

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



10 March 2004

**Collective Complaint No. 21/2003
World Organisation against Torture (OMCT)
v. Belgium**

Case Document No. 5

**OBSERVATIONS FROM THE BELGIAN GOVERNMENT
ON THE MERITS**

registered at the Secretariat on 30 January 2004

Letter from: Jan Devadder, Director General, Legal Advisory Service,
Belgian Federal Foreign Affairs, External Trade and Co-
operation and Development Department

To: Mr Jean-Michel Belorgey

**Memorial of Belgium in response to the collective complaint lodged by the
World Organisation against Torture under the 1995 Additional Protocol
to the European Social Charter**

Dear Sir,

As Agent of the Belgian Government I attach the memorial of Belgium in response to the aforementioned collective complaint. An advanced copy is being sent by fax and the original will follow by post.

Yours faithfully,

Jan Devadder

EUROPEAN COMMITTEE OF SOCIAL RIGHTS

**COLLECTIVE COMPLAINT BY
THE WORLD ORGANISATION AGAINST TORTURE (OMCT)
AGAINST BELGIUM**

MEMORIAL IN REPLY OF THE KINGDOM OF BELGIUM

30 JANUARY 2004

Introduction

On 23 September 2003 the European Committee of Social Rights registered a collective complaint lodged by the World Organisation against Torture (OMCT) against Belgium.

In the complaint, the OMCT maintains that Belgium has failed to apply Article 17 of the European Social Charter satisfactorily because its legal system does not explicitly and effectively prohibit families from using any form of corporal punishment against children. It also accuses the Belgian state of failing to organise sufficient information campaigns on children's rights.

In its general observations, the Committee has interpreted Article 17 of the Charter as follows: "Article 17 requires a prohibition in legislation against any form of violence against children, whether at school, in other institutions, in their home or elsewhere. It furthermore considers that any other form of degrading punishment or treatment of children must be prohibited in legislation and combined with adequate sanctions in penal or civil law"¹.

In reply to this complaint, Belgium wishes to present this memorial to the Committee, describing its system for protecting children's rights. The memorial will show that the complaints are unfounded.

The Belgian Government first wishes to assure the Committee that it fully shares the commitment to combating all forms of violence against children. The Belgian state is particularly concerned about the well-being and future of all children in its territory and has adopted various measures to that end.

Belgian criminal and civil law both prohibit any form of violence, physical punishment or degrading treatment concerning children. Such conduct is punishable under Belgian law in accordance with its gravity.

Moreover, the prohibition is a guiding principle of Belgian law, as part of each child's constitutionally enshrined right to respect for his or her physical, moral, psychological and sexual integrity.

Contrary to the OMCT's allegations, Belgium therefore considers that in its current form its legal system offers children effective and adequate protection, thereby fully satisfying the requirements of Article 17 of the Charter, as interpreted by the Committee.

¹ European Committee of Social Rights, general observations on Articles 7§10 and 17, Conclusions XV-2, Vol. 1, General Introduction, p. 29.

I. Domestic law

A. *The Civil Code*

A ban on corporal punishment of children is implicit in the Belgian Civil Code, which expressly provides for the protection and defence of children's interests. In previous centuries, the notion of parental power and authority predominated. Belgian law has gradually substituted the notion of protection for that of power, and the emphasis is now on the child's interests. Parents' relations with their children are no longer characterised in terms of "powers" but rather of "duties".

For example, Article 203 of the Belgian Civil Code summarises parents' duties by specifying that mothers and fathers shall take responsibility, in so far as they are able, for their children's accommodation, maintenance, supervision, education and training.

Similarly, Articles 371 to 387b of the Code, on parental authority, require parents to exercise this authority in their child's or children's interests², in accordance with Article 3§1 of the United Nations Convention on the Rights of the Child of 20 November 1989³.

Parental authority is therefore now understood to embody parents' duty to protect their children's person and interests. Parents are also bound today by a duty of respect towards their children.

In 1995, the Belgian Parliament added a new Article 371 to the Civil Code introducing the key notion of mutual respect between a child and its father and mother⁴. Previously only children, irrespective of age, were required to respect their parents. We consider this reform to be of major significance because it reflects a change of attitudes in families.

In contrast to what the OMCT maintains in its complaint, Belgium considers that the notion of mutual respect definitively excludes the possibility of parents administering corporal punishment to their children.

Finally Article 387bis of the Civil Code empowers juvenile courts to modify any provisions relating to parental authority, in the child's interest, at the request of the father and mother or either of them, or of the crown prosecutor.

For example, in the event of violence towards a child, the prosecutor's department or the father or mother is entitled to apply to the juvenile court for the separation of a child who has suffered violence from the parent responsible.

² References to the child's interest appear in Articles 374, 375b, 376, 379 and 387bis of the Belgian Civil Code.

³ Ratified by Belgium on 16 December 1991.

⁴ Article 371 of the Belgian Civil Code now states that, irrespective of the child's age, the child and his or her father and mother have a duty of mutual respect.

B. The Criminal Code

1. Criminal assault

Under the Belgian Criminal Code any conduct amounting to personal violence constitutes an offence. The corporal punishment of children is therefore liable to criminal prosecution.

In contrast to what the OMCT maintains, Belgium considers that Articles 398 ff of the Criminal Code offer sufficient grounds for bringing criminal charges in response to the corporal punishment of children. For example, under these articles it is an offence to commit acts amounting to criminal assault, a term that has been broadly interpreted by Belgian legal theory and its courts.

Thus it is established case-law that inflicting a blow on a victim constitutes assault⁵. In a judgment of 10 December 1949, the Brussels court of appeal ruled in a case of criminal assault “that there was criminal intent if the perpetrator had deliberately intended to cause harm, even if this harm was momentary and had been inflicted with the idea that it could eventually be of benefit. However praiseworthy the motives of a teacher responsible for discipline who administered four or five minor blows with a strap to a particularly difficult ten-year old pupil, the punishment was not acceptable in the light of then current attitudes and could justify a prosecution for criminal assault”⁶.

This case involved corporal punishment administered to a child in school. Although to our knowledge no specific cases have yet been brought before the Belgian courts, current case-law offers sufficient grounds for believing that the courts would follow a similar line of reasoning in the case of corporal punishment administered to children by members of their families.

This is the clear inference to be drawn from a judgment of the Brussels criminal court of 14 March 1996. This concerned the corporal punishment administered to a child in a school for the mentally disordered. The court argued that “whereas according to a now ancient principle parents and carers had been granted the right to impose corporal punishment as a necessary adjunct of their right to control and care of a child, and that it had therefore been justified to administer blows within the bounds of reason and with no malicious intent in order to correct a child, this principle had been seriously challenged since the end of the Second World War. Both domestic case-law and that of the European Court of Human Rights appeared to condemn unequivocally the use of physical violence against children for punitive purposes. This case-law had to be acknowledged and it was therefore no longer conceivable for corporal punishment to be considered an acceptable educational method or accepted as a means of punishing conduct retrospectively, whether for the purposes of retribution or prevention”⁷.

⁵ See Corr. Bruxelles, 20 March 1962, in *J.T.*, 1962, p. 320.

⁶ Brussels, 10 December 1949, in *Rév. dr. pén. et crim.*, 1949-1950, p. 900.

⁷ Corr. Bruxelles, 14 March 1996, in *Journ. dr. jeunes*, p. 331.

The Belgian Court of Cassation considers that the notion of injuries extends to any internal or external lesion of the human body, however minor, of externally administered mechanical or chemical origin, that affects the individual's physical state⁸.

The Court of Cassation has also ruled that “a deliberate act could constitute criminal assault, whatever the motives that impelled it and even if the perpetrator did not seek the resulting harm”⁹. In this context it is useful to note that parents who resort to corporal punishment very often do so without really being aware of it and with no direct intention of causing the resulting physical or psychological suffering to their child. This type of conduct is nevertheless inadmissible and as such is liable to criminal prosecution under existing Belgian law.

Until recently criminal assaults on adults and children were liable to the same penalties. The new Articles 405bis and ter of the Criminal Code concerning the criminal law protection of minors, introduced on 28 November 2000, reflect the Belgian Parliament desire and resolve that violence against children should receive special treatment. It has sought to impose stiffer penalties on the perpetrators of such violence on account of children's vulnerability and the influence generally exercised over them.

Article 405bis of the Belgian Criminal Code is concerned with criminal assault committed on minors or other persons who, because of their physical or mental state, are unable to provide for their own maintenance, whereas Article 405ter is expressly concerned with violence committed against children within their own families, making the latter an aggravating factor for sentencing purposes.

Under Article 405ter, “in cases provided for in Articles 398 to 405bis where offences have been committed on minors - or another persons who, because of their physical or mental state, are unable to provide for their own maintenance - by the child's or person's father, mother or other ascendants, any other persons exercising authority over or having custody of the child or dependent person, or persons occasionally or habitually cohabiting with the victim, the minimum sentences incurred by these articles will be doubled in the case of short-term imprisonment and increased by two years in the case of longer sentences”.

2. Torture or inhuman or degrading treatment

Corporal punishment of children may come within the scope not only of the offence of criminal assault but also of the new Articles 417 bis to quinquies of the Belgian Criminal Code.

These articles were recently introduced by the Act of 14 June 2002, following Belgian ratification of the UN Convention of 10 December 1984 against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment¹⁰.

⁸ C. Cassation Belge, 12 April 1983, in *Pasicrisie*, p. 852.

⁹ C. Cassation Belge, 25 February 1987, in *Pasicrisie*, p. 761.

¹⁰ Ratified by Belgium on 25 June 1999.

The new Article 417bis of the Belgian Criminal Code defines the notions of torture, inhuman treatment and degrading treatment, according to the degree of suffering inflicted on the victim.

"Torture" is defined as any inhuman treatment by which extremely severe pain or suffering, whether physical or mental, is intentionally inflicted on a person. "Inhuman treatment" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person. Finally, "degrading treatment" is defined as any act that, in the eyes of others or in the eyes of the victim, causes severe humiliation or debasement.

It goes without saying that under existing legislation Belgian courts are free to interpret these notions broadly and extensively, with particular attention to the case-law of the European Court of Human Rights.

Reference should be made here to some of the Court's decisions. In an earlier judgment it found that the United Kingdom had violated Article 3 of the Convention because the judicial corporal punishment of a minor in a police station constituted "degrading treatment"¹¹. The Court has subsequently condemned corporal punishment in schools on a number of occasions¹². Finally the European Court of Human Rights has recently condemned the United Kingdom in a case concerning the corporal punishment of a child within the family¹³. In this case, the child was beaten by its step-father with a garden cane applied with considerable force. The Court concluded unanimously that Article 3 had been violated.

The relevant United Nations bodies have adopted a similar position on the corporal punishment of children. The United Nations Commission on Human Rights has stated that: "the prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim. In the Committee's view, moreover, the prohibition must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure. It is appropriate to emphasize in this regard that article 7 protects, in particular, children, pupils and patients in teaching and medical institutions"¹⁴.

The United Nations special rapporteur against torture has made the same point: "any form of corporal punishment of children is contrary to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment"¹⁵.

Like all these international institutions and bodies, Belgium considers that corporal punishment of children may constitute degrading, or even inhuman, treatment if it

¹¹ ECHR, *Tyrer v. United Kingdom* judgment, 25 April 1978.

¹² See in particular ECHR, *Campbell and Cosans v. United Kingdom* judgment, 25 February 1982.

¹³ ECHR, *A. v. United Kingdom* judgment, 23 September 1998.

¹⁴ United Nations Commission on Human Rights, General Commentary No. 20 concerning article 7 of the International Covenant on Civil and Political Rights, HRI/GEN/1/Rev. 4, page 108, 10 March 1992.

¹⁵ United Nations Special Rapporteur against torture, report to the General Assembly of the United Nations, 2 July 2002, A/57/173, page 14.

embodies a particular disregard for the child concerned. In some cases such treatment may even amount to torture, for which strengthened protection is offered to victims.

It needs to be emphasised that the new Articles 417 bis to quinquies of the Criminal Code are concerned with suffering, whether physical or mental. This is an important point since punishments inflicted on children need not be solely physical, or may even have purely psychological consequences that can nevertheless cause the victim great suffering.

In this context reference should be made to the new Article 425 of the Belgian Criminal Code, which makes it an explicit offence to deprive minors – and other persons who, because of their physical or mental state, are unable to provide for their own maintenance - of food or care, to the point that their health is threatened¹⁶.

This article makes it possible to bring prosecutions for a very specific form of corporal punishment amounting to degrading or even inhuman treatment, depending on its severity, likely to cause both mental and physical suffering to the victim.

C. The Constitution

To coincide with the tenth anniversary of the United Nations Convention on the Rights of the Child of 20 November 1989, Belgium made a major symbolic constitutional advance. For the first time a specific provision was included on children, in recognition of their particularly vulnerable status.

The Belgian Constitution now has an Article 22bis, guaranteeing each child the right to respect for his or her moral, physical, psychological and sexual integrity¹⁷.

In recognising children as full constitutional subjects, the Constitution has sought to draw attention to their need for additional protection.

Two positions were taken in the Senate regarding the definition of "integrity", and the matter was never finally settled. Nevertheless throughout the debates there was agreement among all the speakers that the notion of integrity necessarily excluded any form of violence against children¹⁸.

There can therefore be no doubt that Article 22bis of the Belgian Constitution formally prohibits all forms of violence to or corporal punishment of children.

¹⁶ This article was also introduced by the Criminal Protection of Minors Act of 28 November 2000.

¹⁷ Article 22b of the Belgian Constitution was introduced by legislation of 23 March 2000.

¹⁸ During debates, the proponents of a broad interpretation of integrity sought to include not only protection against all forms of violence but also such rights as equality between legitimate and other children, and the right to know one's origins. Others maintained that the right to physical integrity should only be concerned with protecting children against physical and mental violence (see below, Taelman report, p. 45).

The Committee's attention should particularly be drawn to the OMCT's assertion that the constitutional amendment "has not been interpreted as changing the ways in which parental authority should be exercised". This claim, whose origins are unknown, is totally false. In fact Article 22bis represents a natural extension and an explicit strengthening of Article 371 of the Civil Code, which adds to the notion of parental authority that of mutual respect between a child and its father and mother, which makes the latter an integral aspect of parental authority.

Finally Belgium strongly challenges the OMCT's claim that "the current state of the Constitution and civil and criminal codes does not send a clear message to parents and others that all corporal punishment is prohibited, within the family and in all other settings".

Its solemn nature¹⁹ and the precedence it enjoys in Belgian law²⁰ makes the Constitution the prime focus for the rules and subjects to which the political world attaches particular importance. Similarly, as the fundamental source of law, the Constitution is ideal for addressing "strong messages" to the public at large.

Thus, although Article 22bis of the Constitution clearly strengthens and gives practical shape to existing Belgian child protection legislation, its main significance lies in the highly symbolic, and thus political, message it sends out. This is confirmed in the preparatory work on the new article, where it is stated that it was intended above all as a signal or significant gesture to society as a whole²¹.

The Belgian Government therefore considers that taken as a whole, and more specifically through Article 22bis of the Constitution, existing Belgian legislation clearly and unambiguously informs the public that modern society will not tolerate any form of violence, physical retribution or corporal punishment towards children, on account of their incontrovertible right to respect for their integrity.

II. Comparative law

According to the Council of Europe, eleven European countries currently have legislation explicitly banning all forms of corporal punishment of children: Germany, Sweden, Finland, Norway, Austria, Denmark, Cyprus, Latvia, Croatia, Bulgaria and Iceland²².

As far as legislation is concerned, recourse to comparative law certainly has its advantages. Nevertheless, caution is required - each legal system is unique and therefore has its own logic.

¹⁹ Reflected in particular in the cumbersome constitutional revision process.

²⁰ According to the hierarchy of norms in Belgium, directly applicable international law takes precedence over the Constitution, which in turn takes precedence over legislation, decrees and orders.

²¹ Belgian Senate, 1999-2000 session, Taelman report, 13 January 2000, p. 53.

²² See Council of Europe, Directorate General III – Social Cohesion, Forum for Children and Families, "Eliminating corporal punishment: human rights imperatives for Europe's children", preliminary report, 16 October 2003.

In the past, the legislation of a majority of the countries referred to above explicitly authorised parents to inflict corporal punishment on their children. In Sweden, for example, parents were excused by the law if they slightly injured their children when administering corporal punishment.

Certain countries still have legislation explicitly granting parents a "right of chastisement" or authorising them to administer "reasonable punishment" to their children.

Such legislation has never existed in Belgium. This is one of the main reasons why it has never seemed appropriate to compare the Belgian system with that of other countries.

In other words it is reasonable to expect a country that previously expressly authorised the striking of children as a punishment to make it explicit in legislation that such conduct is no longer allowed.

It should also be noted that in response to changing social attitudes the Criminal Code has been modified to move away from a legal system that has treated adults and children in similar fashion to one that considers acts of violence against under-age children to be a more serious offence, and that treats such acts committed within the family even more severely.

As explained to the Committee throughout this memorial, Belgium considers that the message to parents, conveyed in the reforms of recent years, that all forms of corporal punishment of their children are to be discouraged has been clearly transmitted to the public²³.

III. Education and awareness campaigns

Without going into details, some reference should be made here to the particular structure of the Belgian state, where powers and responsibilities are shared between the federal state and the federal entities: the Wallonia, Flanders and Brussels Capital regions and the French, Flemish and German-speaking communities. This division of powers was laid down in rules embodied in the Belgian Constitution under the special Institutional Reform Act of 8 August 1980.

Section 5, paragraph 1, II, 6 of the Act makes "child protection" a community responsibility, with the exception of the provisions of criminal law that make certain conduct in contravention of child protection regulations a criminal offence. Item 1 of this section also makes family policy, including all forms of aid and assistance to families and children, a community responsibility.

As part of this family policy the three Communities have each established special bodies to give aid and support in the broadest sense to families, and more specifically to children in distress.

²³ We particularly have in mind the new Article 22b of the Constitution and the Criminal Protection of Minors Act of 20 November 2000.

In the French Community the following organisations have been set up for this purpose: *SOS Enfants*, the *Délégué général aux Droits de l'Enfant*, the *Direction générale de l'Aide à la Jeunesse*, le *Service général de la Jeunesse et de l'Education permanente* and *l'Office National de l'Enfance*. The Flemish Community includes the *Bijzondere Jeugdzorg* committee, the *Kinderrechtencommissariaat*, the *Vertrouwenscentra Kindermishandeling and Kind en Gezin*. Finally in the German-speaking Community there is the youth aid service and the forum of experts on the ill-treatment of children.

The three Belgian Communities have each identified a need to educate their citizens on issues relating to ill-treatment, including more specifically the problem of parental violence towards their children²⁴. They have also made efforts to educate and inform their populations on the need for fundamental respect for children's interests and persons as part of their upbringing²⁵.

To achieve these objectives, the Communities have undertaken and continue to undertake numerous publicity campaigns, particularly through radio and television spots and broadcasts, Internet sites and leaflets on various key questions.

These campaigns all share a common approach, which is one of prevention based on help rather than enforcement²⁶. They are also designed to draw public attention to the various forms of physical and psychological ill-treatment and the different degrees of intensity it can attain. Finally, it emerges clearly from these campaigns that what is being sought is for parents and children to recognise the importance of living together in a harmonious relationship that excludes all forms of violence, chastisement or corporal punishment.

It is important to note that the federal authorities are also active in this area. In late 2002 the departments of social affairs and public health financed a study of violence in the family, one of whose major strands was the problem of ill-treatment of children. The conclusions of the study will be published shortly.

Despite the OMCT's allegations in its collective complaint, it is clear from the foregoing that the various Belgian bodies and institutions with responsibilities in this area are anxious to ensure that their children's rights are respected. Like the entire Belgian political establishment, these bodies have also shown themselves to be particularly sensitive to the problem of child abuse in all its forms. Numerous education campaigns aimed at the general public and medical, social and other professionals have been launched and a national study has recently been conducted on the subject.

²⁴ See for example the campaign by *Kind en Gezin*, in conjunction with the *Vertrouwenscentra* and the *Kinderrechtencommissariaat*, on the theme "*Stop zelf het geweld*". The campaign employed television spots to highlight the importance of communication between parents and children that excludes any form of violence.

²⁵ See the campaign undertaken since 2001 in the French Community on preventing ill-treatment and assisting victims, whose main message is "let's take time to live together". The campaign is mainly conducted through radio and television spots and a special magazine.

²⁶ Regarding enforcement, the Belgian child protection system offers effective help to children who are the victims of family ill-treatment. The free legal aid service in Belgium is also available to any child needing legal advice.

Conclusion

In its general observations on the interpretation of Article 17 of the Charter, the Committee states that it has drawn directly on developments in the United Nations system and decisions of the European Court of Human Rights²⁷.

It is interesting and important to note that Belgium has recently proceeded along the same path, by drawing on these two sources of international law to confirm and strengthen its system for protecting children's rights²⁸.

To coincide with the tenth anniversary of the United Nations Convention on the Rights of the Child, for example, and in recognition of children's special vulnerability, Belgium took the decisive step of incorporating Article 19§1 of the Convention in its highest source of law, the Constitution.

As far as the subject matter of the collective complaint is concerned, this article is undoubtedly broader and more explicit in scope than Article 17 of the 1961 European Social Charter. Article 19§1 reads: "States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child".

Although Article 19§1 of the United Nations Convention lays down an obligation to achieve a particular result, it leaves the choice of means to the individual parties.

As such Belgium considers that it is currently fully compliant with Article 19§1 of the UN Convention, which means that it also satisfies Article 17 of the European Social Charter, as interpreted by the Committee.

Existing Belgian legislation, both civil and criminal, includes a ban on all forms of violence, chastisement or corporal punishment with regard to children²⁹. This ban is also accompanied by appropriate civil and criminal penalties, as required by the Committee.

Like the European Court of Human Rights, Belgium is fully committed to the view that "children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity"³⁰.

²⁷ European Committee of Social Rights, see above, p. 27.

²⁸ For example, the definitions of what constitute the offences of torture, inhuman treatment and degrading treatment in Belgian law have drawn heavily on the case-law of the European Court of Human Rights, including its judgments concerning the corporal punishment of children.

²⁹ To reiterate, in civil law, Belgian legislation on parental authority is clearly moving towards greater protection for children's interests and rights. In criminal law, any form of violence towards or corporal punishment of children by their parents is specifically covered by Article 405c of the Belgian Criminal Code. Finally, where appropriate, such acts may also be the subject of proceedings under the new Articles 417 b-e, having regard to the case-law of the European Court of Human Rights.

³⁰ ECHR, *A. v. United Kingdom* judgment, see above, § 22.

By enshrining respect for children's integrity in an article of its Constitution, Belgium has explicitly recognised the need to grant them special protection. In practice, this need is reflected in the setting up of numerous specialist bodies and the launching of many campaigns designed to make the public more aware of the problem of violence to children.

Having regard to its legislation to protect children's rights, which includes among other aspects the formal outlawing of all violence against them, Belgium therefore asks the Committee to declare the World Organisation against Torture's collective complaint unfounded.

For these reasons

Belgium asks the European Committee of Social Rights to declare the present collective complaint unfounded.

Agent of the Belgian Government

Jan Devadder
Director General
Legal Advisory service

30 January 2004