BEFORE THE UNITED STATES
TRADE REPRESENTATIVE

COMMENTS CONCERNING THE PENDING FREE TRADE AGREEMENT WITH COLOMBIA

FILED BY

THE AMERICAN FEDERATION OF LABOR &
CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO)

SEPTEMBER 15, 2009

CONDITIONS FOR CONSIDERATION OF THE US-COLOMBIA FREE TRADE AGREEMENT

In 2008, the United States and Colombia traded roughly $24.5 billion in agricultural and manufactured goods. Colombia also benefits from unilateral U.S. trade preference programs: the Andean Trade Preferences Act, the Andean Trade Promotion and Drug Eradication Act, and the Generalized System of Preferences. No one suggests that trade between the United States and Colombia should end or that existing preference programs be cancelled. However, the AFL-CIO firmly believes the United States should not, as a matter of principle, commit to deep and more permanent economic integration, by way of a comprehensive trade agreement, with any country with such an atrocious record on trade union and human rights. As reflected in innumerable governmental and non-governmental reports, Colombia is such a case.

In order for Colombia to be a country with which we should even consider negotiating (much less ratifying) a trade agreement, we believe that it must meet certain minimum standards on international human rights. Document 1 sets forth that list. If and when Colombia fulfills these benchmarks, it must also, like any other trade agreement partner, have already adopted the laws and regulations necessary to comply with the labor and environmental commitments. The necessary labor law reforms are set forth in Document 2. Finally, we also believe that several chapters of the trade agreement are flawed and must be renegotiated, including but not limited to the chapters on labor, investment, services, procurement and agriculture. We believe that these necessary changes are in the benefit of workers in both countries.

The roots of the political, economic and social crises in Colombia, and the reasons for their persistence, are multiple and complex. In light of the magnitude of the situation and the need for a comprehensive national and international response, which contemplates complete accountability, authentic justice and full restitution and reparations, we do not believe that Colombia could meet any set of conditions that would adequately address the roots of these crises in less than three years. We would urge the United States Government to closely monitor Colombia's efforts to fulfill these conditions during that time, with consultation from civil society, and to provide monetary and/or technical assistance where appropriate. If all of the conditions herein, and set forth by other human rights and development organizations, have not been satisfactorily met at the end of the three-year period, Colombia should be put on a continual annual review to mark progress toward their achievement.

DOCUMENT I

TRADE UNION AND HUMAN RIGHTS ISSUES IN COLOMBIA: A COMPREHENSIVE VIEW

Trade unionists continue to be unable to exercise their basic rights, as the many factors underlying the country's persistent impunity remain unaddressed (or addressed insufficiently). It is not enough that those directly responsible for the violence against trade unionists are prosecuted if the persons who ordered the killings remain free, or if the conditions that allow these murders and death threats to continue are not dealt with. Today, several thousand former paramilitaries have now regrouped into new armed groups and, in some cases, continue the bloody legacy of the past, including targeted threats and assassinations. There is ample evidence that state actors have been perpetrating widespread acts of violence, and have also colluded with private armed actors to commit criminal acts. High level officials continue to create a hostile environment for unionists and other human rights defenders through defamatory public statements and baseless prosecutions. Most recently, voluminous evidence of a vast and illegal wiretapping and surveillance program has emerged, which to this day continues to target trade unionists, judges, clergy, human rights activists and journalists – even U.S. government officials. Together, these various criminal acts demonstrate a fundamental disregard for the rule of law, not to mention the fundamental human rights of the people of Colombia. If not addressed comprehensively, and the rule of law is restored, there is no question that trade unionists and the trade union movement will continue to suffer.

1. End Impunity for the Killings of Trade Unionists

Murder of Trade Unionists

The National Labor School (ENS), based in Medellín, Colombia, has reported that 49 trade unionists were murdered in Colombia in 2008,[1] a 25% increase in the number of trade unionists murdered in 2007 – 39.[2] Even the government's statistics reflected an increase in assassinations.[3] Of note, 16 trade union leaders were among those assassinated in 2008, an increase over 2007 when 10 leaders were murdered. As of September 1, 2009, at least 24 trade unionists have been murdered.[4]

---

[1] The ENS also recorded 497 death threats, 3 cases of torture, 154 forced displacements, 26 arbitrary detentions, 5 disappearances and 1 illegal break-in in 2008. See, ENS, *Labor and Union Information System Report, First Report to December* 2008 (June 2009), p. 41, available online at www.ens.org.co/aa/img_upload/40785cb6c10f663e3ec6ea7ea03aaa15/SISLAB_A_DIC_2008.pdf.

[2] Id.

[3] The *Fiscalia General de la Nacion (*Office of the Attorney General of Colombia), registered 42 murdered unionists in 41 cases in 2008, up from 27 murdered trade unionists in 26 cases. This is a 50% increase according to the government.

[4] Central Unitaria de Trabajadores (CUT) & International Trade Union Confederation (ITUC), Report Regarding Convention 87 on the Right of Freedom of Association, prepared for the 98th Conference of the International Labor Organization, 2009, p. 13 (on file with AFL-CIO). Note, this number reflects the total number of documented cases of which CUT-ENS is currently aware. However, there is often a lag between the murder and its reporting to the CUT and/or ENS. Thus, the number could potentially be higher.

From January 1, 1986 to August 22, 2009, 2,706 trade unionists have been murdered, of which 699 were union leaders.[5] During the same period, there are recorded 4,277 death threats, 1,571 forced displacements, 616 arbitrary detentions, 235 attempted murders, 190 disappearances, 162 kidnappings, 78 cases of torture, and 44 illegal break-ins.[6] The total number of trade unionists murdered during the administration of Alvaro Uribe, which began on August 7, 2002, is now 505.[7]

Roughly 75% of all violence against trade unionists has been committed against the members of 30 unions, with Sintrainagro (844 murders), Adida (249 murders), USO (116 murders), Anthoc (58 murders) and Sutev (51 murders) being the most affected by the violence. FECODE, the federation of teachers' unions, has seen 828 members of its various affiliate unions (including Addia and Sutev), assassinated over the last 23 years.[8]

The murder of a single trade unionist is wholly unacceptable. Not one more trade unionist should be killed or threatened for their trade union activity in Colombia.

Impunity

From January 2000 to July 2009, the Office of the Attorney General (*Fiscalia*) reports that it has secured 207 sentences in 154 cases related to violence against trade unionists.[9] The recent increase in prosecutions and sentences, the vast majority of which -- 153 -- were obtained since mid-2007 (following significant international pressure for results), is an improvement over past neglect by the current and previous administrations. Nevertheless, even if one reads the statistics in the light most favorable to the government, the rate of impunity still hovers around 95 percent. Behind these official statistics lie several troubling realities. First, at least 6 sentences correspond to 11 victims that were not union members. Second, 22 of the sentences handed down were not for murder, but for a lesser charge, so they do not address the impunity rate for homicides. Third, in roughly 40% of the sentences, the person held responsible for the crime was either tried in absentia or is otherwise not in custody and thus potentially still at large. Finally, in the majority of cases, the person convicted of the crime is not the intellectual author, but rather the material author that carried out the order to kill.[10]

---

[5] Id. Trade unionists were being murdered before 1986. However, there was no centralized collection of data on trade union murders before this date, which roughly coincides with the formation of the CUT.
[6] Id. at pp. 13-14.
[7] Id. at p. 14.
[8] Id. at p. 17
[9] As stated in the July 20, 2009 report of the Fiscalia General – the most recent available. It is important to note that more than one case and/or conviction can arise from the murder of a single person. Unfortunately, the Fiscalia does not report the number of victims behind these case and conviction statistics. Last year, the Colombian Commission of Jurists (CCJ) undertook an analysis of the 122 sentences that the government provided to the organization. The 122 cases involved 118 victims. However, CCJ was able to prove that 27 of them were not unionists. Thus, of the 122, only 91 were actually unionists.
[10] The March 2009 report reflects the first time Fiscalia made a claim with regard to the number of intellectual authors sentenced. The report notes that 33 intellectual authors were sentenced, though it is impossible to tell from the chart who they are and for which murders they were prosecuted. The most current report, July 20, 2009, provides no information on intellectual authors.

Of note, the *Fiscalia* is not attempting to investigate all of the outstanding murder cases, but rather only the subset of cases that have been previously presented to the ILO and new murder cases from 2006 onward. Thus, the *Fiscalia* is investigating only about 1,354 cases. Thus, even if each of these cases were for the murder of a trade unionist, which they are not (several are for lesser crimes), this would account for only half of all union murder cases in the ENS database, considered the most comprehensive. However, it was discovered very recently that several hundred of the trade union violence cases being investigated by the Fiscalia do not appear in the database maintained by ENS.

In May 2009, the Fiscalia turned over a list of 1,546 victims whose cases were under review. It was then discovered that 598 of the victims on this list do not appear in the ENS database. This means that the universe of murdered trade unionists is either larger than previously thought, that a number of victims on the Fiscalia's list are not trade unionists, or a combination of both. This also means that the percentage of union murder cases now under investigation by the Fiscalia likely falls well below half of all union murder cases. Further investigation is needed to determine the status of each of these 598 victims.

Priority List Cases

Upon the creation of the special subunit within the Fiscalia in 2007, the trade union movement developed a list of cases that it considered emblematic and that should be given priority over other cases. Although the percentage of cases on the priority list which have resulted in sentences (roughly 20%), is higher than the overall universe of cases under investigation by the *Fiscalia* (roughly 12%), the percentage is not exceptionally so.[11] More attention needs to be paid to these cases.

Other Forms of Violence

Finally, trade unionists have been subject to several other forms of physical and psychological violence besides murder, all of which has the effect of chilling trade union activity. The ENS has reported well over 10,000 cases of violence committed against trade unionists in Colombia since 1986, including, but not limited to, attempted murder, torture, death threats, kidnappings, assaults, forced displacement, disappearances and break-ins.[12] Few of these cases are being prosecuted. If one considers this vital statistic, the impunity rate for violence against trade unionists soars to well over 95 percent. In short, the Uribe Administration still has a long way to go to end impunity in Colombia.

Thus, at an absolute minimum, the Government of Colombia must:

- demonstrate a sustained and meaningful increase in well-grounded convictions of the perpetrators of anti-union violence. This means convictions in a substantial majority of the over 2,700 cases of trade unionists murders to show a significant shift in the long-term pattern of impunity. The cases, to be considered fully

[11] Supra, fn. 9.
[12] Supra, fn. 4 at p. 14.

resolved, must be fully investigated and prosecutions must be brought not only against those responsible for carrying out the crimes but also for those planning them (if they are not the same). Additionally, the accused and convicted must be in custody, as trials in absentia do not adequately end impunity. If the evidence points to the involvement of state actors, prosecutions should continue up the chain of command to those ultimately responsible.[13] Importantly, convictions should also be based on more than the mere admissions of guilt by paramilitary commanders participating in the Justice and Peace process. These confessions often do little to establish the truth about the killings or accountability for the perpetrators.

- substantial efforts must be undertaken to investigate non-lethal forms of violence, including death threats, which have had and continue to have a substantial chilling effect on trade union activity. Few of the hundreds of threats received each year are investigated or investigated adequately. Those found to have issued these threats must be prosecuted fully. Death threats should also be investigated in the manner described below.

- investigate cases in the context in which the crimes occurred rather than as individual and unrelated cases. There are, for example, several cases in which several members of a single union were murdered in a similar location and/or were murdered within a relatively short period of time of each other. It is believed that if the Fiscalia were to investigate such murders together, rather than a series of unrelated individual cases, it is much more likely that patterns would emerge and those ultimately responsible for the crimes would be identified. Further, it would be more likely that the proper motive of these crimes would be discerned. Human rights organizations have similarly called for the grouping together of investigations of crimes against them, again without response.

- ensure that investigators, prosecutors and judges are well-qualified and sufficient in number. For example, the assignment of only three special judges to review cases of violence against trade unionists is insufficient to overcome the backlog of cases in a reasonable period of time.

2. Hold Paramilitaries Accountable and Dismantle Paramilitary Structures

Demobilized Go Free

The government has often trumpeted its accomplishments under the Justice and Peace Law, which is the legal framework established for the demobilization of the nation's

[13] According to the Fiscalia's July 2009 report, 88 of the 207 sentences were the result of confessions which produced a plea agreement. Of the 88, 51 related to confessions obtained through the Justice and Peace process. In addition to the vastly reduced sentences, little effort, if any, is undertaken to determine whether the confessions are accurate or complete. Further, the demobilized paramilitaries often claim that the unionists they murdered were murdered because of their association of sympathy for the guerillas. Such claims are not scrutinized. Thus, trade unions and the families of murdered trade unionists are further victimized by the stigmatization that results from these unfounded claims.

paramilitary organizations. However, the demobilization process, which included over 31,000 people who claimed to be members of a paramilitary organization, has been largely a failure. In its 2008 Annual Report on Colombia, the U.N. High Commissioner for Human Rights found,

> Proceedings under the Justice and Peace Law, which confers the benefit of a maximum of eight years of imprisonment to demobilized persons who truly contribute to the discovery of truth, justice and reparation of victims, continued to progress very slowly. As of October 31, 2008, out of 3,637 individuals facing charges under the Law, only 1,626 have been subject to the first procedural step, known as "voluntary depositions" (*versiones libres*). The Supreme Court of Justice decided in 2008 that it would not be necessary to wait for the completion of the "voluntary depositions" in order to bring partial indictments. However, at the date of the finalization this report, only 20 persons have been partially indicted, and no one has yet been convicted.[14]

The report also noted that 1,189 of the 1,626 persons providing voluntary depositions have not continued with the process. Since the 2008 Annual Report was published, one person was convicted; however, that conviction thrown out roughly one month ago.

Worse, the Colombian congress passed in June 2009 a law that will grant *de facto* amnesty to roughly 19,000 of the supposedly demobilized rank-and-file paramilitaries, many of whom are responsible for serious human rights violations.[15] Under the law, approved on June 18, criminal investigations into thousands of paramilitaries will be suspended or abandoned if the individuals concerned are deemed to have collaborated in efforts to dismantle the groups to which they belonged. The new law excludes those responsible for crimes against humanity and war crimes. The failure to carry out even the most rudimentary of investigations into the responsibility for human rights violations of many of those benefiting from the new law means that thousands of human rights abusers will evade justice, as well as those members of the security forces and those in politics and business who were complicit in their abuses.

---

[14] UNHCHR, Annual Report Of The United Nations High Commissioner For Human Rights And Reports Of The Office Of The High Commissioner And Of The Secretary-General, Feb 19, 2009, p. 14, available online at http://www.hchr.org.co/documentoseinformes/informes/altocomisionado/Informe2008_esp.pdf. The UN has also noted that former middle-ranking cadres from previous paramilitary groups act as heads of some of these new groups, and that a number of low-level demobilized members operate in areas which were once zones of influence of the paramilitaries.

[15] See, e.g., Amnesty International, *New law strengthens impunity for human rights abusers*, June 22, 2009, available online at http://www.amnesty.org/en/library/asset/AMR23/017/2009/en/5d176d60-ac7e-40f1-8b0b-e9dceec4ed48/amr230172009en.html%20. Note, most of the other paramilitaries had already been granted de facto pardons under a previous law, which the Supreme Court of Justice declared unconstitutional in July 2007. This new law seeks to reach those whose legal status had not been settled prior to the 2007 ruling.

New Armed Groups Continue Legacy, Kill and Threaten Trade Unionists

The flawed demobilization process has also contributed to thousands of "demobilized" and never-demobilized paramilitaries creating new and dangerous armed groups. The regular reports of the OAS Mission to Support the Peace Process in Colombia (MAPP/OEA) have noted the resurgence of several new groups throughout the country with thousands in their ranks.[16] Although they have assumed distinct organizational frameworks, many of these groups are associated to powerful local or regional economic and political interests, and continue the violent legacy of the paramilitaries, including narcotics trafficking and targeted assassinations. Groups such as the "Aguilas Negras" (Black Eagles), Nueva Generacion (New Generation) and Carlos Castaño Vive are responsible for some of the murders and death threats leveled against trade unionists, human rights activists, and indigenous and afro-colombian leaders. Copies of those death threats are attached hereto as Annex __.

Paramilitary links to Military, Political and Business

Military

For many years, human rights organizations have presented detailed and compelling evidence of close ties between the Colombian Armed Forces and paramilitary groups responsible for gross human rights violations.[17] For example, Gen. Mario Montoya, who resigned last year in the wake of an explosive scandal that tied several soldiers under his command to the killing of civilians, has also been accused of having maintained links to paramilitary organizations. The New York Times reported that a CIA memo had tied General Montoya to collaborations with paramilitaries in joint operations with armed forces in 2002.[18] Mr. Montoya is now the Colombian Ambassador to the Dominican Republic.

Politicians

Today, 83 members of the Colombian Congress elected in the current congressional cycle (2006-2010) have come under criminal investigation for collaborating with paramilitaries. [19] This is in addition to numerous governors, mayors and council members located throughout the country. The majority of those individuals under investigation are members of "pro-uribista" parties and include some within the president's innermost

[16] See, e.g., Seventh Quarterly Report of Secretary General to the Permanent Council on the Mission to Support the Peace Process in Colombia (MAPP/OEA), August 30, 2006; Eighth Quarterly Report of Secretary General to the Permanent Council on the Mission to Support the Peace Process in Colombia (MAPP/OEA), February 14, 2007. See also, International Crisis Group, *Colombia's New Armed Groups*, May 10, 2007.

[17] See, e.g, Human Rights Watch, The "Sixth Division" Military-Paramilitary Ties and U.S. Policy in Colombia (Sept. 2001).

[18] Romero, Simon, *Colombian Army Commander Resigns in Scandal Over Killing of Civilians*, NY Times, Nov. 4, 2008.

[19] See, Corporación Nuevo Arco Iris, Parapolítica Legislativa June 2009, available online at www.nuevoarcoiris.org.co/sac/files/oca/analisis/parapolitica_legislativa_JUNIO_2009.pdf.

circle, such as his cousin and ally, Senator Mario Uribe.[20] President Uribe has sought to take credit for the housecleaning, and has invoked the arrests as an example of his administration's adherence to the rule of law. However, the investigations would most likely not have happened but for the efforts of the independent Supreme Court.

Indeed, the president has proposed several measures in efforts to frustrate the further investigation and prosecution of politicians linked to paramilitary groups. In 2008, for example, the president floated a proposal to let all of the implicated politicians avoid prison. The president also blocked a bill in 2008 that would bar political parties linked to paramilitaries from holding onto the seats of those members who are convicted of paramilitary collaboration.[21] Now, the government is considering removing the cases from the Supreme Court, viewed as independent and effective, to a newly-established special court, which observers believe would be far less independent and result in politicians walking free or with greatly reduced sentences. Finally, the illegal surveillance of the Supreme Court justices adjudicating the "para-political" cases (discussed below) call into even further question the executive branch's interest in seeing justice done.

Although we cannot now provide evidence directly connecting a politician to a specific murder-for-hire, it is evident that the strong ties between politicians and paramilitaries allowed paramilitaries to commit crimes against trade unionists for several years without threat of arrest or prosecution for those crimes. Further, their ability to influence state policy, including the passage of the ineffective Justice and Peace Law, all but ensured that all but the highest-level paramilitary commanders would evade punishment of any kind.

Business

There are numerous allegations of substantial corporate financial and tactical support provided to paramilitary groups in a wide range of economic sectors. Indeed, paramilitary leader Salvatore Mancuso, in his *versiones libres* (voluntary testimony), claimed that paramilitaries had received funds from U.S. banana giants Chiquita, Dole and Del Monte.[22] He also stated that paramilitary organizations received money or other contributions in exchange for security services from food and beverage giants Bavaria and Postobon,[23] auto companies such as Hyundai and the state oil company ECOPETROL.[24] This support, in addition to their substantial drug revenues and political

[20] See, e.g., Juan Forero, *Cousin of Colombian President Arrested in Death Squad Probe*, Wash. Post, Apr. 23, 2008, p. A12.
[21] See, Human Rights Watch, *Breaking the Grip*, *Obstacles to Justice for Paramilitary Mafias in Colombia*, Nov. 17, 2008.
[22] El Espectador, *Alianzas de bananeras con 'paras' fueron de "buena gana"*, May 11, 2008, available online at www.elespectador.com/noticias/judicial/articulo-amenazas-de-bananeras-paras-fueron-de-buena-gana.
[23] La Jornada, *Revela Mancuso lista de empresas que financiaron a paramilitares colombianos*, May 18, 2007, available online at www.jornada.unam.mx/2007/05/18/index.php?section=mundo&article=032n1mun.
[24] EFE, *Mancuso dice Hyundai donaba vehículos a paramilitares y cita a otras empresas*, May 18, 2007, available online at http://terranoticias.terra.es/articulo/html/av21580838.htm.

connections, allowed paramilitary organizations to thrive throughout the country. It is perhaps no coincidence that the business that employed paramilitaries for security also saw high rates of threats and assassinations of trade unionists. For example, USO, the union which represents workers at ECOPETROL, has long accused the company of working in tandem with paramilitaries to discipline trade union activity through threats or murder.[25]

Indeed, with regard to the 2005 murder of Luciano Romero (officer in the Valledupar branch of SINALTRAINAL), a case recently adjudicated by one of the specialized labor judges, the judge ordered an investigation into Nestle Corporation for its potential involvement in his murder.[26] His body was found bound and stabbed dozens of times.

Thus, at an absolute minimum, the Government of Colombia must:

- hold accountable paramilitaries by ensuring thorough, careful investigations of allegations against paramilitary groups and their commanders; removing paramilitaries from the Justice and Peace process if they fail to comply with its terms and providing effective protection to victims and witnesses against paramilitaries who have often suffered threats and violence;

- confiscate paramilitaries' illegally obtained assets and returning stolen lands to the rightful owners, in accordance with recent rulings by the Colombian Constitutional Court;

- actively investigate the new or never demobilized paramilitary groups that have appeared in the wake of the supposed demobilization of AUC paramilitaries and prosecute its members fully for crimes committed;

- investigate all high-ranking military, police, and intelligence officers, as well as politicians and business representatives against whom there are credible allegations of collaboration with paramilitaries (and successor organizations) and prosecute those for which there is sufficient evidence of such collaboration;

- cease unfounded personal attacks against and surveillance of members of the Colombian Supreme Court, and provide full support for its investigations of paramilitary influence in the political system.

- support the "empty chair" proposal, to bar political parties linked to paramilitaries from holding onto the seats of those members who are convicted of paramilitary collaboration. Ensure that the bill applies to past elections, not only future ones.

[25] Salvador Mancuso admitted to lending a man to Carlos Castaño, who ordered the murder of Aury Sará Marrugo, president of the Cartagena office of USO.
[26] Text of the decision on file with AFL-CIO.

3. Ensure accountability for the extrajudicial executions

In recent years there has been a substantial rise in the number of extrajudicial killings of civilians attributed to the Colombian Army. Under pressure to demonstrate operational results by increasing their body count, army members apparently take civilians from their homes or workplaces, kill them, and then dress them up to claim them as combatants killed in action. The UN Special Rapporteur on Extrajudicial Executions, Phillip Alston, recently described the practice, known as "false positives" as "cold-blooded, premeditated murder of innocent civilians for profit."[27] His investigation found that the killings have occurred throughout the country, including in the departments of Antioquia, Arauca, Cali, Casanare, Cesar, Cordoba, Huila, Meta, Norte de Santander, Putumayo, Santander, Sucre, and Vichada. Given the wide geographic distribution of the killings, several military units were involved.

While the UN Rapporteur found no evidence to date of an official policy to carry out the killings, or that they were directed by or carried out with the knowledge of the President or Defense Ministers, he discarded the government's argument that the killings were carried out by a few bad apples. "The sheer number of cases, their geographic spread, and the diversity of military units implicated, indicate that these killings were carried out in a more or less systematic fashion by significant elements within the military."[28]

The Attorney General's Office is currently investigating cases involving more than a thousand victims of extrajudicial executions dating back to mid-2002. The Defense Ministry has also issued directives indicating that such killings are impermissible, but such directives have been regularly undermined by statements from high government officials, including President Uribe, who have accused human rights defenders who reported these killings as having inflated the numbers and orchestrating a campaign to discredit the military.[29]

Since October 2008, the Uribe Administration has started to more explicitly acknowledge the problem and dismissed several soldiers and officers from some military units in connection with some of the most well known killings. However, it is crucial that these dismissals be followed by effective criminal investigations, prosecution, and punishment of those responsible for executions -- including commanding officers who may have allowed or encouraged them. The U.S. Office on Colombia (USOC) reports, based on information provided by the human rights unit of the Office of the Attorney General of

[27] Press Statement, Statement by Professor Philip Alston, UN Special Rapporteur on Extrajudicial Executions, June 18, 2009, available online at www.unhchr.ch/huricane/huricane.nsf/view01/C6390E2F247BF1A7C12575D9007732FD?opendocument.

[28] Id.

[29] See, USOC, *A State of Impunity in Colombia: Extrajudicial Executions Continue, Injustice Prevails* (2009), p. 6, available online at http://www.usofficeoncolombia.com/uploads/application-pdf/2009-%20June%20EJE%20memo.pdf.

Colombia, that there have been convictions in only 16 of the 1,025 cases referred to that office.[30]

Importantly, trade unionists have been the victims of extra-judicial executions. Of the roughly 600 cases between 1986 and 2009 for which ENS has data on the presumed author, 41 of those are cases of extrajudicial executions. Roughly half, or 21 of these cases, occurred during the Uribe Administration, reflecting a relative surge in murders committed by state actors. A list of those 21 trade unionists is attached hereto as Annex II.

Thus, at an absolute minimum, the Government of Colombia must:

- follow up the dismissals of military officers with effective criminal investigations, prosecution, and punishment of those responsible for the executions -- including any commanding officers who may have allowed or encouraged them.

- effectively investigate, prosecute, and punish any soldier responsible for extrajudicial executions through the civilian court system; cases pending before the military justice system should be transferred to civilian courts.

- cease verbal attacks by high-level government and military officials upon the human rights groups that have been essential for uncovering these serious abuses.

- reform any and all government policies that have created incentives for such executions.

4. End Government Threats Towards and Surveillance of Trade Unionists and Human Rights Defenders

On numerous occasions, government representatives, including the president, have made defamatory remarks regarding trade unionists and human rights defenders in Colombia. Just this year, the president referred to legitimate civil society critics of the government being the "intellectual bloc of the FARC."[31] This statement de-legitimizes the important and valued work of human rights defenders and closes the necessary and justifiable space for them to exercise their internationally recognized right to free expression. Such remarks place individuals and entire organizations at the grave risk of physical retaliation from members of illegal armed groups, who often use such statements from the government as a license to terrorize and assassinate. President Uribe also publicly denounced the witnesses who testified before the U.S. House of Representatives Committee on Education and Labor on February 12 regarding the labor situation in Colombia as having intentionally distorted the truth and having been motivated by

[30] Id, at pp. 1, 4. See also, U.S. State Department, Memorandum of Justification Concerning Human Rights Conditions with Respect to Assistance for the Colombian Armed Forces, Sept 2009, p. 20 (noting that Investigations into cases of extrajudicial killings are proceeding slowly).

[31] See, e.g., El Espectador, No vamos a permitir que el 'bloque intelectual de las Farc' nos desoriente," Feb. 7, 2009, available online at www.elespectador.com/noticias/politica/articulo115889-no-vamos-permitir-el-bloque-intelectual-de-farc-nos-desoriente.

"political hatred."[32] Vice-President Fransisco Santos upped the ante by later denouncing Committee Chairman George Miller as an "enemy of Colombia."[33]

Last year, a similar remark made by José Obdulio Gaviria, which tarred organizers of a nationwide march for peace as guerilla sympathizers created an environment in which the march organizers, including union leaders, were in fact threatened and several were murdered.[34]

Additionally, there is now emerging and overwhelming evidence of a broad, systematic and illegal operation conducted by the Administrative Security Department (DAS), the national intelligence service of Colombia, which answers directly to the office of the President. Under this operation, hundreds of members of human rights organizations, political opposition parties, journalists, clergy and trade unionists were put under surveillance. Among the unions targeted include union federations CUT and CTC, and unions such as Asonal Judicial (judiciary workers union, which was engaged in a lengthy strike in 2008), SINDESS (health and social security workers union) and SINTRATELEFONOS (telephone workers union).[35] SINALTRAINAL, the food and beverage workers' union, recently learned that the DAS had opened a file related to its international campaign against the Coca-Cola Company. This file, AZ-29, is reported to include extensive information gathered in the course of a comprehensive surveillance operation.[36] Further, file AZ-47 reflects that the email used to communicate abroad, areainternacional@sinaltrainal.org, was tapped.

This operation, which has been ongoing in some form since 2004, employed several illegal tactics including warrantless wiretapping, email intercepts, examination of bank accounts and tax records, entry into homes and offices and the routine physical surveillance of victims by DAS agents. The program targeted those who the government perceived to be a risk or threat, in an effort to discredit and silence critics.[37] It is important to note, however, that despite the scandal the illegal surveillance continues to this day. Indeed, *Semana,* a leading news magazine, reported late last month that the DAS, despite the media scandal and investigation, is continuing and even increasing its illegal surveillance.[38]

---

[32] See, e.g., Press Release – Office of the President of Colombia, Es injusto que por odio político, se desfigure la verdad de Colombia ante Estados Unidos, Feb 14, 2009. available online at web.presidencia.gov.co/ sp/2009/febrero/14/08142009.html.

[33] RCN, Vicepresidente colombiano dice que congresista de EE.UU. es enemigo del país, March 5, 2009, available online at http://www.nuestratele.tv/content/vicepresidente-colombiano-dice-congresista-eeuu-enemigo-del-pais.

[34] El Tiempo, José Obdulio Gaviria insiste en que las Farc convocaron marcha del 6 de marzo, March 27, 2008, available online at http://www.eltiempo.com/archivo/documento/CMS-4037993.

[35] See, Asamblea Permanente de La Sociedad Civil por la Paz, et. al., *Grave Attackes on the Work of Human Rights Defenders in Colombia*, Sept. 2009, at p. 3.

[36] http://www.sinaltrainal.org/images/stories/edgar2/peticion%20uribe.pdf

[37] This issue has been covered widely in the press, especially in publications such as La Semana and El Espectador. For a recent summarizing article, see, e.g., La Semana, Las Fuerzas Oscuras, July 12, 2009, available online at www.semana.com/ noticias-nacion/fuerzas-oscuras/126116.aspx.

[38] See, *Semana magazine*, "Increible… siguen 'chuzando," Aug. 29, 2009, www.semana.com/ noticiasnacion/increible-siguen-chuzando/127960.aspx.

It is important to not that the DAS is also the agency primarily responsible for providing protection to trade unionists, human rights defenders, and journalists who are under threat. The recent investigation by the Fiscalia into the illegal surveillance program has revealed that sensitive information from the union protection program, including the kind of protection scheme (cars, number of bodyguards, schedules) and daily routines of trade unionists, were found in the same files containing illegal surveillance results. This strongly suggests that DAS representatives responsible for overseeing the protection program provided information to those units conducting illegal surveillance.

This recent trove of information also sheds additional light on a previous scandal regarding then-director of the DAS, Jorge Noguera, who turned over sensitive information, including a list of trade unionists working in the Atlantic costal region, to the paramilitaries groups operating in that area. As a consequence of his actions, seven trade unionists were murdered shortly thereafter, all but one of which were on the list supplied by the DAS. Then-Attorney General Mario Iguarán remarked recently that the evidence showed that "Mr. Jorge Noguera participated in these acts [the assassinations] through the turning over of information which was collected through intelligence activities and put the management and function of the DAS at the service of illegal armed groups that had publicly expressed their decision to kill these people [the unionists]."[39] On May 8, 2009, the Office of the Attorney General, before the Supreme Court of Justice, accused Jorge Noguera of responsibility for the assassination of four persons and "having put the DAS at the service of the paramilitaries."

Finally, those who lawfully promote human rights are singled out for particular intimidation through baseless investigations and prosecutions. These unfounded charges are often widely publicized, undermining the credibility of defenders and marking them as targets for physical attack, often by paramilitary groups.[40]

Thus, at an absolute minimum, the Government of Colombia must:

- refrain from all future hostile statements and make public declarations recognizing the legitimacy and value of human rights defenders, including trade unionists, in a free and democratic society.

- immediately review of all criminal investigations against human rights defenders and end all unfounded criminal investigations and criminal prosecutions of human rights defenders. The government must also publicly clear the names of those accused and compensate them for any costs incurred in their defense and for the anguish to them and their family caused by these investigations/prosecutions. The Fsicalia General should also discipline and prosecute all prosecutors found to

[39] El Tiempo, *Seguimientos del DAS a sindicalistas asesinados, revela expediente contra ex director J. Noguera*, May 10, 2009, available online at www.eltiempo.com/colombia/justicia/seguimientos-del-das-a-sindicalistas-asesinados-revela-expediente-contra-ex-director-j-noguera_5175369-1.

[40] See, e.g., Human Rights First, Baseless Prosecutions of Human Rights Defenders in Colombia In the Dock and Under the Gun, available online at http://www.humanrightsfirst.org/pdf/090211-HRD-colombia-eng.pdf.

have breached the law in falsely investigating and/or prosecuting human rights defenders.

- support the Fiscalia in its efforts to conduct a full investigation into the illegal wiretapping and surveillance program(s), to follow the evidence and to prosecute all of those who have committed crimes, including those outside the DAS who may have ordered and been consumers of the illegal intelligence. The scope of the investigation must cover all acts of illegal surveillance from 2004 to the present. The Colombian government must also take all measures necessary to ensure that all such illegal surveillance comes to an immediate end. An effective investigation must also take place into allegations of illegal surveillance by other intelligence agencies such as the SIJIN and military intelligence units.

ANNEX I

LIST OF TRADE UNIONISTS MURDERED IN 2009 IN COLOMBIA

JANUARY 1 TO AUGUST 22, 2009
Total = 24

Name of Unionist	Date	Municipality	Union Affiliation
TIQUE ADOLFO	01-Ene-09	PRADO – TOLIMA	SINTRAGRITOL
RASEDO GUERRA DIEGO RICARDO	07-Ene-09	SABANA DE TORRES - SANTANDER	FENSUAGRO
SAMBONI GUACA ARLED	16-Ene-09	ARGELIA – CAUCA	FENSUAGRO
MEJIA LEOVIGILDO	28-Ene-09	SABANA DE TORRES - SANTANDER	ASOGRAS
ARANGO CRESPO LUIS ALBERTO	12-Feb-09	BARRANCABERMEJA - SANTANDER	ASOPESAM
RAMIREZ RAMIREZ GUILLERMO ANTONIO	15-Feb-09	BELEN DE UMBRIA - RISARALDA	SER
PINTO GÓMEZ ALEXANDER	24-Mar-09	GIRON – SANTANDER	ASEINPEC
AMADO CASTILLO JOSE ALEJANDRO	24-Mar-09	GIRON – SANTANDER	ASEINPEC
CUADROS ROBALLO RAMIRO	24-Mar-09	TULUA – VALLE	SUTEV
CARREÑO ARMANDO	27-Mar-09	ARAUCA – ARAUCA	USO
POLO BARRERA HERNAN	04-Abr-09	MONTERIA – CÓRDOBA	SINTRENAL
AGUIRRE AGUIRRE FRANK MAURICIO	16-Abr-09	ITAGUI – ANTIOQUIA	ASEMPI
FRANCO FRANCO VICTOR	22/04/2009	VILLAMARIA – CALDAS	EDUCAL
MARTÍNEZ EDGAR	22-Abr-09	SAN PABLO – BOLÍVAR	FEDEAGROMISBOL
BLANCO LEGUIZAMON MILTON	24-Abr-09	TAME – ARAUCA	ASEDAR
CARCAMO BLANCO VILMA	09-May-09	MAGANGUE – BOLÍVAR	ANTHOC
JULIO RAMOS RIGOBERTO	09-May-09	MONITOS-CORDOBA	ADEMACOR
CARDENAS HEBERT SONY	15-May-09	BARRANCABERMEJA - SANTANDER	FESAMIN
RODRIGUEZ GARAVITO PABLO	09-Jun-09	PUERTO RONDON-ARAUCA	ASEDAR
ECHEVERRI GARRO JORGE HUMBERTO	11-Jun-09	PUERTO RONDON-ARAUCA	ASEDAR
SEPULVEDA LARA RAFAEL ANTONIO	20-Jun-09	CUCUTA – NORTE DE SANTANDER	ANTHOC
GONZALEZ HERRERA HERBER	25-Jul-09	SABANA DE TORRES - SANTANDER	FENSUAGRO
GOMEZ GUSTAVO	21-Ago-09	DOS QUEBRADAS - RISARALDA	SINALTRAINAL
DIAZ ORTIZ FREDY	22-Ago-09	VALLEDUPAR-CESAR	ASEINPEC

ANNEX II

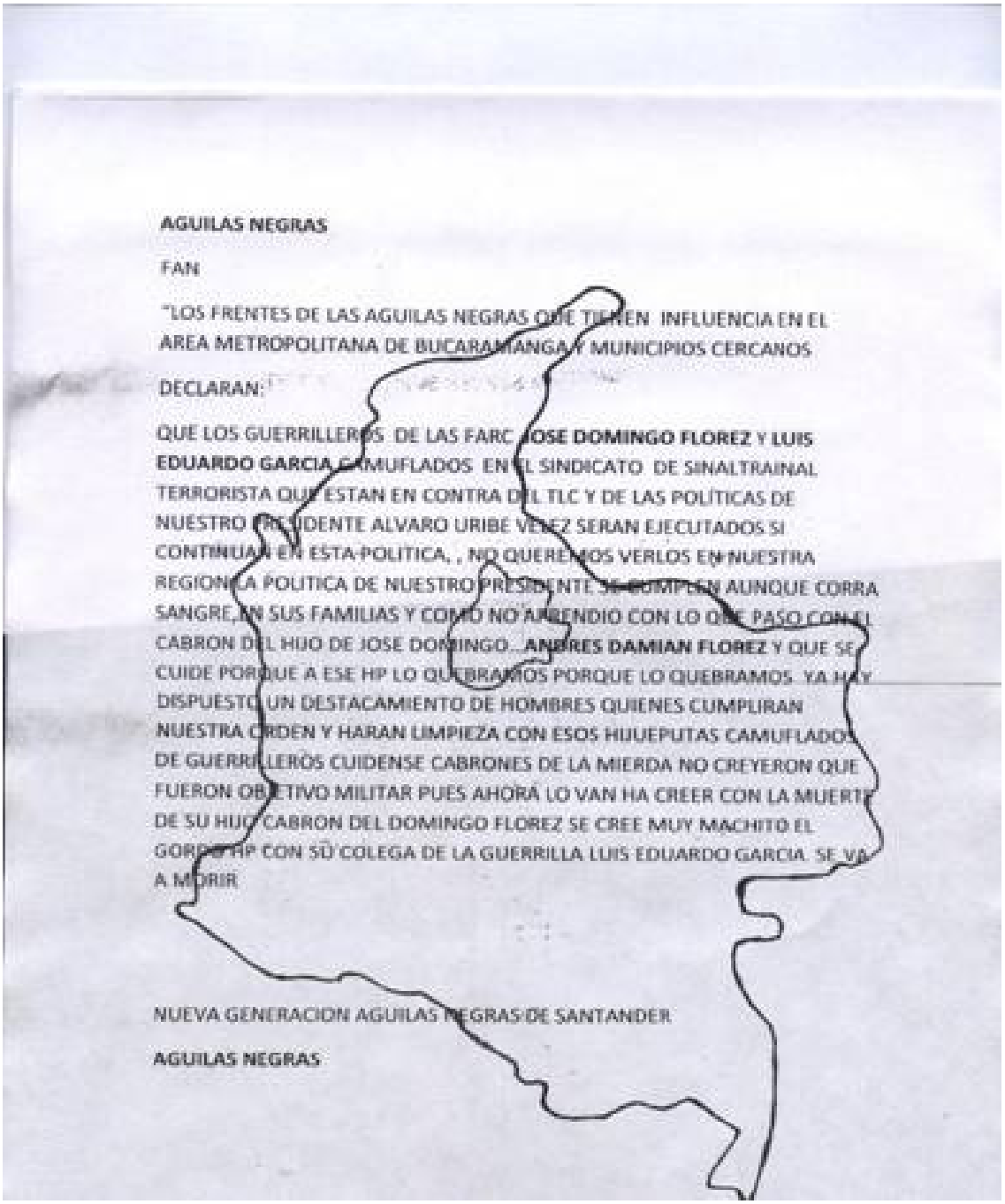
UNIONISTS ASSASSINATED BY STATE ACTORS FROM 2002 – 2008
TOTAL VICTIMS = 21[41]

Name	Date	Municipality	Union	Alleged Author
1. Males Bolaños Luis Hernando	December 4, 2003	San Juan De Villalobos - Cauca	Fensuagro	Army
2. Largo Dagua Carlos Rodrigo	June 16, 2004	Corinto – Cauca	Fensuagro	Army
3. Martínez Héctor Alirio 4. Prieto Chamucero Jorge Eduardo 5. Goyeneche Goyeneche Leonel	August 5, 2004	Fortul – Arauca	Sindicato Agrícola del Arauca ANTHOC Asedar	Army
6. Efrén Ramírez 7. Orlando Ariza	February 26, 2005	El Castillo – Meta	Sintragrim	Army
8. Manuel Antonio Tao	January 9, 2006	Inza – Cauca	Fensuagro	Army
9. Henry Pérez Díaz	April 11, 2006	Coyaima – Tolima	SUTIMAC	SIJIN
10. Alejandro Uribe	September 19, 2006	Morales	Fedeagromisbol	Army
11. Luis Miguel Porto	May 3, 2007	Ovejas	Sindagricultores	Army
12. Genaro Potes	May 26, 2007	El Castillo	Sintragrim	Army
13. Gentil Pai Yascuaran 14. Feliciano Obando 15. Simón Corena	September 10, 2007	Orito – Putumayo	Fensuagro	Army
16. Israel González	January 24, 2008	San Antonio	Fensuagro	Army
17. Miller Vaquero	March 9, 2008	Chaparral	Fensuagro	Army
18. Manuel Antonio Jiménez	March 15, 2008	Puerto Asís - Putumayo	Fensuagro	Army
19. José Fernando Quiroz	March 16, 2008	Puerto Asís – Putumayo	Fensuagro	Army
20. Guillermo Rivera Funeque	April 28, 2008	Ibagué	Sinservpub	Police
21. Jeferson Estiven Bastidas	October 25, 2008	Puerto Leguizamo	Fensuagro	Army

[41] Available information on the circumstances of these assassinations is available upon request.

ANNEX III[42]

DEATH THREATS BY NEW ILLEGAL ARMED GROUPS



AGUILAS NEGRAS

FAN

"LOS FRENTES DE LAS AGUILAS NEGRAS QUE TIENEN INFLUENCIA EN EL AREA METROPOLITANA DE BUCARAMANGA Y MUNICIPIOS CERCANOS

DECLARAN:

QUE LOS GUERRILLEROS DE LAS FARC **JOSE DOMINGO FLOREZ** Y **LUIS EDUARDO GARCIA** CAMUFLADOS EN EL SINDICATO DE SINALTRAINAL TERRORISTA QUE ESTAN EN CONTRA DEL TLC Y DE LAS POLÍTICAS DE NUESTRO PRESIDENTE ALVARO URIBE VELEZ SERAN EJECUTADOS SI CONTINUAN EN ESTA POLITICA, , NO QUEREMOS VERLOS EN NUESTRA REGION LA POLITICA DE NUESTRO PRESIDENTE SE CUMPLEN AUNQUE CORRA SANGRE, EN SUS FAMILIAS Y COMO NO APRENDIO CON LO QUE PASO CON EL CABRON DEL HIJO DE JOSE DOMINGO... **ANDRES DAMIAN FLOREZ** Y QUE SE CUIDE PORQUE A ESE HP LO QUEBRAMOS PORQUE LO QUEBRAMOS YA HAY DISPUESTO UN DESTACAMIENTO DE HOMBRES QUIENES CUMPLIRAN NUESTRA ORDEN Y HARAN LIMPIEZA CON ESOS HIJUEPUTAS CAMUFLADOS DE GUERRILLEROS CUIDENSE CABRONES DE LA MIERDA NO CREYERON QUE FUERON OBJETIVO MILITAR PUES AHORA LO VAN HA CREER CON LA MUERTE DE SU HIJO CABRON DEL DOMINGO FLOREZ SE CREE MUY MACHITO EL GORDO HP CON SU COLEGA DE LA GUERRILLA LUIS EDUARDO GARCIA SE VA A MORIR

NUEVA GENERACION AGUILAS NEGRAS DE SANTANDER

AGUILAS NEGRAS

[42] The attached threats are only two of several threats on file with the AFL-CIO. Information concerning additional threats against trade unionists can be provided upon request.

AGUILAS NEGRAS (Black Eagles)

FAN (Black Eagle Fronts / Brigades)

THE BLACK EAGLE BRIGADES THAT HAVE INFLUENCE IN THE METROPOLITAN AREA OF BUCARAMANGA AND SURROUNDING MUNICIPALITIES

DECLARE:

That the FARC guerrilla members Jose Domingo Florez and Luis Eduardo Garcia, camouflaged in the terrorist union SINALTRAINAL, who are against the FTA and the policies of our president Alvaro Uribe Velez, will be executed if they continue to oppose these policies. We do not want to see them in our region. The policies of our president will be implemented --if necessary, over the spilled blood of their families, and since he has not learned the lesson from what happened to Jose Domingo's bastard son, Andres Damian Florez, he should be careful because we broke that SOB, we beat the hell out of him. There's already a detachment of men who will carry out our orders and will clean out these sons of bitches camouflaged as guerrillas. Watch out you piece of shit bastards. You didn't think that you were a military target. Well now you are going to believe it with the death of Domingo Florez' bastard son. He thinks he's really macho, the fat sob, with his guerrilla buddy Luis Eduardo Garcia. He's going to die.

THE NEW GENERATION BLACK EAGLES OF SANTANDER

AGUILAS NEGRAS

[sent in 2008]

LAS AGUILAS NEGRAS UNIDAS DE COLOMBIA

VECINO USTED QUE NO TIENE CONCIENCIA MALPARIDO TRIPLEHIJUEPUTA GUERRILLERO TE DIJIMOS QUE SALIERAS DE AQUI DE BARRANCA Y NO LO HICISTES, VOLANDO EN HELICOPTERTO TE SALVASTES COMO UN COBARDE TU CRES EN TI QUE TE VAS A SALVAR MALPARIDO HACIENDO DENUNCIAS PENDEJAS REPETIDAS VECES,CREES QUE TE VAS A SALVAR DE LO QUE TENEMOS PLANEADO PARA TI QUE YA ES UN HECHO MARICON, SIGUE JUGANDO SIGUE JUGANDO PARA QUE VEAS POR DONDE TE VAN A SALIR LAS COSAS GUERRILLERO, NO SEAS ILUSO MALPARIDO HIJUEPUTA, NO TE QUEREMOS NI EN BARRANCA, NI EN CARTAGENA NI EN OTRO LUGAR DEL TERRITORIO NACIONAL HAS LA PRUEBA Y TE VAMOS A TIRAR AL PISO, YA TENEMOS UBICADOS Y MARCADO A TU FAMILIA Y A TI EN BOGOTA.

TE ACUERDAS MALPARIDO QUE AQUI EN BARRANCA TE SALVASTES EN LA CRA. 22 HACE UNOS 25 DIAS APROXIMADAMENTE TU SABES QUE RECORRIDO HICIESTES Y CONQUIEN TE ENCONTRASTES ESE DIA, EN TUS REUNIONES CLANDES TINAS TENEMOS FOTOS,VIDEOS,GRABACIONES Y TUS IDAS AL VECINO PAIS TU SABES ESTO DE QUE SE TRATA, ESTAS ATRAPADO Y CONFIADO VUELVES A INCUM PLIR NUESTRA ORDEN YA SABES QUE ESTAS AVISADO QUE ERES OBJETIVO MILITAR DESPUES VIENEN LAMENTOS TE ADVERTIMOS CON TIEMPO MALPARIDO TODO PASA Y SE OLVIDA COMO TU CAMARADA AURI SARA MARRUGO, TODOS TUS GUERRILLEROS MUERTOS, TU VERAS TRIPLEHIJUEPUTA TE VAS A IR AL HUECO Y ADVIERTELES A TUS CAMARADAS QUE NO FASTIDIEN CON SUS RIDICULAS INTERVENCIONES Y TODAS ESAS ORGANIZACIONES SIN BASE, TODO ESO SE VA ACABAR, YA TU ORDEN ESTA LISTA NOSOTROS TENEMOS EL PODER Y LOGRAREMOS NUESTRO OBJETIVO TRIUNFAREMOS.

BARRANCA SEPTIEMBRE 19 DE 2007

COMANDANTE ZONA
LAS AGUILAS NEGRAS UNIDAS DE COLOMBIA

Translation:

Neighbor, you who are not aware son of a bitch guerrilla we told you to leave here from Barranca[bermeja] and you did not do it, flying in a helicopter you were saved like a coward you believe that you are going to save yourself son of a bitch by making repeated dumb-ass denunciations, you think that you are going to save yourself from what we have planed for you, which is already a fact son of a bitch, keep playing, keep playing so that you see where things are going to be left with you guerrilla, you are not a fool you son of a bitch, we do not want you in Barranca, nor in Cartagena, nor in any other place in the nation, *have* the proof and we are going to you to shoot you to the ground, we have already located and marked you and your family in Bogota.

You remember son of a bitch that here in Barranca you were saved on 22nd Ave about 25 days ago you know what route you took and with whom you met that day, in your clandestine meetings, we have photos, video, recordings and your trip to the neighboring country you know what this is about, you are caught and trusted that you will not follow our order, you know that you are advised that you are a military target, after come the laments, we warn you that with time, you son of a bitch, everything passes and is forgotten, like your comrade Aury Sara Marrugo, all your dead guerrillas, your will see son of a bitch that you are going to the grave and warn your comrades that they don't annoy us with their ridiculous speeches and all those organizations without a base, all that is going to end, your order is ready we have the power and now we will obtain our objective, we will prevail.

September 19, 2007
Zone Commander
United Black Eagles of Colombia

DOCUMENT II

WORKERS' RIGHTS BENCHMARKS -- COLOMBIA

For many years, the International Labor Organization (ILO) has identified numerous ways in which Colombia's labor laws fall short of the core labor standards, the *minimum* set of rights to be guaranteed by all countries regardless of level of development. Further, the government of Colombia's has an abysmal record enforcing the labor laws it currently has on the books. This memo sets forth legal reforms that Colombian unions and the AFL-CIO believe must be undertaken in order to bring Colombia into compliance with its international obligations. Further, we urge the government of Colombia to begin immediately to establish a record of sustained enforcement of its labor laws and regulations. Labor law reform, no matter how positive, will be insufficient in the absence of evidence of a sustained and systematic effort to enforce the law.

I. Freedom of Association

Of the roughly 17.5 million workers in Colombia today, less than three million even have the right to form a union due to obstacles in the labor law (which limits unionization to workers with a labor contract). Thus, roughly 4 in 100 workers are presently members of a labor union.[43]

A. Denial or Delay of Union Registration:

Under Article 364 of the Labor Code, a new union is to have legal status upon its formation. Thereafter, a union need only file a specified set of documents with the Ministry of Social Protection (MSP) to complete its registration, which is supposed to be a pro forma process.[44]

In the past, the MSP had invoked numerous, unsubstantiated reasons, including some not found in laws or regulations, to deny registration and thus arbitrarily delay or deny the recognition of a union. According to the National Labor School (known by its Spanish acronym, ENS), 253 new union organizations were denied registration by the MSP between 2002 and 2008.[45] It is important to note that the denial of union registration skyrocketed under the Uribe Administration. In 2002, only three union registrations were denied. In 2003 alone, the first full year of the Uribe Administration, the number soared to 68.[46]

---

[43] Central Unitaria de Trabajadores (CUT), Report Regarding Convention 87 on the Right of Freedom of Association, prepared for the 98th Conference of the International Labor Organization, August 2009, p. 1.

[44] The ILO has stated repeatedly that a government may establish registration requirements that are no more than a mere formality. If conditions for granting registration are tantamount to obtaining previous authorization from the authorities for the establishment of a union, this would constitute an infringement of ILO Convention 87.

[45] Supra n. 1 at p.3.

[46] ENS, La Coyuntura Laboral y Sindical, Hechos y Cifras Más Relevantes 2007 – 2008 (June 2008), p. 11-12.

In late-2008, the Colombian Supreme Court issued a series of rulings that prohibited the MSP from denying the registration of new unions, changes in union statutes, or changes in boards of directors.[47] However, new regulations putting these rulings into effect -- and which are otherwise consistent with ILO recommendations -- have yet to be issued. Further, workers now routinely face unfounded lawsuits by employers who are challenging union registrations, effectively delaying the ability of the unions to function legally.

Recommendation: The government must issue new regulations that establish a minimal set of formal requirements, which are readily verifiable and consistent with ILO norms. Further, the MSP should offer assistance to workers to help them to comply with registration requirements – not, as is the current practice, find ways to prevent their registration. A decision to revoke a union registration should be subject to speedy review by judicial authorities. Frivolous lawsuits by employers seeking to block registrations should be dismissed expeditiously and dissuasive sanctions imposed. Challenges to registration should be unavailable to private litigants for reasons other than: 1) the union does not have the required minimum number of members or 2) the union was formed for an illegal purpose (i.e., fraud, embezzlement, employer domination, etc.).

B. Temporary Contracts, Cooperatives, Subcontracts and Temporary Service Companies

The hiring of workers on temporary employment contracts or commercial contracts, or indirectly through cooperatives and subcontractors, is increasingly common. The effect (and purpose) of the increasing irregularity of work has been to negate a worker's right of free association and collective bargaining, as well as norms related to wages, hours of work and occupational safety and health.

1. Temporary Contracts:[48]

In Colombia, Article 46 of the Labor Code, as modified by Law 50 of 1990, provides the legal framework for the use of temporary contracts. Under Article 46, employers may hire workers on a temporary basis with a term of up to three years and may continue to renew such contracts indefinitely. Except for contracts of thirty days or less, temporary contracts will be automatically renewed for the same term unless either party advises the other in writing at least 30 days in advance. If the contract is for less than one year, it can be renewed up to a maximum of three terms of equal or lesser time; after that time, the term of the temporary contract must be at least one year in duration.

While such workers technically have the right to join unions, when they do, their employers remove them from the workplace simply by not renewing their contracts when they expire. As a result, workers on temporary contracts are unable to exercise their right

[47] Union registration has increased since the MSP was divested of its power with regard to registration. In the remainder of 2008, 90 new unions were registered. So far in 2009, 62 new unions have been registered.
[48] The term "temporary contract" here corresponds to the concept of "contrato de termino fijo" found in Colombian labor law.

to join a union as it often results in the non-renewal of their contracts. Further, it is very difficult for workers to challenge the non-renewal of contracts, even if the motivation is anti-union.

Recommendation: Temporary contracts may be legitimate for truly temporary work. This concept must be limited however. The three classes of temporary work already established under the law governing temp placement agencies (see below), Decree 4369 of 2006, should also be applied to cover direct employment under temporary contracts.

- Occasional Work: Occasional work is defined by Article 6 of the Labor Code to mean "occasional, accidental or transitory work of short term, no longer than one month, and which is related to work distinct from the normal activities of the employer."
- Substitution Work: This would include situations in which one worker is contracted to fill in for another worker on vacation, maternity leave or other accident or illness.
- Increases in Production: This would include work to attend to increases in production, shipping and sales of goods and regular planting and harvests. Contracts should be for a maximum of six months, renewable one time. The employer should receive prior authorization from the MSP in order to hire workers under this form of temporary contract, and would have to establish that the work for which the employee is hired to perform is the result of a bona fide temporary increase in production.

In all cases, the burden of proof should lie with the employer to demonstrate that the nature of the work is in fact temporary. If the worker works beyond the period under contract, he or she shall be treated as if on an indefinite term contract.

2. Employment Through Commercial and Other Contracts

Title 1, Chapter 1 of the Labor Code provides a definition of employment and sets forth the basic rules of the individual employment relationship. The law establishes a presumption in favor of finding an employment relationship, which should be governed by an employment contract, when any work is performed for another.[49] Despite this presumption, a growing number of workers are hired to perform the core functions of an enterprise under non-employment contracts, such as commercial, civil or professional service contracts. Workers so hired are not considered employees but rather independent contractors, even though they may be working at an enterprise for many years under the direction and control of an employer and bring to the job none of the tools, training or expertise normally associated with independent contractors. As such, they are excluded from the protections of the labor code.[50]

[49] See Art 24 of the Labor Code.

[50] This is not to say that such contracts are never appropriate. A contract for occasional legal services, for example, with a firm with multiple clients, would be an appropriate situation in which to employ a services contract rather than an employment contract.

The ILO Committee of Experts recently commented on the exclusion of workers under such contracts to exercise their rights.

> The Committee referred previously to the use of various types of contractual arrangements, such as associated work cooperatives, **service contracts and civil or commercial contracts** which cover actual employment relationships and are used for the performance of functions and work that are within the normal activities of the establishment and under which workers may not establish or join trade unions. In this respect, the Committee requested the Government to take the necessary steps to ensure that full effect is given to Article 2 of the Convention so that all workers, without distinction whatsoever, enjoy the right to establish and join unions.[51] (emphasis added)

Recommendation: Expressly prohibit the use of non-employment contracts where an employment relationship exists, as defined in Article 23 of the Labor Code, for work that is within the core functions of the enterprise.[52] All existing non-employment contracts should be converted into employment contracts if the elements set forth in Article 23 are met. The employer should have the burden of proving that a non-employment situation does exist if he or she believes that to be true.

3. Indirect Employment Regimes

***a. Associated Labor Cooperatives*:**

In theory, a worker cooperative is a voluntary association, is democratically self-managed and equitably distributes the gains realized by its economic activities to its members. For the estimated two million people working for an Associated Labor Cooperative (CTA) in Colombia, the opposite is true. In many cases, an employer has required its workers to join a CTA in order to continue working. In so doing, however, the employer severs the employment relationship and contracts with the cooperative to provide it with the very same workers to do the very same work. Although a cooperative is supposed to be self-managed by the workers, many cooperatives are actually under the effective control of the employer. In still other cases, employers have contracted with management-friendly cooperatives that are being operated, in practice, as a subcontracting agency.

Those who work for an associated labor cooperative are, under the law, treated as owners, not as employees. Thus, these workers are explicitly excluded from the

[51] See, ILO Committee of Experts, Individual Observation Concerning Freedom of Association and Protection of the Right to Organize Convention 87, Colombia, 2009.

[52] Article 23 provides: 1. In order that there may be an employment contract, all three essential elements must be present: a) personal effort by the work, which is to say, undertaken by the worker; b) the continued subordination of dependency of the worker with respect to the employer, which has the faculty to demand compliance with orders, the manner, time and quantity of work, and to impose rules which are maintained for the duration of the contract. None of this affects the honor, dignity and rights as provided by international treaties and conventions with regard to human rights, and c) a salary as remuneration for services. 2. Once these three elements are found, a contract of employment is understood to exist and will not cease to be the name given to the relationship or other conditions and modalities that are applied.

application of the labor law.[53] This has led to extreme forms of exploitation, particularly in the rural sector. The exclusion of these workers, in law and in practice, violates ILO Convention 87. The ILO recently explained:

> Mindful of the particular characteristics of cooperatives, the Committee considers that associated labor cooperatives (whose members are their own bosses) cannot be considered, in law or in fact, as "workers' organizations" within the meaning of Convention No. 87, that is organizations that have as their objective to promote and defend workers' interests. That being so, referring to Article 2 of Convention No. 87 and recalling that the concept of worker means not only salaried worker, but also independent or autonomous worker, the Committee has considered that workers associated in cooperatives should have the right to establish and join organizations of their own choosing.[54]

Further, the ILO has enjoined its member states to refrain from using cooperatives to evade otherwise applicable rights enshrined in the labor code. Article 8(1)(b) of ILO Recommendation 193 (2002) states that "National policies should … ensure that cooperatives are not set up for, or used for, non-compliance with labor law or used to establish disguised employment relationships, and combat pseudo cooperatives violating workers' rights, by ensuring that labor legislation is applied in all enterprises."

The government recently issued a new law on labor cooperatives, Law 1233 of 2008, which, with few exceptions, largely restates many of the provisions found in Decree 4588 of 2006. Most important, the new law does absolutely nothing to bring workers employed in these cooperatives under the coverage of the nation's labor laws – maintaining a permanent underclass of workers without access to the basic labor guarantees that should be enjoyed by all workers.

The new decree does require labor cooperatives to make contributions to three government benefits programs (National Apprenticeship Service - SENA, Colombian Institute for Family Wellbeing – ICBF, and the Family Equalization Fund) as well as the social security system, which covers health care and retirement. However, whereas employers would be responsible for 2/3 of these contributions, a worker/associate in a cooperative is now responsible for 100%.

The decree also requires the labor cooperative to pay the monthly minimum wage for the class of work performed. In 2008, the monthly minimum wage in Colombia is 461,500 pesos, or roughly $265. If enforced, this provision does establish a floor on wages, albeit low, that did not previously exist. However, as the U.S. State Department has observed, "The national minimum wage did not provide sufficient income to purchase the basic market basket of goods for a family of four."[55] According to the government's National

[53] See Law 79 of 1988, Art. 59 and Decree 4588 of 2006, Art. 10.
[54] Digest of Decisions ¶ 262.
[55] U.S. State Department, Human Rights Country Practice Report (Colombia), March 11, 2008.

Administrative Statistics Department (DANE), the cost of the basic basket of goods in 2008 is 955,990 pesos, roughly double the minimum wage.

Once the newly required contributions are deducted for the various welfare programs, however, the take-home pay for the cooperative worker is roughly half of the minimum wage.

Salaried Worker		**Associated Worker Cooperative (CTA)**	
Category	**Quantity**	**Category**	**Quantity**
Pension	4%	Pension	16.0%
Health	4%	Health	12.5%
Professional Risk	N.A.	Professional Risk*	4.60%
Family Subsidies (parafiscales)	N.A.	Family Subsidies (parafiscales)	9.00%
*The contribution varies depending on the risk the worker faces and can range between 0.5 and 8.7 %. In this case, we use the average of these two (4.6%)			
Minimum Wage	**461,500**	**Minimum Wage**	**461,500**
(+) Transport Subsidy	55,000	(+) transport subsidy	N.A.
(+) Family Subsidy	41,535	(+) Family Subsidy	N.A.
(-) Pension	18,460	(-) Pension	73,840
(-) Health	18,460	(-) Health	57,688
(-) Risk/Insurance	N.A.	(-) Risk/Insurance	21,229
		(-) Admin Fee CTA	Variable
		(-)Parafiscales	41,535
Total Monthly	**521,115 Pesos**	**Total Monthly**	**267,209 Pesos**
		Salary Reduction	**- 42.1%**

Source - ENS

The decree does state that labor cooperatives are prohibited from "intermediation," meaning the hiring out of a cooperative associate to a third party. If this provision is violated, the decree provides that the third party and the cooperative are jointly responsible for any wages and benefits owed to the worker. This prohibition is essentially a restatement of a largely unenforced provision of Decree 4588 of 2006. Additional enforcement resources and commitment will be needed if this prohibition on labor intermediation is to be adequately enforced, given the sheer number of cooperatives—around 6,000[56] located throughout the country--and the small staff of the

[56] This number reflects only the legally registered cooperatives. The actual number of unregistered, illegal cooperatives is believed to be far higher. In July 2009, the Superintendant for Economic Solidarity announced the dissolution of 7,741 associated work cooperatives (of the over 12,000 registered coops) that

Superintendent of Economic Solidarity (the agency with primary oversight of cooperatives), and the poor enforcement record to date.

The new law does not prohibit third-party contracting altogether. Like Decree 4588, the law allows for cooperatives to engage in third-party contracting to produce goods and services, so long as the purpose is to produce or perform a specific object or task.

In 2009, the ILO Committee of Experts, not satisfied with the new decree, called upon the government to "take the necessary measures to guarantee explicitly that all workers, without distinction, including workers and cooperatives and those covered by other forms of contract, irrespective of the existence of a labor relationship, enjoy the guarantees afforded by the Convention [87]."[57]

The newly enacted labor measures with respect to cooperatives have already proven inadequate to prevent employers from continuing to use these cooperatives to evade the formation of unions, collective bargaining, and other such responsibilities they would normally face if the workers employed in cooperatives were simply treated as workers. Indeed, one of the largest labor conflicts with regard to cooperative workers, in the sugarcane cutting sector, occurred after this new law was issued. While workers were able to gain additional benefits because of their strike, these workers are still not considered employees and are thus still excluded from the labor law.

Recommendation: First and foremost, workers employed by a cooperative must be treated as workers under the labor code and enjoy all such rights. Second, the prohibition on intermediation must be strictly enforced and dissuasive sanctions must be levied against violators. In order to do so, there must be an accounting of the actual number of cooperatives in existence, their location and the kind of work they perform. Cooperatives must also meet a list of criteria such as adequate capitalization, ownership of their own professional equipment, possession of technical expertise and a multiplicity of clients, among other factors. Any work performed by a cooperative for another entity must not relate to the core functions of that entity, but rather occasional professional services or the ancillary work of an enterprise such as security, maintenance and other related work. Finally, the GOC needs to substantially increase control of cooperatives by the Ministry of Social Protection and Superintendent of Economic Solidarity and bring enforcement actions with suitable sanctions where necessary.

A worker who believes that he or she is working under a disguised employment relationship should have access to an expedient judicial process in which the burden will be on the employer to prove that the relationship is not within the scope of Article 23 (a-b). Finally, the law should explicitly provide that a cooperative cannot be established for the purpose avoiding a union. Employers should be subject to strong sanction where

---

had not come into compliance with the new laws and regulations. It is believed, however, that many of these cooperatives had long been dormant and/or existed only on paper. What is unclear is whether workers in any of the dissolved cooperatives were employed subsequently hired under direct and indefinite employment contracts.

[57] ILO Committee of Experts, Convention 87 (Colombia), 2009.

cooperatives have been used for such purposes; workers should also have a range of remedies available to them.

b. Temporary Service Companies (ESTs)

Today, there are 601 temporary service companies registered with the Ministry of Social Protection, with 940,420 workers.[58] Law 50 of 1990 and Decree 4369 of 2006 regulate the establishment and use of temporary service companies. Under the law, a legally registered and bonded temporary service company may supply workers to a third party employer for its temporary service needs. Temporary service is work that is: 1) less than one month in duration, 2) to fill in for a worker on vacation, maternity leave or illness or 3) to meet an increase in orders for up to six months, a period which may be renewed once (after which time the worker must become permanent if the work still exists). By law, temporary workers hired through an EST and who work in the worksite of a third party (workers "en mision") are to be paid the same salary as workers employed by the primary employer and some of the same benefits (transportation, food, and recreation). The temporary service company is also responsible for occupation health of its workers and payment into the social security and welfare benefits system.

It is also possible that workers are employed by a temporary service company to work at the site of the EST ("en planta"). For example, one could set up an EST in which the work corresponding to an increase in orders, for example, is sent to the EST and performed there. Workers are afforded fewer rights and benefits in this situation. For example, they are not covered by provisions requiring equality in pay and provision of select benefits.

There are several problems with the current law. First, the maximum penalty for violating the law is quite low - only 100 minimum salaries (a minimum salary is roughly $244). Even then, the average fine is much lower. The law does provide for the potential suspension and dissolution of temporary service companies after repeat violations. Also, while workers performing work for a third party have the right to enjoy the same benefits, they do not enjoy all of them, nor do they enjoy any rights which may be established by a collective bargaining agreement. The biggest problem is, however, that many ESTs are neither established and registered in accordance with the law nor respect the limitations on the use of ESTs for truly temporary work.

Recommendations: The law must be vigorously enforced and the fines significantly increased. Moreover, workers both "en mision" and "en planta" should enjoy the wages and benefits afforded workers in the worksite of the primary employer, including those that may be provided under a collective bargaining agreement.

---

[58] Data provide by ENS. Note, however, that many ESTs operate illegally. In 2007, El Tiempo reported that over 300 temporary service companies were "pirate" companies, which is to say they were not properly registered, were undercapitalized and did not observe the strictures of the law. See, El Tiempo, *300 Empresas de Servicios Temporales (EST) en Colombia Son de Garaje*, Sept. 27, 2007.

Overall Recommendations: Article 53 of the Constitution provides that one of the fundamental principles with regard to labor is the primacy of the employment relationship over formalities established in law. All of the forms of contact mentioned above, either in law or in practice, are means to disguise the true nature of the employment relationship. A direct employment relationship should be the norm where a worker is performing the core functions of the employer's business. Other forms of employment are permissible in limited circumstances. Occasional professional services may be contracted under a professional service contract. Truly temporary work may be contracted for under a direct temporary employment contract or through a temporary service company. Cooperatives may be legitimate either when they are truly worker-owned and operated organizations or, in the case of a CTA, they are used to perform ancillary services. In all cases, workers must be able to organize and bargain collectively with regard to their employer.

C. Labor Code Does Not Extend Right to Associate to Informal Sector Workers

The majority of workers in Colombia are employed in the informal sector. Some are employed as day laborers while still others are self-employed as vendors or providers of basic services. The latter, while self-employed, are clearly workers and should be able to associate with other similarly situated workers in unions to defend their common interests. However, as the labor code applies only to those workers who have a contract of employment, most informal workers are thus unable to form a union or affiliate to an existing union or federation. The ILO has noted that, "the concept of worker means not only salaried worker, but also independent or autonomous worker" and that all workers should have the right to establish and join organizations of their own choosing.

Recommendation: Amend the Labor Code to provide that all workers, including independent and autonomous workers, have the right to establish and join organizations of their choosing.

II. Collective Bargaining in Private and Public Sector

The number of collective bargain agreements and the coverage of those agreements are very low, again due to significant barriers in law and practice. According to the ENS, only 1 out of every 100 workers has the opportunity to negotiate collective agreements, the remainder of workers is either employed in the public sector, which does not allow for true collective bargaining, employed through cooperatives or under non-labor contracts not covered by the labor code, or in the informal sector. At the same time, collective pacts, agreements signed between employers and non-union employees, are on the rise.

A. Direct Bargaining with Nonunion Employees:

Article 481 of the Labor Code, as modified by Article 70 of Law 50 of 1990,[59] permits collective agreements ("pactos colectivos") to be directly negotiated with non-unionized workers where the union represents less than one-third of the workforce.[60] In reality, they usually are contracts that workers are unable to negotiate and are forced to accept under threat of dismissal. The agreements are used in some cases to undermine union representation and collective bargaining by establishing terms and conditions with workers often selected and favored by management on the condition that they prevent a union presence from growing at the workplace. In some cases, the employer will use the promise of an agreement to entice workers to resign from the union, leaving membership below the one-third threshold, making such agreements legal. The ILO Committee of Experts has repeatedly voiced its concern that the negotiation of collective accords could undermine the position of trade union organizations and called on the government to amend the legislation so that direct negotiations with workers should only be possible in the absence of trade union organizations.[61]

Recommendation: Amend the legislation so that direct negotiations with workers are only possible in the absence of trade union organizations. Further, collective agreements, when negotiated, must not be treated as collective bargaining agreements but rather as individual contracts collectively negotiated; they should provide no bar to the negotiation of a collective bargaining agreement. Most importantly, any amendment must clearly prohibit the employer from negotiating a collective agreement with the intent of undermining worker efforts to organize a union. In such case, the employer should face a step fine and the collective agreement, if reached, should be nullified.

B. *Bar to Industry-wide Bargaining:*

The labor code does not explicitly provide for industry-wide collective bargaining, only bargaining at the company level. Although the level of bargaining is a matter left to the discretion of the parties, the legislation should not constitute an obstacle to collective bargaining at the industry level.[62] In practice, the government does not recognize the right of unions to bargain on an industry basis.

Recommendation: The Labor Code should be amended to explicitly permit collective negotiation at any level at which the parties agree.

C. Ban on Collective Negotiation over Pension Benefits:

[59] Article 481 as amended: "The pacts between employers and non-union workers are governed by the dispositions established in Titles II and III, Chapter I, Part Second of the Substantive Labor Code, but are only applicable to those who have subsequently signed on to them. When the union or unions represent more than a third of the workers of a company, the company will not be able to form collective pacts or to extend those that are already in effect."

[60] It is possible that a collective bargaining agreement and a collective pact could co-exist side by side. In the event that the union has more than 1/3 of the workplace, the collective bargaining agreement would apply to all workers. In such a case, the collective pact would be prohibited.

[61] See ILO, CEACR: Individual Observation Concerning the Right to Organize and Collective Bargaining, Convention 98, Colombia, 2008.

[62] Digest of Decisions ¶¶ 988-90.

In 2005, Colombia reformed its Constitution to eliminate collective bargaining on the subject of pensions.[63] The law also provides that the pension provisions of existing collective bargaining agreements will become null on July 31, 2010. The ILO has stated that "Matters which might be subject to collective bargaining include the type of agreement to be offered to employees or the type of industrial instrument to be negotiated in the future, as well as wages, benefits and allowances, working time, annual leave, selection criteria in case of redundancy, the coverage of the collective agreement, the granting of trade union facilities, including access to the workplace beyond what is provided for in legislation etc.; these matters should not be excluded from the scope of collective bargaining by law…."[64]

Recommendation: The constitutional amendment should be repealed.

D. Limits on Public-Sector Bargaining:

Article 416 of the Labor Code states that public-sector workers do not have the right to bargain collectively. Instead, public-sector workers are allowed only to submit "respectful petitions."[65] Convention 98, as well as Convention 151, explicitly provides that public employees who are not engaged in activities involving the administration of the state should enjoy the right to collective bargaining.[66]

On February 24, 2009, the government of Colombia issued a new regulation regarding public sector negotiation -- Decree 535. The government claims the decree gives public sector workers the right to bargaining collectively; however, it does nothing to establish the bargaining rights contemplated by Convention 98. Additionally, the decree was drafted without meaningful consultation with public sector workers and their union representatives. Indeed, unions report that the government never provided drafts in meetings set for the purpose of dialogue on public sector labor law reform, and that government officials left such meetings immediately after sign-in sheets were circulated. The government has subsequently used these sheets as evidence of their consultation with workers.

Instead of collective bargaining, the decree establishes a process called "concertación." Here, public employees can submit a "respectful" request every two years, at a specific date agreed to by the parties. The subjects of bargaining are limited, and the negotiating process -- assuming the employer agrees to negotiate, which it has no explicit obligation to do -- may last no longer than 20 days, with the possibility of one extension. At the close of negotiations, a final consultation will occur and the authorities will issue all administrative

[63] Acto Legislativo No. 1 de 2005.
[64] Digest of Decisions ¶ 913.
[65] Article 416: "Unions of public employees cannot present bargaining demands nor celebrate collective conventions, but the unions of other official workers have all the attributions of other unions, and their bargaining demands will be transacted in same way as the others, even though they cannot declare or engage in a strike." The Constitutional Court of Colombia found this law to be unconstitutional. However, a new law has yet to be enacted. *See* Sentence C-1234 of 2005.
[66] Id. *See* also, ILO Mission Report (October 2005) ¶ 144.

acts necessary to implement the obligations. However, the authorities may refuse to implement the agreement and state the reasons for their refusal.

Specifically:

Article Three of Decree 535 limits the subjects of negotiation to: 1) conditions of work and 2) regulation of relations between employers and employees. Explicitly excluded from negotiations is "plantas de personal," which relates to state hiring practices and the composition of the workforce, and may include critical issues such as the percentage of the workforce employed through subcontracting or other forms of contract. It is unclear what other issues may be implicitly excluded from bargaining, such as provisions related to dues collection, leave for union business and the like.

Article Four introduces a new requirement, that the list of demands be adopted by the general assembly of the union. It also provides that "respectful" petitions can only be presented every two years, on a date agreed to by the parties. As a general rule, parties should be able to initiate bargaining at any time, including during the life of an existing contract by mutual agreement. In addition, the ILO has been clear that parties to an agreement should determine the duration of an agreement. If, however, legislation is to fix the duration of collective bargaining agreements, the limit should reflect tripartite agreement.[67] This is not the case here.

Article Six provides that the parties should designate representatives, but provides no guidance whatsoever as to how many representatives may be designated, and who may represent each party. There also appears to be no sanction if any side fails to nominate representatives, send sufficient representatives, or to send representatives with power to negotiate on behalf of the party. Further, there are no additional protections established for worker representative negotiators.

Article Seven explains the steps of concertacion, starting with the presentation of the workers' petition. Most important, this article imposes no duty to bargain on the employer in response to a respectful petition. If the employer chooses to bargain, this starts a negotiation period of 20 days, which may be extended for another 20 days by mutual agreement. Following the negotiation, the government will review the agreement and determine whether to issue an act implementing the agreement or explain why it will not accept the agreement. There are no provisions dealing with the likely situation where the workers and employers are not in agreement on the fortieth day. Indeed, the decree appears to allow the public employer to impose whatever contract may be on the table at the end of the 40th day. Further, the government can refuse the proposed agreement for any reason as long as it provides a statement of those reasons. There appear to be no limitations on the government's discretion to refuse the negotiated agreement. Further, there is no language as to what rights the workers have if the agreement is rejected.

In general, making the validity of collective agreements signed by the parties subject to approval of the authorities is contrary to the principles of collective bargaining and of

[67] CFA Report 320, Case 2047, para 361.

Convention No. 98.[68] With regard to the public sector, the ILO does recognize that, as to monetary issues such as wages, the competent budgetary authority of the government may have some say with regard to those negotiations.[69] However, the limited flexibility of the budget authorities to impose establish outer limits on, e.g., wage demands by no means implies that the government may simply refuse to adopt an agreement freely negotiated between the union and the public agency employer – as Decree 535 provides. As to non-wage demands, the argument that the government should have any discretion to adopt a freely negotiated collective bargaining agreement has even less justification.

Recommendation: Negotiate a new public sector bargaining law (as opposed to a decree), with the full participation of public sector unions and which is fully consistent with ILO norms. The law should then be fully implemented.

III. The Right to Strike

The ability of unions to undertake a strike, an internationally recognized instrument for defending or promoting collective rights and interests, is heavily restricted. The ILO has held that the Labor Code runs afoul of international norms in the following ways:

A. Prohibition on Strikes by Federations and Confederations

Article 417(1) states that a federation has the same legal rights as a union, with the express exception of the right to strike.[70] The ILO has found that "The prohibition on the calling of strikes by federations and confederations is not compatible with Convention No. 87."[71] In 2009, the ILO once again called on the Colombian government to amend this provision to allow federations and confederations to strike.[72]

---

[68] Digest of Decisions, ¶ 1012.

[69] See, e.g., id. at 1038. "While the principle of autonomy of the parties to collective bargaining is valid as regards public servants covered by Convention No. 151, the special characteristics of the public service described above require some flexibility in its application. Thus, in the view of the Committee, legislative provisions which allow Parliament or the competent budgetary authority to set upper and lower limits for wage negotiations or to establish an overall "budgetary package" within which the parties may negotiate monetary or standard-setting clauses (for example: reduction of working hours or other arrangements, varying wage increases according to levels of remuneration, fixing a timetable for readjustment provisions) or those which give the financial authorities the right to participate in collective bargaining alongside the direct employer, are compatible with the Convention, provided they leave a *significant* role to collective bargaining. It is essential, however, that workers and their organizations be able to participate fully and meaningfully in designing this overall bargaining framework, which implies in particular that they must have access to all the financial, budgetary and other data enabling them to assess the situation on the basis of the facts."

[70] Art. 417: "All unions have, without limitation, the ability to join or align themselves in local, regional, national, professional or industrial federations, and these into confederations. The federations and confederations have the right of own legal form and the same attributions of unions, *except for the declaration of a strike*, that is incumbent on, when the law authorizes it, the respective unions or groups of directly or indirectly interested workers."

[71] Digest of Decisions, ¶ 525.

[72] See, ILO Committee of Experts, Individual Observation Concerning Freedom of Association and Protection of the Right to Organize Convention 87, Colombia, 2009.

Recommendation: Strike the proviso regarding strikes from Article 417(1).

B. Prohibition on Strikes in Non-Essential Services

Articles 430 and 450, when read together, prohibit strikes not only in essential services in the strict sense of the term but also in a wide range of services that are not essential.[73] The ILO has found that strikes may be restricted or prohibited: (1) in the public service only for public servants exercising authority in the name of the State; or (2) in essential services in the strict sense of the term (that is, services the interruption of which would endanger the life, personal safety or health of the whole or part of the population).[74] The ILO has found that the following services on Colombia's list are not essential: civil servants not exercising authority of the state, transportation, mining (salt) and oil.[75] Some, but not all, work in telecommunications, hospitals and sanitation may be classified as essential.

Recommendation: Amend Article 430 of the Labor Code to remove from the list of essential public services those services that are not properly considered essential public services under international law.

C. Dismissal of Workers for Strike which is Legal under International Law

Under Article 450(2), an employer can freely fire workers, including union officers otherwise protected under law, who participate in an illegal strike.[76] This is a problem where the unlawfulness of the strike rests on requirements which are contrary to the principles of freedom of association. The Committee on Freedom of Association has urged Colombia to change this provision of its labor law in ILO Report No. 343, Case No. 2355 (Colombia) 2007, concerning mass dismissals after the 2004 strike at ECOPETROL.

Recommendation: No further action is required once the domestic law with regard tp strikes is amended in conformity with ILO norms.

D. Declaration of Legality of a Strike

Until late-2008, the Ministry of Social Protection had the authority to determine the

[73] *See*, Art. 450(1)(a): "The collective suspension of work is illegal in any one of the following cases: a) when it is a public service." Art. 430 of the Labor Code defines public service as: those that work in any branch of the public service, companies that provide transportation by land, sea or air, electricity, telecommunications, all health establishments such as hospitals or clinics, social service establishments, all services related to hygiene and cleanliness of the population, the exploitation, processing and distribution of salt, the exploitation, refining, transport and distribution of oil (when they are used for the fuel supply of the country).

[74] Digest of Decisions, ¶ 576.

[75] The ILO Committee on Freedom of Association has repeatedly found that the oil sector is not an essential public sector. See, ILO CFA Report No. 343, Case No. 2355 (Colombia) 2007.

[76] *See* Art. 450(2): "The suspension of work having been declared illegal, the employer is free to dismiss for this reason those who have taken part in it, and with respect to workers protected by the law, the dismissal will not require judicial qualification."

legality of a strike.[77] The ILO had stated that, "Responsibility for declaring a strike illegal should not lie with the government, but with an independent body which has the confidence of the parties involved."[78] Article 2 of Law 1210 of 2008 responds to this criticism by transferring the authority to determine the legality of a strike from the Ministry of Social Protection to the Labor Chamber of the Superior District Court. However, the new law maintains a substantial role for the MSP. Under Article 4, the MSP can on its own initiative file a complaint with the court contesting the legality of the strike. Indeed, the MSP may file a complaint even if none of the parties, such as the employer, chooses to file a complaint. It remains to be seen whether this provision will substantially limit the effectiveness of this legal reform.

Recommendation: Amend Article 4(3) to disallow the MSP from filing a complaint to independently contest the legality of a strike. Indeed, the law should be further amended to provide that the MSP should act to guarantee worker the right to exercise their right to strike and to protect workers undertaking legal strike actions.

IV. Additional Issues

a. Dissolution of the Ministry of Labor, Social Security & Employment and Weak Labor Inspection System

Colombia has ratified Conventions 81 and 129 regarding labor inspection. However, labor inspection is hampered by three critical problems. First, the government eliminated the Ministry of Labor and created a new institution, the Ministry of Social Protection, which is markedly weaker. Second, the labor inspection system has vastly insufficient resources relative to the task, including a mere 273 inspectors for the entire country. With an active workforce of over 18 million, each inspector is responsible for the oversight of over 65,000 workers. Inspections in the rural sector are particularly rare. Thirdly, the Ministry of Social Protection has not demonstrated the political will to pursue worker rights violations vigorously. For these reasons, complaints filed with the Ministry of Social Protection can take years before there is a resolution.

Recommendation: Reconstitute the Ministry of Labor and build the capacity of the labor inspectorate to conduct inspections, respond to complaints in a timely manner, and, where warranted, fine or otherwise sanction those who violate the labor code.

b. Repeated Failure to Comply with the Recommendations of the Committee on Freedom of Association

Trade unions have filed numerous cases with the ILO's Committee on Freedom of Association. In many of these cases, the ILO has, upon review, criticized the government for its failure to adopt laws consistent with the conventions it has ratified and to effectively enforce domestic and international labor laws. There are several cases in

[77] *See* Article 451(1): "The illegality of a suspension of work will be declared by the Ministry of the Labor."
[78] Digest of Decisions, ¶ 628.

which the ILO has issued repeated recommendations, as the government has continued to simply ignore the ILO.

In mid-2007, the Ministry of Social Protection revived the defunct Commission for Resolving Conflicts. The purpose of the commission is to resolve cases that already have been presented to the ILO in Geneva, or new claims that could be brought to the ILO. The ILO Office in Colombia already has referred several new cases to this commission. However, for a case to be taken up by the commission, all parties involved must agree to it—which is often difficult to achieve when parties are in dispute. The fact that the case remains unresolved despite clear ILO recommendations is not considered sufficient justification for the commission to hear the case. Moreover, the commission is not set up to act upon the ILO recommendations, but rather to broker a settlement between the parties, which may result in outcomes that afford workers less than they are entitled to if international labor law were to be applied.

Of the 72 cases brought before the commission, only 1 has been resolved.

Recommendation: All cases currently before the Commission must be resolved in accordance with ILO recommendations. For older CFA cases not before the commission and where the recommendations have not been mooted by the passage of time, the parties should also seek to resolve the conflicts in accordance with those recommendations.

c. Extend the ILO Office and Program

On October 2006, a tripartite agreement was reached that established an ILO office in Colombia. However, the mandate of the office and its funding will end at the close of 2009. The mandate of the office should be extended for a period of time agreed to by the parties and must be given the additional resources necessary to carry out its mandate effectively. Importantly, the ILO should also be given a much greater role in the resolution of labor conflicts in Colombia and in promoting the recommendations of the ILO as they relate to Colombia; it is currently limited to an educational function and as an intermediary with the ILO headquarters in Geneva.