European Social Charter | Charte sociale européenne

COUNCIL OF EUROPE 75 1949 - 2024 CONSEIL DE L'EUROPE

EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

DECISION ON THE MERITS

Adoption: 11 September 2024

Notification: 5 November 2024

Publicity: 6 March 2025

European Organisation of Military Associations and Trade Unions (EUROMIL) v. Portugal

Complaint No. 199/2021

The European Committee of Social Rights, committee of independent experts established under Article 25 of the European Social Charter ("the Committee"), during its 343rd session in the following composition:

Aoife NOLAN, President
Eliane CHEMLA, Vice-President
Tatiana PUIU, Vice-President
Kristine DUPATE, General Rapporteur
József HAJDÚ
Karin Møhl LARSEN
Yusuf BALCI
Paul RIETJENS
George THEODOSIS
Mario VINKOVIĆ
Miriam KULLMANN
Carmen SALCEDO BELTRÁN
Franz MARHOLD
Alla FEDOROVA
Grega STRBAN

Assisted by Henrik KRISTENSEN, Deputy Executive Secretary

Having deliberated on 16 May, 1 July and 11 September 2024,

On the basis of the report presented by Tatiana PUIU,

Delivers the following decision adopted on the latter date:

PROCEDURE

1. The complaint submitted by the European Organisation of Military Associations and Trade Unions (EUROMIL) was registered on 12 May 2021.

2. EUROMIL alleges that the Portuguese professional military associations are not allowed to exercise their trade union rights and hence to bargain collectively for the protection of the economic and social interests of their members in violation of Article 5 of the revised European Social Charter (“the Charter”). EUROMIL also alleges that Portugal fails to promote either joint consultation or voluntary bargaining mechanisms for the purpose of regulating the terms and conditions of employment by means of collective agreements between military associations and the Ministry of National Defence (as an employer), and that it bars military associations, as workers' organisations, from exercising the right to strike in violation of Article 6§§1, 2 and 4 of the Charter. Finally, EUROMIL maintains that the prohibition of trade union rights for military personnel in Portugal is neither necessary nor appropriate within the meaning of Article G of the Charter.

3. On 25 January 2022, the Committee declared the complaint admissible.

4. Referring to Article 7§1 of the 1995 Protocol Providing for a System of Collective Complaints ("the Protocol"), the Committee asked the Government to submit written submissions on the merits of the complaint by 15 March 2022.

5. Referring to Article 7§§1, 2 of the Protocol and in application of Article 32§§1, 2 of its Rules of Procedure ("the Rules"), the Committee invited the States Parties to the Protocol, the States having made a declaration in accordance with Article D§2 of the Charter, as well as the international organisations of employers or trade unions referred to in Article 27§2 of the 1961 Charter, if they so wished, to submit observations on the merits of the complaint by 15 March 2022.

6. The Government's submissions on the merits of the complaint were registered on 15 March 2022.

7. In accordance with Rule 31§2, EUROMIL was invited to submit a response to the Government's submissions on the merits by 12 May 2022. EUROMIL's response was registered on 12 May 2022.

8. In accordance with Rule 31§3 of the Rules, the Government was invited to submit a further reply by 8 July 2022. The reply was registered on 8 July 2022.

SUBMISSIONS OF THE PARTIES

A – The complainant organisation

9. EUROMIL alleges that the professional military associations in Portugal do not enjoy the right to organise, nor to bargain collectively in violation of Article 5 and Article 6 §§1, 2 and 4 of the Charter with restrictions going beyond the conditions laid down by Article G. More specifically, EUROMIL claims that they do not have trade union rights, i.e. they may not establish trade unions, engage in trade union activities, represent their members to protect their economic and social interests, and negotiate collective agreements.

10. In particular, EUROMIL alleges that Portugal is in violation of:

- Article 5 of the Charter because it prohibits professional military associations from exercising activities of a trade union nature and therefore from collectively representing members for the protection of their economic and social interests,
- Article 6§1 of the Charter because it does not promote joint consultations between professional military associations as workers' organisations and the Ministry of Defence as an employer,
- Article 6§2 of the Charter because it does not promote machinery for voluntary negotiations between professional military associations as workers' organisations and the Ministry of Defence as an employer in order to regulate employment conditions by collective agreements,
- Article 6§4 of the Charter because it prohibits professional military associations as workers' organisations from exercising the right to strike.

B – The respondent Government

11. The Government states that Portugal’s constitutional and legal framework ensures its compliance with international norms and standards for the protection of human rights. The Government accordingly requests the Committee to find the complaint unfounded in all respects.

RELEVANT DOMESTIC LAW AND PRACTICE

12. In their submissions, the parties refer to the following provisions of domestic law:

A – Constitutional principles.

13. The relevant provisions of the Constitution of the Portuguese Republic (seventh revision, 2005) read as follows:

“Article 18 (Legal force)
[…]
2. The law may only restrict rights, freedoms and guarantees in cases expressly provided for in the Constitution, and such restrictions must be limited to those needed to safeguard other constitutionally protected rights and interests.
3. Laws that restrict rights, freedoms and guarantees must have a general and abstract nature and may not have a retroactive effect or reduce the extent or scope of the essential content of the constitutional precepts.

Article 45 (Right to Assemble and Demonstrate)

1. Citizens shall have the right to assemble peacefully and unarmed, even in places open to the public, without the need for any authorisation.
2. The right to demonstrate shall be recognised to all citizens.

Article 55 (Freedoms concerning trade unions)

1. Workers are accorded the freedom to form, belong to and operate trade unions as a condition and guarantee of the building of their unity in defence of their rights and interests.
2. In exercising the freedom to form, belong to and operate trade unions, workers are particularly guaranteed the following, without any discrimination:
a) The freedom to form trade unions at every level;
b) Freedom of membership, and no worker may be obliged to pay dues to a union to which he does not belong;
c) The freedom to decide the organisation and internal regulations of trade unions;
d) The right to engage in trade union activities in their enterprise;
e) The right to political views, in the forms laid down by the respective by-laws.
3. Trade unions must be governed by the principles of democratic organisation and management, to be based on the periodic election of their governing bodies by secret ballot, without the need for any authorisation or homologation, and to be founded on active worker participation in every aspect of trade union activity.
4. Trade unions shall be independent of employers, the state, religious beliefs, and parties and other political associations, and the law must lay down the guarantees that are appropriate to that independence, which is fundamental to the unity of the working classes.
5. Trade unions have the right to establish relations with or join international trade union organisations.
6. Workers’ elected representatives enjoy the right to be informed and consulted, as well as to adequate legal protection against any form of subjection to conditions, constraints or limitations on the legitimate exercise of their functions.

Article 56 (Trade union rights and collective agreements)

1. Trade unions have the competence to defend and promote the defence of the rights and interests of the workers they represent.
2. Trade unions have the right:
a) To take part in drawing up labour legislation;
b) To take part in the management of social security institutions and other organisations that seek to fulfil workers’ interests;
c) To pronounce themselves on economic and social plans and monitor their implementation;
d) To be represented on social concertation bodies, as laid down by law;
e) To take part in corporate restructuring processes, especially with regard to training actions or when working conditions are altered.
3. Trade unions have the competence to exercise the right to enter into collective agreements, which shall be guaranteed as laid down by law.
4. The law shall lay down the rules governing the legitimacy to enter into collective labour agreements and the efficacy of the respective norms.

Article 57 (Right to strike and prohibition of lock-outs)

1. The right to strike is guaranteed.
2. Workers have the competence to define the scope of the interests that are to be defended by a strike and the law may not limit that scope.
3. The law shall define the conditions under which services that are needed to ensure the safety and maintenance of equipment and facilities and minimum services that are indispensable to the fulfilment of essential social needs are provided during strikes.
4. Lock-outs are prohibited.

Article 92 (Economic and Social Council)

[1. The Economic and Social Council is the organ with responsibility for consultation and concertation in the economic and social policy domain, shall take part in drafting the Major Options and the economic and social development plans, and shall exercise any other functions allocated to it by law.]
2. The law shall define the composition of the Economic and Social Council, which shall particularly include representatives of the Government, of the organisations that represent workers, economic activities and families, of the autonomous regions and of local authorities.
3. The law shall also define the way in which the Economic and Social Council is organised and its modus operandi, together with the status and role of its members.

Article 164 (Exclusive legislative competence)

The Assembly of the Republic has exclusive competence to legislate on the following matters:
a) Elections of the officeholders of the entities that exercise sovereignty;
b) The regimes governing referenda;
c) The organisation, modus operandi and procedure of the Constitutional Court;
d) The organisation of national defence, the definition of the duties derived therefrom and the general bases of the organisation, modus operandi, re-equipping and discipline of the Armed Forces;
e) The regimes governing states of siege and states of emergency;
f) The acquisition, loss and re-acquisition of Portuguese citizenship;
g) The definition of the limits of territorial waters, the exclusive economic zone and Portugal's rights to the adjacent seabeds;
h) Political associations and parties;
i) The bases of the education system;
j) The election of members of the Legislative Assemblies of the autonomous regions;
l) The election of officeholders of local government organs and other elections conducted by direct, universal suffrage, as well as elections to the remaining constitutional entities and organs;
m) The statutes governing the officeholders of the entities that exercise sovereignty and of local government organs, as well as of the officeholders of the remaining constitutional organs and of those that are elected by direct, universal suffrage;
n) Without prejudice to the powers of the autonomous regions, the creation, abolition and modification of local authorities and the regime governing them;
o) Restrictions on the exercise of rights by full-time military personnel and militarised agents on active service and by agents of the security services and forces;
p) The regime governing the appointment of members of European Union organs, with the exception of the Commission;
q) The regime governing the Republic's intelligence system and state secrets;
r) The general regime governing the drawing up and organisation of the budgets of the state, the autonomous regions and local authorities;
s) The regime governing national symbols;
t) The regime governing the finances of the autonomous regions;
u) The regime governing the security forces;

Article 168 (Discussion and voting)

[1. Discussion of bills comprises a debate on the general principles and another on the details.
2. Voting comprises a vote on the general principles, a vote on the details and a final overall vote.
3. If the Assembly so decides, texts that are passed on the general principles shall be put to the vote on the details in committee, without prejudice to the Assembly's power to mandate the Plenary to put the details to the vote, or to the final overall vote by the Plenary.
4. The details of laws on the matters provided for in Articles 164(a) to (f), (h), (n) and (o) and 165(1)(q) shall obligatorily be put to the vote by the Plenary.
5. When put to the overall final vote, organic laws require passage by an absolute majority of all the Members of the Assembly of the Republic in full exercise of their office. The same majority is required for passage by the Plenary of the details of provisions concerning the territorial delimitation of regions provided for in Article 255.]
6. Passage of the following requires a majority that is at least equal to two thirds of all Members present and greater than an absolute majority of all the Members in full exercise of their office:
a) The law concerning the media regulatory entity;
b) The norms that govern the provisions of Article 118(2);
c) The law that regulates the exercise of the right provided for in Article 121(2);
d) The provisions of the laws that regulate the matters referred to in Articles 148 and 149, and those concerning the system and method for electing the organs provided for in Article 239(3);
e) The provisions that regulate the subject matter of Article 164(o);
f) Those provisions of the political and administrative statutes of the autonomous regions that set out the matters which are included in the respective power to legislate.

Article 270 (Restrictions on the exercise of rights)

The law may establish, in the strict measure of the requirements of the respective functions, restrictions on the exercise of the rights of expression, assembly, demonstration, association, and collective petition and on the passive electoral capacity by military personnel and militarized agents of the permanent staff on active service, as well as by agents of the security services and forces and, in the case of the latter, the non-admission of the right to strike, even when the right of trade union association is recognized."

B – General legislative and contractual provisions on trade union and collective bargaining of military personnel in Portugal.

14. Organic Law No. 3/2001 on the right to professional association of military personnel

"Article 2 (The rights of associations)

The legally constituted military associations shall enjoy the following rights:
a) To integrate advisory councils, study commissions and working groups set up to undertake the analysis of matters of relevant interest to the institution, in the area of their specific competence;
b) To be heard on the issues of the professional, remuneration and social status of their members;
c) To promote civic initiatives that contribute towards the unity and cohesion of the military serving in the armed forces and the dignification of the military in the country and in society;
d) To promote activities and edit publications on associative, deontological and socioprofessional matters or, with prior hierarchical authorization, on matters of an exclusively technical nature;
e) To hold meetings within the scope of their statutory purposes;
f) To disseminate their initiatives, activities and editions in military units and establishments, provided that it in a specific place made available for that purpose;
g) To express an opinion on matters expressly included in its statutory purposes;

h) To integrate and establish contacts with associations, federations of associations and international organisations pursuing similar objectives.

Article 3 (Restrictions on the exercise of rights)

1. The exercise of the rights enshrined in the previous article for military associations established under the terms of this law shall be subject to the restrictions and conditionalities provided for in Articles 31 to 31-F of the National Defence and Armed Forces Law.
2. Without prejudice to the provisions of this law and other applicable legislation, the exercise of associative activities referred to in this law shall not, under any circumstances and by any means whatsoever, come into conflict with the legally defined duties and functions or with the fulfilment of service missions.

Article 4 (Statute of Associative Leaders)

The statute for associative leaders shall be approved by the Government by means of Decree-law."

15. **Organic Law No. 4/2001 on National Defence and Armed Forces** (sixth amendment to Law 29/82)

"Article 31
[…]
The constitutional rules regarding human rights of workers whose exercise presupposed the rights restricted in the following articles, namely freedom of trade-union, in its different manifestations and developments, the right to creation or workers' councils, also with the respective developments, and the right to strike, are not applicable to the citizens mentioned in para. 1 (military personnel, permanent staff and on voluntary and contract regime).

Article 31D

1. Citizens referred to in Article 31 have the right to form any association, namely professional associations, unless they have political party or trade union nature.

2. The exercise of the right of professional association is regulated by its own law."

16. **Decree-Law No. 295/2007 (Statute of Associative Leaders of the professional associations of military personnel of the Armed Forces)**

"Article 3 (General Principles)

1. Military personnel shall not be prejudiced or benefited in their rights and benefits by virtue of their holding positions as leaders of military professional associations.
2. The activities of leaders of military professional associations shall always be conducted without prejudice to the service and in compliance with the duties inherent to their status as military personnel, and shall be subject to the restrictions and constraints provided for in military legislation, namely the National Defence and Armed Forces Law, the Military Charter, the law regulating the exercise of the right of professional associations of military personnel and the Military Disciplinary Regulations."

17. **Organic Law No. 1-B/2009 (National Defence Law)**

"Article 29 (Right of assembly)

1. Military personnel in active service may, provided they wear civilian clothes and do not bear any national or Armed Forces symbol, convene or participate in legally convened meetings not of a political party or trade union nature.

2. Military personnel in active service may attend political party and trade union meetings that have been legally convened if they do not take the floor or exercise any role in their preparation, organisation, or conduct or in the execution of the deliberations taken.
3. The right of assembly may not be exercised within military units and establishments nor in a manner that jeopardises the service normally assigned to the military personnel or their permanent availability for its performance.

Article 30 (Right to demonstrate)

Military personnel in active service may participate in legally convened demonstrations without a party-political or trade union nature, provided that they are unarmed, wear civilian clothes and do not bear any national or armed forces symbol and provided that their participation does not endanger the cohesion and discipline of the armed forces.

Article 31 (Freedom of association)

1. Military personnel in active service shall have the right to form or join associations without a political, party or trade union nature, namely professional associations.
2. The exercise of the right of professional associations of military personnel shall be regulated by its own law."

18. Organic Law No. 5/2014 making the first amendment to the National Defense Law, approved by Organic Law no. 1-B/2009

"Article 27 (Exercise of rights of members of the armed forces)
[…]
3. Constitutional rules concerning the rights of workers whose exercise presupposes the fundamental rights referred to in the following articles are not applicable to military personnel on active duty, insofar as they are restricted to them, namely feedom of association, the right to establish and enjoy workers' councils and the right to strike."

19. Decree-Law No. 90/2015 approving the Statute of the Armed Military Forces, as amended by Law No. 10/2018

"Title II (Duties and rights) Chapter II (Rights)
Article 16 (Rights, freedoms and guarantees)

1 - Military personnel enjoy all the rights, freedoms and guarantees recognised to other citizens, with the exercise of some of these rights and freedoms being subject to constitutionally provided restrictions, to the strict extent of the requirements of their duties, and under the terms set out in the LDN. 2 - Military personnel may not be disadvantaged or benefited by virtue of ancestry, sex, race, territory of origin, religion, political or ideological convictions, economic situation, social status or sexual orientation.

Article 16a (Right of association)

Military personnel have the right to set up professional associations to represent their members on an institutional, welfare, ethical or socio-professional basis.

Article 17 (Military honours)

Under the terms of the law, military personnel have the right to wear the uniform, titles, honours, precedence, immunities and exemptions inherent to their military status.

Article 18 (Remuneration)

1 - Military personnel shall be entitled to remuneration according to the form of service, rank, length of service and position held, under the terms laid down in specific legislation.
2 - On the basis of the special labour regime, permanent availability and the burdens and restrictions inherent to military status, military personnel shall be granted a remuneration supplement of a certain and permanent nature, known as the military status supplement.
3 - Military personnel may benefit from other remuneration supplements and allowances, under the terms laid down in specific legislation.

Article 19 (Guarantee in disciplinary proceedings)

In disciplinary proceedings, military personnel enjoy all the guarantees of defence and are guaranteed the right to appoint a defence counsel, under the terms of the RDM.

Article 20 (Legal protection)

1 - Military personnel have the right to receive legal protection from the state in the form of legal advice and legal aid, which includes hiring a lawyer and waiving the payment of costs and other procedural expenses, for the defence of their rights and their good name and reputation, whenever they are affected by service they provide to or within the Armed Forces.
2 - In cases where legal protection is granted under the terms of the previous paragraph and the judicial process results in a conviction for an intentional crime whose decision has become final, the Armed Forces may exercise the right of recourse.

Article 21 (Religious assistance)

1 - Military personnel who profess a legally recognised religion are guaranteed religious assistance.
2 - Military personnel are not obliged to attend or participate in acts of worship specific to a religion other than the one they profess.
3 - For reasons of service, military personnel may be assigned to military missions that take place in conjunction with religious ceremonies.

Article 22 (Arrest and pre-trial detention)

1 - Outside of flagrante delicto, the arrest of military personnel on active duty or in the line of duty shall be requested from their hierarchical superiors by the competent judicial or criminal police authorities, under the terms laid down in the applicable criminal procedural legislation.
2 - Military personnel arrested or remanded in custody shall remain in military detention on the order of the competent court or authority, under the terms laid down in the applicable criminal procedural legislation.

Article 23 (Right to transport and accommodation)

1 - In the performance of their military duties, military personnel are entitled to decent transport and accommodation, in accordance with the position held and the level of security required.
2 - When, for reasons of service, military personnel are deployed in an area other than that of their habitual residence, they are entitled, for themselves and their household, to accommodation provided by the state or, in the absence of such accommodation, to a residence supplement, under the terms laid down in specific legislation.

3 - Military personnel in the situation referred to in the previous paragraph shall be entitled to an allowance to compensate for the expenses resulting from their travel and that of their household, as well as the transport of their luggage, regardless of the means of transport used, under the terms set by the members of the Government responsible for the areas of finance and national defence.

Article 24 (Uniforms)

Military personnel on active service are entitled, under the terms laid down in a specific statute, to reimbursement from the state for the cost of their uniforms.

Article 25 (Other rights)

Military personnel have the right to: a) To career development, enhancement and progression, taking into account the constraints set out in this Statute, and to advancement in rank, under the terms set out in the respective remuneration system, reconciling their preparation, experience and merit with the needs of the Armed Forces; b) To receive training appropriate to the full performance of the duties and missions assigned to them, with a view to their human and professional development; c) To benefit, for himself and his family, from medical assistance, medication, hospitalisation and diagnostic means, under the terms laid down in a specific statute; d) To have the provisions of the legislation applicable to workers in public service applied to him in terms of parenthood, with the adaptations laid down in Article 102 of the Civil Code; e) To submit complaints to the Armed Forces' Ombudsman.e) To submit complaints to the Ombudsman, in accordance with the provisions of the LDN and under the terms of special legislation; f) To benefit from a reduction in public transport fares, under the terms of special legislation; g) To benefit, under the terms of special legislation, for themselves and their family, from a system of social assistance, protection and support, covering, in particular, retirement, survivor's and “blood price” (soldiers fallen in combat or defence of the country) pensions and invalidity benefits.”

20. Law No. 108/91 on Economic and Social Council

“Article 1 (Nature)

The Economic and Social Council, provided for in Article 95 of the Constitution, is the body that consults and consults on economic and social policies and participates in drawing up economic and social development plans.

Article 2 (Competence)

1 - The Economic and Social Council is responsible for: a) To give its opinion on the preliminary drafts of the broad options and plans for economic and social development, before they are approved by the Government, as well as on the reports on their implementation; b) To give its opinion on economic and social policies, as well as on their implementation; c) To assess Portugal's positions in the European Community bodies, within the scope of economic and social policies, and to give its opinion on the national use of Community, structural and specific funds; d) To give its opinion on proposals for sectoral and spatial plans of national scope and, in general, on restructuring and socio-economic development policies that the government intends to submit to it; e) To regularly assess the evolution of the country's economic and social situation; f) To assess documents that reflect regional development policy; g) To promote dialogue and consultation between the social partners; h) To approve its internal regulations.
2 - The Economic and Social Council, within the framework of its competences, also has the right of initiative under the terms of article 15 of this law.

Article 3 (Composition)

1 - The composition of the Economic and Social Council shall be as follows: a) A president, elected by the Assembly of the Republic under the terms of Article 166(h) of the Constitutionb) Four vice-presidents, elected by the Council's plenary; c) Eight representatives of the government, to be appointed by resolution of the Council of Ministers; d) Eight representatives of organisations representing workers, to be appointed by the respective confederations; e) Eight representatives of business organisations, to be appointed by national associations; f) Two representatives of the cooperative sector, to be appointed by cooperative confederations; g) Two representatives, to be appointed by the Higher Council for Science and Technology; h) Two representatives from the liberal professions, to be appointed by the sector's associations; i) One representative from the state business sector, to be appointed by resolution of the Council of Ministers; j) Two representatives from each autonomous region, to be appointed by the respective regional assembly; k) Eight representatives from the mainland's local authorities, elected by the regional councils of the areas of each regional coordination commission, one for the Alentejo, one for the Algarve and two for each of the others; l) One representative from the national environmental defence associations; m) One representative from national consumer protection associations; n) Three representatives from the social sector, one representative from Private Social Solidarity Institutions, one representative from Misericórdias and one representative from Mutualities; o) One representative from family associations; p) One representative from universities, to be appointed by the Council of Rectors; q) One representative from associations of young entrepreneurs; r) Two representatives from organisations representing family farming and the rural world; s) One representative from associations representing equal opportunities for women and men; t) One representative from each of the women's associations with generic representation; u) One representative from the women's associations represented on the advisory board of the Commission for Citizenship and Gender Equality, collectively considered; v) One representative from organisations representing people with disabilities, to be appointed by the respective associations; w) Two representatives from organisations representing the financial and insurance sector; x) A representative of the Portuguese Confederation of Culture, Recreation and Sports Collectives; y) A representative of organisations representing immigrants; z) Two representatives of the Council of Portuguese Communities; aa) (Repealed.) bb) Five personalities of recognised merit in the economic and social fields, appointed by the plenary. cc) A representative of the National Youth Council; dd) A representative of the National Federation of Youth Associations; ee) Two representatives of organisations representing pensioners.
2 - The appointment must take into account the relevance of the interests represented and whenever the organisation is represented by more than one person, the criterion of parity between men and women must be observed, and the same organisation may not exercise representation in more than one category.
3 - The mandate of the members of the Economic and Social Council corresponds to the term of office of the Assembly of the Republic and ends when the new members take office.
4 - The vice-presidents referred to in paragraph 1(b) may be elected from among the members of the plenary or outside the plenary.
5 - For each of the sectors represented, there shall be a number of alternates equal to that of the respective representatives on the Council.
6 - The workers' and employers' representatives referred to in paragraph 1(d) and (e) must include their respective representatives on the Standing Committee on Social Dialogue."

21. Law No. 39/2004 which establishes the principles and general bases for the exercise of the right to professional association of the military personnel of the National Republican Guard (GNR)

"Pursuant to Article 161(c) of the Constitution, the Assembly of the Republic hereby decrees the following to be valid as general law of the Republic:

Article 1 (Freedom of association)

1 - Members of the National Republican Guard (GNR) in active service have the right to form professional associations to promote the corresponding interests of their members.

2 - Professional associations have a national scope and headquarters in national territory, and may not be political, partisan or trade union in nature.
3 - In everything that is not provided for in this law, the constitution of GNR military associations and their acquisition of legal personality, as well as their management, operation and dissmissal, are regulated by general law.

Article 2 (Principle of non-discrimination)

GNR military personnel cannot be harmed or benefited as a result of exercising their right of association.

Article 3 (Principle of exclusive registration)

GNR military personnel are not allowed to join more than one professional association.

Article 4 (Principle of no harm to the service)

Under no circumstances and in no way may the exercise of associative activities jeopardise the normal fulfilment of missions, permanent availability for service or the cohesion and discipline of the GNR.

Article 5 (Rights of associations)

Legally constituted professional associations have the right to:
a) To represent members in defence of their statutory, socio-professional and ethical interests;
b) Joining advisory councils, study commissions and working groups set up to analyse matters of relevant interest to the institution, in the area of their specific competence;
c) To be heard by the competent bodies of the GNR on questions of the professional, remuneration and social status of their members and on the conditions for carrying out their respective activities;
d) To present proposals on the functioning of the services and other aspects of relevant interest to the institution, as well as to express an opinion to the competent bodies on matters expressly included in its statutory purposes;
e) To issue opinions on any matters concerning the GNR, when requested to do so by the competent authorities;
f) To hold meetings within the scope of its statutory purposes on GNR premises, previously authorised and provided that they do not compromise the achievement of the public interest or the normal functioning of the services;
g) Promote activities and issue publications on associative, deontological and socio-professional matters or, with prior hierarchical authorisation, on matters of an exclusively technical nature;
h) Post documents relating to its statutory activities, provided that they are posted in the appropriate place made available for this purpose;
i) Establishing relations with associations, federations of associations and similar international organisations pursuing similar objectives.

Article 6 (Restrictions on the exercise of rights)

The exercise of the rights enshrined in the previous article is subject to the restrictions laid down in this law, and GNR military personnel may not:
a) Making statements that could affect the GNR's subordination to democratic legality, its political and partisan impartiality, the cohesion, good name and prestige of the institution, or that violate the principle of discipline and command hierarchy;
b) Make statements on matters of which they become aware in the course of their duties and which are likely to constitute a state or judicial secret or concern matters relating to the GNR's

or the Armed Forces' or other security forces' dispositions or operational activities, with a classification equal to or higher than reserved, except in the case of matters specific to the GNR, when authorised by the hierarchically competent authority;
c) Call public meetings or demonstrations of a political, party or trade union nature or take part in them, except in this case if they are in civilian clothes and, in the case of a public event, do not sit on the board, speak or display any kind of message;
d) Being a member of a trade union association or taking part in trade union meetings;
e) To present collective petitions to bodies for the protection of fundamental rights on matters concerning the GNR, before the hierarchical channels have been exhausted, without prejudice to their individual right to complain to the Ombudsman and their active legitimacy in other means of administrative and judicial challenge, under the terms of the law;
f) Exercise the right to strike or any substitute options that could jeopardise the normal and effective performance of GNR missions, as well as its cohesion and discipline.

Article 7 (Application to pending disciplinary proceedings)

The provisions of this law shall apply immediately to disciplinary proceedings in progress, insofar as they concern acts carried out on behalf of associations that have already been formed.

Article 8 (Regulations)

The regulations governing the exercise of the right of association by GNR military personnel will be approved by decree-law within 90 days of the publication of this law."

22. Law No. 21/85 (Statute of Judicial Magistrates) as amended by Law No. 67/2019

"Article 17 (Special rights)

1 - The following are special rights of judicial magistrates […] The enjoyment of the rights provided for in union legislation and the benefit of a reduction in the distribution of service, upon deliberation by the Superior Council of the Judiciary, when they exercise functions in the executive body of a union association of the judicial judiciary or in international organizations representing magistrates. […]"

23. Law No. 7/2009 (Labour code) as amended by Law No. 13/2023

"Article 24 (Right to equal access to employment and work)

1 - Workers or jobseekers have the right to equal opportunities and equal treatment with regard to access to employment, training, promotion or professional career and working conditions, and may not be favoured, benefited, disadvantaged, deprived of any right or exempted from any duty on the grounds, in particular, of ancestry, age, sex, sexual orientation, gender identity, marital status, family situation, economic situation, education, social origin or condition, genetic heritage, reduced working capacity, disability, chronic illness, nationality, ethnic origin or race, territory of origin, language, religion, political or ideological convictions and trade union membership, and the state must promote equal access to such rights.
2 - The right referred to in the previous paragraph concerns, in particular: a) Selection criteria and hiring conditions, in any sector of activity and at all hierarchical levels; b) Access to all types of vocational guidance, training and retraining at any level, including the acquisition of practical experience; c) Remuneration and other benefits, promotion at all hierarchical levels and criteria for selecting workers to be dismissed; d) Membership or participation in collective representation structures, or in any other organisation whose members exercise a particular profession, including the benefits attributed by them.

3 - The provisions of the previous paragraphs shall also apply in the case of decision-making based on algorithms or other artificial intelligence systems and shall be without prejudice to the application of: a) legal provisions concerning the exercise of a professional activity by a foreigner or stateless person; b) provisions concerning the special protection of genetic heritage, pregnancy, parenthood, adoption and other situations concerning the reconciliation of professional activity with family life.
4 - Employers must display information on workers' rights and duties in terms of equality and non-discrimination in an appropriate place in the company.
5 - Violation of paragraph 1 shall constitute a very serious administrative offence and violation of paragraph 4 shall constitute a minor administrative offence."

RELEVANT INTERNATIONAL MATERIAL

A – The Council of Europe

1. European Convention of Human Rights (ECHR)

24. The ECHR provides:

Article 11 (Freedom of assembly and association)

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

2. Case law of the European Court of Human Rights (ECtHR)

25. According to the ECtHR, the characteristics of military life differ by nature from those of civil life. (*Engel and others v. the Netherlands*, cases No. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, judgment of 8 June 1976, §§54, 57, 59, 73, 103). As to the restriction in Article 11§2 of the Convention concerning the rights of the members of the armed forces, the ECtHR has held in particular that:

"During the preparation and subsequent conclusion of the Convention, the great majority of the Contracting States possessed Defence forces and, in consequence, a system of military discipline that by its very nature implied the possibility of placing on certain of the rights and freedoms of the members of these forces limitations incapable of being imposed on civilians. The existence of such a system, which those States have retained since then, does not in itself run counter to their obligations. [...]" (§57)

"[…] Each State is competent to organise its own system of military discipline and enjoys in the matter a certain margin of appreciation. […]" (§59)

26. In *Matelly v. France* (case No. 10609/10, judgment of 2 October 2014, §§56-58, 71, 75-77), the applicant contested the statutory prohibition against members of the Gendarmerie forming professional associations or trade unions. The Court held that:

"Article 11 of the Convention allowed States Parties to restrict, even significantly, the actions and expressions of a professional association founded by the members of the armed forces, as well as those of the individual members of such an association. Nevertheless, such restrictions could not entirely deprive the association's members of their rights under Article 11 of the Convention. The grounds invoked by the Government in support of the imposed restrictions were neither pertinent nor sufficient to justify an absolute prohibition to adhere to a professional association founded for the purpose of defending the members' professional and moral interests. Such a prohibition affected the essence of the freedom guaranteed under Article 11 of the Convention and constituted a violation of the provision (also *ADEFDROMIL v. France*, case No. 32191/09, judgment of 2 October 2014, §§55, 58, 60; *Junta Rectora del Ertzainen Nazional Elkartasuna (ER.N.E) v. Spain*, case No. 45892/09, judgment of 21 April 2015, §§28-33)."

27. In *Wilson, National Union of Journalists and Others v. the United Kingdom*, cases Nos. 30668/96, 30671/96 and 30678/96, judgment of 2 July 2002, §46:

"the right to bargain collectively with the employer is one of essential elements of the right to form and to join trade unions for the protection of interests. The essence of a voluntary system of collective bargaining is that it must be possible for a trade union to take steps including if necessary, organising industrial action, with a view to persuading the employer to enter into collective bargaining with it on those issues which the union believes are important for its members' interests."

28. In *Demir and Baykara v. Turkey*, Case No. 34503/97, §154, the ECtHR considered that:

"…the right to bargain collectively with the employer has, in principle, become one of the essential elements of the "right to form and to join trade unions for the protection of [one's] interests" set forth in Article 11 of the Convention, it being understood that States remain free to organise their system so as, if appropriate, to grant special status to representative trade unions. Like other workers, civil servants, except in very specific cases, should enjoy such rights, but without prejudice to the effects of any "lawful restrictions" that may have to be imposed on "members of the administration of the State" within the meaning of Article 11§2."

3. Parliamentary Assembly

29. **Resolution 2033 (2015)** of 28 January 2015, "Protection of the right to bargain collectively, including the right to strike" reads as follows:

"1. Social dialogue, the regular and institutionalised dialogue between employers' and workers' representatives, has been an inherent part of European socio-economic processes for decades. The rights to organise, to bargain collectively and to strike – all essential components of this dialogue – are not only democratic principles underlying modern economic processes, but fundamental rights enshrined in the European Convention on Human Rights (ETS No. 5) and the European Social Charter (revised) (ETS No. 163).

2. However, these fundamental rights have come under threat in many Council of Europe member States in recent years, in the context of the economic crisis and austerity measures. In some countries, the right to organise has been restricted, collective agreements have been revoked, collective bargaining undermined and the right to strike limited. As a consequence, in the affected countries, inequalities have grown, there has been a persistent trend towards lower wages, and negative effects on working and employment conditions have been observed.

3. The Parliamentary Assembly is most concerned by these trends and their consequences for the values, institutions and outcomes of economic governance. Without equal opportunities for all in accessing decent employment and without appropriate means of defending social rights in a globalised economic context, the inclusion, development and life chances of whole generations will be put into question. In the medium term, the exclusion of certain groups from economic development, the distribution of wealth and decision making could seriously damage European economies and democracy itself.

4. Investing in social rights is an investment in the future. In order to build and maintain strong and sustainable socio-economic systems in Europe, social rights need to be protected and promoted.

5. In particular, the rights to bargain collectively and to strike are crucial to ensure that workers and their organisations can effectively take part in the socio-economic process to promote their interests when it comes to wages, working conditions and social rights. “Social partners” should be taken to mean just that: “partners” in achieving economic performance, but sometimes opponents striving to find a settlement concerning the distribution of power and scarce resources.“

4. Committee of Ministers

30. **Recommendation CM/Rec(2010)4** of 24 February 2010 on human rights of members of the armed forces provides:

“The Committee of Ministers of the Council of Europe

Recommends that the governments of the member states:

1. ensure that the principles set out in the appendix to this recommendation are complied with in national legislation and practice relating to members of the armed forces;
[…]

Appendix to Recommendation

2. Whilst taking into account the special characteristics of military life, members of the armed forces, whatever their status, shall enjoy the rights guaranteed in the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter, “the Convention”) and the European Social Charter and the European Social Charter (revised) (hereafter, “the Charter”), as well as other relevant human rights instruments, to the extent that states are bound by them.
[…]
53. No restrictions should be placed on the exercise of the rights to freedom of peaceful assembly and to freedom of association other than those that are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.
54. Members of the armed forces should have the right to join independent organisations representing their interests and have the right to organise and to bargain collectively. Where these rights are not granted, the continued justification for such restrictions should be reviewed and unnecessary and disproportionate restrictions on the right to assembly and association should be lifted.
55. No disciplinary action or any discriminatory measure should be taken against members of the armed forces merely because of their participation in the activities of lawfully established military associations or trade unions.
[…]
57. Paragraphs 53 to 56 should not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces.
[…]”

31. The Committee of Ministers, in its Reply CM/AS(2003)Rec1572 final (adopted on 16 July 2003 at the 849th meeting of the Ministers' Deputies) to Parliamentary Assembly Recommendation 1572(2002) of 2 September 2002, Right to association for members of the professional staff of the armed forces, considered (§§9, 13-14) that it was not, at the time, in a position to approve the proposal to amend Article 5 of the Charter by deleting the third sentence relating exclusively to members of the armed forces and by adding this category to the second sentence, presently covering only the police.

B – The United Nations

1. Universal Declaration of Human Rights (UDHR) (1948)

32. UDHR provides:

> Article 29
>
> "1. Everyone has duties to the community in which alone the free and full development of his personality is possible.
>
> 2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
>
> 3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations."

2. International Covenant on Civil and Political Rights (ICCPR) (1966)

33. ICCPR provides:

> Article 22
>
> "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.
>
> 3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention."

3. International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966)

34. ICESCR provides:

Article 8

"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;

b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international tradeunion organisations;

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;

d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

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.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention."

C – International Labour Organisation (ILO)

1. ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise (1948)

35. ILO Convention No. 87 provides:

Article 2

"Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation."

Article 5

"Workers' and employers' organisations shall have the right to establish and join federations and confederations and any such organisation, federation or confederation shall have the right to affiliate with international organisations of workers and employers."

Article 9

"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. […] »

2. ILO Convention No. 98 on the Right to Organise and Collective Bargaining (1949)

36. ILO Convention No. 98 provides:

Article 4

"Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation 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."

Article 5

"1. 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 [...]."

37. General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, International Labour Conference, 101st Session, 2012.

Workers covered by collective bargaining

"209. With the exception of organizations representing categories of workers which may be excluded from the scope of the Convention, namely the armed forces, the police and public servants engaged in the administration of the State, recognition of the right to collective bargaining is general in scope and all other organizations of workers in the public and private sectors must benefit from it. However, the recognition of this right in law and practice continues to be restricted or non-existent in certain countries. This situation has given the Committee cause to recall that the right to collective bargaining should also cover organizations representing the following categories of workers: prison staff, fire service personnel, seafarers, self-employed and temporary workers, outsourced or contract workers, apprentices, non-resident workers and part-time workers, dockworkers, agricultural workers, workers in religious or charity organizations, domestic workers, workers in EPZs and migrant workers. The Committee further emphasizes that the right to collective bargaining should be recognized for teaching personnel and managerial personnel in educational institutions, as well as staff engaged in technical and managerial functions in the education sector."

D – The European Union

Charter of Fundamental Rights of the European Union

38. The Charter of Fundamental Rights provides:

Article 12 (Freedom of assembly and of association)

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.
2. Political parties at Union level contribute to expressing the political will of the citizens of the Union."

Article 28 (Right of collective bargaining and action)

"Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 OF THE CHARTER

39. Article 5 and Article G of the Charter read as follows:

> **Article 5 – The right to organise**
>
> Part I: "All workers and employers have the right to freedom of association in national or international organisations for the protection of their economic and social interests."
>
> Part II: "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."
>
> **Article G – Restrictions**
>
> "1. The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.
> 2. The restrictions permitted under this Charter to the rights and obligations set forth herein shall not be applied for any purpose other than that for which they have been prescribed."

A – Arguments of the parties

1. The complainant organisation

40. EUROMIL argues that Portugal violates Article 5 of the Charter, due to a restricted form of worker's representation through the existing professional military associations which, according to EUROMIL, does not constitute satisfactory implementation of the said Article. EUROMIL further argues that Article G of the Charter allows States to impose restrictions upon the right to organise of members of the armed forces and grants them a wide margin of appreciation in this regard, but these restrictions may not entirely suppress the right to organise and prohibit the establishment of professional associations of a trade union nature as is the case in Portugal.

41. According to EUROMIL, although the right to freedom of association was granted to them in 2001, the role and competencies of military associations have been extremely restricted and resulted in impediment of professional military associations from collectively representing the "workers in uniform". The restrictions on the right to organise prescribed for military personnel and their representatives by the Organic Laws 3/2001 (Law on the right to the professional association of military personnel) and 4/2001 (National Defence) prohibit activities of a trade union nature which, in EUROMIL's view, are not proportionate and necessary in a democratic society.

42. Furthermore, EUROMIL argues that as employed in public service, military personnel should be treated as “workers in uniform” and not only as “citizens in uniform”, meaning that they should be entitled to the same rights as any other worker. They should be treated equally and have the same rights as recognised to other public services, especially security forces, such as the personnel of the Public Security Police (PSP) or the National Republican Guard (GNR), which have genuine trade union rights.

43. EUROMIL refers to Article 92 para. 2 of the Portuguese Constitution, which defines the composition of the Economic and Social Council which includes representatives of the Government, of the organisations that represent workers, economic activities, and families, of the autonomous regions and of local authorities. It states that Article 27 para. 3 of the Organic Law No. 5/2014 (National Defence) inadequately restricts the fundamental rights of military personnel. Specifically, according to this provision, the constitutional rules concerning the rights of workers are not applicable to military personnel on active duty, whose right to the freedom of association is restricted precluding their enjoyment of normal trade union prerogatives, i.e. that they do not have the right to establish and participate in works councils nor do they enjoy the right to strike.

44. Moreover, EUROMIL recalls that according to Article 24 para. 1 of the Labour Code (Law No. 7/2009, as amended), workers are entitled to equal opportunities and treatment regarding access to employment, training and promotion or professional career and working conditions and may not be impaired, disadvantaged or deprived of any right or exempted from any duty on various grounds listed in the provision, and the State must promote equal access to such rights. EUROMIL states that Law No. 39/2004 laid down general principles for the exercise of the right to freedom of association for the members of the GNR, who were subsequently engaged (in 2020) in social dialogue with the authorities on issues such as pay, health and safety at work. The same applies to members of the PSP. According to the complainant organisation, associations of other military personnel do not enjoy these rights, resulting in unjust and strikingly differential treatment.

45. EUROMIL concludes that invoking Article G of the Charter, in order to justify restrictions on the right to organise of military personnel should be considered unproportionate and unnecessary in a democratic society. In its view, the restrictions to Article 5 of the Charter must not suppress entirely the right to organise and prohibit professional associations of a trade union nature. In support of its argument, EUROMIL recalls the Committee’s decisions in European Council of Trade Unions (CESP) v. France, Complaint No. 101/2013, decision on the merits of 27 January 2016, §84 and European Organisaiton of Military Associations (EUROMIL) v. Ireland, Complaint No. 112/2014, decision on the merits of 12 September 2017, §§55-56.

2. The respondent Government

46. The Government states that restrictions on the exercise of trade union rights by military personnel may only apply to the rights expressly referred to in Article 270

of the Portuguese Constitution. These restrictions are subject to the principle of proportionality and limited to the "strict measure of the demands inherent to military functions", which takes into account the adequacy, necessity and enforceability of the measure. The national laws that established the mentioned restrictions were approved in line with Articles 164 and 168 para. 6e of the Constitution. It means they were approved by a 2/3 majority of members of the Parliament.

47. The rights and duties of armed forces are guaranteed and regulated by Articles 29 (freedom of assembly), 30 (right to demonstrate), and 31 (right to association) of the National Defence Law (Organic Law No. 1-B/2009). Freedom of association is further regulated (Article 2) and restricted (Article 3) by Organic Law No. 3/2001. In the Government's view, in international law, it is widely recognised that in matters concerning the armed forces and National Defence, national sovereignty must take precedence, due to the specific nature of the functions the armed forces are invited to perform. In support of its view, the Government recalls the final sentence of Article 5 of the Charter regarding the armed forces.

48. The Government argues that the Constitution, the National Defence Law, the Military Associations Law and the Statute of Leaders of Military Associations laid down the restrictions on the right to organise after taking into consideration the specificities of the duties of the armed forces. In line with the Constitution, the restrictions are established in accordance with the requirements of the respective function. For example, the Law on the Rights of Professional Association of Military Personnel stipulates that the exercise of associative activities cannot, under any circumstances and by any means, conflict with legally defined duties and functions or with the fulfilment of service mission and that the exercise of these rights must always respect the National Defence Law.

49. The Government notes that the rights to freedom of association are effective and freely exercised, which is demonstrated by the existence of various associations, and in the close communication between these associations and the Ministry of National Defence. The Government concludes that there are several associations of Military personnel rightfully established in Portugal. They actively represent their members in accordance with laws and their statutes. Among these associations, the Government mentions *Associação de Oficiais das Forças Armadas* (AOFA), *Associação dos Militares na Reserva e Reforma* (ASMIR), *Associação Nacional de Sargentos* (ANS), *Associação de Praças* (AP) and *Associação de Contratados do Exército* (ANCE).

B – Assessment of the Committee

50. The Committee considers that Article 5 of the Charter allows States Parties to impose restrictions upon the right to organise of members of the armed forces and grants them a wide margin of appreciation in this regard, subject to the terms set out in Article G of the Charter (see CESP v. France, Complaint No.101/2013, op. cit., §80). However, these restrictions may not go as far as to suppress entirely the right to organise, such as the blanket prohibition of professional associations of a trade union nature and the affiliation of such associations to national

federations/confederations (see CESP v. France, op. cit., §§84-86 and EUROMIL v. Ireland, Complaint No. 112/2014, op. cit., §47).

51. The Committee considers that the members of the armed forces who may be excluded from the right to freedom of association should be defined in a restrictive manner and that the complete suppression of the right to organise (which involves freedom to establish organisations/trade unions as well as the freedom to join or not to join trade unions) is not a measure which is necessary in a democratic society for the protection of, inter alia, national security (see *Confederazione Generale Italiana del Lavoro* (CGIL) v. Italy, Complaint No. 140/2016, decision on the merits of 22 January 2019, §92).

52. Moreover, in the case of military representative associations, a complete ban on affiliation to national workers' organisations is not necessary or proportionate and therefore does not fulfil the conditions laid down by Article G of the Charter, in particular when the restriction has the factual effect of depriving the representative associations of an effective means of negotiating the conditions of employment on behalf of their members, in so far as national umbrella organisations of workers possess significant bargaining power in national negotiations (see CGIL v. Italy, Complaint No. 140/2016, op.cit., §90).

53. In the present complaint, based on the submissions of the two parties, the Committee notes that Portugal allows members of the armed forces to form and join professional associations and that there are several military associations established in Portugal. These associations are subject to certain restrictions prescribed by national legislation.

54. The Committee notes that Article 270 of the Portuguese Constitution does not restrict the right to organise and form trade unions but allows for it to be restricted by laws. In that respect, the Committee also recalls that the Charter cannot be regarded as permitting interference with the rules for drafting legislation as provided for by constitutional provisions because this process is the prerogative of sovereign States (*Centrale générale des services publics* (C.G.S.P.) v. Belgium, Complaint No. 25/2004, decision on the merits, 9 May 2005, §41). However, the Committee notes that the legal provisions, referred to by the two parties, on the freedom of association of military personnel are formulated similarly and not only restrict but prohibit entirely military personnel from forming associations of a trade union nature (see e.g. Articles 31 and 31D of the Organic Law No. 4/2001, Articles 29 and 31 of Organic Law No. 1-B/2009 and Article 27 of Organic Law No. 5/2014).

55. According to Article 16a of the Decree-Law No. 90/2015 as amended by Law No. 10/2018, military personnel have the right to establish professional associations to represent their members on an institutional, welfare, ethical or socio-professional basis. As trade union rights are not listed in this provision, such rights are not recognised.

56. In support of its allegations, as regards the exercise of trade union rights, EUROMIL invokes the differential treatment of military personnel and other professions of a similar nature, namely the security forces, GNR and PSP, who were able to negotiate with the authorities on issues such as pay, health and safety at work. In this respect, the Committee points out that Article 5 differentiates between the police and armed forces and recalls its case law according to which the assessment depends on whether the duties of the national guard are equivalent to duties of the police or of the armed forces (see CESP v. France, Complaint No. 101/2013, op. cit., §§ 61, 80).

57. Although Article 5 read in the light of Article G allows for a margin of appreciation in prescribing the restrictions on the right to organise for military personnel, in the Committee's view, the extent of the restrictions imposed by the Portuguese legal provisions referred to, which do not allow for any establishment of associations with trade union prerogatives, is not in conformity with Article 5 going beyond the conditions laid down by Article G of the Charter.

58. The Committee consequently holds that there is a violation of Article 5 of the Charter, as the restrictions applied are disproportionate and do not meet the necessary criteria outlined in Article G.

II. ALLEGED VIOLATION OF ARTICLE 6§1 OF THE CHARTER

59. Article 6§1 of the Charter reads as follows:

> **Article 6 – The right to bargain collectively**
>
> Part I: "All workers and employers have the right to bargain collectively."
>
> Part II: "With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake:
>
> 1. to promote joint consultation between workers and employers;
> […]"

A – Arguments of the parties

1. The complainant organisation

60. EUROMIL argues that Article 6§1 is violated on the ground that Portugal does not promote joint consultation between members of the armed forces and the Ministry of Defence.

61. EUROMIL recalls that according to the Organic Law No. 4/2001 (on National Defence and Armed Forces), military associations have the right to be heard on issues regarding remuneration, and the professional and social status of their members. It further states that contrary to these provisions, the above mentioned right is not ensured in practice, since there is no social dialogue, associations are not consulted, their opinions are not considered, and fair and equal joint consultations are not promoted.

62. According to EUROMIL, military personnel associations may not exercise their right to joint consultation as a social partner, since they are not identified as such. More specifically, EUROMIL recalls that Law No. 108/91, which regulates the functioning of the Economic and Social Council as a body for consultation in the field of economic and social policies that participates in the preparation of economic and social development plans (Article 1) and promotes dialogue and consultation of the social partners (Article 2 para. 1g) does not include any military association or representative of military personnel in the list of social partners identified in Article 3.

2. The respondent Government

63. The Government emphasises that military personnel of the armed forces enjoy a set of special rights that are consistent with their military status, different from the regime of workers in public functions and workers subject to the private sector. More specifically, the Government refers to the Decree-Law No. 90/2015 (Statute of the Armed Military Forces) as amended by Law No. 10/2018, specifically Chapter II of Title II (Articles 16 to 25), and states that these provisions enshrine rights inherent to the military condition, namely the right of association, legal protection, religious assistance, housing and transportation, training, career progression, as well as a special remuneration status and special health care and social security system, extendable to their families.

64. The Government further states that within the scope of a governmental policy of strengthening the participation of the military representative associations in the decision-making process, their interaction with the Ministry of National Defence is constantly increasing, in particular regarding legislative proposals and aspects related to the working conditions of the military personnel. In support of this argument, the Government provides a list of meetings held from 2017 to 2022 with various associations representing military personnel (such as *Associação de Oficiais das Forças Armadas* (AOFA), *Associação dos Militares na Reserva e Reforma* (ASMIR), *Associação Nacional de Sargentos* (ANS), *Associação de Praças* (AP) and *Associação de Contratados do Exército* (ANCE)). These meetings addressed issues such as the exercise of the right of association, negotiation, and representation of the military, including statutory rights, remunerations and social rights in the area of National Defence.

65. Lastly, the Government furnishes the 2022 statement of AOFA according to which the situation regarding consultations has evolved. In particular, the Government provides the Committee with evidence that AOFA stated during a meeting between military personnel representatives and political decision-makers (i.e. the Socialist Party that had the parliamentary majority at the time) held in May 2022 in Parliament that the meeting in question was a sign of full recognition of the Association’s credibility and representativeness and that the dialogue thus established opened up very important, concrete prospects for resolving various labour and social security issues concerning the military personnel.

B – Assessment of the Committee

66. Article 6§1 requires States Parties to promote joint consultation between workers and employers. In the Committee's view joint consultation is held on all matters of mutual interest (Conclusions I (1969), Statement of Interpretation of Article 6§1). Matters of mutual interest are health and safety, working conditions, vocational training, productivity issues, economic and social matters such as the economic situation, working hours, social insurance, social welfare, etc. (Conclusions I, 1969, Statement of Interpretation of Article 6§1). It should cover private and public sectors, including the civil service (Conclusions III, Denmark). The Committee interprets Article 6§1 to require States Parties to take positive steps to encourage consultation between trade unions and employers' organisations (see CGSP v. Belgium, Complaint No. 25/2004, op. cit., §41).

67. The Committee observes EUROMIL's allegation that the provisions of Organic Law 4/2001 regarding consultations are not respected in practice, but EUROMIL does not provide evidence in support of this argument. It merely refers to provisions of Law No. 108/91 on the functioning of the Economic and Social Council which does not list representatives of military personnel as social partners. EUROMIL does not further develop its argument regarding the violation of Article 6§1.

68. The Committee considers that under Article 6§1 military associations should be recognised as social partners and be enabled to participate to an appropriate extent in social dialogue and consultations. Consequently, Law No. 108/91, which regulates the functioning of the Economic and Social Council would not be in conformity with the requirements of Article 6§1 of the Charter. However, the Committee assesses Article 6§1 in a wider context, namely by taking into account developments regarding the social dialogue in practice.

69. The Committee notes that matters of mutual interest are regulated by recent legislation (Decree-Law No. 90/2015 approving the Statute of the Armed Military Forces, as amended by Law No. 10/2018). It also notes that, in practice, according to evidence furnished by the Government, consultations with military associations increased in 2022 in comparison with previous years (2017-2021, see §§64-65). In the Committee’s view, the enhancement of the existing consultation mechanisms, enabling military associations to engage in a dialogue with the government representatives is in line with Article 6§1 of the Charter.

70. Therefore, the Committee holds that there is no violation of Article 6§1 of the Charter.

III. ALLEGED VIOLATION OF ARTICLE 6§2 OF THE CHARTER

71. Article 6§2 and Article G of the Charter read as follows:

Article 6 – The right to bargain collectively

Part I: “All workers and employers have the right to bargain collectively.”

Part II: “With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake:
[…]
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;
[…]”

Article G – Restrictions

“1 The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.

2 The restrictions permitted under this Charter to the rights and obligations set forth herein shall not be applied for any purpose other than that for which they have been prescribed.”

A – Arguments of the parties

1. The complainant organisation

72. EUROMIL alleges that Portugal is in violation of Article 6§2 of the Charter on the grounds that it does not promote any machinery for voluntary negotiations between trade unions representing the armed forces and the Ministry of Defence in order to regulate working conditions through collective agreements. Professional military associations cannot negotiate since they are denied trade union status (see above §§ 51, 54, and 58).

73. EUROMIL further argues that the right to be heard or consulted is not equivalent to the right to negotiate as understood under Article 6§2 of the Charter, and that mere hearing of a military representative association does not result in the efficient exercise of the right to bargain collectively. Military associations do not participate in the determination and improvement of the working conditions and environment. Their trade union rights are restricted to such an extent that they cannot effectively negotiate the terms of collective agreements.

74. In support of their arguments, EUROMIL refers to the record of the meeting held on 26 June 2018 in the Portuguese Parliament, where the Minister of National Defence, then Secretary of State for Defence (Mr Marcos Perestrello) stated that the negotiation process with the trade union structures of State bodies (public sector) and those of the military are of a completely different nature, to the extent it does not resemble negotiation process at all.

75. As for the Organic Law 4/2001 (see above §§ 41 and 61), EUROMIL alleges that the right for military associations to be heard on the issues of the professional status, remuneration, and social status of their members is violated, since military associations are deprived of expressing their demands regarding the working conditions and pay in an appropriate and effective manner.

76. Concerning Decree-Law No. 90/2015 (Statute of the Armed Military Forces) as amended by Law No. 10/2018, and specifically Articles 16 to 25, EUROMIL states that it similarly does not provide any right of representation and bargaining to the members of the armed forces as public workers.

77. EUROMIL concludes that the prohibition of trade union rights for military personnel in Portugal is neither compatible with the requirements of Article 6§2 nor is it necessary or appropriate within the meaning of Article G of the Charter. In support of its argument, EUROMIL recalls the Committee's decision in EUROMIL v. Ireland, Complaint No. 112/2014, op. cit., §97.

2. The respondent Government

78. In its submissions, the Government argues that there is no total prohibition of the right to bargain collectively in Portugal, but merely proportionate restrictions in accordance with the specificities of armed forces functions. It asserts that significant rights are ensured, such as the right to form professional associations, develop collective activities and to be consulted or issue opinions on legal measures within the scope of the National Defence framework.

79. As to the statement of the former Secretary of State for Defence (see §74), the Government recalls that the point of that statement was not a denial of the need to engage in negotiations with the military, but rather that a conclusion regarding the nature of negotiations still had to be reached.

B – Assessment of the Committee

80. Article 6§2 of the Charter obliges the States Parties to promote, where necessary and appropriate, machinery for voluntary negotiations on, inter alia, the regulation of terms and conditions of employment (European Council of Police Trade Unions (CESP) v. Portugal, Complaint No. 11/2002, decision on the merits of 21 May 2002, §§51 and 63).

81. The Committee recalls that States Parties may enact restrictions on the right of the armed forces to bargain collectively laid down by Article 6§2 as long as the conditions provided for by Article G are met. The extent to which collective bargaining applies to public officials, including members of the police and armed forces, may be regulated by law (European Council of Police Trade Unions (CESP) v. Portugal, Complaint 11/2001, decision on the merits 21 May 2002, §58).

82. The Committee notes that the allegations made by EUROMIL bear certain similarities to those made in EUROMIL v. Ireland, Complaint No. 112/2014, op. cit.. Although Article 5 differentiates between the police and armed forces (see above §56), the Committee recalls that regarding Article 6§2 of the Charter, it adopted the same approach to the assessment of conformity as concerning the right of police in terms of collective bargaining (EUROMIL v. Ireland, op.cit., §88). More precisely, the Committee referred to its position where it examined, under Article 6§2 of the Charter

whether, based on practical examples, a police trade union had effectively been consulted and its opinions taken into account (EuroCOP v. Ireland, Complaint No. 83/2012, decision on admissibility and merits of 2 December 2013, §§161-178).

83. Although the extent to which ordinary collective bargaining applies to public officials may be determined by law, such officials retain the right to participate in any processes that are directly relevant for the determination of procedures applicable to them (Conclusions III (1973), Germany, CESP v. Portugal, Complaint No. 11/2002, op. cit., §58).

84. A mere hearing of a party on a predetermined outcome will not satisfy the requirements of Article 6§2 of the Charter, but there must be a possibility for the military association to influence it. In a situation where the trade union rights have been restricted with reference to Article G, an association must maintain its ability to argue on behalf of its members through at least one effective mechanism. In order to satisfy this requirement, the mechanism for collective bargaining must be such as to genuinely provide for a possibility of a negotiated outcome in favour of the workers' side (EuroCOP v. Ireland, Complaint No. 83/2012, op. cit., §177).

85. The Committee notes that while in Portugal the military associations are consulted (see the Committee's assessment regarding Article 6§1 on promotion of joint consultation between workers and employers of the present complaint, §§ 66-70), they are not directly involved in the negotiations with a view to the regulation of terms and conditions of employment as required by Article 6§2. This means that there is no mechanism through which the general issues relating to conditions of service of the armed forces are effectively negotiated as required by the Charter.

86. The Committee notes that the Government merely states that the legislation which restricts the right of military personnel to negotiations was adopted by the Parliament. The Committee considers that the Government does not adequately justify the exclusion in law and practice of the armed forces from genuine collective bargaining on terms and conditions of work is necessary for the protection of public interest and national security. The Committee therefore considers that the restriction cannot be considered necessary within the meaning of Article G of the Charter.

87. Having regard to the purpose of the collective bargaining mechanism as guaranteed by Article 6§2, the Committee considers that Portugal fails to ensure sufficient access for military representative associations to participate in collective bargaining which would allow for the possibility to effectively negotiate outcomes in favour of the interests of military personnel.

88. The Committee consequently holds that there is a violation of Article 6§2 of the Charter.

IV. ALLEGED VIOLATION OF ARTICLE 6§4 OF THE CHARTER

89. Article 6§4 and Article G of the Charter read as follows:

Article 6 – The right to bargain collectively

Part I: "All workers and employers have the right to bargain collectively."

Part II: "With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake:
[…]
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."

Article G – Restrictions

"1 The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.

2 The restrictions permitted under this Charter to the rights and obligations set forth herein shall not be applied for any purpose other than that for which they have been prescribed."

A – Arguments of the parties

1. The complainant organisation

90. EUROMIL argues that the prohibition of the right to strike of military personnel amounts to a violation of the right to collective action under Article 6§4 of the Charter, as it is a fundamental trade union right that must be guaranteed to all workers as the most effective means to achieve a favourable outcome from a bargaining process, although it should only be utilised as a last resort.

91. The prohibition of the right to collective action by way of strike is established by Organic Law No. 4/2001 on National Defence. EUROMIL further argues that the absolute prohibition of the right to strike is not justified nor acceptable in Portugal, because the social dialogue and the right to bargain collectively are not sufficiently organised nor effective. In support of its argument, EUROMIL refers to the Committee's decision in CGIL v. Italy, Complaint No. 140/2016, op. cit., §145.

92. In EUROMIL's view, the prohibition prescribed in the above Organic Law is not necessary in a democratic society and should be replaced by a partial prohibition.

2. The respondent Government

93. The Government's arguments are provided under Article 5 and Article 6§2 (see above §§ 46-49 and 78-79). It does not provide specific arguments on the right to strike.

B – Assessment of the Committee

94. Under Article 6§4 the right to strike is inextricably linked to the right to collective bargaining in the meaning of Article 6§2 of the Charter, as it represents the most effective means to achieve a favourable result in the context of a bargaining process. It is therefore of specific relevance to trade unions. (CGIL v. Italy, Complaint No. 140/2016, op. cit., §143). Consequently, restrictions on this right will only be acceptable under specific conditions as laid down by Article G of the Charter. Requirements that need to be met so that such a restriction is compatible with the Charter are that the restriction is established by law, pursues a legitimate aim and is objectively necessary in a democratic society, i.e. proportionate to the aim pursued (CGIL v. Italy, Complaint No. 140/2016, op. cit., §152).

95. In the instant case, the Committee notes that Article 270 of the Portuguese Constitution, Article 31 of Organic Law No. 4/2001 and Article 27 of the Organic Law No. 5/2014 prohibits the right to strike for military personnel.

96. Although the margin of appreciation accorded to States Parties in terms of the right to strike of the armed forces is greater than that afforded to States Parties in respect of the police (EUROMIL v. Ireland, Complaint No. 112/2014, op. cit., §116) the Committee draws certain parallels between the two categories in its case-law. In similar cases concerning the police, whose right to collective action may be restricted if the requirements of Article G are met, the Committee previously noted the diversity of legal approaches to this issue across Europe and took note of the increasing tendency towards recognising the armed forces' right to strike. Concerning police officers, an absolute prohibition on the right to strike can be considered in conformity with Article 6§4 only if there are compelling reasons justifying it. On the other hand, the imposition of restrictions as to the mode and form of such strike action can be in conformity to the Charter (EuroCOP v. Ireland, Complaint No. 83/2012, §§203-204).

97. The Committee recognised the right to strike of police forces (EuroCOP v. Ireland, Complaint No. 83/2012, decision cited above). It held, for example, in the context of the regulation of the collective bargaining rights of police officers, states must demonstrate compelling reasons as to why an absolute prohibition on the right to strike is justified in the specific national context in question, as distinct from the imposition of restrictions as to the mode and form of such strike action (EuroCOP v. Ireland, Complaint No. 83/2012, decision cited above, §§211-214).

98. The Committee recalls that it has held that restrictions on the right to strike for members of the armed forces may be in conformity with the Charter provided that the requirements of Article G are met, namely the restrictions are prescribed by law, pursue a legitimate aim such as the protection of the rights and freedoms of others or the protection of public interest, national security, public health, or morals and are necessary in a democratic society (Conclusions I (1969), Statement of Interpretation on Article 6§4), EUROMIL v. Ireland, Complaint No. 112/2014, op. cit., §§113-117).

99. Furthermore, in EUROMIL v. Ireland, Complaint No. 112/2014, op. cit., §115 the Committee held that the restriction in question was established by law, pursued a legitimate aim that seeking to maintain public order, national security and the rights and freedoms of others by ensuring that the armed forces remain fully operational and available to respond at all times. It also noted that "most Council of Europe states prohibit members of the armed forces from striking (with the exception of Austria and Sweden)" (EUROMIL v. Ireland, Complaint No. 112/2014, op. cit., §117) . Furthermore, "having regard to the specific nature of the tasks carried out by members of the armed forces, the special circumstances of members of the armed forces who operate under a system of military discipline, the potential that any industrial action could disrupt operations in a way that threatens national security" the Committee considered that there was a justification for the imposition of the absolute prohibition on the right to strike. It concluded that the particular statutory provision was proportionate to the legitimate aim pursued and could therefore be regarded as necessary in a democratic society. Given the comparable context the Committee finds that the above principles are also applicable to Portugal.

100. The Committee notes that the right to strike provided by Article 6§4 is not the only means for effectively achieving the result aimed by negotiations (collective bargaining). There are alternatives to the right to strike provided by the Charter, specifically under 6§3.

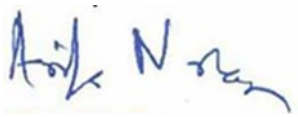
101. On the basis of the above, the Committee holds that the prohibition of the right to strike of members of the armed forces does not amount to a violation of Article 6§4 of the Charter.

CONCLUSION

For these reasons, the Committee concludes:

- unanimously that there is a violation of Article 5 of the Charter;
- by 13 votes to 2 that there is no violation of Article 6§1 of the Charter;
- unanimously that there is a violation of Article 6§2 of the Charter;
- by 14 votes to 1 that there is no violation of Article 6§4 of the Charter.

Tatiana PUIU
Rapporteur



Aoife NOLAN
President

Henrik KRISTENSEN
Deputy Executive Secretary

In accordance with Rule 35§1 of the Rules of the Committee, a separate dissenting opinion of Carmen SALCEDO BELTRÁN is appended to this decision.

SEPARATE DISSENTING OPINION OF CARMEN SALCEDO BELTRÁN

I regret that I cannot agree with the majority opinion of the Committee that there is no violation of Article 6§§1 and 4 of the Charter in this case. With the greatest respect for my colleagues' opinion, I believe that the decision on the merits should have found a violation by Portugal of these two paragraphs.

My arguments will be divided into two sections. I will show firstly that the right to joint consultation guaranteed by Article 6§1 of the Charter is not secured by the requirements of the provision in question or by the legislation, as is stated explicitly by the Committee in §68 of the decision, but nor is it secured in the broader context in which the Committee came to a positive conclusion, finding that there was no violation, namely in practice (I).

Secondly, I would argue that the Committee's interpretation concerning the non-violation of the right to strike of military personnel is totally restrictive, outmoded and discriminatory in our day and age as there are now national and international normative frameworks in which this right has already been granted, albeit with certain restrictions (II). The activities of this workforce are just as important as those of law enforcement agencies and health staff, who do enjoy this right. They are workers in a subordinate role which is unconnected to the results of their work, entitled to individual rights, which to be effective, require them to enjoy collective rights including the right to strike guaranteed by Article 6§4, through its transversal dimension.

I. Violation of the right to consultation guaranteed by Article 6§1.

The Committee states explicitly that Law No. 108/91, which regulates the functioning of the Economic and Social Council is not in conformity with the requirements of Article 6§1 of the Charter. This is a clear violation because when we consider its membership, all the sectors or activities of society are represented on it, expect for military personnel.

However, the Committee ruled, on the basis of the evidence provided by the Government, that there was no violation of Article 6§1 of the Charter on the ground that there had been an increase in social dialogue in practice as a result of an improvement in the existing consultation mechanisms (§§ 68 and 69). This evidence consisted solely of a list of "meetings or hearings" held with a few military associations and a statement by one of these associations reporting a change in the situation regarding consultations.

Firstly, deciding in practice that the right to joint consultation has been respected on the basis of this information alone shows a failure to properly understand the legal mechanisms of this right. It must meet certain requirements to become an effective right as required by the competent consultative bodies (see for example, the requirements regarding the Portuguese Economic and Social Council set out not only

in Law No. 108/91 but also its operating regulations and meeting rules),[1] national legislation and the interpretations of the courts.

Proof of the implementation of this right cannot be afforded solely by the information provided by the Government, which merely reports that one-off formal "meetings" or "hearings" took place on one unspecified day – and nothing more than this. Surprisingly, the Committee considered these to be, or to be more precise, equated these, to "consultations". One simple example shows that they cannot be regarded as the same thing. Article 7§4 of the Protocol governing the collective complaints procedure makes provision for the Committee to hold "hearings" with parties' representatives. *Such hearings do not constitute consultations* of the parties by the Committee.

The aim and purpose of the Charter, being a human rights protection instrument, is to protect rights not merely theoretically, but also in fact (International Commission of Jurists (ICJ) v. Portugal, Complaint No. 1/1998, decision on the merits of 9 September 1999, §32). It has been established that for the right to consultation to be respected and for it to be protected *in fact*, it must meet some requirements which go beyond what a meeting or audience might involve. In particular, it must be signalled in advance, namely with reasonable notice, its length and aim must be specified, and all relevant documents and information must be provided beforehand so that the participants can properly prepare for the consultation and discussion to take place during the proceedings and their goals can be achieved. This is after all one of the manifestations of the right to collective bargaining, a right which the Committee finds to have been violated in §87, and which encompasses the right to consultation, since this right is found in the Charter in the Article headed "The right to bargain collectively".

The aim should be to ascertain and guarantee that this consultation takes place in good faith from the point that it is called for and throughout the subsequent process. We do not have information on all the points referred to in the previous paragraph. The Committee's interpretation that a mere hearing or meeting fulfils the right to consultation empties a right as important as the right to consultation of all its meaning, objective and purpose. It is also clear from the list presented that not all associations are represented, and it is not known what criteria the Government uses to select associations and, if they have been excluded for no reason, which organisations should have appeared on the list. It is plain to see that the decision on, establishment of and carrying out of the process is left entirely to the Government's discretion.

The complainant organisation has also provided government statements asserting for instance that the negotiation processes with the trade union structures of state bodies "are of a completely different nature" to those with the military; they say that the state has "not yet reached a conclusion and therefore, let's say that the negotiation process, with the different characteristics of a negotiation process within the scope of National Defence, with the associative structures of the military and the negotiation process with the union structures of other State bodies which have, as

[1] Regulamento de funcionamento do conselho económico e social (Aprovado em sessão do Plenário de 21.5.93 e publicado no D.R., II Series no. 162 of 13.7.93), https://ces.pt/wp-content/uploads/2022/01/a15.pdf

you know, a completely different nature. I really wonder if we can talk about a negotiation process here". These statements show the state's reluctance to recognise the collective rights of military personnel.

In conclusion to this paragraph, the Committee decided that there was a violation, firstly, of Article 6§2 as military associations are not directly involved in negotiations to establish working conditions, in other words that there is no mechanism through which the general issues relating to conditions of service of the armed forces are effectively negotiated as required by the Charter (§ 85). It also considers that the extent of the restrictions imposed by the Portuguese legal provisions referred to, which do not allow for any establishment of associations with trade union prerogatives, is not in conformity with Article 5 because these restrictions fail to respect the requirements of Article G of the Charter (§ 57).

While acknowledging the existence of these two violations, it considered that there is no violation of Article 6§1. The Charter must be interpreted in the light of the principle of internal consistency or harmony. The rights enshrined in the Charter are not seen as separate compartments; they are closely linked to one another. Effectiveness is precisely what determines the synergies between the provisions of the treaty and a coherent interpretation by the Committee in this respect. The two violations found by the Committee are also sufficiently serious that it can be asserted that the right to joint consultation is protected only theoretically and is respected neither in law nor, in a broader context, in practice.

II. Violation of the right to strike guaranteed by Article 6§4.

The Committee considers that there is justification for imposing an absolute prohibition on the right to strike for military personnel. It concludes that the particular statutory provision is proportionate to the legitimate aim pursued and may therefore be regarded as necessary in a democratic society, bearing in mind "the specific nature of the tasks carried out by members of the armed forces, the special circumstances" in which they operate, governed by "a system of military discipline, the potential that any industrial action could disrupt operations in a way that threatens national security" and the comparable context (§99).

I will begin my dissenting comments by insisting, in keeping with my dissenting opinion on the decision on the merits in European Trade Union Confederation (ETUC), Netherlands Trade Union Confederation (FNV) and National Federation of Christian Trade Unions (CNV) v. the Netherlands, Collective Complaint No. 201/2021, on the crucial nature of the right to strike in democratic societies and its transversal features.

The general right to collective action and, in particular, the right to strike of workers and their organisations, which is the most high profile and contested aspect of this, is a key value of social democracy in all societies. It is "an instrument to regulate democracy",[2] which has served as "a right to transform the law".[3] Social justice is a

[2] Supiot, Alain, "Savant du monde du travail", 9 December 2019, https://www.radiofrance.fr/franceinter/podcasts/l-heure-bleue/reflexions-avec-alain-supiot-savant-du-monde-du-travail-9590288

global challenge. To achieve it, it is necessary to establish "means of allowing differing viewpoints to be expressed".[4] The right to strike needs to be guaranteed and effective because strikes make it possible to bring about "a fairer distribution of the fruits of labour. The right to contest the law is not a cause of disruption to the legal order but a means of preserving this order in societies".[5]

I have stated this irrefutable argument because it is often overlooked. Strikes are generally viewed negatively because of their social impact. This is confirmed by the obstruction that this right has been encountering for some time now, leading the ILO to refer the matter to the International Court of Justice on 10 November 2023.[6]

The Committee considers that the exercise of this right, which is intrinsically linked to the right to collective bargaining as it represents a means of achieving a favourable result from a bargaining process, is "an essential basis for the fulfilment of other fundamental rights guaranteed by the Charter, including for example those relating to just conditions of work (Article 2), safe and healthy working conditions (Article 3), fair remuneration (Article 4), information and consultation (Article 21), participation in the determination and improvement of the working conditions and working environment (Article 22), protection in cases of termination of employment (Article 24), protection of the workers' claims in the event of the insolvency of their employer (Article 25), dignity at work (Article 26), protection of workers' representatives in the undertaking and facilities to be accorded to them (Article 28) and information and consultation in collective redundancy procedures (Article 29)". It is essential in ensuring the autonomy of trade unions and protecting the employment conditions of workers: if the substance of this right is to be respected, trade unions must be allowed to strive for the improvement of existing living and working conditions of workers, and its scope should not be limited by legislation to the attainment of minimum conditions (Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, Complaint No. 85/2012, decision on admissibility and the merits of 3 July 2013, §§ 109-120).

A total proscription of the right reflects an outdated, disproportionate, discriminatory view of the rights of military personnel, which has a totally negative impact, annulling the right to collective bargaining. The non-recognition and hence the violation of Article 6§2 of the Charter decided on by the Committee highlights the fact that this category of worker does not have the means of negotiating working conditions.

Although there have been positive developments in terms of granting other trade union rights to this category, the Committee has not changed its position on the right to strike.

This is a right which can be guaranteed and is granted at national level, for example, in Austria and in Sweden, and even at international level, for example in Article 8 of

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[3] Supiot, Alain, "Revisiter les droits d'action collective", p. 4, https://www.college-de-france.fr/media/alain-supiot/UPL7408028760523467086_revisiter_droit.pdf

[4] Supiot, Alain, "Savant du monde du travail…", *op. cit.*

[5] Supiot, Alain "Vers un droit international de la grève?", *Le Monde Diplomatique*, January 2024, pp. 1-2.

[6] Request for Advisory Opinion from the International Labour Organisation (ILO) of 10 November 2023: https://www.icj-cij.org/sites/default/files/case-related/191/191-20231110-req-01-00-en.pdf

the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, ratified by sixteen states, which refers to trade union rights and, in particular, the right to strike. Paragraph 2, on members of the armed forces, the police and other essential public services, states that when exercising these rights, they may be "subject to *restrictions* established by law". I would point out that the word used is *restrictions* not *prohibitions*.

This shows that nowadays, guaranteeing this right for such workers is not only possible but also a real and legitimate goal in that it affects persons who ultimately are workers with their own working conditions. Their work is just as essential as that of law enforcement officers or health professionals. If the latter have the right to strike, subject to restrictions, the same should apply to military personnel. Since restrictions are "acceptable only under specific conditions" (EuroCOP v. Ireland, Complaint No. 83/2012, *op. cit*., §31; *Confédération générale du travail* (CGT) v. France, Complaint No. 155/2017, decision on the merits of 14 September 2022, §55; Conclusions I – Statement of Interpretation - Article 6§4), this makes it all the more important to provide painstaking justifications for prohibitions.

The Committee must interpret the rights and freedoms enshrined in the Charter in the light of current conditions (Marangopoulos Foundation for Human Rights (MFHR) v. Greece, Complaint No. 30/2005, decision on the merits of 6 December 2006, §194), and of international instruments and the interpretations made of these treaties by their respective regulatory bodies (European Federation of National Organisations working with the Homeless (FEANTSA) v. France, Complaint No. 39/2006, decision on the merits of 5 December 2007, §64), bearing in mind that the Charter is a living instrument.

Just as the Committee has evolved by granting the right to strike to police officers, it is time to move forward on military personnel as well because arguments such as the disruption of national security or military discipline do not justify a complete ban. There are groups which are responsible for national security or governed by a special legal status which enjoy this right, albeit with restrictions. In neither of the two justifications is it acknowledged that military personnel are workers in a subordinate role which is unconnected to the results of their work, which should therefore be entitled to employment rights.

I would like to point out that the Committee also attempts to justify the ban on the right to strike through the argument that the Charter provides for alternatives to the right to strike, specifically under Article 6§3 (§100). This argument lacks precision because it fails to mention a single one of the alternatives, the reason being that there are not in fact any available. This absence of any solution is precisely what shows that military personnel do not have a means of actually arriving at the result aimed at by negotiations. This should not come as any surprise as the right to collective bargaining, as the Committee itself concedes, is not respected (§§ 87 and 88).

In conclusion, and in accordance with my dissenting opinion on the decision on the merits in European Trade Union Confederation (ETUC), Netherlands Trade Union Confederation (FNV) and National Federation of Christian Trade Unions (CNV) v. the Netherlands, Collective Complaint No. 201/2021, I would assert that the value of

collective action is covered both by Article 6§4 and by Article 5 of the Charter. “Negotiation, representation and collective action form a three-way foundation for social dialogue. Collective bargaining is impossible unless we have legal persons authorised to represent the interests at stake, equipped with means of truly influencing the circumstances of the negotiations. These three aspects of collective relations are closely linked to one another and are all affected by the new ways of organising work in the world”.[7] Without the right to strike, “freedom of association would be an empty term, a right devoid of meaning …, allowing governments to believe that they can ratify Convention No. 87 and claim to promote freedom of association while retaining an unlimited capacity to regulate trade union activity is dangerous. The relevant question is whether there can be freedom of association [including the right to organise] without a right to strike. History has shown that the answer is no”.[8]

The right to strike allows a trade union to make its voice heard and constitutes an important instrument for the trade union to protect the occupational interests of its members and in turn for the members of a trade union to defend their interests (see European Court of Human Rights, *Hrvatski liječnički sindikat v. Croatia*, no. 36701/09, § 59, 27 November 2014; *Federation of Offshore Workers’ Trade Unions and Others v. Norway*, no. 38190/97; and *Ognevenko v. Russia*, no. 44873/09, § 70, for cases emphasising the importance of the right to strike as an instrument for trade unions, and see *Enerji Yapı-Yol Sen v. Turkey*, no. 68959/01, § 24, and *Junta Rectora Del Ertzainen Nazional Elkartasuna (ER.N.E.) v. Spain*, no. 45892/09, § 32, where the emphasis was placed on the importance of the right to strike for the members of the trade union; see also, more generally, *Ognevenko*, cited above, § 55, emphasising the dual nature of trade union action as a right of the trade union and of the individual union members). Strike action is clearly protected by Article 11 of the Convention in so far as it is called by trade unions (see *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, no. 31045/10, § 84, and *Association of Academics, v. Iceland*, no. 2451/16, § 24, and *Barış and Others v. Turkey* (dec.), no. 66828/16 and 31 others, § 45, 14 December 2021).

Similarly, the ILO guarantees the right to strike on the basis of Convention No. 87 on freedom of association and protection of the right to organise. Article 3 grants workers’ and employers’ organisations the right to draw up their constitutions and rules, to elect their representatives in full freedom, “to organise their administration and activities and to formulate their programmes”. The right to strike “is an intrinsic corollary to the right to organize protected by Convention No. 87”; “the right to strike and to organize union meetings are essential aspects of trade union rights” and “the Committee has always recognized the right to strike by workers and their organizations as a legitimate means of defending their economic and social interests” (Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 2018, §§ 751-754; Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 2006,

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[7] Supiot, Alain “Vers un ordre social international ?”, *L'Économie politique*, vol. no. 11, no. 3, 2001, pp. 37-61.

[8] Bellace, Janice, “ILO Convention no. 87 and the right to Strike in an era of global trade”, *Comparative labor law and policy journal*, no. 3, 2018, p. 528. Vogt, Jeffrey, Bellace, Janice, Compa, Lance, Ewing, Keith David, Hendy, John, Lörcher, Klaus and Novitz, Tonia, *The Right to Strike in International Law*, 2020, Hart Publishing.

Case No. 2473, United Kingdom of Great Britain and Northern Ireland, Report No. 346, §1532; Case No. 2838, Greece, Report No. 362, §1077).

Therefore, there is also a violation of Article 5 of the Charter, on the right to organise, as a result of this prohibition. Even though the complainant organisation did not refer to this article in relation to the right to strike, the Committee should have drawn this conclusion in the light of the principle of *iura novit curia*. The Committee “knows the law” and “states the law”. A complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on (ECHR, *G.R. v. the Netherlands*, no. 22251/07, §36, 10 January 2012; ECHR, *Silickienė v. Lithuania*, no. 20496/02, §45, 10 July 2012). The parties to a dispute are not required to refer to all the applicable rules of law – or, by extension, the relevant judgments; they must simply provide general evidence of the facts.

For all these reasons, I consider that the Committee should have found a violation of Article 6§1, because of the absence in law and in practice of the right to consultation, and of Articles 5 and 6§4, because of the prohibition of the right to strike.