, a union that is independent of the Government. As a result of the President's Decree, 44,000 workers were instantly terminated from their jobs and 22,000 retirees had their retirement benefits substantially reduced.

The Mineworkers have been on strike occupying several mines, particularly the Cananea mine, for over three years due to allegedly significant health and safety issues. This mine and others where smaller strikes are occurring are currently operated by Grupo Mexico. The Government of

Mexico (the "Government" or the "Mexican Government") has refused to recognize the elected leadership of the Miners' union and in fact has moved to forcibly evict the workers from the mines. Issues arising from both of these cases are pending before the Supreme Court of Mexico. The legal issues regarding these cases are of major interest to ICLR and this delegation.

## III. Members of the ICLR Delegation to Mexico

The delegation was composed of Justice Yogesh Sabharwal, retired Chief Justice of India; Judge Juan Guzmán Tapia, retired Judge of the Appellate Court in Santiago, Chile; Justice Gustin Reichbach, Justice of the New York Supreme Court; labor attorney Jeffrey Sack, from Toronto Canada; labor attorney Teodoro Sánchez de Bustamante, from Buenos Aires, Argentina; Professor Sarah Paoletti from the Faculty of Law at the University of Pennsylvania; and labor attorney Jeanne Mirer from New York City, President of the Board of ICLR (The full biographies of the delegation are attached as Appendix A).

## IV. The Delegation's Program

The delegation was on the ground in Mexico from May 18 to May 24, 2010. During that time, the members of the delegation met with a large number of labor law experts, and received specific information about the cases of the mineworkers and the electrical workers and the complaints which have been made to the International Labour Organization ("ILO"), the National Administrative Office ("NAO") under the *North American Agreement on Labor Cooperation* ("*NAALC*"), and the Inter-American Commission on Human Rights.

The delegation also met with the leaders of SME and the Mineworkers and visited the SME hunger strikers in Mexico City's central square (*Zócalo*). We also met with one of the attorneys defending the President of the Mineworkers against repeated criminal charges brought by the Government of Mexico, which have repeatedly been dismissed by the courts, and which have, nonetheless, forced him to seek refuge in Canada.

The delegation also met with Chief Justice Guillermo I. Ortiz Mayagoitia of the Mexican Supreme Court, and with Ramón Jiménez, Member of the House of Representative for the Democratic Revolution Party (*Partido de la Revolución Democrática*, "PRD"). The delegation attended a forum on "protection contracts," and participated in a panel discussion at the National Autonomous University of Mexico (*Universidad Nacional Autónoma de México*, "UNAM") on Perspectives on International Labor Rights.[2]

[2] The delegation also met with a group of gas station workers who are on strike. They claimed that they are paid only the tips they receive for pumping gas and selling products. They spoke of difficulties trying to unionize with an independent union. Given the lack of time to do a thorough investigation of their claims the delegation makes no findings regarding their situation but notes that the claims they made are consistent with the claims of the SME and the Mineworkers about which we do make findings.

The delegation requested to meet with the public servant most directly involved with the Mineros and the SME cases, Dr. Álvaro Castro Estrada, Sub-Secretary of Labor and Social Welfare. However, this invitation was unavailing.

## V. 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 the *Universal Declaration of Human Rights* which it also ratified. Mexico has acceded to the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. Mexico has ratified the *American Convention on Human Rights* ("*Pact of San José*") and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights ("*Protocol of San Salvador*"), as well as 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, Mexico has ratified *Convention 87* of the ILO which protects workers' freedom of association. In addition, under the *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 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,[3] 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."[4] In particular, the Mexican Government noted as follows:[5]

> 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" (para. 84).

Furthermore, in its fifth annual report to the U.N. Human Rights Committee monitoring *ICCPR* compliance ("HCR"), submitted on September 24, 2008,[6] 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."[7]

## VI. The Government of Mexico's Record respecting Compliance with its International Labor Law Obligations

The history respecting Mexico's compliance with its international labor law obligations does not match its stated commitments.

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[3] 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

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

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

[6] 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

[7] *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-ELECTINO 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.

Thus, in the report of the Canadian NAO under NAALC (CAN 98-I, Part I), delivered in 1999, the Tribunal concluded that the information it received suggested that Mexico did not conform to its obligations under the *NAALC*:

> [a] by failing to ensure that Mexican labor laws and regulations protect workers involved in union organizing campaigns and the integrity of the workers' vote;
> [b] by failing to promote compliance with and effectively enforce Mexican labor laws concerning the expulsion of union members and the provision of a safe voting environment;
> [c] by failing to ensure that the members of the Labor Board are not in a conflict of interest and that procedural protection is afforded to parties involved in Board proceedings.[8]

A 2003 report entitled "Justice for All," authored by the former Executive Director of the NAALC International Secretariat, Professor Lance Compa,[9] confirms that Mexico's fulfillment of international norms on workers' freedom of association is obstructed by labor boards which "favor official, pro-government, pro-employer unions against independent organizations chosen by workers,"[10] and by "protection contracts," which cover some 90% of all collective agreements filed with the Mexican labor department, that are in fact, "pretend contracts" signed by pro-business unions in complicity with anti-union employers, and which are meant only to block the formation of real unions.[11] Professor Compa reports that these conditions, which entrench undemocratic unions not chosen by workers, not representative of workers, and not responsive to workers, have also been documented by the U.S. State Department and Human Rights Watch.[12]

The right to strike is also impeded by complicated rules on strike votes, advance notice, timing of a strike, picket-line conduct, minimum operations and services, and other variables which allow labor boards to declare a strike "ilicit, "illegal," "unjustified" or "nonexistent" on, as Professor Compa notes, "the flimsiest of pretexts."[13]

Similar findings were echoed in concluding observations and recommendations by the UN Committee on Economic, Social, and Cultural Rights, in its review of Mexico in 2006, wherein the Committee expressed "its concern about the severe restrictions in the Federal Labor Law and in the Federal Law for State Workers on the right to form and join trade unions, such as trade union monopolies, exclusionary clauses, minimum age and membership requirements and

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[8] Canadian National Administrative Office, "Review of Public Communication CAN 98-1 (Part I)," Summary of Analysis and Conclusions, online: http://www.hrsdc.gc.ca/eng/lp/spila/ialc/pcnaalc/03review_public_communication_98_I.shtml

[9] American Center for International Labor Solidarity, "Justice For All: The Struggle for Worker Rights in Mexico. A Report by the Solidarity Center" (2003), online: http://www.solidaritycenter.org/files/SolidarityMexicofinalpdf111703.pdf

[10] *Ibid*. at 13.

[11] *Ibid*. at 14.

[12] *Ibid*. at 14-15.

[13] *Ibid*. at 17.

provisions on the cancellation of trade unions in the public sector."[14] The Committee is also concerned about "restrictions on the right of trade unions to establish national federations or confederations and on the right to strike."[15]

From the concerns expressed to the delegation during its investigation, it appears that the conditions referred to in the foregoing reports persist to this day, and that, apart from a Mexican Supreme Court decision requiring a secret ballot vote in union representation elections, little meaningful progress has been made in ensuring workers' fundamental freedom of association.

## VII. The Global Consensus on International Labor Law

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.[16] This decision, which was concurred in by all eighteen judges of the Court's Grand Chamber, is binding upon all states that are parties to the *European Convention on Human Rights and Fundamental Freedoms*. The Convention, which governs 800 million people, provides in Article 11, as does the *Mexican Constitution* in 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);

[14] "Concluding observations of the Committee on Economic, Social and Cultural Rights: Mexico," (9 June 2006), E/C.12/MEX/CO/4 at para. 16, online: http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/c51b8e7f740d2a42c12571e1004e03e5/$FILE/G0642555.pdf

[15] *Id.*

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

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).

One of the key instruments referred to by the European Court of Human Rights is *Convention No. 87 of the ILO on Freedom of Association and the Protection of the Right to Organize* ("*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, as noted above:

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*,[17] decided in June 2007, the Court stated that "the *Charter* should be presumed to provide at least as great a level of

[17] [2007] 2 S.C.R. 391. In its decision, Court 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.

protection as is found in the international human rights documents that Canada has ratified."[18]

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'…"[19]

The Supreme Court of Mexico has itself on previous occasions adopted an approach that is consistent with the global consensus. 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 decision in the secret ballot case (the *recuento* 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."[20] As a preamble to its decision, the Court noted:

> 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.[21]

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'

[18] *Ibid*. at para. 70.
[19] *Ibid*. at para. 76.
[20] "RECOUNT TO DETERMINE BARGAINING AGENT STATUS WITH RESPECT TO A COLLECTIVE AGREEMENT, PROVIDED FOR IN ARTICLE 931 OF THE FEDERAL LABOUR ACT. CONCILIATION AND ARBITRATION TRIBUNALS MUST ORDER AND GUARANTEE THAT WORKERS' VOTE BE PERSONAL, 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.
[21] *Ibid*.

> 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.[22]

The cases examined by our Commission, which are currently pending before the Supreme Court of Mexico, call for an application of the "global consensus" on international labor law.

## VIII. Mineworkers' and Electrical Workers' Cases – Facts, Findings and International Labor Law Issues

According to the information received by the Commission - which could not be confirmed with the Government of Mexico, since it declined the Commission's invitation to meet – the Government of Mexico engaged in a campaign to remove the leadership of the Mineworkers' Union and the Electrical Workers' Union.

### The Mineworkers' case

A. The Facts

In February 2006, the Mexican Government's Labor Secretariat ("STPS"), through its General Directorate of Registry of Associations ("DGRA"), withdrew its legal acknowledgment (*toma de nota*) from the Union's duly elected General Secretary, Napoleón Gómez Urrutia, based on allegations of corruption made by Elías Morales.

The DGRA then recognized an alternative slate of officers, headed by Morales. In early 2008, a federal labor court ruled that the DGRA had acted illegally in withdrawing the *toma de nota* from Gómez and ordered that it be reinstated.

On May 9, 2008, Gómez was re-elected by delegates at the Union's convention, but, on June 24, 2008, the DGRA again denied Gómez a *toma de nota*, based on numerous grounds; the Union appealed, and on December 2, 2009 the Mexican Supreme Court decided to assert jurisdiction over the case and rule on it directly. 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]…"[23]

[22] 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

[23] 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 Atraccion*), File No. 85/2009. Requestor: Sergio Salvador Aguirre Anguiano (2 December 2009). The case is currently pending before the Mexican Supreme Court.

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."[24]

The Government has repeatedly filed criminal charges against Gómez 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. 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 the Union and its officers regarding the disbursement of these funds. Each time the courts have dismissed the charges, the Government has refiled them in other courts, and has also issued arrest warrants for a number of union leaders. One leader, Juan Linares Montufar, has been imprisoned since December 2008. As a result of the Government's conduct, Gómez 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 provide strike benefits to those of its 80,000 members who are on strike.

On July 30, 2007, the Mineworkers went on strike at the Cananea mine of Grupo Mexico. The strike was in response to claims of unsafe working conditions reminiscent of the explosion at Grupo Mexico's Pasta de Conchos mine in 2006 that killed 65 miners.

On three occasions the federal labor board has declared the strike to be "illegal," and every time its decision has been overturned by the courts. The federal labor board's first decision declaring the strike illegal (August 7, 2007) was challenged by the Mineworkers through the filing of an *amparo* application, which resulted in a temporary restraining order in favour of the Union (August 8, 2007), a preliminary injunction (August 15, 2007), and a permanent injunction (October 8, 2007) issued by a district court.[25] These injunctions were affirmed by a federal collegiate court on December 13, 2007, thus restoring the Mineworkers' right to strike.[26] The court ordered the board to reach another decision.

On January 11, 2008, the federal labor board declared the strike to be illegal for the second time. The Mineworkers challenged the decision by filing another *amparo* application, which also resulted in a temporary restraining order in favour of the Union, a preliminary injunction and a permanent injunction (January 21, 2008) issued by a district court, followed by a final decision by a federal collegiate court, handed down in April 2008, declaring that the strike was lawful and

[24] ILO CFA Report No. 350, Case No. 2478 (June 2008), para. 1392, 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 CFA Report No. 350*].
[25] Docket No. PRAL 1313/2007 VI).
[26] Docket No. RT-2381/2007.

is lawful.[27]

In reports issued in June 2008 and March 2010 (ILO Case No. 2478), the ILO's Committee on Freedom of Association noted that the union strike at Cananea, which began on June 30, 2007, was ultimately declared lawful by the courts in April 2008. The Committee criticized the lengthy period that elapsed between the calling of the strike in Cananea on July 30, 2007 and the subsequent court decision in April 2008 declaring it to be lawful, regretting "the prejudice that this caused to the complaining union and its members." The Committee deplored the excessive length of the judicial procedures related to various aspects of the case, and the great prejudice that this caused to the complaining union. The Committee also reiterated its previous conclusions on justice delayed and the need for expeditious judicial procedures.[28]

On December 5, 2008, the federal labor board declared the strike to be illegal for the third time. The Mineworkers again challenged the decision by filing one more *amparo* application, which resulted once again in a temporary restraining order in favour of the Union (December 10, 2008), a preliminary injunction (December 16, 2008),[29] and a decision by the federal collegiate court affirming the district court's decision in favour of the Union (March 19, 2009).[30]

The strike continued, and after a protracted standoff which raised concerns about the potential use of force against the striking miners, the company, Grupo Mexico, persuaded the federal labor board to allow it to terminate the individual labor relations of the approximately 1,200 striking workers, on the grounds that a situation of *force majeure* existed in that the strike and the workers' alleged actions of sabotage to the mine had rendered the mine "inoperable." On March 20, 2009, after a one-day hearing, the federal labor board made a summary decision allowing the company to fire its entire workforce at Cananea. The Commission was advised by the Union that the federal labor board refused to accept the Union's evidence.

The Mineworkers challenged the federal labor board's March 20, 2009 decision before the courts on several grounds, including that the mine is not inoperable since the company publicly announced that it would resume operations with replacement workers as soon as it could fire the striking workers; and that in fact, following the decision being challenged, the striking workers temporarily put the mine to work, thus showing that the mine is in fact operable.

However, both the district court and the federal collegiate court declined to reverse the labor board's decision. In its decision of February 11, 2010, the federal collegiate court affirmed the previous decisions and in doing so, accepted the company's arguments without providing any legal or factual analysis to support the conclusion that a situation of *force majeure* actually existed. The decision of the federal collegiate court is not subject to appeal.

[27] *ILO CFA Report No. 350*, *supra* note 12 at paras. 1402-1405.
[28] *Ibid*. at para. 1405.
[29] Docket No. PRAL 2144/2008 IV.
[30] Docket No. RT-20/2009.

Following a series of attempts by federal and state police to evict the striking workers from the mine (January and April 2008), the Mexican Government sent in more than 4,000 members of the Federal Police to remove the workers from the Cananea mine on June 6, 2010. The action was violent in nature, and targeted not only workers but also their families.

B. International Labor Law and Human Rights Issues

While this case gives rise to a number of issues governed by the laws of Mexico, of particular concern to this delegation was that is simultaneously raises critical issues of international law, and in particular, the following freedom of association issues:

1. Whether the refusal of the national labor authority to certify the election results was a violation of the workers' freedom of association;
2. Whether the denial of certification has the practical and legal effects of leaving union officers without authority to legally represent the union, to make demands, engage in negotiations or sign collective agreements;
3. Whether denial of a *toma de nota* is effectively equivalent to removing elected officers from their office;
4. Whether the repeated filing of dismissed criminal charges against union leaders, in circumstances where the legitimacy of the charges has been rejected by the Mexican courts, constitutes a violation of freedom of association;
5. Whether the federal labor board's repeated declaration of a strike as "illegal" despite multiple court decisions to the contrary is a violation of freedom of association; and
6. Whether the federal labor board's summary decision allowing a request to terminate striking workers, in circumstances where no evidence from the Union was allowed, violates freedom of association.

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.
>
> […]
>
> 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.

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. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

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.
>
> […]

And finally, 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;
> >
> > b. The right to strike.
>
> 2. The exercise of the rights set forth above may be subject only to restrictions established by law, provided that such restrictions are characteristic of a democratic society and necessary for safeguarding public order or for protecting public health or morals or the rights and freedoms of others….
>
> 3. No one may be compelled to belong to a trade union.

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

[31] 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*].
[32] *Ibid*. at paras. 388-453.
[33] *Ibid*. at paras. 388-396.

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]

In connection with to 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, in order to avoid all discretionary risks such measures shall be adopted through judicial but not administrative methods.[40]
>
> For the appropriate application of the principles stating that a professional organization shall not be subject to suspension or dissolution through administrative

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

> 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]

Freedom of association is also explicitly protected by broader international and regional human rights instruments. Enforcement bodies such as the HRC, 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.[43]

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

> 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.[44]

The 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."[45]

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[41] *Ibid*. at para. 703.
[42] *Ibid*. at para. 704.
[43] *Korneenko et al v. Belarus*, Communication No. 1274/2004, Views adopted on 31 October 2006, para.7.2.
[44] 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
[45] *Ibid*., para. 158.

C. Findings

The Government's position in the Mineworkers' case is that it had the authority, through the General Directorate of Registry of Associations ("DGRA"), to determine whether the election conformed to the Union's constitution; in the Union's view, the labor authority's function was simply ministerial, and 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, as opposed to simply certifying that the minutes of the convention corresponded with the constitutional requirements.

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.

As mentioned above, in reports issued in June 2008 and March 2010 (ILO Case No. 2478), 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." (para. 1392).

In these circumstances, it is the view of this Commission that the Government of Mexico has 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, according to the information provided to the Commission, the denial of certification (*toma de nota*) by the administrative authority has had the practical and legal effects of leaving Gomez 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*.

Moreover, while the courts did ultimately interpret and apply Mexico's labor laws in a manner that upheld the Mineworkers' right to strike, the federal labor board did not, and as a result, great delay and prejudice were caused to the Union and the workers, as found by the ILO Committee on Freedom of Association.

The Union contends that the federal labor board summarily ruled that Grupo Mexico could terminate its workers at Cananea on the grounds that the mine had been rendered inoperable, and

that in doing so, the board refused to allow the Union to give evidence. If this is the case, the federal labor board committed a serious violation of the Union's and the workers' right to due process. Further, the federal labor board, the district court and the federal collegiate court all applied the national labor laws in a manner that impaired the rights of the Union and the workers under *ILO Convention No. 87*, contrary to Article 8 thereof.

The actions of the Government of Mexico, specifically the federal labor board and the administrative authority, 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."[46] It appears from the information received by the Commission, that the Mexican Government has done exactly the opposite in the case of Los Mineros.

**The Electrical Workers' case**

A. The Facts

In July 2009 the SME, which represented the employees of LyFC, held elections, as a result of which the slate of the incumbent General Secretary, Martín Esparza, was re-elected. On October 5, 2009, the Mexican government's Labor Secretariat announced that it would not grant legal certification (*toma de nota*) to the Esparza slate. The Government also cut off the distribution of union dues and froze the union's bank accounts. On December 2, 2009, the federal labor board nullified the elections.

Beginning on the night of October 10, 2009, some 6,000 federal police occupied the operations of LyFC, and on Sunday October 11 the Government of Mexico issued an executive decree liquidating the LyFC,[47] which had provided electrical power to the Federal District (Mexico City) and to adjacent states, thereby terminating the employment of 44,000 workers who are members of the SME. The Union contends that the decree was *ultra vires* the powers of the Executive, since the company was established by an act of the Mexican Congress; moreover, there was a failure to comply with legal requirements regarding consultations with the Union.

The Government of Mexico argued that the liquidation of LyFC was an economic necessity due to high operating costs and wastage, and that the SME contract was a cause for the company's

[46] *Ibid*. at para. 156.
[47] "Decreto por el que se extingue el organismo descentralizado Luz y Fuerza del Centro." Published in the Federation's Official Gazette on October 11, 2009, online: http://dof.gob.mx/nota_detalle.php?codigo=5114004&fecha=11/10/2009

financial difficulties but the Union has vigorously contested these assertions, alleging that the Government's action was actually designed to rid itself of a union that was not controlled by the Government, thereby laying the groundwork for further privatization of power generation in Mexico. [48]

The LyFC enterprise, including all of its assets and physical facilities, has been turned over to Mexico's other state-owned power company, the CFE, which is currently operating it with approximately 3,000 management personnel as well as contractors. On this point, the Union contends that the successor rights provisions in the federal labor statute must be applied. The Government has offered the LyFC workers severance payments equivalents to 2.5 years' salary. Many workers, out of financial necessity, have accepted this payment, which will likely deprive them of their right to seek reinstatement.

On November 6, 2009, the SME challenged the Government's actions before the federal labor board. However, on December 2, 2009 the board declared as void the election of Martin Esparza as General Secretary of the SME, and on February 10, 2010 the board rejected SME's claim to represent the workers in upcoming negotiations.

A temporary injunction was issued by the courts, but on December 11, 2009 a permanent injunction was denied; the union has appealed this decision, and the matter is now proceeding to the Mexican Supreme Court, which asserted jurisdiction over the case. A petition by members of Congress challenging the Government's actions is also before the Mexican Supreme Court.

B. International Labor Law and Human Rights Issues

To repeat, 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.

[48] The Union has requested documents that set forth the basis for the government's decision to liquidate the LyFC, in accordance with all statutory mechanisms laid out in the Federal Law on Transparency and Access to Government Public Information. In response, the government has refused disclosure, citing national security concerns (i.e., that disclosure of the information requested could lead to "violent demonstrations," "road blockades," and "acts of sabotage" to critical infrastructure) as well as litigation strategy concerns (i.e., that disclosure of the information requested "would seriously prejudice" the Government's "litigation strategies" in the numerous legal proceedings currently underway, given that "the majority of the documents contained in … [the file requested] have not been provided in [these] legal proceedings, nor are they within the knowledge of the plaintiffs in the said proceedings…"), among other reasons. The Union argues that this is merely a pretext on the part of the government to frustrate the union's constitutional right to information with respect to documentation directly relevant to the *amparo* proceedings currently before the Mexican Supreme Court. See SHCP Response in Access Request No. 000060033510 (12 April 2010).

2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

[…]

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.

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. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

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.

[…]

And finally, 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;

b. The right to strike.

2. The exercise of the rights set forth above may be subject only to restrictions established by law, provided that such restrictions are characteristic of a democratic society and necessary for safeguarding public order or for protecting public health or morals or the rights and freedoms of others….

3. No one may be compelled to belong to a trade union.

This case raises serious issues regarding violation of the foregoing articles of *ILO Convention No. 87*, as well as Art. 22 of the ICCPR, Article 8 of the ICESCR, and Article 16 of the American Convention, in light of the Government of Mexico's actions in refusing to recognize the results of union elections, in liquidating a company and terminating the employment of the

entire union membership, and in eliminating thereby the SME as an effective trade union.

The Commission notes Article 4 of *ILO Convention No. 87*, which provides that "[w]orkers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority." In this regard, the ILO Committee on Freedom of Association has held that "[t]he administrative dissolution of trade union organizations constitutes a clear violation of Article 4 of Convention No. 87."[49] In those rare instances where a union may be dissolved, the Committee has unequivocally held that this decision must be made by the judicial authorities, respecting principles of due process, *prior* to any administrative action or dissolution:

> Even if they may be justified in certain circumstances, measures taken to withdraw the legal personality of a trade union and the blocking of trade union funds should be taken through judicial and not administrative action to avoid any risk of arbitrary decisions.[50]
>
> […]
>
> Any possibility should be eliminated from the legislation of suspension or dissolution by administrative authority, or at the least it 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.[51]

C. Findings

The facts disclose violations of Article 3 of *ILO Convention No. 87*, as well as 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* respecting freedom of association insofar as the STPS refused to recognize the results of union elections by refusing to grant legal certification (*toma de nota*) to the Esparza slate. The Commission's comments with respect to government interference in union elections, made in connection with the Mineworkers' case, are equally applicable to the Electrical Workers' case.

On the facts as provided to us, it appears that the Government of Mexico blocked the SME's funds through administrative, rather than judicial action, and effectively dissolved the SME by terminating the employment of its 44,000-strong membership through an administrative decision. This administrative decision was made summarily by way of an Executive decree effectively executed the night before its formal issuance, thus depriving the Union and the workers of the opportunity to appeal the decree prior to the decree taking effect, contrary to Article 4 of *ILO Convention No. 87*.[52]

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[49] *ILO, Freedom of Association Digest*, *supra* note 19 at para. 684.
[50] *Ibid*. at para. 702.
[51] *Ibid*. at para. 704.
[52] As discussed in footnote 44, SME's freedom of information requests have been denied. *ICCPR* Art. 19 (2) protects an individual's "right to receive and impart information," subject to a restriction for the protection of national

The evidence further suggests that the company was liquidated and the employees were terminated with a view to eliminating the effectiveness and, for all practical purposes, the existence of the Union because of its pursuit of union activities protected by *ILO Convention No. 87* and the aforementioned international and regional instruments.

## IX. Findings and Conclusions

According to the information received by the Commission - which could not be confirmed with the Government of Mexico, since it declined the Commission's invitation to meet – the Government of Mexico engaged in a campaign to remove the leadership of the Mineworkers' Union and the Electrical Workers' Union.

These actions raise concerns about violations by the Government of Mexico of its obligations under international labor law, especially *ILO Convention No. 87 on Freedom of Association*.

With respect to the Mineworkers' case the information provided to the Commission indicates that:

(a) The Government of Mexico has 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.

(b) The denial of certification (*toma de nota*) by the administrative authority has had the practical and legal effects of leaving the Union's duly elected General Secretary, Napoléon 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*.

(c) While the courts did ultimately interpret and apply Mexico's labor laws in a manner that upheld the Mineworkers' right to strike, the federal labor board did not, and as a result, great delay and prejudice were caused to the Union and the workers, as found by the ILO

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security. Restated in regional human rights instruments (Art. 13.1 of the *American Convention on Human Rights* and Art. 10 of the *European Convention on Human Rights*) as well as other sources of international law, the right and its exceptions have been increasingly understood to protect the information seeker. If an authority wishes to exercise an exception to the right, it must show that disclosure will pose a real risk of substantial harm to the protected interest. However, the Government of Mexico has not made a sufficient showing to deny the Union its information request, a possible violation of international norms as well as its own *Freedom of Information Act*. *See* 2000 Annual Report of the UN Special Rapporteur on Freedom of Opinion and Expression to the Commission on Human Rights; Toby Mendel, "National Security vs. Openness: An Overview and Status Report on the Johannesburg Principles" in Campbell Public Affairs Institute, *National Security and Open Government: Striking the Right Balance* (2003, Syracuse, Campbell Public Affairs Institute).

Committee on Freedom of Association.

(d) By ruling that Grupo Mexico could terminate its workers at Cananea on the grounds that the mine had been rendered inoperable, without allowing the Union to give evidence, the federal labor board committed a serious violation of the Union's and the workers' right to due process. Further, the federal labor board, the district court and the federal collegiate court all applied the national labor laws in a manner that impaired the rights of the Union and the workers under *ILO Convention No. 87*, contrary to Article 8 thereof.

With respect to the Electrical Workers' case, the information provided to the Commission indicates that:

(a) In violation of Article 3 of *ILO Convention No. 87* respecting freedom of association, STPS refused to recognize the results of union elections by refusing to grant legal certification (*toma de nota*) to the duly elected slate led by the Union's General Secretary, Martín Esparza.

(b) The Government of Mexico blocked the SME's funds through administrative, rather than judicial action, and effectively dissolved the SME by terminating the employment of its 44,000-strong membership through an administrative decision. This administrative decision was made summarily by way of an Executive decree effectively executed the night before its formal issuance, thus depriving the Union and the workers of the opportunity to appeal the decree prior to the decree taking effect, contrary to Article 4 of *ILO Convention No. 87*.

(c) The company was liquidated and the employees were terminated with a view to eliminating the effectiveness and, for all practical purposes, the existence of the Union because of its pursuit of union activities protected by Article 3 of *ILO Convention No. 87*.

In addition, by directly interfering with the Mineworkers' and the Electrical Workers' rights to choose their representatives in full freedom, the Government of Mexico violated their fundamental human right to freedom of association as guaranteed under the international and regional instruments cited above.

With respect to remedies, the Commission recommends the following: (i) recognition of union election results; (ii) restoration of bargaining rights and of the right to strike; (iii) reinstatement of employees; (iv) return of union funds; (v) cessation of abusive criminal prosecutions; (vi) compensation to unions and workers; and (vii) other appropriate relief.

The Commission notes that, to some extent, circumstances have changed since the underlying disputes between the Unions discussed herein and the Government of Mexico began. However, the Commission emphasizes the importance under international law of an effective remedy for aggrieved parties. The *Universal Declaration of Human Rights* enshrines this principle in Article

8, while Art. 2 of the *ICCPR* 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." The Commission trusts that the Mexican Supreme Court will take this obligation into consideration so as to grant a remedy which, as the European Court of Human Rights framed it, "gives practical and effective protection to human rights."

The Mineworkers' and the Electrical Workers' cases are currently before the Mexican Supreme Court, where the application of *ILO Convention No. 87*, as an integral element of international labor law, will be a significant issue. In this regard, the Commission refers to the "global consensus" supporting the application by national labor courts of international labor law, including the interpretation of competent bodies such as the Committee of Experts and the Committee on Freedom of Association under *ILO Convention No. 87*. The Commission notes that the jurisprudence of the Mexican Supreme Court as exemplified by its decision on secret ballot elections is consistent with this "global consensus".

The Commission reiterates its invitation to the Government of Mexico to communicate with it regarding the events referred to in this report. We will remain seized of the matter pending further developments in respect of the cases in issue.

July 2, 2010

"*Justice Yogesh Sabharwal*"

"*Judge Juan Guzmán Tapia*"

"*Justice Gustin Reichbach*"

"*Jeffrey Sack*"

"*Teodoro Sánchez de Bustamante*"

"*Professor Sarah Paoletti*"

"*Jeanne Mirer*"

# "APPENDIX A"

# Biographies of the Members of the Delegation

## Hon. Yogesh Sabharwal (India)

Retired Chief Justice, Supreme Court of India
yksabharwal@gmail.com

Justice Y.K. Sabharwal was born on 14th January 1942 and received most of his education in Delhi, India.

Before his appointment as a Judge of the Delhi High Court, and starting in 1964, Justice Sabharwal practiced in the areas of civil and constitutional law before the Delhi High Court for about 22 years. He was later appointed Chief Justice of the Supreme Court of India.

Since leaving the office of Chief Justice of India on January 14, 2007, Mr. Sabharwal has visited various universities and other organizations to deliver lectures and speeches on issues such as human rights, India's Constitution, and environmental matters. He has also acted as arbitrator in a number of matters and rendered opinions on important legal issues.

He has been Chairman of various Boards and the Honorary Secretary of the International Law Association (Indian Chapter), before holding the position of President of the International Law Association (Indian Chapter).

Justice Sabharwal has participated in various international conferences organized by the International Law Association, including conferences in Egypt (1992), Argentina (1994), Finland (1996), Barbados, West Indies (2003) and Toronto (2006).

**Hon. Juan Guzmán Tapia (Chile)**
Retired Justice of the Court of Appeals for Santiago
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Justice Guzmán is a Chilean attorney. He completed his law studies at the Pontifical Catholic University of Chile, Santiago. He has completed graduate studies at the National School of the Magistracy in Paris, France, and the Complutense University of Madrid, Spain.

Justice Guzmán was a member of the Chilean judiciary for 36 years, serving as judge of the Republic of Chile in Panguipulli, Valdivia, Santa Cruz, Santiago and Talca. He served as Justice of the Court of Appeals for Talca for 5 years and as Justice of the Court of Appeals for Santiago for 16 years. As part of his functions as Justice of the Court of Appeals for Santiago, he was in charge of prosecuting numerous state agents, including General Augusto Pinochet, for human rights violations.

He has been a professor of Procedural Law, Professional Ethics and Human Rights at the Pontifical Catholic University and various other universities in Chile. He has given talks and conducted seminars in various universities in North, Center and South America, Europe and Africa.

Justice Guzmán has been presented with awards in Chile and abroad for his work in the area of human rights, and has been granted Honoris Causa PhDs by the Catholic University of Lovaina, Belgium; Oberling College, Ohio; and the International Institute of International Studies. In May of 2010 he was granted another Honoris Causa PhD by the University of Haverford, Pennsylvania.

He serves as the academic representing the Republic of Chile before the Royal Academy of Economic and Financial Sciences of Spain. He is the current Vice-Chairman of the American Association of Jurists, Chile.

Justice Guzmán has published various essays, including “The Sentence,” “Lawyer’s Professional Ethics,” and “At the edge of the world,” among others.

## Hon. Gustin Reichbach (USA)

Justice, Supreme Court of New York
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Justice Gustin L. Reichbach is a native of Brooklyn a 1967 graduate of SUNY at Buffalo, where he was elected to Phi Beta Kappa and graduated Columbia Law School in 1970.

Justice Reichbach was in private practice from 1972-1990, with offices in both New York and California. As an attorney, he had a wide-ranging legal practice. In 1974-1975, he served as counsel to Commissioner of the California Agricultural Labor Relations Board, which secured for the first time bargaining rights for the United Farm Workers to represent California field workers.

Justice Reichbach has been on the bench for more than 18 years having been first elected to the Civil Court in 1990 and then to the Supreme Court in 1998.

In 2003-2004 he served as an international judge for the United Nations Mission is Kosovo, where he presided over war crime cases growing out of the Balkans Wars of the 1990's. He was eventually made a 'permanent' member of the Kosovo Supreme Court.

Justice Reichbach is the author of more than 100 published opinions and has presided over more than 80 homicide trials

He has been honored by both the New York Criminal Bar Association and the Brooklyn Criminal Bar Association.

## Jeffrey Sack (Canada)

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Jeffrey Sack is a founding partner of the law firm of Sack Goldblatt Mitchell LLP and is a leading member of the Canadian labour law Bar. For 40 years, Jeffrey has represented trade unions and employees in labour law matters before tribunals and the courts, including the Supreme Court of Canada in *Charter of Rights* cases. Jeffrey's practice includes acting as counsel or as a member of arbitration boards dealing with interest disputes in the university, health care, firefighter and police sectors.

Jeffrey is the founding president of the Canadian Association of Labour Lawyers (CALL), an organization of some 500 lawyers representing trade unions across the country, and a past president of the International Association of Labour Law Journals. He currently serves as co-director of the Canadian Labour Law Association, an affiliate of the International Society for Labour & Social Security Law, and as a vice-president of the International Centre for Trade Union Rights. In 2005, Jeffrey received the Gerard Dion award from the Canadian Industrial Relations Association for outstanding contributions to labour relations in Canada.

Jeffrey has written on numerous issues in the labour law field. He is a co-author of the leading text on Ontario Labour Relations Board law and practice, and monographs on collective bargaining in Canada and labour arbitration. Jeffrey is also the founder and president of Lancaster House, a leading publisher of resource materials on labour, employment and human rights law.

Jeffrey earned degrees in history and modern languages, and pursued post-graduate studies as a Woodrow Wilson Fellow in German literature and philosophy at Columbia University before embarking on a career in law. He received his law degree from the University of Toronto and was called to the Ontario Bar in 1967. In 1982 he was appointed Queen's Counsel.

## Teodoro Sánchez de Bustamante (Argentina)

Labour Attorney and former President of the Latin American Association of Labour Lawyers ("ALAL")
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Teodoro Sánchez de Bustamante is a labour attorney. He graduated *summa cum laude* from the University of Buenos Aires, Argentina.

He served as President of the Labour Lawyers' Association of Argentina for two terms. Having been one of the founding members of the Latin American Association of Labour Lawyers, he served as the Association's President from 2005 to 2007. He was appointed as the international affiliate of the Colombian Association of Labour Attorneys in August of 2006. He has been proposed as a correspondent member - residing abroad – of the Institute of Labour Law and Social Security at the Law Faculty of the University of the Eastern Republic of Uruguay. He is a former director of "The Labour Cause" magazine of Buenos Aires, Argentina.

He has served as labour conciliator for the National Registry of Labour Conciliators, Ministry of Justice, Argentina. He has acted as consulting advisor for the General Legislation Commission of the Honorable Senate of the Nation, Argentina, on a project to amend the bankruptcy laws in that country. He is also an alternate member of the Committee of Guarantees for the Right to Strike, provided for by Article 24 of Law 25877, Republic of Argentina.

In 2004 he acted as an international monitor in Colombia for the International Commission for Trade Union Rights (ICTUR), based in London, England.

He teaches graduate courses at the National University of Buenos Aires, the National University of Catamarca and the National University of Southern Argentina. He is a lecturer and speaker and the author of numerous papers published in Argentina and abroad.

## Dra. Sarah Paoletti (USA)

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Sarah Paoletti heads up the Transnational Legal Clinic, where students explore the lawyer's work in settings that cut across cultures, borders, languages and legal systems. Students in the clinic engage in direct legal representation of individual and organizational clients in matters that raise a myriad of international and comparative legal norms.

Before coming to Penn Law, Paoletti taught in the International Human Rights Law Clinic at American University Washington College of Law, where she also taught a seminar on the labor and employment rights of immigrant workers. Her areas of specialty include international human rights, immigrant rights, asylum law, and labor and employment.

She has presented on the rights of migrant workers before the United Nations and the Organization of American States and continues to work on the domestic application of international human rights norms in the United States.

## Jeanne Mirer (USA)

Labour Attorney and President of the International Commission on Labour Rights (ICLR)
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Jeanne Mirer is a 1971 graduate of Boston University. She has engaged in litigation primarily in the labor law area for most of her years in the practice of law. She has specialized in factually complex class action litigation in a variety of jurisdictions. She is a member of the Massachusetts, Michigan and New York bars.

She is founding board member of the International Commission for Labor Rights and has served as Board President since 2005. She is also President of the International Association of Democratic Lawyers.