EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

27 juin 2011

Case Document No. 1

Defence for Children International (DCI) v. Belgium
Complaint No. 69/2011

COMPLAINT
(Translation)

Registered at the Secretariat on 21 juin 2011

Defence for Children International DCI
Défense des Enfants International DEI
Defensa de Niñas y Niños Internacional DNI

Secretariat of the European Social Charter
Council of Europe
Directorate General of Human Rights and Legal Affairs
Directorate of Monitoring
F-67075 Strasbourg Cedex

Brussels, 16 June 2011

Collective complaint

Defence for Children International v. Belgium

ON THE PART OF

Defence for Children International (DCI)

Represented by:

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- the complainant organisation -

VERSUS

Belgium

Contents

Abbreviations

UMA: urgent medical assistance
CBJ: Comité Bijzondere Jeugdzorg
CGRA: Office of the Commissioner-General for Refugees and Stateless Persons
UNCRC: International Convention on the Rights of the Child
COO: Observation and Orientation Centre
CPAS: Public Social Welfare Centre
DCI: Defence for Children International
Fedasil : federal agency for the reception of asylum seekers
ILA : Local Reception Initiative
MB: Moniteur Belge
MENA: Unaccompanied foreign minors
OE : Aliens Office
SAJ : Youth Welfare Service
SPF : Federal Public Service

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Purpose of the complaint
Defence for Children International (hereafter "DCI") asks the European Committee of Social Rights (hereafter "the Committee") to find that the Belgian government has failed to fulfil its obligations under the revised Social Charter (hereafter "the revised Charter") concerning the right of children and young persons to appropriate social, legal and economic protection.

I Admissibility

1. Complainant organisation

Defence for Children International (DCI) is an international non-governmental organisation for the defence of children's rights and is on the list of organisations entitled to submit collective complaints to the European Committee of Social Rights[1].

Set up as an independent non-governmental organisation, DCI has been promoting and protecting children's rights at global, regional, national and local level for 30 years now (Appendix 1: DCI Statute).

DCI has representatives in 42 countries. One of its goals is to improve and defend the rights of children, by exposing and denouncing violations of children's rights and taking legal action against those responsible.

DCI-Belgium was mandated by DCI to lodge this complaint against Belgium in January 2011 (Appendix 2).

The complaint is supported by Belgian human rights and children's rights organisations (Appendix 8).

2. Defendant state

This complaint is directed against the Belgian state.
On 2 March 2004 the federal, regional and Community governments of Belgium completed the process of ratifying the revised Charter and the Act of 15 March 2002 assenting thereto was published in the *Moniteur belge*.[2]
Belgium has accepted 87 of the 98 paragraphs contained in the revised Charter, including Articles 7, 11, 13, 16, 17 and 30 of the revised Charter, which are used in the present complaint to highlight the failure to fulfil the obligation to provide social, legal and economic protection for unaccompanied foreign minors and accompanied foreign minors who are in the country unlawfully.
Belgium has accepted the collective complaints procedure provided for in the Additional Protocol, ratified on 23 June 2003. The Charter is automatically incorporated into domestic law, a practice that is based on case-law (see *inter alia* the Le Ski judgment, Court of Cassation, 27 May 1971).

[1] Number 42 on the July 2010 List of International Non-Governmental Organisations (INGOs) entitled to submit collective complaints
[2] Act of 15 March 2002 assenting to the revised European Social Charter and to the Appendix, done in Strasbourg on 3 May 1996, *M.B.*, 10 May 2004.

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In ratifying the Social Charter, Belgium has accepted the obligations arising from Articles 7, 11, 13, 17 and 30 of the Charter.

3. Populations concerned

This complaint is intended to expose the violations of certain rights enshrined in the revised Charter, committed by the Belgian state against unaccompanied foreign minors unlawfully present or seeking asylum and accompanied foreign minors unlawfully present who, even though they are legally entitled to receive social assistance in Belgium, are currently being denied such assistance in practice. The violations concern over 1 700 people in families and several hundred unaccompanied foreign minors.[3]

DCI is aware that under the revised Charter, foreigners who are not lawfully present cannot claim the rights enshrined in this instrument. The Appendix to the revised Charter states that its scope is limited to "foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned". It goes on to stipulate that refugees and stateless persons lawfully staying in the territory of the Party concerned are to receive treatment as favourable as possible and in any case not less favourable than under the existing international instruments applicable to refugees and stateless persons.

A strict interpretation of the Appendix to the revised Charter would imply that some of those concerned by this complaint, namely non-asylum-seeking unaccompanied foreign minors and children with families who are in Belgium unlawfully, are not covered by the revised Charter.

DCI notes, however, that the Charter was drawn up for the purpose of allowing the effective exercise of the rights granted therein. The Committee has pointed this out by emphasising the interconnectedness of the revised Charter and other human rights instruments, in particular the International Convention on the Rights of the Child (UNCRC) and the European Convention on Human Rights (ECHR). In effect, the scope of the revised Charter can be extended and the Parties to the revised Charter have "guaranteed to foreigners not covered by the revised Charter rights identical to or inseparable from those of the revised Charter."[4]

In the Committee's view, the Charter was envisaged as a human rights instrument to complement the European Convention on Human Rights and is a living instrument[5]. Accordingly, the Charter must be interpreted so as to give life and meaning to fundamental social rights (FIDH v. France, Complaint No. 14/2003, decision on the merits of 8 September 2004, § 29; DCI v. the Netherlands, complaint No. 47/2008, decision on the merits of 20 October 2009, § 34) and in harmony with other rules of international law of which it forms part[6]. The Committee considers that a teleological approach should be adopted when interpreting the Charter, and that it should not be interpreted in a way that would restrict to the greatest possible degree the obligations undertaken by the Parties (OMCT v. Ireland, Complaint No. 18/2003, decision on the merits of 7 December 2004, § 60). The Committee further held that "restrictions on rights are to be read restrictively, i.e. understood in such a manner

[3] See pages 15 and 16 for the figures concerning accompanied and unaccompanied children whose rights have been infringed.

[4] ECSR Conclusions 2005, Statement of Interpretation on Article 11, § 5, p.10.
[5] ECSR, DCI v. the Netherlands, 20 October 2009, Complaint No. 47/2008, § 34.
[6] Ibid, § 35.

as to preserve intact the essence of the right and to achieve the overall purpose of the Charter (FIDH v. France, Complaint No. 14/2003, decision on the merits of 8 September 2004, §§ 27-29)."[7]

As indicated in its decisions on the merits of the complaint in DCI v. the Netherlands (complaint No. 47/2008, decision of 20 October 2009, §§ 37 and 38) and the complaint in FIDH v. France (complaint No. 14/2003, decision of 8 September 2004, § 30), "*the restriction in paragraph 1 of the Appendix attaches to a wide variety of social rights and impacts on them differently*". The Committee goes on to state that "*such restriction should not end up having unreasonably detrimental effects where the protection of vulnerable groups of persons is at stake.*" Children are recognised as being extremely vulnerable persons, who, for a large part of their existence, are dependent on others for their survival. This dependence on others means that they have very limited (or no) influence on their place of residence. The complainant organisation therefore argues that if the choice of the adult turns out to be less favourable, it should not result in substandard living conditions for the child.

While the fact that Belgium treats children present on its territory differently according to whether they are in the county lawfully or unlawfully may be justified in certain circumstances, DCI considers, with reference to the decision on the merits of collective complaint No. 47/2008 DCI v. the Netherlands, that states' interest in foiling attempts to circumvent immigration rules must not deprive foreign minors, especially if unaccompanied, of the protection their status warrants. As pointed out by the Committee, "the protection of fundamental rights and the constraints imposed by a State's immigration policy must therefore be reconciled (see mutatis mutandis European Court of Human Rights, Mubilanzila Mayeka and Kaniki Mitunga v Belgium, judgment of 12 October 2006 § 81)"[8].

Relying on the Committee's decision on the merits of complaint No. 14/2003 (FIDH v. France) [9], DCI holds that, like medical assistance, social, legal and economic protection is a prerequisite for the preservation of human dignity and that therefore any practice which denies entitlement to such protection (social, legal and economic), as well as medical assistance, to foreign nationals, even if they are in the country unlawfully, should be considered contrary to the revised Charter.

II Articles concerned

1. Relevant fundamental rights

Article 7§10: right to protection against physical and moral dangers resulting directly or indirectly from their work;
Article 11: right to benefit from any measures enabling them to enjoy the highest possible standard of health attainable;
Article 13: right to social and medical assistance;
Article 16: the right to appropriate social, legal and economic protection for the family as a fundamental unit of society;

[7] Ibid, § 36.
[8] Ibid, § 42.
[9] ECSR, FIDH v. France, 3 November 2004, Complaint No. 14/2003, §§ 31-21.

Article 17: the right of children and young persons to appropriate social, legal and economic protection;
Article 30: the right to protection against poverty and social exclusion

Alone or read in conjunction with Article E on non-discrimination

- Article 7 (paragraph 10) of the revised Charter

"*Right of children and young persons to protection*

With a view to ensuring the effective exercise of the right of children and young persons to protection, the Parties undertake:

1. to provide that the minimum age of admission to employment shall be 15 years, subject to exceptions for children employed in prescribed light work without harm to their health, morals or education;
2. to provide that the minimum age of admission to employment shall be 18 years with respect to prescribed occupations regarded as dangerous or unhealthy;
3. to provide that persons who are still subject to compulsory education shall not be employed in such work as would deprive them of the full benefit of their education;
4. to provide that the working hours of persons under 18 years of age shall be limited in accordance with the needs of their development, and particularly with their need for vocational training;
5. to recognise the right of young workers and apprentices to a fair wage or other appropriate allowances;
6. to provide that the time spent by young persons in vocational training during the normal working hours with the consent of the employer shall be treated as forming part of the working day;
7. to provide that employed persons of under 18 years of age shall be entitled to a minimum of four weeks' annual holiday with pay;
8. to provide that persons under 18 years of age shall not be employed in night work with the exception of certain occupations provided for by national laws or regulations;
9. to provide that persons under 18 years of age employed in occupations prescribed by national laws or regulations shall be subject to regular medical control;
10. to ensure special protection against physical and moral dangers to which children and young persons are exposed, and particularly against those resulting directly or indirectly from their work."

- Article 11 of the revised Charter:

"Right to protection of health

With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed inter alia:

1. to remove as far as possible the causes of ill-health;
2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;
3. to prevent as far as possible epidemic, endemic and other diseases, as well as accidents."

- Article 13 of the revised Charter:

"Right to social and medical assistance

With a view to ensuring the effective exercise of the right to social and medical assistance, the

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Parties undertake:

1. to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition;
2. to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights;
3. to provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want;
4. to apply the provisions referred to in paragraphs 1, 2 and 3 of this article on an equal footing with their nationals to nationals of other Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11 December 1953."

- Article 16 of the revised Charter:

"Right to appropriate social, legal and economic protection for the family

With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married and other appropriate means."

- Article 17 of the revised Charter

"Right of children and young persons to social, legal and economic protection" reads as follows:

"With a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities, the Parties undertake, either directly or in co-operation with public and private organisations, to take all appropriate and necessary measures designed:

1.
    a. to ensure that children and young persons, taking account of the rights and duties of their parents, have the care, the assistance, the education and the training they need, in particular by providing for the establishment or maintenance of institutions and services sufficient and adequate for this purpose;
    b. to protect children and young persons against negligence, violence or exploitation;
    c. to provide protection and special aid from the state for children and young persons temporarily or definitively deprived of their family's support;
2. to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools."

- Article 30 of the revised Charter:

***"Right to protection against poverty and social exclusion"* reads as follows:**

"With a view to ensuring the effective exercise of the right to protection against poverty and social exclusion, the Parties undertake:

a. to take measures within the framework of an overall and co-ordinated approach to promote the effective access of persons who live or risk living in a situation of social

exclusion or poverty, as well as their families, to, in particular, employment, housing, training, education, culture and social and medical assistance;

b. to review these measures with a view to their adaptation if necessary."

- Read alone or in conjunction with Article E of the revised Charter:

"The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status."

- The Preamble, furthermore, states that:

"Considering that the enjoyment of social rights should be secured without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin"

Defence for Children International (DCI) asks the European Committee of Social Rights (hereafter "the Committee") to find that Belgium has failed to fulfil its obligations under the revised Charter concerning the right of unaccompanied foreign minors and accompanied foreign minors not lawfully present in the country, who are entitled to reception facilities, to appropriate social, legal and economic protection.

III Merits

1. The complaint

This complaint is intended to expose the violations of certain rights enshrined in the revised Charter, committed by the Belgian Government against unaccompanied foreign minors and accompanied foreign minors not lawfully present in the country who, even though they are legally entitled to receive social assistance (in the form of accommodation in a reception centre) in Belgium have in practice been denied such assistance for almost two years now. Since the end of 2009, nearly a thousand families and hundreds of unaccompanied minors have had to sleep, temporarily in some cases, in the street or in unsuitable accommodation as a result of the Belgian government's failure to comply with its own domestic laws and the revised Charter.
The fact is, however, that the right to social assistance is a prerequisite for the exercise of various other rights granted by the revised Social Charter. Without it, it is impossible, for example, to enjoy even a minimum standard of health or find a decent place to live. Children will also be hindered in their development because without adequate housing they will not be able to have a proper family life. Their education will suffer too.

Under Belgian law (see below), all unaccompanied foreign minors, irrespective of their residence status and whether or not they are seeking asylum, are entitled to the material assistance envisaged in the Reception of Asylum Seekers and Certain Other Categories of Aliens Act of 12 January 2007. In the case of children unlawfully present in Belgium, with their parents, the right to the necessary social assistance is expressly recognised[10], but must necessarily take the form of material assistance through the provision of accommodation for the child and its family in a federal reception centre. Social assistance is confined to material assistance essential for the child's development and is provided solely in federal reception centres. If the family refuses to stay in a federal reception centre[11], they will be eligible only for urgent social assistance to enable them to leave the country or urgent medical assistance.

The reception centres in Belgium are completely full and have been for more than two years.[12] Accordingly, thousands of people entitled to reception, whether asylum seekers (alone or in families), unlawfully present families with minors or unaccompanied foreign minors, are staying in hotels, with no support, while waiting for a place in a reception centre. Some of them have been there for over a year. Thousands more have not been assigned a reception centre by the Dispatching service of the federal agency for the reception of asylum seekers (hereafter "Fedasil") and have simply been left on the street (over 7 000 people in total - asylum seekers, unlawfully present families, unaccompanied minors - since October 2009). Among them are two or three hundred unaccompanied foreign minors, a group that ought in fact to be a priority given the risks of abuse, exploitation and disappearance that they face. This state of affairs, and the risks directly associated with it, violates numerous rights established by the revised Charter but also the International

[10] Royal Decree of 24 June 2004 establishing the conditions and procedures governing the grant of material assistance to foreign minors residing illegally in the Kingdom with their parents.
[11] Because living in a centre means living in a collective reception facility, because it is uncertain how long this reception process will last and because the individuals concerned are afraid that it will be easier to deport them.
[12] For further explanations, see pages 16-18

Convention on the Rights of the Child (hereafter "the UNCRC"), the European Convention on Human Rights (hereafter "the ECHR"), the EU reception directive[13] and Belgian legislation.

2. A basis in international law

DCI asks the Committee to consider the rights enshrined in the revised Charter in the light of the United Nations Convention on the Rights of the Child (hereafter "the UNCRC") which protects all persons under the age of 18 within the jurisdiction of a contracting party, regardless of residence status.

The Committee has stated before that the revised Charter is directly inspired by the UNCRC and that therefore Article 17 of the revised Charter protects in a general manner the right of children and young persons to care and assistance.[14] The Committee also noted, later on, that the UNCRC was one of the most ratified treaties, that it had been ratified by all member states of the Council of Europe, and that it was therefore entirely appropriate for the Committee to have regard for it, as it was interpreted by the UN Committee on the Rights of the Child (see OMCT v. Ireland, Complaint No 18/2003, decision on the merits of 7 December 2004, §61) when ruling on the alleged violation of any right of the child which was established by the Charter.[15] The Committee further stated that "In particular, when ruling on situations where the interpretation of the Charter concerns the rights of a child, the Committee considers itself bound by the internationally recognised requirement to apply the best interests of the child principle."[16]

In 2005, the Secretariat of the ESC produced an information document on the children's rights protected by the revised Charter, from which it transpires that the latter protects the rights of children in two ways[17]. Firstly by the specific relevance of certain rights for children, such as family life (Article 16) and health (Article 11). And secondly by rights relating exclusively to children, such as the right to social, legal and economic protection for children (Article 17).

Although children's rights are covered by the revised Charter, DCI will also refer, in this collective complaint, to the corresponding right in the UNCRC. DCI deems this relevant because it shows the intention of the international community to protect all children, irrespective of their status. The latter includes residence status, as laid down in Article 2 of the UNCRC. The Committee on the Rights of the Child has declared several times that all children enjoy all rights as protected by the UNCRC[18]. Belgium being Party to the UNCRC further shows the commitment to the protection of children's rights by the Belgian government. By signing different treaties to the same effect, Belgium has demonstrated persistence in that commitment. A commitment that ought to be honoured.

In addition, since the revised Charter is designed to complement the European Convention on Human Rights[19] in the field of protection of children's rights, the complainant organisation will refer to it as well.

[13] EU Directive 2003/9/EC –Reception of asylum seekers

[14] ECSR, DCI v. the Netherlands, op cit., §28; ECSR, FIDH v. France, op. cit.,§ 3.6.
[15] OMCT v. Ireland, Collective complaint No. 18/2003, decision on the merits of 7 December 2004, paragraphs 61 to 63
[16] ECSR, DCI v. the Netherlands, op. cit., §29.
[17] Children's Rights under the European Social Charter, information document prepared by the Secretariat of the ESC, 18 November 2005
[18] CRC/GC/2005/6, paragraph 12
[19] Ibid, §§25-26.

IV Belgian statutory framework and observations

1. Statutory framework

Nationwide, federally guaranteed right to "general" social assistance

General principle

Section 1 of the Act of 8 July 1976 relating to the organisation of Public Social Welfare Centres – as amended *inter alia* by the Acts of 2 January 2001, 7 January 2002, 22 December 2003, 23 August 2004, 25 April 2007 and 7 May 2007 – stipulates that:
"Everyone has the right to social assistance. The purpose of such assistance is to enable each individual to lead a life consistent with human dignity (…)"

Any exception to or variation from this principle must be specifically provided for by law; and, insofar as it is provided for, like any exception to a legal principle, must necessarily be interpreted narrowly. It must also be proportionate and necessary in a democratic society.

Exception to this general principle – not applicable to children

There is one – sole – exception to this legal principle, in Section 57 § 2, 1°, which reads: "*In derogation from the other provisions of this Act, the task of public social welfare centres shall be confined to the provision of urgent medical assistance, to foreigners who are present in the Kingdom illegally".*

This exception does not apply to children (cf. below).

Specific case of children present in the country illegally, with their parents

Until the early years of the 21st century, the legislation on social assistance did not specify any residency requirements for eligibility for material assistance in whatever form was most appropriate. Such requirements were gradually introduced into Belgian legislation from the beginning of the 2000s. These successive Acts, however, made no distinction on the basis of age: a child who was in the country unlawfully faced the same consequences (denial of entitlement to public assistance) as an adult in a similar situation (except in the case of urgent medical assistance, which is extremely narrow in scope). Some CPASs have nevertheless been ordered by the Labour Court, on a case by case basis, to provide social assistance (usually under the Convention on the Rights of the Child).
On 22 July 2003, the Constitutional Court ruled that it was not appropriate that social assistance should be wholly and in all cases denied to a child when to do so would oblige the child to live in conditions detrimental to its health and development. The Constitutional Court found that minors who were in the country illegally, together with their parents, had a limited right to material assistance.
Section 57§2, 2°, of the Act of 8 July 1976, mentioned above, now expressly recognises this right to social assistance for children living in Belgium illegally, with their parents, while at the same time stating that:

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"*In derogation from the other provisions of this Act, the task of public social welfare centres shall be confined to : (…)*
2° establishing that a foreigner under the age of eighteen years who is present in the Kingdom illegally, with their parents, is in need as a result of the fact that the parents are failing to fulfil, or are unable to fulfil, their maintenance obligations.
In the instance referred to in 2°, social assistance shall be confined to material assistance essential for the child's development and shall be provided exclusively in a federal reception centre, in accordance with the conditions and procedures laid down by the King. (…)"

In the case of children who are in the country illegally, with their parents, the right to social assistance is expressly recognised therefore, but must necessarily take the form of material assistance, which involves the child and its family being cared for in a federal reception centre.

Social assistance is confined to material assistance essential for the child's development and is provided exclusively by federal reception centres (run by FEDASIL and partner agencies, the Red Cross and the *Rode Kruis*). The presence in the reception centre of the parents or the persons acting *in loco parentis* is guaranteed. If a family refuses to stay in such a centre[20], the only form of aid they can claim is urgent social assistance to enable them to leave the country or urgent medical assistance (which is not nearly sufficient to enable them to lead a life consistent with human dignity).
The reception arrangements and procedures for foreign minors who are in the country illegally, with their parents, are set out in the Royal Decree of 24 June 2004. In addition, certain provisions of the Reception Act of 12 January 2007[21] likewise apply to families present in the country illegally. This Act contains, *inter alia*, provisions to protect children[22].

Specific case of unaccompanied foreign minors

The exception – to the general rule whereby everyone is entitled to social assistance to enable them to lead a life consistent with human dignity – referred to in Section 57§2, 1° of the Act of 8 July 1976 (cf. above), does not apply to unaccompanied foreign minors without a residence permit, notwithstanding any order to return the child that might be issued by the Aliens Office to the child's guardian. For as has been very clearly pointed out by the Brussels Labour Court[23], *"according to the consistent case-law of the Court of Cassation and the Constitutional Court, Section 57§2 does not apply (…) to foreigners who for administrative (…), medical (…), legal (…) or family reasons (…) cannot be forced to leave Belgium. Such is the case with unaccompanied foreign minors who cannot be deported from Belgium unless there are sufficient guarantees as to the care that is effectively available in their country of origin (…) notwithstanding the Aliens Office's assessment".*

[20] Because living in a centre means living in a collective reception facility, because it is uncertain how long this reception process will last and because the individuals concerned are afraid that it will be easier to deport them..
[21] Known as the "Reception Act"
[22] Section 37: "In all decisions concerning the minor, the best interests of the minor shall be paramount"; Section 38: "The minor shall be housed with his or her parents"; Section 39: "Minors who are victims of any form of abuse, neglect, exploitation, torture, cruel, inhuman and degrading treatment, or of armed conflicts, shall have the right to qualified support and to access to mental health care and rehabilitation services"

[23] Judgment handed down on 30 November 2009 by the Brussels Labour Court

Section 57 ter of the Act of 8 July 1976, mentioned above, applies (only) to asylum-seeking unaccompanied foreign minors, who cannot claim their right to social assistance from a public social welfare centre.

Although this prohibition does not apply to unaccompanied foreign minors who are not asylum seekers, it in no way diminishes the right that has been granted to them – in the same way as to asylum-seeking unaccompanied foreign minors – to receive material social assistance in a federal centre (or equivalent). This right is crucial, as the unaccompanied foreign minor will usually need – at least to begin with - material social assistance on being admitted to a reception centre.

All unaccompanied foreign minors, whatever their residence status, are entitled to the material assistance provided for in the Reception of Asylum Seekers and Certain Other Categories of Aliens Act of 12 January 2007.

Reflecting the importance of immediate, proper care for any young person reported to the Guardianship Service as a homeless unaccompanied foreign minor, so that they can be identified and a guardian appointed, and so that they can undergo initial observation followed by orientation, according to the youngster's specific needs, Section 40 of the Act of 12 January 2007 states:
"Appropriate supervision shall be provided to unaccompanied foreign minors during an observation and orientation phase at a centre designated for this purpose.
The King shall determine the rules and regulations applicable to observation and orientation centres."

The Royal Decree of 9 April 2007 determining the rules and regulations applicable to observation and orientation centres for unaccompanied foreign minors expressly states:

- in Article 3, that *"Equal treatment within the centre shall be guaranteed amongst all unaccompanied minors, irrespective of their administrative status under the Entry, Residence, Settlement and Deportation of Foreign Nationals Act of 15 December 1980"*;
- in Article 7, that "*The stay in a centre shall be for a maximum period of fifteen days, renewable once. At the end of the stay, if it has not proved possible to identify a type of care tailored to the unaccompanied minor's particular circumstances, they shall be transferred to the most appropriate reception facility, within the meaning of Section 2, 10° of the Act".**

The right of non-asylum-seeking unaccompanied foreign minors to material assistance - as provided for in the Reception of Asylum Seekers and Certain Other Categories of Aliens Act of 12 January 2007 – beyond the initial reception phase in an Observation and Guidance Centre is largely confirmed by case-law.
Extracts from one of the numerous court decisions:
On 1 December 2010, the Labour Court of Nivelles ruled *inter alia* that "*Fedasil's inertia, whatever the reasons for it – which reasons do not on any account relieve it of its obligations of result -, is liable to give rise to a grave and imminent danger that would be difficult to redress, since the applicant's under-age ward will be left to his own devices with no means of supporting himself or of securing a roof over his head at a time when autumn, with its attendant bad weather, is fast approaching. There is therefore a risk that this minor will very shortly find himself having to survive in health conditions that are not consistent with human dignity".*
The Court concluded: "*In the alternative, and in the absence of an observation and orientation centre or a suitable reception centre, Fedasil is ordered to provide … with suitable accommodation that will enable him to lead a life consistent with human dignity […] and to pay a fine of €500 per day of delay as from the date of this ruling."*

Right to specialised assistance for young people in difficulty, provided by the Communities

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Article 1 of the Belgian Constitution states that "*Belgium is a federal state composed of communities and regions".*

Article 128 of the Constitution reads as follows:
"*§ 1. The French and Flemish Community Councils rule by decree, in as much as each is concerned, on personal issues, in addition to what is included in such issues, matters of inter-communal and international cooperation, including the ratification of treaties.*
A law adopted by majority vote as described in Article 4, last paragraph, establishes such personal issues, in addition to the various forms of cooperation and the terms governing ratification of treaties.
§ 2. These decrees have force of law in French-language and in Dutch-language regions respectively, as well as in those institutions established in the bilingual region of Brussels-Capital which, on account of their activities, must be considered as belonging exclusively to one community or the other, unless a law adopted by majority vote as provided for in Article 4, last paragraph, makes other provisions with regard to those institutions in the bilingual region of Brussels-Capital."

Section 5 of the Special Institutional Reforms Act of 8 August 1980 states *inter alia* that:
" § 1. The personal issues referred to [in] the Constitution, shall be: (…)
II. With regard to assistance to persons :
1° Family policy including all forms of support and assistance to families and children.
(…) "

Youth welfare
The French Community Decree of 4 March 1991 on youth welfare provides (Arts. 2 and 3) that any young person "*in difficulty*" or "*whose health or safety is in jeopardy or whose education arrangements are being compromised by their own behaviour, that of their family or close circle"*, "*shall be entitled to specialised assistance under the present decree. The aim of such assistance shall be to enable them to develop in a climate of equal opportunities in order that they may achieve a life consistent with human dignity."*

While Article 36 of the Decree of 4 March 1991 states that on receiving a request for assistance, a counsellor "*§2. 1° shall refer the persons concerned to any appropriate individual or agency, accredited or otherwise under the present decree, including notably the competent public social welfare centre"*, it immediately goes on to state that the counsellor " *2° shall help the persons concerned with the procedures and formalities for obtaining the desired assistance"*. It further specifies that the counsellor "*shall co-ordinate the efforts to help the persons whom they have been asked to assist"* and that the counsellor has the authority "*after having established that no other agency or individual is currently able to provide the young person with appropriate assistance, exceptionally and provisionally until such time as the procedures referred to in § 2 have been completed, to entrust the youth welfare services and the individuals and agencies involved in implementing the present decree with the task of providing the appropriate assistance for as long as necessary".*

Specialised assistance for young people in difficulty – which is ancillary to the general social assistance provided at federal level – does not comes into play until the Community institution responsible for granting this assistance has confirmed that general assistance has failed to adequately address the problem.

Once a child is on the street, this is a fairly clear sign that there has not been sufficient and/or adequate general assistance to resolve the person's problems.

A MENA on the street is inevitably a child at risk. As well as the dangers to their health and the risks associated with failure to attend school, such children are also at risk from crime, forced prostitution,

trafficking, etc. Their entire future and all of their rights as children are severely jeopardised if they are living on the street.

A MENA without a place to live is therefore entitled to the specialised assistance provided by the Communities for young people in difficulty.

On being asked to provide assistance to a MENA living on the street, the Youth Welfare Service (known as the "SAJ)" is required to take immediate action to remove the youngster from the high-risk situation in which they find themselves, while at the same time trying to find the most appropriate "solution", having regard to the person's particular problems, needs, etc.

In the Flemish Community, the decree of 7 March 2008 deals with the provision by Community authorities of specialised assistance for young people who find themselves in difficulty or in danger, or in a "problematic situation with regard to their upbringing". Unaccompanied minors living on the street fall into that category and as such are eligible for assistance from the Bijzondere *Jeugdzorg* (youth welfare in the Flemish Community).

Even though it may be illegal, Fedasil's current practice of refusing to admit non-asylum-seeking MENA to its centres (unless they are deemed to be "very vulnerable") cannot be ignored by the Community institutions responsible for specialised assistance (SAJ, CBJ), who are, for instance, invited to (1) help the young person and their guardian with the procedures for obtaining this federal social assistance to which the young person is entitled and (2) to provide the young person, for as long as it takes to complete these procedures, with appropriate care tailored to their needs within the network of agencies accredited by Youth Welfare. In the case of yet other MENA, because of the specific nature of their needs or the danger in which they find themselves, care in a Community-approved residential service will be a more appropriate solution than looking after the youngster within the Fedasil network; in such cases, priority must naturally be given to the former arrangement, in the best interests of the child.

2. Observations

The fact that the reception network has reached saturation point is preventing children, accompanied or otherwise, from accessing reception services. "Reception" means not only accommodation but also meals, schooling, clothing, medical, social and psychological support, access to legal aid, a daily allowance and training. This state of affairs constitutes a breach of certain social rights enshrined in the revised Social Charter and a failure to comply with Belgian legislation on the reception of unaccompanied foreign minors, children seeking asylum and children in families who are in the country unlawfully.

Unaccompanied foreign minors

On 20 October 2009 Fedasil issued an instruction stating that, because the network was overstretched, the observation and orientation centres could no longer accept non-asylum-seeking MENA except those classed as "vulnerable": "*Fedasil's Executive Committee has decided, on 20 October 2009, not to accept any more non-asylum-seeking MENA".*[24] This illegal instruction was later withdrawn but its provisions are still being applied[25], as a letter from Fedasil dated 21 March 2011 shows: "*As far as non-asylum-seeking MENA are concerned, only the most vulnerable will also be admitted to COOs. Young, non-asylum-seeking MENA in respect of whom a court order has been issued against FEDASIL have also, thus far, been referred to hotels"*.[26] At present, a non-asylum-

[24] The Fedasil instruction issued on 20 October 2009 appears in Appendix 4
[25] La Libre Belgique, "*MENA: Fedasil retire sa circulaire*", 24 October 2009, page 20 of the press review.
[26] Fedasil's letter dated 21 March 2011 appears in Appendix 5

seeking MENA is considered to be vulnerable if they are under the age of thirteen, a girl who is pregnant, a girl with a child or an alleged victim of trafficking in human beings.

Since September 2009, it is estimated that between 300 and 500 unaccompanied minors have not received accommodation through Fedasil. The figure is at least 258 for 2010.[27] These estimates are based on figures from the Guardianship Department[28], cases reported by guardians and surveys conducted by the media. Unfortunately there are no reliable statistics because neither Fedasil nor the Guardianship Department keeps a systematic record of young people who end up on the street. Based on the number of non-asylum-seeking MENA arriving in Belgium since October 2009, the figure works out at roughly 1 800 youngsters. Assuming that half managed to find lodging with family or friends, that would mean 900 youngsters may have lived for a time on the street. In a number of cases, Fedasil managed to find accommodation for youngsters who had not disappeared whilst living on the street after it was ordered to do so by the Labour Court. The fact remains, however, that these youngsters have been exposed to the risks associated with living on the street and, owing to the lack of reception facilities, some have disappeared and lost the opportunity to exercise their social rights.

The Committee on the Rights of the Child made a similar point in paragraph 74 of its Concluding Observations, expressing concern that:

"*Unaccompanied and separated children older than 13 years who do not file an asylum claim are denied access to reception centres and find themselves in the streets;*

Due to a lack of available places in reception centres, unaccompanied children may be housed in asylum centres for adults and in some cases excluded from any type of assistance".

Children in families unlawfully present in Belgium

For almost two years now, FEDASIL, even though it has an obligation to provide accommodation for these families under the "Reception Act", has been turning them away on the ground that its reception network is overstretched. Such people are therefore regarded as less of a priority than families seeking asylum and are not put on a waiting list (to be passed on to Dispatching)[29] As a result, many of these families are forced to live, together with their under-age children, on the street, while others find themselves wandering from one makeshift shelter to the next: emergency reception centres, temporary accommodation, church-run facilities, etc.
This conclusion was echoed by the Committee on the Rights of the Child in paragraph 76 of its Concluding Observations of 11 June 2010: "*The Committee is further concerned that families whose application for asylum has been rejected have to leave the facilities and often end up living on the streets*."

The public social welfare centres have so far declined to act, saying it is for FEDASIL to deal with the matter. The only hope for these families, therefore, is to lodge an urgent application with the Labour Court, asking it to put a stop to the practices in question and to order FEDASIL to provide them with

[27] Le Soir, *258*, 24 March 2011, pp. 58-59 of the press review
[28] Source : Guardianship Department : February 2010: 18 MENA without shelter, March 2010: 23 MENA without shelter, April 2010: 20 MENA without shelter, May 29 MENA without shelter. We were unable to obtain other figures. See pp. 58-59 of the press review.
[29] The only answer the CPASs receive from FEDASIL is that, in view of the fact that the reception network is currently overstretched, "*the Agency is in a situation of force majeure that prevents it from granting their request for accommodation for the family*".

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accommodation. As at 30 September 2010, **1773** unlawfully present families had not been given a place in a reception facility.

V Issues under the revised European Social Charter

Article 17

Article 17 reads as follows: *"With a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities, the Parties undertake, either directly or in co-operation with public and private organisations, to take all appropriate and necessary measures designed:*

1.

a. *to ensure that children and young persons, taking account of the rights and duties of their parents, have the care, the assistance, the education and the training they need, in particular by providing for the establishment or maintenance of institutions and services sufficient and adequate for this purpose;*
b. *to protect children and young persons against negligence, violence or exploitation;*
c. *to provide protection and special aid from the state for children and young persons temporarily or definitively deprived of their family's support;*

2. *to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools."*

As noted by the Committee in § 66 of its decision on the merits of complaint No. 47/2008 DCI v. the Netherlands, children, whatever their residence status, come within the personal scope of Article 17 of the Revised Charter.

At present, the failure to provide reception facilities both for non-asylum-seeking unaccompanied foreign children[30] and for children in families who are in the country unlawfully means that such children are unable to exercise their right to appropriate social, legal and economic protection. Such protection, however, is guaranteed to them under Article 17 of the revised European Social Charter, entitled "The right of children and young persons to social, legal and economic protection".

Because the reception network run by the federal agency for the reception of asylum seekers (Fedasil) is overstretched, many children and young people end up on the street, totally destitute and highly vulnerable. Their right to reception having been thus violated, they find themselves without a place to stay that would enable them to satisfy their basic needs. As a result, they receive no help or support and their right to food, health care, social assistance, education, family life, etc. is effectively signed away. This lack of reception facilities also has serious ramifications for the legal status of the minors concerned, in that they cannot be informed of the progress of any administrative or other procedures concerning them (summonses and official notifications of decisions are sent to the address indicated by the person as the address for service and if there is no such address, to the authority itself! This means that very often the individuals concerned do not even receive them, yet

[30] An exception is made for the reception in an Observation and Orientation Centre of non-asylum-seeking minors who are in a particularly vulnerable situation within the meaning of the royal decree of 9 April 2007 establishing the rules and regulations applicable to observation and orientation centres for unaccompanied foreign minors.

failure to respond to a summons or decision can have major consequences for the outcome of the procedure).

In ratifying Article 17 of the revised Charter, however, the Federal Government pledged to take the necessary measures to secure for children and young persons the effective exercise of the right to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities. To this end, it is required to take measures to ensure that youngsters receive the care, assistance, education and training they need. The state also has an obligation to protect children and young persons against negligence, violence or exploitation. As regards unaccompanied foreign minors in particular, it also has a specific obligation to provide protection and aid for these children and young persons, temporarily or definitively deprived of their family's support. Without adequate reception facilities, however, the kind of care required under Article 17 is impossible.

The aforementioned obligations arising from the Charter echo Belgium's other obligations under the European Convention on Human Rights, specifically Articles 3 and 8. Article 3 of the Convention prohibits inhuman or degrading treatment. In failing to honour its obligation under Article 17 of the revised Charter to protect minors against all forms of negligence, violence or exploitation, the Government is thus also ignoring the prohibition contained in Article 3 of the Convention. For there can be little doubt that leaving a child on the street, without shelter or provision for its basic needs, amounts to inhuman and degrading treatment.

As for Article 8 of the Convention, this covers the right of everyone to "respect for his private and family life, his home and his correspondence", including the right to the full development of his personality and to moral integrity, i.e. "all those values that are apt to be undermined when a person does not have proper shelter for themselves and their family"[31]. Here again, compliance with this provision requires Belgium to honour its obligations under Article 17 of the revised Charter, for the purpose of ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities.

In earlier collective complaint procedures, moreover (Nos. 14/2003 and 18/2003), the Committee opted for an extensive interpretation of Article 17 ESC, in the light of the Convention on the Rights of the Child. It noted that this article had been directly inspired by the UNCRC and that the article therefore protected in a general manner the right of children and young persons to care and assistance. The Committee deemed this appropriate as the UNCRC is one of the most ratified treaties (it has been ratified by all member states of the Council of Europe).

Given that Article 17 ESC is inspired by the UNCRC, it is worth looking at the provisions guaranteed by this instrument. Article 27 of the UNCRC reads as follows:

> *1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.*
> *2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions necessary for the child's development.*
> *3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support program's, particularly with regard to nutrition, clothing and housing.*

[31] F. TULKENS, "Le droit au respect de la vie familiale. Égalité et non discrimination", *Rev. trim. dr. fam.*, 2008, n°3, p. 628.

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The wording of Article 17 ESC and Article 27 of the UNCRC is clearly similar. The reason for the reference to Article 27 of the UNCRC lies in the fact that this article mentions the minimum provisions ('material assistance') that should be provided by the state if the parents cannot. Given the fact that the UNCRC is intended to include all persons under the age of 18, the Belgian government is wrong to exclude children not lawfully present in the country from social assistance benefits, legal and economic and assistance.

It is clear from both Article 17 ESC and Article 27 of the UNCRC that the parents are primarily responsible for providing for their children. The problem arises when, as is currently the case in Belgium, either the child, an unaccompanied foreign minor, finds itself alone in the country, or its parents, not being lawfully present, cannot work or claim social assistance benefits and so have no legal means of securing an income and fulfilling their maintenance obligations.

From DCI's perspective, the fact that the reception network is currently overstretched can never be a justification for putting children in a situation of homelessness, depriving them of the social, legal and economic protection that is guaranteed to them in law.

Article 7 §10

Article 7 § 10 of the revised European Social Charter, in conjunction with Article E, requiring the Parties to respect the principle of non-discrimination in the exercise of rights, states that "*Children and young persons have the right to a special protection against the physical and moral hazards to which they are exposed, and particularly against those resulting directly or indirectly from their work*".

Part II of the revised Social Charter, which entered into force on 1 July 1999, expands upon the obligations of states that have signed the Charter. One such state is Belgium, which ratified the revised ESC on 2 March 2004.

It is clear from these provisions that the scope of this article is not confined to protecting children and young persons from the risks to which they are exposed as a result of their work and that the article should be understood as covering all types of physical and moral hazards, actual or potential.

It accordingly transpires from the case-law of the European Committee of Social Rights that Article 7 § 10 implies that as regards other forms of exploitation, States party must prohibit the use of children in other forms of exploitation such as domestic/labour exploitation, including trafficking for the purposes of labour exploitation, begging, or the removal of organs[32].
States party must also take measures to prevent and assist street children.[33]
States parties must ensure not only that they have the necessary legislation to prevent exploitation and protect children and young persons, but also that this legislation is effective in practice[34].

Belgian legislation, however, does not entirely meet the requirements of the European Committee of Social Rights. At present there is no law against begging in Belgium. As recommended by the Committee, however, the Belgian Government has passed legislation to prohibit the exploitation of others who engage in begging, and in particular, exploitation involving minors.

[32] Conclusions 2004, Bulgaria, p. 57
[33] Conclusions XV-2, Statement of interpretation on Article 7§10, pp. 26-27
Conclusions 2004, Romania, p. 472
[34] Conclusions 2006, Albania, p. 61.
Conclusions 2006, Bulgaria, p. 113.

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The Belgian Government has voluntarily decided not to punish parents who engage in begging, accompanied by their children. On 26 May 2010 the Brussels Court of Appeal quashed a decision by the court of first instance to convict a young woman caught begging, with her children, in Brussels.

In its reasons, the Court states that "begging is not a punishable act under Belgian law. The fact that a young beggar with very young children keeps them with her when appealing to the generosity of passers-by and takes advantage of their presence to arouse pity, while certainly not very fulfilling for the children, does not constitute a criminal offence".

CODE (Coordination des ONG pour les droits de l'enfant – NGO co-ordination for the rights of the child) and all the children's rights organisations welcomed the Brussels Court of Appeal decision of 26 May 2010. In it, the Court points out that begging with children is not an offence and that, as envisaged by lawmakers, there is a need to provide a social response to the problems facing people who find themselves in Belgium with neither the right to stay in the country nor social assistance and who are forced to beg in order to survive.

It is clear, however, that, as things stand at present, the Belgian state is incapable of protecting street children, and specifically children accompanying parents who are in the country unlawfully and engage in begging. In the vast majority of cases, begging with children is a consequence of not having lawful residence status (even in the case of European nationals); the failure to take proper account of this situation and the discrimination experienced by the persons concerned in their country of origin means that such people are seldom seen as requiring assistance as a matter of urgency.

According to information gathered in two studies conducted by CODE among the competent authorities and associations working in the field, the minors who beg in the French Community and the Brussels-Capital Region are mostly foreign minors accompanied by their parents or members of their extended family who have come from central and eastern European countries (CEECs) and are of Roma origin.

The term "CEECs" should be understood as meaning Albania, Bosnia and Herzegovina, Bulgaria, Croatia, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia and other countries of the former Yugoslavia. Some of these states are not in the European Union and in some cases therefore their nationals, on entering Belgium, do not have the right to stay in the country legally, or at least not an automatic right. The same is true for European nationals who are not eligible to settle in Belgium in the context of the free movement of people in Europe.

A number of foreigners who are in the country unlawfully therefore resort to begging, together with their children. Living on the street patently and unquestionably involves certain moral and physical hazards for those who are forced to do it. The fact that some of them are children and young persons and that they also engage, either actively or passively, in begging merely increases the risk. According to Jean-Yves Hayez, a child psychiatrist and professor at UCL, when children either beg themselves or are involved in begging by adults and "*the children are included on a regular basis, the psychological damage to those children is already significant*": lack of stimulation at a crucial age, difficulties in developing self-esteem, from seeing their parents in a position of pseudo-submission to the whims of a society that is condescending and suspicious, creation of an image of society centred on inequality, in terms of treatment and power. "*As teenagers, they sometimes seek revenge, lashing out at the society that denied them proper care and support. The way in which they do this is fairly minor - vandalism, petty theft, etc. – but once again, they are the ones we will accuse of being criminals without really stopping to ask what our own part in the problem might be.*[35]

[35] J.-Y. HAYEZ, Un enfant mendiant est-il un enfant maltraité ?, La Libre Belgique, 9 March 2005

As has already been pointed out, begging is not a criminal offence in Belgium. Not even begging carried out by children and young persons, either themselves or as accessories, or begging of which they are passive victims owing to the behaviour of their families or persons close to them. Because there is no legislation, however, the Belgian Government has failed to fully discharge its responsibility to prevent this sort of thing from happening to foreign minors who are in the country unlawfully, either alone or with their families, and living on the street. The law as it stands is not effective at protecting these children and young persons: the Belgian state is thus in breach of its obligation to protect the group in question. The manner in which most of these children are treated, moreover, effectively amounts to inhuman and degrading treatment, since with no way of obtaining legal status, social assistance, rented accommodation, help from reception centres or employment, begging becomes a means of survival. And while under Article 417*quater* of the Criminal Code, inhuman or degrading treatment carries very severe penalties, especially if it is committed against a minor and if the perpetrator is an official or public servant, in practice, the persons who inflict such treatment are neither bothered by the police nor prosecuted.

Conclusions of the European Committee of Social Rights regarding the application by certain states which have signed Article 7 § 10 ➔

In its conclusions of 31 October 2006 (Conclusions XVIII-1 Volume 1) on Croatia, the committee points out that "*The criminal offence of neglect and maltreatment of a child or a minor (Article 213 of the Criminal Code) consists of a grave violation of the duties of parents, adopters, guardians or other persons, or maltreatment of a child or a minor or forcing him/her to work in a way that is unsuitable for his/her age or to work excessively or beg or inducing him/her for personal gain to behave in a manner which is harmful to his development. If the aforementioned offences cause serious bodily injury to a child or a minor, or if his/her health is severely impaired, or if they cause a child or a minor to engage in begging, prostitution, or other forms of asocial behaviour or delinquency, then the punishment is more severe. In addition the Committee notes that Article 175 of the Criminal Code on trafficking of human beings covers all forms of trafficking."*

In its conclusions of 30 June 2006, in which Moldova was found to be in breach of its obligations under Article 7§10, the committee notes that: "States must under Article 7§10 all prohibit the use of children in other forms of exploitation following from trafficking or being on the street, such as, among others, domestic exploitation, begging, pick pocketing, servitude or the removal of organs, and shall take measures to prevent and assist street children.
The Penal Code prohibits the trafficking and use of children in forced labour (labour exploitation) and begging and organ removal. The "luring of minors" into criminal activities is also prohibited.
No information is provided on the situation in practice. The Committee notes from other sources[36] that the trafficking of children for labour exploitation and begging exists in Moldova. The Committee refers to its comments above in respect of children trafficked for the purposes of sexual exploitation and concludes that the situation is not in conformity with the Revised Charter."

In this instance, the committee's conclusions are based solely on the observation, unsupported by statistics, that networks exist, the purpose of which is to use children for begging.

In its conclusions of 30 June 2006 on Romania, the Committee held that "*As regards street children, the Committee notes that specific programmes aimed at assisting and reintegrating street children continued over the reference period, these again consisted of the provision of shelters, activities and health care*."

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It follows from the foregoing that the failure by a state to take adequate measures to prevent a minor from engaging in begging or committing, either personally or as an accessory, criminal acts – the fact that this violation of minors' physical and moral integrity is a last resort, rendered necessary by life on the street, and the destitution and lack of economic, social and institutional support that that entails, is irrelevant – constitutes a serious breach of the obligations incumbent on states which have signed the revised ESC and in particular Article 7 § 10.

Furthermore, as pointed out in these last conclusions of 30 June 2006 concerning Moldova, states can fulfil their obligations in this regard by providing minors, irrespective of their status, with shelter, activities and health care. Generally speaking, the inability of these reception arrangements to accommodate some of the minors unlawfully present in the country, and/or to offer them psychological support and health care, owing to the fact that the minors, whether accompanied by their families or not, are particularly exposed to physical and moral hazards, because of the lack of shelters and, in some cases, the fact that they are living on the street, is characteristic of the act or omission that gave rise to liability on the part of the Belgian state.

Article 11

Article 11 reads as follows: *"With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed inter alia:*

1. to remove as far as possible the causes of ill-health;
2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;
3. to prevent as far as possible epidemic, endemic and other diseases, as well as accidents."

The right to health established by international, European and national legislation for foreign minors, accompanied or otherwise, with or without a residence permit, is not being observed at present. The law provides that, on being admitted to a reception centre, unaccompanied minors and families seeking asylum or unlawfully present in the country are to be given access to a medical service. Apart from the general check-up, and screening for TB, they can also ask this medical service for help with any other medical problems they may have. The cost of the medical examinations and treatment is borne by the reception centre.

Because of the crisis in Belgium's reception system, young people and families are spending long periods on the street, in hotels or emergency reception centres and have extremely limited or no access to medical services. The issue of payment for the medical care of people who have no fixed address is highly problematical. Only urgent medical assistance can be provided by Public Social Welfare Centres. In order to claim this, even though the Act of 8 July 1976 relating to the organisation of Public Social Welfare Centres guarantees the right to urgent medical assistance, it is highly desirable to have a fixed address known to the medical service. Otherwise, there is a strong chance that the service will say the person falls outside their catchment area. Some CPASs, moreover, faced with an influx of requests, have expressly decided not to deal with requests from foreigners who are in the country unlawfully, thus depriving them of the possibility of having their application considered. CPASs can help overcome this problem by providing a postal address but, in that case it is also necessary to complete certain administrative formalities which can be a major obstacle for children, accompanied or otherwise. The procedure takes too long and, because the person does not have a fixed address, some CPASs refuse to cover the medical costs. In ratifying the Social Charter, however, Belgium pledged "*to remove as far as possible the causes of ill-health*" (Article 11 of the Charter). The Belgian state must remove the causes of ill-health by implementing

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the existing laws and granting children and other entitled persons a place in a reception centre which has a medical service. Such measures constitute statutory obligations.

Children who are forced to live on the street, moreover, face increased risks to their health. Being on the street has an enormous impact on young people's physical and mental state. A Médecins du Monde survey of the medical, psychiatric and paramedical needs of users of the Brussels-based "Samu social" (emergency welfare service) in June 2010 describes the findings concerning the state of health and medical needs of homeless people, including asylum-seeking families, families not lawfully present in the country and unaccompanied minors.
"*Not only are homeless persons overexposed to various risk factors, problems with housing, income, employment and a lack of social and family support, they are also more vulnerable in terms of their physical and mental health.*
They are prone to major morbidity factors and suffer from multiple diseases more frequently than the general population. As well as mental problems and psychiatric disorders, homeless persons have been found to suffer notably from skin conditions, infections of the upper and lower respiratory tracts, frequent traumas, neurological problems in particular epilepsy, oral health problems and overconsumption of psychotropic substances. They have a shorter life expectancy and experience fewer years of good health."[37]

In ratifying the revised Social Charter, the Belgian state also pledged "*to prevent as far as possible epidemic, endemic and other diseases, as well as accidents*". Screening for TB in unaccompanied minors, asylum-seeking families and families not lawfully present in the country was accordingly instituted. At present, however, because they do not have access to the medical services in reception centres, children with TB (or other epidemic or contagious diseases) end up on the street, untreated, and are liable to infect anyone who comes into contact with them.

The above-mentioned survey also refers to the situation of asylum seekers and families not lawfully present in the country in the context of winter schemes. "*This winter, Fedasil, the federal agency for the reception of asylum seekers, found itself completely overwhelmed and unable to provide care and shelter for asylum seekers. Families ended up on the street and were looked after by the "Samu social". As regards health care, such people often have a poor understanding of the administrative procedures and do not know where to turn for medical treatment, even though in theory they are entitled to social, legal, medical and psychological support, with medical costs to be met by Fedasil. If Fedasil declares that they are outside its jurisdiction, the CPAS is supposed to take over. For political reasons, however, this has not happened, leaving the individuals concerned in a state of utter helplessness and confusion.*
In practice, therefore, such persons end up on the street, homeless, destitute and disorientated, and with the utmost difficulties in obtaining medical attention.
For the "undocumented", people who are in Belgium unlawfully, the situation is no better: access to health care is conditional upon obtaining an "urgent medical assistance" certificate from a doctor, which must then be presented to a public social welfare centre. Finding a doctor willing to issue this certificate is not easy however, and the process is made even more complex by the lack of uniformity in the administrative procedures of the various CPASs in the 19 municipalities of the Brussels-Capital Region. According to the latest MdM report on persons present in Europe unlawfully, all the health indicators are flashing red[38]*. People are living in precarious conditions with only erratic access to*

[37] Médecins du Monde, Dr Twin Zhao et Frank Vanbiervliet, "Etude des besoins médicaux, psychiatriques et paramédicaux des usagers du Samu social de Bruxelles", June 2010
[38] Médecins du Monde European Observatory on Access to Healthcare, "*Access to healthcare for undocumented migrants in 11 European countries*", 2008 survey report

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health care. Nearly half of the respondents had been unable to obtain proper medical attention. Children and pregnant women are no exception to this sad fact".[39]

In the specific case of children, the right to health is also protected by Article 24 of the UNCRC, under which "the States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health (…)". A statutory framework and institutions have been put in place to ensure that children are able to enjoy "the highest attainable standard of health" but in failing to provide places in reception centres, the Belgian state is violating this right.

Article 13

Article 13 reads as follows: "*With a view to ensuring the effective exercise of the right to social and medical assistance, the Parties undertake:*

1. *to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition;*
2. *to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights;*
3. *to provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want;*
4. *to apply the provisions referred to in paragraphs 1, 2 and 3 of this article on an equal footing with their nationals to nationals of other Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11 December 1953.*

As the right to social assistance is based on a criterion of need, the assistance should be granted as soon as the need arises, i.e. the person in question is unable to obtain "adequate resources"[40]. Unaccompanied minors and asylum-seeking families who are not allowed to work during the first six months as from the date of their asylum application and the children of families unlawfully present in the country, whose parents cannot work legally, are not in a position to secure "adequate resources".
Under Article 13§4 ESC, even people not lawfully present in the territory of a member state can be eligible for social assistance benefits[41]. Need and human dignity are the main criteria for eligibility, which means that emergency social assistance (food and accommodation) should be given until the unlawfully present person can be repatriated[42]. Both the Act relating to the organisation of the CPASs and the Reception of Asylum Seekers Act explicitly refer to this notion of human dignity.

Under Article 13 § 3 of the revised European Social Charter, the Belgian state must ensure that "*everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want*".
In the reception centres for MENA, support is available. As well as social workers to help the youngsters with administrative procedures, their education and psychological and social welfare, there are also educators and mentors on hand to guide the youngsters in their day-to-day lives. Activities are organised, and the youngsters have someone to turn to if they have any questions or concerns. Through the centre, youngsters can get in touch with their families back home and they can also call their guardians. MENA who have not been assigned a reception centre do not have this kind of

[39] Médecins du Monde, Dr Twin Zhao et Frank Vanbiervliet, "Etude des besoins médicaux, psychiatriques et paramédicaux des usagers du Samu social de Bruxelles", June 2010
[40] European Committee of Social Rights, Conclusions XIII-4, pp. 54-57 and Conclusions XIV-1 Portugal, pp. 701-702
[41] European Committee of Social Rights, General Introduction to Conclusions XVIII-1, Belgium
[42] European Committee of Social Rights, Conclusions XIII-4, pp. 54-57. And Conclusions XVIII-1, Germany, p. 323

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support, despite being in "want" by virtue of the fact that they are unaccompanied minors living on the street.
Guardians likewise have an important role to play in providing support. But they cannot do their job properly unless there is a place where they can find the youngsters or visit them. Even assuming the guardian is able to meet with the youngster in the street, the support that they provide will in that case focus merely on the issue of accommodation. The fact that the youngster does not have a roof over their heads makes it difficult for the guardian to win their trust, as it will seem to the minor that the guardian cannot meet even their most basic needs, such as housing. Young people who are not monitored from the outset are at greater risk of disappearing.
In the case of asylum-seeking and non-asylum-seeking families with children, who find themselves homeless and therefore in need, the Belgian state is failing to ensure that they are all able to obtain the help and advice required to alleviate their need. The process of obtaining assistance from a social worker, lawyer or doctor is fraught with obstacles, and Article 13 is being violated as a result.

Article 16

Article 16 reads as follows: "*With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married and other appropriate means.*"
Based on Article 16 ESC, member states have an obligation to ensure the full development of families by means of social and family benefits and housing provision. The conclusion that can be drawn from the wording of Article 16 ESC is that without adequate housing, no family life is possible. This conclusion is supported by the decision on the merits in collective complaint No. 15/2003, in which the Committee concluded that Article 16 also covers the availability of suitable family housing.[43] Adequate housing is thus a prerequisite for family life and, consequently, the well-being and development of the child as a member of the family. DCI further notes that the Belgian government is bound by case-law on family life, as it arises from Article 8 of the European Convention on Human Rights.
The lack of reception facilities for families, obliging them to live on the street, in run-down hotels or centres for the homeless, prevents them from enjoying a full family life because it means a lack of privacy, basic hygiene, proper nutrition, schooling, etc.

Article 30

Article 30 reads as follows: "*Everyone has the right to protection against poverty and social exclusion. With a view to ensuring the effective exercise of the right to protection against poverty and social exclusion, the Parties undertake:*

a) *to take measures within the framework of an overall and co-ordinated approach to promote the effective access of persons who live or risk living in a situation of social exclusion or poverty, as well as their families, to, in particular, employment, housing, training, education, culture and social and medical assistance;*
b) *to review these measures with a view to their adaptation if necessary."*

[43] European Roma Rights Centre (ERRC) v. Greece, Collective Complaint No. 15/2003

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Article 30 requires the Belgian state to secure for people who live or risk living in a situation of social exclusion and poverty effective access to housing, training, education, culture, employment, social and medical assistance. The article does not discriminate on the basis of claimants' nationality, or the lawfulness of their presence in the country.
Foreign minors who are unlawfully present, with or without their families, and who do not have a place in a shelter or other accommodation, fall into this category. They are socially excluded, since they typically live in precarious conditions and manage to survive only through begging or the proceeds of crime.

The Belgian state is bound, however, under Article 30, to ensure that they have effective access to all the services listed in the Charter. This is not an inchoate right, therefore, but an actual one, that needs to be implemented. Article 30 imposes on all states an obligation to take action and holders of this right have a claim against the government concerned.

In its decision of 5 December 2007, International Movement ATD Fourth World (ATD) v. France, the European Committee of Social Rights held that the measures should be adequate in their quality and quantity to the nature and extent of poverty and social exclusion in the country concerned. This means that in the case of Belgium, the insufficient supply of accommodation for unlawfully present foreign minors reflects the absence of a co-ordinated approach for promoting effective access to housing for persons who live or risk living in a situation of social exclusion. It thus amounts to a clear violation of Article 30 in that it is frustrating one of the objectives assigned to all states.
The inadequacy of the provision for MENA, among others, is expressly recognised in FEDASIL's 2009 report, in which it is clearly stated (page 18) that "*In 2009, the principle of phased reception was severely hampered by the lack of available and suitable places in Fedasil's reception network (as in the reception facilities run by the Communities). Both the two observation and orientation centres (100 places) and the special network reception structures (424 places at the end of 2009, spread over 7 federal centres, 3 Flemish Red Cross centres and 12 ILAs) had insufficient capacity to house all of the unaccompanied foreign minors that arrived in the country. Consequently, Fedasil was forced to place minors, while awaiting a place in an observation and orientation centre, in 'adult' places in the federal centres, where they did not receive special guidance. At the end of 2009, approximately 130 young people were in this situation. As Fedasil was unable to offer a place to all of the minors that had recently arrived in the country, from October 2009 Fedasil had no choice but to prioritise minors that were also asylum seekers, followed by the most vulnerable of the minors that were not asylum seekers.*"

The report reminds us that Fedasil is the federal agency for the reception of asylum seekers in Belgium, is responsible for providing material help to asylum seekers in Belgium, together with other categories of foreigners that are also entitled to reception, including unaccompanied foreign minors (whether or not they are asylum seekers), foreigners whose asylum application has been rejected but for whom material help has been extended, and minors whose parents are illegal immigrants and whom a CPAS has found to be in need.

Three points thus emerge from this report:

1) there is not enough reception capacity specifically for MENA;
2) MENA who cannot be housed in facilities appropriate to their age are placed in "adult" facilities (or, something the report fails to mention, in hotels or simply left on the street), where they are more likely to develop psychosocial disorders;
3) owing to the inability to accommodate all newly arrived minors, priority is given to asylum-seeking MENA and the most vulnerable amongst non-asylum seekers.

This last point shows that the inadequate or non-existent reception facilities for MENA constitutes a breach not only of Article 30 of the Charter but also of Article E in that it creates discrimination amongst MENA in favour of asylum seekers.

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It is also fair to assume that if a number of foreign minors, accompanied or otherwise, are not being admitted to reception facilities, then neither are they receiving basic social and medical assistance, when in fact, living on the street means they are at increased risk of infection or health problems and some of them will suffer from malnutrition or lack of food, on a temporary, occasional and/or regular basis.

Notwithstanding these serious shortcomings, CODE (NGO co-ordination for the rights of the child), in a paper dating back to May 2005, recommended that, in order to combat begging, the authorities should promote access to education. CODE based its proposals, moreover, on the right of every child, irrespective of its residence status, to education, citing Article 24 of the Belgian Constitution and the Convention on the Rights of the Child. Here, the legal basis for this right is Article 30, mentioned above.
The provision of a place to stay and social and medical assistance are essential but not sufficient and MENA must also be given schooling for the reception process to be complete. Such schooling, however, cannot be fully provided when the children in question are foreign minors for whom no reception arrangements have been made.
All this constitutes another aspect of the violation of Article 30 of the Charter.

In the light of the foregoing, whether in terms of the provision of a place to stay, education or social and medical assistance, it is clear that the measures taken by the Belgian authorities are not adequate in their quality and quantity to the nature and extent of the poverty and social exclusion that threatens or affects foreign minors, in particular non-asylum-seeking foreign minors.

Together, these elements amount to a clear violation of Article 30 of the Charter by the Belgian state.

Discrimination

Article E of the revised Charter reads as follows: "*The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status*".
Article E in general prohibits member states from discriminating on any ground in the enjoyment of the rights set forth in the revised Charter. It does not prohibit all differences in treatment since the appendix to the Charter states that "*A differential treatment based on an objective and reasonable justification shall not be deemed discriminatory".* The non-discrimination clause is similar to Article 2 of the UNCRC, on non-discrimination. For the interpretation, therefore, DCI refers to the meaning assigned to non-discrimination by Article 2 of the UNCRC, which prohibits any discrimination in the exercise of the rights set forth therein, on any ground whatsoever.
It is thus prohibited to penalise a child by reason of the legal status, and hence the residence status, of its parents. In DCI's view, the Belgian state is discriminating against people in two ways: firstly between Belgian children and non-Belgian children with regard to the effective granting of social rights and secondly, between foreign children, accompanied or otherwise, with different types of legal status or residence procedures.
It should be noted that under Belgian regulations, MENA are entitled to a place in a COO, whatever their administrative status[44]. Giving priority to asylum-seeking MENA is against the regulations.

[44] Art. 3 of the Royal Decree on COOs. This provision is rather paradoxical, considering that the definition of a MENA in Belgian law may itself be regarded as discriminatory since it does not include minors who are nationals of an EU member state. See on this subject Mathieu BEYS, "La protection des mineurs étrangers non accompagnés (MENA). 1ère partie : Définition légale du MENA, processus de protection, accueil", *Parole à l'exil*, July 2008- March 2009, http://www.caritas-int.be/fileadmin/word/parole_vluchtschrift/1-2009-%20parole%20juillet%202008-mars%202009%20MENA.doc

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Unaccompanied minors from European Union countries, furthermore, are not classed as "unaccompanied foreign minors", according to the definition used by Belgian lawmakers.
At present, non-asylum-seeking unaccompanied foreign minors who are over the age of 13 and who are not considered "vulnerable" (pregnant girls, alleged victims of trafficking in human beings and minors with serious psychosocial disorders) are being denied the right to reception and all the entitlements that flow therefrom, on the basis of their administrative status.
It can therefore be said that discrimination is occurring in practice, mainly on the basis of the minor's administrative status, i.e. whether or not they have applied for asylum. Even assuming this distinction were based on an objective criterion, it could not be said to be reasonably justified, as the needs of non-asylum-seeking minors are no less worthy of attention than those of asylum-seeking minors.

VI Conclusion

In ratifying the revised Social Charter, the Belgian Government showed that it intended to secure social rights for children, whatever their administrative status.

The current failure to provide reception facilities for children, whether accompanied by their parents or not, is depriving hundreds of children of legal and social protection, exposing them to serious hazards and denying them human dignity and the opportunity to flourish, physically and mentally. This state of affairs has been going on since 2009.

DCI asks the European Committee on Social Rights to consider the arguments in this collective complaint and to find that Belgium is in violation of Articles 7 § 10, 11, 13, 16, 17 and 30, read in conjunction with Article E of the revised Charter.

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Appendices

1) DCI Statute
2) DCI's mandate
    a. Mandate of Abdul Manaff Kemokai, Vice President Africa, International Executive Council, Defence for Children International
    b. Mandate of Marcos Guillén, Vice-President Americas, International Executive Council, Defence for Children International
    c. Mandate of Jean-Luc Ronge, Vice-President, International Executive Council, Defence for Children International
    d. Mandate of Ileana Bello, executive director of the International Secretariat of Defence for Children International
    e. Mandate of Rifat Kassis, President of the International Executive Council, Defence for Children International
    f. Mandate of Juan Fumeiro, member for the Americas region, International Executive Council, Defence for Children International
    g. Mandate of Laurencio E. Akohin, member of the International Executive Council, Defence for Children International

3) Press review
4) Correspondence table from the press review
5) Fedasil instruction issued on 20 October 2009
6) Letter from Fedasil dated 21 March 2011
7) Concluding Observations of the Committee on the Rights of the Child of 11 June 2010 (§§ 74, 75, 81)
8) Letters of support
    a. UNICEF-Belgium
    b. League of Human Rights
    c. L'association des tuteurs francophones-MENA
    d. CIRE (Co-ordination and initiatives for refugees and foreigners)

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