

INTERNATIONAL HUMAN RIGHTS

LouvainX online course [Louv2.01x] - prof. Olivier De Schutter

READING MATERIAL

Related to: section 1, sub-section 3, unit 2: *Jus cogens* status of human rights norms (ex. 6)

Example 6. The scope of application *ratione personae* of the European Social Charter

European Committee of Social Rights, Complaint No. 69/2011, *Defence of Children International v. Belgium*, decision on the merits of 23 October 2012

[The complaint is filed by Defence for Children International (DCI), which alleges that unaccompanied foreign minors unlawfully present or seeking asylum and illegally resident accompanied foreign minors are denied the rights to their full development, social, health, legal and economic protection against poverty, in breach of articles 7 § 10, 11, 13, 17 and 18 of the Revised European Social Charter, read alone or in combination with the non-discrimination requirement of Article E. However, Belgium asserts that the Revised European Social Charter does not extend its protection to such children. Indeed, under paragraph 1 of the Appendix to the Charter: "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. ...". Belgium considers that the implication of paragraph 1 of the Appendix to the Charter is that 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 rejects the argument, in part on the basis of the *jus cogens* nature of the norm stipulated in Article 17, according to which children and young persons have the right to social, legal and economic protection.]

28. [...] 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, decision on the merits of 20 October 2009, §19; *International Federation of Human Rights Leagues v. France*, Complaint No. 14/2003, decision on the merits of 8 September 2004, §§ 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).

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*.