

**OPINION No. 8/2008 (Colombia)**

**Communication addressed to the Government on 5 October 2007.**

**Concerning Mr. Frank Yair Estrada Marín, Mr. Carlos Andrés Giraldo Hincapié and Mr. Alejandro de Jesús González Duque.**

**The State is a party to the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 14/2007.)
2. The Working Group expresses its appreciation to the Government for having provided the requested information in a timely manner.
3. (Same text as paragraph 3 of Opinion No. 15/2007.)
4. In the light of the claims made, the Working Group welcomes the cooperation of the Government. The Working Group transmitted the reply provided by the Government to the source and received its comments. The Working Group believes that it is in a position to render an opinion on the facts and circumstances of the cases, in the context of the allegations made and the response of the Government thereto, as well as the observations by the source.
5. According to the information received, Mr. Frank Yair Estrada Marín was arrested in May 2007 by members of the army, who took him to a barracks for the purpose of conducting medical examinations to determine his fitness for military service. Immediately following those examinations, he was forcibly enrolled into military service despite his express assertion that he was a conscientious objector and was opposed to wearing military uniform and to fighting alongside the armed forces or any other party to a conflict. He is currently serving in the Pedro Justo Berrio Battalion.

6. Mr. Carlos Andrés Giraldo Hincapié was arrested in August 2006 and forcibly recruited into the army. No heed was paid to his assertion that he was a conscientious objector and he was obliged to take part in military action in Puerto Cayumba, including counter-guerrilla operations. He is stationed at the Casabe military base, which is attached to the No. 7 Plan Energético y Vial Battalion of Barrancabermeja.

7. Mr. Alejandro de Jesús González Duque was arrested on 8 April 2007 when on his way to the city of Medellín. Soldiers from the Puerto Erró Battalion made him get out of the vehicle in which he was travelling and asked him to show his military service certificate. Mr. González Duque explained to them that he did not possess such a document since his military status would shortly be determined, in December 2007, when the army called up young men completing their secondary-school studies. However, he was apprehended, taken to the Pedro Justo Berrio Battalion and forcibly recruited, being obliged to abandon his employment and studies.

8. In its response of 26 February 2008, the Government stated that Mr. Frank Yair Estrada Marín commenced his enrolment process with Military District No. 24 as a member of the fourth enlistment quota for 2007. He was called to the recruitment rally on 7 May 2007. On undergoing the standard examinations, he was found to be fit for military service and was accordingly enrolled into the Pedro Justo Berrio No. 32 Infantry Battalion of the National Army. Before joining that Battalion, Mr. Estrada Marín voluntarily signed a document of commitment, in which he declared under oath that he did not qualify for exemption from military service on any of the grounds provided for in article 28 of Law No. 48 of 1993, which regulates the recruitment and mobilization of Colombian citizens. With regard to Mr. Estrada's assertion that he was a conscientious objector, the Directorate for Recruitment and Control of Reserves of the National Army points out that it is constitutionally impossible to apply that concept since such status is not formally established within Colombia's legal system.

9. The Government adds that the Constitutional Court of Colombia, in its rulings T-409 of 8 June 1992 and C-511 of 16 November 1994, stated that the obligation to perform military service was based on the premise that collective interests took precedence over individual interests. Conscientious objection cannot be invoked unless it is expressly established within the legal system. In other words, since the possibility of its application is not provided for in law and the circumstances under which it has to be recognized are not laid down in current legislation, the authorities cannot acknowledge or apply it. To do so would be to exceed their powers and would constitute a clear breach of the principle of equality, in addition to causing uncertainty among the population.

10. The Government affirms that the call-up for compulsory military service of males has as its basis the constitutional principle whereby the general interest prevails over private interests and is lawfully established by Law No. 48 of 1993 and Regulatory Decree No. 2048 of 1993. This principle is in turn linked to two constitutional precepts relating to the commitment of all men to effectively defend their native land and, in the area of rights, to the application of the principle of equality of civic duty.

11. With reference to Mr. Alejandro de Jesús González Duque, the Government denies that he commenced his military service on 18 April 2007. He was found to

have been called by Military District No. 26 to the secondary-school graduate recruitment rally held on 4 December 2007; thus the formalities provided for in Law No. 48 of 1993 for the purpose of defining his military status began recently.

12. With reference to Mr. Carlos Andrés Giraldo Hincapié, the Government states that the Directorate for Recruitment and Control of Reserves of the National Army has found no records relating to him.

13. The Government concludes, in the light of the foregoing facts and the information provided, that the Working Group may declare that the above-mentioned young men are not subjected to arbitrary detention and may accordingly order that these cases be filed.

14. In its comments on the Government's response, the source acknowledges that Mr. Estrada Marín signed documents on the date of his recruitment but points out that he did so without being given a opportunity to read them. As regards the Government's remarks concerning conscientious objection in Colombia, the source cites the jurisprudence of the Human Rights Committee. With reference to Mr. González Duque, it affirms that he was forcibly recruited under the Democratic Security Programme. He was personally ordered to enlist and to defend the nation. However, on 12 April 2007, he was released thanks to the filing of a petition with the Fourth Army Brigade in Medellín. With regard to the situation of Mr. Giraldo Hincapié, the source confirms that he was arrested on 4 August 2007 at the Casabe military base, where he was obliged to sign three documents with no opportunity to read them. One of the documents indicated that he had voluntarily enrolled in the army despite his having expressly declared his conscientious objection. Mr. Giraldo Hincapié opposes the use of weapons, is unwilling to fight alongside any party to a conflict and does not wish to have to kill anyone.

15. The Working Group considers that, although the situation of the three young men to which the claims relate may have elements in common, it is necessary to treat them individually. With reference to Mr. Estrada Marín, it is not denied in the information provided by the Government that he was detained by the military authorities for the purpose of determining his medical fitness for military service or that he signed a document, without having read it, in which he declared under oath that he did not qualify for exemption from military service on any of the grounds provided for in article 28 of Law No. 48 of 1993. The Working Group may thus conclude that this person was deprived of liberty against his will, detained and enrolled into No. 32 Infantry Battalion of the National Army despite having expressly stated that he was a conscientious objector.

16. With reference to Mr. González Duque, both the Government and the source agree that he was arrested and deprived of his liberty on 8 April 2007, released on 12 April and summoned for the purpose of determining his military status on 4 December 2007.

17. With reference to Mr. Giraldo Hincapié, the Working Group regards as conclusive the particulars provided by the source regarding his arrest in August 2006 and his forced enrolment into the army at the Casabe military base. Although the Government states, in its response, that it possesses no information whatsoever on this person, the source submits concrete details concerning the date of his arrest and forced recruitment into the army, the battalion in which he is serving and his conscientious objection declaration and the reasons adduced.

18. The Working Group considers that these persons were detained and deprived of their liberty against their will for the purpose of being enrolled in the army. Although the Working Group cannot establish the duration of their confinement or when it ended, since, once their military service in the army began, these persons could not be regarded as detainees, it is nevertheless clear that they were enlisted into the armed forces by means of a violent act of deprivation of their liberty.

19. The Working Group thus concludes that Mr. Estrada Marín and Mr. Giraldo Hincapié were detained and deprived of their liberty against their will for the purpose of their forcible recruitment into the armed forces. Although Mr. González Duque was released four days after his arrest, that was done solely as a result of the exercise of his right to petition the military authorities. In none of the three cases could the detention be effectively contested before the relevant judicial authority. Once deprived of liberty, none of the three persons could in any way appeal to a court in order that it might rule on the lawfulness of their detention and order their release.

20. Already in its Opinion No. 24/2003 (Israel), adopted on 28 November 2003, the Working Group had stated that the situation of conscientious objectors gave cause for concern and had pointed out that international law was evolving towards full recognition of the right of all individuals to refuse to bear arms or to serve in the armed forces, in the exercise of their right to freedom of thought, conscience or religion (para. 27). The Human Rights Committee, in its general comment No. 22, states that, while the International Covenant on Civil and Political Rights does not explicitly refer to the right to conscientious objection, that right can be derived from article 18 “inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one’s religion or belief” (para. 11). Freedom of thought and conscience and the freedom to have a religion or belief of one’s choice are protected unconditionally (para. 3).

21. In the views adopted by the Human Rights Committee on Communications Nos. 1321/2004 and 1322/2004 (Republic of Korea) under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, the Committee notes that article 8 of the Covenant neither recognizes nor excludes a right of conscientious objection. The Committee observes that, in setting forth the right to manifest one’s religion or beliefs, article 18, paragraph 3, of the Covenant provides certain protection against being forced to act against genuinely held religious beliefs. While it is possible to allow restrictions necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others, such restrictions must not impair the essence of that right (paragraphs 8.2 and 8.3).

22. The Working Group considers that, although Law No. 48 of 1993, which regulates recruitment and mobilization, lays down in its article 42 penalties for persons who fail to enrol or comply with the enlistment ballot or call-up and generally for those who, having been duly summoned for military service, do not report, such penalties are exclusively of a pecuniary nature or take the form of fines. In no case are arrest, detainment and enrolment in the army against one’s expressly declared will authorized.

23. 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 or legal basis.

24. In the light of the foregoing, the Working Group, in accordance with paragraph 17 (a) of its methods of work, renders the following Opinion:

The deprivation of liberty of Mr. Estrada Marín, Mr. Giraldo Hincapié and Mr. González Duque was arbitrary, being in contravention of article 9 of the International Covenant on Civil and Political Rights and, in the case of Mr. Estrada Marín and Mr. Giraldo Hincapié, also in contravention of article 18 of the International Covenant on Civil and Political Rights, and falls under category I of the categories applied by the Working Group.

25. Consequent upon the Opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation of these persons, in order to bring it into conformity with the standards and principles set forth in the International Covenant on Civil and Political Rights, and to examine the possibility of amending its legislation with regard to conscientious objection in order to adapt it to the contents thereof.

Adopted on 8 May 2008.