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**EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX**

6 October 2014

Case Document No. 2

European Council of Police Trade Unions (CESP) v. France
Complaint No. 101/2013

SUBMISSIONS OF THE GOVERNMENT ON THE MERITS

Registered at the Secretariat on 9 January 2014

**OBSERVATIONS BY THE GOVERNMENT OF THE FRENCH
REPUBLIC ON THE MERITS OF
COMPLAINT No. 101/2013,
EUROPEAN COUNCIL OF POLICE TRADE UNIONS (CESP) v.
FRANCE**

In a decision of 21 October 2013, the European Committee of Social Rights declared admissible Complaint No. 101/2013, lodged by the European Council of Police Trade Unions (CESP), which claimed that the military status of the National Gendarmerie was unwarranted because 95% of its duties were the same as those of the national police force. The CESP therefore considers that France is violating Articles 5 and 6 of the revised European Social Charter by depriving the military personnel of the National Gendarmerie of the rights enshrined in those articles.

The French Government would like to submit the following observations to the Committee on the merits of the complaint.

I. THE COMPLAINTS

1. The CESP disputes the application of military status to the personnel of the National Gendarmerie, arguing that it unwarrantedly deprives them of their trade union rights, particularly in comparison to their colleagues in the police, whereas they effectively perform the same duties and are now attached to the Ministry of the Interior. Consequently, the CESP asks the ECSR to find a violation of Articles 5 and 6 of the revised Social Charter because it is impossible for the members of the National Gendarmerie to set up their own representative organisations.

II. DOMESTIC LEGISLATION IN FORCE

II.1. Civil and political rights of military personnel

Article L1111-1

... The aim of defence policy shall be to secure territorial integrity and protect the people against armed aggression. It shall help to combat other threats capable of undermining national security. It shall foster respect for alliances, treaties and international agreements and contribute, under the relevant European treaties, to the common European security and defence policy.

Article L4111-1

The Army of the Republic shall work in the service of the Nation. Its task shall be to prepare and secure by the force of arms the defence of the homeland and the higher interests of the Nation.

Military service requires, in all circumstances, a spirit of sacrifice – which may extend to the ultimate sacrifice – discipline, readiness to serve, loyalty and neutrality. The duties it comprises and the constraints it entails deserve the citizens' respect and the Nation's consideration.

The rules set out in this book shall provide all those who have chosen this profession with the guarantees corresponding to the particular obligations imposed on them by the law. It shall provide for compensations for the constraints and demands of life in the armed forces. It shall offer those leaving the military profession the means of returning to work in the civilian sphere and help retired military

personnel to maintain a link with the institution.

A National Evaluation Board on the Military Profession shall draw up an annual report, addressed to the President of the Republic and submitted to Parliament. The composition of the National Evaluation Board on the Military Profession and its powers shall be established by decree.

Article L4121-1

Military personnel shall enjoy all the rights and freedoms granted to other citizens. However, the exercise of some of them shall be prohibited or restricted under the conditions set by this book.

Article L4121-4

The exercise of the right to strike shall be incompatible with military status.

The existence of military professional associations of a trade union nature and the affiliation of serving military personnel to such associations shall be incompatible with the rules of military discipline.

Commanders at all levels shall have a responsibility to look after the interests of their subordinates and to report, through the chain of command, any problem of a general nature which might come to their attention.

Article L4121-5

Military personnel may be called on to serve at any time and in any place.

Article L4124-1

The Higher Military Council shall be the institutional framework in which matters affecting the circumstances of all military personnel are discussed.

The Higher Military Council shall express its opinion on questions of a general nature concerning the conditions and status of military personnel. It shall be consulted on draft texts for the application of these provisions with a statutory scope.

Military councils for the fighting forces and the related units shall investigate any matter relating to their fighting force, directorate or department concerning living conditions or conditions for the exercise of the military profession or for work organisation.

They shall also conduct initial investigations into items on the agenda of the Higher Military Council.

Members of the Higher Military Council and the military councils shall enjoy the guarantees that are essential for their freedom of expression. All the information and facilities necessary for the exercise of their functions shall be provided to them.

The composition, organisation, functioning and arrangements for the appointment, including drawing lots, of members of these councils shall be established by a decree of the *Conseil d'Etat*.

Retired military personnel shall be represented on the Higher Military Council.

Article R4124-6

The military councils, which are national consultation and co-ordination bodies, are as follows:

- 1° the Military Council of the Army;
- 2° the Military Council of the Navy;
- 3° the Military Council of the Air Force;
- 4° the Military Council of the National Gendarmerie;
- 5° the Military Council of the Directorate General of Armaments;
- 6° the Military Council of the Military Healthcare Service;

7° the Military Council of the Military Fuel Service.

Article R4124-7

The military councils shall conduct an initial investigation into texts and items of general interest on the agenda of the Higher Military Council. Their observations shall be addressed to the Secretary General of the Higher Military Council.

It shall also be their task to investigate any matter relating to their own force or related unit concerning living conditions, or conditions for the exercise of the military profession or for work organisation.

Military councils may, where appropriate, investigate such matters when they relate to military personnel represented on the councils who:

1° have been appointed to a post outside their force or related unit; 2° are managed by a related unit without its own council.

Article R4124-8

The Minister of Defence shall chair the military councils. However, depending on the agenda, the Military Council of the National Gendarmerie may be chaired by the Minister of Defence or the Minister of the Interior, or by both.

The Chief of Staff of each fighting force, the Director General of the National Gendarmerie, the Chief Representative for Armaments, the Central Director of the Military Healthcare Service and the Director of the Military Fuel Service shall serve as the Vice-Chairs of the respective military councils. They shall serve as acting chairs at the request of the minister or ministers concerned.

Article R4124-9

An Order of the Minister of Defence shall establish the composition of military councils, taking account of the division of staff according to category described in Article R. 4124-2 and for each category, depending on the nature of their link to the service and, if necessary, according to rank, the geographical location of military personnel or where they are posted if this is outside their force or the related unit to which they belong.

The composition chosen may differ within each military council in order to take account of the specific nature of each force or related unit.

Members shall be appointed for four years by an Order of the Minister of Defence. For military personnel on the list for promotion, the rank to be taken into consideration shall be their future one.

Article R4124-10

Full members of the military councils and their substitutes shall be appointed by drawing lots among those military personnel who have volunteered from a given group for each force or related unit, according to procedures established by an Order of the Minister of Defence.

Volunteers may not be members of the military corps of the General Army Inspectorate, general officers, Secretaries General of the councils referred to in this chapter or their deputies, or volunteers in the armed forces.

Half of the membership shall be renewed every two years, having been divided into two groups by an Order of the Minister of Defence.

Members shall receive special training in the tasks involved in their function.

Article R4124-11

Military personnel wishing to volunteer shall satisfy the following conditions on the first day of the month during which the drawing of lots commences:

1° be in active service in the French forces;

2° be more than four years away from the age limit for their rank for regular military personnel or four years from the statutory limit on the maximum length of service for military personnel serving under a contract;

3° not have been subject to a second or third category disciplinary sanction for which no amnesty was granted in the three years preceding the drawing of lots.

To volunteer, candidates must send a letter to the secretariat of the military council at least twenty days before the date scheduled for the drawing of lots. This date shall be set by an Order of the Ministry of Defence.

Article R4124-12

Every military council shall have a permanent secretariat run by a senior officer appointed by the Minister of Defence serving as Secretary General. The Secretary General of the Military Council of the National Gendarmerie shall be appointed by the Minister of Defence on a proposal by the Minister of the Interior.

The Secretary General shall attend sessions but shall not take part in votes.

Secretaries General of the military councils shall be directly answerable to the Vice-Chairs referred to in Article R. 4124-8.

The minister or ministers concerned may delegate their signatory authority to Secretaries General if this is required for the proper functioning of the military councils.

The Secretary General of each military council may be assisted by a deputy who shall replace him or her in the event of absence or unavailability. The deputy to the Secretary General of a military council shall be appointed in the same manner as the Secretary General.

The deputy to the Secretary General may be delegated signatory authority by the Minister if the Secretary General is absent or unavailable.

Article R4124-13

The Chief of Staff of each fighting force, the Director General of the National Gendarmerie, the Chief Representative for Armaments, the Central Director of the Military Healthcare Service and the Director of the Military Fuel Service may, subject to the agreement of the minister or ministers concerned, convene the council of which they are the vice-chair to deal with a subject relating specifically to their force or related unit and falling within the council's remit.

Article R4124-14

After each session of the military council, a communiqué containing a summary of the proceedings and opinions shall be drawn up. This communiqué shall be signed by the chair of the session of the military council or the person with delegated authority and countersigned by the session secretary, who shall be a member of the military council appointed for each session by the council members.

Article D4121-1

All military personnel shall have the right to express themselves freely with due regard for the provisions of the general military service regulations. Military personnel may, individually or, where necessary, through the bodies set up for the purpose, address proposals to their hierarchical superiors for improvements to the conditions for the performance of their duties or communal life as well as questions relating to their personal circumstances. Demonstrations, petitions or collective complaints are prohibited.

Article D4121-2

All military personnel may raise with the general officers serving as inspectors any question relating to their personal circumstances, the conditions for the performance of their duties or communal life. Reasons for the request for a hearing need not be supplied in advance.

Article D4121-3

Military personnel shall take part in decisions on the day-to-day life of their unit through commissions whose members shall be appointed in accordance with the procedures established by Order of the Minister of Defence or, for the National Gendarmerie, by Order of the Minister of the Interior.

Pursuant to Article D.4121-3, the Order of 23 July 2010 lays down the rules on the organisation of representative and participatory bodies in the National Gendarmerie.

II.2. The National Gendarmerie's place in the armed forces

Article L3211-1

The armed forces shall comprise:

1° the army, the navy and the air force, which shall constitute the fighting forces within the meaning of this Code;

2° the National Gendarmerie;

3° the combined forces support service.

Article L3211-2

The armed forces of the Republic shall work in the service of the Nation. The task of the fighting forces is to prepare and secure by the force of arms the defence of the homeland and the higher interests of the Nation.

Article L3211-3

The National Gendarmerie shall be an armed force established to ensure the execution of laws.

Without prejudice to the provisions of Article L.421-1 of the Code of Internal Security, it shall help to defend the homeland and the higher interests of the Nation, particularly the supervision and safety of nuclear arms.

All of its military duties shall be performed throughout the national territory and outside the national territory in accordance with France's international undertakings, as well as within the fighting forces.

Article L3225-1

Without prejudice to the powers of the judiciary for the purpose of performing its criminal investigation tasks, and those of the Ministry of the Interior for the purpose of performing its civilian tasks, the National Gendarmerie shall be placed under the authority of the Minister of Defence for the purpose of performing its military tasks, in particular where it is participating in operations by the armed forces outside the national territory.

The Minister of Defence shall participate in the management of the human resources of the National Gendarmerie in the manner laid down by decree of the *Conseil d'Etat* and shall exercise disciplinary powers over the military personnel of the National Gendarmerie.

III. ADMISSIBILITY OF THE COMPLAINT

2. In a decision of 21 October 2013, the ECSR found Complaint No. 101 admissible on the ground that it concerned two provisions accepted by France, namely Articles 5 and 6 of the European Social Charter, that the grounds for the complaint were indicated and that the Committee had already considered that the CESP has particular competence in the areas of the complaint within the meaning of Article 3 of the Protocol.
3. The Government would nonetheless like to make the following observations.
4. The aim of this complaint is for the ECSR to find a violation of Articles 5 and 6 of the European Social Charter because of the application of military status to the personnel of the National Gendarmerie and the restrictions on trade union rights which pertain to this status.
5. The Government considers that the military status of the personnel of the National Gendarmerie is a matter for each state to decide according to how they wish to organise their armed forces. In France, the National Gendarmerie has been an integral part of the armed forces since its creation. The European Social Charter does not contain any provision in this field, especially given that Article 5 of the European Social Charter makes express provision for special rules for members of the armed forces.
6. Consequently, the Government wishes to dispute the admissibility of the complaint and the principle that the ratification of the European Social Charter established obligations for France with regard to the organisation of its armed forces.
7. The Government would also point out that Article 3 of the Protocol of 1995 provides as follows:

“The international non-governmental organisations and the national non-governmental organisations referred to in Article 1.b and Article 2 respectively may submit complaints in accordance with the procedure prescribed by the aforesaid provisions only in respect of those matters regarding which they have been recognised as having particular competence.”
8. This complaint relates to the organisation of the armed forces and, in particular, the application of military status to the National Gendarmerie. Yet, Article 8 of the statutes of the CESP state that “the aim of the CESP is to unite the police officers who are members of its constituent organisations; .. to fight for the full exercise of trade union rights and against any unwarranted restriction on European police officers’ fundamental and statutory rights...; ... [and] to take action to enhance and harmonise the work, pay and living conditions of European police officers”. This does not tally with the subject of the complaint because gendarmes cannot in any way be equated with police officers.
9. Therefore, the Government cannot accept that this complaint, which relates to the organisation of the armed forces and, in particular, the fact that the Gendarmerie forms part of the armed forces, falls within a sphere where the CESP has been recognised as having particular competence and satisfies the requirement of Article 3 of the Additional Protocol.

IV. MERITS OF THE COMPLAINT

10. The CESP considers that the military status of the National Gendarmerie is unjustified and that this means that France is violating Articles 5 and 6 of the Charter by denying gendarmes the rights deriving from these provisions.

A. The restrictions on the trade union rights of military personnel

11. First of all, it should be pointed out that all international conventions without exception provide for exceptions to trade union rights for military personnel.

12. For instance, Article 16 of the American Convention on Human Rights makes express provision for the possibility of imposing restrictions or even the deprivation of the exercise of the right of association on members of the armed forces and the police.

13. Article 9 of ILO Convention No. 87 of 9 July 1948 on Freedom of Association and Protection of the Right to Organise states that “*the extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations*”. The Committee on Freedom of Association, which is in charge of monitoring compliance with the Convention, has had occasion to state that this is a matter that is left to the discretion of the ILO member states as they “*are not required to grant these rights to the said category of persons*”.¹

14. Article 22 of the International Covenant on Civil and Political Rights provides as follows:

“1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.”

15. Article 8 of the International Covenant on Economic, Social and Cultural Rights provides as follows:

“1. The States Parties to the present Covenant undertake to ensure:

(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others

...

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

...

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.”

¹ *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th (revised) edition, 2006, paragraphs 224 and 225.*

16. Article 5 of the European Social Charter makes no exception to these principles, providing as follows:

“With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations”.

17. The ECSR found that the French legislation prohibiting military personnel from joining trade unions was in conformity with the Charter in its decision of 4 December 2000 (Complaint No. 2/1999). The ECSR confirmed this decision in 2010 in its conclusions on the Portuguese report, holding that the impossibility for military personnel to form trade unions did not constitute a violation of Article 5.
18. As to the attempts of the Parliamentary Assembly of the Council of Europe to amend Article 5 of the Charter, which are cited by the complainant organisation, it should be pointed out that they do not have any binding force and do not mean that the states are required to extend trade union freedom to the armed forces through the recognition of military professional associations of a trade union nature. The Recommendation adopted by the Parliamentary Assembly of the Council of Europe on 2 September 2002 (Recommendation 1572 (2002) on the “Right to association for members of the professional staff of the armed forces” was not accepted by the Committee of Ministers. In its Reply of 16 July 2003 (CM/AS(2003)Rec1572 final), the Committee of Ministers noted that the member states in favour of the proposed amendment were not in the majority. In 2010, the Committee of Ministers reiterated that states had the right to impose lawful restrictions on the exercise of freedom of association by members of the armed forces (item 57 of the Appendix to Recommendation CM/Rec(2010)4 of 24 February 2010).

B. The application of military status to members of the National Gendarmerie

19. The CESP disputes the application of military status to members of the National Gendarmerie, firstly because the National Gendarmerie is attached to the Ministry of the Interior and secondly because of the type of duties assigned to them.
20. To contest the military status of the National Gendarmerie, the CESP points out that it has been placed under the budgetary and operational authority of the Ministry of the Interior.
21. Law No. 2009-971 of 3 August 2009 effectively organised the transfer of the institutional attachment of the National Gendarmerie from the Ministry of Defence to the Ministry of the Interior with the aim of modernising the organisation and functioning of the security forces. It had become essential for the organisation and the budgetary resources of the two security forces to be managed by the same ministry so as to achieve greater co-ordination in the definition and deployment of the resources given over to internal security tasks while preserving the military status of the National Gendarmerie so as to have two security forces, one with civil status, the other with military status.

22. The explanatory memorandum to the Law of 3 August 2009 clearly asserts the political desire to preserve the military status of the Gendarmerie and the special nature of its work:

“Since its creation by the Law of 16 February 1791, the National Gendarmerie has regarded itself as a military force, whose main task is to secure the peace and safety of the public.

The Gendarmerie is an armed force, which takes part in the execution of general defence policy, both in France and in foreign theatres of operation.

When carrying out its policing duties, it is a public force, invested with a power of constraint, but also a community service, which heeds the requests of our fellow citizens.

This dual mission makes the National Gendarmerie a “third force”, capable of intervening in a broad spectrum of situations, ranging from public safety and criminal investigation to upholding law and order in the most problematic contexts or even participation in armed conflicts.

The military nature of the status of officers and non-commissioned officers in the Gendarmerie, combined with the obligation to occupy official accommodation makes for a service which is versatile, responsive, available and geared to the needs of the population. Military status also allows a major dispersion of units which results in almost complete coverage of the country as the areas of jurisdiction of the Gendarmerie extend to 95% of the national territory, both on the mainland and overseas. It also allows the Gendarmerie to take action anywhere and contributes to the equal access of citizens to the public security services.

These essential characteristics of the Gendarmerie, some of which are inherited directly from the historic mounted constabulary, the *Maréchaussée*, continue to provide daily evidence of their benefits in the service of the community.

However, the democratic, social and operational context in which the security forces carry out their tasks is undergoing major change and calls for new synergies.

Already in 2002, this situation prompted the Government to place the use of the Gendarmerie for its internal security tasks directly under the responsibility of the Minister of the Interior.

Furthermore, when the new Institutional Act on Finance Laws was implemented, establishing a close link between public policies and the resources allocated to them, this highlighted the need for greater consistency in the definition and deployment of the resources given over to internal security tasks.

As a result, it has become essential for the organisation and budgetary forces of the two security forces to be managed by the same ministry.

From a budgetary viewpoint, the next Finance Law will enshrine the transfer of the Gendarmerie programme to the Ministry of the Interior, thus making the "security" task a ministerial one.

The aim therefore of the institutional and operational attachment of the National Gendarmerie to the Ministry of the Interior is to place the two internal security forces under the authority of the same minister so as to achieve greater synergy and improve the complementarity of their actions to promote internal security.

In this context, in order more accurately to reflect the responsibilities and tasks of the Gendarmerie, which it fulfils permanently under the authority of the Minister of the Interior, it should no longer be the rule that the Gendarmerie will be systematically requisitioned for defence and emergency tasks, the most important of which is policing. This development, while respecting the principle of the subordination of the military authority to the civil authority, will make it possible to harmonise the two forces' rules of engagement.

This is a historic reform: the last law to deal with the National Gendarmerie was the Law of 28 Germinal in Year VI of the French Republic, which was repealed when the Defence Code came into force. Otherwise, at the very beginning of the twentieth century, the Decree of 20 May 1903 was enacted to update the organisation of the Gendarmerie and clarify the arrangements of the service.

This is also an essential reform. It perpetuates the pluralist “French-style” policing model to which the French nation is attached. It must be conducted with a view to preserving the balances which enable the Gendarmerie to perform the special function assigned to it for the benefit of the national community.

This is the purpose of this law.”

23. Therefore, contrary to what the CESP claims, the law confirms the military nature of the National Gendarmerie and its roots in the armed forces, complete with the values that are inherent to that institution. **The dual nature of the two State security forces (the police and the National Gendarmerie) has therefore been preserved**, with each keeping its identity and status. The Gendarmerie is a military force, capable of intervening in armed conflicts in France and abroad. One of its features is a high response capacity in all places and at all times, particularly during crises, because of its close-knit structure covering the entire country and the considerable constraints involved in compulsory occupation of official accommodation.
24. At the same time, the new joint code of conduct for the police and the National Gendarmerie, which was incorporated into the Internal Security Code and came into force on 1 January 2014, also recognises the military status of the National Gendarmerie. Article R.434-2 of this Code provides that “*when carrying out their internal security tasks, the national police, which has civil status, and the National Gendarmerie, which is an armed force, are subject to a joint code of conduct and to rules applying to each body separately ...*”.
25. However, despite its attachment to the Ministry of the Interior, when performing its military tasks, in particular where it is participating in operations by the armed forces outside the national territory, the National Gendarmerie still acts under the authority of the Minister of Defence. The Minister of Defence also contributes to the management of the human resources of the National Gendarmerie according to arrangements laid down by a decree of the *Conseil d'Etat* and exercises disciplinary powers over the military personnel of the National Gendarmerie (Article L. 3225-1 of the Defence Code).
26. Similarly, criminal investigation is carried out by the members of the Gendarmerie under the direction of the State Prosecutor.
27. Therefore, the purely budgetary and operational attachment of the National Gendarmerie to the Ministry of the Interior cannot be considered to call into question its role as an armed force and the application to it of military status.
28. **Secondly**, contrary to what the CESP alleges, the nature of the tasks assigned to the National Gendarmerie require it to be given military status.
29. Military activities are crucial for the security of the country. In this connection, the Senate Commission on Foreign Affairs, Defence and the Armed Forces² refers to the role played by the National Gendarmerie in military policing (supervision of military personnel and punishment of military offences) or its defence duties in times of both

peace and war, allowing the other armed forces to dispose of the human and material resources necessary for military operations.

² Information report No. 271 prepared on behalf of the Senate Commission on Foreign Affairs, Defence and the Armed Forces by the working group appointed to consider the future of the organisation and the tasks of the Gendarmerie, p. 16.

For example, the military capabilities of the Gendarmerie were used in Afghanistan between 2009 and 2013.

30. Therefore, it seems essential that in order to perform its duties, the National Gendarmerie continues to be subject to the demands in terms of discipline, readiness to serve, loyalty and neutrality which military status calls for.
31. Of course, unlike other armed forces which are deployed in foreign theatres of operation, the prime mission of the National Gendarmerie is to carry out its security tasks on the national territory. This does not make it any less true, however, that since it contributes to the defence of the nation, it is essential for it to be available at any moment and in any place.
32. In this respect, it is worth noting that the National Gendarmerie exercises its powers over 95% of French territory for the benefit of 50% of the population. Given these circumstances, a trade union dispute could undermine the permanent nature and the proper functioning of the service because of the risk of doubts as to the justification for the orders which military personnel are required to carry out, thus weakening the military command structure. Military status therefore seems essential for the requirements of a permanent public national defence service.
33. Furthermore, as an armed force, the National Gendarmerie has access to military resources which are not available to the national police force. This material capacity for action, combined with the requirements of readiness to serve and military discipline, means that the state can call on a security force capable of coping with major crises and events requiring the rapid deployment of extra personnel (such as law enforcement operations, implementation of relief plans and searches for missing persons).³
34. The dual nature of the security forces is also a fundamental guarantee of independence for the judiciary because the principle of the free choice of the investigating service by judges makes it possible to avoid depending on a single security force for the conduct of investigations.⁴
35. Contrary to the applicant organisation's claims, the military status of the National Gendarmerie is not in any respect an arbitrary form of organisation, whose sole aim is to place unjustified restrictions on gendarmes' trade union rights. It should be reiterated in this respect that:
 - the military nature of the National Gendarmerie is a long-standing historic legacy, dating back to the Maréchaussée, the principles of which were reaffirmed recently in the Law of 2009 in particular;
 - the Gendarmerie unquestionably belongs to the military community, its officers being recruited from the Grandes Ecoles of the three fighting forces;
 - gendarmes are subject to particular restrictions: for instance they have to live in official accommodation.

³ Public thematic report by the Auditor General's Department, "Police and Gendarmerie, wage expenses and working hours", March 2013.

⁴ Page 60 of the Report of the Senate Commission for Foreign Affairs, Defence and the Armed Forces, cited above.

36. Furthermore, having two security forces, one with civil status, the other with military, is by no means an exception in Europe. Ten other European countries have a police force with military status like the Gendarmerie (Austria, Bulgaria, Spain, Italy, Luxembourg, the Netherlands, Poland, Romania, Switzerland, Turkey). The organisation of the National Gendarmerie is especially similar to that of the Spanish Civil Guard and the Italian Carabinieri.⁵
37. The European Committee of Social Rights has already recognised that the National Gendarmerie is an armed force and accepted the statutory obligations that this entails for its members. For instance, in its Conclusions of 2004, the Committee points out that *“the legal status of Gendarmerie officials, who are classified as military personnel, is defined by Act No. 72-662 of 13 July 1972, Section 10 of which prohibits trade unions within the armed forces”* and reiterates that Article 5 authorises *“the total abolition of the right to organise for members of the armed forces”*. On this matter, in a decision of 1999, the Committee stated that it had consistently held that *“it follows from the wording of the final sentence of Article 5 of the ... Charter... that states are permitted to ‘limit in any way and even to suppress entirely the freedom to organise of the armed forces’”*.⁶
38. In its 2004 conclusions the Committee also notes that *“for both historical and institutional reasons France has a dual police system, with a civil force constituted by the national police and a military force represented by the national gendarmerie. As a result, ... the latter's activities are governed by military law and gendarmerie members, irrespective of the duties they are carrying out and the ministry for whom they are acting, continue to retain their military status. Even though their duties are normally administrative or judicial in nature, this does not alter or compromise these officials' military character.”*
39. The Committee also reiterates in its 2006 Conclusions that the duties of the National Gendarmerie are military within the meaning of the Charter and that the situation of France is in conformity with Article 5. These conclusions expressly state that *“the Gendarmerie performs both civilian and military duties. The Gendarmerie’s civilian duties are identical to those carried out by national police officers where it comes to their administrative and judicial investigation work. In the course of its military duties, the Gendarmerie, which forms an integral part of the armed forces, helps to ensure the security of France’s national defense potential and helps the government to control its strategic nuclear forces. It is also responsible for the operational defense of the country in the event of a crisis and can be called on, just like the other armed forces, to take part in foreign operations. The nature of the duties performed by the Gendarmerie and the readiness to serve that these duties entail require gendarmes to be governed by the conditions of service of military personnel on an equal footing with the members of the armed forces. As a result, they are not entitled to form trade unions””.*
40. In this complaint, the Government fails to identify any argument which should prompt the Committee to change its conclusions.

⁵ Information report cited above, page

⁶ Complaint No. 2/1999 by the European Federation of Employees in Public Services against France.

41. From all of the foregoing it can be inferred that the CESP has no grounds to assert that the National Gendarmerie is not an armed force and that its members should be covered by the rights enshrined in Article 5 of the Charter.

C. The violation of Article 6 as regards the right to bargain collectively

42. Article 6 of the Charter provides that “*with a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties undertake:*

1. *to promote joint consultation between workers and employers;*
2. *to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements;*
3. *to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes; and recognise:*
4. *the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.”*

43. Although membership of a trade union or a civil or military professional association is prohibited by the law (Article L. 4121-3 of the Defence Code), the right of association is granted to military personnel.

44. Furthermore, the lack of trade union rights in the armed forces does not preclude the setting up of systems of consultation, representation and participation. Although such bodies do not organise collective bargaining, they do contribute to the internal dialogue in the National Gendarmerie by allowing each member to take part in the decision-making process concerning the day-to-day life of their unit.

45. At national level, consultation is provided for by the Military Council of the Gendarmerie (CFMG), whose task it is to investigate any matter relating to the living conditions or conditions for the exercise of the military profession or for work organisation and give opinions on all legislation or regulations affecting the Gendarmerie. The membership of the CFMG reflects the diversity of the institution: all the statuses, ranks and subdivisions of the Gendarmerie are represented depending on their respective weighting in terms of numbers.

46. The National Gendarmerie is also represented on the Higher Military Council (CSFM), which is the supreme body for the consultation of military personnel in the armed forces. Its members are elected by the members of the military councils, in proportion to the staff numbers of the different fighting forces and related units. Under Article L.4124-1 of the Defence Code, the CSFM discusses “matters affecting the circumstances of all military personnel”. It also expresses “its opinion on questions of a general nature concerning the conditions and status of military personnel” and must be “consulted on draft texts for the application of these provisions with a statutory scope”. The CSFM is the natural discussion partner of the Minister of Defence and its members enjoy complete freedom of expression,

guaranteed by a decree of the *Conseil d'Etat* (Article R. 4124-24 of the Defence Code). As a result, many texts relating to the military community have been amended or modified following the opinions given by the military councils or the CSFM.

47. In addition, Article D.4121-3 of the Defence Code guarantees that military personnel may “take part in decisions on the day-to-day life of their unit through commissions”. This has given rise to the establishment at local and regional level of participatory commissions, made up of elected representatives, category presidents and members of the command structure, which allow military personnel to express their opinions to their superiors concerning their living conditions and the conditions for the exercise of their military profession and the organisation of their work. These commissions meet twice a year.
48. More specifically, in the National Gendarmerie, Article 17 of the Order of 23 July 2010 on representative and participatory bodies in the National Gendarmerie provides for “participatory commissions” to be set up. These are bodies “in which questions are raised in relation to living and working conditions, which, because of their general nature, go beyond the level of the subordinate units”. In addition to the participatory commissions established at departmental unit level or the level of a similar entity, chaired by the commander of the unit or the similar entity, there are regional participatory commissions, which meet at least four times a year.
49. In addition, Article 2 of the aforementioned Order established the institution of a “military staff president”, elected for four years in each district of the Gendarmerie. The task of these presidents is to represent all the staff categories in each Gendarmerie company or squadron and this is a significant step forward compared to the previous situation, in which there was a president for each category. This measure was intended to reduce the number of dialogue partners – which decreased from nearly 2 000 to about 800 – so as to overcome the divisions between categories which have arisen and strengthen staff cohesion.
50. In view of the foregoing comments, the complaints deriving from the misunderstanding of Articles 5 and 6 of the European Social Charter are unfounded. The complaint by the European Council of Police Trade Unions should therefore be dismissed by the ECSR.
51. In conclusion, the Government asks the ECSR to find that this complaint is inadmissible or alternatively to find it unfounded and conclude that there is no violation of Articles 5 or 6 of the European Social Charter.