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International Standards on Conscientious Objection to Military Service and Alternative Service applicable to Colombia

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Introduction

The issue of conscientious objection to military service is addressed within the United Nations (UN) human rights system in a number of ways. Most notable is the Human Rights Committee¹ in both individual cases and when considering State reports under the International Covenant on Civil and Political Rights, as well as in its General Comments No. 22 on Article 18 and No. 32 on Article 14 of the Covenant². The UN Human Rights Council and (former) UN Commission on Human Rights have adopted resolutions on the subject. The Special Procedures of the Human Rights Council³ have taken up the issue, and it has also arisen in the Universal Periodic Review (UPR) system.

All of these are directly relevant to the situation of conscientious objection to military service in Colombia. Colombia is a party to both the International Covenant on Civil and Political Rights (ratified 29 October 1969), and to its

¹ The Human Rights Committee is the body of independent experts which oversees the implementation of the International Covenant on Civil and Political Rights. All States parties to the Covenant are required to report to the Committee on a regular basis. The Committee examines the report on a public dialogue with representatives of the State and adopts Concluding Observations highlighting improvements needed as well as progress made. The Committee also produces General Comments clarifying and interpreting the Covenant's provisions. In those States which are also parties to the First Optional Protocol, individuals can send the Committee complaints alleging violations of the Covenant.

² Human Rights Committee General Comment No. 22 (CCPR/C/21/Rev.1/Add.4 of 30 July 1993), 'The right to freedom of thought, conscience and religion (Article 18)' and General Comment No. 32 (CCPR/C/GC/32 of 23 August 2007), Article 14 'Right to Equality before Courts and Tribunals and to Fair Trial'.

³ The UN Human Rights Council replaced the UN Commission on Human Rights in 2006. It is the main UN intergovernmental human rights body, as the Commission was before it.

First Optional Protocol which enables the submission of individual complaints. Furthermore Article 93 of the Constitución Política de Colombia introduces ratified international human rights standards into Colombian law.

In 2004 the Human Rights Committee highlighted the lack of provision for conscientious objection to military service in its Concluding Observations on the State report of Colombia under the Covenant:

“17. The Committee notes with concern that the legislation of the State party does not allow conscientious objection to military service. **The State party should guarantee that conscientious objectors are able to opt for alternative service whose duration would not have punitive effects (arts. 18 and 26).**”⁴

By 2010 the position had changed:

“22. The Committee notes with satisfaction Constitutional Court ruling C-728 of 2009 exhorting Congress to regulate conscientious objection to military service, which represents progress in the implementation of the Committee’s earlier recommendation of 2004 (CCPR/CO/80/COL, para. 17). However, the Committee is still concerned by the lack of progress on the introduction of the necessary legislative amendments for recognizing conscientious objection and by the use of “round-ups” as a means of checking who has carried out military service (art. 18). **The State party should, without delay, adopt legislation recognizing and regulating conscientious objection so as to provide the option of alternative service, without the choice of that option entailing punitive effects, and should review the practice of “round-ups”.**”⁵

The earlier lack of provision was also the subject of a recommendation to Colombia by Slovenia in the 1st cycle of the UPR system: “37(a) Following the concern expressed by the Human Rights Committee in 2004 that Colombia does not allow conscientious objection to military service, Slovenia recommended that Colombia (a) recognize this right in law and practice and ensure that recruitment methods allow it. The State should guarantee that conscientious objectors are able to opt for alternative service, the duration of which would not have punitive effects.”⁶ Slovenia followed up in the 2nd cycle of the UPR with a written question: “Considering that liberty of conscience in Colombia

⁴ COLOMBIA (CCPR/CO/80/COL of 26 May 2004), para. 17

⁵ COLOMBIA (CCPR/C/COL/CO/6 of 4 August 2010), para. 22

⁶ Report of the Working Group on the Universal Periodic Review: Colombia (A/HRC/10/82 of 9 January 2009), para. 37(a). The Government responded: “37 (a) Non acceptance. The Colombian Constitution and the legal framework establish that all citizens have the obligation to enrol in the military service when the circumstances so require to defend the National sovereignty and the public institutions and to provide security conditions for all citizens. This obligation has been upheld on several occasions by the jurisprudence of the Constitutional Court.” (A/HRC/10/82/Add.1) This was, of course prior to the Constitutional Court ruling of 2009.

is protected by the Constitution (Art 18), we would be interested to know if the government adopted any specific legislation that refers to or regulates the right to conscientious objection with regard to military service?”⁷

The UN Working Group on Arbitrary Detention undertook a mission to Colombia in 2008 and addressed the issue of *batidas* and conscientious objection to military service⁸ as well as in its Opinion No. 8/2008 (Colombia), concerning Frank Yair Estrada Marin, Carlos Andres Giraldo Hincapié and Alejandro de Jesus González Duque, in which it stated: “The detention of individuals who expressly declare that they are conscientious objectors has no juridical foundation or legal basis and their enrolment in the army against their will is in clear contradiction with the promptings of their conscience and can be in violation of Article 18 of the International Covenant on Civil and Political Rights. Failure to make provision for the right to conscientious objection may violate that article. Also, the practice of *batidas* or recruitment round-ups, whereby young men who cannot provide proof of their military status are apprehended on the streets or in public places, has no juridical foundation of legal basis.” It came to the conclusion that this detention and recruitment was arbitrary and contrary to articles 9 and 18 of the Covenant.

The UN Standards

The right of conscientious objection to military service:

Both the Human Rights Committee and the UN Human Rights Council have recognised the right of conscientious objection to military service as part of the right to freedom of thought, conscience and religion enshrined in Article 18 of both the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights.

The Human Rights Committee considers that “the right to conscientious objection to military service is inherent to the right to freedom of thought, conscience and religion. It entitles any individual to exemption from compulsory military service if the latter cannot be reconciled with the individual's religion or beliefs. The right must not be impaired by coercion”. In the Committee's most recent cases⁹ on the subject, it held that Turkey and the Republic of Korea violated Article 18 by not providing for conscientious objection to military service.

The Committee has definitively laid to rest suggestions that conscientious objection is not protected under the Covenant either because it was not recognised specifically (an argument it had already addressed in its General Comment 22 on Article 18)¹⁰, or because of the reference to conscientious objection which is included in Article 8. Article 8 concerns the prohibition of

⁷ OPINION No. 8/2008 (COLOMBIA) Adopted on 9 May 2008, Concerning: *Frank Yair Estrada Marin, Carlos Andrés Giraldo Hincapié and Alejandro de Jesús González Duque* (A/HRC/10/21/Add.1), pp110-114

⁸ A/HRC/10/21/Add.3, 16 de febrero de 2009, para. 66

⁹ *Atasoy and Sarkut v Turkey* (CCPR/C/104/D/1853-1854/2008 of 19 June 2012) and *Jong-nam Kim et al v Republic of Korea* (CCPR/C/101/D/1786/2008 of 1 February 2012).

forced labour. Its paragraph 3 states that for these purposes, the term forced or compulsory labour does not include “any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors”. Since 2007, the Committee has consistently stated in its case law that “article 8 of the Covenant itself neither recognizes nor excludes a right of conscientious objection. Thus, the present claim is to be assessed solely in the light of article 18 of the Covenant”.¹¹

Under the Covenant, Article 18(1), which covers both the right to freedom of thought, conscience and religion and the right to manifest one’s religion or belief, is non-derogable even during times of national emergency threatening the life of the nation.¹² Some restrictions on the right to manifest one’s religion or belief are permitted by Article 18(3) of the Covenant, but these are not relevant to the question of conscientious objection to military service because of the Committee’s position that this is inherent in the right rather than a manifestation of it. In any case, these restrictions are only those which are “prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others” and any “such restriction must not impair the very essence of the right in question”.¹³ Thus these possible limitations cannot be used to justify or excuse making no provision for conscientious objection.¹⁴

In September 2013, the UN Human Rights Council adopted (without a vote), resolution A/HRC/24/17, which “Recognizes that the right to conscientious objection to military service can be derived from the right to freedom of thought, conscience and religion”, and re-stated and developed the

¹⁰ In 1993, the Human Rights Committee stated in its General Comment 22 on Article 18 that a claim of conscientious objection to military service can be derived from the right to freedom of thought, conscience and religion inasmuch as the use of lethal force seriously conflicted with the individual’s convictions.

¹¹ *Yeo-Bum Yoon and Myung-Jin Choi v Republic of Korea* (CCPR/C/88/D/1321-1322/2004 of 23 January 2007) and all its subsequent cases concerning conscientious objection to military service. This was an important clarification as in an early case (*L.T.K. v Finland* (Case No. 185/1984)), while ruling the case out at a preliminary stage, the Committee had suggested that the wording of Article 8 precluded a requirement on all States to provide for conscientious objection to military service. In 2011, the European Court of Human Rights (Grand Chamber) in *Bayatyan v Armenia* followed the same line as the Human Rights Committee in resolving the similar argument which had arisen under the European Human Rights Convention Article 4(3)(b) which is almost identical to Article 8(3)(c)(ii) of the Covenant. The Inter-American Commission on Human Rights has not addressed the issue of conscientious objection to military service since these developments in the Human Rights Committee and European Court of Human Rights but has a similar provision, Article 6(3)(b) of the American Convention on Human Rights to that of the Covenant and European Human Rights Convention.

¹² International Covenant on Civil and Political Rights, Article 4

¹³ *Yoon and Choi v Republic of Korea* (CCPR/C/88/D/1321-1322/2004 of 23 January 2007).

¹⁴ In its General Comment 22, the Human Rights Committee observed that “national security” is not one of the permitted grounds of limitation listed in Article 18, unlike in relation to some other Articles of the Covenant.

provisions of the former UN Commission on Human Rights resolutions going back to 1989.¹⁵

Scope/extent of the right of conscientious objection:

The identification of conscientious objection to military service as inherent in the right to freedom of thought, conscience and religion makes clear that it can be based on a religious or other belief or on conscience. The Human Rights Committee in General Comment 22 had given a broad scope to the terms religion and belief, stating¹⁶ “Article 18 protects theistic, non-theistic and atheistic beliefs, ... Article 18 is not limited in its applications to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions” (para. 2). The Committee has specifically addressed this issue in Concluding Observations on State reports under the Covenant, for example:

“The Committee therefore expresses its concern that no measures appear to have been taken to extend the right of conscientious objection against mandatory military service to persons who hold non-religious beliefs grounded in conscience, as well as beliefs grounded in all religions (art. 18).

The Committee reiterates its previous recommendation (CCPR/C/UKR/CO/6, para. 12) and stresses that alternative service arrangements should be accessible to all conscientious objectors without discrimination as to the nature of the beliefs (religious or non-religious beliefs grounded in conscience) justifying the objection”¹⁷ Similarly, in the case of *Eu-min Jung et al v Republic of Korea*, the Committee specifically identified that “the authors' subsequent conviction and sentence amounted to an infringement of their freedom of conscience” in addition to being a violation of their freedom of religion or belief.¹⁸

This broad definition ties in with Human Rights Council resolution 24/17 which recognises “that conscientious objection to military service derives from principles and reasons of conscience, including profound convictions, arising from religious, ethical, humanitarian or similar motives”.

In other words, it is clear that although conscientious objection may be based on a formal religious position, this is not required. Indeed, both the Committee and the Council have made clear that no discrimination is permitted between the religion or belief on which the objection is based.¹⁹

¹⁵ Human Rights Council resolution 24/17 of 27 September 2013

¹⁶ Human Rights Committee General Comment 22, para. 2

¹⁷ UKRAINE (CCPR/C/UKR/CO/7 of 26 July 2013), para.19

¹⁸ *Eu-min Jung et al v Republic of Korea* (CCPR/C/98/D/1593-1603/2007 of 14 April 2010), para. 7.4

¹⁹ Human Rights Committee General Comment 22, para 11; Human Rights Council Resolution 24/17

As the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights both recognize the right to change one's religion or belief,²⁰ it is also clear that a person can become a conscientious objector, even after agreeing to undertake compulsory military service, or indeed volunteering to join the armed forces. This is explicitly recognized in UN Human Rights Council resolution 24/1 which states: "persons performing military service may develop conscientious objections". Similarly, the Human Rights Committee has addressed this in its Concluding Observations "recognizing that conscientious objection can occur at any time, even when a person's military service has already begun".²¹

Thus, any arrangements for conscientious objectors cannot be such as to prevent applications after joining the armed forces, or even after completion of military service, for example by those listed as reservists or subject to further call-up or training.

Equally, any payment in lieu of military service is not the same as, nor a substitute for, recognition of conscientious objection.²²

Decision-making process:

Trying to judge another person's conscience or the sincerity of their belief is an inherently difficult task. The UN Human Rights Council has welcomed "the fact that some States accept claims of conscientious objection as valid without inquiry" (Resolution 24/17), but if there is to be an inquiry then it must be undertaken by an "independent and impartial decision-making" body. The Human Rights Committee has observed that this means under the control of civilian authorities and not of the Ministry of Defence.²³

Alternative Service:

Alternative Service in lieu of compulsory military service is not required²⁴ but is not prohibited, provided that it is compatible with the reasons for the conscientious objection, of a civilian character, in the public interest and not of a punitive nature. In addition to civilian alternative service, unarmed military service may be provided for those whose objection is only to

²⁰ See also Human Rights Committee General Comment 22, para. 5 and Human Rights Council Resolution 24/17

²¹ Human Rights Committee, Concluding Observations on Chile (CCPR/C/CHL/CO/5 of 18 April 2007), para. 13

²² Human Rights Committee, Concluding Observations on Syria (CCPR/CO/84/SYR of 9 August 2005), para. 11

²³ Human Rights Committee Concluding Observations on Greece (CCPR/CO/83/GRC of 25 April 2006), para. 18

²⁴ See, for example, Friendly Settlement in *Alfredo Diaz Bustos v Bolivia*, Case 14/04, Report No. 97/05, Inter-Am. C.H.R., OEA/Ser.L/V/II.124 Doc. 5 (2005)

personally bearing arms²⁵. The Human Rights Committee has consistently stated that it must be a civilian alternative to military service “outside of the military sphere and not under military command. The alternative service must not be of a punitive nature, but must rather be of a real service to the community and compatible with respect for human rights.”²⁶ The term “punitive” covers not only the duration of alternative service but also the type of service and the conditions under which it is served.

Duration of alternative service:

The question of the length of alternative service in comparison to the length of military service has been the subject of a number of cases considered by the Human Rights Committee. However, in 1999 the Committee settled on the test which it has subsequently applied. This starts from the requirement that the alternative service must not be discriminatory. This does not preclude a different duration to that of military service but any difference in length in a particular case must be “based on reasonable and objective criteria, such as the nature of the specific service concerned, or the need for a special training in order to accomplish that service.”²⁷

Non discrimination:

As already mentioned, no discrimination is permitted “among conscientious objectors on the basis of the nature of their particular beliefs”.²⁸

Equally no discrimination as to the terms or conditions of service is permitted in law or practice between those who do military service and those who do alternative service. Nor may conscientious objectors subsequently be subjected to discrimination in relation to any economic, social, cultural, civil or political rights because they have not done military service.²⁹ This would cover the specific issue of problems for conscientious objectors associated with not having a *libreta militar* such as inability to graduate from university.

Access to information about conscientious objection:

The importance of making information available to all affected by military service (not only to first time conscripts) is stressed by UN Human Rights Council resolution 24/17, and has also been taken up by the Human Rights

²⁵ Human Rights Council resolution 24/17

²⁶ *Atasoy and Sarkut v Turkey* (CCPR/C/104/D/1853-1854/2008 of 19 June 2012), para. 10.4 and *Jong-nam Kim et al v Republic of Korea* (CCPR/C/101/D/1786/2008 of 1 February 2012), para. 7.4

²⁷ *Foin v France* (Communication No. 666/1995), CCPR/C/D/666/1995, 9 November 1999

²⁸ Human Rights Committee General Comment 22, para. 11; UN Human Rights Council resolution 24/17

²⁹ Human Rights Committee General Comment 22, para. 11; Human Rights Council resolution 24/17

Committee in Concluding Observations, to ensure that people know about the right of conscientious objection and also how to acquire conscientious objector status.³⁰

³⁰ Human Rights Committee Concluding Observations on Paraguay (CCPR/C/PRY/CO/2 of 24 April 2006, para 18.

Punishment of unrecognised conscientious objectors:

The UN standards establish three essential points in relation to the punishment of unrecognised conscientious objectors whether the lack of recognition arises because there is no provision for conscientious objection or because the individual concerned is not accorded such status in a situation where there is some provision:

1. Conscientious objectors should not be imprisoned for their refusal to do military service³¹;
2. Conscientious objectors should not be subjected to the death penalty for their refusal to undertake military service or for desertion resulting from their conscientious objection³²
3. Conscientious objectors should not be subjected to repeated punishment because the continued refusal to undertake military service constitutes the same offence and, therefore, repeated punishment contravenes the *ne bis in idem* principle³³ and Article 14 of the Covenant.³⁴ It also contravenes Article 18(2) of the Covenant since it amounts to coercion intended to change the convictions of the conscientious objector.³⁵

Conclusion

Conscientious objection to military service is recognised in international law as inherent in the right to freedom of thought, conscience and religion enshrined in Article 18 of the Universal Declaration of Human Rights as well as Article 18 of the International Covenant on Civil and Political Rights (to which Colombia is a party). Colombia is, therefore, under an obligation to make provision for conscientious objection to military service in its domestic law as soon as possible and implement it in practice. Implementation in practice also requires that information about conscientious objector status and how to apply for it is available to (potential) conscripts and that recruitment methods permit such applications to be made and acted on.³⁶

³¹ Human Rights Council resolution 24/17 and UN Working Group on Arbitrary Detention Opinion No. 16/2008 (TURKEY) of 9 May 2008

³² UN Sub-Commission on the Promotion and Protection of Human Rights resolution 1994/4

³³ Human Rights Council resolution 24/17

³⁴ Human Rights Committee General Comment 32 (2007), paras. 54-55 and Concluding Observations on Cyprus (CCPR/C/79/Add.88 of 6 August 1998), para. 17

³⁵ Working Group on Arbitrary Detention Recommendation No. 2 (E/CN.4/2001/14)

³⁶ The Inter-American Commission on Human Rights (*Piché Cuca v Guatemala*, Report No. 36/93, Case 10.975, and Fourth Report on the Situation of Human Rights in Guatemala, QEA, Ser.L/V/II,83; Doc. 16 rev.; June 1, 1993, chapter III) has found that forced recruitment is a violation of the rights of personal liberty, human dignity and freedom of movement under the American Convention on Human Rights, and has noted that the conscription process must enable the individual to challenge the legality of their recruitment. See also the UN Working Group on Arbitrary Detention (above).

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