

INTERNATIONAL TRADE UNION CONFEDERATION (ITUC)

INTERNATIONALLY RECOGNISED CORE LABOUR STANDARDS

REPORT FOR THE WORLD TRADE ORGANIZATION (WTO) GENERAL COUNCIL REVIEW OF THE TRADE POLICIES OF COLOMBIA

(Geneva, 12 & 14 June Colombia 2018)

EXECUTIVE SUMMARY

The Republic of Colombia is a member of the International Labour Organization (ILO). It joined on 29 June 1919. Colombia has ratified all eight (8) fundamental Conventions of the ILO including Freedom of Association, Protection of the Right to Organise, Protection of the Right to Collective Bargaining, Equal Remuneration, Discrimination (Employment and Occupation), Forced Labour, Minimum Age and Worst Forms of Child Labour.

WTO Ministerial Declarations on respect for internationally recognised core labour standards reflect the ILO's Declaration on Fundamental Principles and Rights at Work, the 2008 Social Justice Declaration and the latest Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. Colombia, as a signatory to these commitments, is enjoined to take concrete measures, in law and practice, to adhere to these core standards as part of its trade obligations.

The report reveals violations and restrictions on the right to freedom of association and the right to collective bargaining and a general atmosphere of impunity, unfreedom and the lack of the rule of law.

Colombia continues to be one of the most dangerous countries in the world for trade unionists with assassinations and violent attacks continuing to occur with almost complete impunity. The failure to hold employers and paramilitary actors accountable for their role in perpetuating violence against trade unionists and other human rights defenders is an egregious breach of core international labour standards.

The country's regulatory framework denies basic trade union rights to workers. The judiciary and Ministry of Labour are inadequately equipped to protect those attempting to exercise their labour rights. Organising, collective bargaining and the right to strike are all significantly undermined through both legal and illegal means.

Courts almost always declare strikes unlawful exposing the livelihood of unionists to harm and prejudice. Collective bargaining agreements are rarely enforced. Employers undermine unions by offering alternative deals to non-unionised members similarly situated at the workplace to prevent unionisation. In other workplaces, the only unions active are employer-sponsored unions that represent the interests of the employer and not the workers.

In view of the restrictions, attacks, breaches and Colombia's failure to fully fulfill its commitments, further measures are needed to ensure compliance with WTO-recognised international core labour standards.

Introduction

This report on the respect of internationally recognised core labour standards in Colombia is one of the series the ITUC is producing in accordance with the Ministerial Declarations adopted by the World Trade Organization (WTO). The first Ministerial Conference (Singapore, 9-13 December 1996) declared the commitment of Ministers to observe internationally recognised core labour standards.

To promote coherence in international development policy, recognition must be accorded to core international labour standards including the Declaration on Fundamental Principles and Rights at Work adopted by the 174 member countries of the ILO in June 1998, the Declaration on Social Justice for a Fair Globalisation adopted unanimously by the ILO in 2008 and the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy adopted by the Governing Body of the ILO at its 329th Session in March 2017.

The ITUC represents 207 million workers in 163 countries and territories and has 331 national affiliates. The ITUC's primary mission is to promote and defend workers' rights and interests through international cooperation between trade unions, through global campaigning and through advocacy. Its main areas of activity include trade union and human rights; economy, society and the workplace; equality and non-discrimination; and international solidarity.

The information below has been compiled in consultation with the Central Unitaria de Trabajadores (CUT) and the Confederación de Trabajadores de Colombia (CTC).

I. Freedom of Association, the Right to Organise and the Right to Collective Bargaining

The Republic of Colombia ratified ILO Convention No. 87 on the Freedom of Association and Protection of the Right to Organise and Convention No. 98 on the Right to Organise and Collective Bargaining in 1976. Additionally, Colombia has ratified the American Convention, and signed the Protocol of San Salvador – both Articles 16 and 8 respectively commit Colombia to freedom of association and require State parties to permit trade unions, federations and confederations to function freely and to protect the right to strike.

- ***Attacking freedom of association - assassinations, forced disappearances, torture***

Serious violations against trade unionists are rampant in Colombia including assassinations, forced disappearances and torture. The government has failed to thoroughly investigate these violations and to enforce its laws. As such, the severe and widespread violations of personal integrity against trade unionists have continued with almost complete impunity. Specifically, 93% of violations to physical integrity have gone unpunished, with the rate rising to 98% for assassinations.

On 1 July 2017, Alberto Román Acosta González, president of the Guacarí branch of Colombia's National Union of Agricultural Workers, was assassinated by two hired men while watching his son play soccer. The union had been engaged in a coordinated effort to formalise workers' jobs in fields and to secure them basic labour rights.

On 9 April 2014, Jesús Adán Quinto, a leader in the fight for land rights of the black communities in the Middle and Lower Atrato River area, was assassinated. His assassination directly followed a reduction in protection measures that the National Protection Unit (NPU) had established for him. Although Quinto's union had requested that the measures be reinstated, the NPU never responded to these requests.

In addition to assassinations, extensive state-sanctioned intimidation and violence is permitted against workers. The Mobile Anti-Disturbance Squadron (ESMAD), Colombia's riot police, has been deployed several times to intimidate workers as they enter bargaining sessions. ESMAD police also use violence to quell labour protests. For example, on 2 February 2016, judicial workers were protesting outside the civil and family courts in central Bogotá when about 300 ESMAD police violently attacked them with blows and taser guns, leaving several people injured, including a pregnant woman.

In another event, on 10 January 2014, members of SINTRAELECOL-CUT conducted a demonstration demanding the right to implement their collective agreement and denounced the abuses committed by the Empresas Públicas de Medellín against the communities in Caldas. The demonstrators were violently beaten by ESMAD and exposed to tear gas. The canisters seriously injured several workers and their families. Among them was the president of CUT and SINTRAELECOL-Caldas, Óscar Arturo Orozco – the fourth attack on his life.

Trade unionists also face threats, as well as attacks on their vehicles and buildings. In 2015, 22 CTC trade union leaders received threats via pamphlets, telephone calls, and WhatsApp messages. In the same year, bullets were fired at CTC's headquarters in Bogotá, a building that had been previously bombed.

In April 2014, bombs were thrown at the headquarters of SINTRAEMCALI, a public sector union in Cali. That attack came only days after a major court decision ordering the current Colombian president and vice president to ask for forgiveness for crimes committed against SINTRAEMCALI, SINTRAUNICOL and SINTRATELEFONOS under the Uribe government.

In the decade since 2004, at least 15 members of SINTRAEMCALI have been forced into exile, eight have been killed, and over 100 more have been threatened. The union was also the target of "Operation Dragon," a government-backed assassination plot against then-SINTRAEMCALI president Alexander López Maya and other human rights defenders in the region. On 21 May 2014, the vehicle of SINTRAEMCALI's vice president was set on fire, causing second-degree burns to his arms and legs.

- *Undermining the right to strike*

The Ministry of Labour declared so many strikes illegal (95% from 1991-2008) that the ILO found the government to be out of compliance with Convention 87, ordering Colombia to put the judiciary in charge of these determinations. In spite of the narrow chance that their demands will be met, the possibility that the unions will be dissolved or fined and threat of dismissals associated with strikes, workers engage in strikes, reflecting the dire conditions faced by many workers.

Public sector workers are categorically barred from exercising the right to strike. The amount of jobs deemed to be "essential services" expands far beyond what it is permissible by the ILO and includes teachers and bankers. Moreover, trade federations and confederations are barred from calling strikes, critically undermining their collective strength.

In a workplace where the union calling the strike holds less than half the workers in membership, more than half of all workers in the workplace must agree to strike. This means that even workers not in the union are included in the vote. This problem is exacerbated in larger workplaces and where multiple unions exist in the workplace.

There are only three circumstances where strikes are considered legal: (1) solidarity strikes; (2) strikes due to grave failure to fulfill obligations as an employer; and (3) striking due to an inability to reach a collective agreement in negotiations. Despite this, strikes are effectively banned and never have been protected.

In addition, the government has allowed employers to call in the military to repress strikes. In 2016, 28 unionised SINTRAVIDRICOL workers were dismissed for striking. Then, in 2017, six union leaders of SINTRAPAZDELRIO, including the union's president, were dismissed. This action effectively dissolved the union's board of directors, severely weakening the union. In the middle of 2017, 37 Cerromatoso workers were dismissed, among them the majority of the union's directive board. Thus, even where circumstances ought to provide for the legal exercise of a strike, the exercise often does more harm than good due to unwieldy judicial interpretation and the power of employers to dismiss workers and effectively dissolve unions.

- Attacks on organising and collective bargaining efforts

Colombian law as it stands today substantially impedes the ability of workers to organise. As a result, the union affiliation rate has plummeted from 16% to 4.5% in the last 30 years. Of the existing legal impediments, the most egregious consist of (1) the limitation of collective bargaining rights to workers operating under an employment contract and (2) the use of collective pacts to hinder attempts to organise.

Reading sections 5 and 353 of the Substantive Labour Code (CST) together limits collective bargaining rights to workers under an employment contract organising against a direct employer. This provision severely limits the right of informal workers, who compose approximately 65% of the total workforce. Because labour protections are contingent upon a direct employment contract, workers can be exploited through indirect employment alternatives such as subcontracting, outsourcing of labour, or provisional service contracts without the right to organise.

Cooperatives are traditionally understood to be democratic worker-controlled enterprises. Therefore, Associated Cooperative (CTA) workers do not benefit from the same protections, labour rights, or work benefits that direct employees receive in Colombia. In the past, employers leveraged this legal structure by reorganising their *de facto* employees into a CTA and operating as their exclusive "contractor". Under this false but legally permissible "indirect employee relationship", an employer could effectively fire CTA workers who attempted to bargain collectively. Personnel ranging from field labourers to doctors were exploited through the CTA system.

In 2010, Colombian law outlawed the outsourcing of personnel to CTAs and passed formalisation agreements intended to shift informal workers, including unlawfully subcontracted CTA workers, into contracted employment relationships. In response, most CTAs morphed into one of two new, less legally accessible forms: yellow unions or simplified anonymous societies (SAS). In the case of yellow unions, CTAs were absorbed by employers into direct employee relationships, and intermediary CTA leaders became "union leaders" through which employers established abusive "contratos sindicales" or "union contracts". Similarly, the SAS – a legal structure that did not exist until directly after outsourced

labour was prohibited – serve as exploitative intermediaries by “subcontracting” direct SAS employees to indirect third-party employers. Employers may refuse to “subcontract” workers at whim, effectively firing workers via an insulated indirect employee relationship. Because labour protections exist only with respect to a direct employer, workers have no available legal recourse.

Even those under direct employment contracts, however, have seen their collective bargaining rights whittled away through collective pacts. Collective pacts are separate from collective agreements in that they are not formed with a union, but rather are “negotiated” directly with non-unionised employees. Although the ILO recommends that collective pacts only be permitted in the absence of a union, Colombia permits pacts in any case where a union represents a third or less of all employees. This severely undercuts established unions, as many of them are job-specific, and because collective pacts bind the entire workforce, regardless of who is unionised. When collective pacts are made, the employer establishes all of the terms and the employees are forced to accept the pact as presented. Although the Constitutional Court has held that it is illegal to grant additional benefits to non-unionised workers, many companies continue to do so through collective pacts.

- *Legal obstacles*

Two features of the legislation in particular facilitate the violation of labour organising and collective bargaining: the 1951 Substantive Labour Code (CST) and a deeply debilitated Ministry of Labour.

The 1991 Colombian constitution required Congress to promulgate a new substantive labour code in accordance with the new constitutionally guaranteed labour rights. Yet, Congress failed to formulate the new code, and as a result, the employer-friendly CST of 1951 still governs labour today, forcing unions to litigate for the reconciliation of individual phrases of the CST with the constitution. Litigation from trial court to the constitutional court may last as long as seventeen years, and the sluggish pace of adjudication has only facilitated employer abuse, as union members often abandon their efforts over the years out of sheer exhaustion. Because the court generally only reconciles individual CST clauses per case, and because the CST is composed of over four hundred articles, it is unlikely that the court could completely reconcile the CST with the constitution in the next decade.

Additional structural weaknesses permeate the Ministry of Labour, crippling its effectiveness in handling labour rights violations and allowing employers to wield the ministry against workers. The ministry’s punitive powers are limited to fines, which SAS companies evade with relative ease. Although criminal penalties are theoretically available, an employer has yet to be jailed for a labour offense.

The ministry is technically empowered to inspect employers for labour violations at will, but the scarcity of available inspectors means that employers are only inspected pursuant to a complaint. Of all labour complaints filed with the Ministry of Labour, only 2.5% are resolved. In most cases, the employer seeks arbitration through the ministry with the knowledge that, in the approximately three years needed to resolve the dispute, union support for the opposing party will dwindle. Employers often release a “benefit plan” after requesting arbitration to expedite the union’s decline.

- *Child labour and danger to the livelihood of children and social mobility*

The ILO Committee of Experts observed in its 2017 report that 869,000 children between the ages of 5 and 17 years work, and that rural areas are those most affected by child

labour. The Committee notes that 4.2% of children between the ages of 5 and 14 years are engaged in work, compared with 19.8% of those between 15 and 17 years of age. The indications are that the measures adopted by the government to promote compulsory education have not been effective, as primary school attendance by children in 2016 fell by 85,005 pupils in relation to 2015, further exposing children to poverty and trafficking.

Regrettably, it appears that the measures taken and the laws adopted by the government to address sexual exploitation of children have not been effective. A significant number of children continue to be the victims of sexual exploitation. 7.1% of persons working as prostitutes started this activity before the age of 15 years, and 17.4% of them started between the ages of 15 and 17 years.

The ILO Committee of Experts expressed deep concern that, despite the prohibition by the national legislation of the forced or compulsory recruitment of children for use in armed conflict and the measures taken by the government to combat this practice, children are still being forced to join illegal armed groups. There are concerns that the lack of dissuasive penalties that could be imposed on the perpetrators of such crimes and the lack of training of those responsible for law enforcement account for the lack of progress. The government reports of the creation of the Inter-Sectoral Commission for the Prevention of the Recruitment and Use of Children by Armed Groups (Inter-Sectoral Commission) to prevent armed groups from recruiting and using children and committing acts of sexual violence against them. However, there are reports of cases of recruitment of children by the Revolutionary Armed Forces of Colombia – People’s Army (FARC–EP) and the National Liberation Army (ELN).

II. Conclusion

We argue that these reports feed into the general atmosphere of impunity, lack of rule of law and the capture of key State institutions that threaten to undermine efforts to grow ethical trade practices that respect core international labour standards in Colombia. It is important to take a serious view of the recommendations in order to put Colombia on a path towards ethical and equitable international trade practices.

III. Recommendations

We recommend that the government undertake the following urgent steps to begin addressing these violations:

1. Investigate violent crimes against trade unionists and prosecute not only the direct perpetrators but also the actors who orchestrate the crimes.
2. Resource labour inspectors to investigate and prevent child labour.
3. End the criminalisation of protests and strikes, as well as the violence perpetrated by state military and police in those scenarios.
4. Reform the list of jobs considered essential services to meet ILO standards.
5. Reform the voting procedure for calling strikes to meet ILO standards, specifically: remove the majority vote requirement and the permitting of non-union workers to participate in the vote.
6. Enforce existing prohibitions on employer use of cooperatives as labour intermediaries by outlawing SAS and cracking down on yellow unions.
7. Increase resources allocated to the labour inspectorate and the judicial enforcement systems.
8. Promulgate a new labour code in accordance with international labour standards.
9. Build institutional capacity of judiciary, law enforcement and labour market institutions and human rights bodies.