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COUNCIL OF EUROPE
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**EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES RIGHTS SOCIAUX**

DECISION ON THE MERITS

23 October 2012

Defence for Children International (DCI) v. Belgium

Complaint No. 69/2011

The European Committee of Social Rights, committee of independent experts established under Article 25 of the European Social Charter (“the Committee”), during its 260th session attended by:

Luis JIMENA QUESADA, President
Colm O’CINNEIDE, Vice-President
Monika SCHLACHTER, Vice-President
Jean-Michel BELORGEY, General Rapporteur
Csilla KOLLONAY LEHOCZKY
Andrzej SWIATKOWSKI
Lauri LEPPIK
Birgitta NYSTRÖM
Rüçhan IŞIK
Petros STANGOS
Alexandru ATHANASIU
Jarna PETMAN
Giuseppe PALMISANO
Karin LUKAS

Assisted by Régis BRILLAT, Executive Secretary,

Having deliberated on 22 and 23 October 2012;

On the basis of the report presented by Giuseppe PALMISANO;

Delivers the following decision adopted on this last date:

PROCEDURE

1. The complaint submitted by Defence for Children International (DCI) was registered on 21 June 2011. DCI alleges that unaccompanied foreign minors unlawfully present or seeking asylum and illegally resident accompanied foreign minors are denied the rights to its full development, social, health, legal and economic protection, social and medical assistance and protection against poverty, in breach of articles 7§10, 11, 13, 16, 17 and 30 of the Revised European Social Charter (“the Charter”) read alone or in conjunction with Article E. Even though they are legally entitled to receive social assistance in Belgium, they are currently being denied such assistance in practice.
2. The Committee declared the complaint admissible on 7 December 2011.
3. In accordance with Article 7 paragraphs 1 and 2 of the Protocol providing for a system of collective complaints (“the Protocol”) and with the Committee’s decision of 7 December 2011 on the admissibility of the complaint, the Executive Secretary sent the text of the decision on admissibility to the Belgian Government (“the Government”) on 14 December 2011. On the same day it was also sent to the States Parties to the Protocol and States that have made a declaration in accordance with Article D§2, and to the organisations referred to in Article 27§2 of the European Social Charter of 1961.
4. In accordance with Rule 31§1 of its Rules, the Committee set 3 February 2012 as the deadline for the Government to present its submissions on the merits of the complaint. At the Government’s request, the Committee President extended the deadline to 3 April 2012. The Government’s submissions on the merits were registered on 3 April 2012 and forwarded to the DCI on 17 April 2012.
5. The Committee set 7 June 2012 as the deadline for the complainant organisation to present its reply. The reply was registered on the same date and forwarded to the Government on 15 June 2012.
6. In accordance with Rule 32A of the Rules, the President invited the Office of the United Nations High Commissioner on Refugees (UNHCR) and the Platform for International Co-operation on Undocumented Migrants (PICUM) to present written observations and the deadline for 13 July 2012. These observations were registered on 13 July 2012.

SUBMISSIONS OF THE PARTIES

A – The complainant organisation

7. DCI invites the Committee to assess that the situation in Belgium of unaccompanied foreign minors unlawfully present or seeking asylum and accompanied foreign minors unlawfully present amount to a violation of Articles 7, 11, 13, 16, 17 et 30 of the Charter read alone or in conjunction with Article E.

B – The Government

8. The Government asks the Committee to find the complaint unfounded in all respects.

RELEVANT DOMESTIC AND INTERNATIONAL LAW

A – Domestic law

9. In their pleadings, the parties refer to the following provisions of domestic law:

10. Article 23 of the Constitution.

“Everyone has the right to lead a life in keeping with human dignity. To this end, the laws, federate laws and rules referred to in Article 134 guarantee economic, social and cultural rights, taking into account corresponding obligations, and determine the conditions for exercising them.

These rights include among others:

- 1° the right to employment and to the free choice of an occupation within the context of a general employment policy, aimed among others at ensuring a level of employment that is as stable and high as possible, the right to fair terms of employment and to fair remuneration, as well as the right to information, consultation and collective negotiation;
- 2° the right to social security, to health care and to social, medical and legal aid;
- 3° the right to decent accommodation;
- 4° the right to the protection of a healthy environment;
- 5° the right to cultural and social fulfilment.”

11. Organic Law of 8 July 1976 on public social welfare centres (“CPAS” Law).

“Article 1: “Everyone has a right to social assistance, designed to ensure for everyone a life compatible with human dignity. Public social welfare centres are created to ensure this assistance in accordance with the conditions laid down by the present law.”

“Article 57§2: “By derogation to the other provisions of the present Law, the public social welfare centre’s remit is confined to:

- 1° Granting emergency medical assistance for foreigners residing illegally in the Kingdom;

2° Noting the situation of need deriving from the fact that the parents do not or cannot fulfil their duty to provide for a foreigner under the age of eighteen who is residing illegally in the Kingdom together with his or her parents.

In the situation mentioned in para. 2 above, social assistance is confined to the material aid required for the child's development and is exclusively provided by a Federal reception centre, in accordance with the conditions and arrangements established by the King (...).

"Article 63

All minors in respect of whom no person is vested with parental authority or has the guardianship or physical custody are entrusted to public social welfare centres of the municipality where the minor is located"

12. Law of 12 January 2007 on reception of asylum-seekers and specific categories of migrants ("*Reception Law*").

Article 2§6 of the Law defines material assistance as:

"assistance, provided by the Federal Agency or its partner, at a reception centre, consisting in particular of accommodation, meals, clothing, medical, social and psychological support and payment of daily allowances. It shall also comprise access to legal assistance, to services such as interpretation and training and to voluntary return programmes."

Article 3 defines reception services :

"Article 3

All asylum seekers shall be entitled to reception services enabling them to lead a life consistent with human dignity. Reception services shall be taken to mean the material assistance provided in accordance with this law or the social assistance provided by public social assistance centres in accordance with the Law of 8 July 1976 on public social assistance centres."

Articles 6 and 60 establish the beneficiaries of material assistance:

"Article 6

§ 1. "... all asylum seekers shall be entitled to material assistance from the point at which they apply for asylum and shall retain this right throughout all asylum proceedings.

§ 2. Entitlement to material assistance shall also apply to the persons referred to in Article 60 of this law".

"Article 60. The Agency shall be responsible for providing material assistance for minors unlawfully present in Belgium with their parents, whose state of need has been confirmed by a public social assistance centre and whose parents are incapable of fulfilling their duty to provide for them. This material assistance shall be provided by the reception facilities run by the Agency. The Crown shall determine the arrangements for providing material assistance."

Article 22 relates to the evaluation of the individual needs of the beneficiary:

" Article 22 § 1. Within thirty days of the selection of a beneficiary's compulsory registration site, his or her individual situation shall be examined in order to determine whether the support provided meets his or her needs. If this is clearly not the case, the compulsory registration site may be changed.

§ 2. For this purpose, the examination of the beneficiary's individual situation shall focus in particular on ostensibly undetectable signs of potential vulnerability such as those found in persons who have experienced torture or other serious forms of psychological, physical or sexual violence.

§ 3. The evaluation of the beneficiary's individual situation shall continue throughout his stay at the reception facility.

§ 4. The Crown shall determine the arrangements for this evaluation."

Articles 23 to 29 deal with the right to medical support:

"Article 23

Beneficiaries of reception services shall be entitled to the necessary medical support to lead a life consistent with human dignity.

Article 24

Medical support shall be taken to mean medical assistance and care, either corresponding to the classification provided for in Article 35 of the Consolidated Law of 14 July 1994 on compulsory health care insurance and allowances, or forming part of routine, everyday provision. The Crown shall decide, under a decree issued by the Council of Ministers, firstly, which forms of medical assistance and care, although listed in the classification cited above, shall not be provided for persons admitted to a reception centre because they are clearly unnecessary and, secondly, which forms of routine, everyday medical assistance and care shall be provided for such persons, although not listed in the classification cited above.

Article 25

§ 1. The Agency shall be responsible for providing the medical support referred to in Article 23 for persons admitted to a reception facility, irrespective of the type of facility to which they are admitted, with the exception of those managed by the type of partner referred to in Article 64.

§ 2. For this purpose each reception facility shall guarantee effective access to medical support for those admitted to it. § 3. This support shall be provided under the responsibility of a doctor who shall retain his or her professional independence vis-à-vis the director or the manager of the facility in question. § 4. Asylum seekers who do not reside at the reception facility designated as the one with which they are required to register may make use of the medical support provided by the Agency. § 5. Beneficiaries of reception services may lodge appeals with the Agency against a decision by the reception facility's doctor concerning the provision of medical support which is not considered necessary in order to lead a life consistent with human dignity, in accordance with Article 47.

Article 26

The Agency or partner may, in a manner determined by the Crown, negotiate agreements with health care establishments laying down the rules for the reimbursement of medical, pharmaceutical and other costs resulting from care provided for beneficiaries.

Article 27

A single medical record shall be kept and stored at the Community reception facility chosen as the compulsory registration site. In the event that a compulsory registration site has been chosen in accordance with Article 11§2 and this site is changed in accordance with Article 12, the file shall be transferred to the new site.

Article 28

The Agency may change or do away with a compulsory registration site in accordance with Articles 12 and 13 if a beneficiary's state of health so warrants in the opinion of his or her personal doctor.

Article 29

Beneficiaries may be required to undergo a compulsory medical examination for public health reasons."

Article 30 addresses the right to psychological support:

“Article 30

Beneficiaries shall be granted the necessary psychological support. For this purpose, the Agency or partner may, in a manner determined by the Crown, negotiate agreements with specialised bodies and institutions.”

Article 33 deals with legal aid:

“Article 33

The Agency or partner shall ensure that beneficiaries have proper access to level-1 and level-2 legal assistance, as referred to in Articles 508/1 and 508/23 of the Judicial Code. For this purpose the Agency or partner may negotiate agreements with associations set up to protect aliens’ rights or with legal advice bureaux.”

Articles 40 and 41 provide the framework for the reception of unaccompanied foreign minors in observation and guidance centres:

“Article 40. Appropriate support shall be provided for unaccompanied minors during an observation and guidance phase in a centre designed for this purpose. The Crown shall decide on the procedures and operating rules that apply to observation and guidance centres.

Article 41 § 1. An observation and guidance centre shall admit unaccompanied minors who do not have access to the country under Article 3 or Article 52§1 of the Law of 15 December 1980 on the entry, residence, settlement and removal of aliens, pending the possible enforcement of a refoulement order. Such centres shall be assimilated with a specific location on the border.

§ 2. Aliens who declare themselves to be minors and about whom there can be no doubt as to their minority shall be admitted to an observation and guidance centre as soon as they arrive at the border. The age of aliens who declare themselves to be minors and about whom the border control authorities express a doubt as to their minority shall be determined within three working days of their arrival at the border. Where, as a result of unforeseeable circumstances, this examination cannot take place within this time limit, it may be extended by three working days.

§ 3. Unaccompanied minors shall be admitted to an observation and guidance centre within twenty-four hours of their arrival at the border for those referred to in the first sentence of paragraph 2 above or of the notification of the decision regarding their age for those referred to in the second sentence of paragraph 2 above, and shall be permitted to remain there for a maximum period of fifteen days, which may be extended by five days under duly substantiated exceptional circumstances. During the period referred to in the previous sentence, the minor shall be considered to have been authorised to enter the country.

§ 4. Notification of decisions concerning minors’ ages shall be presented to guardians and the authorities responsible for matters relating to asylum, access to territory, residence and removal of aliens at the same time as it is presented to those directly concerned.

§ 5. If a refoulement order cannot be executed within the period of 15 days referred to in paragraph 3, the unaccompanied minor shall be authorised to enter the country”.

13. Several Royal Decrees have been adopted for the implementation of the “*Reception Law*”, such as the Royal Decree of 9 April 2007 establishing the operational rules and regulations applicable to observation and guidance centres for unaccompanied foreign minors (implementing Articles 19 and 40 of the Reception Law), published on 7 May 2007 (“Royal Decree COO”).

“Article 3: All unaccompanied minors shall be treated equally at the centre irrespective of their administrative status under the Law of 15 December 1980 on the entry, residence, settlement and removal of aliens.”

“Article 7: Residence at a centre shall last for a period of no more than fifteen days, renewable once.

Following this period, unless it is possible to provide them with a more suitable and specific form of accommodation, unaccompanied minors shall be transferred to the most appropriate reception facility within the meaning of Article 2, sub-paragraph 10° of the law.

At all events, the centre shall take all the necessary steps to enable minors under the age of 13 or those with psychological disorders or mental health problems or who are victims of trafficking in human beings to be directed as quickly as possible to the place where they will be given the specific support most suited to their vulnerable situation.”

14. Royal Decree of 24 June 2004 on the conditions for granting material assistance.

“Article 2: To obtain the material assistance referred to in Article 57, §2, sub-paragraph 2 of the Law of 8 July 1976 on public social assistance centres (CPASs), a request must be submitted to the CPAS covering the location in which the minor ordinarily resides either by the minor him- or herself, or on his or her behalf by his or her parents (or any other person effectively exercising parental authority).”

15. Programme Law of 24 December 2002 on guardianship of foreign unaccompanied minors (Guardianship Law).

“Article 3

§ 1. A department called the “guardianship department” shall be set up within the Federal Public Justice Service and assigned the task of making specific guardianship arrangements for unaccompanied minors. The membership and functioning of this department shall be determined by the Crown, under a decree issued by the Council of Ministers.

§ 2. The guardianship department shall co-ordinate and supervise the practical organisation of the work of guardians. Its role shall be:

- 1° to appoint a guardian for unaccompanied minors so that somebody can represent them;
- 2° to identify unaccompanied minors and, in the event of disputes over their age, to have their age checked by means of a medical test under the conditions described in Article 7;
- 3° to co-ordinate contacts with the authorities responsible for matters relating to asylum, access to territory, residence and removal of aliens and those responsible for reception and accommodation, as well as the authorities of the minors’ country of origin – with a view in particular to tracing their family – or with any other reception facility;
- 4° to see to it that a lasting solution in the child’s best interest is sought by the competent authorities as promptly as possible;
- 5° to certify persons who can be appointed as guardians and, where appropriate, to withdraw such certification;
- 6° to maintain a list of certified persons, with a record for each one of how many minors for whom they act as guardians;
- 7° to ensure that persons appointed as guardians are given appropriate training on issues relating to unaccompanied minors.”

"Article 5

The type of guardianship provided for in the first sentence of Article 3§1 shall apply to all persons meeting the following conditions:

- under eighteen years of age;
- not accompanied by a person exercising parental authority or guardianship (under the applicable law in accordance with Article 35 of the Law of 16 July 2004 establishing the Code of Private International Law);
- a national of a non-member country of the European Economic Area;
- and in one of the following situations:
 - has asked to be granted refugees status, or;
 - does not meet the conditions for entry to and residence in the country laid down by the laws on the entry, residence, settlement and removal of aliens.

Article 6

§ 1. Any authority which is aware of the presence, at the border or in the country, of a person who appears to be or claims to be under the age of 18 and seems to meet the other conditions listed in Article 5, shall immediately inform the guardianship department and the authorities responsible for matters relating to asylum, access to territory, residence and removal of aliens and shall forward to them any information in its possession on the situation of the person concerned.

§ 2. As soon as it receives such information, the guardianship department shall assume responsibility for the persons concerned and:

- 1° identify them, check their age where appropriate and check whether they meet all the other conditions in Article 5;
- 2° if they are minors, immediately assign a guardian to them;
- 3° contact the relevant authorities to arrange for their accommodation during the two procedures described above. Accommodation of minors shall take place in compliance with the legal provisions governing entry to the country”.

"Article 8

§ 1. Once the guardianship department considers it to have been established that the person for which it has taken responsibility does satisfy the conditions listed in Article 5, it shall immediately appoint a guardian.

§ 2. Notice of their appointment shall be given immediately to guardians as well as the authorities responsible for matters relating to asylum, access to territory, residence and removal of aliens and any other authority concerned. The minor shall receive details of the guardian's identity without delay, along with information on the guardianship arrangement.

Article 9.

§ 1. Subject to the provisions of Article 10§2, the role of guardians is to represent the unaccompanied minor in all legal proceedings and other procedures provided for by the law on the entry, residence, settlement and removal of aliens together with any other judicial or administrative procedure. They are particularly responsible for the following matters:

- 1° lodging applications for asylum or authorisation to reside in Belgium;
- 2° seeing to it, in the minor's interest, that the laws on entry, residence and removal of aliens are respected;
- 3° exercising legal remedies. Unaccompanied minors may, however, file their own application for asylum without being represented by a guardian.

§ 2. Guardians shall assist minors at every stage of the proceedings described in § 1 and shall be present at all hearings. In cases of force majeure, guardians may ask for hearings to be postponed. (If a guardian is unavailable for any other reason, in an emergency, he or she may be replaced by an approved guardian under conditions laid down by the Crown. The Crown shall decide on the remuneration to be paid to this guardian by an order passed in the Council of Ministers.) If necessary, minors shall be assisted by an interpreter. The interpreter's costs shall be covered by the authority conducting the hearing.

Article 10

§1 “Guardians shall take care of unaccompanied minors personally during their residence in Belgium. They shall ensure that minors go to school and are given appropriate psychological support and medical care. Where they are authorised to enter the country and it is decided not to send them to a specific centre for unaccompanied minors, guardians shall ensure that the authorities responsible for their reception take the necessary steps to find them appropriate accommodation, where appropriate with a family member, a foster family or with an adult who takes care of them. Guardians shall ensure that respect is shown for the minor’s political, philosophical and religious opinions.”

16. Royal Decree of 22 December 2003.

“Article 5 “To provide permanent assistance, the guardianship department shall set up a 24-hour emergency phone line for guardians, the relevant authorities and any other interested person”.

B – International standards and acts

17. DCI refers to the United Nations Convention on the Rights of the Child of 20 November 1989, which was ratified by Belgium, and in particular to the following articles:

“Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures. (...)

“Article 27

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.”

18. As to the application of Article 27 of the United Nations Convention on the Rights of the Child, to which DCI refers, the Committee on the Rights of the Child states as follows in General Comment No. 6 on the Treatment of Unaccompanied and Separated Children Outside Their Country of Origin (document CRC/GC/2005/6):

“§44. States should ensure that separated and unaccompanied children have a standard of living adequate for their physical, mental, spiritual and moral development. As provided in Article 27§2 of the Convention, States shall provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.”

19. Concerning the right to satisfaction of basic material needs of persons in situations of extreme hardship, on 19 January 2000 the Committee of Ministers of the Council of Europe adopted Recommendation No. R(2000)3 to member states:

(...) "Principle 2: The right to the satisfaction of basic human material needs should contain as a minimum the right to food, clothing, shelter and basic medical care.

(...) Principle 4: The exercise of this right should be open to all citizens and foreigners, whatever the latter's position under national rules on the status of foreigners, and in the manner determined by national authorities." (...).

20. Regarding unaccompanied migrant minors, the Committee of Ministers issued Recommendation CM/Rec (2007) 9 to member states on life projects for unaccompanied migrant minors, which was adopted on 12 July 2007:

"§17. The competent authorities should undertake to ensure that the life project comprises measures to protect the minors in order to help them achieve the aforementioned objectives. These measures should include access to:

- appropriate accommodation;
- specialised support provided by properly trained personnel;
- appointment of specially trained guardians and/or legal representatives;
- clear and full information about his or her situation in a language that he or she understands;
- basic services, including food, medical care and education."

21. The Parliamentary Assembly of the Council of Europe adopted in 2006 Resolution 1509(2006) on the human rights of irregular migrants:

"§ 5. The Assembly considers that, as a starting point, international human rights instruments are applicable to all persons regardless of their nationality or status. Irregular migrants, as they are often in a vulnerable situation, have a particular need for the protection of their human rights, including basic civil, political, economic and social rights."

"§ 13. In terms of economic and social rights, the Assembly considers that the following minimum rights, *inter alia*, should apply:

13.1. adequate housing and shelter guaranteeing human dignity should be afforded to irregular migrants;

13.2. emergency health care should be available to irregular migrants and states should seek to provide more holistic health care, taking into account, in particular, the specific needs of vulnerable groups such as children, disabled persons, pregnant women and the elderly;"

22. According to the United Nations High Commissioner for Refugees (UNHCR) Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum of 1997:

"The basic guiding principle in any child care and protection action is the principle of the "best interests of the child.

Effective protection and assistance should be delivered to unaccompanied children in a systematic, comprehensive and integrated manner."

"Children seeking asylum, particularly if they are unaccompanied, are entitled to special care and protection."

“In recognition of the particular vulnerability of unaccompanied children, every effort should be made to ensure that decisions relating to them are taken and implemented without any undue delays.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 17 OF THE CHARTER

Article 17 –The right of children and young persons to social, legal and economic protection

Part I: “Children and young persons have the right to appropriate social, legal and economic protection.”

Part II: “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.”

Applicability of Article 17 to the persons concerned by the complaint

23. Under paragraph 1 of the Appendix to the Charter:

“1 Without prejudice to Article 12, paragraph 4, and Article 13, paragraph 4, the persons covered by Articles 1 to 17 and 20 to 31 include foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned, subject to the understanding that these articles are to be interpreted in the light of the provisions of Articles 18 and 19.

This interpretation would not prejudice the extension of similar facilities to other persons by any of the Parties.”

Arguments of the complainant organisation

24. The DCI complains of violations of specific rights guaranteed under the Charter, perpetrated by the Belgian State against:

- illegally resident unaccompanied foreign minors and asylum-seekers, and
- illegally resident accompanied foreign minors.

25. According to the DCI, a strict interpretation of paragraph 1 of the Appendix to the Charter would leave some of the persons concerned by the present complaint unprotected, namely unaccompanied foreign minors who are not requesting asylum, and children in families illegally resident in Belgium. In the same vein, the Committee on Social Rights has interpreted the Charter in such a way as to give life and meaning to the fundamental social rights, in line with the other rules of international law to which it belongs (*International Federation of Human Rights Leagues v. France*, Complaint no. 14/2003, decision on the merits of 8 September 2004, § 29; *Defence for Children International v. Netherlands*, Complaint no.47/2008, decision on the merits of 20 October 2009, §§ 34 and 35), and not so as to confer minimum scope on the undertakings of the Parties (*World Organisation against Torture v. Ireland*, Complaint no. 18/2003, decision on the merits of 7 December 2004, § 60).

26. The DCI recalls that according to the Committee, the restriction set out in paragraph 1 of the Appendix “*attaches to a wide variety of social rights and impacts on them differently*”, and “*should not end up having unreasonably detrimental effects where the protection of vulnerable groups of persons is at stake*” (*Defence for Children International v. Netherlands 47/2008*, decision of 20 October 2009, §§ 37 and 38, and *International Federation of Human Rights Leagues v. France*, Complaint No. 14/2003, decision of 8 September 2004, § 30). Children are extremely vulnerable persons and have very limited influence over their place of residence. The adult’s choice should not result in unfit living conditions for the child. Furthermore, the DCI considers that the right to social, legal and economic protection, like healthcare, constitutes a vital precondition for the preservation of human dignity. Any breach of this right must be deemed contrary to the Charter.

Government’s pleas

27. The Government says that it realises the need to find the interpretation best suited to the purpose of the treaty (*World Organisation against Torture v. Ireland*, Complaint No. 18/2003, decision on the merits of 7 December 2004, §60), and that restrictions on rights must be interpreted in such a way as to leave intact the essence of the right in question (*International Federation of Human Rights Leagues v. France*, Complaint No. 14/2003, decision on the merits of 8 September 2004, §§ 27-29). It nevertheless invites the Committee to take account of paragraph 1 of the Appendix to the Charter when examining the present complaint.

Assessment of the Committee

28. The Committee notes that, according to an argument put forward by States Parties in response to other complaints concerning the rights of foreign minors unlawfully present in the country (*Defence for Children International v. the Netherlands*, §8, and *International Federation of Human Rights Leagues v. France*, § 18), the implication of paragraph 1 of the Appendix to the Charter is that the persons concerned by this complaint (accompanied and unaccompanied foreign minors unlawfully present in a country) would not come within the personal scope of Article 17, as they are not nationals of other Parties “lawfully resident or working regularly” within the territory of the Party concerned. The Committee nonetheless points out

that, the restriction of the personal scope included in the Appendix should not be read in such a way as to deprive foreigners coming within the category of unlawfully present migrants of the protection of the most basic rights enshrined in the Charter or to impair their fundamental rights such as the right to life or to physical integrity or the right to human dignity (Defence for Children International v. the Netherlands, Complaint No. 47/2008, *ibid*, §19; International Federation of Human Rights Leagues v. France, *ibid*, §§ 30 and 31).

29. The Committee indeed considers that, beyond the letter of paragraph 1 of the Appendix, the restriction on personal scope contained therein should be interpreted – as is generally the case for any provision of an international treaty – in the light of the object and purpose of the treaty concerned and in harmony with other relevant and applicable rules of international law (Vienna Convention on the Law of Treaties, 23 May 1969, Article 31, paragraphs 1 and 3), including first and foremost the peremptory norms of general international law (*jus cogens*), which take precedence over all other international norms and from which no derogation is permitted (Vienna Convention on the Law of Treaties, 23 May 1969, Article 53).

30. Concerning the object and purpose of the Charter, the Committee reiterates that it is a human rights treaty which aims to implement at a European level, as a complement to the European Convention on Human Rights, the rights guaranteed to all human beings by the Universal Declaration of Human Rights of 1948. As the Committee already found (International Federation of Human Rights Leagues v. France, Complaint No. 14/2003, decision on the merits of 8 September 2004, §§ 27 and 29), the purpose of the Charter, as a living instrument dedicated to the values of dignity, equality and solidarity, is to give life and meaning in Europe to the fundamental social rights of all human beings. It is precisely in the light of that finding that the Committee considers – as the Government pointed out in its submissions – that a teleological approach should be adopted when interpreting the Charter, i.e. it is necessary to seek the interpretation of the treaty that is most appropriate in order to realise the aim and achieve the object of this treaty, not that which would restrict the Parties' obligations to the greatest possible degree (World Organisation against Torture v. Ireland, Complaint No. 18/2003, decision on the merits of 7 December 2004, § 60). It is in point of fact this teleological approach that leads the Committee not to interpret paragraph 1 of the Appendix in such a way as to deny foreign minors unlawfully present in a country (whether accompanied or unaccompanied) the guarantee of their fundamental rights, including the right to preservation of their human dignity.

31. In addition, such a strict interpretation of the Appendix, which would deprive foreign minors unlawfully present in a country of the guarantee of their fundamental rights, would not be in harmony with the United Nations Convention on the Rights of the Child, which all member states of the Council of Europe have ratified. It is therefore justified for the Committee to have regard to this convention, adopting the interpretation given to it by the United Nations Committee on the Rights of the Child, when it rules on an alleged violation of any right conferred on children by the Charter (see *World Organisation against Torture v. Ireland*, Complaint No. 18/2003, decision on the merits of 7 December 2004, § 61).

32. In this connection, following the guidance of the Committee on the Rights of the Child, the Committee considers that in the present case the personal scope of the Charter must be determined according to the principle of the child's best interests. In this respect it notes that, according to General Comment No. 5 (document CRC/GC/2003/5, §§ 45-47) of the Committee on the Rights of the Child "Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions – by, for example, a proposed or existing law or policy or administrative action or court decision, including those which are not directly concerned with children, but indirectly affect children".

33. Furthermore, this choice in applying the Charter follows from the legal need to comply with the peremptory norms of general international law (*jus cogens*) such as the rules requiring each state to respect and safeguard each individual's right to life and physical integrity. A strict interpretation of paragraph 1 of the Appendix, which would result in the non-recognition of the States Parties' obligation to guarantee foreign minors unlawfully present in their territory the enjoyment of these fundamental rights, would be incompatible with international *jus cogens*.

34. In the light of the latter observations and of the mandatory, universally recognised requirement to protect all children – requirement reinforced by the fact that the United Nations Convention on the Rights of the Child is one of the most ratified treaties at world level, the Committee considers that paragraph 1 of the Appendix should not be interpreted in such a way as to expose foreign minors unlawfully present in a country to serious impairments of their fundamental rights on account of a failure to give guarantee to the social rights enshrined in the revised Charter.

35. However, although the restriction of personal scope contained in the Appendix does not prevent the application of the Charter's provisions to unlawfully present foreign migrants (including accompanied or unaccompanied minors) in certain cases and under certain circumstances, the Committee wishes to underline that an application of this kind is entirely exceptional. It would in particular be justified solely in the event that excluding unlawfully present foreigners from the protection afforded by the Charter would have seriously detrimental consequences for their fundamental rights (such as the right to life, to the preservation of human dignity, to psychological and physical integrity and to health) and would consequently place the foreigners in question in an unacceptable situation, regarding the enjoyment of these rights, as compared with the situation of nationals and of lawfully resident foreigners.

36. Since it is exceptional to apply the rights enshrined in the Charter to persons not literally included in the Charter's scope under paragraph 1 of the Appendix, the Committee considers that this category of foreigners (which includes accompanied or unaccompanied minors not lawfully present in a country) is not covered by all the provisions of the Charter, but solely by those provisions whose fundamental purpose is closely linked to the requirement to secure the most fundamental human rights and to safeguard the persons concerned by the provision in question from serious threats to the enjoyment of those rights.

37. Moreover, the risk of impairing fundamental rights is all the more likely where children – *a fortiori* migrant children unlawfully present in a country – are at stake. This is due to their condition as "children" and to their specific situation as "unlawful" migrants, combining vulnerability and limited autonomy. As a result, in particular, of their lack of autonomy children cannot be held genuinely responsible for their place of residence. Children are not able to decide themselves whether to stay or to leave. Furthermore, if they are unaccompanied, their situation becomes even more vulnerable and the State should be managed entirely by the State, which has a duty to care for children living within its territory and not to deprive them of the most basic protection on account of their "unlawful" migration status.

38. In the light of the above general observations, the Committee, referring specifically to Article 17 of the Charter and recalling its decisions (*International Federation of Human Rights Leagues v. France*, Complaint No. 14/2003, decision on the merits of 8 September 2004, §§ 30-32; *Defence for Children International v. the Netherlands*, Complaint No. 47/2008, decision on the merits of 20 October 2009, §§ 34-38), considers that this provision is applicable to the persons concerned by this complaint. Article 17, in particular paragraph 1 thereof, requires States Parties to fulfil positive obligations relating to the accommodation, basic care and protection of children and young persons. Not considering that States Parties are bound to comply with these obligations in the case of foreign minors who are in a country unlawfully would therefore mean not guaranteeing their fundamental rights and exposing the children and young persons in question to serious threats to their rights to life, health and psychological and physical integrity and to the preservation of their human dignity.

39. Consequently, the Committee considers that the children and young persons concerned by this complaint come within the scope of Article 17 of the Charter.

Alleged violation of Article 17

A – Submissions of the parties

1. The complainant organisation

40. The DCI alleges that although unaccompanied foreign minors and illegally resident accompanied foreign minors are eligible for social assistance (in the form of accommodation in a reception centre) in Belgium, since 2009 they have in practice been excluded from such assistance because of the saturation of the reception network. This lack of reception facilities for both unaccompanied foreign children who are not asylum-seekers (apart from those who are in a particularly vulnerable situation) and children in legally resident families means that these children cannot exercise their right to appropriate social, legal and economic protection.

41. According to the DCI, 1 000 individuals eligible for reception, including asylum-seekers (in families or alone), illegally resident families with children and unaccompanied foreign minors have been placed in hotels pending availability of places in the reception centres, without support of any kind. A further 1 000 have not received any solution of reception by the Federal Agency for the reception of asylum-seekers (FEDASIL) and have simply been left in the streets. These latter persons include between two and three hundred children, unaccompanied foreign minors, who should be treated as a priority group.

42. The DCI contends that this situation is in breach not only of Article 17 of the Charter but also of Articles 3 and 8 of the European Convention on Human Rights and the Convention on the Rights of the Child (CRC).

Unaccompanied foreign minors

43. The DCI points out that all unaccompanied foreign minors – whatever their residence situation – are entitled to the material assistance provided for by the Law of 12 January 2007 on reception of asylum-seekers and certain other categories of foreigners.

44. According to the Law, any authority which has knowledge of the presence of an individual who appears to be an unaccompanied foreign minor must inform the Guardianship Department, as well as the Aliens Office and the Office of the General Commissioner on Refugees and Stateless Persons (CGRA) if the individual is an asylum-seeker. The Guardianship Department arranges for emergency accommodation, and in the event of doubt about the person's age, arranges for his or her identification. If the concerned person is identified as an under-age person, he or she is taken in by an Observation and Guidance Centre (COO). A guardian is appointed (Article 40 of the Law of 12 January 2007). The unaccompanied foreign minor must then be transferred to the most suitable reception structure.

45. Special aid for young people in difficulty – in addition to the general social aid provided by the Federal authorities – is also provided for under Communities legislation (Decree of the French Community of 4 March 1991 on Aid for Youth; Decree of 7 March 2008 of the Flemish Community).

46. Saturation of the FEDASIL network has, according to the DCI, deprived many children and young persons of access to reception facilities, leaving them on the streets in situations of total deprivation and vulnerability. On 20 October 2009, FEDASIL issued an instruction to the effect that because of the saturation of the network the COO could no longer take in unaccompanied foreign minors who were not asylum-seekers, apart from those in situations of vulnerability. This unlawful instruction was cancelled, but the DCI contends that it continues to be applied in substance. According to the Guardianship Department, 300 to 500 unaccompanied minors have failed to obtain accommodation from FEDASIL since September 2009, the figure being 258 in 2010, but the DCI considers that these figures are much higher in view of the influx of unaccompanied foreign minors.

47. According to the DCI, the right to reception has been violated, thus depriving unaccompanied foreign minors of accommodation which would help them meet their own basic needs. As a result, these persons receive no support or assistance, jeopardising their right to food, healthcare, social welfare, education, family life, etc. This lack of reception facilities also has serious effects on these young people's legal situation, depriving them of access to information on the progress of administrative and other procedures concerning them (convocations and official notifications of decisions are sent to the person's chosen address and failing that, to the administration itself). This means that many such persons never receive the convocations and notifications, despite the fact that any failure to respond to a convocation or to take action on a decision has major consequences for the subsequent procedure.

48. This being the case, the DCI alleges that unaccompanied foreign minors do not enjoy the legal, economic and social protection laid down in the Charter.

a) Economic and social protection

49. According to the DCI, since October 2009 FEDASIL has only been accommodating unaccompanied foreign minors who are asylum-seekers and children who are deemed vulnerable.

50. Even though the DCI acknowledges that additional reception places have been provided, they are still insufficient to accommodate all unaccompanied foreign minors.

51. According to the complainant organisation, 1 675 unaccompanied foreign minors have been placed in Belgian reception structures (FEDASIL, CPAS, *Aide à la jeunesse*). But the fact is that in 2011 more than 3 000 such children arrived in Belgium. Therefore, still according to the DCI, over 1 300 young people have not been catered for by the appropriate structures. Other figures which have been provided by the DCI but which are deemed lower than the real levels are as follows: the accommodation crisis prevented 461 young people from being taken in in 2011, and 258 in 2010. 688 youngsters were placed in hotels, but the psychosocial support provided is incompatible with the *loi accueil*, in breach of the right to effective legal, economic and social protection. The DCI provides sample complaints about

unaccompanied foreign minors living conditions in the hotels: overcrowded rooms, lack of hygiene, insalubrity and safety and security problems.

b) Legal protection

52. Legal protection is provided for unaccompanied foreign minors in that the Guardianship Department appoints a guardian, one of whose duties is to request the appointment of a lawyer. According to the DCI, the time-limits for the initial interview at the Guardianship Department are far too long, with the young person often having to wait up to one month. Subsequently, the periods for appointing a guardian are also very long, often up to 8 months. No provisional guardian is appointed for the young people in question. Meanwhile, the young person has no lawyer, and legal protection cannot be guaranteed without a lawyer.

53. In view of the increasing numbers of unaccompanied foreign minors being registered (3 100 in 2011 as against 2 500 on average the previous years), the DCI reproaches that the Guardianship Department has refocused its work on identifying minors to the detriment of its other tasks such as contacting the authorities with an eye to ensuring accommodation for the young people and appointing guardians. The DCI also sharply criticises the type of tests used (virtually exclusively medical tests) and the manner in which age testing for identifying minors is carried out (excessively long deadlines and lack of support for the young people). In the DCI's view, such tests are more a means of reducing the influx of unaccompanied foreign minors into the Belgian reception network than anything else.

54. The DCI notes that the Guardianship Department itself, a State body, confirms that the right to the appointment of a guardian and to accommodation is being flouted in practice.

Children illegally resident with their parents

55. The right to social assistance for children illegally resident with their parents is explicitly recognised by Article 57§2.2 of the Law of 8 July 1976. Social assistance is nevertheless confined to the requisite material aid for the child's development, consisting in receiving the child and his or her family in a Federal Reception Centre (managed by FEDASIL, and under special agreements, by the Red Cross [*Croix Rouge* and *Rode Kruis*]). Where the family refuses to reside in this centre, assistance is confined to emergency social aid in leaving the country or emergency medical aid.

56. According to the DCI, however, because of the saturation of the reception network, FEDASIL has since 2009 been refusing to take in illegally resident families, as they are not prioritised as compared with asylum-seekers and are not registered on any waiting list. As a result of this situation, many families are forced to live in the street with their children. The public social welfare centres, which are competent at the municipal level, have also refused to intervene, referring the responsibilities to

FEDASIL. The only legal possibility involves lodging a judicial appeal with the Labour Court in order to force FEDASIL to accommodate them. According to the organisation, 1773 illegally resident families had still not been granted accommodation on 30 September 2010.

57. The DCI also alleges a targeted refusal to accommodate these families, such refusal being systematic even when the network is not saturated. During their hearing at the Chamber of Representatives on 17 November 2011, the Federal ombudsmen stressed that “from 6 December 2010 to 26 April 2011, FEDASIL was able to provide places for all the asylum-seekers applying, whereas during this period, no illegally resident family was accommodated, unless the FEDASIL was ordered to do so by a court”. For its part, in its 2010 annual report, FEDASIL expressly confirms that since April 2009 it has taken in no illegally resident families with under-age children in need without being ordered to do so by a court, accompanied by a coercive fine. Moreover, the Government confirms in its submissions that while an alternative solution to cope with the saturation of the network is possible for asylum-seekers, the law does not provide any alternative to FEDASIL for families with illegally resident minors. This can probably be explained by the fact that historically, the Agency’s primary task was to take in asylum-seekers. The DCI notes here that under Article 18 of the *loi accueil*, where the accommodation capacities are temporarily exhausted, the Agency must provide emergency accommodation for those eligible for aid. This article applies to all beneficiaries of reception facilities.

58. The DCI concludes that the situation is discriminatory because neither the State nor FEDASIL have looked for any genuine or structural solution to the problem of accommodating these families, as FEDASIL is legally required to do under Article 60 of its own *loi accueil*. According to the DCI, these families have been left in a state of extreme insecurity.

59. According to DCI, between January 2011 and April 2012, 774 families received a negative decision on their applications for accommodation. These decisions concerned 3 011 persons (the DCI did not know the number of children involved). In 2011, 553 families received a negative response to their request for accommodation; the latter comprised 901 adults and 1 242 minors. The DCI also notes that in 2011, FEDASIL received 43 court orders to take in families. Individual complaints were also lodged with the Federal Ombudsman, who addressed 17 recommendations to FEDASIL between 1 March 2011 and 24 May 2012.

60. According to the DCI, in 2009, the families accommodated accounted for 6.7% of the population of the reception network. In September 2011, they only represented 1% of all persons taken in. According to the Government, some families repeatedly failed to report to FEDASIL, and the DCI wonders if these families were actually in a position to receive information if they were living in the street.

2. The respondent Government

61. The Government notes that according to the introductory paragraph to Part I of the Charter and Article A of Part III, the aims of the text must be pursued by all appropriate means. According to the Government, the Belgian authorities are taking all the necessary action to achieve these rights, although complete results cannot always be guaranteed.

62. The Government attributes the saturation of the reception network to several factors:

- The larger target group assigned to the FEDASIL, whose original task had been to take in asylum-seekers;
- The major increase in the number of asylum applications;
- The granting of reception services to asylum-seekers for the whole duration of the procedure;
- The introduction into legislation of a procedure for granting residence permits for medical reasons.

63. The Government lists the measures taken in the light of the saturation of the reception network in order to increase reception capacities, limit the number of entries into the reception network and encourage exits.

- The Belgian State has been working to expand reception capacities by increasing the number of reception places in the existing centres and creating new reception, emergency and structural places. In this connection, the Government has appointed a delegate in charge of reception places. There were 18 684 places at the end of 2009, including emergency structures, and over 23 400 places at 31 December 2011. The budget of FEDASIL has increased, raising the annual grant from € 235 399 000 in 2007 to € 347 427 000 in 2011.

- In May 2009, owing to the lack of places in the reception network, those eligible for reception facilities were housed in hotels. In November 2009, FEDASIL set 1200 persons as the operational limit for managing such hotel accommodation. At the end of March 2011, in view of the unsuitable accommodation conditions and the availability of new places, FEDASIL decided no longer to use hotels.

- Where emergency reception is concerned, FEDASIL has provisionally installed reception beneficiaries in military barracks (some 90 persons in summer 2008 and 40 at the beginning of 2009); rooms originally meant for leisure activities have been converted into dormitories (112 places), and tents and housing containers were installed (a total of 400 beds) in 2009. Between December 2010 and 13 December 2011 a transit centre was also set up with a capacity of 250 places. Furthermore, between December 2008 and January 2012, more than 900 Federal structural places were introduced. In 2012, further initiatives should be launched, with the opening of new Federal reception initiatives "FOIs" providing more than 200 additional places.

- In short, since the end of 2008, a total of over 8 000 reception places (structural and emergency/transit) have been created within FEDASIL and its partners (Belgian Red Cross, NGOs and the CPAS). Places are also to be created in the context of Local Reception Initiatives (CPAS).
- Where unaccompanied minor children are concerned, in January 2012 between 1 250 and 1 330 were accommodated, as compared with 375 in June 2006. Accordingly, in addition to the reception places in hotels (between 100 and 200 per month), almost 600 places were created from December 2010 to December 2011. At 12 March 2012, FEDASIL has 1157 places in its reception network and partners, with an occupancy rate of 1172 places. Despite the increased capacity for taking in unaccompanied foreign minors, the Government acknowledges that 166 unaccompanied minors were still in hotels at 12 March 2012.
- FEDASIL has also taken action to improve the rota system for its centres and those of its partners.
- There have been legal amendments to limit the right of reception when submitting a third asylum request or any subsequent request, and a change to the rules on extension of entitlement to material assistance for rejected asylum-seekers.
- Additional resources have been granted in order to reduce the length of asylum application procedure, as the latter affects the asylum-seekers' period of residence in the reception network.
- In connection with unaccompanied minor children, recruiting additional staff and the introduction of new co-operation processes have enabled the Guardianship Department to identify the young people within a reasonable time. Moreover, 60 new guardians have been recruited for 2010.
- In connection with unaccompanied minor children holding recognised refugee status, FEDASIL has signed agreements with organisations on providing support to these young people.
- Assistance has been provided for voluntary repatriation of minors illegally resident with their parents and asylum-seekers who are awaiting the outcome of the procedure but whose applications are habitually rejected.
- Lastly, consultations have been reintroduced among the different agencies responsible for unaccompanied foreign minors.

64. The Government acknowledges that because of the saturation of the reception network, FEDASIL has been unable to discharge all its duties vis-à-vis families with illegally resident minors and unaccompanied foreign minors.

Illegally resident families with minors:

65. Article 57§2 (2) of the Law of 8 July 1976 and the Royal Decree of 24 June 2004 entitle illegally resident families with minors to material assistance. In view of the total saturation of the network, FEDASIL has decided to place these families on a waiting list, inviting them to report every day to check on the availability of places in the reception centres. At the end of April 2009, FEDASIL opted for telling families the blunt truth that FEDASIL was no longer able to provide them with accommodation. The Government admits that an alternative solution had been envisaged by the Law on asylum-seekers, but not for such families with illegally resident minors. Some of the families took legal action and obtained either social aid from the CPAS or a reception place in the FEDASIL network. In other situations, places have been provided thanks to the intervention of the Board of Federal Ombudsmen. Sometimes, after such legal action or the involvement of the Ombudsmen, despite invitations from FEDASIL, certain families have not shown up or have refused the legal protection offered.

Unaccompanied foreign minors

66. The Government acknowledges that the reception crisis has also impacted on unaccompanied foreign minors and led to changes in the organisation of their reception. Where an unaccompanied minor applies for asylum, the Aliens Office receiving such application reports the young person to the Guardianship Department, which takes charge of him or her, appoints a guardian and submits a request for accommodation to FEDASIL. If a place is available, the unaccompanied foreign minor will be directed to one of the two Observation and Guidance Centres (COO). Where no place is available, he or she is directed exceptionally to a hotel if there is any doubt about his or her age. The Government does, however, note that according to FEDASIL, for the period from mid-July 2011 to mid-December 2011, 78% of the young people declaring themselves as unaccompanied foreign minors, after medical tests, were identified by the Guardianship Department as being of full age. The Government also contends that even if hotel accommodation is not ideal, it at least prevents the unaccompanied foreign minors from having to live in the street. The Government claims that contrary to the DCI's assertions, unaccompanied foreign minors accommodated in hotels are not left without support. FEDASIL provides for medical support. In the case of non-asylum-seeking unaccompanied foreign minors, FEDASIL accommodates the most vulnerable children in its Observation and Guidance Centres. The latter centres also take in unaccompanied foreign minors for whom FEDASIL has been ordered by a court to provide accommodation. FEDASIL has noted that some of the unaccompanied foreign minors who have applied for accommodation or for whom FEDASIL has been ordered to provide a place have left the reception centre of their own free will.

67. Concerning the lack of information on the progress of their procedure stemming from the failure to provide reception facilities, the Government notes that in every procedure the applicant or his or her representative must supply a residential or home address. In the case of an unaccompanied minor, the guardian may choose the address, and also initiate the administrative and/or judicial procedures, keeping

the applicant informed. In view of these measures, the Government considers that Belgium respects the obligations of Article 17 of the Charter.

B – Assessment of the Committee

68. The Committee notes that the DCI does not contest the essence of the legislation, but rather the fact that it is not being applied.

69. The Committee recalls that when considering several complaints, it has specified the nature of States' obligations vis-à-vis implementation of the Charter. The purpose and aim of the Charter is to protect not theoretical but effective rights (CIJ v. Portugal, Complaint No. 1/1998, decision on the merits of 9 September 1999, §32; FEANTSA v. Slovenia, Complaint No. 53/2008, decision on the merits of 8 September 2009, §28). It considers that proper application of the Charter cannot be achieved solely through legislation if its application is neither effective nor strictly controlled.

70. In connection with the means of achieving the aims set out in the Charter, the Committee stresses that for the application of the Charter, it is incumbent on States Parties not only to take legal initiatives but also to provide for the requisite resources and procedures to facilitate full exercise of the rights guaranteed by the Charter (International Movement ATD Fourth World v. France, Complaint No. 33/2006, decision on the merits of 5 December 2007, §61).

71. The Committee underlines that, where the implementation of the rights proves highly complex and costly, the States Parties must endeavour to achieve the aims of the Charter according to a reasonable timetable, securing measurable progress and making optimum use of such resources as can be mustered.

72. The Committee also recalls that the States Parties must pay particular attention to the impact of their choices on the most vulnerable groups and on the other persons concerned (*mutatis mutandis*, International Association Autism-Europe v. France, Complaint No.13/2002, decision on the merits of 4 November 2003, § 53).

73. The Committee refers to the content of Article 17, which concerns the aid to be provided by the State where the minor is unaccompanied or if the parents are unable to provide such aid. The Committee also recalls the importance of paragraph 1 (b) of Article 17, because failure to apply it would obviously expose a number of children and young persons to serious risks to their lives or physical integrity.

74. The Committee notes that the only substantive complaint of DCI relates to the lack of reception places, which is allegedly rendering ineffective any access to accommodation and all the other measures provided for legal, economic, medical and social protection.

75. The Committee notes the Government information on the increase in the number of reception places available: 8 000 additional reception places have been introduced since 2008 and that measures have been taken to reduce the duration of the procedure for granting asylum, and thus the length of stay of asylum seekers in reception centers.

76. The Committee recalls that the present complaint relates to the fulfilment by Belgium of its obligations under Article 17 vis-à-vis two categories of persons:

- minors illegally resident with their families;
- unaccompanied foreign minors and asylum-seeking unaccompanied foreign minors.

77. In connection with illegally resident accompanied minors, the Committee notes that no further such families, with their children, have been taken in since 2009 because of network saturation. The Committee takes note of the fact that in 2011 FEDASIL received 43 court orders to provide accommodation for families and that the Federal Ombudsmen have addressed a series of recommendations to FEDASIL. According to the DCI, 774 families received a negative response to their applications for accommodation between January 2011 and April 2012. These decisions concerned 3011 persons (the DCI did not know how many children were involved). In 2011, 553 families were refused accommodation; the latter comprised 901 adults and 1 242 minors. The Government provides no data, but acknowledges that they were unable to find an alternative accommodation solution for these families.

78. Where unaccompanied foreign minors are concerned, the Committee notes that the statistics on the number of such minors seem to be approximate, varying widely according to the source of information used. According to the DCI, Guardianship Department statistics suggest that 461 such minors were turned away in 2011 as compared with 258 in 2010. On the other hand, when taking into consideration the number of arrivals of unaccompanied foreign minors, this figure is much higher. According to the DCI, over 1 300 young people were not accommodated in appropriate structures. There are no data on the number of asylum-seekers among non-accommodated unaccompanied foreign minors, but it emerges from the complaint that such minors are prioritised for reception facilities. The Government does not supply statistics on the number of such minors who failed to obtain a reception place.

79. The DCI estimates the number of unaccompanied foreign minors put up in hotels at 668, while the Government estimates 166 such minors in hotels at 12 March 2012.

80. The Committee also notes the observations of the UNHCR according to which, unaccompanied foreign minors must be placed as quickly as possible in an appropriate reception structure and their needs must be meticulously assessed in order to keep any changes to a minimum. This period is crucial, because it is when the first links are forged between the minor and the social actors involved. If unaccompanied foreign minors are not properly provided for, they are simultaneously deprived of any chance of exercising the right of asylum.

81. The Committee considers that immediate assistance is essential and allows assessing material needs of young people, the need for medical or psychological care in order to set up a child support plan. In the same spirit, the guiding principles on extreme poverty and human rights, submitted by the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona and adopted by the United Nations Human Rights Council on 27 September 2012 state:

“§32. Given that most of those living in poverty are children and that poverty in childhood is a root cause of poverty in adulthood, children’s rights must be accorded priority. Even short periods of deprivation and exclusion can dramatically and irreversibly harm a child’s right to survival and development. To eradicate poverty, States must take immediate action to combat childhood poverty.”

“§34. Poverty renders children, in particular girls, vulnerable to exploitation, neglect and abuse. States must respect and promote the rights of children living in poverty, including by strengthening and allocating the necessary resources to child protection strategies and programmes, with a particular focus on marginalized children, such as street children, child soldiers, children with disabilities, victims of trafficking, child heads of households and children living in care institutions, all of whom are at a heightened risk of exploitation and abuse.”

82. In the light of the above, the Committee considers that the fact that the Government has, since 2009, no longer guaranteed accompanied foreign minors unlawfully present in the country any form of accommodation in reception centres (through either through the FEDASIL network or other alternative solutions) breaches Article 17§1 of the Charter. The persistent failure to accommodate these minors shows, in particular, that the Government has not taken the necessary and appropriate measures to guarantee the minors in question the care and assistance they need and to protect them from negligence, violence or exploitation, thereby posing a serious threat to the enjoyment of their most basic rights, such as the rights to life, to psychological and physical integrity and to respect for human dignity. Similarly, the fact that at least 461 unaccompanied foreign minors were not accommodated in 2011 and the problems posed by inappropriate accommodation in hotels lead the Committee to the conclusion that the Government failed to take sufficient measures to guarantee non-asylum seeking, unaccompanied foreign minors the care and assistance they need, thereby exposing a large number of children and young persons to serious risks for their lives and health.

83. Consequently, the Committee holds that there is a violation of Article 17§1 of the Charter.

II. ALLEGED VIOLATION OF ARTICLE 7§10 OF THE CHARTER

Article 7 – The right of children and young persons to protection

Part I: “Children and young persons have the right to a special protection against the physical and moral hazards to which they are exposed.”

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

(...)

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.”

Applicability of Article 7§10 to the persons concerned by the present complaint

84. With regard to the general and preliminary aspects of the question concerning the applicability of the provisions of the Charter to persons – such as foreign minors (accompanied or unaccompanied) not lawfully present in a country - who are not mentioned in paragraph 1 of the Appendix to the Charter, the Committee refers to the reasoning set out above under Article 17 (paragraphs 28-37 of this decision).

85. With specific reference to Article 7§10, the Committee recalls that this provision guarantees children and young persons special protection against the physical and moral hazards to which they are exposed. Above all regarding protection against physical hazards, this is clearly a very important requirement to States Parties so as to ensure that certain fundamental rights are effectively guaranteed, in particular the right to life and to physical integrity. For this reason the Committee deems that not considering States Parties to be bound to comply with this obligation in the case of foreign minors who are in a country unlawfully would therefore mean not guaranteeing their fundamental rights and exposing the children and young persons in question to serious impairments of their rights to life, health and psychological and physical integrity.

86. Consequently, the Committee considers that the children and young persons concerned by this complaint come within the scope of Article 7§10 of the Charter.

Alleged violation of Article 7§10

A – Submissions of the parties

1. The complainant organisation

87. The DCI stresses that Article 7 para. 10 protects children and young persons not only from risks linked to work but also in all cases of real or potential physical and moral dangers, as highlighted in the case-law of the Committee. Article 7§10 implies that in the case of other forms of exploitation, the States Parties must prohibit children from being subjected to other forms of exploitation, such as domestic exploitation or servitude, including trafficking for the purposes of servitude, begging

or the removal of organs (Conclusions 2004, Bulgaria). The States Parties must also take measures to prevent and assist street children (Conclusions XV-2, Statement of interpretation of Article 7§10; Conclusions 2004, Romania). The States Parties must ensure not only that their legislation prevents the exploitation of and protects children and young persons, but also that it is effective in practice (Conclusions 2006, Albania and Bulgaria).

88. The DCI notes that Belgian law does not prohibit begging, but in accordance with the Committee's conclusions, the Belgian State has legislated against the exploitation of begging, particularly using minors.

89. According to the DCI, however, in the great majority of cases begging with children is the consequence of illegal residence and the absence of measures to assist and accommodate the populations in question. Such persons are forced to beg in order to survive in the absence of any social response to their difficulties. According to information collected from research projects conducted by the *Coordination des ONG pour les droits de l'enfant* (CODE), most minors who beg in the French Community and in the Brussels-Capital Region are foreigners accompanied by their parents or members of their wider families, come from central and east European countries and are of Roma origin. Therefore, according to the DCI, a number of illegally resident foreigners in fact resort to begging, accompanied by their children. Living in the street obviously and undeniably entails moral and physical risks to those forced to do so; the current legal situation is incapable of protecting these children and the Belgian State is in breach of its obligation to protect children and young persons in this field.

90. The DCI recalls that according to the Committee, States could fulfil their obligations in this field by providing minors, whatever their status, with hostels, various activities and treatment. Broadly speaking, the incapacity of these reception facilities to cater for many of the illegally resident minors in question, and/or to provide them with psychological and medical care, because the minors, whether accompanied by their families or not, are highly exposed to physical and moral risks owing to the absence of hostels and, for some of them, the fact of their living in the street is the main factor incurring the responsibility of the Belgian State (Conclusions 2006, Moldova).

2. The respondent Government

91. The Government recalls that the exploitation of begging is punishable by law and that the basic offence can be accompanied by aggravating circumstances, including the fact of committing it against a minor (Articles 433ter and 433quater of the Criminal Code established by the Law of 10 August 2005).

92. According to the Government, research shows that there are two groups of beggars in Belgium: beggars from Romania (Roma), and Belgian beggars. According to some CODE studies, minors who beg are mostly children accompanied

by their parents or family, and they are often of Roma origin. In the Roma Community, begging with one's child is not regarded as ill-treatment or neglect.

93. The Government points out that there is little information on the phenomenon of exploitation of begging in Belgium, and the social approach is prioritised over the criminal or police-oriented approach.

B – Assessment of the Committee

94. The Committee confirms that pursuant to paragraph 10 of Article 7, States undertook to protect children not only against the risks and forms of exploitation that result directly or indirectly from their work, but also against all forms of exploitation. It recalls in particular that States must prohibit the use of children in forms of exploitation resulting from trafficking or "being on the street, such as domestic exploitation, begging, pick pocketing, servitude or the removal of organs, and take measures to prevent and assist street children" (Conclusions 2006, Article 7§10, Moldova).

95. In the light of the available data and the Government's submissions taken into consideration above to assess the alleged violation of Article 17, the Committee notes that the Government has failed to find a care solution for a significant number of foreign minors unlawfully present in the country (accompanied or unaccompanied). Referring to its Conclusion 2011 on Article 7§10, the Committee also reiterates the ECPAT network's observation "that sexual exploitation of minors and child trafficking are significant problems in Belgium and are priorities in the Federal Plan for Security and Prison Policy. According to ECPAT child trafficking is closely linked with the problem of unaccompanied minors who are in Belgium and do not receive sufficient protection." In its Conclusion 2011, the Committee requested information on the incidence of sexual exploitation and trafficking of children, including those not lawfully present, and reserved its position on this point in the meantime.

96. The Committee considers that the data at its disposal are not sufficient to permit a conclusion that exploitation of begging is a widespread phenomenon in Belgium or to show that there are close links between begging, trafficking or sexual exploitation of minors in Belgium and the reception facilities' incapacity to care for a large proportion of the foreign minors unlawfully present in the country, or that these phenomena are substantially enhanced as a result of this incapacity.

97. Nonetheless, the Committee considers that the Belgian reception facilities' lasting incapacity to care for a significant proportion of the unlawfully present minors (whether or not accompanied by their families) has the effect of exposing the children and young persons in question to very serious physical and moral hazards, resulting from the lack of reception homes and from life on the street, which can even consist in trafficking, exploitation of begging and sexual exploitation (Conclusions 2006, Article 7§10, Moldova). The important and persistent failure to care for foreign minors

unlawfully present in the country therefore shows that the Government has not taken the necessary measures to guarantee these minors the special protection against physical and moral hazards required by Article 7§10, thereby causing a serious threat to their enjoyment of the most basic rights, such as the right to life, to psychological and physical integrity and to respect for human dignity.

98. Consequently, the Committee holds that there is a violation of Article 7§10 of the Charter.

III. ALLEGED VIOLATION OF ARTICLE 11 OF THE CHARTER

Article 11 – The right to protection of health

Part I: "Everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable."

Part II: "With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in co-operation with public or private organisations, to take appropriate measures designed *inter alia*:

- 1 to remove as far as possible the causes of ill-health;
- (...)
- 3 to prevent as far as possible epidemic, endemic and other diseases, as well as accidents."

Applicability of Article 11 to the persons concerned by the present complaint

99. With regard to the general and preliminary aspects of the question concerning the applicability of the provisions of the Charter to persons – such as foreign minors (accompanied or unaccompanied) not lawfully present in a country - who are not mentioned in paragraph 1 of the Appendix to the Charter, the Committee refers to the reasoning set out above under Article 17 (paragraphs 28-37 of this decision).

100. With specific regard to Article 11, the Committee points out that paragraph 1 requires States Parties to take appropriate measures to remove the causes of ill-health and that, as interpreted by the Committee, this means, *inter alia*, that States must ensure that all individuals have the right of access to health care and that the health system must be accessible to the entire population.

101. In this connection, the Committee has already underlined and now confirms that health care is a prerequisite for the preservation of human dignity and that human dignity is the fundamental value and indeed the core of positive European human rights law – whether under the European Social Charter or the European Convention on Human Rights (*International Federation of Human Rights Leagues v. France*, Complaint No. 14/2003, decision on the merits of 8 September 2004, § 31). For this reason, the Committee has already applied its teleological interpretation of the personal scope of the Charter in respect of Article 11§ 1, noting that the States Parties "have guaranteed to foreigners not covered by the Charter rights identical to or inseparable from those of the Charter by ratifying human rights

treaties – in particular the European Convention of Human Rights – or by adopting domestic rules whether constitutional, legislative or otherwise without distinguishing between persons referred to explicitly in the Appendix and other non-nationals. In so doing, the Parties have undertaken these obligations.” (Conclusions 2004, Statement of interpretation on Article 11).

102. In the light of the above, the Committee holds that Article 11 is applicable to the persons concerned by this complaint. Not considering the States Parties to be bound to comply with the requirement to protect health in the case of foreign minors unlawfully present in their territory and, in particular, with the requirement to ensure access to health care would mean not securing their right to the preservation of human dignity and exposing the children and young persons concerned to serious threats to their lives and physical integrity.

Alleged violation of Article 11

A – Submissions of the parties

1. The complainant organisation

103. According to the DCI, the right to health enshrined in international, European and national legislation for foreign minors, whether accompanied or not and whether holding a legal residence permit or not, is currently being violated. Legislation provides that when unaccompanied minors and asylum-seeking or illegally resident families are admitted to a reception centre, they must have access to a medical service.

104. Owing to the saturation of the reception network, these young people and their families remain for long periods on the street, in hotels or in emergency reception centres and have no access (or severely limited access) to a medical service. The payment of medical expenses for homeless persons is extremely problematical. The Public Social Aid Centre can only provide emergency medical aid. In order to be eligible for such aid, even though the Organic Law of 8 July 1976 on Public Social Aid Centres guarantees the right to emergency medical aid, it is highly desirable to have a fixed address known to this service. Failing that, the Centre will most likely refuse territorial jurisdiction.

105. The DCI contends that the fact of forcing people on to the street despite their eligibility for accommodation is contrary to Article 3 of the European Convention on Human Rights (judgment *M.S.S. v. Belgium and Greece*, No. 30696/09 of 21 January 2011).

106. Furthermore, when some CPASs have faced an influx of requests in the past, they have explicitly decided not to examine requests from illegally resident foreigners, thus depriving them of any chance of having their requests accepted. The DCI also refers to the practice which has been implemented by the Brussels CPAS at least since April 2009 of refusing to examine requests for social aid from certain categories of persons. According to the DCI, the Brussels Labour Court has handed down numerous judgments against this practice.

107. Moreover, the DCI notes that forcing children on to the street subjects them to increased health risks. Life in the street has an enormous impact on young people's physical and mental state. The State is also breaching its obligation to combat epidemic and contagious diseases by failing to provide access to the reception centre medical service.

108. In connection with beneficiaries accommodated in hotels, the DCI points out that defrayal of medical expenses by FEDASIL for unaccompanied foreign minors is hard to obtain because of the long series of administrative procedures to be followed. Access to hospitals is also becoming difficult. Some young people have been refused access to emergency departments because they had no FEDASIL document proving that expenses would be defrayed. Furthermore, outpatient service reports constantly refer to health problems among unaccompanied foreign minors living in hotels who have not been given appropriate assistance. The DCI also mentions that the implementation of FEDASIL agreement with the Red Cross was cancelled in March 2011 and that the Red Cross no longer provides medical treatment for unaccompanied foreign minors in hotels.

2. The respondent Government

109. In response to the DCI's complaint concerning the requirement of a fixed address known to the CPAS in order to be eligible for emergency medical aid, the Government recalls that the CPAS responsible for providing social assistance for homeless persons abode is that of the municipality in which they have their *de facto* residence. Homeless persons can also be registered in a reference address at the CPAS under the following two conditions: they must not be homeless or have lost their home because of lack of resources, and they must apply for social assistance within the meaning of Article 57 of the Law of 8 July 1976 or the minimum subsistence aid provided under the Law of 7 August 1974.

110. In connection with the CPAS' refusal to examine requests for aid as a result of a mass influx of requests, the Law of 2 April 1965 was amended on 31 December 2010 in order to cope with the accommodation crisis. The competent CPAS is that of the place where the asylum-seeker is registered on the waiting list, provided that such registration does not comprise the address of the Aliens' Office or the Office of the General Commissioner on Refugees and Stateless Persons.

111. According to the Government, ever since 2009, medical support for persons eligible for reception who have been accommodated in hotels has consistently been provided by FEDASIL in accordance with the provisions of the Law on reception. In 2010, FEDASIL concluded an agreement with the Croix-Rouge of Belgium on the provision of such medico-social support. This agreement was renewed in 2011.

112. Furthermore, medical support is always available for beneficiaries housed in emergency or transit centres.

113. Owing to network saturation, FEDASIL has served some asylum-seeking families with decisions of non-designation of a mandatory place of registration, specifying that social aid can be provided by the competent CPAS.

114. The Government considers that it has taken the appropriate action to comply with the obligations of Article 11 of the Charter.

B – Assessment of the Committee

115. The Committee notes firstly that some of the complainant organisation's complaints regarding Article 11 actually come under Article 13 of the Charter. In particular, the Committee refers to the complaints concerning urgent medical assistance and effective medical assistance. With regard to these complaints, the Committee refers to the paragraphs below concerning assessment of the alleged violation of Article 13. It considers that the other substantive complaints of the complainant organisation relate to paragraphes 1 to 3 of Article 11.

116. With regard to the right of access to health care (article 11§1) , the Committee notes that the total lack – since 2009 – of reception facilities for accompanied foreign minors and the partial lack of such facilities for unaccompanied foreign minors, leading some of them to live in the street, makes it difficult for foreign minors unlawfully in the country to access the health system. This is because the FEDASIL reception and assistance network has reached saturation point and because it is hard for the persons concerned to prove that they have fixed addresses or de facto addresses.

117. With regard to Article 11§3, the complainant organisation does not provide any detailed information on specific cases of shortcomings by the State in the removal of the causes of ill health among the minors covered by this complaint or specific cases of shortcomings in preventing epidemic or endemic diseases. The Committee considers nonetheless that the lasting incapacity of the reception facilities and the fact that, consequently, a number of the minors in question (particularly those accompanied by their families) have been consistently forced into life on the streets exposes these minors to increased threats to their health and their physical integrity, which are the result in particular of a lack of housing or foster homes. In this connection, the Committee considers that providing foreign minors with housing and foster homes is a minimum prerequisite for attempting to remove the causes of ill health among these minors (including epidemic, endemic or other diseases) and that the State therefore has felt to meet its obligations as far as the adoption of this minimum prerequisite is concerned.

118. For these reasons, the Committee holds that there is a violation of Article 11 §§ 1 and 3 of the Charter.

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CHARTER

Article 13 – The right to social and medical assistance

Part I: “Anyone without adequate resources has the right to social and medical assistance.”

Part II: “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.”

Applicability of Article 13 to the persons concerned by the present complaint

119. With regard to the general and preliminary aspects of the question concerning the applicability of the provisions of the Charter to persons – such as foreign minors (accompanied or unaccompanied) not lawfully present in a country - who are not mentioned in paragraph 1 of the Appendix to the Charter, the Committee refers to the reasoning set out above concerning Article 17 (paragraphs 28-37 of this decision).

120. With specific regard to Article 13 concerning the right to social and medical assistance, the Committee points out that it has already underlined the importance of this article from the angle of effectively securing the most fundamental human rights, in particular the rights to life, physical integrity and the preservation of human dignity. For this reason, the Committee has held that “legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State Party, even if they are there illegally, is contrary to the Charter” (International Federation of Human Rights Leagues v. France, Complaint No. 14/2003, decision on the merits of 8 September 2004, § 32).

121. The Committee would also point out that, in the case of exceptional application of the provisions of the Charter, extending beyond the restriction set out in paragraph 1 of the Appendix, Article 13 can apply to the persons concerned by this application (foreign minors present unlawfully) only insofar as any shortcomings in the implementation of the obligations set out in the article are likely to impair the most fundamental rights of the persons in question such as the rights to life, psychological and physical integrity and preservation of human dignity.

122. For this reason, the Committee holds that the minors concerned by this complaint fall solely within the scope of Article 13, in particular concerning the right to appropriate medical assistance.

Alleged violation of Article 13

A – Submissions of the parties

1. The complainant organisation

123. The DCI considers that this article is applicable to illegally resident persons in accordance with the case-law of the Committee because the situation of need and human dignity are the main criteria for granting this aid. It also notes that both the Organic Law on the CPAS and the Law on reception of asylum-seekers (*loi accueil*) explicitly refer to the concept of human dignity.

124. According to the DCI, support is provided for in the reception centres for unaccompanied foreign minors (welfare assistants, tutors, support staff and guardians). The problem is that, unaccompanied foreign minors outside the reception network have no access to such support despite their situation of need, which is contrary to Article 13 of the Charter.

125. The DCI contests the assertion that non-asylum-seeking unaccompanied foreign minors, whether in hotels or outside of the FEDASIL reception structures, are supported by a guardian. Some such minors have to wait for days or even months to have a guardian assigned. During this time, these children are on the street, where they become difficult to locate and have no chance of receiving an invitation to an initial interview at the Guardianship Department. Without reception facilities, the right to a legal representative to ensure access to rights is also breached. Without a legal representative it is also more difficult to lodge an appeal. According to the DCI, without reception facilities there can be no social, medical or legal protection, and the person's physical safety is jeopardised.

126. As pointed out in respect of Article 17, since illegally resident families have had no access to reception facilities, they do not benefit from social or medical support. In the winter of 2011-2012, NGOs initiated a humanitarian scheme for such families, opening a night shelter accommodating up to 150 persons.

2. The respondent Government

127. According to the Government, non-asylum-seeking unaccompanied foreign minors have support from a guardian whether they are in hotels or outside the FEDASIL reception structures.

B – Assessment of the Committee

128. The Committee firstly confirms the right of migrant minors unlawfully in a country to receive health care extending beyond urgent medical assistance and including primary and secondary care, as well as psychological assistance. Concerning the access to the health system and to health care in general, the Committee refers to paragraphs 116 to 118 under Article 11.

129. The Committee notes that in Belgium unlawfully present migrant minors are in principle entitled to medical assistance on the same basis as the country's nationals. As can be seen from the parties' arguments and PICUM's observations, in practice this assistance essentially takes the form of the right to "urgent medical assistance", which is provided by public social welfare centres. In its observations, PICUM explains that the concept of "urgent medical assistance" is not clearly defined, which gives rise to differing interpretations. In the light of the data at its disposal and of the actual implementation of "urgent medical assistance", the Committee considers that, even though the title of the legislation ("Urgent Medical Assistance") is ambiguous, it covers not only life-threatening medical situations but also curative and preventative assistance, as well as essential psychological assistance.

130. Admittedly, there are many difficulties with the practical implementation of this urgent medical assistance in the case of foreign minors who are in the country unlawfully. As pointed out by PICUM in its observations, the procedures for access to care are often cumbersome and complex and health care professionals are not always aware of the legislation or the procedures, which differ depending on whether or not the patient is documented or is an asylum seeker whose application has been rejected. Moreover, during the individuals' stay in Belgium there may be successive changes in their administrative status (undocumented, with temporary permits, rejected asylum seekers, etc) and whenever they change status or place of residence, a new procedure is required.

131. However, in view of the existence of a form of medical assistance guaranteed by law, which operates effectively in practice, and of the lack of precise data showing serious shortcomings in this system of assistance in respect of the persons concerned by this complaint, the Committee considers that the situation does not constitute a violation of Article 13 of the Charter. In particular, the Committee considers that the situation does not indicate that the Belgian State has failed to take appropriate measures to provide foreign migrants unlawfully in the country with urgent medical assistance or primary and secondary health care, or essential psychological assistance, thereby impairing their rights to life, physical integrity and preservation of human dignity.

132. For these reasons, the Committee holds that there is no violation of Article 13 of the Charter.

V. ALLEGED VIOLATION OF ARTICLE 16 OF THE CHARTER

Article 16 – The right of the family to social, legal and economic protection

Part I: “The family as a fundamental unit of society has the right to appropriate social, legal and economic protection to ensure its full development.”

Part II: “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.”

Applicability of Article 16 to the persons concerned by the present complaint

133. With regard to the general and preliminary aspects concerning the applicability of the provisions of the Charter to persons who are not explicitly mentioned in paragraph 1 of the Appendix to the Charter, the Committee refers to the reasoning set out above concerning Article 17 (paragraphs 28-37 of this decision). The Committee would merely confirm that the exceptional nature of the application of the Charter rights to foreign minors unlawfully in a country means that they are not covered by all the provisions of the Charter but solely by those whose fundamental purpose is closely linked to the requirement to secure the most fundamental human rights and to safeguard the persons covered by the provision in question from serious threats to the enjoyment of those rights.

134. With specific reference to Article 16, the Committee points out that respect for the right to economic, legal and social protection of the family requires States to adopt appropriate measures to promote the well-being and development of the family. This mainly involves positive measures in terms of social protection, welfare benefits, economic benefits and tax benefits, as well as legal protection measures concerning family relations and family members.

135. As to measures to protect and promote families, the Committee considers that they are not all equally important where it comes to effectively safeguarding the most fundamental rights. However, the Committee considers that, in so far as its aim is to secure housing to families, Article 16 is actually linked to the enjoyment of certain fundamental rights such as preserving human dignity and health. Failing to consider that States Parties are required to respect the right of families to housing in relation to foreign families unlawfully present in the country would therefore be at variance with the Charter.

136. For this reason, the Committee holds that the part of Article 16 relating to the right of families to decent housing and particularly the right not to be deprived of shelter applies to foreign families unlawfully present in the country.

Alleged violation of Article 16.

A – Submissions of the parties

1. The complainant organisation

137. The DCI considers that according to the text of Article 16, family life is impossible without adequate housing. This conclusion is shored up by the decision on the merits in *Collective Complaint European Roma Rights Centre (ERRC) v. Greece No. 15/2003*, decision on the merits of 8 December 2004. The DCI also notes that the Government is bound by the right to family life deriving from Article 8 of the European Convention on Human Rights, as interpreted by the Court.

138. According to the DCI, the lack of reception facilities, which forces families on to the street, into insecure hotels or into centres for the homeless, prevents families from leading a proper family life, because it deprives them of privacy, healthy living, adequate food, schooling, etc.

139. Lastly, even if living in a reception structure provided families with economic, legal and social protection, the problem is that families have no practical access to such reception facilities.

2. The respondent Government

140. The Government considers that accommodation in the Fedasil centres meets the conditions set out in Article 16. The Government draws a distinction here between long-term and short-term situations. In the event of reception centre saturation, Belgium does not seek to perpetuate a situation which is primarily considered temporary and is geared to offsetting immediate needs. The Government also points out that Belgium has not accepted Article 31 of the Revised Charter.

B – Assessment of the Committee

141. The Committee would point out that it considers Article 16 to be applicable to this complaint in so much as it relates to the protection of the right of families to decent housing (paragraphs 135 and 136 of the present decision) and, more precisely, to the prevention of vulnerable persons covered by the present complaint from becoming homeless.

142. The Committee notes that the organisation's complaints under Article 16 in relation to the part of the provision that can be applied in this case fall more within the scope of Articles 17 and 7 of the Charter. The Committee refers in particular to the complaints relating to the fact that the failure to provide reception facilities forces accompanied foreign minors who are unlawfully present in the country onto the streets or into shelters for the homeless – which are basically the same complaints as those supporting the alleged violation of Articles 17 and 7. These complaints do not relate to the protection of the family as one of the fundamental units of society or to the rights of minors as family members but rather to the protection of unlawfully present minors under Articles 17 and 7 of the Charter. Accordingly, where it comes to the assessment of these complaints, the Committee refers to the paragraphs of this decision assessing the alleged violations of Articles 17 and 7, in which it finds that there is a violation of both Articles 17§1 and 7§10.

VI. ALLEGED VIOLATION OF ARTICLE 30 OF THE CHARTER

Article 30 – The right to protection against poverty and social exclusion

Part I: "Everyone has the right to protection against poverty and social exclusion."

Part II: "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."

Applicability of Article 30 to the persons concerned by the present complaint

143. With regard to the general and preliminary aspects concerning the applicability of the provisions of the Charter to persons who are not explicitly mentioned in paragraph 1 of the Appendix to the Charter, the Committee refers to the reasoning set out above concerning Article 17 (paragraphs 28-36 of this decision). The Committee would merely confirm – as it did regarding the applicability of Article 16 – that the exceptional nature of the application of the Charter rights to foreign minors unlawfully in a country means that the minors concerned are not covered by all the provisions of the Charter but solely by those whose fundamental purpose is closely linked to the requirement to secure the most fundamental human rights and to safeguard the persons covered by the provision in question from serious threats to the enjoyment of those rights.

144. With specific reference to Article 30, the Committee points out that the article essentially requires States Parties to adopt an overall and co-ordinated approach consisting of measures to promote access to social rights, in particular employment, housing, training, education, culture and social and medical assistance (Conclusions 2003, France, statement of interpretation on Article 30).

145. The Committee recalls that living in poverty and suffering social exclusion obviously undermine human dignity (Conclusions 2005, Statement of interpretation on Article 30). Nevertheless, it considers that the overall and co-ordinated approach provided for in Article 30 involves the adoption of positive measures entailing economic, social and cultural promotion which are required of States Parties under a series of Charter provisions, most of which cannot be regarded as being applicable to persons who are not mentioned in paragraph 1 of the Appendix, such as unlawfully present foreign minors. This is because these are not provisions whose fundamental purpose is closely related to the requirement to secure the most fundamental human rights and to safeguard the persons covered by the provisions in question from serious threats to the enjoyment of those rights.

146. For this reason, the Committee does not consider that the range of economic, social and cultural measures to be taken under an overall, co-ordinated approach to secure the right to protection against poverty and social exclusion can be deemed an obligation on States Parties applicable in respect of foreign minors who are in a country unlawfully.

147. For these reasons, the Committee holds that Article 30 does not apply in the instant case.

VII. ALLEGED VIOLATION OF ARTICLE E OF THE CHARTER, IN CONJUNCTION WITH ARTICLES 17, 7§10, 11, 13, 16 AND 30

Article E – Non-discrimination

“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.”

Applicability of Article E to the persons concerned by the present complaint

148. The Committee recalls that the prohibition of discrimination enshrined in Article E of the Charter establishes an obligation to ensure that any individuals or groups falling within the scope *ratione personae* of the Charter equally enjoy the rights of the Charter (*Defence for Children International v. the Netherlands*, Complaint No. 47/2008, decision on the merits of 20 October 2009, §§ 72-73).

149. Furthermore, the principle of equality, which results of the prohibition of discrimination, means treating equals equally and unequals unequally (*Autism-Europe v. France*, Complaint No. 13/2002, decision on the merits of 4 November 2003, § 52). It follows from the above that States Parties may treat individuals differently depending on whether or not they are lawfully on their territory and that they may also treat foreign minors unlawfully present differently depending on whether or not they are accompanied or whether or not they are asylum seekers.

150. With regard to foreign minors unlawfully in a country and the various categories of such minors concerned by this complaint, what is at issue is not therefore so much respect for the principle of equal treatment but determining whether or not these persons fall within the scope of the Charter and whether their most fundamental rights are actually respected. That is not the object of Article E of the Charter.

151. For these reasons, the Committee holds that Article E does not apply in the instant case.


CONCLUSION

152. For these reasons, the Committee concludes:


- unanimously that there is a violation of Article 17 of the Charter;
- unanimously that there is a violation of Article 7§10 of the Charter;
- by 13 votes to 1, that there is a violation of Article 11 §§1 and 3 of the Charter;
- by 11 votes to 3, that there is no violation of Article 13 of the Charter;
- unanimously that Article 30 of the Charter does not apply in the instant case;
- unanimously that Article E of the Charter does not apply in the instant case.



Giuseppe PALMISANO
Rapporteur



Luis JIMENA QUESADA
President



Régis BRILLAT
Executive Secretary