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TUAC Submission on Trade Union Rights and Safety in Colombia
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Introduction and Summary

1. On 21 March 2018, the OECD Committee on Employment, Labour and Social Affairs (ELSAC) will meet in Closed Session to discuss a Formal Opinion on Colombia's Accession to the OECD. This submission by TUAC provides an update on the progress made by Colombia on issues relating to the rights and safety of trade union representatives, which are currently under review by the Committee. It also identifies priority measures that Colombia should be requested to take before governments agree to support a Formal Opinion.ⁱ

2. There is clear evidence that Colombia has failed to make adequate progress on the recommendations made by ELSAC. Given that many of the same recommendations were made in the context of other international and bilateral processesⁱⁱ, TUAC considers that this signals a clear lack of political will. Governments should not support a Formal Opinion at ELSAC until demonstrable progress is made by Colombia to stop, protect and punish anti-union violence, tackle informality and sub-contracting, strengthen and enforce labour law, and support collective bargaining.

3. Key areas of trade union concern are the following:

- ***Continuing violence against trade unionists and increasing violence against social leaders***ⁱⁱⁱ: in 2017, 19 trade unionists were assassinated compared to 20 in 2016 and 21 in 2015. Trade union activists and leaders have been increasingly targeted – in 2017, 82.8 per cent of anti-union violence involved trade union leaders and activists, compared to c50% in 2012. In 2017, 170 social leaders were assassinated, compared to 117 social leaders in 2016 – a 45% increase. So far, 32 social leaders have been assassinated in 2018;

- ***Refusal, withdrawal and reduction of protection:*** since the end of 2016, the National Protection Unit has been withdrawing/limiting protection from trade unionists and other human rights defenders (see Annex), including in February 2018 from the Presidents of FECODE (teachers) and SINTRAININGRO (agricultural workers) – two of the sectors that have experienced the most violence. Trade unionists refused protection were killed in 2015: Alex Fabián Espinosa Carvajalino and Over Libardo Rivera Rodríguez^{iv};
- ***High levels of impunity:*** there are persistently high levels of impunity for all crimes against trade unionists: anti-union violence and violations of trade union rights. The level of impunity for anti-union violence is 95% overall – 87% for assassinations, rising to 99.8% for threats – the most common crime of violence against trade unionists. There are no convictions under Article 200 of the Criminal Code for violations of freedom of association;
- ***High levels of average and rural informality:*** informality in Colombia is 65% overall, rising to 88% in the rural areas^v. In 2017, 6,035 workers were formalised through 47 labour formalisation agreements. The Government reports that it has formalised a total of 35,719 workers from 2013 to 2017, through 170 formalisation agreements, but this represents just 0.2% of informal workers in Colombia. Trade unions have not been assigned a role in the formalisation process and have not been involved in monitoring their implementation;
- ***Increasing use of false “union contracts”:*** there has been a substantial reduction in some forms of labour intermediation, such as cooperatives, but an increase in others, including the number of workers hired through false “union contracts”. There is no current proposal by the Government to eliminate union contracts. None of the complaints filed by trade unions concerning labour intermediation through union contracts has been resolved by the Ministry of Labour;
- ***Weak labour law enforcement:*** while the number of inspectors has been increased, this has not translated into stronger labour law enforcement. The number of inspections has in fact declined and the level of labour law violations is high, while the level of collective bargaining coverage remains low. Eighty-five percent of 1800 complaints filed for the crime of violation of freedom of association have been closed without any result;
- ***Low levels of collective bargaining and social dialogue:*** collective bargaining coverage remain low, particularly in the private sector (<0.5%). Improvements made in the public sector were achieved following strike action. No progress has been made in eliminating the option of negotiating collective pacts with non-unionised workers, or to support multi-level bargaining. Decree 017 (2016) has not been effective in shortening the dispute resolution process of the Arbitration Tribunals;
- ***Stalled progress on draft laws and decrees:*** there is no progress on laws and decrees proposed by former Labour Minister López due to the requirement, introduced by Minister Restrepo, for consensus in the Tripartite Permanent Commission on Wage and Labour Policies: preventing labour outsourcing; prohibiting false union contracts; eliminating collective pacts; promoting multi-level bargaining;^{vi} and guaranteeing the right to strike.

Violence against Trade Unionists and Impunity

Violence against Trade Unionists

4. According to the Escuela Nacional Sindical (ENS),^{vii} in 2017, 19 trade unionists were assassinated compared to 20 in 2016. The number of threats against trade unionists was 125 compared to a total of 201 in 2016 and 121 in 2015. The total number of violent incidents against trade unionist was 198 in 2017, compared to a total of 285 in 2016. In 2017, 170 social leaders were assassinated, compared to 117 in 2016 – a 45% increase. So far, 32 social leaders have been assassinated in 2018.

5. Analysis of the data for anti-union violence for the period 2012-2017 conducted by ENS shows:

- Trade union activists and leaders are increasingly targeted, indicating selective violence;
- Increased acts of violence against trade union organisations as a whole;
- Reactivation of anti-union violence against trade union leaders in the rural areas;
- Criminalisation of union activity in the form of repression by the Colombian anti-riot police, ESMAD and acts of violence by the army and the police.^{viii}

Table: Violence against Trade Unionists 2010-2017

Type of Violence	2010	2011	2012	2013	2014	2015	2016	2017
Homicides (ENS)	53	31	25	37	21	21	20	19
Homicides (Attorney General)	37	36	30	33	21	20	12	/
Threats	408	544	449	337	244	121	201	125
Forced Displacement	46	51	90	3	1	/	1	1
Harassment/Intimidation	19	61	50	63	78	30	30	24
Arbitrary Detention	4	16	19	24	17	8	5	9
Attacks with or without injury	22	13	9	18	24	17	18	16
Enforced Disappearances	10	3	5	1	-	2		1
Kidnapping	6	3	-	4	-	3		
Illegal Search	3	1	3	2	2	2	8	2
Torture	3	2	2	-	1	4	2	1
Total	574	725	652	489	388	208	285	198

Source: Anti-union violence, impunity and protection of trade unionists in Colombia (2012-2017); ENS, February 2018. The figures for 2017 should still be considered preliminary.

Withdrawal and Reduction of Protection for Trade Unionists

6. Protection for trade unionists/human rights defenders is systematically being withdrawn or reduced, on the basis that protection is no longer required in the post-agreement context. Yet, the +37% increase in the number of threats against trade unionists in 2016, clearly indicates that the risk of threats remains high. No public information on the total numbers who have had protection withdrawn or reduced is available. Examples of trade union cases for the period 2016 to 2018 are provided in the Annex.

Informality and Sub-contracting

Formalisation Agreements

7. The Ministry of Labour does not conduct ongoing monitoring of formalisation agreements, nor guarantee the participation of unions in their development and implementation. The problems with formalisation agreements include: employers using formalisation agreements to avoid sanctions without establishing permanent or direct employment relationships and/or without covering all the workers affected by the illegal subcontracting (e.g., Caracol Radio outsourced 300 core workers but only hired 74 workers under the formalisation agreement); or firing workers without ‘just cause’ within the protected five year period after formalisation

Illegal and Abusive Sub-contracting

8. Millions of Colombian workers are hired under various forms of illegal subcontracting, which have the effect of exempting workers from the protection of the labour code and undermining labour rights. The OECD has called on Colombia to prohibit the misuse of such relationships and to oblige companies to formalise those workers hired under such contracts.

9. While substantial progress has been made in reducing some forms of illegal intermediation, such as cooperatives, these have been replaced by other forms of illegal intermediation including false “union contracts”. According to figures of the Colombian Ministry of Labour, 1500 new union contracts were signed in 2017. A further development is that the duration of these false union contracts has increased. Whereas previously 80% of contracts were short-term – one month – today they may last two or three years. A reduction in the number of new union contracts, therefore, does not necessarily mean a reduction in the numbers of workers hired through this illegal form of labour intermediation.

10. Finally, none of the complaints filed by trade unions concerning labour intermediation through union contracts has been resolved by the Ministry of Labour. The trade union confederation CUT has filed 118 complaints since 2014, of which 4 (2.5%) have been resolved. None of these relate to union contracts, which today represent the most significant form of labour intermediation, replacing cooperatives.

Labour Law Enforcement

11. The OECD recognised the need to strengthen labour inspection stressing that the “high frequency of labour law violations and the low coverage of collective bargaining in Colombia make a well-functioning labour inspection system all the more important to ensure decent working conditions for Colombian employees”.^{ix} It recommended that Colombia increase the numbers of inspectors, the level of resources and training, and the number of preventative inspections.

12. Colombia has hired 869 out of the 904 labour inspectors committed to under the US-Colombia Labour Action Plan. In June 2017, it started the process of appointing 804 inspectors as career civil servants. The increase in the number of inspectors has not, however, strengthened labour law enforcement as the number of inspections has declined: in 2010, 423 inspectors carried out 24,631 administrative investigations and made 9,066 workplace visits; in 2015, 819 inspectors undertook just 3,099 investigations and only undertook 1,063 visits.^x Trade unions report that inspectors still do not have sufficient capacity, autonomy and resources, especially for labour inspection in rural areas.

Collective Bargaining

Collective Bargaining Agreements

13. The number of collective bargaining agreements in the public sector increased in 2017, although the agreement between the Government and the three Colombian trade union confederations in June 2017 was achieved after strike action by public sector workers. There is no such progress in the private sector. No progress had been made in eliminating the option of negotiating collective pacts with non-unionised workers. Decree 017 (2016) has not shortened the dispute resolution process of the Arbitration Tribunals which takes more than two years. The Ministry of Labour has only concluded 17% of cases submitted by CUT on collective pacts. There has been no progress made in supporting multi-level bargaining.

The Right to Strike

14. The right to strike is an intrinsic corollary of the right to organise, which, in turn, is a prerequisite for effective collective bargaining. Given the unequal power relations between employers and workers, it is impossible to exercise the right to bargain collectively in the absence of the ability to withhold labour: collective bargaining without the right to strike would be no more than “collective begging”.

15. No progress has been made on the right to strike. The role of the Government in the recent Avianca case represents a serious set-back. The Ministry of Labour acted *ultra vires* by determining civil aviation to be an essential service in contravention of both Colombian and international law. Avianca has dismissed all the leaders of the union because the strike was declared illegal.

16. In its 2016 review of labour market and social policies in Colombia, the OECD concluded that “[C]onditions on the right to strike are sometimes overly strict”, especially in relation to essential services. It recommended that Colombia abolish the clause providing for compulsory arbitration after 60 days of strike action and consider alternatives to its outright prohibition of strikes in essential services, including:

“5) giving the right to strike to higher-level trade union organisations; and 6) abolishing the clause of compulsory arbitration after 60 days of strike. In addition, Colombia should reflect on alternatives to the full prohibition of strikes in essential services (e.g. strikes conditioned on a minimum-service requirement)...”^{xi}

Decision on a Formal Opinion and Next Steps

17. In light of the above, it is clear that adequate progress on the four areas under review has not been achieved and accordingly ELSAC should not support a Formal Opinion at this stage. As recommended in our previous submission in November 2017, a number of priority measures should be undertaken before the process of Accession is completed and Colombia is invited to join the OECD. The list of measures is provided below. In addition, the OECD should facilitate better dissemination within ELSAC of information provided by NGOs – an example is the recent call by Human Rights Watch for the OECD, and specifically ELSAC, to “Examine Local Hunger Crisis in Colombia”^{xii}.

Trade Union Violence and Impunity

- The first priority for the trade union movement is to stop the violence against trade unionists, including by strengthening protection and significantly reducing impunity;
- Maintain and strengthen protection measures for human rights defenders, social leaders and trade union leaders under threat: body guards, transfers and prioritise investigations of those responsible for the threats;
- Bring to justice the intellectual authors of the crimes against trade unionists;
- Take a systematic approach to improve investigations in case of trade union violence;
- Create specialised prosecutors for crimes of violence against trade unionists;
- Increase the number of specially assigned judges for handling cases of violence against trade unionists: in 2016 the number of judges was reduced from three to one and has not since been increased;
- Establish a plan for collective reparations for the trade union sector as per Decree 624 of 2016, including truth, justice and guarantees of non-repetition;
- Evaluate the role of ESMAD in relation to the right to freedom of assembly and social protest with a view to reform, and involve the trade unions.

Labour informality and sub-contracting

Tackling illegal labour intermediation and increasing the level of formalisation are also high priorities:

- Eliminate labour intermediation that disguises the true employer (beneficiary of labor). This should include all labour intermediation for all activities that are inherent to the core mission of the business, and are permanent or habitual.
- Reform the Labour Code to eliminate false union contracts (Art 482):
- Eliminate the use of civil and commercial contracts that disguise the true labour relations.
- Eliminate the use of labour contracts that disguise the true duration of labor relations (i.e. defined term contracts, usu. used repeatedly).
- Through administrative actions and formalisation agreements, reduce the level of labour informality, characterised by workers labouring under the forms of contracting described above, by 30% (conservative calculations indicate that 4,000,000 workers presently labour under the types of contracts characterised above).
 - Formalised workers should be contracted with direct, permanent labour contracts with the true employer, with guarantees of associated labour rights and social protection;

- The Ministry of Labour should monitor compliance with the formalisation agreements;
- Reform the law so as to guarantee the effective participation of trade unions in the negotiation, implementation and follow-up of formalisation agreements;
- Reform the law so that formalised workers cannot be fired without just cause;
- Increase the severity of the sanctions in cases of non-compliance with the formalisation agreement.

Labour law enforcement

The Colombian Government has taken significant steps forward including implementation of the ILO Information System, increasing the number of labour inspectors and starting the process of transforming jobs into career civil service posts. However, further progress should be made:

- Enact an executive decree designating DIAN (Departamento de Impuestos y Aduanas Nacional) as responsible for the collection of fines imposed by the Labor Ministry as a result of administrative procedures.
- Strengthen the inspection capacity of the Ministry of Labour by:
 - Increasing the number of inspectors;
 - Hiring inspectors on the basis of direct permanent contracts;
 - Recruiting inspectors through competitive merit based civil service career path requiring a specialised profile;
 - Establishing a system of continuous training for labour inspectors;
 - Providing the necessary resources for inspectors to perform their duties, including per diems and covering travel costs to remote rural areas.
- Implement the Information System prepared and completed by the ILO for the Labour Ministry in 2016 and make it publicly accessible (Sistema Informática de la Dirección de Inspección, Vigilancia, Control y Gestión Territorial) in all territories:
 - Implementation of the Information System should demonstrate a tripling in administrative actions and sanctions over a two-year period.
- Issue a Decree stating that the IVC (Inspecciones, Vigilancia y Control) of the Labour Ministry has the authority to investigate public as well as private entities using disguised employment relationships:
 - Currently the Ministry of Labour does not have the authority to handle complaints filed by trade unions regarding labour intermediation in the public sector.
- Increase the number of investigations into the process of improper use of collective pacts.
- Increase the number of investigations into the improper use of labour intermediation.

Collective Bargaining

- Prohibit collective pacts in companies where there is a union by reforming the Labour Code;
- Enact an executive Decree to establish multi-level, collective bargaining guaranteeing consolidated collective bargaining agreements (negociación colectiva multinivel, concentrada y con unidad convencional). The right to bargain collectively should be guaranteed at the industry level, the economic group level, the regional level, the company level, and the workplace level;
- Strengthen CETCOIT including by hiring mediators on permanent contracts;
- Accelerate the operation of the arbitration courts to resolve collective disputes;
- Recognise that civil aviation is not an essential public service;
- Give the right to strike to higher-level trade union organisations (trade union federations and confederations), in line with OECD recommendations and the situation in most OECD countries;
- Abolish the clause of compulsory arbitration after 60 days of strike, in line with OECD recommendations;
- Remove the prohibition of strikes in essential services and introduce a minimum-service requirement while allowing the majority of employees in a particular industry to participate in strike action, in line with OECD recommendations.

Annex: Withdrawal or Reduction of Protection from Trade Unionists, 2016-2018

Protection reduced or limited:

- **Carlos Arturo Posada García**, CUT Executive Antioquia: Protection Reduced, 2017 (Protection reduced to one bodyguard, a bullet-proof vest and a mobile phone).
- **USO Sub-branch Arauca**: Protection Limited, 2017 (Protection measures have been limited to: 4 days of travel for trips; no protection for flights.)
- **Manuel Calderón**, Presidente Seccional Puerto López: Protection Limited
- **Roger Simmons**, Fiscal Seccional Ciénaga: Protection Limited
- Anthoc Bolívar: **Alberto Rivero Payares, Andrés de León Romero and Antonio Pérez Villalba**: Protection Reduced, 2017
- USO Cartagena: **José Ibarguen, Omar Mejía, Abel Triana, Joaquín Padilla, Wilmer Hernández, Hamilton Meza Alvarado, Enrique Rodríguez, Álvaro Vega, Alex Escobar, Álvaro Arroyo, Oscar Cuello, Rodolfo Prada, Juan Darío Ramírez, Julio Carrascal**: Protection Reduced 2017
- **Wilson Ferrer Díaz**, President of the regional board CUT Santander: Protection Reduced 2017 (Protection plan reduced to one bodyguard unit, a vehicle and a phone.)
- President, CGT, **Rubén Darío Gómez Hurtado** and General Secretary, CGT, **Jorge Iván Diez Vélez**, Human Rights Secretary and President of UTP's Bello subdivision **Luis Alberto Pinzón** and Assistant Secretary, **Gerardo de Jesús Sánchez Zapata**, President Albeiro Franco Valderrama, CGT's Urabá subdivisión: Protection Reduced 2016-2017

Protection withdrawn:

- **Guillermo Rivera**, President SINTRAINAGRO: Protection Withdrawn, February 2018
- **Carlos Rivas**, President of FECODE: Protection Withdrawn, February 2018 (The risk assessment found the threat to be 'normal' but as national representative of teachers, and leader of the 2017 national strike he is a target of those who are against the teachers' movement.)
- **Luis Alberto Plaza Vélez**, CUT Bolívar: Protection Withdrawn, January 2018 (Due to continuous threats received in Cartagena, he had to move to Bogota in 2016. In 2018 he was informed by the Protection Unit that he will lose all his protection.)
- **Luis Alberto Vanegas Zuluaga**, National executive of the CUT (In 2018 he was informed by the Protection Unit that he will lose all his protection.)
- **Néstor Monsalve**, President Sintraemsdes: Protection Withdrawn, January 2018 (Protection was assigned in 2000, then at the beginning of 2017 reduced to a bodyguard, a bullet-proof vest and a mobile phone and then completely withdrawn at the beginning of 2018.)
- **Juan Carlos Martínez Gil**, CUT Caldas and EDUCAL: Protection Withdrawn, December 2017 (Lost an eye after an assault by ESMAD (anti-riot police) in 2006; filed a law suit against the police; those responsible have been identified; the case was taken up by the Inter-American Court of Human Rights; has received numerous threats since demanding justice for the crimes committed by ESMAD.)
- **Alfonso Ahumada**, Secretary General CUT Bogotá: Protection Withdrawn, October 2017 (The risk assessment confirmed that the threat level was high: "One cannot ignore that, following the results of the data collected, the analysis of the information and the subsequent revaluation of the risk level, the level of threat intensity was reduced from 52.22% to 50.55%..." and therefore that the protection plan should have been maintained.)

- **Héctor García**, Vice-President CUT Risaralda. Protection Withdrawn, August 2017 (Collective protection plan was reduced in 2016, before being withdrawn, Aug. 2017.)
- **Adela Torres Valoy**, Secretary General of the National Board: Protection Withdrawn 2017 (The bodyguard team, which also drove him, was withdrawn in 2017. He was informed that he now faces a ‘normal’ risk, which resulted in his protection being withdrawn.)
- **Héctor González**, CUT Tolima: Protection Withdrawn, 2017
- SINTRAINAGRO: Protection Withdrawn, 2017 (**Cresencio Serna Pandale**, Tesorero Seccional Carepa; **Daniel Guerra Oviedo**, Presidente Seccional Turbo; **Esteban Gulfo Romero**, Presidente Seccional Chigorodó; **Eusebio Palmero**, Tesorero Seccional Turbo; **Fernando Alcides Pérez**, Junta Nacional; **José Borja**, Presidente Seccional Ciénaga; **José Luis Flores Pájaro**, Presidente Seccional Apartadó; **Pedro Barbosa Díaz**, Secretario Bienestar Social Seccional Turbo; **Waldino Vizcaino**, Vicepresidente Seccional Ciénaga; **Jorge Vargas**, Secretario Dpto. Comunicación Junta Nacional)
- **Iván Velásquez Marín**
- **Juan Carlos Valencia**, Secretary of Human Rights at Sintraemsdes Pereira: Protection Withdrawn, December 2016 (appealed by the union, after which protection was reassigned by the judge but still unprotected).

ⁱ This submission updates the TUAC submission of 2 November 2017, where new information is available. Otherwise for some issues, the information provided is the same.

ⁱⁱ UNDP, ILO, EU Roadmap (2628), US-Colombia, Labour Action Plan (LAP), US, Canada Trade Agreements.

ⁱⁱⁱ Based on previous years, it is expected that the figures for 2017 will increase, as other cases come to light.

^{iv} Anti-union violence, impunity and protection of trade unionists in Colombia (2012-2017), ENS, Feb. 2018.

^v Observatorio Laboral de la Universidad del Rosario.

^{vi} Colombian law only permits bargaining at company level.

^{vii} Anti-union violence, impunity and protection of trade unionists in Colombia (2012-2017); ENS, Feb. 2018.

^{viii} *Ibid.*

^{ix} OECD Review of Labour Market and Social Policies Chapter 3, Enforcing Labour Rights in Colombia, p.122.

^x Presentation of the CUT and the CTC; Feb. 2018.

^{xi} OECD Reviews of Labour Market and Social Policies: Colombia: 2016, p. 32.

^{xii} <https://www.hrw.org/news/2017/10/30/oecd-examine-local-hunger-crisis-colombia>