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The Action Plan Related to Labor Rights
A New Frustration?

Evaluation of the first six months since the implementation of the Action Plan Related to Labor Rights between the governments of Colombia and United States

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October 7, which is the "World Day for Decent Work", marks six months since the adoption of the Action Plan Related to Labor Rights agreed to between the governments of Colombia and United States. In this respect, ENS has prepared an evaluation of its implementation and effects. Additionally, we hope there is a public evaluation involving State institutions, trade union confederations, and business owners.

This evaluation presents many critical voices. For instance, over the last six months, the Unified Workers' Confederation (CUT) and the Confederation of Colombian Workers (CTC) have reported specific cases of violations to labor and union rights, where the contents of the Action Plan have not had any effect. Furthermore, the General Labor Confederation (CGT) and the Colombian Confederation of Retired Workers (CPC), which signed this labor agreement, have also reported cases of violations and have publicly expressed their concern for incompliance with certain parts of this agreement.

Likewise, this evaluation has been released at time when workers' protests have increased over the last few months. Thousands of workers at oil fields, ports, hospitals, and the palm oil plantations, among other sectors, have been on strike to demand direct employment relationships through regular work contracts at their places of employment. This evaluation has also been released within the context of a public sector strike by the three trade union confederations and the federations of all public employee unions, which will be carried out this Friday, October 7. These organizations have justified this strike due to several breaches by the national government, especially since outsourcing has continued at public institutions through the use of associated workers' cooperatives, a decree previously issued on collective bargaining has not been implemented, the situation of 120,000 temporary employees has not been resolved, and the government has not complied with Ruling C-614 of 2009.

The Action Plan Related to Labor Rights created many expectations for change, which have yet to materialize. This plan has been reduced to implementing certain measures (without dialogue or compliance with ILO standards) that fail to transform labor public

policy and consequently have minimal effects on the labor situation in the country. At this time, there needs to be dialogue processes, greater and more sustained political will, increased State capacity to protect labor and union rights, persistence in transforming labor public policy, and the accompaniment and direct participation of unions. It would be important that the Labor Minister, who shall be appointed in the coming weeks by the President of the Republic, be in charge of achieving the objectives of the Action Plan and compliance with ILO recommendations and conclusions.

We are concerned that, if the United States Congress passes the Free Trade Agreement, the limited willingness for change will be further reduced and the Action Plan will be turned into a new frustration for Colombian workers, in addition to causing other serious consequences.

A. ACTION PLAN HAS BEEN IMPLEMENTED WITHOUT COMPLYING WITH THE ILO OR CARRYING OUT SOCIAL DIALOGUE

At first, we believed that the Action Plan could be a sign of progress, given that the country's grave situation of violations to labor and union rights requires implementing measures to reverse the shortage of decent work resulting from decades of exclusion for workers and their unions. Although all the measures included were positive in principle, others measures should have also been included to ensure its effectiveness. Likewise, specific goals should have been established to measure the changes achieved.

We have argued that it is essential to coordinate the Action Plan with the conclusions of the High-Level ILO Mission, which visited Colombia in February 2011 and stressed the urgent need for legislative changes on at least 53 issues. Unfortunately, this was not done.

We had also hoped that the Colombian government would meet and engage in dialogue with different actors of society on the design and implementation of the measures in the Action Plan. However, none of the implemented measures emerged from social dialogue. It should also be pointed out that the Labor Agreement signed by the government, business owners, and two trade union confederations (CGT and CPC) has yet to be fulfilled. Recently, the President of the CGT expressed his concern for the failure to comply with the Labor Agreement, especially since the decree on collective bargaining for public employees has yet to be reformed.

B. THE MEASURES DO NOT REPRESENT SUBSTANTIAL CHANGES IN PUBLIC POLICY

The Action Plan includes approximately 37 concrete measures to be implemented by the government on 10 major issues, which will contribute to five principal goals: strengthening State institutions on work-related issues, achieving regular work contracts, protecting the right to organize, protecting the right to collectively bargain, and overcoming anti-union violence and impunity. Our evaluation will focus on the implemented measures and their effects on each of these five goals:

1. Strengthening State institutions on work-related issues

In this area, the Colombian government committed to establishing the Ministry of Labor, increasing the number of inspectors and improving their training, establishing a web-based mechanism for registering complaints, and improving capacity for conflict resolution.

In May, the Congress gave the government broad powers to create several Ministries, including the Ministry of Labor. Nonetheless, this Ministry is the only one yet to be established. We have stressed the need to give the Labor Ministry a high political profile and greater institutional capacity, enabling it to lead the necessary changes in labor public policy. We also insisted that the new Ministry must fulfill all ILO recommendations to bring the country into line with the requirements of Conventions 81 and 129 on labor inspections in the areas of industry, trade, and agriculture. However, perhaps the most important point is that the design of the new ministry has not been the result of social dialogue. In fact, there was only one brief opportunity for discussion took place with trade union confederations in the month of July.

With respect to the new inspectors and their training and capacity for conflict resolution, government reports have described a small number of measures that have yet to be implemented. We believe that there need to be more measures and an adequate number of inspectors. According the ILO standards, there should be at least 2,000 inspectors, who are trained and specialized to address the different situations of risk and violations to labor rights. These inspectors should also have sufficient authority to enforce their decisions, receive adequate wages, hold career civil service positions, exercise independence and control in their actions, and have the necessary materials and supplies to perform their duties.

With respect to a system for citizens to file complaints, no information is available on any type of penalty imposed due to the telephone hotline or the web-based mechanism for registering complaints. Complaints may not be filed through web page and the contacts link does not provide any information about the complaint process or the state of investigations processed this way.

It is evident the State inadequately protects union rights and is unable to significantly reduce abuses and illegal practices in the workplace. Many cases have been reported publicly on these problems in different sectors, including ports, health, palm, and oil. Most notably, the State has not been able to resolve the workers' concerns about the application of regulations issued by the State itself. It is also not evident that the work inspections will be able to respond adequately to situations. The 100 new inspectors who supposedly were going to be appointed are not visible. Agreements were not reached on an inspection plan for prioritized sectors. To the contrary, protests have increased in these sectors. The Ministry should have a special inspection plan to protect workers seeking to unionize and be employed directly by the companies where they work.

2. Achieving regular work contracts

In this area, the government pledged to eliminate the abuse of associated workers' cooperatives and any other form of work relationship affecting labor rights. The government also pledged to establish a system to monitor labor rights violations by temporary service agencies. In order to do this, legislation needs to be amended, labor inspections need to be strengthened, and workers' rights need to be widely disseminated.

The government made some progress with legislative changes on associated workers' cooperatives, but has made no progress on temporary service agencies. The regulatory framework for Article 63 of Law 1429 of 2010, through Decree 2025 of 2011, only established sanctions for failing to comply with the ban on associated workers' cooperatives and subcontacting. However, unlike the commitment made in the Action Plan, it does not refer to sanctions for the use of other forms of subcontracting or weakened employment contracts. This situation has enabled the business owners in several sectors to turn the associated workers' cooperatives into "simplified corporations" (Sociedades Anónimas Simplificadas – SAS) through union contracts and temporary service agencies. In this respect, the ports, palm businesses, health care providers, and other sectors, continue to disregard the employment relationship and circumvent the law.

Under the new rules on the prohibition of subcontracting through associated workers' cooperatives, workers have found an opportunity to claim their rights, such as having a work contract and social and labor protections. Additionally, they have begun to mobilize and protest, demand the implementation of standards, which is fair, legitimate and supported by the law. However, these demands are not addressed by the State. Sanctions have not been applied against companies that continue to use associated workers' cooperatives or other forms of subcontracting or ways to take advantage of workers' rights. Government reports only mention two cases of companies penalized for carrying out illegal subcontracting.

A few companies have understood the political message of the day, and have done so without any prodding by the State. As such, they have established direct work relationships with labor contracts and labor and union rights. Specifically, they have begun to directly contract workers who were previously employed through associated workers' cooperatives. The companies include Carrefour, Éxito, and Fabricato, among others. What is amazing is that the State has not understood this, when it should have been the first to end outsourcing. It is outrageous that major companies —like oil companies, port companies, the palm agro-industry, and the sugar industry—, which have administrative and financial capacity to resolve this problem, attempt to circumvent the law.

The vast majority of companies contracting their workers through associated workers' cooperatives and temporary service agencies have not transformed their labor relationships, thanks to non-existent labor inspections and legislative loopholes, which allow them to disregard rights.

It is therefore necessary to extend the scope of Decree 2025 of 2015 to cover other forms of subcontracting that affect labor rights. The Ministry of Social Protection also needs to design a strategy, in consultation and concert with labor confederations, to implement Decree 2025 of 2011 and control temporary service agencies. We cannot proceed on a case-by-case basis. The State must give a proportional response to the massive problem of labor outsourcing in the country.

The State must be the first to set an example by providing decent work. There are many national and regional State institutions that subcontract work for the regular activities of these public institutions, which adversely affects workers' rights. It will therefore be necessary for the government, as announced by President Santos in a meeting with the

trade union confederations on March 31, to issue a concerted regulation on the implementation of the Constitutional Court Ruling C-614 of 2009. It also needs to develop agreements with public institutions so that workers —who are providing their services to the State through the associated workers' cooperatives, services contracts, and other forms of subcontracting— may be directly employed by the State.

3. Protecting the right to organize

The government pledged to reform Article 200 of the Penal Code to punish violations to the right to organize and collectively bargain. In this respect, as part of the Citizen's Security Law (Act 1453 of 2011), the government presented a legislative bill that included broad protections for union rights. This legislative bill also included prison sentences for those who obstruct or hinder unionization through labor promises or pressure, dismissals or changes in working conditions to prevent the establishment of unions or the right to organize unions, the refusal to negotiate, retaliations for providing testimony or supporting investigations, threats to trade unionists to affect the exercise of union rights, or the promotion of collective pacts granting better terms than those provided for in the collective bargaining agreements. However, in the last debate in Congress, the bill was substantially amended, eliminating many of the elements included in the original legislative bill, leaving only one protection that would be difficult to apply for the case of encouraging collective pacts.

The final version[1] of Law 1453 of 2011 establishes three important changes compared to the previous article. First, a person may be sentenced to prison for 1 to 2 years, while before there was only a fine. Second, it establishes a series of aggravating circumstances, including if the worker had been deceived. Third, it criminalizes collective pacts if they grant better conditions for non-unionized workers than the conditions agreed-to in collective bargaining agreements with unionized workers at the same company.

Over 10 years ago, violations to union rights were classified as a crime in the Criminal Code. It has been applied on only two occasions, according to available information, because in the practice it is very difficult to implement since it is an open-ended criminal offense. Increasing the penalty does not make it an adequate and sufficient protection for the right to organize.

We believe that Article 57 of the Labor Code, which establishes the obligations of the employer, should be reformed to more effectively protect union rights. This article should also include the duty of employers to respect, protect and promote union rights for their

[1] "Article 26. Amending Article 200 of Law 599 of 2000, which will be as follows: Article 200. Violation to the rights of assembly and association. Whoever prevents or disrupts a lawful meeting or the exercise of rights granted by labor laws or retaliates because of strikes, lawful assembly or association, shall be liable to imprisonment for one (1) to two (2) years and will face a fine of hundred (100) to three hundred (300) legal monthly minimum wages.
The same penalty shall apply to collective pacts that grant better conditions for non-unionized workers than those conditions agreed-to in collective agreements with unionized workers at the same company.
The prison term shall be three (3) to five (5) years and a fine of three hundred (300) to five hundred (500) legal monthly minimum wages if the conduct described in paragraph one is committed:
1. Placing the employee in a position of helplessness or threatening their personal safety.
2. The conduct is committed against a disabled person, a person who is serious ill, or a pregnant woman.
3. By threatening to cause death, personal injury, damage to private property or workers or their family members, spouse, permanent partner or companion, sibling, adoptive parent or child, or relative to the second degree.
4. By deceiving the worker."

workers. In this respect, the high-level ILO mission said: "*The Mission is deeply concerned by the repeated and detailed information received about anti-union discrimination at private companies and in the public sector, in addition to the absence of effective action to put end to such acts*."

4. Protecting the right to collectively bargain

Insofar as collective pacts, the government pledged to make it a crime (with a prison sentence) to use collective pacts to undermine collective bargaining rights by offering better conditions for non-union workers in such pacts. The government also pledged to conduct campaigns to promote awareness about the illegal use of collective pacts, implement a strong system of compliance, and use ILO technical assistance to monitor the use of collective pacts.

In effect, the reform of Article 200 of the Criminal Code made it a crime to use collective pacts for anti-union purposes. However, even though this measure punishes the employer making use of anti-union collective pacts, it does not prohibit them and therefore collective pacts may continue to exist at companies with a unionized workforce, until Article 481 of the Labor Code is reformed. In its 2010 report on Convention 98, the Committee of Experts on the Application of Conventions and Recommendations of the ILO stated: "*…the Committee requests the Government to provide information on the measures adopted to encourage and promote the full development and utilization of voluntary collective bargaining, in accordance with Article 4 of the Convention, and to ensure that the conclusion of collective pacts negotiated directly with the workers is only possible in the absence of a trade union and that it is not carried out in practice for anti-union purposes*."

In connection with the campaign and labor inspection activities to prevent the use of anti-union collective pacts, the government claims to have a plan and a schedule of visits to companies with collective pacts, but has not spoken about any type of sanctions to be imposed.

With respect to essential services, the government pledged to gather and disseminate Colombian doctrine and jurisprudence, which it did in fact do. However, the document it published did not include the jurisprudence issued by the Supreme Court of Justice and the Council of State supporting the possibility of carrying out strikes in cases of serious breaches of employer obligations, including for workers employed at essential public services. The document cites several Constitutional Court decisions, but fails to mention the judgments in favor of strikes at essential public services and the decisions urging Congress to issue regulations on the issue. The document also does not underscore the doctrine of the ILO Committee of Experts, which has consistently pointed out the services considered essential in Colombia that are in violation of Convention 87. It has also requested that legislative changes be made, but the Colombian state has yet to comply.

We believe that a legal regulation needs to be concerted that expressly and accurately establishes the concept of essential services in the strict sense, and the minimum provision of services in accordance with ILO standards. These ILO observations and recommendations have specifically questioned the laxity of the law and, above all, the overly restrictive interpretation of the right to strike established by Colombian judges.

Lastly, the issue of collective bargaining was not included in the Action Plan. However, in the Labor Agreement the government pledged to issue a decree to allow collective bargaining for the more than 800,000 public employees. For several months, the government and all public sector trade unions belonging to the three Colombian trade union confederations discussed and agreed to a draft of the decree. Nonetheless, four months after reaching this agreement, the decree has not been issued.

5. Overcoming anti-union violence and impunity

In this area, the government pledged to adopt measures regarding the protection program for trade unionists and unionized teachers, and measures to strengthen the investigative capacity of the Prosecutor General's Office.

With respect to the protection program, the government adopted Resolution 716 of 2011, which extends the coverage of the program, Resolution 3900 of 2011, which amends the procedures for the protection of threatened teachers, and Decree 3375 of 2011, which amends the risk assessment procedure. Additionally, the government launched an emergency plan for addressing cases yet to be evaluated and strengthened funding for the protection program.

As a whole, these measures partially improve the protection of trade unionists and resolve some of the problems, which have been spoken out against for several years. However, despite this strengthening and improvement, anti-union violence has continued. During the Santos administration (from August 7, 2010, to October 4, 2011), 40 trade unionists have been murdered. Since the Action Plan was issued (from April 7, 2011, to October 4, 2011), 16 trade unionists have been murdered. So far in 2011, 23 trade unionists have been murdered. Since 1986, 2,908 trade unionists have been murdered.

We therefore believe that the program must adopt an approach that is not limited to individual protection. It should also include collective protection and it should especially take a preventive approach. In this regard, the External University of Colombia conducted a study last year for the United Nations Development Program (UNDP), which included some recommendations that highlighted the need for a personal protection policy, the importance of incorporating the methodology of the early warning system developed by the Human Rights Ombudsman's Office, and a mapping of the threats and risks faced by trade unionists and trade union organizations.

Additionally, dialogue on the protection program should not be limited to merely presenting cases and adopting measures. As indicated by the High-Level ILO Mission, dialogue should include "*an analysis, conducted with the participation of trade union organizations, on the protection to continue to be provided for trade union leaders, unionized workers and union offices,*" which leads the program's improvement and effectiveness.

With respect to strengthening the investigation capacity of the Prosecutor General's Office, the government pledged to hire 95 new investigators, broaden resources for the specialized subunit on cases of trade unionists, carry out training processes for prosecutors and investigators, conduct an analysis on the closed cases to

draw up conclusions and improve investigations, improve support for victims, determine with the trade unions confederations the list of cases to be investigated, and change the legal regulation on the threats. The government claims to be adopting all of these measures, although very little information is publicly available. The implementation of these measures would certainly allow progress to be made in achieving justice in some cases, but will contribute little or nothing to ensuring the victims' rights to truth and reparation.

Serious problems continue to prevent the Prosecutor General's Office and judges from taking on a greater role in enforcing the victims' rights. The principal problem is the lack of dialogue with trade unions and human rights organizations that have worked on the issue of anti-union violence. This dialogue could lead to building a list of cases to be investigated and a new and more effective methodology for investigation. Although the Action Plan specifically included the obligation to reach an agreement on the list of cases to be investigated, at the only meeting carried out to date, the Prosecutor General's Office refused to agree to a procedure to identify cases of anti-union violence reported by the trade union movement over the past 25 years. Likewise, there are no plans or evidence of a willingness of the Prosecutor General's Office to advance dialogue with the trade union movement and human rights organizations to improve the methodology of investigations in the cases of violence against unionized workers. We continue to insist that the current methodology will not produce satisfactory results.

A plan must be developed to overcome impunity within ten years. This plan needs to include resources and specific goals. The addition of new investigators and prosecutors requires the adoption of a new methodology for the investigations. In order for investigations to be more effective and complete, this new methodology should identify the logic behind the violence committed against trade unionists and focus on the 15 organizations and the 6 departments most affected by violence against trade unionism. This methodology should also examine the context in which violations have occurred (socio-political violence and anti-union violence), carry out in-depth analysis on the motives behind the crimes, identify the instigators (State agents, business owners, and armed groups), and carry out a reliable investigation of the facts, including all violations perpetrated against the victims.

We consider it very important to analyze the investigations undertaken to date. Additionally, lessons should be drawn from this to improve the investigative work carried out by the Prosecutor General's Office. However, this analysis should also consider the contributions of the trade union confederations and the studies conducted by ENS, Dejusticia, and the Colombian Commission of Jurists. The analysis of closed cases must also specifically analyze the plea bargain agreements reached through the "Justice and Peace" Process to ensure that future investigations verify the version of events claimed by the defendants. Likewise, the gaps in the investigations need to be identified in order to initiate new investigations on other possible perpetrators (including instigators and intellectual authors, among others). The trade union confederations should also have the opportunity to see the conclusions reached by the Prosecutor General's Office on the closed cases so that they can make recommendations.

Cases without evidence, old cases, inactive cases, or those which have not officially begun investigations, should not be closed, rather should benefit from a special investigation policy to provide new elements for them to make progress. In order to keep

"cold" cases from stalling other investigations, a group of prosecutors should be exclusively dedicated to these cases. These measures do not conflict with the promotion of a special investigation policy for recent cases or cases with evidence, which should be taken on by specific prosecutors.

Additionally, the training program for prosecutors, judges, and investigators, should present the history of trade unionism and the violence against trade unionists so these officials can have more a complex and complete understanding when they undertake investigations and prosecutions.

C. THE MEASURES FAIL TO PRODUCE EFFECTS ON WORK AND UNION CONDITIONS

Six months after agreeing to the Action Plan, the government has adopted some of the measures. However, these measures have failed to produce changes in the working world, which has weakened the political impact initially created with Action Plan. No measure has begun to have any effects. The formal aspects have been carried out, but their implementation has yet to begin. Additionally, several recent cases demonstrate that the new labor agenda is not a reality, since business owners and public servants continue to broadly violate labor and union rights. Informality, weak work contracts, and anti-union practices, have not subsided. The low figures on decent work have not changed.

First, this lack of change is due to the fact that the government did not listen to or consider the proposals submitted by trade unions on the complementary measures that would make the actions more effective. In general, the government of Colombia unilaterally determined all of the measures by without any input from the trade unions. Second, the measures were adopted without changing the existing legal framework and policies, which created contradictions and loopholes preventing their implementation and therefore failing to generate any change.

Third, with the exception of Vice President who promotes opportunities for dialogue, the State as a whole is not committed to the Action Plan Related to Labor Rights. For instance, the Congress of the Republic did not effectively amend Article 200 of the Criminal Code, since it should have increased penalties and fines for offenses against the right to organize. The Prosecutor General's Office has not demonstrated any interest in developing a productive dialogue with trade unions and human rights organizations working on the issue of anti-union violence. The Ministry of Social Protection, the state agency in charge of leading this Action Plan, has not been committed to working on it, has not effected changes, and has not modified its apathetic reaction to the daily attacks faced by workers and their unions, as in the recent cases of palm workers in the Magdalena Medio and the oil workers in the department of Meta.