

final instance with regard to the Daegu Construction Workers Union, and to review the convictions of the members and officials on grounds of extortion, blackmail and related crimes, for what appears to be ordinary trade union activities. The Committee requests to be kept informed of developments in this respect.

- (k) The Committee once again requests the Government to undertake further efforts for the promotion of free and voluntary collective bargaining over terms and conditions of employment in the construction sector covering, in particular, the vulnerable "daily" workers. In particular, the Committee requests the Government to provide support to construction sector employers and trade unions with a view to building negotiating capacity and reminds the Government that it may avail itself of the technical assistance of the Office in this regard if it so wishes. The Committee requests to be kept informed of developments in this respect.*
- (l) The Committee recalls the Government's indication of its willingness to ratify Conventions Nos 87 and 98, in the near future, which it made to the ILO High-level Tripartite Mission in 1998 and which was reported to the Governing Body in March 1998 (see document GB.271/9) and requests the Government to keep it informed of developments in this respect.*
- (m) The Committee calls the Governing Body's attention to this serious and urgent case.*

CASE No. 2620

INTERIM REPORT

Complaint against the Government of the Republic of Korea presented by

- the Korean Confederation of Trade Unions (KCTU) and
- the International Trade Union Confederation (ITUC)

Allegations: The complainants allege that the Government refused to register the Migrants' Trade Union (MTU) and carried out a targeted crackdown on this union by successively arresting its Presidents Anwar Hossain, Kajiman Khapung, and Toran Limbu, Vice-Presidents Raj Kumar Gurung (Raju) and Abdus Sabur and General Secretary Abul Basher Moniruzzaman (Masum), and subsequently deporting many of them. The complainants add that this has taken place against a background of generalized discrimination against migrant workers geared to create a low-wage labour force that is easy to exploit

750. The complaint is contained in communications from the Korean Confederation of Trade Unions (KCTU) dated 18 December 2007 and 8 May 2008. In a communication dated 9 May 2008, the International Trade Union Confederation (ITUC) associated itself with this case.
751. The Government replied in a communication dated 10 November 2008.
752. The Republic of Korea has not ratified either the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), or the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainants' allegations

753. In a communication dated 18 December 2007, the complainant KCTU alleges that the Government: (i) refused to acknowledge the legal status of the Migrants Trade Union (MTU), despite a High Court ruling which held in February 2007 that the rights of migrant workers to establish and join labour unions, regardless of their residence status, are protected under the national law, including the Constitution; and (ii) carried out a targeted crackdown against the President, Vice-President and General Secretary of the MTU who were arrested and deported.
754. With regard to the first issue, the complainant indicates that the MTU was founded on 24 April 2005, and sent notification of its establishment to the Seoul Regional Labour Office on 3 May 2005, with its rules and regulations attached, as required by section 10(1) of the Trade Union and Labour Relations Adjustment Act (TULRAA). On 9 May, the Seoul Labour Office requested supplementary documents, including: (a) "the name of the workplaces and their representatives and the name of all union members and the number of union members at each workplace (in accordance with section 10(1) of the TULRAA and section 4(2) of the Enforcement Regulations"; and (b) "a register of union members (including first and last name, date of birth, nationality, foreigner registration number or passport number) in order to establish whether each worker has the right of employment". Although the MTU submitted various other documents requested, it refused to provide the abovementioned information on the grounds that there was no legal basis to require this material and that the requirements themselves were in violation of the principle of equal treatment of foreign workers protected in the Constitution, the TULRAA and international law. Following this, on 3 June 2005, the Seoul Regional Labour Office rejected the MTU's notification of union establishment on the basis that it had not submitted the requested information and that "because the officers of the union are foreigners without legal right of residence and employment under the Constitution and the union members in question can be assumed to be illegal residents, the Seoul Gyeonggi-Incheon Migrants' Trade Union is constituted by illegally employed foreigners who do not have the right to join labour unions and thus cannot be viewed to be a trade union under the TULRAA".
755. On 14 June 2005, the MTU filed an administrative suit against the Seoul Regional Labour Office, claiming that the rejection of its application for union status was unfounded and constituted illegal discrimination against foreign workers. Although, on 7 February 2006, the case was decided in favour of the defendant (Government), on appeal the Seoul High Court decided on 1 February 2007 that irregular migrant workers had the right to freedom of association under the national law. The main points of this decision are: (i) the rejection of the application for trade union status by the MTU because of the refusal to submit the names of workplaces and their representatives as well as the names of all union members and their number in each workplace, is devoid of a legal basis and therefore constitutes a violation of the Constitution; and (ii) irregular migrant workers are recognized as workers under the Constitution and the TULRAA and, therefore, are the subjects of legally protected basic labour rights; thus, the denial of irregular migrant workers' basic labour

rights is a violation of the Constitution and the TULRAA which protect the rights of foreigners, outlaw discrimination and grant basic labour rights to workers. The Ministry of Labour appealed against this decision which is now pending before the Supreme Court.

756. According to the complainant, the arguments of the Government are twofold: (i) as a union with members working at more than one workplace, the MTU's establishment can violate section 5(1) of the TULRAA which temporarily prohibits more than one trade union at the same enterprise in certain circumstances; and (ii) irregular migrant workers, because they are not lawfully employable under the Immigration Control Act, do not have the legal status which would allow them to strive for the improvement of wages and working conditions, which is based on the premise of a legal labour relationship, and cannot be seen as workers with the right to form a trade union.
757. The complainant indicates that the High Court refuted both these arguments on the following grounds: (i) the purpose of supplemental section 5(1) of the TULRAA is to guard against confusion arising from the establishment of new unions in companies where they had been prohibited in the past and this, for a limited period of time and under certain conditions; this section does not apply to unions established above the company level, i.e. regional industrial or other unions with workers in more than one workplace, even though these unions may have chapters in companies in which a company level trade union already exists; section 4(2) of the TULRAA Enforcement Regulations, which calls for the name of the workplaces and their representatives, the names of all union members and the number of union members at each workplace to be indicated when a union is constituted at more than one workplace, does not pertain to unions established above the company level; (ii) foreigners already engaged in labour relationships, even if they do not have legal residence status, are still recognized as workers under the relevant national law including the Constitution, the Labour Standards Act and the TULRAA and are protected against discrimination with regard to their fundamental rights including the three basic labour rights; and (iii) while the Immigration Control Act regulates the employment of foreigners with the objective of prohibiting the employment of foreigners without residence status, these workers are nevertheless vested with the right to establish an organization in order to improve labour conditions.
758. The complainant emphasizes that, as acknowledged by the Seoul High Court, article 11(1) of the Constitution reads, "All citizens are equal before the law. No one shall be discriminated against in any area of political, economic, social or cultural life based on gender, religion or social status." Despite the use of the word "citizen", this clause has been found by the Constitutional Court to mean that the basic rights of foreigners in a similar position to citizens are equally constitutionally protected, with limitations only in the area of political participation (Constitutional Court Decision 93 Ma 120 of 29 December 1994 and 99 Ma 494 of 29 November 2001). Moreover, article 33(1) of the Constitution defines a worker as "one who lives off his/her wages/salary or other similar forms of income, regardless of the type of work" and states that "workers have the right to independent organization, collective bargaining and collective actions for the improvement of their working conditions". This clause recognizes that workers have the need and the right to form organizations and negotiate collectively to achieve material equality with employers, and that beyond recognizing this right, the Government has the responsibility to establish a legal system for creating the conditions in which this right can be exercised. According to the Constitution, these rights can be limited only in the case where foreigners (and native workers) are employed as public servants or in the national defence (article 33(2) and (3)) or only as appropriate for the "sake of the protection of public security, order or common interest" and in this case to the least extent possible (article 37(2)). Section 5 of the TULRAA also provides that "all workers have the right to freely form or join labour unions" and section 9 provides that "union members may not be

discriminated against on the basis of race, religion, gender, political affiliation or social status under any circumstances”.

759. The complainant further indicates that MTU President Kajiman Khapung, Vice President Raj Kumar Gurung (Raju) and General Secretary Abul Basher M Moniruzzaman (Masum) were arrested in a targeted crackdown in the morning of 27 November 2007 between 8.30 a.m. and 9.30 a.m. The complainant alleges that, despite statements from the Immigration Authority and the Ministry of Justice, the men were arrested in the course of a regular immigration raid, there is no doubt that these arrests were planned in advance and constituted repression aimed at stopping the rightful union activities of the MTU: all the arrests were carried out at roughly the same time in front of each man's home or workplace and by an abnormally large number (up to 15) of immigration officers who immediately presented detention documents with the names of the trade union leaders and transferred them to a detention centre three hours' away from the capital by car instead of the usual detention centre near Seoul; the detentions coincided with the intensification of a crackdown against irregular migrant workers (who amount to 230,000, more than half the total migrant workers in South Korea) which had been criticized by the MTU, and plans for a revision of the immigration law so as to reduce migrant workers' rights, which was opposed by the MTU. The complainants add that these arrests are not the only ones targeted against the MTU. Soon after the trade union's establishment in 2005, its first President, Anwar, was arrested in a similar targeted crackdown on 7 May 2005 in the middle of the night. Despite the National Human Rights' Commission affirmation of the anti-human rights nature of his arrest, which included verbal and physical abuse, it was only after nearly a year of detention that President Anwar was granted a temporary stay of detention for health reasons. Further, since the arrest of MTU President Kajiman Khapung, Vice-President Raj Kumar Gurung (Raju) and General Secretary Abul Basher M Moniruzzaman (Masum) on 27 November 2007, some 20 MTU members and officers had been arrested.
760. Finally, the complainant refers to the deportation of MTU President Kajiman, Vice-President Raju and General Secretary Masum. The complainant alleges in particular that despite a commitment that the three men would not be deported while an investigation was under way by the National Human Rights Commission, on 11 December 2007, the three men were woken up in the middle of the night and put in separate vans, escorted by several guards. Twenty minutes later they were taken off the vans and through a small side door, down a hill, through a hole cut by one of their guards in a newly made wire wall and into other cars with more guards waiting for them. Each man was taken to Incheon International Airport separately, accompanied by Ministry of Justice officials, who made reports on the movements of the group on their cellular phones every five minutes. At the airport, they were made to board flights to their native countries of Nepal and Bangladesh. Upon arriving in Dhaka, General Secretary Masum was met by police officers who questioned him for over an hour and told him to return for additional questioning by the prosecutor on 18 December 2007. In addition, the MTU has been informed that the Ministry of Justice plans to pass documents about the General Secretary to the Bangladeshi authorities before this questioning. The complainant adds that the middle of the night deportation was carried out in a secretive and illegal manner, contrary to the promises given. The men were even prevented from contacting family and friends in both South Korea and their home countries.
761. The complainant finally indicates that these facts take place against the background of generalized discrimination against migrant workers, both regular and irregular, and a system geared to create a low-wage labour force that is easily exploitable, a condition desired on the part of the Government and employers. In particular, the employment permit system “binds” migrant workers to their employers and restricts their freedom to change employer (this is possible up to three times), severely restricts the legal residence period,

which is only three years, and raises language and cultural barriers due to lack of translation and education services. The complainant also indicates that the above constitutes a violation of Conventions Nos 87 and 143, the International Convention on the Protection of the Rights of Migrants and their Families and the 1998 Declaration on the Fundamental Principles and Rights at Work. It also refers to cases examined by the Committee on Freedom of Association on the freedom of association rights of migrant workers (Cases Nos 2121 and 2227).

762. In a communication dated 8 May 2008, the complainant provides additional information according to which after the targeted crackdown of 27 November 2007, the MTU, the KCTU and supporters from the labour movement and civil society carried out a 99-day sit-in protest calling for an end to the oppression against migrant workers who organize while rebuilding the MTU; on 6 April 2008, the MTU elected a new leadership, with Toran Limbu as President, and moved forward to fight to protect migrant workers' rights. The new conservative Government, however, strengthened the overall policy of repression against migrant workers and specifically against the MTU, even going so far as to make statements to the effect that union organizing of undocumented migrant workers, such as the MTU, will not be tolerated. In this context, the newly elected MTU President Torna Limbu and Vice-President Abdus Sabur were arrested in the night of 2 May 2008 by ten or 15 hidden immigration officers outside their workplace or home, respectively. Torna Limbu's arrest reportedly involved physical violence and he was refused the use of his cellular phone. While being transferred in a van, President Limbu heard the officers communicate consistently with others stationed near the house of Vice-President Sabur. The vehicles carrying the two trade union leaders met in the street and stopped for a short while. According to the complainant, these acts of repression constitute additional violations of the fundamental labour rights of migrant workers.

B. The Government's reply

763. In a communication dated 10 November 2008, the Government indicates that, as a result of economic and social changes, the Republic of Korea has evolved from a country of emigration to a country of immigration. As a result, it has had to consider the protection of domestic workers, on the one hand, and of foreign workers' human rights on the other. In doing so, it has introduced and implemented various systems, including the current Employment Permit System. The complaint refers to a case which is currently before the Supreme Court, an independent national jurisdiction whose procedures offer appropriate guarantees of impartiality. According to the special procedures for the examination of complaints, "when a case is being examined by an independent national jurisdiction whose procedures offer appropriate guarantees, and the Committee considers that the decision to be taken could provide additional information, it will suspend its examination of the case for a reasonable time to await this decision, provided that the delay thus encountered does not risk prejudicing the party whose rights have allegedly been infringed." [*Digest of decisions and principles of the Freedom of Association Committee*, Annex I, para. 29]. Given the above, the Government requests the Committee to suspend its consideration of the case until after the Supreme Court gives its final ruling.
764. With regard to the substance of the complaint, the Government indicates that on 3 May 2005, a group of 91 foreigners submitted a notification of establishment of a trade union to the Seoul Regional Labour Office of the Ministry of Labour. In conformity with the provisions of the Trade Union and Labour Relations Adjustment Act (TULRAA), the Seoul Regional Labour Office requested on 9 May 2005 the following complementary information: (i) names and addresses of the three union officials and two auditors that were missing in the report; (ii) (a) names of workplaces the union members belong to, number of union members and name of the union head, and (b) a list of union members to see if each member qualifies for employment in the Republic of Korea; and (iii) other related

documents, including minutes of the general assemblies. However, of the complementary information requested, the union only submitted the documents described in (i) and (iii) and failed to provide those described in (ii), arguing that the requested information was not required for a notification of establishment of a trade union under the TULRAA.

765. On 3 June 2005, the competent authorities rejected the union's report on its establishment not only because it had failed to submit all the complementary information requested, but also because it was not deemed legitimate under the TULRAA since its members were mainly foreigners who had no right to stay in the Republic of Korea under the Immigration Control Act. On 14 June 2005, the union filed a case against the administrative authorities, requesting the withdrawal of the rejection. On 7 February 2006, the Seoul Administrative Court ruled against the plaintiff on the following basis: (i) the TULRAA temporarily prohibited the establishment of multiple unions until 31 December 2006 (this period was later extended to 31 December 2009) and section 3(4) of the enforcement regulations of the TULRAA requires a trade union to provide the names of workplaces in which its members are employed when reporting its establishment; (ii) the reporting organization mainly consisted of illegal foreigners; so it is legal to ask for a list of union members, which is necessary to decide if the plaintiff meets the requirements for a legitimate trade union by looking at whether the members are workers eligible to establish a trade union; and (iii) since illegal residents are strictly banned from employment under the Immigration Control Act, they are not considered to have the legal rights to seek to improve and maintain their working conditions and to improve their status, as such rights are given on the assumption that legitimate employment relations will continue; therefore, it is hard to consider illegal foreign residents as workers eligible to establish a trade union.
766. On 21 March 2006, the plaintiff filed an appeal with the Seoul High Court. On 1 February 2007, the Court found in favour of the plaintiff, on the following grounds: (i) the ban on trade union pluralism under the TULRAA is limited to multiple unions established by workers engaged in work of the same kind in the same workplace; so a notification of establishment of a trade union should not be rejected just because of its failure to provide complementary documents not required by law; (ii) even illegal foreign residents should be considered as workers allowed to set up a trade union as long as they actually provide labour services and live on wages, salaries or other equivalent incomes paid for their service; (iii) the restrictions on the employment of illegal residents under the Immigration Control Act are not intended to prohibit foreign workers not eligible for employment from forming a workers' organization to improve their working conditions on an equal footing with their employer. So it is against the law to request a list of union members with no legal ground for the purpose of checking if they hold a residency status. The Government appealed against this decision and the case is pending before the Supreme Court.
767. With regard to the legitimacy of the request for complementary information by the Seoul Regional Labour Office, the Government indicates that this was necessary in order to enable the authorities to check whether a newly established union is a multiple union or not and adds that the Supreme Court said in a ruling that the establishment of a new trade union at a level above the enterprise level, can still be prohibited if such a union has a chapter which already operates as an independent trade union and is capable of independently concluding its collective bargaining and agreement without having to obtain such mandate from the upper-level organization (section 5 of the Addenda to the TULRAA and 4(2) of the Enforcement Regulations of the TULRAA). Furthermore, on the basis of section 2(4) TULRAA, and as recognized in Ruling 93DO855 of the Supreme Court (1996), when receiving a notification of establishment of a trade union, the authorities should look into the existence of an employment relationship between union members and employers or the independence of the trade union; this process is intended to give a trade union legal advantages, such as special immunities, tax exemption, etc., and ensure its normal function. Such a requirement is reflected, according to the Government in

paragraph 275 of the *Digest* which provides for “formalities in ... legislation as appeared appropriate to ensure the normal function of occupational organizations”.

768. The Government adds that the fundamental rights recognized under the Constitution can be divided into human rights and citizens' rights. Human rights, such as human dignity and value, the right to pursue happiness, physical freedom, privacy, etc., are recognized as fundamental rights for all people, regardless of whether they are illegal residents or not. However, such fundamental rights as the right to election, the right of access to public service, etc., should be considered as rights that allow a country to govern and sustain itself rather than universal human rights, hence these rights are not necessarily recognized for foreigners. The right to engage in union activities may share some characteristics with the right to liberty, which is a human right, yet it has more of the characteristics of citizens' rights or social fundamental rights in that the state actively intervenes in industrial relations and stipulates workers' rights necessary for their lives and existence in order to resolve the malaises of capitalism. Therefore, what status foreigners should be given, in particular, illegal residents, in relation to their employment in the Republic of Korea, is a matter decided by law and policy after taking into account the sovereign country's economic situation, employment situation, relations with other countries and international circumstances. It is not something directly guaranteed under the Constitution.
769. The Government adds that section 18(1) of the Immigration Control Act provides that a residence permit is a prerequisite for the employment of foreigners in the Republic of Korea. The labour rights of these foreigners are recognized under the law, e.g., the benefits of national health insurance and industrial accident compensation insurance, etc., under the Act on the Employment, etc. of Foreign Workers. Like other countries' governments, the Korean Government has no obligation to necessarily endow illegal residents with all labour rights. And given the intent of the relevant provisions of the Immigration Control Act (forced deportation of illegal foreigners, criminal punishment for hiring illegal foreigners), recognizing the right to establish a trade union for illegal residents would create a contradictory situation in which the Government deports foreign workers by force and criminally punishes employers who hire them under the Immigration Control Act while recognizing a trade union of illegal residents and guaranteeing their right to collective bargaining and collective action for the future at the same time. This is “likely to cause a serious threat to public safety and public order” as referred to in the *Digest*. Therefore, the relevant provisions of the Immigration Control Act can be relied upon to restrict illegal foreigners' right to establish a trade union. This is necessary in order to efficiently address instability in the domestic labour market, ensure the efficient management of the labour force and maintain working conditions not only for native Korean workers but also for legitimate foreign workers.
770. The Government adds that as foreigners illegally staying in the Republic of Korea are all strictly banned from employment under the Immigration Control Act, they are not in a legal position to seek to maintain and improve working conditions and their status on the assumption that their employment relations will continue. This has been confirmed in a Supreme Court ruling which found that employment relations with any foreigner not eligible for re-employment should be terminated (Ruling 94NU12067 of 15 September 1995). The Government gives protection of fundamental human rights even to illegal foreigners if they have already established an employment relationship; for example, they can receive overdue wages for services rendered or be compensated for occupational accidents. However, this protection is intended for services already provided and is different from giving them the right to establish a trade union, the right to collective bargaining and the right to collective action, assuming that their employment relationships will continue. In addition, since the organization of a trade union by irregular workers does not guarantee that they will be given a status allowing their legitimate stay in the Republic of Korea, the Immigration Control Office, once notified of their illegal stay will take

measures such as deportation according to the law. Thus, it is completely out of the question for illegal residents to conclude a collective agreement through collective bargaining, assuming that their employment relationship will continue, and under such collective agreement, maintain and improve their working conditions, which is the ultimate goal of the establishment of a trade union.

771. The Government indicates with regard to the rejection of the notification of establishment of the MTU, that upon examination of this report, it was found that the President and auditor of the trade union were foreigners and that its by-laws stipulated that the purpose of its establishment was "to oppose crackdown on and deportation of migrant workers and fight for the legalization of migrant workers", etc. Concerning Anwar Hossain in particular, the Government indicates that he had entered the Republic of Korea on a tourist visa on 24 May 1996 and had remained illegally in the country since 25 August 1996, when his visa expired. On 14 May 2005, he was caught up in a crackdown on illegal residents and as an illegal foreigner subject to forced deportation was held in custody. However, he was temporarily released from custody on the ground of treating his illness and attending legal proceedings. His release was conditional on his compliance with the ban on violation of the Immigration Control Act. From then, the release period was extended six times until 31 July 2007. However, during the temporary release period he argued that he had organized a trade union of foreigners and submitted a report on its establishment saying that he had been elected as President. During his stay in the Republic of Korea, he along with social activist groups was engaged mainly in instigating or participating in rallies against sending troops to Iraq, the import of agricultural produce, or crackdown on and deportation of illegal residents. On 26 July 2007, he voluntarily departed from the Republic of Korea.
772. As a result of the above, the authorities rejected the notification of establishment of the trade union for the following reasons: the trade union was composed mainly of illegal residents; the purpose of its establishment stated in its by-laws was beyond the legitimate purposes prescribed under the TULRAA; they disrupted the immigration control order of a sovereign country by opposing crackdown on and deportation of illegal residents and fighting for their legalization; they refused the request for the submission of complementary materials. The Government emphasizes that the administrative authorities have no obligation to issue a report certificate and endow a legal privilege to an organization which has as its head an offender, illegally staying in the Republic of Korea in violation of the Immigration Control Act, has established by-laws against the law and order of a sovereign country, will obviously be unable to accomplish the prescribed goals of a trade union, and has refused the request for the submission of complementary documents. The Government makes comparisons with the situation prevailing in other OECD countries and argues that there are no illegal residents' unions because the authorities strictly control the status of residence and the trade union activities of foreign workers are, to some extent, restricted.
773. With regard to the arrest and deportation of illegal residents, the Government indicates that in order to protect native Koreans and establish immigration control order, the relevant government agencies have jointly conducted crackdowns on illegal residents every year since 2004. Messrs Kajiman Khapung, Raju Kumar Gurung and Abul Basher Moniruzzaman (Masum), had been illegally staying in the Republic of Korea for 15 years and nine months, seven years and seven months and 11 years and three months respectively in violation of the Immigration Control Act, by the time they were caught up in a crackdown. Raju Kumar Gurung in particular, had been deported in 1998 but re-entered the country in 2000 on a forged passport. Although they were illegal residents, they along with some civil activist groups, regularly held rallies dozens of times in front of the Immigration Control Office, demanding the legalization of illegal residents and the introduction of a work permit system. They were mainly involved in activities ridiculing

the exercise of public power and disrupting immigration control law and order, rather than in reasonable labour movements. They even protested against the Korean Government's policies, such as the Republic of Korea/US FTA and sending troops to Iraq, and made empty threats by telling crackdown agents to arrest them if they could.

774. The Government rejects the complainant's allegation that the Government was working on plans to revise the Immigration Control Act to reduce the rights of migrant workers when it arrested the abovementioned illegal residents as, according to the Government, the revision bill was intended solely to clarify the legal grounds for cracking down on illegal residents.
775. The Government adds that Messrs Kajuman Khapung, Raju Kumar Gurung, and Abul Basher Moniruzzaman (Masum) were caught up in a joint crackdown carried out by government agencies aimed at reducing the number of illegal residents. The use of their mobile phones was restricted for security reasons and to ensure that other illegal residents and their employers were not informed of the crackdown. However, the illegal residents were allowed to make phone calls from the detention centre and their mobile phones were returned when they were deported. The joint crackdown team did not target only the individuals in question or illegal residents in general, but also engaged at around the same time, in a massive crackdown on drug use and gambling, unlicensed driving, violence, patrolling areas where foreigners are concentrated or crime-ridden areas. The Government, especially the Ministry of Justice, the Police and the Ministry of Labour, have been conducting such sweeping joint crackdowns once or twice a year since 2004. As a result, it has found tens of thousands of illegal residents and forced them to depart from the Republic of Korea. With the number of illegal residents steadily increasing, the Government is continuously strengthening such crackdowns.
776. The Government clarifies that the illegal residents arrested were taken along with many others to the Cheongju detention centre instead of the nearest detention centre because there was not enough space available in the latter centre. On the morning of 13 December 2007, they were taken from the Cheongju detention centre to Incheon International Airport and then deported to their own countries, including Nepal and Bangladesh. There had been no promise to the National Human Rights Commission not to deport those illegal residents, but rather pending complaints with both this Commission and the Ministry of Justice. However, since it usually takes a long time for the National Human Rights Commission to make its recommendations, any delay in the forced deportation would make the detention of the three individuals long term, which would lead to a human rights infringement. Moreover, the Government has no obligation to wait for the Commission's recommendations on individuals whose illegal stay is an obvious fact. On 12 December 2007, the Ministry of Justice decided to dismiss the appeal filed with the Ministry and on the same day, notified the National Human Rights Commission of its intention and gave written notice of its decision to the illegal residents and their lawyers.
777. The Government emphasizes that the illegal residents who had been illegally staying in the Republic of Korea for ten years or longer had obviously breached the Immigration Control Act by entering the Republic of Korea on a false passport or working illegally. And for such violations, deportation orders had already been issued and the Government had arrested them following legitimate procedures. Furthermore, the consulates and diplomatic missions of their own countries in the Republic of Korea agreed to the forced deportation and cooperated in issuing the necessary passports. Therefore, the Korean Government's action was a legitimate immigration control measure taken according to a sovereign country's law, and has nothing to do with the illegal residents' organization of a trade union.

778. On 13 December 2007, the illegal residents were woken up in the morning and put onto a bus to be escorted to Incheon International Airport in time for the morning flights. But about 30 demonstrators, already informed of the escort plan, blocked the front gate. For fear of missing the flights, the bus got out of the centre through the back gate.
779. With regard to the arrests of Torna Limbu and Abdus Sabur on 2 May 2008, the Government indicates that they were arrested during a crackdown on illegal residents. By the time of their arrest, they had been illegally staying in the Republic of Korea for 16 years and four months and nine years and two months respectively, in violation of the Immigration Control Act. According to the current crackdown guidelines, a crackdown agent, when arresting an illegal resident, should check his/her ID and then show the arrest warrant. In most cases, this legal procedure is observed. However, in case of an emergency, such as when an illegal resident runs away or resists an arrest, it is inevitable to physically put him/her under control first and then check his/her ID and show the arrest warrant. Limbus strongly resisted and tried to run away while other people around him obstructed his arrest. That is why the crackdown agents used physical force during his arrest.
780. The Government adds that arresting illegal residents and deporting them to their home countries is an authority with which a sovereign country is naturally endowed, and is unrelated to the involvement of these individuals in trade union activities. Their status as union officials does not mean that they are granted a legal status of residence and their violation of the Immigration Control Act was obvious. Therefore, the arrest and deportation were legitimate measures.
781. Finally, with regard to the general condition of migrant workers in the Republic of Korea, the Government indicates that the Employment Permit System is aimed to ensure that foreign workers continue to work in the workplace that obtained permission for their employment to avoid disturbances in the labour market; nevertheless, concerned about their human rights, the Korean Government allows foreign workers to change workplaces for a maximum of four times. Taking into account the ILO opinions, the Government is now in the process of inserting the phrase "where labour contract is deemed hard to maintain because of violations of labour laws, such as overdue wages" in the relevant provision so as to further guarantee foreign workers' freedom to move to other workplaces and engage in job-seeking activities if the reason for doing so is not attributable to them. In practice, since the introduction of the Employment Permit System, a total of 73,379 foreign workers have been permitted to move to other workplaces. Finally, various legal and institutional devices have been put in place to eliminate discrimination against foreign workers and protect their rights and interests (legal protection against discrimination, language support, etc.) The Government notes that in recent years, especially among advanced countries, there has been a tendency to strengthen crackdowns on illegal residents to protect the country's own people.
782. In conclusion, the Government indicates that with greater labour mobility resulting from globalization, it is well aware of the need to pay more attention to and come up with measures to improve working conditions for foreign workers and protect their human rights. And in spite of its relatively short history of importing foreign workers, the Republic of Korea has made various efforts to improve the management of foreign workers and protect their human rights, including the introduction of the Employment Permit System. The Government states that it will continue to make its utmost efforts to protect the rights and interests of foreign workers and to guarantee their legitimate establishment of a trade union and involvement in trade union activities. The Government expects the Committee's continuous understanding and cooperation in this regard.

C. The Committee's conclusions

783. *The Committee notes that this case concerns allegations that the Government refused to register the Migrants' Trade Union (MTU) and carried out a targeted crackdown on this union by successively arresting its Presidents Anwar Hossain, Kajiman Khapung, and Toran Limbu, Vice-Presidents Raj Kumar Gurung (Raju) and Abdus Sabur and General Secretary Abul Basher Moniruzzaman (Masum), and subsequently deporting many of them. The complainants add that this has taken place against a background of generalized discrimination against migrant workers geared to create a low-wage labour force that is easy to exploit.*
784. *The Committee notes the Government's request for a suspension of the examination of this case, while waiting for the Supreme Court to render its decision. The Committee recalls that although the use of internal legal procedures, whatever the outcome, is undoubtedly a factor to be taken into consideration, it has always considered that, in view of its responsibilities, its competence to examine allegations is not subject to the exhaustion of national procedures [Digest, Annex I, para. 30]. Moreover, the Committee notes that the issue has been pending before the Supreme Court for more than two years and that during that time, several leaders of the MTU have been arrested and deported. In addition, the Supreme Court decision proceedings concern only the issue of the registration of the MTU, and not the other allegations raised in the complaint. The Committee will therefore proceed with its examination of the case with the aim of providing additional elements for the consideration of the relevant authorities in relation to the international principles of freedom of association.*
785. *The Committee notes that the facts of this case as emerging from the complainants' allegations and the Government's reply are the following: on 3 May 2005, the MTU sent a notification of its establishment to the Seoul Regional Labour Office. On 3 June 2005, the Seoul Regional Labour Office rejected the notification essentially on the following grounds: (i) the union failed to produce documents to prove that its establishment does not violate the provisions of the TULRAA upholding trade union monopoly at the enterprise level; and (ii) the union was composed mainly of illegally employed foreigners "who do not have the right to join labour unions" and its officers are foreigners without legal right of residence and employment. On 14 June 2005, the MTU filed an administrative suit against the Seoul Regional Labour Office which was rejected by the Courts essentially on the grounds that: (i) the union was under an obligation to produce documents proving that the provisions of the TULRAA on trade union monopoly are not violated; and (ii) since illegal residents are strictly banned from employment under the Immigration Control Act, they are not vested with the legal right to seek to improve and maintain their working conditions and to improve their status; such rights are given on the assumption that legitimate employment relations will continue; thus, illegal migrant workers are not eligible to establish a trade union. The MTU appealed against this decision and the Seoul High Court decided on 1 February 2007 in favour of the union on the following grounds: (i) there was no need to produce documents to ensure application of the provisions of the TULRAA upholding trade union monopoly, since these provisions apply in specific circumstances at the enterprise level while the MTU was established above that level; (ii) irregular migrant workers qualify as workers under the Constitution and the TULRAA and therefore, they are vested with legally protected basic labour rights; they are workers allowed to set up trade unions as long as they actually provide labour services and live on wages, salaries or other equivalent income paid for their service; and (iii) the restrictions on the employment of illegal migrant workers under the Immigration Control Act are not intended to prohibit foreign workers from forming a workers' organization to improve their working conditions. As a result, the High Court found that it is against the law to request a list of union members with the only purpose of checking whether they hold legal residence status. The Government appealed against this decision and the case is pending*

before the Supreme Court. In the meantime, several leaders of the MTU have been arrested in successive crackdown operations and in certain cases, deported.

786. The Committee notes that the first issue to be examined is whether migrant workers, even in irregular situations, are entitled to freedom of association and collective bargaining rights. The Committee observes that according to the complainants, the High Court acknowledged in its decision of 1 February 2007, that all workers, including irregular migrant workers, are vested with these rights by virtue of articles 11(1) and 33(1) of the Constitution which guarantee to all workers without discrimination the right to independent organization, collective bargaining and collective action, and sections 5 and 9 of the TULRAA which provide that all workers have the right to freely form or join labour unions and that they should not be subject to discrimination.
787. The Committee notes the Government's arguments that irregular migrant workers are not entitled to freedom of association and collective bargaining rights; their right to establish a trade union depends on their residence status and the existence of a lawful employment relationship which is not possible in their case. The Government considers that the fundamental rights recognized under the Constitution can be divided into human rights and citizens' rights with only the former pertaining to migrant workers and excluding the right of freedom of association and collective bargaining. According to the Government, freedom of association for migrant workers is not directly guaranteed under the Constitution and the issue should be decided after taking into account the sovereign country's economic and employment situation, the need to protect its own nationals, relations with other countries and international circumstances. Moreover, recognizing the right to establish a trade union for illegal foreigners would create a contradictory situation in which the Government deports irregular foreign workers by force and criminally punishes employers who hire them under the Immigration Control Act, while at the same time recognizes a trade union of illegal foreigners and guarantees them the right to collective bargaining and collective action for the future. Foreigners illegally staying in the Republic of Korea are all strictly banned from employment under the Immigration Control Act and therefore are not in a position to seek to maintain and improve working conditions and their status on the assumption that their employment relations will continue.
788. The Committee recalls in this regard the general principle according to which all workers, without distinction whatsoever, including without discrimination in regard to occupation, should have the right to establish and join organizations of their own choosing [*Digest*, op. cit., para. 216]. The Committee further recalls that when examining legislation that denied the right to organize to migrant workers in an irregular situation – a situation maintained de facto in this case – it has emphasized that all workers, with the sole exception of the armed forces and the police, are covered by Convention No. 87, and it therefore requested the Government to take the terms of Article 2 of Convention No. 87 into account in the legislation in question [*Digest*, op. cit. para. 214]. The Committee also recalls the resolution concerning a fair deal for migrant workers in a global economy adopted by the ILO Conference at its 92nd Session (2004) according to which “[a]ll migrant workers also benefit from the protection offered by the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998). In addition, the eight core ILO Conventions regarding freedom of association and the right to bargain collectively, non-discrimination in employment and occupation, the prohibition of forced labour and the elimination of child labour, cover all migrant workers, regardless of status” [para. 12].

789. *As regards the refusal of the authorities to acknowledge the establishment of the MTU and grant it trade union status, the Committee notes that this aspect of the case is pending before the Supreme Court and requests the Government to communicate this judgement as soon as it is rendered so that the Committee may examine this aspect of the case in full knowledge of the facts. The Committee intends to examine this issue in any event at its November 2009 meeting.*
790. *As regards the arrest and deportation of the MTU leaders, the Committee notes that according to the complainants, these acts were planned in advance and constituted repression to stop the rightful activities of the MTU; moreover, the deportation of MTU President Kajiman Khapung, Vice President Raju Kumar Gurung and General Secretary Abul Basher Maniruzzaman (Masum) took place in the middle of the night and in a secretive and illegal manner on 11 December 2007 while appeals were pending to the National Human Rights Commission and despite a commitment on behalf of the Government not to deport the trade union leaders while the investigation of the National Human Rights Commission was under way.*
791. *The Committee notes that according to the Government, arresting illegal residents and deporting them to their home countries is an authority with which a sovereign country is naturally endowed, and is unrelated to the involvement of these individuals in trade union activities. Their status as union officials does not mean that they are granted a legal status of residence and their violation of the Immigration Control Act was obvious. According to the Government, there had been no promise to the National Human Rights Commission but rather pending complaints with both this Commission and the Ministry of Justice against the deportation of the MTU leaders. However, it usually takes a long time for the National Human Rights Commission to make recommendations and any delay in the forced deportation would prolong the detention of the three individuals and would lead to a human rights infringement. The Government was not under an obligation to await for the Commission's recommendations since the illegal stay of the individuals was an obvious fact. The deportation took place on 13 December 2007 (and not on 11 December as alleged by the complainants) after a decision on 12 December 2007 to dismiss the appeal filed to the Ministry of Justice which was notified to the National Human Rights Commission and the illegal residents and their lawyers.*
792. *The Committee cannot fail to observe that the President of the MTU along with other officials, have been arrested shortly after their election to trade union office and despite the fact that they had been in the country for many years. The MTU's second President Kajiman Khapung was arrested four months after the departure of Anwar Hossain, on 27 November 2007, along with Vice President Raju Kumar Gurung and General Secretary Abul Basher Maniruzzaman (Masum) after having spent 15 years and nine months, seven years and seven months and 11 years and three months respectively, in the Republic of Korea. They were subsequently deported to their home countries. The MTU's third President Torna Limbu was arrested on 2 May 2008 along with Vice President Abdus Sabur less than a month after their election to the leadership of the MTU and after having spent 16 years and four months and nine years and two months, respectively, in the Republic of Korea. They were subsequently deported. With regard to the MTU's first President Mr Anwar Hossain, the Committee also observes that it may have been precisely Mr Anwar Hossain's activities in founding a trade union for migrant workers that gave rise to his arrest given that, until that time, he had been working in the country for almost ten years without any apparent incident. Indeed, he was arrested on 14 May 2005, 11 days after notifying the creation of the MTU with him as President to the Seoul Regional Labour Office.*

793. *The Committee recalls that the detention of trade unionists for reasons connected with their activities in defence of the interests of workers constitutes a serious interference with civil liberties in general and with trade union rights in particular [Digest, op. cit., para. 64]. The arrest of trade unionists may create an atmosphere of intimidation and fear prejudicial to the normal development of trade union activities [Digest, op. cit. para. 67]. Moreover, measures of deportation of trade union leaders while legal appeals are pending may involve a risk of serious interference with trade union activities. In this regard, the Committee expresses concern at the allegations according to which General Secretary Masum faced further interrogation upon arrival to his home country of Bangladesh. While the Committee is not in a position to opine as to their legal right to reside in the country, nor is it within the Committee's mandate to examine a country's immigration policy unrelated to freedom of association, the Committee can only once again express its deep concern at the coincidental timing of these actions with the trade union activities of these long-standing workers.*

794. *The Committee requests the Government to avoid in the future measures which involve a risk of serious interference with trade union activities such as the arrest and deportation of trade union leaders shortly after their election to trade union office and while legal appeals are pending.*

The Committee's recommendations

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

- (a) *As regards the refusal of the authorities to acknowledge the establishment of the MTU and grant it trade union status, the Committee notes that this aspect of the case is pending before the Supreme Court and requests the Government to communicate this judgement as soon as it is rendered so that the Committee may examine this aspect of the case in full knowledge of the facts. The Committee intends to examine this issue in any event at its November 2009 meeting.*
- (b) *The Committee requests the Government to avoid in the future measures which involve a risk of serious interference with trade union activities such as the arrest and deportation of trade union leaders shortly after their election to trade union office and while legal appeals are pending.*

CASE NO. 2518

INTERIM REPORT

Complaint against the Government of Costa Rica presented by

- **the Industrial Trade Union of Agricultural Workers, Cattle Ranchers and Other Workers of Heredia (SITAGAH)**
- **the Plantation Workers Trade Union (SITRAP)**
- **the Chiriqui Workers Trade Union (SITRACHIRI) and**
- **the Coordinating Organization of Banana Workers Trade Unions of Costa Rica (COSIBA CR)**