



International Labor Rights Forum

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Pre-Hearing Brief and Notice of Intent to Testify
Case # 004-CP-08
In re. the Philippines Country Practice Petition.

January 10, 2012

ATTN:
William Jackson, Deputy Assistant U.S. Trade Representative for GSP
GSP Trade Policy Staff Committee
Office of the United States Trade Representative
600 17th St., NW
Room 514
Washington, DC 20508

Pursuant to [76 FR 238] (December 12, 2011), the International Labor Rights Forum (ILRF) files this pre-hearing brief in support of the on-going review of freedom of association violations by the Government of the Republic of the Philippines (GRP), Case # 004-CP-08.

Notice of Intent to Testify: Brian Campbell, Director of Policy and Legal Programs, International Labor Rights Forum, hereby provides notice to the Committee of his intent to testify.

Introduction

In 2007, the International Labor Rights Forum (ILRF) filed this petition pursuant to 15 C.F.R. §2007(b) to request a review of the Republic of the Philippines' designation as a beneficiary country under the Trade Act of 1974, Generalized System of Preferences (GSP), 19 U.S.C. §2461 *et seq.*, as amended. The Government of the Republic of the Philippines (or GRP) has failed to takes steps to afford its workers "internationally recognized worker rights" as required under 19 U.S.C. § 2462(b)(2)(G) & (c)(7) and defined in 19 U.S.C. § 2467(4).

Labor leaders and organizers continue to face widespread, systematic abuses, including murder, disappearances, torture, violence, intimidation harassment, and arbitrary arrests.

Furthermore, the Philippine government continues to implement labor laws and regulations intended to deprive workers of their rights to organize. In a report to the World Trade Organization in November 2011, International Trade Union Confederation stated,

Trade union rights are recognised in the Philippines to some extent and with many restrictions. In practice, there is an environment of violence and intimidation against trade unions. Employers and state authorities make use of anti-union practices in order to curb unions' rights. Furthermore, the increasing replacement of long-term employment contracts with subcontracted or contractual labour curtails union membership.¹

Since 2007, when we filed the current complaint, we continue to see little change in the Philippines where labor rights continue to be routinely violated by the Government of the Republic of the Philippines (GRP), particularly by the Armed Forces of the Philippines (AFP). The GRP has declared the intent to initiate reforms and trainings of government officials to promote the principles of freedom of association, those efforts have not yet been undertaken, and those that have are cosmetic at best without any tangible outcomes.

Impunity for these crimes remains rampant, and many workers continue to live in fear of being killed, kidnapped, tortured and arbitrarily arrested. Workers continue to face harassments and anti-union education programs by the AFP and other government officials in the GRP, both at the national and local levels, aimed at undermining principles of freedom of association.

In June 2009, the ILO Committee on Application of Standards conducted a hearing on the Philippine government's compliance with ILO Convention 87 on the right to freedom of association. Just before the hearing, the Philippine government announced that it would accept the long-standing request for an ILO High-level Mission (ILO HLM), which conducted its mission in September 2009. As we wrote in a letter to this Committee last July 2009, the GRP should be commended for finally accepting the ILO's long-standing request. As a result, at that time, we requested that this Committee not take any action and hold open the review pending the successful completion of the ILO HLM and the full implementation of the ILO HLM's recommendations.

ILO High-level Mission was conducted in September 2009; reported its findings in December 2009; and submitted them to the ILO's Committee on Freedom of Association (ILO CFA) and the ILO Committee on Application of Standards' Committee of Experts (ILO CAS) for review and a final determination. In March 2010, the ILO CFA examined the report of the ILO HLM and issued a set of recommendations on each of the cases currently pending before the Committee based on the findings of the ILO HLM.

The ILO HLM and ILO CFA both outline a detailed and comprehensive set of recommendations identifying measures that the GRP must take to come into compliance with ILO Convention No. 87. Rather than addressing each recommendation contained in

¹ http://www.ituc-csi.org/IMG/pdf/wto_review.pdf

the ILO reports, which we will cover more fully in our testimony and post-hearing briefs, we will highlight several key recommendations that we believe have yet to be addressed to demonstrate that, up to this point, the Philippine government has yet to successfully implement the ILO's recommendations.

Extra-judicial killings, disappearances, arbitrary arrest and torture have continued with impunity in 2009, 2010, and 2011.

After reviewing the efforts of the government to end impunity, the ILO CFA stated that "the advances in prosecuting and convicting perpetrators of violence against trade unionists are still entirely insufficient."² The Committee noted, "The absence of judgments against the guilty parties creates, in practice, a situation of impunity, which reinforces the climate of violence and insecurity, and which is extremely damaging to the exercise of trade union rights [see **Digest**, op. cit., para. 52]."³

Extra-judicial executions, disappearances, torture, and arbitrary arrest have continued with little progress made to end the abuses or hold the perpetrators accountable. According to the Center for Trade Union and Human Rights (CTUHR), five more labor leaders were killed and two escaped assassination attempts in 2009.⁴ Among those killed are Sabina Ariola, leader of urban poor and informal workers organization from Laguna; Carlito Dacudao, Edwin Oyeman and Reynaldo Bucaling from National Federation of Sugar Workers (NFSW) in Negros. Adelaida Calosa of the NFSW and Joel Ascutia, a leader of transport workers in Bicol escaped assassinations attempts.

In 2010, three more labor leaders and organizers have been killed in 2010 so far. **Eduard Panganiban**, 27, was killed on June 2, 2010. Panganiban is a maintenance employee of Takata Philippines, Inc. and Secretary of workers' union Samahang Lakas ng Manggagawa sa Takata or (United Strength of Workers in Takata or SALAMAT-Independent). He was on his way to work on board his motorcycle when two men on a motorcycle wearing ski-masks shot him fired at him shot 13 times, including one to the head, Laguna, south of Manila.⁵ In the month leading up to his killing, neighbours had been approached by suspicious men who were asking information about Panganiban.

Benjamin Bayles, 44, was murdered on June 14, 2010 allegedly by members of 61st Infantry Battalion Philippines Army.⁶ At around 4:30 pm, Bayles was with his friend waiting for public transport near the waiting shed in Sitio Antolo Bgy. Buenavista when a couple of unidentified men riding a Honda motorcycle stopped in front of the victim and using a .45 caliber pistol shot Bayles, the other man driving the vehicle also fixed shots at

² CASE NO. 2528 INTERIM REPORT. (hereinafter "CFA KMU Report") Complaint against the Government of the Philippines presented by the Kilusang Mayo Uno Labor Center (KMU) para. 1152.

³ Id. at para. 1154

⁴ Center for Trade Union and Human Rights, Yearend Report for 2009, *Tides of Crisis on the Workers' Movement*. December 2009 available at <http://www.ctuhr.org/reports/tides-crisis-workers-movement> (last visited July 20, 2010.)

⁵ <http://www.ctuhr.org/news/urgent-appeal-%E2%80%9Cmilitary-agent-and-labour-dispute-behind-recent-killing-labor-leader%E2%80%9D-union-says>

⁶ <http://www.ctuhr.org/news/negros-farm-worker-murdered-victims-ejk-nfsw-now-11>

the victim. On April 2010, Army soldiers belonging to the 61st IBPA encamped at the barangay center of Bgy. Buenavista. Witnesses say that since the last week of April, army soldiers had been asking the whereabouts and other pertinent information about Bayles. Bayles is the 11th NFSW who became victim of extrajudicial killings since 2001.

Josephine Estacio, 46, was shot and killed by unidentified assailants on July 12, 2010 in front of her students at Tenejeros Elementary School. Ms. Estacio is a mother of four children and teaches first grade. She is a member of the Bataan Public School Teachers Association, which is an affiliate of Action and Solidarity for the Empowerment of Teachers (ASSERT). Her union has complained that the police responded by asserting that she was an “activist” and have condemned the police for not undertaking a full investigation of the Ms. Estacio’s killing.

The GRP has failed to hold the intellectual instigators responsible by implementing the doctrine of command responsibility.

The ILO CFA called on the GRP to investigate the “intellectual instigators” and to implement the recommendations of the Melo Commission and the UN Special Rapporteur on extra-judicial executions “to implement the doctrine of command responsibility . . . in respect of all acts of violence.”⁷

Military officers who have been credibly alleged to have committed human rights abuses continue to enjoy impunity for their violations. In particular, as we have noted to the Committee on several occasions, retired General Jovito Palparan has managed to escape investigation by the Philippine government despite credible evidence that he is responsible for widespread human rights violations, including violations of freedom of association, during the past decade while in command. The Melo Commission, which was tasked by President Arroyo to investigate the killings, called for the immediate investigation of General Palparan, in its final report to the president in November 2007.

Since then, witnesses came forward to point fingers at General Palparan. In one case, the Manalo brothers – two brothers who had been abducted by the military but managed to escape – successfully petitioned the court for a *writ of amparo* to provide them protection from the military after positively identifying General Palparan from the military camp where they were tortured. When granting the writ, the court of appeals found that General Palparan was directly involved in the abduction of the brothers. The supreme court upheld the lower court’s ruling in *Secretary of National Defence vs. Manalo brothers*, prompting lawmakers to renew calls for investigation.

Yet, despite the growing body of evidence that General Palparan, who sat among the military’s highest ranks, maybe responsible for the rise in killings since 2001 in areas under his command, the Philippine government has taken no steps to open a full investigation. When the Melo Commission questioned the heads of the police and the military about ongoing investigations into Palparan, neither the military nor the police believed that they had the responsibility to investigate him. In fact, General Esperon, then

⁷ CFA KMU Report at 1121.

head of the military, stated that while the military has authority to open an investigation, “to investigate General Palparan during the time when he was neutralising the NPA [New Peoples’ Army, Communist Party of the Philippines] would have been counterproductive.”

Though Palparan is retired from the AFP, he has continued to enjoy his impunity and is working closely with the Alliance for Nationalism and Democracy (ANAD), a fringe anti-communist organization which has been working with the military to implement anti-KMU training programs, particularly targeting workers at Dole Philippines plantation in Mindanao. (See *infra*)

The GRP, particularly the Armed Forces of the Philippines, continues to conduct anti-union campaigns and subjects labor leaders and organizers to surveillance, harassments and anti-union “education programs” intended to undermine trade union disfavored by the government.

The ILO CFA called for the government (1) to investigate the military’s anti-union campaigns that harass and threaten union leaders and organizers;⁸ (2) to stop using orders of battle to target and then publicly vilify union leaders in campaigns aimed at dismantling unions disfavored by the AFP;⁹ and (3) to respect “the right, without distinction whatsoever, in particular without discrimination on the basis of political opinion, to join the organization of their own choosing . . . whether or not they support the social and economic model of the Government, including the political model of the country.”¹⁰

The AFP continues to conduct anti-union symposiums they describe as “anti-communist” public awareness programs. As described more fully in our testimony in 2008 regarding the military programs around Dole Philippines, Philippine government forces nationwide have been working with private individuals, corporations, and organizations to systematically subject many local unions, mostly affiliated to the Kilusang Mayo Uno, to anti-KMU campaigns intended to erode support for KMU unions by instilling a sense of fear and distrust in communities where the KMU has enjoyed widespread support. The programs seek to create divisions within communities and local KMU unions in order to erode support for these democratically-elected unions the AFP alleges are communist and who are accused of impeding the government’s pro-business investment policies.

According to the ILO CFA, the military admits to holding community meetings on trade unions and worker representation as a part of their Integrated Area Security and Public Safety System and the Integrated Territorial Defence System. According to the military, they are teaching people how to protect themselves from false awareness campaigns through public awareness programs. Denying that the program content violated the rights of the workers, the AFP simply viewed their program as engaging the community to

⁸ Report. High-level ILO Mission to the Philippines on the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), November 2009 at 43. (“ILO HLM Report)

⁹ CFA KMU Report at 1179

¹⁰ Id. at para. 1145

establish good relations, and, according to the AFP, “it was possible that this might lead to perceptions of harassment.”¹¹ The programs are not held in direct relation to labor disputes, as many of the targeted unions are currently under CBA’s. Rather, they are part of a longer-term strategy to erode support for unions disfavored by the government and the military.

Universal Robina Corporation

For example on Last March 15 and 18, 2010, military officers from the 16th Infantry Battalion held a series of anti-communist and anti-union symposia for the workers of Universal Robina Corporation’s agribusiness unit, Robina Agri Partners, at Rubina Farm 5 inside the premises of the said company entitled “Peaceful and Harmonious Relationship of Labor and Capital.” Robina Farm employees are members of the Robina Employees Union-Farm Division-ANGLO-KMU. According to participants, the military program began by discussing the history of communism, but quickly moved into topics related to their trade union activity and their employer. The military also said that the workers should not join their union in their fight against corruption because essentially all people are corrupt in their own ways. Asserting that the AFP has nothing against unions but urged the workers not to participate in union activities that may harm the good relationship between workers and employers. She asked the workers to stop forwarding part of their union dues to their federation (which is ANGLO-KMU) and just save it to build a cooperative. She then offered assistance in organizing and running the cooperative. The military and management also discussed holding more programs on different farms of Robina in Antipolo. The management approved to the proposal stating that it is good for the workers to be “educated” by the military regarding peace and order inside the company. Union officers tried to convince the manager not to allow the military’s anti-KMU symposiums but the management refused.

The union officers said that the military has no business inside their workplace. “Hindi nila kailangan magkaroon ng pag-aaral sa industrial peace dahil wala naman malalang sigalot sa pagitan namin at ng management. Katatapos lang ng CBA signing namin noong isang taon.” (*There is no need to hold lectures on industrial peace because there is no conflict between us [the union] and the management. We just finished signing a CBA last year.*)

Union officials also report being placed under surveillance by military officers.¹²

Dole Philippines

In 2008, we submitted briefing and testimony before this committee in response to a request by Dole Packaged Foods for a CNL waiver. At that time, ILRF opposed granting a waiver for pineapples from the Philippines on two grounds: (1) the Philippines was currently under review for GSP eligibility for being in violation of the GSP eligibility

¹¹ ILO HLM Report at 43.

¹² See <http://www.ctuhr.org/news/militarization-robina-farm-intensifies-military-holds-series-anti-communist-and-anti-union-symp>

requirements, and (2) Dole Philippines is a direct beneficiary of the programs by the Armed Forces of the Philippines and the Government has failed to take action to protect Dole Philippines workers from the abuses.

From 2007 continuing through 2010, the AFP has been conducting an anti-KMU campaign to Dole Philippines in Polomolok and Tupi, South Cotabato. Explaining reasons for bringing their campaign to Dolefil and beginning efforts against AK-NAFLU-KMU, Lt. Col. Richard Santiago declared that “Security problems can also come from the ‘inside’” and accused the union of “infiltrating” Dole Philippines.¹³ Lt. Col. Santiago ignored the fact that AK-NAFLU-KMU was democratically-elected in two consecutive elections and that AK-NAFLU-KMU leaders have worked on average for Dolefil for more than 18 years.

To assist in their anti-KMU campaign, the AFP has been working with the Alliance Nationalism and Democracy (ANAD) in its anti-union campaign. At Dole Philippines, ANAD was responsible for developing the curriculum and implementing the programs promoted by the military. ANAD worked closely with a group of former union leaders at Dole Philippines lead by Mr. Frances Gales, who later formed the union LEAD-PH to conduct anti-communist and anti-KMU symposiums. Herbolingo is a military contractor and produces anti-communist, anti-union propaganda programs for the 5th Civil Relations Group and for the military’s Joint Task Force GenSan which was formed in 2002.¹⁴ According to Herbolingo, he also works on anti-KMU programs in “Del Monte-Bukidnon, Dole Stanfilco, Lapanday Group of companies, Marsman State Plantation and many others . . .”¹⁵ Herbolingo was awarded special honor by President Arroyo and the military for his role in the military’s programs.¹⁶ As discussed before, after retiring from the military with full honors, General Palparan joined with ANAD party-list to continue the work he started in the military.

ANAD and LEAD-PH worked with the military for three years to organize anti-KMU “education programs” in the local barangay hall other places adjacent to Dole Philippines facilities in South Cotabato. The “education programs,” referred to as “Public Awareness Symposiums” from September 2007 – December 2008, later called “Industrial Safety Focus” seminars from 2009 to 2010, take place regularly. The seminars are a joint effort by UR Dole leaders, Chito Herbolingo, and military personal, including Maj. Aguilar and soldiers from the 27th Infantry Battalion. According to Lt. Col. Santiago, the AFP has been conducting the “information drives on a regular basis among all labourers of Dole” in order to combat KMU labor organizing.¹⁷

¹³ Miller, Brad. “Left extremists continue to punish Big Business.” InterPress Service. March 13, 2008 attached hereto as Exhibit L.

¹⁴ Philippine Information Agency, Press Release. “JTF GenSan steps up campaign vs communism, terrorism.” November 10, 2008. [“The symposium was followed by a documentary film showing the campus infiltration by the Communist Party of the Philippines and its armed wing the new People’s Army (CPP-NPA), which was edited by Chito Herbolingo.”].

¹⁵ E-mail to Campbell from Herbolingo, March 29, 2010.

¹⁶ See Industrial Security Forum (ISF) Documentary, “Herbolingo gets Award from Pres. Arroyo.

¹⁷ Miller, Brad. “Left extremists continue to punish Big Business.” InterPress Service. March 13, 2008.

The ILO HLM and ILO CFA have expressed strong concerns regarding allegations of “intimidation by the armed forces . . . that need to be investigated and redressed.”¹⁸ The ILO called for investigations into allegations that the military, as part of its counter-insurgency campaign, have “taken it upon themselves to invite workers to community forums where they set out to educate the workers in the exercise their organizational rights.” The ILO has reported that “[m]any workers have felt this to be particularly threatening and a warning to then not to join certain unions that may not be appreciated by the army.”¹⁹ Recognizing that the military has a “role to play in ensuring law and order”, the ILO HLM and ILO CFA nonetheless criticized the government’s approach of making blanket and generalized accusations accusing unions accused of supporting the insurgency, thereby “stigmatizing” the workers’ elected leaders of the local unions.²⁰ The ILO CFA “supports the conclusion of the high-level mission that incidents of intimidation by the armed forces need to be independently investigated and rapidly redressed.”²¹

Finally, the ILO CFA has called on the GRP to take the necessary measures to:

(i) bring to an end prolonged military presence inside workplaces which is liable to have an intimidating effect on the workers wishing to engage in legitimate trade union activities and to create an atmosphere of mistrust which is hardly conducive to harmonious industrial relations; (ii) to ensure that any emergency measures aimed at national security do not prevent in any way the exercise of legitimate trade union rights and activities, including strikes, by all trade unions irrespective of their philosophical or political orientation, in a climate of complete security; and (iii) to ensure the strict observance of due process guarantees in the context of any surveillance and interrogation operations by the army and police in a way that guarantees that the legitimate rights of workers’ organizations can be exercised in a climate that is free from violence, pressure or threats of any kind against their leaders and members. The Committee requests to be kept informed in this regard.²²

In some cases, other agencies of the Government operate in violation of internationally recognized workers rights. Philippine government entities, both national and local, continue to support in practice anti-union organizing policies in the EPZs based on discriminatory policies.

The Philippine Government’s policy to undermine the right to freedom of association, particularly through publicly by labeling the KMU and other independent unions as

¹⁸ ILO HLM Report at 43.

¹⁹ ILO HLM Report at 43.

²⁰ ILO HLM Report at 34. [“The HLM stressed that the military had clearly a key role to play in ensuring law and order in the country, but that there needed to be a better understanding of the meaning of labor relations and the importance of not stigmatizing unions and their leaders by making blanket linkages to the counterinsurgency.”] See also CASE NO. 2528 INTERIM REPORT Complaint against the Government of the Philippines presented by the Kilusang Mayo Uno Labor Center (KMU) para 1182.

²¹ ILO CFA KMU Report at 1178

²² Id. at 1184.

supporters and recruiters for the New People's Army, is strongly backed and implemented by the Philippine business community as well, and the collaboration runs deep. Often working together, Philippine government institutions, whether at the national level or the local level, and companies engage in joint campaigns to discriminate against particular unions and to influence certifications elections. During one recent audit conducted by Italy-based SGS in response to a complaint lodged under the SA8000 program by the union at Dole Philippines alleging government and management discrimination in violation of ILO conventions 87 and 98, the auditors conducted an anonymous canvass of HR managers across the Philippines who they work with and reported,

“As per information given by the majority of HR Managers and practitioners in Laguna, Cebu, Clarke field Pampanga, Tarlac, Davao . . . ; they will allow their employees to form a trade union of their choice **but not KMU** since this is one of the trade union implicated in several killings done by the CPP-NPA here in the Philippines (copy of evidences can be browsed in www.Youtube.com/c/oANADPartylist). This Party list is supported by majority of communities and military here in the Philippines. Due to this reason, business managers/owners are encouraging their workers to disaffiliate with KMU . . . Also, as far as I can remember, based on our interview with Mr. Teruel last audit, he told us that he is being convinced by Mr. Kevin Davis to disaffiliate to the KMU group also.”²³

Dole Philippines was also one of those companies who actively supported efforts by ANAD party-list to break the workers' democratically elected union. The same audit of Dole's management systems noted that Dole Philippines management facilitated the AFP/ANAD programs. These in March 2011, just two weeks after the AFP/ANAD programs had resulted in an election victory for LEAD-PH over the KMU incumbent union, investigators from the AFP confirmed to the Philippine Commission on Human Rights that Dole Philippines management invited ANAD to conduct anti-KMU programs. The AFP has not yet completed its investigation AFP-supported abuses at Dole Philippines.

In June 2011, the Employers Confederation of the Philippines awarded Dole Philippines its highest honor as employer of the year.

Hoffen Industries

As another example of the government/industry collaboration to undermine rights, during the ILO High-level Mission in September 2009, union leaders from a Cavite-based garment manufacturer, **Hoffen Industries**,²⁴ lodged a formal complaint seeking relief from a combined campaign of the local government and company management to blatantly interfere with union organization through threats, harassment, intimidation,

²³ SGS Management Systems Certification Audit Summary Report of Dole Philippines, Inc. conducted on June 29 – July 3, 2009.

²⁴ Hoffen Industries produces garments for brands like Ann Taylor and Ralph Lauren

discrimination, and termination of union members and officers. Again, local village officials became a constant presence in the factory, as well as police officers and government consultants.²⁵ When the management created rival unions to the worker-supported NMHI-OLALIA-KMU, it was clear that government officials and consultants had been instrumental in their organization.²⁶ Officials from Provincial Government's Office (OPG) actively intimidated union members and officials, urging them to disaffiliate with the union, and even paying members house calls to discourage unionization. During the certification of the union, the employees were warned that they would be monitored and that their vote would be recorded. OPG officials spoke to employees and openly attacked the unions as leftist groups, urging them to instead vote for the management-backed union. In Cavite, workers are also forced to pre-qualify for work in the EPZ by obtaining a clearance by local police after the local authorities require them to attend anti-union seminars.

The Department of Labor and Employment continues to assume jurisdiction over labor disputes in violation of international standards and efforts by the DOLE clarifying the assumption of jurisdiction (AJ) procedures were insufficient.

In its March 2010 findings and recommendations, the ILO CFA continued to condemn the Philippine government's abuse of Assumption of Jurisdiction and mandatory, non-voluntary arbitration. Condemning the firing of over 200 workers who staged a peaceful picket at a Toyota factory in 2001 who were still out of work, the Committee stated unequivocally the assumption of jurisdiction order is "itself contrary to freedom of association principles, and as liable to lead to a worsening of an already deteriorated situation . . ." ²⁷ The ILO repeated that the Philippine AJ power "is not compatible with the principles of freedom of association."²⁸

As discussed in our 2007 complaint, the Philippine labor law provides the Secretary of Labor and Employment wide discretion to determine when to issue an Assumption of Jurisdiction order to compel binding arbitration. According the Philippine government, AJ orders are used sparingly where most labor disputes are resolved before reaching that stage. However, as we have demonstrated, the Philippine government uses the AJ power in an overly expansive manner depriving many unions, particularly those affiliated with the KMU, of the right to strike.

In response to the ILO's continued criticism of the Secretary's use of the AJ power, the Philippine Department of Labor and Employment announced an intention to submit "proposed legislative reforms . . . to amend section 263(g) of the Labour Code which authorizes the DOLE Secretary to assume jurisdiction over labour disputes imbued with national interest." According to the Government, the legislation will "limit the

²⁵ ILO Complaint: Nagkakaisang Manggagawa Sa Hoffen Industries-OLALIA. September 25, 2009. (on file with ILRF)

²⁶ *Id.*

²⁷ CASE NO. 2652, Complaint against the Government of the Philippines presented by the Toyota Motor Philippines Corporation Workers' Association (TMPCWA) by a communication dated 12 May 2008 at para 1216.

²⁸ *Id.* at para 1215.

assumption of jurisdiction to the ILO's concept of "essential services".²⁹ As the ILO noted, the Philippine government has been promising legislative reforms to the AJ law for nearly 10 years now and have failed to muster the political will to secure passage. Furthermore, as DOLE itself seems to admit in its filings before this committee, the Secretary of Labor and Employment is not ever required to assume jurisdiction over a dispute, and, if the DOLE's statistics regarding AJ orders are true, the Secretary usually chooses not to assert jurisdiction. Therefore, there is nothing preventing the Secretary from refraining abusing his discretion when assume jurisdiction in industries outside the "essential services."

Recognizing that waiting for a legislative fix to the problem would be time consuming and hardly assured of passage, and in view of his broad discretion when asserting jurisdiction, the DOLE has issued its own regulatory reform by amending Department order No. 40-G-03, which implements the Secretary's broad AJ discretion, to include procedural requirements purporting to limit the Secretary's broad discretionary powers. Unfortunately, the newly revised Order 40 has done little to reform the abusive discretion of the Secretary of Labor and Employment because, according the new order, the Secretary can still assume jurisdiction over a dispute and compel mandatory arbitration provided that (1) both parties have requested the action; (2) upon request by one of the parties, or (3) on its own initiative; the only change seemingly being the new requirement to hold a conference of the parties prior to the Secretary asserting broad discretion to issue an order.³⁰

Philippine Airlines

Almost immediately following DOLE's issuance of a new AJ guidelines, the Secretary of Labor assumed jurisdiction over a labor dispute at Philippine Airlines, Inc. on April 26, 2010. In a remarkable process that has been unfolding for more than two years that was conducted in a manner directly contrary the ILO's recommendations on the use of the AJ powers, the Philippine Department of Labor assumed jurisdiction over and decided a labor dispute that resulted in the firing of more 2,600 employees and the demise of a union that had represented workers for more than 60 years. In the process, the Philippine government interfered with 60 years of trade union representation, and in the process undermined the sanctity of the collective contract and good jobs.

In August 2009, company management sought to take advantage of a down year financially for the Airline in August 2009 and, during a routine meeting with the employee's union, Philippines Airlines Employees Association-TUCP, the company announced plans to fire more than 3,500 employees. Management informed the union that it would eliminate more than more than 10 departments, including Information Technology, Human Resources, Benefits, Legal, Medical, Reservations, Ticketing, Accounting, Airport Services, and Catering, and that nearly every member of the union was going to lose their job.

²⁹ ILO CFA KMU Report at 1208.

³⁰ DOLE, Department Order 40-G-03 (April 3, 2010), *Amending Rule XXII, Book V of the Omnibus Rules Implementing the Labor Code*.

Revising the plan two weeks later, airline management announced instead that only 2,600 workers from the Airport Services and Catering Division would lose their jobs. The company was going to hire a service company to provide the same services, and if they wanted, they would be hired by the airline's service company if they applied for a job. After being rehired, the workers were allowed to return to their old jobs, but only after having lost their union, their contract, their seniority and their job security.³¹

With a one year voluntary moratorium on the on collective bargaining agreement set to expire soon, a concession granted to management by the union in good faith years before during a difficult economic year for the airline, management announced that they would implement the fire and re-hire outsourcing scheme by November 15, 2009. PAL needed to act quickly before the CBA came into effect or they would be bound by provisions their previous agreement with the union not to outsource their jobs.

Protesting that firing 2,600 union members would be a clear violation of the letter and spirit of agreements between the union and management, the union formally notified company management that they would be willing to re-negotiate the remaining four years of the existing CBA that wasn't set to expire until 2013. With the assistance of government mediators, the union met with PAL management over the next two weeks, but management refused to discuss anything related to its fire-and-rehire outsourcing scheme. The mediation ended in failure.

Facing a mass layoffs and an end to their 65 year old union under PAL management's fire-and-re-hire outsourcing scheme, PAL's employees voted in January 2010 to authorize a strike. In February 2010, PAL employees began staging protests, and in a testament to the power of a strong union, PALEA's members also went to the polls for routine leadership elections in February and elected new leadership.

Company management announced to all employees in April 2010, just two weeks after the new union leadership had taken the helm, that they planned to move forward with their "fire and re-hire" outsourcing scheme. PAL management also announced that more than 2,600 employees would be sent notices of termination through registered mail.

Afraid that the union would go on strike, which would have been a legal exercise at that time since the union had already conduct the legally mandated strike vote and waited the legally mandated cooling off period, PAL management appealed to the Philippine Department of Labor to assume jurisdiction over the labor dispute and require the union to submit to compulsory arbitration. This would prevented from exercising their right to strike as well as end the union's effort to negotiate a solution with management through the collective bargaining process. Now, whether they wanted to or not, the union was required to submit to the power of the Secretary to compel arbitration, where the Secretary herself would ultimately decide the outcome. On April 26, 2010, the Philippine Government granted the company's request, and the union was enjoined going on strike.

³¹ See In re Labor Dispute at Philippine Airlines, Inc., O.S. AJ No. 004-2010.

In June 2010, as one of the final acts of the Arroyo Administration, the Secretary of Labor pre-empted the compulsory arbitration process, which was still on-going, and issued a decision granting the PAL management the legal authority to proceed with its fire-and-rehire outsourcing scheme and to forgo the collective bargaining process. In its decision, the Secretary of Labor upheld outsourcing as a “valid exercise of managerial prerogative.” Stunned by the decision, PALEA appealed the decision to the Philippine courts, where the case lingers today unresolved.

While the case lingered in the courts, the Philippine Department of Labor stepped in again in October 2010 to make clear that PAL’s fire and rehire outsourcing scheme was legitimate management prerogative could not be constrained by law or collective contract. Upholding management’s decision to fire more than 2,600 long-time employees, Secretary of Labor Rosalinda Baldoz, appointed by then recently elected President Aquino, upheld PAL management’s right to fire its 2,600 workers to implement the outsourcing scheme. As Undersecretary of Labor for President Arroyo, Secretary Baldoz had chaired the arbitration hearings between PAL and PALEA. Gerry Rivera, president of PALEA and Vice-chair of Partido Ng Manggagawa (PM) condemned the decision: “Baldoz’s order means the green light for contractualization at PAL via a retrench-rehire scheme. Pal will retrench 3,000 regular unionized workers who will be rehired as contractuels . . .”³²

With the Department of Labor fully in management’s camp, and out of all other options, PALEA appealed to Philippine President Benigno Aquino who took up the case under pressure from the Philippine trade unions, who had united around the union party in solidarity, partly out of fear that the precedent is an attack on everyone’s right to freedom of association and to bargain collectively. In August 2011, President Aquino endorsed the decision of the Secretary of Labor, and agreed to allow PAL management to go forward with the fire-and-rehire outsourcing scheme. With the President’s stamp of approval, PAL management fired all 2,600 employees on October 1, 2011.

Most of the workers refused to re-apply for job at the outsourcing firm and have appealed to the courts for relief from the President’s order.

Toyota Philippines

As demonstrated by the Philippine Government’s actions at Toyota Philippines, the government’s use of its AJ powers are part of the foundation of a failed labor justice system. In 2010, the ILO condemned the firing of over 200 workers who staged a peaceful picket at a Toyota factory in 2001, all of whom were fired because otherwise legal actions were made illegal by the Secretary’s AJ order. In its report, the ILO CFA stated unequivocally that the assumption of jurisdiction order is “itself contrary to freedom of association principles, and as liable to lead to a worsening of an already

³² Perhaps recognizing that her decision would significantly hurt PALEA’s members, Secretary Baldoz ordered the company to pay some additional compensation in the form of a severance package.

deteriorated situation . . .”³³ The ILO repeated that the Philippine AJ power “is not compatible with the principles of freedom of association.”³⁴

Beginning in the late 1980s, when Toyota established several factories in the Philippines to produce both autos for export as well as auto parts, Toyota’s hourly employees tried to form a trade union to bargain with management. Each time, Toyota management would tie the initiative up in legal proceedings using the Philippines’ management-friendly labor laws that allowed companies to interfere in certification elections. Despite the relentless and expensive campaigns against the formation of a union and the initial dismissal of the petition for certification by the Philippines Bureau of Labor Relations (BLR), the Toyota workers, who had formed the Toyota Motor Philippines Company Workers Association (TMPCWA), won their petition when the Secretary of Labor overturned the BLR decision and ordered a certification election (CE) in June 1999. On March 8, 2000, nearly eight months after Secretary ordered the election, the TMPCWA won in a close vote.³⁵

The TMPCWA immediately sought to open negotiations on the long awaited CBA and provided their opening negotiating demands to management. Ignoring the unions demand for negotiations to open, management instead appealed the results of the election arguing that nearly 100 workers had been denied the right to vote in the election. The TMPCWA had successfully challenged the ballots during the election on the ground that the workers were really supervisory employees and not a part of the bargaining unit. With their appeal lodged, Toyota management has refused to recognize and negotiate with the TMPCWA.

When DOLE finally set a hearing on the company’s appeal for February 21, 2001, or more than one year after the CE, nearly 300 rank-and-file members of the TMPCWA gathered for a peaceful assembly before DOLE to protest the Toyota’s long-standing refusal to recognize the union. Though the Union had notified management of their intent to attend the hearings and offered to make up production on scheduled rest days, the company refused. When the union went forward with the peaceful assembly anyway, Toyota fired more than 227 union officers and members and suspended 64 others.

Angry at what they called illegal dismissals, which decimated the union’s leadership ranks and its base, the union filed a notice of strike and, after waiting through the legally mandated cooling-off period, walked out to the picket lines in late March 2001.

Appealing to the Secretary of Labor for help, Toyota was able to end the strike when the Secretary of Labor assumed jurisdiction over the dispute and ordered parties to back to negotiation. For the next five years, though, Toyota just refused to recognize and bargain with the union despite the DOLE order arguing that they were still the appealing the results of the original certification election. Even when the Supreme Court stepped in to side with the union in September 2003, Toyota ignored the order arguing that the

³³ CASE NO. 2652, Complaint against the Government of the Philippines presented by the Toyota Motor Philippines Corporation Workers’ Association (TMPCWA) by a communication dated 12 May 2008 at para 1216.

³⁴ Id. at para 1215.

³⁵ 503 votes were in favor of the TMPCWA and 440 against with 105 “challenged ballots”.

decision was not final. When the National Conciliation and Mediation Board (NCMB) called Toyota to a series of conciliation meetings with the TMPCWA, management ignored the request.

In 2005, still without a CBA, a union or a decision by the Court of Appeal, Toyota workers couldn't wait any longer and decided to try organizing another union, the Toyota Motor Philippines Company Labor Organization (TMPCLO) and filed a petition for certification with the Department of Labor and Employment. In a move strongly condemned by the ILO CFA, the DOLE decided to grant the TMPCLO's petition on the grounds that "under these present circumstances, it would appear that there was a shift in allegiance on the part of the employees", and that the decision is "in harmony with the Secretary's recognition of the desire of the majority of the employees to conduct a certification election, and their need to be represented by a labor union in the negotiating table." DOLE also cited a substantial change in the workforce due to down-sizing. In making its decision, DOLE ignored that fact that the TMPCWA's appeal was still pending at the Court of Appeals; the union's ranks had been decimated by the mass firing in 2001; and that Toyota had refused to reinstate the fired union supporters.

When TMPCLO moved quickly to implement DOLE's order, Toyota dropped its longstanding policy opposing unions and agreed to clear a path to a smooth certification election by dropping its insistence that 100 supervisors have a right to vote in the rank-and-file election, which was the sole basis of their appeal of the 2000 CE results favoring TMPCWA. Citing the ease at which the TMPCLO was able to secure a CE order and Toyota's sudden change of position to clear the path for a CE, the TMPCWA accused TMPCLO of being a pro-management, yellow union organized to replace the TMPCWA and began a sustained public campaign against the TMPCLO starting with unsuccessful lodging of unfair labor practice charges alleging that the TMPCLO is a company dominated union.

Though the TMPCWA appealed to stop the new CE pending resolution of their still pending case at the Court of Appeals, TMPCLO defeated the weakened TMPCWA in the CE conducted on February 16, 2006 by a vote of 424 to 237 with 210 challenged ballots. The TMPCWA appealed the results arguing that the TMPCLO did not have the votes of a majority of the workers.

The Court of Appeals consolidated all appeals related to Toyota Philippines, including Toyota's appeal of the TMPCWA CE victory pending since 2001. On April 2, 2008, the Court of Appeals sanctioned the decisions of the Department of Labor by allowing TMPCLO to remain the sole and exclusive bargaining agent as a result of the 2006 CE, and that the yet-unresolved 2001 CE, which TMPCWA won, is now moot.

The ILO Committee on Freedom of Association (ILO CFA) has condemned the firings as a violation of ILO conventions 87 and 98. Despite repeated calls by the ILO CFA for the reinstatement of the workers and the recognition of the TMPCWA, Toyota has refused, offering only severance packages. At the same time, as a result of the strikes, more than

18 workers are facing criminal charges filed by Toyota supervisory personnel, who claimed they were harassed and “coerced” by the picket line.

Recognizing the complexity of resolving a dispute caused by a failed labor justice system and tainted by intervening employer actions that prejudiced the union, the ILO called for the Philippine government to seek an “outside-the-box” solution to the dispute. Of particular concern to the ILO is that the parties reach an agreement to reinstate the fired TMPCWA workers. The ILO also called for resolution of the TMPCWA claims. Also, alarmed by reports of harassments and surveillance of TMPCWA union leaders, the ILO has called for investigations into the reports by the Philippine government agencies, including the Philippine Commission on Human Rights. Finally, the ILO called for an independent investigation into the allegations of discrimination against the TMPCWA’s members and to take the necessary measures to ensure that the violator is sanctioned

The GRP, employers and union already participating on the National Tripartite Industrial Peace Committee established a monitoring body of labor rights violations but which does not include the KMU and others unions whose cases were heard.

The ILO CFA called on the Government, Employers and Trade Unions to establish a tripartite monitoring mechanism to review cases of violations of freedom of association and to pursue its efforts . . . establishing a high-level tripartite case-monitoring committee within the framework of the NTIPC.³⁶

Responding to the ILO’s recommendation to establish a high-level tripartite body to monitor and respond to cases filed at the ILO. So, at a follow-up conference to the HLM in December 2009, the Philippine government announced plans to establish a high-level tripartite case monitoring committee within the National Tripartite Industrial Peace Council (NTIPC) and housed in the Tripartite Executive Committee, which is chaired by the DOLE Secretary.³⁷ The plan was announced prior to consulting with all of the trade union with complainants pending before the ILO, particularly the KMU whose cases will comprise the bulk of the cases reviewed but who are not participants at NTIPC. At the time the decision was announced, the KMU had not been invited to join, and that the KMU’s participation would be limited to being invited to provide more information and additional evidence.

In February 2010, the Tripartite Executive Committee (TEC) held its first meeting to review and evaluate sixteen cases involving alleged extrajudicial killings. The cases were chosen by the Government representatives. According to the ILO CFA,

In the Government’s view, only 13 cases were possibly labour related, that is, the victim was either an organizer or a union member regardless of whether or not there was a strike or labour dispute at the time of death and the circumstances indicate a possible relation to labour issues and concerns. The Government

³⁶ CASE NO. 2669 Complaint against the Government of the Philippines presented by the International Wiring Systems Workers Union (IWSWU) para 1260.

³⁷ ILO CFA KMU Report at para. 1133

stressed that many of the cases of alleged violence against unionists were not labour related but common crimes, since, in the absence of any dispute, strike, bargaining deadlock, or collective bargaining agreement negotiations, no connection with a trade union had been proven.³⁸

In this regard, the Committee stresses that all allegations of violence against workers who are organizing or otherwise defending workers' interests should be thoroughly investigated and full consideration should be given to any possible direct or indirect relation that the violent act may have with trade union activity.³⁹

The GRP also reported to the ILO that it rejected 24 of the cases on the vague grounds that they were "related to the counter-insurgency." The ILO CFA, though, questioned the Governments' decision noting that the Philippine Commission in Human Rights reported to the ILO HLM that "the Government was waging a propaganda war putting labour in the camp of the communists, and drawing a grey line between labour and security matters."⁴⁰

After the first meeting, the Committee drafted decisions on the 13 cases purporting to classify each one as "possibly labor-related" or "not labor-related", again without including the unions of the victims and their families. Overall, the Committee resolutions were varied with some recommending further action by police and others recommending action by the Commission on Human Rights. However, in two of the cases, the Committee appeared to question whether a case was "labor-related" because the victims refused to cooperate with local authorities; the implication being that if someone chooses not to cooperate with the investigation, the case must be "political in nature and outside the ambit of ILO Convention No. 87."⁴¹

The NTIPC is a work in progress without a clear purpose or vision that would result in meaningful concrete change. For example, the ILO envisions the body as a receptacle for dialogue on all cases concerning freedom of association violations, such allegations of military harassments and anti-union "education" programs. For now, though, based on the first 13 cases, it is too soon to tell if the NTIPC monitoring body will be equipped to effectively monitor and address violations of freedom of association.

In the end, the only power the NTIPC appears to have is to monitor whether the government has made progress on resolving complaints filed before the ILO CFA. If there has been no progress made, the NTIPC can only suggest a next step and, if there is political will, keep the pressure on the government agencies to resolve the violation. Considering that the majority of complainants involve unions that were neither consulted prior to the establishment of the NTIPC monitoring body, nor were consulted upon the

³⁸ Id at para. 1144

³⁹ Id. at para. 1143

⁴⁰ Id. at para. 1144

⁴¹ TIPC Monitoring Body, Resolution No. 3, Series 2010. CFA Case No. 2528 (KMU). Case of Edwin Bargamento; TIPC Monitoring Body, Resolution No. 4, Series 2010. CFA Case No. 2528 (KMU). Case of Manuel Batolina.

hearing of their first cases, it remains to be seen if the Committee will have the required political will to push the agencies, who themselves already sit on the Committee. Also, even if Committee finds that the government agencies have failed in their duties to ensure, the NTIPC can only refer the case to the Philippine Commission on Human Rights.

Technical cooperation and freedom of association trainings are important are not a substitute for demonstrated political commitment to implementing reforms at all levels of government.

In response to the ILO HLM and ILO CFA recommendations, the GRP has announced the intention to work closely with “the ILO, the social partners and other stakeholders, to establish a technical cooperation programme that will raise the awareness and strengthen the capacity of all relevant government institutions including the social partners in the promotion and protection of labour rights.” Additionally, the GRP has announced the intention to implement “a combined human rights, trade union rights and civil liberties programme for the forces of order (in particular PNP and the AFP).”^{42,43}

Pending the implementation of the program, the Government also started conducting small awareness raising program on the principles of freedom of association, which included a the three-day National Tripartite Conference on the Principles of Freedom of Association held last December 2009. At the conference the Tripartite participants signed a joint statement with the PNP, AFP and PEZA recognizing on paper that the Government needed significant training on freedom of association and the need for effective disciplinary mechanisms for violations of freedom of associations.⁴⁴

Ultimately, though, trainings are only effective if the principles of the training are sound and are implemented by the trainee outside of the training. At this time, no information is publicly available on the content or impact of the trainings, which are apparently still at a design stage.

Conclusion

In September 2009, the ILO HLM conducted an exhaustive analysis of impediments to freedom of association faced by workers in the Philippines during their visit, and even issued some preliminary recommendations such as the establishment of a tripartite labor rights monitoring body. The ILO HLM submitted their reports to both the ILO Committee on Freedom of Associations and ILO Committee on Application of Standards to review issue final recommendations. The ILO CFA issued those recommendations in March 2010, some of which are discussed above.

⁴² ILO CFA KMU Report.

⁴³ CASE NO. 2669 Complaint against the Government of the Philippines presented by the International Wiring Systems Workers Union (IWSWU)

⁴⁴ Id.

In view of continuing violations from 2009 – 2011, and the lasting impact of previously raised violations, we hereby request that the USTR hold open the review of the petition and implement a freeze on all new GSP benefits, including product petitions, pending implementation of the ILO recommendations.

We also request that the USG support the work at the ILO, including, if necessary, a review of the Philippine Government's progress implementing the ILO recommendations. Under normal circumstances, the ILO CAS reviews progress on the outcome of ILO missions at least two years after the end of the mission. Philippines case, however, was not heard in 2011 at ILO CAS, and a review is overdue.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "B. Campbell", written in a cursive style.

Brian Campbell
Director, Policy and Legal Programs

