Street Children's Right to Education:
The failure of international law in protecting the rights of a vulnerable group

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DECLARATION

This thesis is the result of my own work. Material from the published or unpublished work of others, which is referred to in the thesis, is credited to the author in the text.

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ABSTRACT

This thesis studies the role of international law in protecting the rights of marginalized groups and examines the case of street children as a group whose rights are not adequately protected. It argues that the omission of a reference to street children in international law is a contributing factor to the systematic violation of street children’s rights.

This discussion examines the concept of group and the meaning of group status in international human rights law. It links the notion of a “vulnerable group” to discrimination and discusses the required special measures and attention in applying the principle of non-discrimination. To illustrate this, the example of the right to education is employed to demonstrate the difficulty in applying international human rights law as it currently stands to street children. The right to education serves to illuminate the discrimination against street children and provides concrete meaning to the application of the principle of non-discrimination to specific groups. Therefore, the thesis examines the international rights of the child and all relevant binding and non-binding instruments to explain how particular provisions and principles may, constructively or adversely, affect the implementation of street children’s right to education. The study finds that notwithstanding the apparent inadequacy of international law, relevant provisions have not been used optimally. An examination of the case study of Brazil confirms this, while underscoring the difficulty in linking norms and practice nationally and internationally.

The discussion concludes that international law has the potential to better protect street children’s right to education. By extension, the practical applications thereof extend to the rights of other groups that are not expressly covered at present. The key to this lies in exploring the role of human rights mechanism in teleologically interpreting human rights norms to determine, and monitor, state obligations towards specific groups.
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Annex I

Annex II

Bibliography
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Thank you.
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<th>Abbreviation</th>
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<tr>
<td>CADE</td>
<td>Convention against Discrimination in Education</td>
</tr>
<tr>
<td>CEDAW</td>
<td>Convention on the Elimination of All forms of Discrimination Against Women</td>
</tr>
<tr>
<td>CEDAW Committee</td>
<td>Committee on the Elimination of All forms of Discrimination Against Women</td>
</tr>
<tr>
<td>CEDC</td>
<td>Children in especially difficult circumstances</td>
</tr>
<tr>
<td>CEDCA</td>
<td>State Council of Children’s Rights <em>(Conselho Estadual dos Direitos da Criança e do Adolescente)</em></td>
</tr>
<tr>
<td>CEJIL</td>
<td>Center for Justice and International Law</td>
</tr>
<tr>
<td>CERD</td>
<td>Convention on the Elimination of All Forms of Racial Discrimination</td>
</tr>
<tr>
<td>CERD Committee</td>
<td>Committee on the Elimination of All Forms of Racial Discrimination</td>
</tr>
<tr>
<td>CHR</td>
<td>Commission on Human Rights</td>
</tr>
<tr>
<td>CIEP</td>
<td>Integrated Centre of Public Education <em>(Centro Integrado de Educação Pública)</em></td>
</tr>
<tr>
<td>CLT</td>
<td>Consolidated Labour Legislation <em>(Consolidação das Leis do Trabalho)</em></td>
</tr>
<tr>
<td>CMDCA</td>
<td>Municipal Council for Children’s Rights <em>(Conselho Municipal dos Direitos da Criança e do Adolescente)</em></td>
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<tr>
<td>CONANDA</td>
<td>National Council for Children’s Rights <em>(Conselho Nacional dos Direitos da Criança e do Adolescente)</em></td>
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<tr>
<td>CRC</td>
<td>Convention on the Rights of the Child</td>
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<tr>
<td>CRC Committee</td>
<td>Committee on the Rights of the Child</td>
</tr>
<tr>
<td>CRPD</td>
<td>Convention on the Rights of Persons with Disabilities</td>
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<tr>
<td>DCN</td>
<td>National Curricular Directives <em>(Diretrizes Curriculares Nacionais)</em></td>
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<tr>
<td>DCNEJA</td>
<td>National Curriculum Directives for the Education of Youth and Adults <em>(Diretrizes Curriculares Nacionais para Educação de Jovens e Adultos)</em></td>
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<tr>
<td>ECA</td>
<td>Statute of the Child and the Adolescent <em>(Estatuto da Criança e do Adolescente)</em></td>
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<tr>
<td>ECHR</td>
<td>European Court of Human Rights</td>
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<tr>
<td>EFA</td>
<td>Education for All</td>
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<tr>
<td>EJA</td>
<td>Education of Youth and Adults <em>(Educação de Jovens e Adultos)</em></td>
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<tr>
<td>ESC rights</td>
<td>Economic, social and cultural rights</td>
</tr>
<tr>
<td>FEBEM</td>
<td>State Child Welfare Foundation <em>(Fundação Estadual para o Bem-Estar do Menor)</em></td>
</tr>
<tr>
<td>FIA</td>
<td>Foundation for Childhood and Adolescence <em>(Fundação para a Infância e Adolescência)</em></td>
</tr>
<tr>
<td>Forum DCA</td>
<td>Forum for the Defence of Children’s Rights <em>(Fórum Nacional de Defesa da Criança e do Adolescente)</em></td>
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<tr>
<td>Abbr.</td>
<td>Full Form</td>
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<tr>
<td>FUNABEM</td>
<td>National Child Welfare Foundation (<em>Fundação Nacional do Bem-Estar do Menor</em>)</td>
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<tr>
<td>GA</td>
<td>General Assembly</td>
</tr>
<tr>
<td>HRC</td>
<td>Human Rights Council</td>
</tr>
<tr>
<td>IACHR</td>
<td>Inter-American Commission on Human Rights</td>
</tr>
<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
</tr>
<tr>
<td>ICCPR Committee</td>
<td>Human Rights Committee</td>
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<tr>
<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<tr>
<td>ICESCR Committee</td>
<td>Committee on Economic, Social and Cultural Rights</td>
</tr>
<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
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<tr>
<td>ILO</td>
<td>International Labour Organization</td>
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<tr>
<td>LDB</td>
<td>Law on the Basis and Guidelines of Education (<em>Lei de Diretrizes e Bases da Educação</em>)</td>
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<tr>
<td>OAS</td>
<td>Organization of American States</td>
</tr>
<tr>
<td>OAU</td>
<td>Organization of African Unity</td>
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<tr>
<td>MNMMR</td>
<td>National Movement of Street Boys and Girls (<em>Movimento Nacional de Meninos e Meninas de Rua</em>)</td>
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<tr>
<td>NGO</td>
<td>Non-governmental organisation</td>
</tr>
<tr>
<td>PCIJ</td>
<td>Permanent Court of International Justice</td>
</tr>
<tr>
<td>PCN</td>
<td>National Curricular Parameters (<em>Parâmetros Curriculares Nacionais</em>)</td>
</tr>
<tr>
<td>PNDH</td>
<td>National Human Rights Plan (<em>Programa Nacional de Direitos Humanos</em>)</td>
</tr>
<tr>
<td>SAM</td>
<td>Service of Assistance to Minors (<em>Serviço de Assistência aos Menores</em>)</td>
</tr>
<tr>
<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<tr>
<td>UK</td>
<td>United Kingdom</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UNESCO</td>
<td>United Nations Educational, Cultural and Scientific Organization</td>
</tr>
<tr>
<td>UNHCR</td>
<td>United Nations High Commissioner for Refugees</td>
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<tr>
<td>UNICEF</td>
<td>United Nations Children’s Fund</td>
</tr>
<tr>
<td>US</td>
<td>United States of America</td>
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<tr>
<td>WDEFA</td>
<td>World Declaration on Education for All</td>
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This chapter introduces the discussion of street children as a topic in international law and underlines the importance of conducting a legal study on the human rights of street children. It identifies the difficulties that exist in examining the rights of street children in theory and practice, largely due to the specific nature and characteristics of this phenomenon combined with the controversies surrounding the lack of a definition of street children as a group. The discussion also demonstrates the way in which the study of the right to education can be a useful tool in understanding street children’s situation in general and the state of implementation of their human rights. Finally, the chapter shows the importance of the methodology chosen in the study for the assessment of international law.

1. From charity to the rights of the child

1.1 Our (mis)perception of street children

Around the world street children have become increasingly visible and their numbers are counted in millions. While the situation seems alarming in developing countries, the phenomenon is also expanding in the industrialised world, with a faster pace in transitional economies. It is a specifically urban phenomenon with a striking magnitude in large developing cities which are not equipped to accommodate growing numbers of needy people. Street children have always existed as part of the urban picture even in the West. Across centuries, there have been abandoned children as well as runaways who have chosen to leave their abode. They have occasionally received help, but have often been ignored, exploited or abused. Such mixed attitudes still exist, and are spurred by a mix of fear, repulsion or pity towards these independent children.

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1 While no accurate statistics exist, UNICEF has estimated that there are between one and 30 million street children, depending on the definition. Other sources put the number at 100 million. See Taçön, “Abandoned and street-children”, 18 UNICEF Ideas Forum, 1-12; UNESCO, Working with Street Children. Selected case-studies from Africa, Asia and Latin America, 14. Both estimates are over a decade old, but are frequently quoted. Full references of all sources used in this thesis are included in the Bibliography.


3 Following the failure of the 1212 Children’s Crusade, they roam ed the streets, and many were sold into slavery. See Agnelli, Street Children, A Growing Urban Tragedy, 45. By 1803, 9,288 street children were estimated to be in London rising to 30,000 by 1876 according to Schurink, Street Children, 12.
Such attitudes look set to ensure that conditions will remain unchanged and might even worsen for street children. However, an opportunity for change lies in the difference between their past and present circumstances against the emergence of international human rights law. Given the common acceptance of rights as those embodied in the United Nations (UN) Convention on the Rights of the Child (CRC)\(^4\), more genuine interest in street children as human beings has markedly risen. Considering street children as bearers of rights in the same way as all other citizens, and treating them accordingly, are significant challenges both in terms of the prerequisite changes in attitudes towards them and of the practical need to apply human rights to them.

Research on street children would not require a specifically legal approach as demonstrated in the literature which addresses their plight and calls for action. Much is usually authored by and directed to social workers, child psychologists, paediatricians, educators and child activists. Notably, this new interest in street children has not created many legal publications; most are case studies with a social or humanitarian perspective and focus on developing countries. These approaches are essential to gather data, to understand street children’s situation, to attract attention of legislators and decision-makers, and to mobilise support for projects designed to help street children.\(^5\)

1.2 A fresh perspective

This thesis is not another attempt to attract attention to the condition of street children. Rather, it seeks to demonstrate the importance of considering street children as an international law topic by examining the state and impact of international human rights law in relation to street children, their specific condition, needs and rights, which are all closely linked.\(^6\) Of the purpose of legal research on street children, sceptics

\(^4\) The Convention on the Rights of the Child was adopted unanimously in 1989 and is the widest ratified human rights treaty (UN doc. A/44/49 (1989)). This Convention will be further dealt with in Chapters III and IV. In addition, reference is made here to the principle of universalism of human rights embodied in the 1948 Universal Declaration of Human Rights (UDHR), UN doc. A/810, 71 (1948) and the covenants of 1966: The International Covenant on Economic, Social and Cultural Rights (ICESCR), UN doc. A/6316 (1966), and the International Covenant on Civil and Political Rights (ICCPR), UN doc. A/6316 (1966).

\(^5\) See Invernizzi, L’Enfant qui vit dans les rues en Afrique, en Asia et en Europe de l’Est. Bibliographie commentée; Ennew & Milne, Methods of Research with Street and Working Children. An Annotated Bibliography; and Mermet, Bibliography on Street Children, for existing studies about street children.

\(^6\) Starting with the premise that children are rights-holders, this thesis does not discuss the debate on needs, rights and interest based theories as applied to children, such as described in Van Bueren, The International Law of the Rights of the Child, 1-6; Alston et.al. (eds.), Children, Rights and the Law; Franklin, “Children’s Rights and media wrongs: changing representations of children and the developing
among professionals and activists working with and for street children would argue that laws do not change those children’s lives, whereas actions do. International law seems even further away from our daily lives than national law and can be seen as completely irrelevant to street children’s well being. National laws identify direct duties and responsibilities of citizens, and people understand the consequences of breaking the law or of suffering injustice. International law, conversely, seems to be unknown to the general public thus leaving its effects and role unrecognised. One of the two main issues examined in this discussion is the need to categorise vulnerable people into different groups in international human rights law, and the special protection required by their specific needs. The other question is that of the protection of vulnerable groups and the use of international human rights instruments, their relation to national law and practice, and the scope for improving their content and effectiveness.

The rationale for selecting street children as a case-study to examine vulnerable groups and to assess international human rights instruments is many-fold. An essential element of choice is that in international law street children are an unrecognised vulnerable group within a larger recognised one: children. Two contradictions make children an interesting topic for human rights research. First, they attract much attention and sympathy, but their mistreatment is widespread. Second, they have only recently become recognised as subjects of international human rights law, but are hardly treated separately from the adults they depend on. Street children are in a peculiar position because they are systematically mistreated and their links to responsible adults are often severed. Their situation, characterised by their age, lack of adult support, legal status as minors, homelessness and illegal activities on the streets, is far from the “normal” image of childhood as accentuated in attitudes and as expressed in the CRC. This difficulty is amplified by the absence of mention of street children in binding human rights instruments, in contrast to other groups, such as children with disabilities and refugees. The current state of international human rights law, with its minimal and general

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protection, is thus not enough to ensure that street children enjoy the rights to which they are entitled. Examining this claim requires analysing the relevance, applicability, necessity and sufficiency of children’s rights to street children, both in terms of their formulation and their implementation, as this thesis sets out to do. Additional legal research would be necessary for developing an in-depth understanding of the status and rights of street children as these are neither expressly specified in national or international legislative documents, nor explained by researchers or specialist law practitioners. Because street children have generally not been considered as a legal subject to date, the use of sociological and anthropological studies as a background is crucial in this thesis and allows for a practical and realistic analysis of the law. This ultimately leads to exploring the potential of international law in protecting the rights of street children.

Street children’s condition and undetermined status places them among the most marginalised. Studying how international law protects their human rights provides a good test case of the practical significance of current international human rights law to groups that are not expressly mentioned in that law. This requires not only studying the provisions of human rights treaties to assess whether street children are explicitly included, but also examining the way in which general human rights provisions may be applied to them in theory and in practice. International law could benefit such excluded groups in, for example, considering them during the monitoring of the implementation of human rights treaties at the international level, the adoption of laws and policies protecting them at the national level, based on international legal obligations, or the use of international human rights provisions by national courts in favour of excluded groups. Signs of ineffectiveness of international law for street children and other marginalised groups include, for example, human rights treaty provisions that are not suited to their situations and might even be detrimental to them, the inability of treaty monitoring bodies to interpret existing human rights provisions in extensive ways to adapt their implementation to the situation of specific marginalised groups, and the inability of marginalised groups to use international instruments in national courts to defend their rights.
2. The identity of street children: a central component of a legal study

2.1 Debates over the identity of street children

Common misperceptions exist of street children giving their characteristics a fluid and nebular nature. They are commonly perceived as young children living on the streets of large cities in developing countries, often begging. While this can be a true image in many instances, it is too vague and yet too precise for a description of street children as a specific group whose situation would require a targeted legal response. It is vague because it comprises children who happen to be on the streets, those who work on the streets to complement the family income, those who beg with an older family member, children who run away from home temporarily, and children who have been abandoned or who have abandoned their families. The image is also too precise, because it excludes adolescents and children in similar situations in developed countries.

Misconceptions, assumptions and emotional reactions associated with street children are linked to the term “street children”, to its definition, and to the concept itself. As this thesis will explore at the outset, the debate on street children’s identity is ongoing, and follows the initial interest in street children which became widespread in the 1980s and early 1990s. As this interest grew and knowledge about these children developed, researchers began discerning dissimilarities in street children. Indeed, they have different backgrounds, end up on the streets for various reasons, and their experiences on the streets vary. Research indicated that street children as a group was less homogeneous than initially perceived. Definitions offered by some were rejected by others, and many attempted to define street children in categories: those who only work on the street, those who work and sleep on the streets, and those who have no contact with their families. Problems of defining street children were therefore linked to the concept itself, and many authors questioned the existence of street children as a group that could be studied in its own right, and the needs of whom could justify a specific response. With these doubts, the term “street children” also became a topic for discussion, as some authors found it stigmatising and simplistic, while others debated this claiming that street children themselves use it.

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8 This introductory chapter does not survey literature on this issue. Chapter II addresses discussions on street children's definition and characteristics.
It is equally important to distinguish between controversies related to the term, definition and concept of street children, as terms can vary depending on time and location, and definitions can be refined, while debates over the concept can lead to a lack of recognition of the group, and to decreased research. Nevertheless, the term "street children" remains prevalent, even among its detractors, and research usually distinguishes between a core group of street children, who live autonomous lives, and those for whom the street is a more functional or marginal part of life. Members of the first group share common characteristics, as the street is their home. Even though many of these children have families and some maintain contact with relatives, they are used to the street and find it difficult to comply with a conventional way of life. Because of this, they often fail to commit to reintegration programmes. Meanwhile, many of them struggle as they continue to face rejection by their societies that perceive them as criminals.

This thesis distinguishes the first group of street children from others, and argues that their special condition justifies further research and a targeted response. The term "street children" is therein used strictly to refer to autonomous homeless children, who live on the margins of society. They are not the only street children, but they are the most representative of the problems and needs of children, whose condition and status exclude them from legal protection. This author argues that street children share many characteristics, and that their independence and lack of adult supervision and guidance give them a particular status, which creates unique problems that have not received adequate attention in international human rights law. While recognizing the limitations of the term "street children", its wide use is acknowledged. In contrast, the thesis differentiates between street children who correspond to the concept as it is used here, and other concepts, usually referring to children who work on the streets but maintain a strong link with their families. The discussion will therefore not attempt to address issues concerning such other groups of children with a street connection.

2.2 Possible consequences of a "street child"-identity: group recognition and special status in international law

Recognition of street children as a specific group would have consequences for them in international human rights law given the special protection it grants the rights of women, children and migrant workers, among other, mostly generic, groups. Such protection exists at different degrees depending on the level of recognition of each
group's unique characteristics that lead to discrimination against its members. For example, special attention is given to some groups through declarations, guidelines or the practice of monitoring bodies of human rights treaties, while the rights of other groups are included as legally binding provisions in general or specific human rights treaties. The first group includes internally displaced persons and persons with HIV/AIDS, for instance, while examples of the second group include women and national minorities. This attention is justified by discrimination against these groups, and their special condition and characteristics that have not been addressed sufficiently in general international human rights law.

Based on this, this thesis examines whether there is discrimination against street children on grounds of their group characteristics, and not only on an individual basis. It also examines protection provided in existing international instruments and mechanisms in light of the reality of street children's lives and situation. For instance, it has been recognised that the CRC provided insufficient protection to the rights of child soldiers or of sexually exploited children, even though the Convention mentioned these sub-groups. Such recognition led to the adoption of two optional protocols to the CRC in 2000.9 It has also been acknowledged that indigenous people are in a special situation that is not covered by existing international human rights treaties. They are unable to exercise their rights because of discrimination against them and need additional rights to preserve their way of life. While the UN has been working on a declaration on the rights of indigenous people for twenty years, no instrument has been adopted so far because of the political sensitivities associated with the recognition of some groups as "peoples" or "nations". As for street children, this thesis discusses the desirability and feasibility of drafting a specific instrument on their rights. Human rights provisions specifically tailored for street children would have to reconcile their love for freedom and yearning for security. These provisions would also have to offer them options and enable them to exercise their rights while acknowledging the clash between their independence and their minority status.

3. Cases to frame and illustrate the study

To limit the scope of the thesis, one right and one country have been chosen to test the status and implementation of international law in relation to street children: the right to education and the case study of Brazil. Both can be adequately representative of the problems faced by street children as a group, and their study can shed light on the situation of street children in general and on their capacity to exercise their human rights.

3.1 Significance of the right to education

Studying street children highlights interrelated causes and consequences of the street child phenomenon ranging from child labour and drug abuse to disintegration of families and poverty. For instance, a child might become a street child because of poverty and family break-up. His\textsuperscript{10} new condition can lead him to drug abuse and prostitution, which in turn will draw problems concerning criminal justice. This vicious cycle will keep him on the street once he has fled a specialised institution, and he will have to work to survive, and suffer exploitation and health hazards in the process. Difficulties that street children face are nearly endless, depending on how deep in the causes and how far in the consequences one wishes to venture. To remain focused, and to define limitations to the study, the thesis focuses on one topic – education – to illustrate the condition of street children in general, which is characterised by stigma and disregard for their rights.

Analysis of the right to education, a widely accepted right that concerns all children, will shed light on the general situation of street children. It is especially important for street children, as it is a tool for change, a way out of poverty and a way to self-discovery and personal achievement. Not only does the problem lie in the question of access to education as the first stronghold of discrimination, but also in the significance of education to street children. Their survival needs and independent way of life make traditional teaching methods and subjects incompatible with and irrelevant to their daily lives. In practice, the scant education they receive is often given in non-formal settings by non-governmental organisations (NGOs). International human rights treaties have little concern for this type of education and, evidently, not one street child

\textsuperscript{10} This thesis uses "he" or "she" indiscriminately.
can fully enjoy formal education in public schools.\textsuperscript{11} This contrasts with the recognition of the special educational needs of other groups of children, especially children with disabilities and children from linguistic or religious minorities. When not formally included in treaties, the need to provide adequate educational opportunities for specific groups of children is explored in non-binding instruments, such as the UNHCR documents on refugee children.\textsuperscript{12}

Lack of educational opportunities makes it difficult for street children to enjoy other human rights, as the right to education is a basic right and a prerequisite to the enjoyment of all others. Its direct links with other rights places it in all categories: civil, political, economic, social and cultural (ESC) rights. These important aspects were a basis for a focus on the right to education. Moreover, the interconnectedness of rights means that other topics undoubtedly have to be discussed in relation to the right to education. More generally, issues such as the concept of the best interest of the child also emerge as pertinent to street children's right to education. Other relevant topics to street children's lives - such as juvenile justice or the trafficking of children - may be mentioned to illustrate specific problems, but will not be fully analysed unless directly related to this discussion.

Within the broader research context lies the uncontested and essential nature of the right to education for the effective application of other rights, and its challenging implementation due to its undefined contents and beneficiaries, to its formal affiliation with ESC rights, and its informal link to civil and political rights. Employing the right to education as a parameter throughout the discussion will provide a good example of the implementation of a right that requires both positive and negative obligations from the state. The right to education is universally recognised at least in its most basic form and its implementation has complex implications. It can be interpreted narrowly as well as broadly, and there are many non-binding international instruments that define its contents and serve as guidelines for its implementation. Moreover, because of its clear interdependent nature, this right has implications on the exercise of many other human rights. Examining the implementation of the right to education in relation to street children and other marginalised groups can therefore be a useful tool for gaining a

\textsuperscript{11} The main component of the right to education is the right to compulsory primary education, which in practice means access to public schools at the primary level. See Chapter III.

\textsuperscript{12} Especially the Revised Guidelines for Educational Assistance to Refugees (UNHCR/PTSS, 6.1995).
broader sense of the current and potential implementation of international human rights law in general.

3.2 Justifications for Brazil as a case study

To illustrate and analyse the implementation of street children’s right to education, and other general tendencies concerning the implementation of human rights, this discussion will examine Brazil as a case study. This choice is warranted by Brazil’s long-standing experience with the issue of street children as a country with the best and worst examples of street child programmes and policies. For decades, its street children were systematically institutionalised in prison-like conditions following national child protection policies. It is also infamous for its “death squads” operating to clean up the streets of big cities and make them safer for “respectable” citizens. Brazil witnessed the birth of the movement for street children’s rights in the 1970s before spreading beyond its borders in the 1980s. Brazil invented the concept of “street educators” and adopted progressive programmes for street children, which became models in other countries. Given the extensive studies of street children in Brazil, its active civil society and the involvement of its government, this discussion will address the current situation of Brazil’s street children’s rights. It would test whether Brazil’s ratification of the CRC has had any effect on street children’s exercise of their human rights, especially their right to education, exploring in the process what evidence, if any, exists of the link between international law and national practice. This would pose questions on how much is Brazil’s action for street children based on international law; whether international instruments proved to be good guidelines for national laws, policies and programmes that relate to street children directly or indirectly.

The thesis acknowledges the limitations caused by the examination of one country in a study of a global character. A broader study of street children’s rights would have to include thorough case-studies of countries that are representative of different political, legal, cultural and socio-economic systems. A country profile is therefore included herein to set the scene in which legislation, policies and programmes in Brazil can be analysed, and to aid in comparing it with other countries. The nature and causes of the phenomenon, and especially the solutions chosen, can nevertheless...

13 These were groups of private individuals operating with the participation or collusion of the police to carry out extra-judicial executions. See Report 2001, Amnesty International; Concluding Observations to the Initial Report submitted by Brazil to the ICCPR Committee, UN doc. CCPR/C/79/Add.66; MNMMR, Vidas em Risco: Assassinatos de Crianças e Adolescentes no Brasil; Dimstein, Brazil, War on Children.
vary according to political and legal systems, and different levels of development, cultural and social contexts in each country. While HIV/AIDS pandemic in some countries is responsible for the presence of street children, in other countries they may be the consequence of domestic violence or waning family values and structures. In some countries, political systems make the state a sole provider of services, while elsewhere the state mostly relies on private actors because of financial constraints. Some countries recognise international law as directly applicable in the domestic legal system, whereas others regard international and national law as completely separate spheres. All these differences can influence the way in which international law is implemented at the national level and the involvement of the government in programmes for street children. Brazil can therefore only be compared to similar situations, even though examples of good practice are helpful in all settings. Similarly, failures and shortcomings are used to illustrate general tendencies and to inform decision makers in different parts of the world.

4. Methodology

This thesis starts with the hypothesis that street children do not enjoy their right to education because they are a group, whose special characteristics and situation are not recognised by international human rights law. To test the validity of this hypothesis, the discussion will seek to answer a number of questions: What characterises street children as a specific group? What is street children’s educational situation? Do street children have a right to education in international law? What are the framework and contents of that right? Is that right enforced in practice, and what are the problems linked to the implementation of that right and its monitoring? The thesis must therefore proceed to theoretical and practical analyses of street children’s right to education.

4.1 Defining the framework: street children as a group

To explore the above questions, the discussion first defines street children as a group, whose members are discriminated against because of their common characteristics. This is done mostly through analysis of current literature on street children. Since there is no specific literature concerning street children and their right to education in the legal field, this author has had to rely on sources from other disciplines, especially sociology and anthropology, to examine the situation of street children around the world, especially in Brazil. While it may seem difficult to compare different
studies because of the particular focus in each field of study and because of differing definitions of street children, the classifications and definitions included in literature have proved very useful in overcoming this difficulty. As this study is based on a specific understanding of the concept of street children, classifications applied in different studies allow the use of survey results to find out various characteristics of street children, including their age, gender, family background, school attendance, rate of arrests, drug consumption, institutionalisation, type of work performed, reasons for being on the street, etc. The classifications used in the literature, usually between children with different degrees of family contact, are useful to compare the situation between “real” street children and those who are commonly called “street children”, but who have stronger ties with their families. This comparison makes it possible to link the particular characteristics and situation of street children with their legal status and the protection of their rights by international human rights law.

Examining sources from other fields of study has broadened this author’s understanding of the target group and issues concerning these children that can have legal ramifications. Social studies are in fact a necessary basis for legal studies that cover a new area of law. Understanding the nature of street children as a group, their individual characteristics and their educational situation can contribute to appropriate legal response based on practical understanding of issues at hand, instead of mere theoretical assumptions. While this author is not in a position to evaluate the literature found in other academic fields, it has been possible to use some of these studies to point out common findings or discrepancies, generally using them to support her arguments or to dispute assertions that she has found contradicting her findings based on other literature. These works will be mostly studied in Chapter II. The thesis acknowledges the limitations posed by the use of secondary literature to define street children as a group and to describe their characteristics, especially as there is no common definition, and the term and concept are not used in a unified way. However, as this thesis has its

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15 A word of caution is given in bibliographies on street children concerning the reliability of most studies because of a lack of common definitions and research methodologies, making it difficult to compare different studies (Invernizzi and Ennew & Milne op.cit. note 5.).
own specific understanding of street children, literature is used where it can support this interpretation, and supplement personal observation and interviews carried out in different countries.16

Examining street children’s characteristics, as well as controversies and different tendencies surrounding the term “street children”, leads to comparing the situation of street children with other groups that have been recognised as groups by international law. The literature surveyed here includes works on the notion of “group” or “vulnerable groups” or “group rights” in international law.17 Legal theories on discrimination are also relevant to the study of these groups and comparisons with the current situation and legal status of street children. The examination of discrimination also includes studies on measures to combat discrimination, such as positive discrimination, as well as on the groups that are regarded as in need of protection from discrimination. Even though many of these groups are also poorly covered in legal literature, some of the theories of discrimination in relation to specific groups, such as children, women, persons with disabilities, racial and sexual minorities, can be used for the recognition of street children as a specific group.

Discrimination against street children and against “vulnerable groups” in general, and the consequences of recognition of a group in international law are examined more thoroughly in the context of the right to education. Chapter II uses the right to education to show the discrepancy between street children’s educational situation and their educational needs, and compares this with steps that have been taken in response to the situation and needs of other groups. This requires an analysis of the concept of education through the study of existing literature, and international instruments and practice of international organisations. An examination of the concept

16 This author has conducted field work for this thesis in Brazil, and worked for two NGOs on street children in Nepal and the Philippines. Additionally, she has conducted interviews with people working directly with street children in those countries, as well as in Vietnam, in Canada and throughout Africa and South America.

of discrimination in education is also necessary to understand what discrimination means to street children as a group, and what special measures in education can be taken and have been taken with regard to street children and other groups.

4.2 The state of international human rights law in relation to street children

Chapter III conducts a theoretical study of street children’s rights to determine the extent to which international human rights law takes street children into account and protects their rights. It considers the place occupied by street children in the historical evolution of the rights of the child, and examines the evolution of theories of the rights of the child as described in literature. Important theories of children’s rights include those that analyse children’s status as children and position them vis-à-vis adults. As will be shown, the main difference lies between proponents of protection and limited rights for children, and supporters of extended rights and non-discrimination based on age. These viewpoints are also applied to the main precepts of child rights, which the discussion considers in light of their appropriateness to street children and their usefulness for the protection of street children’s rights. Such principles include the concepts of minority and the best interests of the child, both of which are crucial for the understanding of the rights of the child in relation to street children.

This thesis looks more specifically at the right to education, its evolution in international law and the way in which this evolution has affected street children. It also weighs the principles linked to the right to education against street children’s educational needs. Literature on the right to education has been used here for a balanced understanding of important concepts, such as compulsory primary education and the purposes of education. Literature from non-legal fields has been useful as


well, especially studies providing insight into street children’s educational needs. Many of these works are helpful for drawing parallels between children on the streets and their previous educational failures, as well as for establishing that these children have specific needs which are not met by general educational systems and policies. An important issue is that of the relationship between education and child work, and many studies conclude that there is a need to reconcile the two.

Having examined the rights of the child and the right to education, the discussion reviews different types of international and regional laws more broadly. Chapter III analyses the direct and indirect relevance of customary and codified law to street children and distinguishes between legally binding and non-binding instruments. The relevance of “adults’ instruments” to street children is also explored. This allows for an understanding of the levels of protection accorded to street children’s rights, especially their right to education.

4.3 Examining the dynamics of international human rights law in relation to the implementation of street children’s right to education

Different angles of international human rights instruments and other norms and standards applicable to street children need to be analysed to form an understanding of the strengths and limitations of international law in the implementation of street children’s education. Chapter III examines the types of instruments available for street

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children and the levels of protection accorded to their rights therein, the applicability and effect of their central principles to street children, and their place within the international hierarchy of norms. Chapter IV analyses more deeply the usefulness of existing international norms in the protection of street children’s rights. It considers ways in which existing provisions can be used to implement street children’s right to education through different mechanisms that are available for the adaptation of existing norms to different circumstances. Chapter IV then provides a more practical approach to the analysis of international law introduced in Chapter III. The discussion discerns possible ways of implementing international norms by clarifying the roles of actors involved in the right to education, and exploring the international obligations of states to implement the right to education generally and for street children specifically. References used to support arguments in this chapter include literature on states’ implementation obligations in relation to ESC rights, and more specifically concerning the right to education.22 Non-legal literature was also needed to describe existing practice in different countries regarding street children’s education.23 This allowed an illustration of possible ways of implementing different legal obligations, and helped to describe links among different national actors. Literature and jurisprudence on the right to education also serve to show the interconnectedness between the right to education and other rights in international law.

Given this interrelatedness and interdependence, other rights can be used to support and adapt the implementation of the right to education in practice. Some of the most significant rights are analysed in Chapter IV with respect to their importance to street children and their usefulness in the interpretation and implementation of the right to education. Certain rights and principles of human rights in general and the rights of the child in particular can be used to make the right to education more flexible and adaptable to street children’s needs and to better define states’ implementation

obligations. Principles of interpretation can be very practical for adapting the theoretical right to education as stated in international treaties to a variety of circumstances that seem not to be covered by the general provisions included in international instruments. Special attention in this discussion is given to the different possibilities of interpreting international law through monitoring mechanisms. Examination of monitoring in general has to be part of the implementation of the right to education, as monitoring includes mechanisms that support implementation and allow its assessment. Chapter IV explores the range of treaty-based and other monitoring mechanisms available at international and regional levels. The discussion assesses their effectiveness through examining their theoretical mechanisms, their practice and examples of case law, as well as their capacity to guide states in the implementation through principles of interpretation.

4.4 Examining practice through the case study of Brazil

While Chapter IV studies practical aspects of the implementation of street children's right to education through international instruments and mechanisms, it remains within a theoretical sphere. For a more realistic picture of international law, it is necessary to examine its implementation in practice. As has been discussed, Brazil has been chosen to illustrate the practice of street children's right to education at the national level because of the visibility of the issue there and the widespread activism to improve their situation.

Having described the common situation of street children in Brazil in Chapter II, Chapter V depicts the general socio-economic, political and institutional framework of the country. Within this framework, the Chapter examines the legislation and measures taken in Brazil to provide street children with education during its recent history. In Chapter V, as in the whole study, the discussion starts by examining the theory of street children's right to education before discussing its practice. Chapter V first explores national laws and policies relating to the rights of the child and to education, then proceeds to describe practice at national and municipal levels. The analysis of street children's right to education in theory and practice enables the assessment of the practical usefulness of law at international and national levels. Chapter V ends with a critical analysis of the findings regarding Brazilian legislation and practices, and the analysis it provides therein is a significant element for the overall synthesis of findings provided in the concluding chapter.
This examination of theory and practice is essentially based on the author's field trips in Brazil during 2002, where she conducted interviews of practitioners, policymakers and researchers, and on a thorough survey of original literature. The fieldwork is limited to the city of Rio de Janeiro and the capital Brasilia. Programmes for street children, laws, policies and institutions therefore mostly reflect those of the federal government and of the municipality and state of Rio de Janeiro. Other examples around the country have also been cited with information gathered during field trips and through literature. The documents and interviews provide an insight into the views of different actors involved. These analyses aim to shed light on Brazil's implementation of street children's right to education through policies and programmes, as well as on the current concrete situation of street children's education.

Brazil's implementation of the rights of the child and its adaptation to the situation of street children is measured against other countries from a wide socio-economic and geopolitical scale throughout this discussion. Data about other countries has been obtained through visits, interviews and literature. These examples are primarily drawn from secondary sources and they provide a more thorough view of the problem within a set of predetermined concepts and questions. As has been suggested, there are limitations imposed by a comparative study of secondary literature, especially when considering the lack of common discourse and verifiable data about street children. Some descriptions about street children's situation worldwide might thus not provide consistent and accurate illustrations to match the focus of this study, but it must be emphasised that the analysis of the implementation of street children's education is strictly tied to the definition used here. Moreover, data from secondary literature concerning other countries are only given as examples to demonstrate the variety of implementation systems of international human rights law at the national level.

4.5 Reaching conclusions and discussing solutions

The thesis concludes by synthesising the findings discussed in Chapters II to V. It offers conclusions on the issue of street children's right to education in line with the questions asked at the beginning of the thesis, as well as on more general questions concerning the usefulness of international human rights law to groups excluded from human rights instruments. While keeping the focus on the case of Brazil, Chapter VI seeks to clarify the connection between theory and practice. It examines whether one is
the result of the other, whether there is interdependence between national and international spheres, and whether this is the result of formal mechanisms or more subtle, country-specific effects. It also considers the complex web of issues and relationships between actors at the national and international levels implicated in the implementation of street children’s right to education. Conclusions address the problems encountered in the protection of street children’s right to education through existing human rights instruments and mechanisms. The synthesis thus highlights the lacunae of international and national law, the failures of practice and challenges ahead.

A more constructive side is also offered in seeking to make findings of this study useful to practitioners. Essentially, the purpose of research is not to suggest practical solutions or to draft perfect laws. Instead, it seeks to serve as a catalyst for further study and to provide legislators and decision-makers with the necessary tools to take steps towards finding useful and practically feasible solutions based on the findings of research such as this. Therefore, this discussion, in the final analysis, identifies certain practical solutions, their concrete merit and practicability, and arguments for and against them. It also examines the need for legislative improvements at the international level, including the possibility of adopting new treaties, such as a convention on the rights of street children or an additional protocol to the CRC, or non-binding instruments, such as a declaration on the rights of street children. Both risks and benefits of such an approach are duly analysed. The final section then considers measures related to international monitoring of street children’s right to education. In doing so, it emphasises the role of international treaty monitoring bodies in making extensive use of existing instruments. Particularly, Chapter VI studies the potential role of the CRC Committee in developing the international law on the rights of the child through its existing work methods.

Chapter VI concludes by connecting the initial hypothesis and the conclusions for the thesis. In doing so, the conclusions use the previous findings to reaffirm the apparent inadequacy of international law for the protection of excluded groups through the example of street children’s right to education. The conclusions also draw on the analyses of existing principles, instruments and mechanisms to confirm that international law has potential for the provision of adequate protection of the rights of marginalised groups. It thus argues that international law can take into account street children’s special circumstances and educational needs, as well as states’ international obligations and capacity to put international human rights norms into practice at the
national level. The importance of law for the improvement of all persons' lives is reaffirmed and the role of awareness-raising and public education at all levels is emphasised for an improved connection between theory and practice.
CHAPTER II

Defining concepts: Street children as a "vulnerable group"

This chapter examines street children as a specific group. It describes their main characteristics and discusses factors that differentiate them from other groups of children. Such discussion requires addressing the complexities and the growing controversies over the definition of street children as a group. The discussion compares the situation of street children with other groups, whose specificities have been recognised internationally, and who, as a consequence, receive special protection enabling them to exercise their human rights on an equal basis with others. These groups are often considered “vulnerable”, and the chapter analyses this concept together with the principle of non-discrimination and its implications. Education is used as an example to illustrate how the specific situation of these groups is addressed and how the lack of official recognition is detrimental to street children’s educational status. The concepts of education, discrimination and special measures in education are examined and used to shed light on the special educational needs of street children.

1. Who are street children?

1.1 General characteristics of street children

Street children have always been part of the urban scene. Most of us can recall romantic pictures of young heroes and victims in nineteenth century literature brought to us by authors such as Mark Twain, Jack London, Victor Hugo and Charles Dickens. But do we feel that Huckleberry Finn, Gavroche and other “street urchins” fit into the portrait of today’s street children? While images of these children in dirty rags, looking aggressive, sad or indifferent, harassing passers-by or sleeping on sidewalks have not changed very much over the years,24 it is only recently that street children have been at the centre of debate and research. Researchers have attempted to draw an accurate picture of these children by listing their characteristics through observations carried out in different parts of the world, while others have tried to develop a concise definition of street children acknowledging that they are not all the same. Others have concluded that street children do not exist as a group, and that they are simply part of the great diversity of children “in difficult circumstances” or “at risk”.

As street children have not been properly researched until the 1980s, it is not possible to adequately answer the question concerning the similarities or differences of street children across centuries. However, it is now possible to compare street children across continents. First, it must be noted that while old images of street children are those of European and American industrialising cities, today's pictures tend to be those of children begging on the urban streets of developing countries. As studies indicate, street children exist in most countries and what might be misleading is the appearance of street children - often called "street youth" - in industrialized countries, as they are older and have less visible activities on the street than their peers in developing countries. Second, it can be observed that there are children who are often called "street children" because they work or play on the streets, while they actually return home most nights. These children must be contrasted with the "real" street children, who generally do not return home, and whose peers have somehow replaced their family. These are the children whose characteristics are described here, and the distinction will be further explained when discussing the definition of street children.

Despite obvious differences in external circumstances and in individual characteristics, studies on street children worldwide show that there are major shared commonalities. An abundance of literature allows for comparisons. For example, Aptekar, Dallape, Gigengack, Parazelli, Swart, Baker, Panter-Brick, Lusk, Swift, Grover, Impelizieri and Lucchini, among many others, have written about street children in specific countries or cities. Some have conducted comparative case studies in two or more countries. Some studies discuss street children generally, while others examine specific aspects of their characteristics. The study by Panter-Brick, Todd and

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Barker, for example, looks at street children’s nutritional status, while Grover examines the educational situation of Canada’s street youth, and Parazelli studies the role of space in street children’s socialisation patterns. Conclusions indicate that street children generally come from economically disadvantaged families; are school drop-outs; their parents are often separated; and they have often experienced domestic violence. In the case of street children coming from middle-class families, they usually have strict parents who fail to communicate with them and who create pressures through unjustified demands. Parents might also be often absent because of work, thereby neglecting their child. Children from those families might also experience abuse and violence at home or live in broken families; many, especially in developed countries, have been placed in state care, and have ended up on the streets after leaving care before reaching the age of majority. The uniting element in all these cases seems to be the lack of communication between parents and children, the feeling that parents do not understand the child, leading possibly to physical abuse and neglect and sometimes to state intervention. A decisive factor is undoubtedly the perception of the situation by the child, who decides to change his life. It has been said that street children are more likely to abandon their families than to be abandoned, and that this is based on a rational decision to satisfy their needs.

Case studies do show differences among street children around the world. Street children in developing countries are younger than those in industrialised countries. They tend to be often males in the South compared to their peers in the North, where the number of girls is close to that of boys. In developing countries, street children are also more likely to be on the streets because of factors directly related to poverty. In Northern industrialised countries, street children often come from “dysfunctional” families and have been placed in care.

Broadly, the street child phenomenon has to do with poverty, rapid urbanisation and industrialisation leading to rural-urban migration. Urban poverty and way of life lead to the deletion of social values and to family break-up. Other scenarios include abandoned, lost or orphaned children, and children in conflict with the law. Some are

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born in the city in which they live; some migrate with their families, whereas others come on their own looking for jobs, either sent by their parents or on their own initiative. Some have been displaced by war, while others are AIDS orphans. Some have lost their families, and others have fled their families because of abuse or neglect. Some are young and have followed their elder sibling in quest for food, while others are older and might have left their home or their care institutions where they were misunderstood.

1.2 The consequences of street life as a cause of street children’s specificity

Aside from the causes, there are differences in children’s lives once they are on the street. Some retain contact with their families, while others cut off all ties. Some use services, including shelters, non-formal education, health care and food, while others avoid contact with service providers altogether. Some are part of a group or a gang, which provides them with protection and companionship, while others are on their own, in pairs, or move from one group to another. Some children are engaged in criminal activities for survival, such as pick-pocketing, robbery or the drug trade, while others rely on “legal” activities, such as carrying bags, vending food, and using existing services for their daily needs. On the whole, street children seem to move easily between different lifestyles. The literature from around the world shows that street children have common characteristics despite apparent differences. Many studies have shown how street children live day-by-day, and are not able to make concrete long-term plans. It has been observed that street children have very conventional wishes and dream of studying, getting a job, having a house, raising a family and supporting their parents. At the same time, street children’s behaviour contradicts these wishes, as they often refuse help and seem unable or unwilling to leave street life.

Irrespective of why they have become street children, these children have become too accustomed to an independent way of life to leave the streets for various reasons. They might not want to return to an abusive stepparent or an alcoholic caretaker; their parents might send them back to work or will neglect or mistreat them; they prefer making their own money rather than handing their earnings to the family; they skip school which is irrelevant to their lives and will not get them jobs; and they make friends who are in a similar situation and who do not reject them. After spending

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32 Aspirations of Filipino children, for instance, are: education (38.43%), home life (20.94%), employment (19.93%), ability to help the family (15.93%) and goods health (5.93%). (Lamberte, Today’s Metro Manila Street Children, ix). Similar aspirations were confirmed by Brazilian former street children living in a shelter or turned-street-educators (interviews by the author in Brasilia and Rio 13-26.12.02).
some time on the streets, street children become used to living without formal constraints, and making independent choices. Many authors have discussed street children’s resilience, which they must acquire in order to survive on the streets and which gives them some form of emotional stability. Resilience is a form of resourcefulness generally understood as the capacity to make autonomous choices and to solve problems. While life on the streets has some positive impact on street children, such as resilience and solidarity with peers, most of their experiences leave scars that are difficult to heal. Street children often experience violence on the streets, and for many, it is a usual aspect of their street life. Although they might fight among themselves, violence usually comes from outside their circles, and especially from law-enforcers – official or self-proclaimed. Street children also learn not to trust people who claim to want to help them. Moreover, many street children come to the street from violent or abusive homes or institutional settings. Such experiences leave these children with little respect for authority and that reinforces their independence and makes it nearly impossible to force or convince them to adopt another way of life.

1.3 Description of street children in Brazil

The case study of Brazil illustrates street children’s characteristics. As already pointed out, the great majority of street children are teenage boys who have experienced violence at home, where their families live in poverty. Rizzini’s study shows how children have been “pushed” out of their families and communities, because these do not constitute adequate support systems for them, while the street presents opportunities of freedom, financial independence, friendship and fun. Impelizieri’s study, which corresponds well to the target group this thesis examines, shows that 81.2% of street children are male, and that their average age is 15.4 years. Fifty-four percent are black, and 31.6% are of mixed race, which is a sign of belonging to the lowest social classes in Brazil. They have had limited education before turning to the streets where they receive no formal education. However, many have been approached by street educators and have visited projects that provide non-formal education. In fact, street child projects are a major component of their survival strategy, and they even call NGOs their “clients”.

34 See Lucchini, op.cit.note 14 and Street Children, op.cit. note 25.
35 Rizzini et al., Crianças e adolescentes em situação de rua na cidade do Rio de Janeiro.
36 Impelizieri, op.cit. note 14: 61.
Rizzini studies street children's mobility in the context of such programmes given that street life involves mobility between home, the street and institutions where the children either seek temporary security, or where they are sent forcefully. However, these exits from the street usually do not indicate the end of street life.\(^{37}\)

Having fled violence at home, children also experience violence on the street from their peers, criminal gangs (especially drug-related), from the police and death squads, which are groups of civilians and/or policemen who perform extra-judicial killings and torture as forms of social cleansing.\(^{38}\) People still talk about the "Candelaria massacre" that shocked the whole country when off-duty policemen shot at a group of street children sleeping next to a church in Rio on 23 July 1993, killing eight of them. Violence is also present in institutions where the juvenile judge might refer street children. A secretly filmed video footage of the horrifying treatment of minors in São Paulo's juvenile detention centres in 1999 and 2000 alerted the government to the reality of these centres, where "socioeducative measures" were theoretically applied.\(^{39}\) The important place of violence in street children's lives before, and more so after adopting street life, is also highlighted in Rizzini's study, where the majority of children interviewed cite violence as the worst thing about the street, although they might still perceive the street as safer than their families and communities.\(^{40}\) As part of this life of violence and marginality, the majority of street children have been arrested at least once, use drugs and engage in illegal activities. They work, beg and steal to survive, but for most of them getting a job would improve their life. Rizzini's team of researchers found that street children considered street life as the "bad path", especially relating to their use of drugs.\(^{41}\) Job training and studying are also the aspects that street children like most about the activities they are offered in day centres and shelters, or generally physical, cultural and craft activities, according to Rizzini. Aside from working and studying, street children's ideas of a better life included also housing.\(^{42}\) All this

\(^{37}\) Rizzini et al., op.cit. note 35: 81.
^{38} See note 13.
^{39} Viewing of video by the author at the National Congress, Commission on Human Rights, Brasilia, 13.12.02. According to the Commission, the situation has improved since, but the Inter-American Commission on Human Rights (IACHR) declared a petition concerning these facts admissible in 2002 (IACHR, Adolescents in the custody of the FEBEM, Report no. 39/02, Admissibility petition 12.328, CEJIL v. Brazil, 09.10.02).
^{40} Rizzini et al., op.cit. note 35: 94.
^{41} Nanko Van Buuren, Director of IBISS (Brazilian Institute for Innovations in Social Health), believes violence in communities makes children choose the 'safety' of streets - directly relevant to growing drug trafficking in Rio de Janeiro; and drug trafficking has changed street children's profile, making traditional descriptions outdated. Interview with the author, 11.12.02.
^{42} Impelizieri, op.cit. note 13: 79.
reconfirms street children's interest in reintegrating a more traditional lifestyle. According to Rizzini's study, dreams, appearance, and nature of relationships are part of street children's means to combat discrimination against them and to improve their self-esteem: they want to be seen as citizens, not robbers.

Aspirations for respectable life need to be weighed against the glamour of street life and criminality. As well portrayed in the Brazilian film *City of God*, it often does not pay off to be a hard-working citizen if one belongs to the urban poor, because one will not get equal treatment and will remain in poverty no matter how honest. Other survival tactics, such as those used by street children or even drug traffickers in the film, can be valued more, because they show people's discontentment with the system and their capability to avoid exploitation. Young and impressionable, children and adolescents can be easily influenced either way, sometimes proud of their criminal activities, seeing a role model in a drug lord, and at other times repentant, remembering their mothers. This explains how they easily join rehabilitation programmes, and also easily return to the streets. Streets are associated both with danger and work, and with pleasure and leisure. Whatever street children's aspirations might be - making money, studying or living in a house, the rights of the child in their current form do not seem to offer the ideal protection for street children, as this discussion will show.

2. Definitions and classifications of street children

2.1 Difficulties relating to the definition of street children as a group

With this exposé of street children's characteristics, it becomes clear that street children's attributes are diverse, but that they share common elements across cultures. Because of these similarities, researchers have attempted to define street children as a group since the 1980s, when the "street child phenomenon" received increasing attention in terms of services for street children, research about their identities and

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43 Ibid., chapters I and III.
44 Rizzini et al., *op.cit.* note 35: 110.
45 Directed by Fernando Meirelles, 2002.
47 Many in Rio de Janeiro recognise the influence of drug criminals on poor children growing up without a father figure or honest opportunities in life. Author's interviews with Van Buuren (note 41) and Claudio Cavalcanti, City Councillor and President of the Commission on Children's Rights in Rio, 10.12.02.
48 Street children often idealise their mothers. Rizzini et al., *op.cit.* note 35: 46.
49 DaMatta, *op.cit.* note 46.
needs, and possibilities to offer them ways out of their street life. In the early 1980s, the Inter-NGO Programme for Street Children and Street Youth, considered “those for who the street (in the widest sense of the word, including unoccupied dwellings, wasteland, etc.) more than their family has become their real home, a situation in which there is no protection, supervision or direction from responsible adults” to be street children.\textsuperscript{50} This definition shows street children’s independence and their special relationship with the street. However, it has been widely criticised for its simplicity given the complicated situation in which street children find themselves. Other definitions have hence added elements to this. The Council of Europe and the European Taskforce on Street Children Worldwide, for instance, speak of street children’s peer groups and contacts in the street, of their limited contact with adults and institutions, and their work on the street.\textsuperscript{51} However, such definitions were also deemed simplistic by some, especially those working directly with street children.

As elaboration of a single definition seemed too difficult, some authors started to define street children by categories, mainly revolving around the double relationship that street children have with the street and with their families. It was observed that most children work on the streets during the day, and spend time with other children in the same situation, but return home to sleep. Fewer children stay on the streets day and night. UNICEF adopted a typology which reflects these two basic distinctions:

Children on the streets are those whose family support base has become increasingly weakened [who] must share in the responsibility for family survival by working on city streets and marketplaces. For these children... home ceases to be their centre for play, culture and daily life. Nevertheless while the street becomes their daytime activity, most of these children will return home most nights. While their family situation may be deteriorating, they are still definitely in place, and these children continue to view life from the point of view of their families.

Children of the streets are a much smaller number of children who daily struggle for survival without family support, alone. While often called “abandoned”, they too might also have abandoned their families, tired of insecurity and rejection and aged


up with violence... [Their] ties with home have been broken... de facto [they] are without families.  

This distinction between children “on” the street and children “of” the street has been widely used, especially since the mid-1980s, but it has also been increasingly criticized, as researchers have found out that many street children do not strictly belong to one of these categories, but shift between both categories. Some children remain on the streets for an extensive period of time, then return home, but leave again when they realize they are unwelcome, that the situation they fled has not changed, or when they miss their friends and street life. Some children who work on the streets start sleeping on the streets once in a while and then gradually join their peers. Many street children are thus in between both categories and might float towards one or the other. Such realization led some researchers to propose multidimensional definitions. Lucchini, for instance, has introduced a complex definition, which includes multidimensional factors in street life: space, time, opposition street/family, sociability, street activities, subculture, identity, motivation and gender. Others have suggested new models or classifications to understand street children’s characteristics. Williams proposes a working definition based on a hierarchy of street use, from minimal to total dependency on the street. In the Brazilian context, Lusk has distinguished between working children, children from street families, children who have broken all ties with the family and children who still have some contact with their family. In most contexts, street children are still understood as both those who live away from home and those who return home most nights.

Given the difficulties in defining street children as a group, and the apparent differences between children who spend time on the streets, many authors ended up denying the existence of street children as a specific group. They found it impossible to define street children, and not even desirable to try categorizing them into inflexible

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52 Taçon, A UNICEF Response to the needs of abandoned and street children, 3. Later UNICEF documents distinguish “abandoned” children from other children who left home, but retain occasional contacts with their families.
53 Williams, op.cit. note 20: 832.
55 Williams, op.cit. note 20.
56 These “family based street workers”, “children of street families”, “children of the street” and “independent street workers” represented respectively 21.4%, 13.6%, 14.6% and 50.5% of the group studied. See Lusk, op.cit. note 14.
groups, because of their fluid lives. Ennew was one of the first to have stopped studying street children as a group and has even found that such attention is detrimental to street children.⁵⁸ Others have felt that “street children” is a pejorative term that only reinforces stereotypes and encourages marginalization of these children.⁵⁹ They considered street children as “children at risk” or “children in difficult circumstances” together with other children whose condition calls for attention. Some feared that studying street children reduces attention due to other children who might need more assistance. Ennew has even accused street children of hijacking the urban agenda.⁶⁰ Moreover, some prefered to direct their efforts towards a larger group of children to diversify their action and thereby attract funding more easily. And, the broader the definition, the easier it seemed to incorporate street children into different categories covered by financial assistance, and thereby avoid the marginalization of these children.⁶¹ In Brazil, with a tendency to enlarge target groups, the term “children and adolescents in a street situation” (em situação de rua) has become popular with service providers,⁶² and wider terms, such as “children in a situation of risk”, are favoured as less stigmatising than “street children”. Butler and Rizzini claim that these wider terms “reflect a greater sensitivity to the actual situation of those it studies”, and that definitions and classifications “serve to stigmatise the group and end up serving the interests of particular sectors of society”.⁶³ In addition, many authors feel that one should focus on preventing children from ending up on the streets instead of trying to rescue children who have not responded well to street child

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⁶² Introduced by the Children’s Affairs Office of the State of São Paulo in 1993, the term refers to minors for whom the street constitutes the “primary or secondary everyday space guaranteeing survival and leisure, or both simultaneously” (cited in Rosemberg, “From Discourse to Reality: A Profile of the Lives and an Estimate of the Number of Street Children and Adolescents in Brazil”, in Mickelson, op.cit. note 20: 124). See also Inter-American Children’s Institute, “Niños, Niñas y Adolescentes en Situacion de Calle”.

programmes. Rizzini, Barker, Cassaniga, Panter-Brick, and Dallape have expressed similar views, favouring mainstream and preventive approaches to poverty.  

2.2 Use of the term “street children”

Opposition to the recognition of street children as a group is refutable. First, the term “street children” has a negative connotation only because the street is seen as bad. The term “street” is used in its widest sense when discussing street children. It denotes any public space, such as car parks, public squares and gardens, play areas, wastelands, railway stations, ports, abandoned buildings, etc. The specific significance and evolution of urban public areas in common perception and as they apply to street children has been well described by Tessier.\(^{65}\) He analyses “the street” as a space that has become a place of transit only, instead of its original function as a place of socialisation. It is therefore seen as abnormal to use it as a place to stay and socialise. The new perception of public space transforms the way we relate to and judge those who do not use that area as it is intended by modern urban planning. DaMatta contrasts the street with the house: in the house one rests, in the street one works. In the street it is “every man for himself”, “a world marked by universal laws and anonymity”, while the house is marked by “reciprocity, obedience and respect.”\(^{66}\) According to Taçon, it is not the street that is bad, but our attitudes towards it.\(^{67}\) La Cecla advocates for a change in attitudes by changing the street to be a more child-friendly place.\(^{68}\) In many places the use of the term “street children” came in fact as a reaction to more denigrating terms, such as “street urchins”, “street Arabs” or “waifs”.\(^{69}\) “Street children” was chosen as a more neutral term, showing the connection between the children and their use of the street. In Brazil, for example, the adoption of the term “street children” (meninos da rua),\(^{70}\) came as an attempt to change the term “minor”, which had a very negative connotation and was used before the end of the 1970s for all minors found outside their homes and considered as abandoned, needy, delinquent, at risk or marginalised.\(^{71}\) It is

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64 Rizzini et al., From Street Children to all Children. Improving Opportunities of Low Income Urban Children and Youth in Brazil; Panter-Brick, op.cit. note 60; and Dallape, op.cit. note 59. See also Moran & de Moura Castro, “Street-children and the Inter-American Development Bank: Lessons from Brazil”, Discussion Paper, which recommends that street children be mainstreamed for cost-effectiveness reasons.
66 DaMatta, op.cit. note 46: 17.
68 See La Cecla (ed.), Bambini per Strada, 9-23.
69 See e.g. Hecht, “In Search of Brazil’s Street Children”, in Panter-Brick & Smith, op.cit. note 26: 147.
70 The term meninos de rua was used in two studies in 1979: Fischer Ferreira, Meninos da rua, and Gonçalves, Meninos de rua e marginalidade urbana em Belém.
also noteworthy that “street children” has become a widely recognised and used term, even though many countries use other terms as well.72 Street children themselves use this term,73 as they differentiate themselves from other poor children.74 Indeed, other terms can be regarded as more degrading, depending on common perceptions, and many authors recognise the existence of a street culture.75 Street children might want this unique culture to be reflected in their appellation.

As to whether using this term marginalises street children, it is more likely that they be marginalised if treated together with other children in different situations. Epstein rightly argues that lumping street children into broad categories can be stigmatising, and may prevent effective assistance.76 Mainstreaming can be a way to sideline an issue, which is not considered worth according special attention to. Street children, because of their small numbers and the difficulty in ensuring their successful reintegration into society can be seen as a low-priority issue. Moran and de Moura Castro, while arguing for the mainstream approach as opposed to specialised programmes for street children, affirm that “trying to rescue a veteran youth without links to family, school, or a steady job is like trying to retrieve a boat adrift in a storm”.77 They recognise that the effectiveness of mainstream programmes depends on the degree of alienation of street children.78 If street children are dealt together with other children living in poverty, they will not get the assistance their particular situation calls for, and they will therefore be marginalised within the mainstream programme. Mainstreaming cannot be justified by the claim that attention towards street children will draw attention away from other children in difficult circumstances. Nobody contests the importance of special measures for children as a group, or even the use of sub-groupings, such as refugee children, child soldiers or children in conflict with the law. There is no hierarchy between different groups of children, and it is up to each

72 For nicknames of street children in different countries, such as *sciusha* (Naples), *pajaro fútero* (Peru), *saligoman* (Rwanda), *moustique* (Cameroon), *pivete* (Brazil), see Rane (ed.), *Street Children. A Challenge to the Social Work Profession*, 2-3; Agnelli, *op. cit.* note 3: 33; Hecht, *op. cit.* note 69. The term “street children” is understood in those countries.
76 Epstein, *ibid.*, 300.
77 Moran & de Moura Castro, *op. cit.* note 64: 9.
country, region or municipality to determine where priority action is needed depending on the local situation.

Prioritising prevention is no doubt crucial although it does not change the fact that there are thousands of children live on the streets at present. Many, including Williams and Glauser, have explicitly recognised street children as a separate group that requires special attention. Needs of independent street children and the way in which they respond to action can be very different from other children in difficult circumstances, such as domestic workers or those working in sweat shops. Therefore, institutional intervention based on unclear definitions and vague delimitations of groups is disadvantageous to these children. Most authors accept that several categories of street children exist, based on their relationship with the street and their families. It is also accepted that children with the most independence and closer ties with the street and with peers than with their families or other legal guardians, are the "real" or "hard core" street children. They are the children "of" the street, cherishing their independence and avoiding social conventions and other adult-imposed restrictions. It is only when they enter adulthood that they may decide to change their lifestyle, as life on the streets as an adult means increased difficulties and less help for those seen as a "lost cause". For children, alternative support groups help to fulfil immediate physical and emotional needs outside home. Support groups can be composed of peers, charitable adults, and institutional caretakers including street educators. Numerous studies have shown the importance of street children's peer groups in their lives.

Compared to children who spend some time on the street but sleep at home somewhat regularly, the "real" street children are in a unique position given their independence. Children with temporary street connection face fewer difficulties once

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80 It has also been pointed out that it is not in the interest of other children to be included in street children's programmes because they would not benefit from these specialised services. See Cockburn, "Discussion Paper on the Children's Bill: Focus on street children", <web.uct.ac.za/depts/ci/plr/submissions.htm>.
81 See e.g. Dallape, op.cit. notes 20 and 59; Invernizzi, op.cit. note 5; Lucchini, op.cit. notes 25 and 54.
82 It has been argued that family-child relationships should not be idealised in the case of street children; instead, one should consider the set of relationships they are in and their quality (Veale et al., op.cit. note 30: 139); see also Ennew, "Parentless Friends: A Cross-Cultural Examination of Networks Among Street Children", in Nestmann & Hurrelmann (eds.), Social Networks and Social Support in Childhood and Adolescence, 409-425.
83 See Terra Nuova, Voci e Visioni di Strada; Taracena & Tavera, "La fonction du groupe chez les enfants de la rue à Mexico", in Tessier, op.cit. note 33 : 70-87; and Stöcklin, op.cit. note 25: 62-91.
reintegrated, given the chance, as they are theoretically supported by their legal guardians. Measures to help these children can thus follow the formula presented in the rights of the child, which consists of governmental support to parents, who in turn support their children. If they fail, measures can be taken to correct this neglect and, if necessary, children are placed in alternative care. For children living on the streets, measures to help the family will have a different effect, as these children choose not to live with their guardians. For example, financial support to parents as an incentive not to send children to work on the streets is a possible measure for the first category who would be happy to return to school. Such a measure would not work for the second category, who value their lucrative activities and the freedom to spend their earnings.

2.3 Choice of a definition and legal consequences

2.3.1 Requirements of a legal definition

A definition of street children would help to address issues related to identifying appropriate action. The purpose is not to stigmatise a group of people, but to better respond to their needs and the significance of a definition can be seen in the protection of other groups in international law. For example, the difficulty and importance of defining groups for specific legal protection has become apparent in the negotiations towards the Convention on the Rights of Persons with Disabilities (CRPD). While many felt that no acceptable and accurate definition of such a heterogeneous group of people could be established, it was clear that only a definition, even an open-ended and evolving one, would ensure that persons with disabilities are the subjects of this convention and that rights protected by the convention are tailored to their needs. The definition of indigenous people also continues to be debated and, since it has bearing on the character and scope of the human rights of indigenous people, the lack of

84 It has been recognised in Bangladesh, for example, that mixing up the characteristics of other disadvantaged children with street children has led to costly and ineffective methodologies. See “South Asia Civil Society Forum on Promoting the Rights of Street Children”, Colombo, 12-14.12.2001, Bangladesh Country Report.

85 See “South Asia Civil Society Forum on Promoting the Rights of Street Children”, ibid., India Country Report.


88 The Convention demonstrates a compromise solution in preambular paragraph (e) and Article 1.

agreement can considerably delay the adoption of the Declaration on the Rights of Indigenous Peoples or any other related legal instrument.\(^90\)

Similarly, a definition of street children should reflect their specific situation, from which special needs arise. It should reflect their independence and self-sufficiency, which makes them different from other poor and marginalised children, including others with a street connection. From this independence arises a need to be presented with realistic options in life that allow for active participation of street children in choosing their own lives. Such options should emphasise short-term results first in comparison to long-term objectives. Moreover, options need to increase street children's resilience, in order to strengthen their survival skills. Some street children might not be ready to leave the street, and in this case, it is important that their safety and well-being on the streets is improved, without creating dependency on street based services. This resilience can in turn become a tool for children who want to change their lives. In contrast, if street children were included in a bigger and vaguer target group, such as urban children living in poverty or "children in especially difficult circumstances" (CEDC)\(^91\), ensuing measures would not be targeted to their specific needs, and the children would easily fall through the cracks of that protection system. Measures to help these groups of poor children, encompassing all working children, exploited and abused children, might be founded on community-based support services for children who are part of a community. Similarly, measures are likely to target families of these children,\(^92\) and would therefore only work for children who have meaningful relationships with their families.

As for other groups, it is important that the definition be embodied in law to ensure its systematic application in all actions taken for street children. A suggestion put forward to allow street children's inclusion in South African legislation consists of defining CEDCs in law and listing the groups of children, including street children,

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\(^90\) The drafting of a declaration started in 1985. The Declaration (UN doc. E/CN.4/Sub.2/1994/2/Add.1) was adopted by the Human Rights Council (HRC) in 2006, but not by the General Assembly (Third Committee), and negotiations are therefore continuing.

\(^91\) The term CEDC was introduced by UNICEF in the mid-1980s to cover all categories of disadvantaged children (see resolution of UNICEF's Executive Board, E/ICEF/1986/CRP.33). UNICEF based many of its programmes and policies on its analyses of the CEDCs. The term has since then been commonly used among other catch-all categories of children requiring special protection.

\(^92\) Including extended families for children heading households and other orphans.
falling under this category. The definition of CEDCs is useful as it recognises the existence of children needing special measures, but a separate definition of street children would be necessary to ensure that special measures are taken for each group according to its specific circumstances. Additionally, the definition needs to be adopted internationally for states to be required to adapt their national legislation to this definition as part of their implementation of the international rights of the child. Because of the top-down approach whereby international law shapes national law, which is the basis of other levels of national, regional or local regulations and policies, the international definition of street children should be wide as well as being specific to street children.

Among all the definitions that have been presented, only those focusing on "hard core" street children or those distinguishing between the two main types of children on the streets are used in this thesis. Complex definitions, such as the one suggested by Lucchini, are useful to understand the specificities of each individual child, but cannot be used for the purposes of legal categorisation. For the purposes of legal analysis, definitions must be clear and simple enough for systematic use. For example, the first definition of street children demonstrates adequately street children's main characteristic: their independence. The definition initially given by UNICEF to categorise street children is also useful, because it distinguishes between children who seem like street children, and the "real" street children, as understood in this thesis. In that sense, the definition given by the CRC Committee cannot be used, as it combines these two categories and describes street children as "children who, in order to survive, are forced to live and/or work on the streets". Also, from the standpoint of this thesis, this definition is not adequate because of the wording "...in order to survive, are forced

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93 See Ritchie, "Children in 'Especially Difficult Circumstances': Children living on the Street. Can Their Special Needs be Met through Specific Legal Provisioning?", Consultative paper.
94 In this proposal, CEDCs are defined as "children who have extra-ordinary needs which are not met and who require specific protection to regulate their special needs" (ibid., 2).
95 Mention of top-down approach does not deny the influence of national law on international law, for example during the drafting of international instruments. See Chapter VI on the connection between national and international law.
96 Sociological and anthropological studies should be used in a legal study to ensure that legal categories and responses to social problems reflect reality and are not based on abstract and outdated theories and assumptions. However, because of their different purpose they should not be measured against the legal analysis of a situation. See King & Trowell, Children's Welfare and the Law: The Limits of Legal Intervention, 108-137 concerning the role of law, and Freeman, "Sociology of Childhood and Children's Rights", 6 International Journal of Children's Rights, 433-444, about the need for dialogue between law and sociology.
97 This wording was first used in resolution 1994/93 of the Commission on Human Rights (CHR), "The Plight of Street Children", 9.31994.
to...”, which points more to children who are on the streets only because they need to work there. This thesis would thus adopt the first definition introduced in 1982 with some amendments for clarification:

Street children are those for who the street (in the widest sense of the word) more than their family has become their real home, a situation in which there is no systematic protection, supervision or direction from legal guardians or other responsible adults, or in which this protection is rejected by the child.98

This definition takes into account street children’s independence, while recognising the fact that protection is often offered to these children and that different services and relationships intermittently exist in street children’s lives. Such a definition could be adopted at the international level, because it is wide enough to accommodate the different circumstances of street children around the world. It does not include explanations about why street children end up on the streets, about their daily activities, or about their personalities. The definition simply reflects the core characteristic of street children, which makes it difficult for them to exercise their rights as they are currently formulated in the framework of the international rights of the child.

2.3.2 Concept of legal status

Adopting a definition does not guarantee an increase in the protection of street children’s rights. The embodiment of a definition in law gives groups a legal status, which affirms their legal personality and defines their legal capacity thus involving rights and duties directed to individuals, and the capacity to exercise these rights and to undertake these duties, without representation by a third party.99 A legal status defines this legal capacity and conditions people’s life in society.100 The status ensuing from a definition can therefore have positive or negative repercussions on the individual. For example, the definition of children in conflict with the law can lead to a status requiring either protective or punitive measures depending on whether these children are defined

98 The additions in italics are modifications to the original definition by this author.
100 Eekelaar rightly emphasises the social function of legal status in “The Interests of the Child and the Child’s Wishes: the Role of Dynamic Self-Determinism”, in Alston (ed.), The Best Interests of the Child, Reconciling Culture and Human Rights, 43. See also Van Bueren , op.cit. note 6: 51; McKean, Equality and Discrimination under International Law, 1.
as victims or as criminals. Likewise, a definition of persons with disabilities can lead to a status highlighting their dependency and inabilities on the one hand, or their abilities and legal capacity on the other. ¹⁰¹ Such distinctions are important in defining street children, as they can be portrayed as criminals, victims, or holders of rights. ¹⁰²

Another important point to note is that defining street children internationally does not necessarily give them an international legal status, because such a status would make them international actors. Some authors, such as Cançado Trindade, argue that individuals have an international legal personality. ¹⁰³ While this would be desirable for enhanced protection of human rights, such legal personality remains limited. ¹⁰⁴ Although there are treaties that regulate the legal status of specific groups, ¹⁰⁵ this status has bearing on their situation at the national level alone. For example, in countries that are parties to the 1951 Convention relating to the Status of Refugees, ¹⁰⁶ the definition of refugees is linked to a legal status, which grants them special rights to be implemented by their host country, different from other foreigners. An international legal status should also not be confused with the reference to "other status" in non-discrimination clauses of international human rights treaties, where "status" does not necessarily refer to a legal status, but to what defines a person in society. ¹⁰⁷

As children, street children already have a legal status as minors. ¹⁰⁸ The rights and duties arising from legal minority status depend on national legislation, and they are generally linked to legal incapacities affecting different areas of life at different stages

¹⁰² For example in China the definition of “street child” is “a person under 18 who has left his/her family or guardian and lives a vagabond life for more than 24 hours without reliable safeguard for basic survival with the result of falling into dire straits” (West & Yang, "Out of Place out of School”, 3 Chinabrief, 7-12). As a result, the official response is that of systematically sending children back to their families.
¹⁰⁴ International legal personality of individuals is manifested in judicial proceedings of regional human rights courts.
¹⁰⁵ For example the 1954 Convention on the Status of Stateless Persons (360 UNTS 117) or the 1975 European Convention on the Legal Status of Children Born out of Wedlock (ETS No. 85).
¹⁰⁷ Article 2 of ICCPR refers to “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” which can be legal statuses in some countries, but often refer to a person’s social, economic or other condition that defines their place in society.
¹⁰⁸ The Human Rights Committee in General Comment 17 on Article 24 underscores the link between childhood and minority: “The right to special measures of protection belonging to every child because of his status as a minor” (UN doc. HRI/GEN/1/Rev.2, 23). See also Article 16 of the Protocol of San Salvador (Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, O.A.S. Treaty Series No. 69 (1988)).
of childhood. \textsuperscript{109} National legislation, of course, has to be in line with the CRC, as it links childhood to the concept of minority. \textsuperscript{110} As argued in Chapter III, this status does not take their special circumstances into consideration and can be problematic for street children, who live independently but are prevented from exercising this independence. According to the Inter-American Court of Human Rights, "those who are legally [incapable] are subject to parental authority, or in its absence, to that of guardians or representatives." \textsuperscript{111} Depending on national legislation, children can have additional statuses, if they: live in state care, belong to national minorities, are in conflict with the law, or if homelessness is regulated in national law. \textsuperscript{112} A specific status as street children, such as that derived from the definition adopted in this thesis, can be instrumental in securing the adoption of specific policies and programmes for street children, and also in litigation. Defining a group that shares a particular situation and interests leads to more effective action and adequate outcomes for the whole group, especially where class action suits exist. It is easier for street children or their representatives to claim that they represent a class, once that class has been defined in law. \textsuperscript{113} Perhaps the lack of a commonly accepted definition can explain the dearth of litigation by and on behalf of street children nationally and internationally. \textsuperscript{114}

\textsuperscript{109} See McKean, \textit{op. cit.} note 100: 1. Although he refers to slavery, castes, marriage and religions, his description of the legal status within his analysis of equality and discrimination under the law corresponds well to the legal situation of children as minors.

\textsuperscript{110} At the national level, "minor" is a legal term denoting legal incapacity in certain areas, while "child" has a more biological meaning, and is often distinguished from "adolescent" and "youth". At the international level, "child" has gained the same juridical meaning as "minor".

\textsuperscript{111} Advisory Opinion No. 17 (\textit{op. cit.} note 99), Structure of the Opinion, at 41.


\textsuperscript{113} Indian street children identify lack of societal acceptance and legal status as major issues responsible for their lack of access to basic services and opportunities for employment and financial assistance (India Country Report, \textit{op. cit.} note 85).

\textsuperscript{114} At the regional level there has only been one case: \textit{Villogran Morales et al. v. Guatemala}, judgment of 19.11.1999, Series 6, No.63 (1999) - see Chapter IV.
3. Definitions and categorisations in international law

3.1 The notion of “vulnerable group”

Defining groups and granting them a special status, leading to special measures, is common practice in international human rights law. In fact, international law has evolved in that direction, after securing general human rights applicable to all. It has become increasingly clear that not everybody benefits from the protection offered by the International Covenants adequately, and that many groups of people have special circumstances, which are not taken into account by these Covenants. Such groups are sometimes called “vulnerable groups”. The term is widely used by the UN, but is not to be found in international legal instruments. It has also been criticised, because it gives the impression that people are powerless and need assistance.

Viewing people as vulnerable would be contrary to the principles of dignity and equal worth of every human being, and would translate into charity and dependency, instead of participation and empowerment. Moreover, vulnerability is a very vague concept, which leaves open the question: what are people vulnerable to? In the social field, vulnerability is understood as “a state of high exposure to certain risks and uncertainties, in combination with a reduced ability to protect or defend oneself against those risks and uncertainties and cope with their negative consequences.” Its causes are linked inter alia to changes in the family structure, industrialisation and urbanisation, migration of the young from rural areas, and the decline in the size of the nuclear family.

Street children clearly fit into this description. In the legal context, vulnerability is linked to discrimination, which is the other side of the coin. Because of their social situation, vulnerable groups are more likely than others to be discriminated against, and this hampers their equal enjoyment of their human rights. They also suffer discrimination and social exclusion, thereby reducing their chances to break away from this vicious cycle. If value judgement is to be taken out of the concept of vulnerability, “vulnerable groups” would then seem to be an appropriate way to designate groups of

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116 For instance, the CHR’s agenda included item 14(c): Specific groups and individuals: Other vulnerable groups and individuals.
117 See e.g. UN, Report on the World Social Situation, 2003, 53.
people who are treated separately in human rights law because of their position in society that can restrict their enjoyment of human rights. Group members have specific characteristics that entitle them to that group’s membership, and all “vulnerable groups” share the fact that their members are vulnerable to discrimination because of that membership. The recognition of their vulnerability does not lead to simple assistance measures, but to a rights-based response, which aims to restore their equality with the rest of the population.

This approach involves granting vulnerable groups separate sets of rights that respond to their specific conditions and activities better than general human rights instruments. In general, the purpose of separate sets of rights is to protect the individual members of groups by conferring them a special status. Not all groups are in need of protection and sometimes it is only the activities of individuals that need to be regulated because of their membership to a certain group. Human rights law is only interested in groups that are in a weaker position than the rest of society and need enhanced protection because of their “vulnerability”. This does not mean that international law grants special protection only to vulnerable groups. For instance, the ILO has developed numerous international conventions protecting the rights of workers. Workers, in the traditional sense, cannot be considered vulnerable, as they mainly represent the majority of the world’s dominantly healthy and male population. In fact, their protection is not based on their membership of a group, but on their activities as workers, i.e. on a specific situation. Consequently, they cannot claim special protection in any aspect of their private lives that is not related to their work on grounds of their status as workers.

Vulnerable groups are groups whose members need protection generally in all aspects of their lives, because their status and/or condition places them in a weaker position than other individuals in the same situation. This is the case for children (because of the legal, psychological, physical and social consequences of their age), persons with disabilities, migrant workers, and national minorities, for example. For children, specific rights that address their special circumstances include rights related to family environment and forms of care, and the right to free and universal primary education.

120 See the Human Rights Committee’s General Comment on Article 24, which recognises “The right to special measures of protection belonging to every child because of his status as a minor” (emphasis added), op.cit 108: 4.

121 Discrimination can also be considered in separate areas of life. Examples are the Discrimination (Employment and Occupation) Convention (ILO No. 111), 1958, 362 UNTS 31 and the UNESCO Convention against Discrimination in Education (CADE), 1960, 429 UNTS 93.
education. Not all groups are vulnerable at all times, in all contexts and all societies. However, if a separate set of rights has been developed for them, it is based on widely noted phenomena, which show that members of those groups face the risk of being in a weaker position in society than other individuals, usually because of social construct and stigma, and that the protection offered by general human rights does not meet their needs. The observation of these phenomena usually confirms both historical experience and present values, thus validating the role of law in responding to social realities.

International law has not dealt equally with all vulnerable groups and there are groups it has not yet considered, such as street children. The first groups it treated separately were national minorities that benefited from a protection system developed by the League of Nations. Vulnerable groups that have received significant attention since the creation of the UN are women, children, ethnic minorities, and refugees. Other minorities and indigenous populations have also received considerable attention. Persons with disabilities, the ageing, and more recently people with HIV/AIDS can be added to the list of recognised vulnerable groups. Probably the greatest attention has been given to the situation of women, which is addressed in an integrated way across all UN programmes. In addition to a convention protecting their specific rights, several bodies have been established throughout the UN system to make sure that their situation and the question of their equality with men is addressed in all spheres of action. Improvements in the condition of women also ensure that their problems are being tackled, as they have gained influence as a pressure group.

As previously noted, children belonging to groups that have been recognised as vulnerable in general human rights law have been granted special attention. These

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123 This system was based on minorities' treaties and declarations, which contained guarantees for their protection to prevent their assimilation with the majority population because of its subordinate position in society due to the consequences of WWI.
125 The 1979 Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) is the main convention (UN doc. A/34/46). Others exist, such as the 1952 Convention on the Political Rights of Women (193 UNTS 135) and the 1957 Convention on the Nationality of Married Women (309 UNTS 65).
126 These include the Commission on the Status of Women, the Division for the Advancement of Women in the UN Secretariat, the International Research and Training Institute for the Advancement of Women (INSTRAW) and the UN Development Fund for Women (UNIFEM).
children benefit from the declarations, guidelines, or general comments made by human rights treaty monitoring bodies, and either directed towards adults or these children as a sub-group. An exception to this rule, whereby adult groups are prioritised and children benefit from this attention later, exists with children temporarily or permanently deprived of their family environment, who are entitled to “special protection and assistance” by the state. Street children belong to this group prima facie. However, closer analysis reveals that street children are often not literally deprived of their family environment and that the provision targets children who need to be placed in care. Street children have therefore not yet been recognized as a vulnerable group in international law, and because of this their “vulnerability” cannot receive a specific legal response.

3.2 Debates over “group rights”

Because we are discussing the rights of vulnerable groups, the notions of individual and group rights must be clarified. As in the case of children, it is simply one’s existence as a human being that guarantees one’s right to exercise rights granted to every person by international human rights law. At first glance, human rights thus seem to be individual rights. However, children can exercise their rights as defined in the CRC because of their status as children. For that, it is not enough that they are individual human beings, but they also need to belong to this category defined by age. Children’s rights are thus group rights. This is the same for sub-groups of children. For example, the General Discussion Day of the CRC Committee on children with disabilities recognised the need to develop strategies to ensure that the rights of disabled children are respected both as individuals and as groups.


128 CRC Article 20. Articles 21 and 25 are also relevant.

These group rights must not be confused with collective rights. Children exercise the rights of the child because they belong to a group, but they exercise those rights individually, each right being directed to each individual child. Collective rights, on the other hand, are exercised by groups and thus cannot be exercised individually. An example is the right of peoples to self-determination where members of a certain group, defined as a “people”, have the right to self-determination as a group. The categorisation of rights into individual and collective rights has been the subject of much debate. There are different definitions of these rights and arguments both for and against an emphasis on each category. Division can be made either by using the criterion based on the mode of exercise of rights or on the beneficiaries of rights. In the first case, individual rights would be those that can be exercised individually, such as the right to freedom of expression, and collective rights would be those exercised collectively, like the right to freedom of association. The second theory presents individual rights as the rights of which individuals are the subjects and direct recipients—the case for all traditional rights and freedoms in general—whereas collective rights focus on the group as the subject of law. This is the case particularly of the so-called “third generation rights”, such as the right to development.

Some scholars, such as Lerner, would argue that children’s rights could not be called group rights, because children are not a real “group”, but rather a certain category of individuals. Other similar categories of individuals are the elderly, migrant workers, refugees, aliens, members of a social class or a certain profession, etc. What is

130 Generally speaking, there is no consistency in the terminology used. See e.g. Jones, op.cit. note 16, Oestreich, “Liberal Theory and Minority Group Rights”, 21 Human Rights Quarterly, 108-132; Rodley, “Conceptual Problems in the Protection of Minorities: International Legal Developments”, 17 Human Rights Quarterly, 48-71; Donnelly, Universal Human Rights in Theory and Practice. This thesis differentiates the two so as to distinguish between rights held by groups and rights held by members of a group who suffer discrimination because of group characteristics. See also Sanders (op.cit. note 17: 368-370).

131 This is the “corporate” as opposed to the “collective” conception of rights (Jones, op.cit. note 17).

132 For arguments supporting the individualistic approach to human rights, see Donnelly, op.cit. note 130, Rodley, op.cit. note 130, or Galenkamp, op.cit. note 17, and for arguments in support of groups as bearers of rights, see e.g. Ramaga, “The Group Conception in Minority Protection”, 15 Human Rights Quarterly, 575-588 and Oestreich, op.cit. note 130.


134 See especially Donnelly, op.cit. note 130: 25-26, 208 and Galenkamp op.cit. note 17: 73.

135 See Lerner, op.cit. note 17; Van Boven presents a wider approach and defines a group as “a collectivity of persons which has special and distinct characteristics and/or which finds itself in a specific situation or condition” (op.cit. note 17: 54). The list of group characteristics by Glaser and Possony is limited (citizenship groups; racial groups; nations, nationalities and ethnic groups; economic and social classes; and castes), but goes beyond the simplistic yet commonly used notion of groups limited to nations, minorities and indigenous peoples (Glaser & Possony, op.cit. note 17).
common to these categories of individuals is that their group affiliation is temporary and does not necessitate a strong sense of solidarity or belonging. The “real groups” would be those that are bound by “unifying, spontaneous and permanent factors”, 136 which are beyond the control of group members and independent of any specific situation. Individuals need to identify with the whole and share a sense of belonging to their groups, which could be ethnic or racial, religious, linguistic or cultural. 137 Such distinctions between groups and categories are rather forced. 138 Belonging to a category is not always a question of choice – as in the case of refugees or social classes, especially castes – and being a member of that group for long enough can give some sense of belonging and create a common culture. 139

Children, for instance, recognise themselves as children and relate to each other better than to adults, even those who share the same religion or ethnic origins. Similarly, street children often form solid peer groups and feel alienated in the company of children living in families. In contrast, people belonging to a linguistic, racial or religious group might not be so deeply involved in that group. This author would partially agree with Donnelly’s liberal view of group membership, which recognises people’s multiple identities and choices between identities, but she would reject his view that all group memberships are based on individual choice. 140 It is clear that people from one group can also belong to other groups and create sub-groups, and this is what determines each person’s identity. For instance, one could be simultaneously a woman, a migrant worker, have a disability and be Jewish. Street children can also belong to groups that have not officially been recognised as vulnerable groups through specific rights and instruments, but that receive special protection through the CRC, such as trafficked or orphaned children. 141 As Wiessner states: “Our lives are enriched through multiple affiliations and identifications, by participating in the dynamic process of

136 See Lerner, op.cit. note 17: 30. This is based on the UN Secretary-General’s observation on the nature of communities (Definition and Classification of Minorities, UN Doc. E/CN.4/Sub.2/85,18).
137 See e.g. Heinze, op.cit. note 17 and Ramaga, op.cit. note 132: 581.
138 See Heinze, ibid.
139 See Wiessner, op.cit. note 17, who differentiates between the rights that each of these groups claim: the preservation of group identity for “organic groups” and the elimination of discrimination for “non-organic groups”. This distinction can be sometimes artificial.
141 Membership of additional vulnerable groups is often a direct consequence of the street child’s situation and could be prevented by enforcing rights that would be designed to address street children’s needs.
shaping and sharing values in ever-changing patterns of social configurations and identities.\textsuperscript{142}

3.3 Non-discrimination and equality

In international human rights law, groups are thus often associated with the protection of vulnerable groups and linked to the notion of non-discrimination, which is grounded in the principle of equality.\textsuperscript{143} These two principles are among the most frequently cited and declared norms of human rights, and yet some of the most debated concepts.\textsuperscript{144} The concept of equality with which international human rights law is concerned is that of relative equality, which prohibits discrimination based on unfair, unreasonable, unjustifiable and arbitrary distinctions.\textsuperscript{145} This should be distinguished from absolute equality, which is unattainable because of each person's individual characteristics. People are thus different individually and in categories, while being equal in their human nature.\textsuperscript{146} This means that it is not discriminatory for law to treat people differently if there is an objective justification for distinction, as international jurisprudence has consistently explained,\textsuperscript{147} but that in no case should there be preferential treatment in the application of the law, which is the original understanding of non-discrimination.\textsuperscript{148} Some argue that differentiation of treatment ensures greater equality in society. This assertion is based on the understanding that people in comparable situations should be treated similarly, while treating people in different

\textsuperscript{142} Wiessner, \textit{op.cit.} note 17: 226.


\textsuperscript{144} See McKeen, \textit{op.cit.} note 100: 1-13; Nowak, "Civil and Political Rights", in Symonides, \textit{op.cit.} note 140: 98-100.

\textsuperscript{145} See the Belgian Linguistics (Judgment of 23.7.1968, Series A, No.6, 1 EHRR 252); and Marckx (Marcks v. Belgium, Application no. 6833/74, Judgment of 13.6.1979, ECHR 2) cases of the European Court of Human Rights (ECHR), and General Comment 18 of the ICCPR Committee ("Non-discrimination", UN doc. HRI/GEN/1/Rev.2, 26).

\textsuperscript{146} The CRC embodies the concept of dignity in Articles 28(2), 37(c) and 39, dealing respectively with school discipline, deprivation of liberty and the recovery and reintegration of child victims. See also UDHR Article 1.

\textsuperscript{147} See ICCPR Committee, General Comment 18, \textit{op.cit.} note 145; the CRC Committee has also reiterated this principle in its General Comment on General Measures of implementation for the Convention on the Rights of the Child (General Comment 5, UN doc. CRC/GC/2003/5); One may also quote Judge Tanaka in his dissenting opinion in the South West African Case: “To treat different matters equally in a mechanical way would be as unjust as to treat equal matters differently” (South-West Africa, second phase, Ethiopia v. South Africa; Liberia v. South Africa, judgment, 18.07.1966, 1966 ICJ Reports, 6, 306).

\textsuperscript{148} See Nowak, \textit{op.cit.} note 144: 98; Kelsen quoted in Bossuyt, \textit{L'interdiction de la discrimination dans le droit international des droits de l'homme}, 75.
situations similarly would lead to greater *de facto* inequality. 149 The European Court of Human Rights (ECHR) has clarified the meaning of Article 14 of the European Convention in this sense in the case of *Thlimmenos v. Greece*:

The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different. 150

As an illustration, a six-year old child should not be treated the same way as a fifteen-year old, even if they have committed the same offence. Similarly, children who live in very difficult conditions should receive more attention than those whose basic needs are already met. 151 Such inequality can be justified, whereas discrimination based on the arbitrary use of subjective criteria cannot. 152 People should not be discriminated against because of individual characteristics, or more commonly because of group characteristics as defined in international human rights treaties. 153 It is generally accepted that discrimination is a distinction “made on grounds of natural or social categories, which have no relation either to individual capacities or merits or to the concrete behaviour of the person.” 154

Provisions against non-discrimination exist in major human rights treaties 155 and there are special treaties dealing with the discrimination problem faced by certain

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149 See e.g. Bayefsky, *op. cit.* note 143 and McKean, *op. cit.* note 100: 7, referring to “compensatory treatment” and “distributive justice”.

150 No. 34369/97, judgment of 6.4.2000, ECHR 161at 44.


153 See McKean, *op. cit.* note 100.

154 See “The Main Types and Causes of Discrimination”, memorandum submitted by the Secretary-General, UN doc. E/CN.4/Sub.2/40, Rev. I. Discrimination is more specifically defined in some human rights treaties, including the 1965 Convention for the Elimination of All Forms of Racial Discrimination (CERD), 660 UNTS 195, CEDAW, CADE and ILO Convention Concerning Discrimination in Respect of Employment and Occupation (No.111).

155 Non-discrimination clauses are the following in the main human rights instruments: UDHR: art.1; ICESCR: Article 2(2); ICCPR: Article 2(1).
groups.156 The lists generally include: race, religion, national origin, ethnic group, class or sex, but are open-ended157 and new grounds for discrimination can be added.158 Age can be added to this list if people belonging to a certain age group, such as children and the ageing, receive differential treatment without a valid justification.159 It is noteworthy, however, that the CRC completely ignores the issue of discrimination against children because of their status as children, and limits the concept of non-discrimination to the equal application of the rights stated in the Convention to each child. The above definition of discrimination also fits the case of street children perfectly, as their suffering from unequal treatment is historically grounded, and is based not only on their low social status, but also on the fact that they cannot enjoy the same rights as other children.

3.4 Non-discrimination and special measures

As has been argued, members of vulnerable groups are at risk of being treated differently because of illegitimate reasons based on social stigma. They are thus unlikely to be able to exercise their rights as efficiently as other people, and this in turn contributes to their subordinate position in society. To protect their rights, states are to intervene and facilitate their ability to enjoy their rights. General international human rights instruments do not give much guidance on the way in which non-discrimination should be applied. In its most passive (or "negative") sense, the principle of non-discrimination simply means that states should not take any measures that discriminate against people. This is usually not enough to ensure that all people enjoy their human rights, as there is a difference between equality before the law and de facto equality.160

The adoption of positive measures means that not only should all discriminatory laws be abolished, but that States should also do more than enact legislation prohibiting discrimination against certain groups. This can entail combating discrimination actively,
and changing the general negative perception of a specific group. Sometimes it is also necessary to adopt "affirmative action" measures, which are the utmost form of positive measure, and are also called "positive discrimination". These are measures in favour of a group of people that can disadvantage the majority, such as quotas. International law, especially through jurisprudence, has recognised the need to ensure *de facto* equality through positive measures including affirmative action. Such special measures should be limited in time and should only serve the specific goal of achieving *de facto* equality. It is important that preferential treatment does not go beyond the intended goal, because it would then amount to reverse discrimination.

Positive measures are connected to ESC rights, but in the case of vulnerable groups they go further, as they include all measures that states need to take to ensure the realisation of *de jure* and *de facto* equality of members of vulnerable groups in relation to all human rights. Some rights may call for more protection than others, such as the right to education and the right to work, as these are *par excellence* related to the problem of discrimination, and the only ones that have been objects of specific treaties. Other rights are more closely related to the notion of special protection, because they are relevant to specific groups, but might be of no interest to others. For example, the right to freedom of religion is of primary importance to religious

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161 See CEDAW Articles 2(f) and 5, and CRPD Article 8.
162 The Permanent Court of International Justice (PCIJ) in the case of Minority Schools in Albania (Advisory opinion, 6.4.1935, Series A/B No.64, 143) endorsed and encouraged affirmative action by insisting that equality must exist in fact as well as in law. This has been explicitly reaffirmed in Article 1 of CERD, Article 4 of CEDAW, and Article 5 of CRPD. The understanding that special measures are also required for the implementation of the human rights Covenants is included in their travaux préparatoires (see Bossuyt, op.cit. note 148: 47-48), and the concept is consistently applied in the jurisprudence of human rights treaty monitoring bodies: ICCPR Committee General Comment No. 18 (op.cit. note 145); General Comment No. 23 ("The rights of minorities", UN doc. CCPR/C/21/Rev.1/Add.5); General Comment No. 28 ("Equality of rights between men and women", UN doc., CCPR/C/21/Rev.1/Add.1028); CEDAW Committee General Comment No. 18 ("Disabled women", UN doc. A/46/38); General Comment No. 25, ("Temporary special measures", UN doc. HRI/GEN/1/Rev.7); ICESCR Committee General Comment No. 5 ("Persons with Disabilities", UN doc. HRI/GEN/1/Rev.4); General Comment 6 ("The economic, social and cultural rights of older persons", UN doc. E/1996/22; General Comment 16 ("the equal right of men and women to the enjoyment of all economic, social and cultural rights", UN doc. E/C.12/2005/3); and CERD Committee General Comment No. 27 ("Discrimination against Roma", UN doc. A/55/18, annex V). The European Court of Justice has also reversed, although shyly, its previous judgment, where it had ruled that affirmative action programmes violated Community Law. See Kalanke v. Freie Hansestadt, Case 450/93, Bremen, 1995 ECR I-3051, and Marschall v. Land Nordrhein-Westfalen, Case 409/95, 1997 ECR I-6363.
163 "Reverse discrimination" is sometimes used to mean "positive" or "special" measures. This author would agree with the understanding of "discrimination" by Bossuyt, as exclusively designating "arbitrary, unjust or illegitimate distinctions" (Bossuyt, op.cit. note 148: 5). Special measures, especially in their extreme form, such as affirmative action, would amount to such discrimination if they had ceased to be necessary for a group.
164 CADE and ILO Convention Concerning Discrimination in Respect of Employment and Occupation (No.111).
minorities, but not so to women as such. Some rights, however, might be important to all vulnerable groups, but require special attention in relation to a specific group, such as the right to housing for homeless people. Consider also the right to work for women that includes the right to maternity leave and the provision of social services, such as child-care facilities. Recognition of the special vulnerable status of a particular group in international law does not always necessitate the creation of new rights, and special rights do not arise from special measures. What often is more appropriate is the reinforcement and reinterpretation of existing rights.

As examples of positive measures for street children, states should combat discriminatory measures that ensue from children's minority status, like certain status offences, whose justification is generally not based on children's best interests but those of adults. Such rules often concern children's behaviour in public and are thus discriminatory against street children for whom the public area has become their private sphere. While international law offers street children protection through the general principle of non-discrimination, it does not recognise them as a specific group. Consequently, this principle is not applied to their specific situation in a systematic way. If street children were recognised as a distinct vulnerable group amounting to special status the principle of non-discrimination would have to be accorded a specific meaning in view of their situation and special measures would need to be taken. For example, measures would need to be taken to enable street children's direct protection without including their parents or without unnecessarily limiting their freedom. Such measures would be taken to implement their rights as stated in the CRC and as read through the non-discrimination lens.

165 See General Comment 4, op.cit. note 112: 11.
166 CEDAW Article 11(2).
168 See Daes, op.cit. note 140: 305.
169 See Qvortrup, op.cit. note 18.
170 Street children’s absence in the CRC can be contrasted with other groups, for instance children of minorities or indigenous populations (Article 30), of whom it is said that “in light of [other articles] article 30 might seem redundant. However, the overwhelming evidence of serious and continuing discrimination against minority and indigenous populations justifies mention of their rights in a separate article” See Hodgin & Newell, Implementation Handbook for the Convention on the Rights of the Child, 407.
171 Unless street children are recognised as a special group in human rights law, measures taken cannot be part of a rights-based approach and thus cannot guarantee that they are entitled to such measures.
3.5 Non-discrimination: right to equality or right to difference?

Vulnerable groups' rights to special protection and non-discrimination ensure that they enjoy a certain equality with the rest of a country's population. The special rights and protection also imply that the state acknowledges their difference and promotes it. While there is no "right to difference" as such, there is a right for all human beings to be recognised as equal because of their human dignity which does not change with their differences. This requires the recognition, protection and promotion of the diversity of humanity. The question of equality and difference in relation to the non-discrimination of vulnerable groups has already received principled answers during the League of Nation's system of protection of vulnerable groups. The PCIJ considered that for there to be true equality between the majority and the minority, the minority needs to have special rights enabling them to preserve their characteristics. The importance of individual and collective characteristics is also included in the 1978 UNESCO Declaration on Race and Racial Prejudice, which states, "all individuals and groups have the right to be different, to consider themselves and to be regarded as such" (Article 1(2)). The double need of the right to equality and the right to difference is established in the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities as well. This "right to difference" is also reflected in the CRPD. The right to non-discrimination ensures that the state accepts and acknowledges the difference of a vulnerable group in comparison with other groups. Moreover, the right to special protection ensures that the state will actually take measures to enable a vulnerable group to advance and promote their identity.

This right to difference ensures that special protection of vulnerable groups does not contribute to their appearance and treatment as inferior to others. The right to difference implies respect and encouragement for all groups to nurture their characteristics. The correspondence between protection and subordination is especially relevant in the case of children whose overprotection gives them a disadvantage in society. This can explain why children's special rights include some "safeguard" rights, which are applicable in connection to all other rights. These are the principle of the

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172 However, see Piovesan, "Social, cultural and economic rights, and civil and political rights", 1 SUR - International Journal on Human Rights, 29-30; and the 1978 UNESCO Declaration on Race and Racial Prejudice, E/CN.4/Sub.2/1982/2/Add.1, annex V.
173 Minority Schools in Albania, op. cit. note 162: 17.
175 GA resolution 47/135.
176 See CRPD Article 3.
child's best interests and the right for the child to have her views heard and taken into consideration.177 The child is thus to be respected as a child and with the views of a child, and is to be consulted in all decisions affecting her. This is equally important to street children, whose "right to be different" is usually violated by lack of consultation and the conviction that they should be rescued from the street. Most vulnerable groups face a similar problem as judgments are made about their interests without consulting them. They are seen as requiring protection rather than empowerment and are often considered dependent and unproductive.178 That is why both the right to equality and the right to difference are crucial for their full participation in society. Equality gives people equal opportunities in a given society, whereas the right to be different gives them respect, a sense of pride and identity, and the freedom to be members of a specific group. A real right to difference thus seems to promote the right to equality, creating a necessary parallel between the two rights. This link is strengthened by the concept of human dignity, which is inherent to human nature, and which is the foundation of human rights and of the equality of every person.179 Without this concept, rights to equality and difference would lack an essential element: respect.

4. Vulnerable groups and the right to education

As this discussion has shown, members of vulnerable groups have specific needs which are not taken into account in general human rights law. These include, for example, issues related to maternity for women, accessibility to the environment and to information and communication for persons with disabilities, protection and development needs related to young age for children, as well as land-ownership and preservation of culture for indigenous people. As has been argued, street children are a specific group due to their characteristics related to their independent way of life. It is important to examine how this specificity translates into special needs and discrimination in different areas of life. The example of education is used throughout this discussion to illustrate street children's special needs. Particularly important to street children as to any other poor and marginalized people, education can be a way out of poverty, as it gives these people better chances in finding decent employment, helps them to understand the reasons of their condition, and to discover their own worth and

177 These principles are embodied in CRC Articles 3 and 12, and will be analysed in subsequent chapters.
179 See note 146.
capabilities. However, socially and economically marginalized groups experience great difficulty in receiving education. This difficulty is heightened in the case of street children, not only because they need to work to satisfy their own basic needs, but also because of discrimination against them. According to Richter, "[street] children are most especially harmed on the streets by... denial of their right to receive an education that will equip them to achieve a better life". The following discussion will shed light on the specific educational needs of street children, while analysing the concept of education and different educational practices that affect them.

4.1 Definition of education: multiplicity of concepts and components

While education holds an important place within the body of international and regional human rights instruments, none has clearly defined it. Some instruments contain very detailed provisions concerning education, the CRC, the African Charter on the Rights and Welfare of the Child and the Convention against Discrimination in Education (CADE) being the most elaborate ones. The concept of education is better explained in international policy documents concerning education, but the difference in the vocabulary used in such documents compared to human rights documents can easily lead to confusion. Furthermore, education itself is not usually defined, but linked to an array of other concepts which form an integral part of education, and which are included in more or less interrelated ways within that concept depending on a narrow or a wide understanding of education.

4.1.1 Education, instruction and schooling

In a study about the origins and evolution of the right to education, Szabó distinguishes the right to instruction from the right to education. On the one hand, the right to instruction is the right as it was understood initially, especially within national spheres. It comprises the child’s right to receive instruction, the state’s duty to instruct, the freedom of private bodies to impart instruction, and the parents’ right to choose a preferred type of instruction. Such instruction is limited to basic teaching and learning at the primary school level: the imparting of indispensable knowledge to be able to

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181 While 30.8% of American homeless children and youth were not attending school in 1988 (Stronge & Helm, op.cit. note 112: 203), 3% of Vietnam’s street children attend school (Bond, Street Children in Ho Chi Minh City, 18).
182 See Grover, op.cit. note 20.
183 Quoted in Le Roux & Smich, op.cit. note 51: 921.
function in society. The right to education, on the other hand, is a right to formation and development as a human being. The term was chosen for international instruments, because it denotes a wider conception of the right to instruction, but could also include the latter. In fact, the different elements of the right to education – the right to be educated, the right to educate and the right to choose education – are included in human rights treaties containing provisions on education. Education implies imparting more than the basic reading and writing skills, including higher levels of instruction as well as other types of instruction. With societies’ growing needs for education, the use of such wide and flexible conception has paved the way to a concept called lifelong education promoted by UNESCO. The CRPD is the first binding human rights instrument to mention the concept.

Education has to be distinguished from schooling. In the CADE “the term education refers to all types and levels of education, and includes access to education, the standard and quality of education, and the conditions under which it is given”. Speaking of different types and levels of education implies institutional education, which requires the state, with whom the primary responsibility for that right lies, to establish an educational system. This system can be defined as “any institutional arrangement of knowledge and cultural transmission”. However, even within an educational system, it is necessary to distinguish between schooling and education. Although education is usually thought of in terms of formal schooling and an educational system requires the setting up of schools – i.e. establishments offering instruction provided by teachers – there can be institutional arrangements where education does not take place in a school. Non-formal education can be defined as: “any organised, systematic, educational activity carried on outside the framework of the formal system, to provide selected types of learning to particular subgroups in the

185 ICCPR and the American Convention on Human Rights (“Pact of San Jose”, OAS Treaty Series No. 36) do not contain provisions recognising the right to education, but include the freedom of parents to provide education for their children according to their own convictions (Articles 18 and 12 respectively). This is also stressed in Article 2 of Protocol 1 of the European Convention on human rights. The CRC does not include the freedom of parents to choose education for their children, although it includes the freedom to establish private educational institutions.

186 Article 24(1).

187 Article 1(2).

188 Halvorsen, op.cit. note 19: 356.

189 This is explicit in Article 13(e) of the ICESCR.

190 These are usually physical establishments, but they do not have to be permanent or fixed, as schooling can take place outdoors or in a mobile structure. What characterises a school is a permanent organisation to teach children according to predetermined learning goals.
population, adults as well as children."\textsuperscript{191} Such education includes non-formal community literacy programmes or street education.\textsuperscript{192} For those programmes to be part of an educational system, they have to be either government initiatives or private initiatives approved by the government in the same way as private schools are. In addition to formal schooling and other types of institutional arrangements, education also has a wider definition. This definition is explained in the 1974 UNESCO Recommendation concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms as

the entire process of social life by means of which individuals and social groups learn to develop consciously within, and for the benefit of, the national and international communities, the whole of their personal capacities, attitudes, aptitudes and knowledge. This process is not limited to any specific activities.\textsuperscript{193}

In this context, education includes informal education, which can be defined as:

The life-long process by which every person acquires and accumulates knowledge, skills, attitudes and insights from daily experiences and exposure to the environment – at home, at work, at play; from the example and attitudes of family and friends; from travel, reading newspapers and books; or by listening to the radio or viewing films or television. Generally, informal education is unorganised, unsystematic and even unintentional at times, yet it accounts for the great bulk of any person's total lifetime learning.\textsuperscript{194}

These different educational processes will be explored in greater depth in relation to street children. For these children it is especially important to distinguish education from schooling, as school attendance cannot guarantee that a child truly receives education.

\textbf{4.1.2 Basic and primary education}

UNESCO uses several definitions of education and a common source of confusion is the reference to basic or primary education. In the World Declaration on

\begin{itemize}
  \item \textsuperscript{191} Coombs, "The Rise of Non-formal Education", reproduced in Ennew (ed.), \textit{Learning or Labouring?: A Compilation of Key Texts on Child Work and Basic Education}, 29.
  \item \textsuperscript{192} Verhine distinguishes additionally between non-formal education and extra-school education, which is more linked to formal school (\textit{Educational Alternatives and the determination of earnings in Brazilian industry}).
  \item \textsuperscript{193} UNESCO General Conference, 19.11.1974, UNESCO's Standard-Setting Instruments, I.B. (1994). The ECHR has also used this kind of wide definition of education, as opposed to instruction. See \textit{Campbell and Cosans v. United Kingdom}, Judgment of 25.02.1982, Series A, No.48, 4 EHRR 293, 33.
  \item \textsuperscript{194} Coombs, \textit{op.cit.} note 19: 29.
\end{itemize}
Education for All (WDEFA)\textsuperscript{195} the right to education is the right to benefit from all opportunities to meet every person’s basic learning needs. This is both a narrow and a broad statement. It is wide in the sense that it implies different people and groups of people having different learning needs that have to be met both in terms of the contents and means of learning. It is narrow, because it is limited to “basic education”. However, the implementation of basic education is described in the Declaration in a broad sense, as it comprises the supply of essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning.\textsuperscript{196}

This basic education has been UNESCO’s main focus as part of its Education for All (EFA) campaign. In relation to basic education, WDEFA deals with such issues as discrimination, the importance of learning acquisition, the broadening of the means and scope of basic education, and the enhancement of the environment for learning. These elements, as in the case of street children, have their importance for the correct implementation of basic education. Basic education is often identified with primary education. These notions are interconnected, but not synonymous, as primary education corresponds to the level of formal education where children are supposed to acquire the knowledge and skills that are part of basic education, which itself is not tied to formal education. Primary/elementary, secondary and tertiary/higher education correspond to levels of formal schooling that determine the contents and the level of education that should be applied to children of a specific age group. Confusion tends to arise from the fact that educational terminology has not been standardized.\textsuperscript{197} There has been a general shift from the notions of “fundamental” and “elementary” education to “basic” education.\textsuperscript{198} Human rights documents, nonetheless, still largely refer to “primary” education.\textsuperscript{199} This appears to be linked to problems of enforcement of the right to

\begin{itemize}
  \item For another definition, see Hawes in “The History of Basic Education” reproduced in Ennew, \textit{op. cit.} note 191: 30-31.
  \item See “Preliminary report of the Special Rapporteur on the right to education, Ms. Katarina Tomasevska,”, UN doc. E/CN.4/1999/49.
  \item See World Education Report 2000: \textit{The Right to Education}, UNESCO, 26. “Fundamental education” was used in the UDHR and “elementary education” in the ICESCR.
  \item Reference to “primary education” can be found in the ICESCR, the American Declaration of the Rights and Duties of Man (OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992), the African Children’s Charter and in the CRC. It is almost systematically found in documents containing educational strategies, such as
\end{itemize}
education. State obligations in relation to the right to primary education are undoubtedly clearer than those relating to basic education. Primary education refers to a certain number of years to be completed by children from a certain age group in a school system provided by the state. The state’s minimum obligation in relation to the right to education is to make that education free and compulsory to children who qualify by their age. Meanwhile, basic education refers to a certain set of skills and knowledge that every person should possess. Therefore, it seems reasonable to provide this education during primary schooling, which is compulsory and which should benefit all children.

However, a rigid definition of primary education is problematic as far as street children are concerned, because their educational needs primarily call for basic education in non-formal settings, as well as for “second chance” education. Non-formal education is not formally recognised as a right in international human rights treaties, although the importance of non-formal education is addressed in some non-binding instruments. Some international instruments and jurisprudence also provide for more flexibility in understanding state obligations, as they describe basic education (its recipients, contents and methods of delivery) as surpassing the scope of primary education. Some instruments also recognise the right of children to complete their primary education if they have not done so during the age reserved for compulsory education. Yet, to translate flexible conceptions of basic education into state obligations, more uniformity in concepts would be required without compromising differences in educational needs and the understanding of education as a wide concept.

in “UNICEF strategies in basic education” (E/ICEF/1995/16), or in the documents adopted at the World Conference on EFA (op.cit. note 195).

200 Length and age group are defined by the state, and vary greatly (from four to eight years). See Preliminary report, op.cit. note 197, Table 3.


204 The ICESCR Committee endorses the view that considers primary education as only a component, albeit the most important, of basic education (General Comment 13, “The Right to Education”, UN doc. E/C.12/1999/10, 9).

205 “UNICEF Strategies in Basic Education”, op.cit. note 199: 6. Here basic education is assimilated to primary education, which is not seen as confined to formal education.
So far, agreement exists only on the very basic components of education. It is unfortunate that UNESCO has not used its leading position to give clearer definitions of education to avoid confusion between classifications relating to levels and the substance of education.

4.2 Discrimination in education

Discrimination in education is multiform as this discussion will show. A good framework for analysis is provided by the Special Rapporteur on Education, according to whom the implementation of the right to education requires that education be accessible, available, acceptable and adaptable. This section explains how street children are discriminated against in relation to each of these requirements.

The most obvious form of discrimination is where education is not made available to a certain group of people. On the whole, street children live in large urban centres, where public schools are theoretically available to all children while availability is a greater problem in rural areas. The most flagrant form of discrimination in education for street children is the clear denial of access to schools, which can be based on the fact that the children are dirty, their school attendance is irregular; their parents are not there to supervise them and to deal with the school administration; they cannot show a birth certificate or a home address; or they cannot pay school fees (especially for secondary education). These are all indirect, yet clear, forms of discrimination.

Discrimination in access can also take less apparent forms. Teachers or other students might treat street children disrespectfully, thus contributing to their eventual drop out to escape constant disregard, bullying, discouragement or punishment. Other ways to indirectly deny children's access is through hidden fees, for example by making students buy their own school uniform and supplies, contributing to the renovation of school buildings, requiring or encouraging private tutorial, or even presenting gifts to teachers. Street children can also be denied access to certain types and levels of

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207 Preliminary report, op.cit. note 197.
208 For examples of obstacles to schooling in the US, UK and Canada, see Herr, op.cit. note 20: 348, Stronge & Helm, op.cit. note 112, Stronge, Educating Homeless Children and Adolescents, chapter 2; Lansdown & Newell (eds.), UK Agenda for Children, 152; Grover, op.cit. note 20: 9.
209 See Dallape, op.cit. note 20: 68; Espinola et al., In the Streets. Working with Street Children in Asuncion, 94-96.
education, because of assumptions about their limited capabilities and lack of consultation concerning their wishes and ambitions.210

Another problem is that of the questionable quality of education that street children receive, which is linked to the acceptability of education. Such education is usually given in non-formal settings, because of the difficulties of access to public schools, but also because of street children's attitudes. Most street children would not enter a public school after having left their family, sometimes their village, and after living on the street for some time; most street children are afraid of such authoritative institutions especially if they evoke negative experiences; most cannot cope with strict discipline after experiencing freedom on the streets; most have already experienced school failure and dropped out211 of primary education before becoming street children.212 In addition, some street children fail to see the purpose of schools and learning subjects that are not useful in their daily life. Street children who do get some education are those who have been approached by street educators or social workers, or who spend some time in street children's homes and shelters. However, street education usually does not match public or private schools providing formal education. Education targeting street children usually has little continuity, no quality control, and poor teachers' interest due to poor financial returns and lack of visible results with street children, whose attendance and concentration span are irregular.213 Street children tend to be very critical of education that is offered to them, especially in closed institutions.214 As Blunt points out: "The traditional model of city schools, with its middle-class curriculum, values and social norms excludes, and is also rejected by those who are 'the poorest of the poor'."215

210 In India, 40% of street children would like to get education, 29% jobs, and 27% skills for better jobs (see Kanth & Varma (eds.), Neglected child. Changing Perspectives, 114). In Vietnam, 74% would like to go to school (Bond, op.cit. note 20). Similarly, Canadian street youth are concerned about opportunities in education (Grover, op.cit. note 20: 13). See also note 32.

211 Williams suggests referring to "school exclusion" instead of "drop-out" and "truancy" which characterize children as the causes of the phenomenon, when the real problem lies with unequal access and opportunities, which the author refers to as "pull" and "push" factors (op.cit. note 20: 833).

212 In Ghana, 38% of street children have incomplete primary education (20% have no education, 11% incomplete junior secondary education, and 25% unsuccessful junior secondary education): Street Child Africa, Annual Review, 1999-2000. In Ethiopia, 77% of street children are school drop-outs (Ministry of Labour and Social Affairs of Ethiopia et al., Study on Street Children in four Selected Towns in Ethiopia.). In the Philippines, 52.73% of street children are drop-outs, and 31.06% have never gone to school (Lamberte, op.cit. note 32). In Bangladesh, 55% of street children are illiterate (Bangladesh Country Report, op.cit. note 84).

213 See e.g. Williams, op.cit. note 20 or Dallape, op.cit. note 20.

214 In Voci e Visioni di Strada Angolan street children speak of institutions they fled to escape strict rules, misconduct of educators, frequent and unjustified punishments, etc. (op.cit. note 83).

Education needs to adapt to the needs of street children for it to appeal to them. As many studies have shown, education will not be helpful to them if it does not recognise their knowledge, capabilities and needs. They have learned how to survive on the streets, which makes them "street-wise" and their hard earned wisdom and skills must be utilised as a base on which to build further knowledge and skills, regardless of whether they remain on the street thereafter. Most schools that accept street children try to impose mainstream mould on them by using the same teaching methods and curricula meant for regular school children. This is especially true of public schools. It is of course important for street children to get basic education, because without elementary skills they will not have the same opportunities in life as other children. Basic education is comprised of learning tools and learning content, or learning skills and life skills enabling people to function in society. However, these components do not have to be identical in every country or for every group of children as has been recognised, for example, in the "UNICEF Strategies in Basic Education". Several studies have shown that street children do not respond well to traditional teaching methods because of their short attention span and their need for interactive methods. They often end up dropping out because the school curriculum is too far from their lives.

4.3 The recognition of special measures in education

Street children are not the only victims of discrimination in education. Other groups have suffered discrimination before them as has been recognised and addressed by international law. Linguistic, ethnic and religious minorities, as has been noted, were among the first in international law to receive special protection as a group, and focus was on discrimination against them in education. Two basic principles for the protection of minorities were established in the treaties after World War I: non-discrimination and protection through special rights – the negative and positive components of equality. These special rights included inter alia the right of minorities to use their own language, the right to have separate educational establishments and the right to possess their own religious institutions. There is ample case law, especially from the ECHR, reaffirming

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216 See WDEFA, op. cit. note 195.
217 See "UNICEF Strategies in Basic Education", op.cit. note 199.
218 Ibid., 6.
219 See views of Bangladeshi street children, Bangladesh Country Report, op.cit. note 84.
220 See e.g. the judgment of the PCIJ concerning the case of Minority Schools in Albania, op.cit. note 162.
these principles, and accommodating the right to education to the special needs of certain groups.

As has been discussed, minorities' special characteristics need to be protected to allow them to maintain and transmit their culture, language and other characteristics. Education has always been considered crucial in this respect, and the above measures were adopted as means for preserving the characteristics of national minorities. The principle of religious and linguistic freedom is now well grounded in the right to education, and is generally extended to cover the freedom of parents to choose a type of education for their children according to their conviction. Leading European cases concerning education are the "Belgian Linguistics case" concerning language, Campbell and Cosans v. United Kingdom about disciplinary measures, and Kjeldsen, Busk Madsen and Pedersen v. Denmark concerning sex education. In the first case, the court ruled that the European Convention on Human Rights does not require states to offer education to children according to parents' linguistic preferences. The court noted that only parents' religious and philosophical convictions must be respected in public schools. The two other cases show the application of the right of parents to have their children educated according to their convictions. In Campbell and Cosans, the court ruled that corporal punishment used in school failed to respect parents' philosophical convictions. In Kjeldsen et al., in contrast, the court decided that sex education given neutrally and objectively in school did not violate the European Convention, as there was no indoctrination, and parents had the freedom to provide alternative education to their children outside school and in other schools. These rulings show that there is an element of choice in education and that public school education should be conducted in a way that respects different convictions, instead of imposing thought models. Therefore, what was a special measure for a group – national minorities – has become an integral component of the right to education even if it still essentially concerns religious and linguistic minorities. This freedom element is also important for street children, not only from a religious or linguistic point of view, but also from the standpoint of the freedom to choose education that does not attempt to assimilate children and to reform their identity, but that acknowledges and cultivates


222 The Human Rights Committee ruled similarly in the case of Hartikainen v. Finland (Communication No. 40/1978, UN doc. CCPR/C/12/D/40/1978), and later in Leirvåg et al. v. Norway (Communication No. 1155/2003, UN doc. CCPR/C/82/D/1155/2003), where a violation was found).
difference. However, such freedom can be limited due to financial constraints, as there is no clear obligation on the state so far to fund private schools or to provide benefits to students attending private schools.\textsuperscript{223}

Another group that has received considerable attention in education is persons with disabilities. It is generally recognised that children with disabilities have needs which require special education. Blind children, for instance, require education in Braille and deaf children in sign language. It is increasingly understood that special education does not have to be given in specialised institutions, but that ideally, mainstream schools would have the facilities and staff to provide specialised education in integrated settings.\textsuperscript{224} This is not always possible due to limited resources, and some groups of persons with disabilities insist on the importance of maintaining special education schools, in addition to the accessibility of mainstream schools. UNESCO has also widened the concept of special education to "special needs education". This term is linked to the concept of "children with special educational needs", which extends beyond children with disabilities to cover "those who are failing in school for a variety of other reasons that are known to be likely to impede a child's optimal progress".\textsuperscript{225} This interpretation of "special education" thus includes street children, who are explicitly mentioned in the Salamanca Framework of Action.\textsuperscript{226}

Applying the principle of special education therefore ensures that street children’s special educational needs are taken into account. Unfortunately, this principle is not part of binding international instruments, and even the CRC only includes special education as part of Article 23, which specifically concerns children with disabilities. In the sense used by UNESCO, special education entails special measures, including the adaptation of the curriculum, teaching, provision of additional human or material

\textsuperscript{223} The jurisprudence of the ICCPR Committee leaves open the question of whether there is an obligation by the state to provide some funding to private schools in certain cases, but the Committee makes it clear that a different level of funding between private and public schools does not amount to discrimination. See Blom v. Sweden (Communication No. 191.1985, UN doc. CCPR/C/32/D/191/1985) and Lindgren et al. and Hjord et al. v. Sweden (Communications Nos. 298 and 299/1988, UN doc. CCPR/C/40/D/299/1988).

\textsuperscript{224} See the Salamanca Statement and Framework for Action on special education (adopted by the UNESCO World Conference on Special Needs Education: Access and Quality, Salamanca, 7-10.6.1994), which has become the general frame of reference for inclusive special needs education. See also CRPD Article 24.

\textsuperscript{225} ISCED, \textit{op.cit.} note 201. UNESCO's \textit{EFA 2000 Assessment} states that special education targets children "with all sorts of deficiencies and behaviour problems, and the exceptionally gifted" (Country Reports: Brazil: Report: Part II, <www2.unesco.org/we/countryreports/brazil/>).

resources, in order to stimulate efficient and effective learning of all children with special educational needs.\textsuperscript{227}

4.4 Existing special measures for street children

Special measures do exist for street children in practice, based on the idea of special needs education. Primarily, there are two types of education that target street children specifically: one based on protection, and the other on the principle of participation. The protection approach is the most common and is provided equally by governments and NGOs. It emphasizes the welfare aspect of the right to education by serving the child’s developmental interests. Protection in this context means protecting the child, the future adult and society. By keeping children in school, education protects them from the dangers of the street, hazardous work, exploitation by adults, falling into crime, and from a future with limited options. It protects society by bringing marginalized people back into mainstream society, decreasing the number of active or potential criminals and reducing the burden on taxpayers. This model usually follows the same pattern: the child is “rescued” from the street and taken to a centre where information is collected about his background. Before being returned to his family, the child temporarily stays in a “half-way house”, where he receives education with other children of a similar condition, and daily activities which are geared towards teaching \textit{inter alia}, hygiene, social skills, and obedience to rules. This is usually the institutional approach of programmes for street children, and these programmes and institutions are often run or operated by the government.\textsuperscript{228}

The participation approach to street children’s programmes, in contrast, is less common, and usually organised only by NGOs. Here, education is seen as promoting street children’s participatory rights, and facilitating their integration in society. There is a focus on the freedom element of the right to education and empowerment. Participatory approaches are more likely to respect street children’s identity and offer them guidance by teaching them to analyse, organise, identify their needs and priorities.\textsuperscript{229} Children’s views about their needs and interests are taken into account. For

\textsuperscript{227} ISCED, \textit{op.cit.} note 202. See also the Salamanca Framework of Action, which calls for, \textit{inter alia}, the matching of curriculum content and method to the individual needs of pupils (\textit{op.cit.} note 224: 9).

\textsuperscript{228} For example the programme \textit{Vem pra Casa} in Rio de Janeiro, Brazil. See description in Chapter V and Magalhães \textit{et al.}, \textit{Cartilha de Normalização do Programa Vem Pra Casa}.

\textsuperscript{229} When given the appropriate means, street children have shown that they can organise themselves and identify their educational and other needs. This has been demonstrated in street children’s congresses and street children’s movements in developing countries. For example in the Philippines, during the first
example, practical skills for carrying out projects are treated as essential, because most of these children and youth have to learn to handle functional aspects of independent living. Formulas for this type of education differ. In many programmes, children are first taught by street educators, who have an important role in approaching the children, befriending them, gaining their trust and guiding them. Street educators meet children on the street and alternate informal conversation with educational sessions outside street children’s working hours. Street child programmes sometimes also use peer educators – older children or youth who have “graduated” from non-formal educational programmes.

For street children, the most important component of education in the beginning is thus not reading or writing, but gaining trust, confidence in themselves and making plans for the future. Often children have the choice to go to a centre where they can receive education, a meal, wash, receive medical care, or simply play. Here education is optional and follows a non-formal structure and teaching methods with flexible and alternative curricula. If children want to move further, they can join a more organised structure, where education enables them to take an equivalency test and to join mainstream education in public schools, or to take up vocational training, with the aim to find a job and ensure independent living. General education and vocational education, as well as apprenticeships or internships, are sometimes combined. This phased educational scheme is thus a bridge with change and widened options as goals. Many successful models exist, such as the frequently cited Undugu Society in Kenya, Project Axé in Brazil, the Juconi model in Mexico, or Bosconia/La Florida in Colombia.

Several authors have attempted to draw the common characteristics that make programmes successful. Volpi, for instance, identifies the use of trained professionals, reaching children where they are, individualized attention and tailor-made services, children’s participation, inclusion of physical and mental care, lobbying and advocacy,

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230 This is the case for example of the Movement to Support Abandoned Children (MAMA) in Mexico.
integration of services, networking and institutional cooperation, among the characteristics of successful programmes.\textsuperscript{232} Concerning educational programmes, Myers refers to the use of work as an educational instrument, the adaptation of schooling to the practical learning needs of children, constant dialogue between street educators and children, and the promotion of children’s physical, mental and social development as important characteristics.\textsuperscript{233} Similar strategies of NGO programmes for street children are highlighted by Dewees and Klees.\textsuperscript{234} Typically, good programmes for street children are small-scale projects that allow each child to get individual attention. As they cater for the needs of small groups of children, they can offer education responding to more than formal basic learning needs, and tailored to improve street children’s life on the streets and to prepare them for a life off the streets. Subjects in such programmes include skills training, health education, nutrition, hygiene, the environment, family planning, drugs, para-legal issues, conflict resolution, democratic decision-making, value and goals orientation, and human rights.\textsuperscript{235} It has been demonstrated that children are better able to solve problems in familiar contexts, such as vending for street children, rather than within theoretical frameworks.\textsuperscript{236} Moreover, optional subjects, which can be very motivating, can supplement basic education already at the primary level. It has been observed that street children can learn certain things that seem complex to other children, and that certain information in textbooks should not have to be a requirement for their basic education.\textsuperscript{237} Street children’s educational needs are first linked to their survival needs. Improving their survival skills allows them to improve their quality of life on the streets, or to opt out of street life. First and foremost, street children need to be able to support themselves, whether they decide to stay on the streets or not. Many will not stay in educational programmes, because they lose time they could otherwise use to earn money. Education for street children should take this into account for example by including a vocational component, and possibly by organising work for these children. This can be done in the form of

\textsuperscript{232} Volpi, \textit{ibid.}, 23.


\textsuperscript{235} The contents and methods for teaching human rights to street children have been developed by Holland (\textit{op.cit.} note 20). The importance of human rights education has also been highlighted by the Special Rapporteur on Education (see Preliminary report, \textit{op.cit.} note 197: 72).

\textsuperscript{236} See e.g. Lansdown, \textit{The Evolving Capacities of the Child}, 25.

\textsuperscript{237} Rane explains that “solutions to the problems of street children can never be… formal education as these children have inner strengths and abilities to lead an independent life”, India Country Report, \textit{op. cit} note 85.
remunerated training workshops and sheltered employment opportunities, which have a clear educational component, and could also help the children secure employment in the future.

Not all good programmes are as successful as the ones mentioned earlier, and they can be very short lived. Nevertheless, many rely on their thorough understanding of street children's condition and needs, and evolve over the years after having tried several approaches and improved their methods. While some NGOs have managed to show what the right to education ought to be for street children, the major problem lies in their limited reach, which is not only due to a lack of resources, but also to the very nature of these programmes, whose success relies on their small size, enabling individual handling of children. Providing solid bridges between each street child and society is labour intensive and requires resources, the lack of which if often aggravated by the small size and independence of NGOs that want to distinguish themselves from the government. This enables them to explore different approaches to teaching more freely, but also marginalizes them. 238

Conclusion

This chapter has examined the ways in which street children differ from other children in difficult circumstances. Despite street children's common characteristics, especially their independent way of life, they have not been recognised as a specific group. After initial interest in them, the trend towards special attention has been reversed and an increasing number of authors, governments and organisations are now in favour of preventive measures and of including street children in mainstream programmes that focus on communities. This is opposite to the attention that other groups have received because of their special situation. International law protects groups that are vulnerable to discrimination through special provisions that are based on the principle of non-discrimination and recognises the need to adopt measures that are adapted to the particular situation of these groups. Without these measures they cannot exercise their human rights effectively.

238 Only few NGOs are part of networks. If relations with the government are tense, there is a risk of marginalisation of some NGOs, and many have a short life-span. NGOs need both support and freedom to experiment. However, in Costa Rica, Colombia, Brazil and Uruguay, for example, street children NGOs have grouped themselves into national associations (see Agnelli, op.cit. note 3). NGO coalitions and alliances are supported by the CRC Committee (General Comment 5, op.cit. note 147: 59).

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In the case of street children, appreciating the special nature of their educational situation enables us to understand that their educational needs differ from those of the majority of children, and that they are not met by the general protection granted by the human right to education. International law provides for special measures in education for other groups of children. Special measures also exist for street children, but these are not based on international norms, and often differ from one programme to another. Some programmes adopt a purely protective approach, while others prefer a participatory approach to street children's education. It is clear that, even if it should not be the only option available, non-formal education is best adapted to street children because of its flexibility. Unfortunately, there are no guarantees for its systematic use as part of the implementation of the right to education, and so far street children have had to depend mostly on NGOs, whose existence, methods and success cannot be relied upon.
CHAPTER III

Street children in international human rights law

While street children have specific characteristics, as examined in the previous chapter, this should not necessarily lead to distinguishing street children's rights from the general rights of the child. Such a separation is only justified if the realisation of the rights of the child in respect to street children fails. This can happen if the needs and realities of street children do not correspond to the protection provided by human rights instruments. To address this question, this chapter examines the position of street children in international human rights law by focussing on the rights of the child and the right to education. In doing so, it analyses the evolution and the general principles of the rights of the child and more specifically of the right to education in light of street children's specific situation. In addition, the chapter discusses the level and quality of protection provided by international human rights law to street children by examining the types of instruments that apply to them.

1. Evolution of the rights of the child and street children

1.1 First steps towards child rights

Street children are children first of all. The evolution of general human rights and the rights of the child has as much importance for street children as for any other children. Interestingly enough, street children have substantially contributed to the notion of childhood, with consequences on the treatment of children and on their rights. The concept of children being viewed as separate from adults started dawning towards the end of the eighteenth century. Western philosophers and writers of that time contributed to a new image of children as being innocent, close to nature and victims of society, instead of their perception as mouths to feed or pairs of hands to help with work. They created the whole notion of childhood, which had previously been unknown to all societies, and the need to protect this childhood. This notion found expression in biographical and fictional stories about children, and in the appearance of literature for children. Street children inspired many of these child characters, who were pictured as clever and touching little tramps and vagabonds. This image building was

239 See references to children’s rights in Blackstone, Commentaries on the Laws of England (Book I, Chapter 16) and Paine, Rights of Man, 243. Legal scholars are quite consistent in interpreting those rights as mere interests instead of legal rights.

240 See e.g. Rousseau, L’Emile ou de l’éducation.

241 See Veerman, op.cit. note 6: 3-10.
reinforced by some historical developments, which helped to reinforce the idea of children as victims. The principal circumstance was industrialisation, which led to the employment of young children in factories, often in very difficult working conditions. Writers helped to sensitise public opinion to the problem of working children, and subsequently to mobilise governments to act in favour of all these children suffering from the consequences of industrialisation and urbanisation. The situation sparked off a legislative response that was followed in many European countries.  

The objective of these first legal measures was to protect children from the dangers of an adult world. Along with working children and other neglected and abused children, street children were seen as an exemplary category of children who were victims of society and who had to be rescued from their tragic situation – even if that situation itself was romanticized as one symbolising liberty, nature and resourcefulness. In fact, these characteristics were seen as conflicting with the man-made urban and industrial environment in which they lived. These children were thus perceived as victims, a situation to which the appropriate response was protection. However, the purpose was not to protect children’s human dignity and equality, but to make sure that their condition would not prevent them from becoming productive citizens. Education, leading to a decent profession, was seen as benefiting the child, his family and the whole community. Placing street children in orphanages protected society from budding criminals. The need to contain street children was sometimes expressed with mild caution, like in this excerpt from a 1886 pamphlet entitled “Children’s Rights”, in which Alfred Mager first aroused the reader’s pity while describing the number of “neglected and famished children… a double line, shoulder to shoulder, reaching from Manchester to York... Watch this vast army of unkept, ragged, almost naked starvelings as they quickly march, with bare feet past your door.” The tone changed, as the author declared that if these children continued to be “left alone by the Church and the State, they will inevitably grow up to propagate their vile class and to inflict a terrible retribution upon the society that neglects them.”  

A similar warning was issued in an American newspaper in 1853: “...let society beware, when the outcasts, vicious, reckless multitude of New York boys swarming now in every foul alley and low street, come to

242 Examples of English laws include the 1830s Factory Acts and the 1850s and 1860s Acts, which accredited and secured funding for the “ragged schools” – schools that sought to feed, give vocational training and basic education to children.  
244 Quoted in Cunningham, ibid., 8.
know their power, and use it.”245 The ultimate goal of child protection was thus linked to general public interest and the rights of the child were even referred to as “identical with the interests of the State”, and required “the minimum clothing, shelter, food, and training needed to fit [the child] for becoming in due time a self-supporting member of the community”.246

1.2 Declarations on the rights of the child

The legacy of the end of the eighteenth and nineteenth century continued well into the twentieth century with a proliferation of societies for the protection of children.247 The dramatic consequences of the two world wars helped to complement this protective attitude with a humanitarian perspective, and children were included as a sub-category in both international humanitarian and labour treaties. The world wars and the internationalisation of issues with the creation of international organisations also brought the rights of the child to the international front. In 1923, the International Save the Children Union drafted the Charter on the Rights of the Child, which was subsequently adopted by the League of Nations as the Geneva Declaration on the Rights of the Child.248 The first ever international document relative to the rights of the child contained only five commonly accepted principles reflecting general attitudes towards children and measures taken for them nationally.

Its wording shows that children were considered as objects instead of subjects and the issues covered demonstrate purely protective and humanitarian concerns, including the general interest of society. It is thus doubtful that this Declaration could be considered as embodying children’s rights. With this very basic approach, the Declaration covered street children, who were seen as waifs needing to be rescued from the streets.249 In fact, all principles were applicable to street children, whose basic needs were to be addressed first, before helping them to earn a livelihood through education or other means. Principle 4 was open to interpretation as to how to help children become self-sufficient without sacrificing their safety, and could thus have been useful for street

247 For example the British Societies for the Prevention of Cruelty to Children.
249 Principle 2: “…the orphan and the waif must be sheltered and succoured.”
children.\textsuperscript{250} It is not clear whether these principles were ever referred to in action taken for street children, but their spirit was recognisable in both traditional and innovative responses.\textsuperscript{251}

When the UN replaced the League of Nations, the Geneva Declaration also gave way to a new declaration. The UN adopted the Declaration on the Rights of the Child in 1959 with a view to building on the previous Declaration, but giving it more substance and bringing it in line with prevailing attitudes.\textsuperscript{252} The draft was the result of a long preparation, showing the difficulties of creating a more detailed and advanced text.\textsuperscript{253} Though it was non-binding, the difficulties in drafting could be explained by the fact that the text contained some new principles to enable states to make progress in the protection of children. For example, the Declaration stated that the child should not suffer from discrimination, should be entitled to a name and nationality, to education and recreation, and should be first to receive protection and relief.\textsuperscript{254} The Preamble contains the precept that the best interests of the child should be the guiding principle of those responsible for the child’s education and guidance. Compared to the 1924 Declaration, the UN Declaration projects a rights approach. This was not revolutionary, as the contents were based on national legislation, but it helped to make existing ideas more widely accepted. Focus was still, however, on children’s needs for well-being and nurturing.\textsuperscript{255} Street children were implicitly included in the reference to “children without a family and those without adequate means of support”, who were to receive “particular care” from the state.\textsuperscript{256} They could also have been included as the “socially handicapped”, who should be given “special treatment, education and care required by his particular condition”.\textsuperscript{257} These provisions showed already that special measures should be taken with respect to certain groups of children. Another interesting provision was Principle 2 stating that children should enjoy opportunities and facilities enabling them to develop “physically, mentally, morally, spiritually and socially... in conditions

\textsuperscript{250} "The child must be put in a position to earn a livelihood and must be protected from every form of exploitation."

\textsuperscript{251} See e.g. examples of innovative approaches in Veerman, \textit{op.cit.} note 6, Part C.

\textsuperscript{252} UN Doc. A/4354 (1959).

\textsuperscript{253} The Commission on Social Affairs presented a draft in 1950, which was examined by the CHR only in 1957. A third draft was finally adopted by the GA in 1959.

\textsuperscript{254} Principles 1, 3, 7 and 9 respectively.


\textsuperscript{256} Principle 6.

\textsuperscript{257} Principle 5.
of freedom and dignity”. This could have provided a good basis for innovative approaches to the issue of street children and their education. However, it seems that the overwhelmingly protective and conservative principles of the Declaration prevailed and the traditional option of placement in orphanages or centres for juvenile offenders was universally retained.258

1.3 The United Nations Convention on the Rights of the Child

Since the unanimous adoption of the Declaration on the Rights of the Child, the notion of childhood and rights of the child continued to develop, and a developmental dimension was added to the protective and humanitarian emergency approaches to the rights of the child. These approaches suited well the situation of street children. Developmental work brought by decolonisation made all children priority targets of development assistance, with the underlying rationale being that children were the future of those new countries, the prosperity of which depended on the physical, psychological and intellectual development of children. Once again, the rights of children were closely linked to the interests of society at large.

The evolution of mentalities helped to bring about the idea of a legally binding instrument containing children’s rights, and the International Year of the Child marked the beginning of the drafting of a convention on the rights of the child in 1979.259 That year helped to draw attention to the situation of children worldwide and served as a catalyst for action and further research about children. It also showed the first signs of international concern for street children, with an international conference on street children held in Bombay in 1979 and subsequently, in 1982, the creation of an International Programme of Non-Governmental Organisations on Street Children. The Convention, adopted in 1989, is a product of a long evolution, as the child liberation movement of the 1970s,260 the International Year of the Child and the drafting process in the 1980s had given new impetus to the image of childhood. Children had ceased to be only victims to be protected from society, or the future that societies could count on, becoming individuals in their own right. The major innovation of the CRC was

258 For example, “in a... normal manner” was added to Principle 2, restricting different views on child development.
259 The UN declared 1979 the International Year of the Child to urge countries to review their programmes on children, to induce authorities and society to show concern for children’s specific needs, to create awareness on child rights programmes as components of programmes for socio-economic progress, and to encourage countries to implement programmes on child protection, care and education.
therefore its new, participatory, approach to the rights of the child. Meanwhile, the
concept of participation was not fully embraced in practice, as children had not been
officially invited to raise their concerns during the drafting of the Convention.

Moreover, the CRC's new approach was not accepted unanimously. Children's
"autonomy rights" were much criticised by some legal scholars, who did not consider
children as capable of making decisions or expressing themselves coherently, and feared
that participation rights might conflict with children's protection and development
interests. In fact, autonomy rights were often associated with the concept of rights,
which itself was questioned by some, while protection or welfare rights were unjustly
dissociated from rights and instead treated as mere interests or parental obligations.
While contemporary child rights advocates defend more moderate views than early
child liberationists, all rightly consider the absence of participation rights to be
antithetical to the concept of rights. However, both the theories of radical child
liberationists and those of child protectionists who subscribe to the concept of rights
lead to implementing children's rights in a way that conflicts with the interrelatedness
and interdependence of all human rights.

Participation presents the principal opportunity to change traditional approaches
to the issue of street children, as it allows the opinions of children to be taken into
account. This contrasts with traditional approaches to street children, which are based
on their protection and that of society — similarly to paternalistic approaches to children
more generally. Participation should also allow street children, who are not expressly
included in the Convention, to become more visible and to voice their concerns. The
omission in the CRC can probably be explained by the lack of knowledge about street
children at the time of drafting, as only that process generated interest in them. Street
children were traditionally considered as orphans or victims of neglect and abuse to be

261 See Eekelaar, op.cit. note 6; Hafen & Hafen, op.cit. note 18; Théry, "Nouveaux droits de l'enfant, la
potion magique", 3-4 Esprit, 5-30. Other authors, on the contrary, have criticised the CRC for being too
weak on participation rights compared to protection and provision rights. See e.g. Green, Hidden Lives.
Voices of Children in Latin America and the Caribbean, 200, citing Andino.

262 See Alston et al., op.cit. note 6, for debates regarding the nature and contents of child rights (see
especially contrasting views presented by Campbell (at 1-23), Freeman (at 52-71), O'Neill (at 24-42), and
Eekelaar (at 221-235).

263 See Franklin, op.cit. note 6: 21-28; Breen, Age Discrimination and Children's Rights, 5-8; Freeman,
"Taking Children More Seriously", in Alston et al., op.cit. note 6: 65; Farson, op.cit. note 260: 27; Holt,

264 For example Farson opposes welfare rights with "rights" (Farson, op.cit. note 260: 9). For a contrast,
see Eekelaar's ranking of children's "basic", "developmental" and "autonomy interests" (Eekelaar, op.cit.
ote 6: 171-182).
rescued, or as rebels or idlers to be forced back into society. Assumptions about street children's needs that are solely based on their activities and vulnerable situation are still widespread, and justify the absence of specific reference to them in the CRC.\(^{265}\) Moreover, while the Convention introduces the concept of children's participation and related rights, it attempts to balance these with a more traditional approach.\(^{266}\) Therefore, the CRC's stress on the role of the family and the need to protect children reflects the fact that children refusing help or deciding about their own needs were not at all recognized.

Since the CRC entered into force, views on children have changed and their situation has received sustained attention. As human "beings" and not just human "becomings" they are holders of rights and have become more integrated into society.\(^{267}\) The situation can be highlighted in the case of street children, who are now seen as individuals having rights as persons and not only because their life is pitiful or because society could benefit from an improvement in their situation. More importantly, this has resulted in dialogue and participation. Many countries have seen the emergence of street children's congresses, associations and networks.\(^{268}\) In Brazil, street children were even consulted in relation to the drafting of a new constitution and legislation, as described in Chapter V. Another result of these developments is that institutions where street children used to be locked up are seen as an inappropriate response to children who are used to thinking for themselves and creating their own rules. It is during the child rights movement that innovative programmes, including street education, were developed for street children. Subsequently, the notion that street children should not be integrated

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\(^{265}\) At the “European Conference on Street Children Worldwide”, Sardenberg, then vice-president of the Committee on the Rights of the Child, stated that “the issue of street children is raised in connection with general principles and subsequent chapters of the Committee’s Guidelines. But it is in connection of the last chapter on special protection measures that the issue is addressed in a comprehensive and thorough manner, because provisions included in this chapter relate to all concrete aspects of the situation of street children: Articles 19-21, 23-25 and 32-40.” (op.cit. note 52). In the practice of the Committee, street children have been most frequently addressed under articles on protection from abuse, neglect and exploitation (especially Article 36) in state reports and the Committee’s concluding observations. See e.g. Concluding Observations on the Periodic Report submitted by Namibia, UN doc. CRC/C/3/Add.20 and Concluding Observations on the Periodic Report submitted by Peru, UN doc. CRC/C/15/Add.8.

\(^{266}\) See Breen, op.cit. note 263: 8; Freeman op.cit. note 263: 69.

\(^{267}\) Yet there is room for improvement. For example, in the European Union, children have not been taken into consideration unlike some other groups, such as women and the elderly. See Ruxton, op.cit. note 178. The only reference to children in EU treaties is Article K.1 of the 1997 Treaty of Amsterdam, which deals with offences against children (European Communities, Official Journal 97/C 340/01). It is noteworthy, however, that Article 13 on no-discrimination prohibits discrimination on grounds of age.

\(^{268}\) The most notable example being the Brazilian National Movement of Street Boys and Girls. See Swift, Children for Social Change: education for citizenship of street and working children in Brazil.
into mainstream society without their consent or without their own initiative is increasingly commonplace.

This liberty, linked to the new concept of the rights of the child, has had adverse consequences. Ruxton refers to a shift from childhood “innocence” to the inherent “evil” of childhood.269 These new attitudes are reflected in the administration of juvenile justice and the treatment of children deprived of their liberty in many countries.270 In Brazil, for instance, it is since the adoption of the CRC and of the new national child rights legislation271 that so many street children have been killed by the notorious death squads. Such practice has been tolerated and even supported by a population that has grown fearful of these children who freely roam the streets and who seem dangerous to people from other social classes.272 Street children have to pay the price for their rights by being forced to live with the perception that they are a threat. As a result, correctional measures are favoured again and this approach is no longer even moderated by a romantic vision of childhood. Today, because of childhood-related research273 and because of the message contained in the rights of the child, children are not seen as innocent any more and are expected to be more responsible for their actions.274 Based on this, it seems that the price to pay for rights is an increase in responsibilities. Whether this will ultimately lead to positive or negative developments constitutes the main disagreement between “child savers” and “kiddie libbers”. While this author agrees with Freeman on the legitimacy of the concerns of both schools, she would nevertheless emphasize the potential of participation rights in changing existing

270 See e.g. Chile’s reports to the CRC Committee, which illustrate the Committee’s concern about an “increasing trend for juvenile justice to become the subject of social and emotional pressure” (General Discussion on the administration of juvenile justice, UN doc. CRC/C/G6): “Since 1991, there has been a growing feeling... that there had been a sharp increase in delinquency. The present climate of public opinion was therefore not conducive to the adoption of laws guaranteeing protection to offenders” (emphasis added) (Summary Record of the 146th meeting: Chile, UN doc. CRC/C/SR.146, 33). See also Summary Record of the 173rd meeting: Spain, UN doc. CRC/C/SR.173, 50; and O’Malley, “Juvenile Justice”, in Heffernan (ed.) Human Rights: A European Perspective, 303-325.
271 The Statute of the Child and Adolescent (ECA Law 8069/90).
272 Brazil ended its long-standing practice of institutionalising children after it adopted the ECA, which many saw as encouraging child crime. Surveys have shown widespread support for these practices. Interesting interviews can be seen in the documentary film Bus 174 (by Jose Padilha, 2003).
274 This is also demonstrated in a growing number of exceptions to minors’ legal incapacity in national legislation and practice of courts. See Verhellen, op.cit. note 18: 88-90.
attitudes towards street children, and in moving away from considering them as “victims” or “villains”.275

2. Pertinence of the main precepts of the rights of the child to street children

2.1 Minority – a problematic concept for street children

One could question the need to consider children’s rights separately from general human rights. As with all other groups, separation of rights from general human rights requires solid justification and poses questions about the possible marginalisation of the group. In the case of children, once the notion of childhood had been established, children had become a separate group, living in their own world. They were small, inexperienced and vulnerable, needing protection from adults, who had a dominant position in society and control over them. In the medical and psychological fields, which started specialisations on children, studies found that children had different needs from adults. As the role of law is to respond to new and existing realities in society, framing them with sets of rules, the separate treatment of children was a natural response at the time the UN was created, as it still is today. Another important aspect in separating children as a group is the fact that national legislation considers children as legally incapable, not allowing them to perform certain legal actions that are reserved to adults.276 This “handicaps” them in relation to some of the general human rights. Some rights, which are important to human beings in adult life, are made unusable for children, considering their status and role in society. These are for example the ICCPR’s Articles 12 and 25b, which grant respectively the right to choose one’s residence and the right to vote and to be elected. There are also rights that children need, but are not expressed in general human rights documents, which are mainly directed at adults. These include the right not to be separated from one’s parents, and rights related to adoption.277

Moving from this premise, the rights of the child help to define children’s unique legal status. As discussed in Chapter II, children’s legal status is established by their minority. “Minority” determines an age group whose members, though not denied rights, are nevertheless conferred limited legal capacity (as defined in Chapter II) in

276 See El Ghamrawi, La Protection International des Mineurs en Droit Comparé.
277 CRC Articles 9 and 21.
different areas of life. This means that children need legal representation to carry out certain actions, or the authorisation of their legal guardians, and that they are completely excluded from certain areas of life. Areas covered by national legislation may include employment, marriage, enlistment in the armed forces, criminal responsibility, medical consent, participation in judicial procedures, and joining or creating associations. This is problematic for street children, who do not always have adults representing them, and who are used to independent living. This is similarly problematic for children heads of households who need to take decisions in life affecting their family. Children’s inferior role and need of protection also translate into criminalising certain acts when committed by minors. These status offences hit street children hardest.

In the Brazilian context, the concept of “minor” has always had a negative connotation linked to criminality, as opposed to the term “child”. Many authors, such as Wringe, Mallet and Monier, have interpreted the concept of minority from the point of view of its debilitating implications on children’s rights. Children’s subordinate role used to be explicit in national legislation, indicating that children owed respect to their parents and that fathers were bestowed with parental authority. The following were the contents of parental authority over their minor children: the right of instruction and guidance, the right of care and custody, the right of punishment, the right to demand obedience and respect, the duty to cover the child’s maintenance and education charges. Because children were seen as vulnerable, they needed protection through rights. However, these rights were mostly expressed as parental rights and duties.

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278 See Advisory Opinion no.17 of the Inter-American Court and Concurring Opinion of Judge Garcia Ramirez (op.cit. note 99).
279 Rule 3 of the 1985 UN Standard Minimum Rules for the Administration of Juvenile Justice (GA resolution 40/33, 29.11.1985) refers to “status offences” as “a range of behaviour considered to be an offence” that “is wider for juveniles than for adults (for example truancy, school and family disobedience, public drunkenness, etc.)”. In many countries vagrancy and begging are crimes, and so is running away from institutions where street children are placed (see Veale, op.cit. note 30). As an illustration, see the 1992 Chicago’s Gang Congregation Ordinance, which was declared unconstitutional by the US Supreme Court (Chicago v. Morales, Supreme Court of the United States, 527 US 41 (1999)). See also Leckie, Housing Rights, UNDP Human Development Report 2000 Background Paper, 25.
280 See Rizzini, “In Praise of Science, or the Concept of ‘Minors’ in Legal Practice”, in Rizzini (ed.), Children in Brazil Today: A Challenge for the Third Millenium, 85.
282 The general definition of patria potestas was the body of rights and duties given by law to father and mother on the person and the property of their minor children to allow them to fulfill their role as parents. See El Ghamrawi, op.cit. note 276: 101-109; Weisberg, “Evolution of the Concept of the Rights of the Child in the Western World”, 21 The Review, 43-51.
284 Verhellen explains the complementarity between minority and parental authority (op.cit. note 18: 87-88).
from which the child would benefit. While it is now accepted that children are direct beneficiaries of rights, the general view of children as defenceless and belonging to a family is still at the heart of the concept of minority. As this thesis will further explain, international human rights instruments do not seek to separate children from their family. Rather, they underscore the importance of the family for the child’s well-being and the role of parents as the primary caretakers of children. Although this view fits the ideal childhood perfectly, it is problematic in relation to street children.

The determination of the age of minority and of the areas that it affects changes from one country to another. What changes also is the division of minority into sub-groups. For different purposes, minority can be divided into age groups, which grant different rights and duties to children according to their age. This is common practice for example in criminal law. The child is considered liable for criminal offences only from a certain age and the consequences of that liability become more severe as the child grows up, in relation to the child’s maturity. Although there is a need to reconcile children’s gradual development towards adulthood with the regulatory nature of law, age limits set for each area can seem very arbitrary, as expressed by a British teenager: “We can be criminals at 14, make career choices at 14, can marry at 16, but cannot vote until 18”. This arbitrariness is well illustrated by the case of street children, whose living conditions and roles in life differ from those of other children, as they need to survive in hostile surroundings. And even if the difference between a toddler and an adolescent is undisputed, setting up age categories and minimum ages is not the best solution for all rights. For instance, all children should have access to medical counselling without parental authorisation, or to lodge complaints without

285 Still, some countries have made reservations concerning articles of the CRC dealing with the need for parents to respect the views and evolving capacities of the child, especially as formulated in Article 18. See Reservations, Declarations and Objections relating to the Convention on the Rights of the Child, UN doc. CRC/C/2/Rev.5.

286 The report by Bangladesh to the CRC Committee notes that legislation relating to children does not adopt a uniform definition of the child (the age of majority is set at eighteen years, while the National Children’s Policy defines children as those under fourteen), and the minimum legal age set for various purposes varies from 10 to 21 years. Areas covered by legislation include compulsory education, admission to employment, marriage, sexual consent, enlistment in armed forces, criminal responsibility, deprivation of liberty, testimony in court, judicial recourse, change of name, legal capacity to inherit and consumption of certain substances (See Second Periodic Report submitted by Bangladesh, 14.3.2003, UN doc. CRC/C/65/Add.22).

287 See e.g. Council of Europe, The Child as Citizen, 27-41.

288 Lansdown & Newell, op.cit. note 208: 50
parental consent, especially in cases of domestic violence. These are freedoms which give autonomy to children, but which protect them and thus should be widely applicable.

2.2 Determination of minority

The CRC links childhood to minority, but in practice it leaves room for interpretation in a way which can be beneficial to street children and their special condition. The CRC considers all children under eighteen as children, “unless, under the law applicable to the child, majority is attained earlier”. The CRC Committee has interpreted the clause as a guarantee that children will receive protection until the age of eighteen – whether minors or not – but that they can be granted some autonomy before that age, according to their evolving physical, intellectual and emotional capacities. This interpretation is in line with the spirit of the Convention and the general evolution of the rights of the child, which tend to reinforce both protection and participation rights by raising the limits of protective minimum age and lowering participatory age. The Human Rights Committee has also adopted this interpretation. It has affirmed that protective ages must not be set unreasonably low and that in any case a state party to the Covenant cannot absolve itself under the Covenant from the obligation to children under eighteen, even if they have reached the age of majority under domestic law. States can, however, substitute a lower age for particular purposes, provided that they do so in a way that is consistent with the Convention and its general principles. If majority is attained later in some countries, these young people are not covered by the Convention, because it does not consider them as children. Yet, there is nothing in the CRC to discourage the protection of youth until their twenties, and the Convention is meant to provide only the minimum protection.

International law therefore allows for the division of childhood into age groups according to different activities and areas of life. However, it offers little guidance on

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289 Children's access to courts is still very limited (see Chapter IV). For example in Bangladesh, children under eighteen cannot lodge complaints or seek redress before courts (see Second Periodic Report, op.cit. note 286).

290 Notably, while some international treaties define children as those under sixteen (the Hague Convention on Civil Aspects of International Child Abduction (25.10.1980, 19 ILM 1501) and the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (20.5.1980, ETS No. 105)), there is a tendency to set the limit at eighteen years without the supplementary clause (e.g. the African Children’s Charter).


292 ICCPR General Comment 17, op.cit. note 108: 24.
the determination of age limits. This allows for a grey area to be formed in national law regarding children who are minors, and yet are gaining adult rights and responsibilities: the age group in which most street children fall. The gaps in protection that this can produce are demonstrated, for example, in the fact that in England, children between sixteen and eighteen years are allowed to live on their own, but do not receive child benefits and do not qualify for adult benefits. Young people without income and unable or unwilling to live at home thus become easily homeless. Yet, the 1985 and 1996 Housing Acts do not take homeless minors into consideration. Furthermore, while emancipation is a solution in some countries, emancipated children gain adult rights and privileges, but they lose all protection accorded to minors. While the CRC does not give specific ages or criteria for classification, some other international treaties do. This is the case for conventions of the International Labour Organization (ILO) protecting young children from work, while allowing older children to work under certain conditions which protect their health, safety, and morals without hindering their educational opportunities.

The CRC principles of the child’s best interests and evolving capacities remain crucial as they allow for contextual and cultural situations to be taken into account alongside children’s individual pace of development. This is especially relevant for street children, who take on adult responsibilities earlier than the majority of children. Moreover, the CRC Committee has commented on the use of certain criteria. For example, it has made it clear that puberty, used in some countries to determine majority in civil and criminal matters, is too subjective and does not take into consideration the mental and emotional maturity of the child. Besides, such a criterion tends to discriminate against girls who attain physical maturity earlier than boys. The Committee, instead, has been in favour of the criterion based on the child’s “sufficient understanding”, which is used in some national legislation and avoids rigid barriers. However, such a criterion leaves a large margin of judgment to adults, who might not be able or willing to fully appreciate the concept of the evolving capacities of the child. Moreover, the notion of “understanding” can be used in different ways in different societies. For example, it is used in Bangladesh in reference to children from lower social classes who are expected to work when they are young, in contrast to children.

293 However, no concrete solutions for the application of these principles are offered. See discussions infra.
from the middle class who are protected for much longer and lack this “understanding”. "Understanding" means the loss of innocence and carries the possibility of guilt and punishment. This example shows the difficulty of translating international concepts derived from national legislation, practice or principles into universally understood concepts. The notion of childhood is of course at the centre of this difficulty, and is usually associated with younger children. 295 This is detrimental to street children—usually adolescents, as “[p]ublic concern for these young people seems to fade to such a degree that a child ceases to look like a child or act like a child, and loses the beauty of a child”. 296 Street children do not always even fit definitions of children, leaving either older or younger street children excluded. 297 These children are then detached from the notion of minority and their legal status becomes blurred, which results in inadequate legal protection.

2.3 The principles of the CRC and their importance to street children

The concept of minority can have detrimental consequences for street children, because it limits their options in life and criminalizes many of their acts. As already mentioned, the CRC Committee uses the principles of the best interests of the child and the evolving capacities of the child as guidelines to determine whether children should be considered as minors in certain areas of life. Other principles of the rights of the child can also moderate the effect of minority. Non-discrimination is extremely important for the application of the Convention’s provisions to street children and to all other vulnerable groups not expressly mentioned by the Convention. The Committee actually mentions “children living and/or working on the streets” in its “Guidelines for Periodic Reports” under the heading “General Principles – A. Non-discrimination” 298 Applying the principle of non-discrimination in an effective manner should ensure that

295 In the Bangladeshi example, the word “child” used in the CRC has been translated as shishu, which denotes a “small, innocent and dependent child”, excluding eight to sixteen year-olds, who are considered as capable of forming ideas and opinions. Children’s rights are thus understood as young children’s needs, a very different idea from the one that the Convention wants to convey. (See Blanchet, Lost Innocence, Stolen Childhoods).

296 A social assistance agency quoted in Grover, op.cit. note 20: 32.

297 In China, for example, a street child is a child of less than fourteen years, who has abandoned his parents, is without a fixed destination and without a legal way to earn a living (Stöcklin, op.cit. note 25: 72). See also Treanor, “Relief for Mandela’s Children: Street Children and the Law in South Africa”, 63 Fordham Law Review, 889. In many Western countries, street children are referred to as “street youth”, including only 15 to 24-year-olds.

298 See General guidelines regarding the form and contents of periodic reports to be submitted by States Parties under Article 44, paragraph 1(b) of the Convention, UN doc. CRC/C/58, 27.
the CRC’s provisions are adapted to the situation of street children if they cannot be applied directly as such.\footnote{299} 

The best interests of the child is more confusing than the principle of non-discrimination and has been subject to much scholarly analysis and debate about its meaning and usefulness,\footnote{300} as neither the drafters of the Convention, nor the Committee have proposed any criteria for its application. In national legislation the principle has been traditionally applied to cases of child custody.\footnote{301} As an international principle it is applicable to any case involving conflicting interests. However, it has been criticized for being too flexible and open-ended.\footnote{302} First, the Convention defines it as “a” primary consideration, not clarifying which other considerations – supposedly interests of other people or the society – should have precedence over the best interests of the child, and when. Second, the criteria that compose the principle have not been explained in the Convention. The CRC Committee has tried to clarify the meaning of the principle by including a range of issues that state reports should address under Article 3.\footnote{303} This seems redundant as all these areas are already covered by other articles, which should be applied in light of the best interests principle. Moreover, the Committee limits the scope of Article 3 to these few areas when the principle should give flexibility to all solutions concerning children’s issues, as the best interests differ from child to child.\footnote{304} It is this flexibility that has been rightly perceived as the strength of the concept, and several authors, such as Alston and Van Bueren, consider that it should be used through a case-by-case approach.\footnote{305} 

In this way it must be related to Article 12, because individual solutions require the consideration of situations from children’s standpoint, otherwise the best interests

\footnotesize{299} See discussions in Chapters II and IV.

\footnotesize{300} See Alston op. cit. note 100, and \textit{The Best Interests of the Child in the European Union}, \textit{op.cit. note 269}.

\footnotesize{301} See e.g. Lopatka, “The Concept of the Best Interests Principle in polish Law”, and Truu, “Best Interests of the Child in Estonia”, both in \textit{The Best Interests of the Child in the European Union, ibid.}


\footnotesize{303} See General guidelines, \textit{op. cit. note 298: 25-32}.

\footnotesize{304} This understanding of the principle of the best interests of the child is evident in the frequent use of the principle in national law. See e.g. the South African Case of \textit{Jooste v. Botha} (Case No. 1554/99, 12.10.1999, High Court, Transvaal Provincial Division, 2000(2) SA 199(TPD)), and the Canadian cases of \textit{Baker v. Canada} (Supreme Court of Canada, (1999) 2 SCR 817) and \textit{Canadian Foundation for Children, Youth and the Law v. Canada} (Supreme Court of Canada, (2004) SCC 4).

\footnotesize{305} See e.g. Alston & Glimour-Walsh, \textit{op. cit. note 302}; Van Bueren, \textit{op.cit. note 6: 47-48}.}
principle would be completely paternalistic. The best interests principle is especially relevant to street children when considering separately their rights, their needs as they perceive them, their needs as professionals perceive them, and the concerns of the urban population and society at large when it comes to health, safety, morals and community development. The holistic and individual applications of the principle are well suited to street children's varied situations and ensure that different facets of their lives are addressed together. The respect for the views of the child should guarantee that the definition of the best interests principle in specific cases is not completely left to adults, in which case it might be difficult to argue that a solution is taken genuinely with the interests of the child in mind or that those interests are defined within the child's reality. One could join child protectionists in saying that children do not always have the maturity to decide about their own best interests. However, this author would also agree with Freeman, who argues that not only should children's capacities not be underestimated, but also that "competence" should not be a requirement for the exercise of the freedom of choice, as all people need to learn from experience. These are complicated issues, which cannot receive principled solutions, as they largely depend on individual experiences. Nevertheless, it is important that many people have their word to say in matters concerning children: children themselves, their parents, teachers, psychologists, doctors, lawyers, judges, etc. Flexibility in solutions and openness in procedures make it less likely that actions will be completely against the interests of children, and at least will not knowingly be taken to the disadvantage of children.

Article 12 also serves as a guarantee that the best interests principle does not become a simple way for adults to take welfare measures to the detriment of other rights, in which case the best interests principle could be antagonistic with children's rights. Such opposition is bountiful in children's rights literature. Falk, for instance, prefers an interests approach to a rights approach for children. Eekelaar believes that the best way to determine what is in the best interests of a child is to try to find out what

306 Freeman finds the principle paternalistic and suggests that a reference to the child's wishes should have been more explicit in Article 3 (Freeman op. cit. note 302: 31, 51). See also Karp, "The Best Interests of the Child", in The Best Interests of the Child, op. cit. note 269: 21-27.
307 See e.g. Hafen & Hafen, op. cit. note 6: 461-487.
308 Freeman, op. cit. note 263: 58-66.
309 See discussion supra and 264.
310 See Falk, "Rights and Autonomy or the Best Interests of the Child?", in Douglas & Sebba, op. cit. note 18: 111-117.
the child will see as having been in his best interests once he becomes an adult. 311 Such a method is complicated and provides nearly exclusively an adult approach to the problem. Moreover, it tends to see the child only as an adult in becoming, instead of a full-fledged human being. However, it encourages an individual approach and is less patronizing than some other suggestions, such as the one given by MacCormick, who claims that only adults know what is best for children, and lists the right to discipline as one of the most important to the well being of children. 312 Such a statement seems shocking today as it is not seen as a children’s “right” any more, and it shows the whole difficulty (and danger) of leaving the definition of children’s the interests solely to adults, who are more likely to be prisoners of their time and ideologies than children.

Respect for the views of the child is essential for street children, because it gives them a sense of self-worth and belonging to the community. This in turn might help them to enjoy other rights by becoming aware of their capabilities. Moreover, seeking and respecting views of street children acknowledges their experience and knowledge as valid and supports their independence. While all categories of rights are important to all children, protection rights have been overemphasised compared to participation rights. As already emphasised, the concept of participation presents an opportunity to create programmes that are closer to street children’s realities and provide them with options in life. While the CRC is innovative with its inclusion of Article 12 and other participation rights, the principles chosen by the Committee of the African Children’s Charter give more emphasis to this aspect than the principles of the CRC, as the Committee has subdivided the principle of the participation of the child into respect of the child’s views (Article7), and provision of information to children and promotion of their participation (articles 4, 7 and 12). 313

However, none of these principles has much meaning if the child is denied the right to life, survival and development. This is unfortunately often the case for street children. Even if Article 6 of the CRC can be criticized for its vagueness, its enforcement should at least ensure that all children could enjoy all the basic rights

311 Eekelaar also thinks that the best interests principle has to be read in the context of all other rights of the Convention, as it is not to be the primary consideration in most issues concerning children (Eekelaar, “The importance of thinking that children have rights”, in Alston et al., op. cit. note 6: 221-235).
guaranteed by the Convention. “Development” further implies that each child should
expect her situation to improve and that she is given equal opportunities to develop her
personality and work on her life goals. These basic rights and constant evolution
approaches give more substantial meaning to the best interests principle and also link
the right to life, survival and development to the principle of non-discrimination. These
linkages, further explored in Chapter IV, ensure that applying the CRC according to
these general principles should reduce most of the limits to the applicability of the
Convention to street children. Some articles would still not be relevant to street
children, and some of their needs might not be properly addressed, but at least they
should be able to enjoy all the basic rights in their specific life context. The impact of
the principles of the CRC is all the more important if it is considered that states cannot
make reservations to them. Indeed, one can claim that reservations to these general
principles are incompatible with the object and purpose of the Convention, and
therefore prohibited.\footnote{Article 51(2) of the CRC and Article 19 of the 1969 Vienna Convention on the law of treaties (1155
UNTS 331). Understanding the general principles of the CRC as representing the object and purpose of
the Convention is supported by Kuper ("Reservations, Declarations and Objections to the 1989
Convention on the Rights of the Child", in Gardner (ed.), Human Rights as General Norms and a State’s
Right to Opt Out: Reservations and objections to human rights conventions, 109-110). It should be noted
that the general principles identified by the CRC Committee have not been object of many reservations
and declarations. See Reservations, Declarations and Objections, op. cit. note 285.}

3. The right to education in international law and street children

After having examined the rights of the child and their effect on street children,
this section will look more specifically at the right to education by considering its
relevance and applicability to street children. This is done through the examination of
the evolution and principles of the right to education in light of the previous analysis of
children’s rights.

3.1 Evolution of the right to education

Education has been said to be “...so intimately connected to what is of vital
importance for human life that it is essential that it be granted to all ‘as of right’”\footnote{Snook & Lankshear, Education and Rights, Melbourne University Press, Carlton, 1979, quoted in
Hodgson, op. cit. note 19: 17.}. Thomas Jefferson also acknowledged its importance: “I think by far the most important
bill in our code is that for the diffusion of knowledge among the people. No other sure

\footnote{Snook & Lankshear, Education and Rights, Melbourne University Press, Carlton, 1979, quoted in
Hodgson, op. cit. note 19: 17.}
foundation can be devised for the preservation of freedom and happiness.\footnote{316} John Locke and Sir William Blackstone wrote about the importance of education as a natural right for the child with a correspondent parents’ duty.\footnote{317} More recently, Jean Monnet has been quoted wishing that he had started the creation of the European Community with education.\footnote{318} The universal recognition of the importance of education requires explanations about the meaning of “education” and the “right to education”. Although education is as old as mankind,\footnote{319} it has not always been a right and even less a children’s right. There has been an evolution from education as an adult’s right (or privilege) to a children’s right, and now there is a tendency to move towards the concepts of “education for all” and “lifelong learning”. However, education is most commonly seen as a children’s right and it is in this function that it offers the strongest protection, as it has moved from a privilege and a natural right, to a legal right. This evolution has affected street children in different ways, depending on each phase.

As mentioned, adults were first the beneficiaries of education. Most of these beneficiaries were wealthy males, and this lead to movements for the democratisation of education to all men. For example, American and French revolutionaries focused on the liberation of an oppressed adult population. The right to education was considered a natural right, but was not applicable to people like street children. Authors like Locke and Rousseau contributed to the development of the moral obligation of parents to educate their children during the eighteenth and nineteenth centuries, and this reinforced the understanding of education as a right. Education was then included into positive law during the nineteenth century. Since the first legislative measures taken to guarantee children’s access to education, the importance of education in national law has become manifest in its inclusion in national legislation and constitutions.\footnote{320} As with the rights of the child, this legislative activity was driven by two types of considerations: the charity-based motives to save children by removing them from factories and streets, and the security and productivity driven actions to ensure that children would become

\footnote{317} Locke, The Second Treatise of Government, Chapter 6, and Blackstone, op.cit. note 239.
\footnote{318} Toschi, Chronology of the Legal Evolution of Children’s Rights – de l’amour vers le respect.
\footnote{319} According to Volio, education has always been important in all societies, but it was not part of the first human rights because it was seen to benefit collective instead of individual interests (op.cit. note 316).
\footnote{320} Even where the right to education is not included in the constitution, its importance has been affirmed. See e.g. US Supreme Court decisions in the cases of Brown v. Board of Education of Topeka, 347 US 483 (1954), 493 and Plyler v. Doe, 457 US 202 (1982), 221.
responsible citizens. Street children were very much targeted during this phase that lead to the creation of the concept of compulsory primary education.

At the international level, provisions on education were first included in the minorities’ treaties that were set up after World War I, as education was always considered an important means for minorities to maintain and transmit their culture, language and other characteristics. However, the expression of the right to education as a generally applicable universal human right did not emerge before the adoption of the UDHR. As a children’s right, education was surprisingly not mentioned in the 1924 Declaration on the Rights of the Child, although it could have been understood implicitly in the statements of Principles I and IV: “The child must be given the means requisite for its normal development...”; “The child must be put in a position to earn a livelihood...”. The 1959 Declaration corrected this deficiency, and now, the CRC and the African Charter on children’s rights contain the most detailed human rights provisions concerning education. When comparing different instruments, one can observe some evolution towards a child rights based approach to education, even though the basic elements have remained unchanged. For example, the UDHR and the Declaration on the Rights of the Child state children’s entitlement to free and compulsory primary education. The UDHR adds the availability of higher forms of education. The ICESCR goes further by presenting the progressive introduction of free education at the secondary and higher levels, and includes the concept of fundamental education for persons who have not completed their primary education. The CRC encourages the development of different forms of secondary education and their accessibility to all, and includes provisions on regular attendance and school discipline. Meanwhile, Article 27 of the CRC presents some weaknesses compared to Article 13 of the ICESCR, as it considers the progressive introduction of free secondary education as only one of the means to make education accessible to all, and it ignores the concept of “second chance” education. It is therefore necessary to read all provisions on education

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321 See Chapter II.
323 Principle 7.
324 CRC Articles 28 and 29 and Article 11 of the African Charter.
325 According to King, “child savers” have dominated the debate in education, as educational rights are mostly protective and procedural rather than autonomous and substantive (op.cit. note 18). Although this remark predates the CRC, it is not completely untrue in modern child rights law, as the core elements of the right to education have remained the same during the evolution of international human rights law.
together and apply what is most conducive to the effective application of the rights of the child in each case. This is especially important to street children whose rights should not be limited to those of children strictly speaking, as in most cases they are independently living and working adolescents.

3.2 Precepts and principles of the right to education

3.2.1 Non-discrimination in education

The principle of non-discrimination is a key concept which is recognised in all human rights instruments, and in relation to the right to education it has been specifically developed in the CADE, and defined in its Article 1.\textsuperscript{326} The importance of this provision for street children lies in its examples of possible unequal treatment, which all bear equal relevance to street children's reality. However, the protection offered by this article does not entirely match street children's needs. Firstly, the list of grounds for discrimination provided is problematic because it includes street children neither explicitly nor implicitly with reference to "other status" as in the International Covenants or the CRC.\textsuperscript{327} It is possible to include them under broad economic and social categories, but this does not guarantee that rights will be implemented in a way to respond to their specific needs. Epstein affirms that:

\begin{quote}
[T]he difficulties schools experience in addressing the needs of diverse population groups as determined by their ethnicity, gender, social class or disability are well known. What makes the case of homeless children and youth unique or worthy of special attention? The answer lies in the distinctive culture of street life, whose values, while internally consistent, are entirely antithetical to those practiced in schools.\textsuperscript{328}
\end{quote}

Secondly, the Convention emphasises the meaning of non-discrimination as requiring the equivalence of standards and conditions relating to the quality of education in all public educational institutions of the same level, and the compliance with state-regulated standards by private educational institutions. In fact, the Convention adopts a very cautious approach to educational systems that are separate from the state school system. It admits the possibility for other private institutions to be set up, but declares

\textsuperscript{326} Op.cit. note 121.

\textsuperscript{327} This was a deliberate omission, as some drafters considered that the expression was too imprecise, covered \textit{de facto} inequalities which could only be eliminated gradually, and did not have a "discriminating character". See McKean, op.cit. note 100: 133. As McKean points out, this objection is surprising in light of the obligations that the Convention assigns to states in order to eliminate all barriers to equal access to education.

\textsuperscript{328} Epstein, op.cit. note 20: 294.
that the state should be strict about the standards it lays down and inspects. Such concern is important when there is no regulation of private educational systems, but extreme suspiciousness will not create a climate conducive to private initiative which, by its flexibility and variety, can be more suited to street children's needs than more rigid public systems. Epstein again notes that:

Homelessness is treated as a temporary abnormality. Rather than directly acknowledge the power of the culture of the street and the skills that one must learn in order to survive within that culture (respect for temporality, mistrust of authority and elimination of private and public entitlement to space) the formal educational response is one of encouraging homeless children to blend into the existing school system without structurally adapting the system to their specific needs. 329

Thirdly, it is unclear whether states can use special measures to help street children, or any other groups, to have access to public schools, or to ensure that the education they receive is of sufficient quality. The Convention declares that the state is not to allow "any restrictions or preference based solely on the ground that pupils belong to a particular group" (Article 3(d)). 330 This is surprising considering international human rights law. As Chapter II explained, special transitional measures taken to restore equality should not be considered discrimination. 331 When parents neglect their child, the state must step in and assist the child in exercising his rights, especially as primary education is compulsory. The street child is entitled to receive this basic education, whether he goes to a formal school or not. One could argue that the state can assist street children without grounding the assistance on street children's membership to a group, but this strips street children of guarantees for systematic action based on their specific needs. One may turn to the CRC as the most important treaty for children, which prohibits discrimination in relation to education using the term "equal opportunities". The CRC also seems to agree with other human rights instruments allowing special measures, 332 because it calls for special consideration for children

329 Ibid, 294.
330 While McKean criticises the Convention for not distinguishing between discrimination of permanent nature and temporary measures, he argues that the legality of special educational institutions for special cases is implied in the Convention, as distinction, exclusion and preference are only discriminatory when they have the "purpose or effect of nullifying or impairing equality of treatment in education" (Article 1), and that special measures for persons in particular circumstances are not "unjustified" preferences (travaux préparatoires). McKean, op.cit. note 100: 134-135.
332 For example, the "Riyadh Guidelines" ask educational systems to "extend particular care and attention to young persons who are at social risk" (UN Guidelines for the Prevention of Juvenile Delinquency, UN
living in exceptionally difficult conditions. This aspect of non-discrimination is further examined in Chapter IV.

3.2.2 Compulsory primary education

Chapter II noted that basic education is a larger concept than primary education. Basic education can be provided in different contexts, one of them being primary education, which corresponds to the first level of instruction in general schools. Primary education is legally guaranteed as a right, while basic education, which can also be received through non-formal education, is only included in non-binding instruments. This means that street children, as all other children, only have a right to primary education, while they can benefit from international guidelines concerning basic education. The right to primary education is characterised by its free and universal nature. This is of course important for street children, but as Chapter II demonstrated, it is not always sufficient, as there might be discrimination against street children in terms of access to primary education, including in hidden costs. Moreover, this right can be very theoretical to them, as it does not correspond to their needs, in terms of methods of teaching and substance, causing drop-out and leading to incomplete primary education.

Another significant characteristic of the right to primary education is its compulsory nature. The right to compulsory education can be interpreted as the child's duty to receive education, as well as the obligation of parents and the state to provide education. Some drafters of the UDHR did criticize this duty because it could imply that the child could be forced to be educated in a way which might be contrary to her wishes and interests. However, these concerns were refuted with the interpretation of this duty as a sustained right, meaning that nothing and no one could prevent the child from being educated.333 The principle of compulsory primary education is included in all provisions dealing in detail with the right to education and can be qualified as a core obligation. Parents and the state are liable for this right, as are children to some extent. Even if compulsory education has been explained as giving children a sustained right, several authors are of the opinion that children have a duty to get education, especially when referring to older children who cannot be considered to be under total control of their

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parents. According to Bainham and O’Malley this children’s duty should be included in national legislation similarly to parents’ duties.\textsuperscript{334}

Treating adolescents differently in this matter would be consistent with the CRC’s use of the evolving capacities of the child. This approach is especially relevant to street children who have proved their independence and, by their choices and action, have agreed to take on more responsibilities than children who live with their guardians. However, the problem lies with the enforcement of the duty, as making children liable for their education could be interpreted as contravening the UN Rules on the Administration of Juvenile Justice,\textsuperscript{335} which recommend that truancy should not be penalised. It would place the great majority of street children in conflict with the law, thus resulting in increased stigma and harsh treatment. The result also depends on the sanction to be taken against the adolescent refusing to go to school. Greenville suggests taking only welfare sanctions, or tolerating the situation until the child is persuaded to attend school.\textsuperscript{336} But what are “welfare sanctions”? If they mean limiting children’s access to state welfare provision, then such measures can only be counterproductive. And “tolerating the situation” implies adopting a defeatist attitude, which is already too common in the search for solutions to the “street children problem”.

Despite the need to recognise street children’s maturity and independence, it is neither realistic nor desirable to hold them responsible for their non-attendance as long as the state does not take its own responsibilities seriously, especially considering that the provision of education to all children is part of the minimum core of the right to education.\textsuperscript{337} In addition to the obligation to make quality education accessible to all children, the state is also to “take measures to encourage regular attendance at schools and the reduction of drop-out rates”.\textsuperscript{338} This entails making education relevant to children’s lives. Schools should adapt to children and tackle problems affecting street children’s schooling, including the lack of relevant curricula and realistic options.\textsuperscript{339} For many street children the irrelevant nature of education and the inadequate conditions of

\textsuperscript{334} Bainham, \textit{op. cit.} note 18; O’Malley, \textit{op. cit.} note 270: 322.
\textsuperscript{335} \textit{Op.cit.} note 279.
\textsuperscript{337} See ICESCR Committee General Comment 13, \textit{op.cit.} note 204.
\textsuperscript{338} CRC Article 28(1)(e).
\textsuperscript{339} See \textit{e.g.} Quint, \textit{Schooling Homeless Children – A Working Model for America’s Public Schools}.
schooling have led them to drop out of school and even to turn to street life. Once they have spent some time on the streets, the education provided in schools becomes increasingly inadequate for them.

Age becomes an obstacle, as the longer children stay out of schools, the more difficult it becomes to place them in schools, where classes correspond to a certain age and to an educational level. Age is also a complicated issue with reference to compulsory schooling age. If a youth who is over the age of compulsory education has only completed two years of primary education, should he not be required to complete that education in order to acquire basic education? If he has not acquired it, clearly it is in great part because of the failure of the state to provide it to every child of compulsory schooling age. Determining age limits for compulsory schooling has been interpreted as part of states’ duties to implement the right to education. Although the requirement for age limits for different levels of education is not explicitly mentioned in international provisions, in national legislation only children who fit into a certain age category can benefit from the right to compulsory education. This fails to take street children’s condition into account and discriminates against them. If a child cannot exercise her right to compulsory education once she has reached an age limit, but without finishing primary education, her chances of moving to higher levels of education, including vocational training, are highly compromised. This author would therefore recommend other type of criteria instead of age, such as certain types of skills that should be acquired during compulsory education, or extending the right to basic education to all children. In general, criteria that focus on outcome should be favoured over simple enrolment rates based on age. Provisions concerning basic education for children and youth who have dropped out of school, however, are scarce and are not linked to the idea of compulsory education.

340 In the UK school curriculum has proved to be the primary cause of truancy. See Lansdown & Newell, op.cit. note 208: 157. See also Grover, op.cit. note 20.
341 Notably, Article 21 of the 1963 Central American Convention on the Unification of the Fundamental Norms of Education (10997 UNTS 248) refers to the “legal school age”.
342 Grover also expresses concern about age limits in education (in Canada), which make many young people fall through the cracks of the education system (op.cit. note 20).
343 For example, the 1996 Constitution of the Republic of South Africa (Act 108, 1996) provides the right to basic education to “everyone” (Chapter 2, 29).
344 Article 4 of the WDEFA states that the focus of basic education must be “on actual learning acquisition and outcome, rather than exclusively upon enrolment, continued participation in organized programmes” (op.cit. note 195).
345 Compare CRC Article 28 with ICESCR Article 13(d) and CADE Article 4(c). CEDAW offers better protection, calling for the “reduction of female drop-out rates and the organisation of programmes for
3.2.3 Protection from work

Concern about effective enforcement of compulsory education is, however, superfluous if compulsory education is found not to be in street children's best interests. Reasons for the justification of the importance of education to street children abound. However, the reality is more complex as street children need to (and often want to) work, while child labour is considered an obstacle to education. As labour laws are needed to enforce educational laws (and vice versa), states determine a minimum age for child labour to ensure that children of school age go to school. Children are not considered to have a right to work, but a right to protection from work. The minimum age for work and the end of compulsory schooling should thus coincide. Surprisingly this is not always the case and in some countries children are allowed to be employed before they have completed primary education. The reverse is also true with a gap in many countries between the end of compulsory education and the minimum age for employment. For street children both strict laws concerning the age of compulsory schooling and the minimum age for employment cause problems, as these children need to earn a living, and cannot be expected to complete compulsory primary education within a set time frame. Laws prohibiting child labour have not been found to reduce child work, but to push children into irregular situations, without any protection. While working children denounce deplorable working conditions and exploitation, laws protecting children from harmful work only reach those who work in the formal sector. Street children, therefore, suffer both from the irrelevance of educational and labour laws and from their limitation of the formal sector.

girls and women who have left school prematurely" (Article10 (f)). This should be applied to all vulnerable groups. See also “UNICEF Strategies in Basic Education”, op.cit. note 199.

346 Children's perceptions of the role of work in their lives depend on the cultural context in which they live. See Lansdown, op.cit. note 236: 21.

347 Unlike adults, who have the right to work (UDHR Article 23, ICESCR Article 6) and the right to protection as workers (e.g. ILO conventions).

348 In international law (ILO Minimum Age Convention (No.138), 1973, 1015 UNTS 297) both ages are set at fifteen, although there is some room for exceptions.

349 See e.g. Second Periodic Report submitted by Finland, UN doc. CRC/C/70/Add.3, and Periodic Report submitted by Peru, UN doc. CRC/C/65/Add.8. See also Melchiorre, At What Age?... are school-children employed, married and taken to court?

350 See e.g. Second Periodic Report (Bangladesh), op.cit. note 286; Initial Report submitted by Burundi, UN doc. CRC/C/3/Add.58. See also Byrne, The Human Rights of Street and Working Children. A Practical Manual for Advocates, 257-270; Melchiorre, op.cit. note 349. The Special Rapporteur on the Right to Education has also noted that while the starting age for compulsory education is consistent worldwide, this has not been achieved for the finishing age (Preliminary report, op.cit. note 197).

Street children, who want both work and education, are left in a legal void. They fail to get basic education because of discrimination and because of their work, and they fail to get respectable work partly because of their lack of education and because of discrimination. As Boyden explains, most schools do not leave time for children to work during the day. If children try to combine school and work, they will be too tired to succeed and will eventually drop out favouring their earnings over theoretical knowledge. Boyden also recognises that, while school is seen as a deterrent from work, it can also be the cause. Other authors acknowledge that positive work experience can be beneficial to children. Aptekar, for example, favours providing street children with jobs enabling them to work productively with the responsibilities they have chosen to take on. Lansdown notes that education and learning are not synonymous of schooling, and that many competencies are acquired by children outside of school, including in work life. Sawyer takes a pragmatic view: “Until there has been a worldwide revolution in the quality and availability of education, job satisfaction is the best means of bringing alienated children back into tune with society.” One should thus differentiate between harmful child labour and positive child work. Positive work could be combined with school and used as training for a future job.

Unfortunately, street children’s work can hardly be called educative or progressive. It is often hazardous and does not promote social mobility. It consists of scavenging, vending, guarding cars, carrying shopping bags, begging, etc. Yet, that work should not be discredited, as it can be a source of pride for street children. Indeed, positive work does not necessarily mean formal work requiring educational

352 See Grover, op. cit. note 20.
353 Boyden, op. cit. note 21.
354 “In Brazil, boredom with school and knowledge that it will not bring them better jobs or higher earnings are significant factors in desertion” (ibid., at 30).
356 Aptekar, op. cit note 27.
357 Lansdown, op. cit. note 236: 21.
359 Examples of successful street child programmes that provide work opportunities as a form of life education include República do Pequeno Vendedor (Republic of Small Vendors) and Salão de Encontro (Meeting Place) in Brazil. The fact that work should be made an educational instrument was even recognised as one of the principles of the government-led Alternative Services for Street Children Project (See Myers, op. cit. note 233: 2).
360 While international law has started distinguishing between harmful and non-harmful work (see ILO Convention on the Worst Forms of Child Labour (No.182), 1999, 38 ILM 1207), it does not openly advocate for the use of work for educational purposes.
361 This was well expressed by Senegalese and Malian street children in 1994, as they marched for their rights as workers, demanding to be treated with dignity, to have their work recognised as contributing to their country’s economy, to receive social protection and education corresponding to their needs as workers (A Letter from the Street, 1994/11).
qualifications. Instead of relying on existing assumptions about what kind of work is acceptable, beneficial or harmful to children, we should take children’s views into account and conduct research about the effects of work on children. One study, for instance, found that street trading is not harmful to children and that all forms of work have both constructive and detrimental impacts.\textsuperscript{362} Although street children in all surveys have expressed the will to get education, work remains a priority.

In order to satisfy street children’s need for both education and work, it is necessary to consider these in a complementary manner. Street children’s educational needs are usually work-oriented and should be geared towards immediate and longer-term results leading to higher productivity and better jobs. Emphasis could be placed on vocational education, which belongs both to the right to education and to the right to work.\textsuperscript{363} Other measures could include flexible schooling hours or partnership schemes with local artisans or companies.\textsuperscript{364} Such schemes are frequently developed for working children, whose needs – mostly financial – are more straightforward than those of street children.\textsuperscript{365} Street children have many similar needs to those of working children, but their integration in educational and conventional working schemes is more complicated because of their attitude towards society, rigid rules and responsibilities. Because of their multifaceted problems, they easily fall through the cracks of educational systems.\textsuperscript{366}

In coordination with educational services, street children also need social services to help them integrate society and meet their immediate physical and psychological needs.\textsuperscript{367} They also require educational and career choices, as well as guidance and information about existing possibilities and about ways to organise


\textsuperscript{363} An interesting option has been developed by the Egyptian Ministry of Education as a way of responding to the needs of the poorest segments of population and rising numbers of school drop-outs. These alternative educational opportunities include elementary occupational schools, allowing children to start occupational training earlier than what is normally authorized by law. See Azir, “Modalities of the Best Interests Principle in Education”, in Alston, \textit{op. cit.} note 100: 227-258.

\textsuperscript{364} However, problems brought by protected work opportunities should not be overlooked (see Ennew, \textit{Street and Working Children: a Guide to Planning}, Chapter 5).

\textsuperscript{365} See e.g. Glasmovitch, “Trabajar o estudiar: un falso dilema”, reproduced in Ennew, \textit{op. cit.} note 191: 80-82.

\textsuperscript{366} See Epstein, \textit{op. cit.} note 20. According to Stronge, homeless students share common characteristics with other at-risk students, but present a special case to school officials, because they are more marginal and represent a multidimensional societal problem (\textit{op. cit.} note 208).

\textsuperscript{367} See Stronge, \textit{ibid.}. 104
themselves.\textsuperscript{368} Unless states recognise their obligation to take street children's needs into consideration in a holistic way, combining their needs for basic education, work, recognition, integration, and choices, the responsibility for the right to compulsory education cannot be placed on street children, who are often blamed for their truancy. Judging them as truants contributes to their stigmatisation as delinquents and further marginalisation.

\subsection{3.2.3 Purpose of education}

The concept of education and the discussion about its aims and purpose have long preceded the development of international human rights law. Some proclaimed the child's personal development and emancipation to be the main purpose of education, while others saw the interest of society as the prevailing element. These personal and general goals are still part of today's discussion about the objectives of education.

Many provisions on the right to education in international instruments include a list of purposes and goals of education. These are generally principles related to universally agreed human rights, such as dignity and tolerance, and leave a good margin of appreciation to states for their interpretation and implementation in the context of education. The principles of the UDHR reflect the priorities as they were seen after the world wars. Emphasis is thus placed on the respect for human rights and international peace and cooperation. Development of the human personality is the only subjective goal and is also linked to these concerns. According to Arajärvi, the development of the personality includes "...all dimensions of the human being: physical, intellectual, psychological and social. The aim is that each individual could develop himself or herself according to his or her abilities and talents, to a harmonious person."\textsuperscript{369} The CADE has a similar list of objectives.\textsuperscript{370} The ICESCR contributes to the category of subjective aims by including the development of the sense of dignity, and enabling persons to participate effectively in a free society. The CRC goes further by having a separate article (Article 29) on more detailed aims of education. This article shows the evolution in the approach to children's rights, as it omits the paternalistic mention of

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{368} In one survey, the majority of Canadian street children expressed the desire to begin another life, but very few had developed a sense of how to accomplish changes (see WHO \textit{et al.}, Solicitor General Canada, \textit{The Canadian Street Children Project: Phase One Findings}).
\item \textsuperscript{369} Arajärvi, "Article 26", in Eide \textit{et al.} (eds.), \textit{The Universal Declaration of Human Rights. A Commentary}, 409.
\item \textsuperscript{370} See also the UNESCO Recommendation concerning Education for International Understanding, Co-operation and Peace (\textit{op.cit.} note 193).
\end{itemize}
\end{footnotesize}
“become a useful member of the society”, and includes a more comprehensive list of aims that should benefit the child. New subjective aims are the development of the child’s personality, talents and abilities to their fullest potential.371 Objective aims include the respect for the child’s parents, his cultural identity, for the values of his own country and for other civilizations, and the development of respect for the natural environment. Respect for the child’s cultural identity and values is important to street children, and can be understood as prohibiting discrimination and supporting the right to be different.372 The right to education is thus an individual right, which benefits the whole society.373

Less frequently cited objectives, included in regional instruments, UNESCO’s instruments and the CRC,374 can also be classified within the two categories: those geared towards individual development, dignity and welfare, and those directed towards the development of societies through economic growth, the maintenance of democratic structures and peaceful relations. This is summarized in the preamble of UNESCO’s WDEFA, which states “education can help ensure a safer, healthier, more prosperous and environmentally sound world, while simultaneously contributing to social, economic, and cultural progress, tolerance and international cooperation” and “education is an indispensable key to... personal and social improvement”.375

The social and global aims of education can lessen education’s importance as an individual right, but they increase its perception as an important human right, because it can be explained in objective results-based terms. Its individual side has been much less elaborated. One explanation may be the perception of education as a threat. Positioning individual rights against state rights and empowering individuals make it a politically sensitive issue. While the individual side of education – education for its own sake, for pleasure, for personal development and empowerment – may be seen as benefiting from

371 This could be considered a more developed version of “the full development of the human personality” introduced by the UDHR.
372 A similar interpretation of UDHR Article 26(2) is provided by Arajärvi, according to who the promotion of understanding, tolerance and friendship among nations and racial and religious groups “calls for the existence of different views, coexisting side by side, as well as within each other” (op.cit. note 369: 485).
373 This is even clearer in Principle 7 of the Declaration on the Rights of the Child.
the collective importance of education that is more likely to attract attention, policies and resources, facts reveal unmet goals.\textsuperscript{376} Failures do not only reflect lack of commitment, but also the complexities of education. In some countries, such as South Africa, education constitutes the highest spending, which proves intention, while all children are still not in school.\textsuperscript{377} One can also say that universal enrolment, like in Brazil, does not reflect true universal education.\textsuperscript{378}

3.2.4 The right to education in relation to other rights

The right to education is interlinked with many other human rights, because it belongs to both categories of civil and political, and ESC rights. While this categorisation has lost its relevance today,\textsuperscript{379} the concept still clings to human rights vocabulary.\textsuperscript{380} According to the traditional human rights theory, the right to education is considered part of ESC rights, either as a social and economic right enabling the individual to acquire an adequate standard of living, to function effectively in society and to satisfy his economic needs, or as a cultural right enabling him to have access to knowledge, and to participate in the development and transmission of scientific, artistic and cultural values and activities. However, the right to education belongs to the civil and political rights because of the obligation to respect parents' choice, private bodies' freedom to educate, and the right of access to educational facilities without discrimination. Moreover, it is a prerequisite to the implementation of civil and political rights, such as the rights to participate in the political life of a country, the rights of defense for the accused, the freedoms of expression and of association.\textsuperscript{381} The right to

\textsuperscript{377} Spending constitutes about 20% of the total government expenditure (or 7.5% of GDP). Because of the \textit{apartheid} legacy poorer regions are still at a disadvantage. See Garson, "Education in South Africa", \texttt{<http://www.southafrica.info/ess_info/sa_glance/education/education.htm>}.\textsuperscript{378} See Chapter V.
\textsuperscript{380} Many authors explain the relativity or irrelevance of the distinction between the two groups of rights as to the nature, justiciability, or implementation of those rights, while continuing to use the classification themselves. See \textit{e.g.} Eide & Rosas, "Economic, Social and Cultural Rights: A Universal Challenge", in Eide \textit{et al.}, \textit{op.cit.} note 22: Chap.1; Scheinin, "Economic and Social Rights as Legal Rights", \textit{ibid}, 21-86; Eide, "Realization of Social and Economic Rights and the Minimum Threshold Approach", 10 \textit{Human Rights Law Journal}, 35-51. Leary acknowledges this and justifies the use of the categories "for the purposes of common usage" ("The Social and Economic Rights of the Child", 17 \textit{Law and Policy}, 354-375), while Leckie considers the usefulness of adopting new terminology \textit{(op.cit.} note 143). Other authors still find the distinction useful, especially for the purpose of defining state obligations. See \textit{e.g.} Debrück, \textit{op.cit.} note 22; Nowak, "The Right to Education", in Eide \textit{et al.}, \textit{op.cit.} note 22: 189-227. See also Donnelly, \textit{op.cit.} note 17: 27-31; Van Hoof, "The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views", in Alston & Tomaševski (eds.), \textit{The Right to Food}, 97.
\textsuperscript{381} It has even been argued that education became a human right because it was seen to guarantee the equal application of civil rights and freedoms. See Volio, \textit{op.cit.} note 316. These arguments were also
education is also connected to many other rights without which it could not be correctly implemented. Without certain basic conditions people cannot benefit from the right to education even if theoretically schools are open to everybody. The right to education thus is the perfect example to demonstrate the artificiality of rigid classification of rights as opposed to their natural interdependence.\(^{382}\) This interrelatedness of rights was clearly demonstrated in the South African *Grootboom* case. The judgment showed that the right of access to adequate housing cannot be viewed in isolation, and affording socio-economic rights to all enables them to enjoy all other rights guaranteed to them.\(^{383}\)

The right to education allows street children to exercise many rights that are fundamental to their survival and development. As an economic right, it allows them to become socially mobile and to take full advantage of opportunities in society, for example through street children's congresses. As a social right, as it allows street children to participate in society. As a cultural right it enables them to participate in cultural life as creators and consumers of culture. This is manifest in the importance given to art and performance in street children's programmes. The freedom perspective of civil and political rights may seem less prominent as far as street children are concerned, as the right of parents to choose education for their children does not apply to them. Arguably, street children themselves should be endowed with this freedom, but it is not something explicitly recognised by provisions on educational rights.\(^{384}\) There is another important freedom element, however, as street children are usually educated outside the public school system by institutions that the state has to respect. Moreover, the state must refrain from discriminating against them in access to public schools. Although the right of access to education is usually linked to public institutions, it should be understood for street children as the right of access to all educational facilities, including private ones, especially those that are most likely to meet their educational needs.

### 3.3 Street children and their right to education in international human rights law

This part examines the type and level of protection that exists for street children's right to education in international law. First, it distinguishes between codified

\(^{382}\) See Donnelly & Howard, *op. cit.* note 159: 214-248.

\(^{383}\) Government of the RSA and Others v. Grootboom and Others, Case No. CCT11/00, 4.10.2000, 2001 1 SA 46 (CC), at 83.

\(^{384}\) See Chapter IV.
and non-codified law, and then examines different types of codified law and their application to street children – regional and international instruments, specific and general instruments, "hard" and "soft" law, "adults'" and "children's" instruments.

3.3.1 The role of international customary law

Arguably, the seal of custom would make the CRC a more powerful instrument. Indeed, one advantage (and sometimes disadvantage) of customary law over treaty law is that it is usually less easy to override once it has been established and it applies to states that are not parties to treaties. International custom would make treaty provisions applicable to all states, regardless of reservations and declarations. This presents a considerable advantage, as reservations to the CRC weaken the impact of the Convention nationally. These reservations affect marginalised groups more than others, because they tend to limit the application of articles on participation and on the provision of services, and emphasise the traditional role of families. For street children, reservations on articles related to participation would probably have the most negative impact, as life on the street has made them independent, and traditional forms of intervention, involving imposed measures, have proven to be ineffective. In addition to overriding reservations, international customary law also enables people to invoke human rights principles in court, even if a treaty incorporating the same principles has not become part of national law. This can be useful in dualist countries, where a treaty does not automatically become part of the law of the land upon ratification.

One might argue that the CRC has become customary law because of its wide and prompt ratification. States have not objected to it and have continued to show support to it by making declarations at international conferences, signing new documents on children's rights, and complying with their reporting obligations. Yet it is the very existence of numerous and sweeping reservations in addition to the poor implementation of the Convention that does not permit the classification of the whole convention as customary law. However, similarly to claims made on the customary nature of the UDHR, one could argue that specific articles may have become customary.

385 See Kuper, op.cit. note 314: 104-113.
386 For example, Egypt and Jordan have reserved the right not to be bound by Article 20, according to which a child deprived of his family environment is entitled to special protection. Kiribati and Indonesia have made sweeping reservations on provision rights, while the reservations of Singapore and the Holy See have focused on preserving children's subordinate role in society. See Reservations, Declarations and Objections, op.cit. note 285.
387 See Chapter VI.
norms. For example, the right to education could be considered as customary law due to its inclusion in the UDHR and in all major human rights treaties. Schachter recognizes that basic education could meet the requirements of consistent practice and *opinio juris*. The provision of basic education has been determined as part of states minimum core obligations in the implementation of the right to education, and many countries have constitutional guarantees for the right to education. Undoubtedly, poor implementation and reservations could again be used to prove the contrary, and one could easily get into a cyclical argument about the recognition of customary law and practice of states. Like Higgins, this author would like to question non-compliance as proof of the lack of normativity of human rights provisions. If human rights principles could lose their status as customary law because of their violation by states parties to human rights treaties, one would find that this could be the case for the great majority of these principles. The strength of *opinio juris* has to be assessed to determine whether practices such as the ratification of international treaties, the adoption of UN General Assembly (GA) resolutions, international conferences and national legislation and policies are sufficient as consistent and widespread practice. As one cannot read the minds of states, practice itself has to be analysed to help determine the existence and extent of this moral requirement of customary law. Important indications in this respect are the lack of opposition or diverging interpretation from states, strengthened by constant and consistent reaffirmation of the law in different contexts. Concerning the right to education, it seems clear that basic education enjoys strong *opinio juris*, unlike

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388 In an attempt to confer legal value to the UDHR, human rights advocates claim that the Declaration as a whole is international customary law, while most legal scholars argue that only some rights included in the Declarations have reached that status. See Schachter, *International Law in Theory and Practice*, Chapter 15; Buergenthal, *International Human Rights in a Nutshell*, 29. (Few scholars, such as Sohn, and Waldock, consider the whole Declaration as having such legal value. See Sohn, “The New International Law: Protection of the Rights of Individuals Rather than States”, 32 American Univ. Law Review, 16, and Waldock, *Mélanges offerts à Paul Reuter, Le droit international, unité et diversité*, 15). While Article 4 on the right to freedom from slavery and Article 5 on the right to freedom from torture of the UDHR are most often cited, the list of possible customary norms is longer and Articles 4 and 5 can be even considered as norms of *jus cogens* (see Meron, *Human Rights and Humanitarian Norms as Customary Law*).

389 See Chapter IV.


391 There are 58 countries, as of 18.3.04, where the right to education is neither free, nor compulsory, or simply not available, at <http://www.right-to-education.org/research/index.html>. Although there have not been many reservations on the right to education in the CRC, many countries have made general declarations or reservations that have an effect on the full implementation of the right to education (ibid).

392 Higgins provides the example of the right to freedom from torture. This right is generally recognized as an international customary norm, and yet the great majority of states violate it. See *Problems and Process: International Law and How We Use It*, 19.

393 See *Right of Passage Over Indian Territory, Portugal v. India*, judgment, 12.4.1960, 1960 ICJ Reports, 40.
more controversial aspects of the right to education, such as the right to free secondary education or the right to inclusive education for persons with disabilities. This can be seen in the lack of opposition to basic education, the inclusion of the right to basic education in many national constitutions and the reiteration of this right in international conferences and assemblies of states, such as the UN CHR and the UN GA. 394

The principle of the best interests of the child could be another candidate for customary law, as it has been accepted by all countries and is reinforced by national practice. Additionally, there are no reservations to Article 3 of the CRC. However, as discussed earlier in this Chapter, the principle is confusing and it has different meanings in different contexts. Its adaptability is one of its strengths in national courts, where it is applied case by case, but such flexibility makes it difficult to use internationally. The right to freedom from discrimination also could be qualified as customary law, as it is one of the underlying principles of international human rights law. 395 However, there is no agreement on a comprehensive list of prohibited grounds for discrimination. It seems that the prohibition of racial discrimination and discrimination based on gender and religion, to some extent, would qualify as international customary laws. 396 On the contrary, discrimination based on social status or age are not widely cited as violations of universally recognised human rights. Therefore, international customary law cannot be used to protect street children specifically through the principle of non-discrimination.

At first view, international customary law seems to provide considerable advantages in the protection of the rights of street children, especially if the CRC were completely or partly considered as customary law. However, international custom is a difficult source of law for street children to use. Not only is it difficult to prove, because of the lack of general understanding of the meaning of "practice" and "opinio juris", but it does not offer the same accuracy as treaty provisions and it is more likely to consist of general rules. Only the general, core principles contained in human rights treaty provisions can be considered customary law, as in the case of the right to education.

394 Though some authors caution against considering even unanimously adopted GA resolutions as reflecting opinio juris, and recommend considering the practice relating to the resolutions (Oppenheimer, Oppenheimer's International Law, in Jennings & Watts (eds.), Vol. 1, 45 and Schachter, op. cit. note 388: Chapter 15).
395 See e.g. McKean, op. cit. note 100: 276.
396 See e.g. Bayefsky, op. cit. note 143: 19-22. Brownlie considers racial, gender and religious non-discrimination as principles of jus cogens (Principles of Public International Law, 513, note 29).
This imprecision and the difficulties involved in establishing customary law make it a very complicated tool for street children to use. As to international judicial recourse, one has to note that international and regional judicial and quasi-judicial bodies, such as the ECHR or the Human Rights Committee have not used custom in their deliberations. Only the International Court of Justice, which cannot be used by groups of individuals, such as street children, has referred to custom.\footnote{See e.g. the cases of the *Lotus* (*The Steamship Lotus, France v. Turkey*, judgment, 7.9.1927, P.C.I.J. Series A No. 10, 18), *North Sea Continental Shelf* (Federal Republic of Germany v. Denmark and v. Netherlands, judgment, 20.2.1969, 1969 ICJ Reports, 3) and *Nicaragua (Military Activities in and Against Nicaragua)*, Nicaragua v. USA, 27.6.1986, 1986 ICJ Reports, 14), where the Court emphasized the importance of *opinio juris*.

\footnote{Bennett, especially, criticized the CRC for not bringing many new elements or precisions to already existing rights, especially those rights covered by specific treaties ("A critique of the emerging Convention on the Rights of the Child", 20 Cornell International Law Journal, 27).

\footnote{Ibid.}

\footnote{Ibid. 28.}

\footnote{See General Comments 6 ("The Right to Life", UN doc. HRI/GEN/1/Rev.2, 6), 17 (op.cit. note 108), 18 (op.cit. note 145) and 19 ("Protection of the family, the right to marriage and equality of the spouses", UN doc. HRI/GEN/1/Rev.2, 28).} One can also acknowledge that the widespread acceptance of the CRC as a universally applicable instrument makes it less important to rely on custom for the protection of children’s rights. This can be confirmed in the case of the right to education. Since only basic education could be considered international customary law, and as most states include this in their national legislation, its recognition as customary law would not necessarily increase its use in national courts.

### 3.3.2 Human rights and children’s rights

There are many human rights instruments applicable to children, dealing with issues such as education, adoption, criminal justice, child custody and child labour. This has led some authors to argue that there was no need to recodify what already existed into a new instrument, the CRC.\footnote{Ibid.} In addition to specialised instruments, general human rights instruments, such as the UDHR or the International Covenants are applicable to street children, as to all human beings, as they refer to “everyone”, “all persons”, “all individuals”, and “every human being”.\footnote{Ibid, 28.} It has been observed that the drafters of the Covenants had implied that children were covered by the Covenants’ provisions,\footnote{See General Comments 6 ("The Right to Life", UN doc. HRI/GEN/1/Rev.2, 6), 17 (op.cit. note 108), 18 (op.cit. note 145) and 19 ("Protection of the family, the right to marriage and equality of the spouses", UN doc. HRI/GEN/1/Rev.2, 28).} and the ICCPR Committee frequently comments on children’s rights in its General Comments concerning the Covenant.\footnote{Ibid.} However, it has been proven that children need special or additional protection of their rights because general instruments do not take their situation sufficiently into consideration. Moreover, the fact that some general instruments have specific provisions on children could indicate that the rest of...
the instrument is not intended to protect their rights.\textsuperscript{402} Aside from two regional instruments – the African Charter on the Rights and Welfare of the Child and the European Convention on the Exercise of Children’s Rights\textsuperscript{403} – the CRC is the only binding international instrument of a general character concerning children’s rights and should thus be the principal instrument for the protection of street children’s rights. All its provisions\textsuperscript{404} are theoretically applicable to street children notwithstanding the relevance of these provisions to their lives. While the CRC does not always add much to the already existing children’s provisions, it brings some precision and addresses additional situations where children may need protection. Most importantly, it introduces children’s civil rights and freedoms, thereby legitimising children’s participatory rights. In addition, it has the most detailed provisions on the right to education. Because of the CRC, most children’s provisions found in adults’ human rights instruments lose their importance and need no separate application.

However, this thesis has shown that children’s rights are intimately linked to the minority status of children, and that this can be detrimental to street children. This author believes that adults’ instruments should be applicable to street children insofar as they are relevant to street children’s status and conditions, and do not explicitly or implicitly require the person protected to have reached majority. In contrast, some scholars argue that civil and political rights are strictly adults’ rights and that human rights treaties should be applied restrictively to children, focusing only on provisions which mention them specifically, in connection with family rights, or including them implicitly, such as provisions on health and education. Authors such as Hafen consider that the CRC has gone too far in creating civil rights to children, for which there was no need.\textsuperscript{405} While this is not a prevalent view, there are some provisions that are considered

\textsuperscript{402} ICCPR Articles 10, 23 and 24, ICESCR Article 10, and UDHR Article 25.
\textsuperscript{404} Except for provisions concerning implementation (Article 4), or those dealing mainly with the rights and duties of parents and other carers, and with the relationship between children and parents (Articles 5, 9, 10, 18).
\textsuperscript{405} See Hafen & Hafen, \textit{op. cit.} note 18. The authors criticize the CRC’s novel approach to child autonomy, which might undermine parental responsibilities and the family’s right to privacy. See also Thery, \textit{op. cit.} note 261. The point of those authors is well taken, but they fail to see the diversity of childhoods and cultural settings, merely describing problems that could arise in Western countries where, for example, the child might be manipulated by one parent in divorce proceedings. They do not discuss the issue of children who are responsible for themselves and for others, and who are better experts about their own life than their parents. For a contrasting view, see e.g. Milne, “La Partecipazione dei Bambini.
as adults’ rights in most countries, especially the right to take part in the political life of a state, including the right to vote, to be elected and to work for the public service of one’s country (Article 25 of the ICCPR). The right to choose one’s residence is also considered as inapplicable to children, although this is questionable, and has been indirectly challenged at the regional level. Moreover, restrictions may not apply to older children.

While it is unnecessary to apply adult’s rights when children’s rights provide better protection, one should be aware of adults’ rights that might be formulated in a way that is more relevant to street children, or add a point that is omitted in the CRC. An example could be work-related rights, which are not recognised for children, but which would offer them much needed protection. Many ILO conventions contain provisions that are not considered applicable to children, as they concern the right to organise, collective bargaining, workers’ representatives, or non-discrimination in access to professions. Such conventions are never mentioned in relation to child workers, increasing their vulnerability at work. Their provisions should be used in the international legal protection of street children, even though there might be reluctance to do so. Article 41 of the CRC affirms that other national or international provisions which are “more conducive to the realization of the rights of the child” should have precedence over those of the CRC.

3.3.3 The legal value of instruments: “hard” and “soft” law

Treaties as legally binding “hard” law are the most widely known because they often include provisions concerning their diffusion and mechanisms for the control of

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Una Visione Generale del loro Contributo nei Progressi Democratici", 2 Niños y Adolescentes Trabajadores, 44.

406 Some countries, such as Brazil, Nicaragua and Cuba, have lowered their voting age to sixteen.

407 The European Commission on Human Rights has dealt with applications from the Netherlands and Denmark concerning young runaways refusing to return home (X & Y v. The Netherlands, Application no. 6753/74, DR 2 (1975) 119, and X v. Denmark, Application no. 6854/74 (in Fortin, “Rights Brought Home for Children”, 62 Modern Law Review, 350). The Commission’s decisions demonstrated that when the child’s and parents’ views conflict about the residence of the child, the parents’ right to a family life prevails. However, the state is not under obligation to enforce this right by compelling the child to live at home. (See Van Bueren, op.cit. note 6: 74-75). These decisions are pertinent to the situation of street children, even though street children are not always in direct conflict with their parents who sometimes approve of them leaving home.

408 For example in the UK, sixteen-year-olds can choose their residence. The fact that the Hague Convention on International Abduction applies only to children under sixteen also shows that above that age children answer for their own movements.

their application. This makes them the most effective instruments for the protection of people’s rights. Of all non-binding instruments, only the UDHR has attained a status and authority comparable, or maybe superior, to human rights treaties. Together with the International Covenants they form the International Bill of Rights, containing the most general human rights applicable to all persons.410 The non-binding nature of other non-treaty instruments is more clear-cut. Those instruments, considered as “soft” law, are far more numerous than treaties and cover vast areas, including rights that are not yet universally recognized. Sometimes they are adopted as declarations, like the UN Declaration on the Rights of the Child, and often considered as necessary precedents to treaties, while at other times they are mainly intended as guidelines, statements, or programmes of action.411

Most of the human rights instruments directly applicable to street children are non-treaty instruments. These include the only instruments specifically mentioning street children, showing the inadequate quality of the protection accorded to their rights. Those mentioning street children are the World Declaration on the Survival, Protection and Development of Children and its Plan of Action adopted,412 the Vienna Declaration and Programme of Action,413 the outcome document of the of the UN GA Special Session on Children,414 the WDEFA,415 the “the Riyadh Guidelines”,416 the GA and CHR resolutions on “The Plight of Street Children”,417 the Sub-Commission’s resolution on the “Situation of Street Children and Minor Detainees”,418 and the GA resolutions on “Rights of the Child”.419 The resolutions of the GA, CHR and Sub-

411 Examples of the first type are the Declaration on the Elimination of All Forms of Racial Discrimination (20.11.1963, UN GA resolution 18/1904) and the Declaration on the Rights of the Child (op.cit. note 251), while examples of the second type are the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27.8.-7.9.90) or the “Riyadh Guidelines” (op.cit. note 332).
417 GA resolutions 47/126 (18.12.92), 48/136 (20.12.93) and 49/212 (23.12.94), and CHR resolutions 1993/81 (10.03.93) and 1994/93 (09.03.94) on “The Plight of Street Children”. They are all based on GA resolution 47/126, with only minor changes in the most recent ones. They could thus amount to one resolution, while repetition gives weight to their content.
419 These resolutions incorporate a part on street children. It is interesting to note the evolution of the resolutions: from resolutions specifically on “The Plight of Street Children” to those on the “Rights of the Child” incorporating “The plight of street children” in 1995 and 1996 (resolutions 50/153 and 51/77),
Commission on Human Rights are the only instruments specifically concerned with street children, and the Sub-Commission's brief resolution in fact focuses on detained minors. The resolutions of the Commission recognize the growing problem of street children and the difficult conditions in which many of them have to live. They urge governments to take action in order to stop violence against street children and to provide them adequate nutrition, shelter, health care and education. They also recognize other bodies' and organisations' role in addressing the problems of street children and finding comprehensive solutions for them. The resolutions offer no specific help in finding such solutions, except for general statements about the importance of effective government action inter alia in the fields of law enforcement and in the administration of justice, and in social, educational and public health programmes. They also stress the fact that strict compliance with the provisions of the CRC "constitutes a significant step towards solving the problems of street children". Although such documents offer no guarantees for the protection of street children, they are meaningful as the first documents that recognize the specific needs of street children and their existence as a separate group. Unfortunately, these resolutions do not specifically recognise street children's needs in the area of education, and simply state the need to provide them with education.

Other international instruments especially applicable to street children are the Standard Minimum Rules for the Administration of Juvenile Justice, the UN Rules for Protection of Juveniles Deprived of their Liberty, and the Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally. These

"The plight of children living and/or working on the streets" from 1997 to 2002 (resolutions 54/149, 55/79 and 57/190), a single paragraph on "Children working and/or living on the street" in 2003 and 2004 (resolutions 58/157 and 59/261), and only a reference to street children among other "children in difficult situations" in 2005 (A/C.3/60/L.22). Aside from decreasing attention to street children and fewer paragraphs on them, the GA resolutions have also included increasingly weak language, focusing in the last few years only on violence and exploitation, rehabilitation and reintegration. This is characteristic of the trend in place since the mid-1990s, as described in Chapter II.

More significantly, they recommend that the CRC Committee and other relevant treaty monitoring bodies give attention to street children when examining state reports (this provision is also included in some of the GA resolutions on "Rights of the Child": 50/153, 51/77, 52/107, 53/128 and 55/79). It is striking that while the GA calls upon states "to ensure that basic social services, notably education, are provided for street children" (emphasis added), it only asks states to "make education accessible to... street children" (emphasis added) (resolutions 55/79 and 57/190).


GA resolution 41/85. One could also mention the Standard Rules on the Equalization of Opportunities for Persons with Disabilities (op. cit. note 127), the Declaration on the Protection of All Persons from Enforced Disappearances (UN Doc. A/47/49 (1992)), the Convention on the Civil Aspects of
instruments, linked to international conferences, can be considered as more authoritative than the street children’s resolutions, as the texts of the documents are closer to those of treaties, because of a detailed and logical structure, the use of precise wording and legal terms. They include a long preamble mentioning human rights treaties and assigning specific roles to each actor for the implementation of the rules, using such terms as “invites”, “calls upon”, “requests”, or “urges”, as well as provisions on implementation and monitoring. One especially important provision is paragraph 38 of the “Riyadh Guidelines”, which recognises the government’s responsibility to “provide necessary services for homeless or street children”, including “information about local facilities, accommodation, employment and other sources of help”. The World Declaration and Plan of Action of the Children’s Summit also have a more sustained effect than simple resolutions. This is mainly due to the fact that they were agreed to at the World Summit where 153 heads of state or government and other high representatives had gathered to express their will to improve the state of children worldwide. However, these instruments differ from the previously mentioned UN Rules on juvenile justice in that they do not resemble a treaty and do not include legal terms or a “rights” language. Instead, they present the recognition of major obstacles to children’s well-being and common goals for improving the concrete situation of children. The issues they cover concern mostly children’s and women’s health, nutrition, education and family planning, thus adopting UNICEF’s protective approach to children. Many of the goals are not applicable to street children, as they concern the health of children under the age of five, or women. Moreover, those provisions tend to be very detailed compared to others. 425

The right to education is included in the major international treaties, which gives this right a high status and should guarantee its implementation in all parts of the

International Child Abduction (op. cit. 290), the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (UN Doc. E/1989/89), and the UN Standard Minimum Rules for Non-custodial Measures (UN Doc. A/45/49 (1990)). Many other declarations and plans of action concerning children directly or indirectly exist at the international and regional levels. For example, the Council of Europe has conducted studies on children in Europe, including street children. It has also adopted many resolutions and recommendations that are mostly of indirect relevance to street children, including the protection of young persons at work or their integration into the world of work, juvenile delinquency and social reaction to juvenile delinquency, protection of children against ill-treatment, sexual exploitation and trafficking, lowering the age of full legal capacity, and prevention of drug dependence.

425 For example, the “Reduction of the rate of low birth weight (less than 2.5 kg) to less than 10 per cent” (B.ii), compared to “Provide improved protection of children in especially difficult circumstances and tackle the root causes leading to such situations” (F.). The “Specific Actions” that complement the Plan of Action’s “Goals” do not include information on how to help street children. Paragraph 22 simply states, “Such children deserve special attention, protection and assistance from their families, communities and as part of national efforts and international co-operation” (op. cit. note 151).
world. However, the right to education is not well defined in these instruments, and is usually only limited to children’s right to compulsory primary education, as well as to parents’ freedom to educate their children according to their convictions. Street children have not specifically been targeted at this level of protection, as the focus has been on providing the same education to all children of a same age group. As concerns non-binding instruments, some do mention street children, but none respond to their educational needs. In the past decade, UNESCO has worked to enlarge the concept of education to include more groups, needs and types of education. These new elements are part of “Education for All”, introduced at the 1990 World Conference on EFA. The WDEFA includes street children in its provisions, among other groups of people who usually fail to receive education or quality education adapted to their needs. Together with the Dakar Framework of Action, it also recognises the value of non-formal education and, as Chapter II explained, it focuses on basic education, which is of a broader application than primary education. The Salamanca Statement and Framework for Action is another set of international instruments of direct relevance to street children. Even though special education traditionally targets children with disabilities, the Statement and Framework of Action include concepts that can translate into innovative programmes for street children. However, these concepts, as well as other detailed definitions of education and state obligations, are so far only included in international policy documents, which often arise from international conferences. Since these are not legally binding, and do not refer consistently to the right to education, they offer very limited protection of the right to education to street children.

426 ICESCR (Article 13), the regional human rights instruments (Protocol I, Article 2 of the European Convention, Article 12 of the American Declaration, Article 13 of the Protocol of San Salvador, and Article 17 of the African Charter on Peoples and Human Rights (OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982)), CERD (Articles 5 and 7), CEDAW (Article 10), International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Doc. A/45/49, Article 30), CRPD (Article 24), the 1951 Convention relating to the Status of Refugees (189 UNTS 150, Article 22), and the Convention relating to the Status of Stateless Persons (Article 22).

427 See WDEFA, Article 3.4 (op.cit. note 195). References to street children are also included in the Final Report of the World Education Forum (Dakar, April 2000, UNESCO), and some of its Regional Frameworks for Action, but not in the main Dakar Framework for Action.


430 See Chapters II and IV.

431 However, it must be acknowledged that rights-based discourse is gaining ground, especially among UN bodies and agencies. UNICEF’s State of the World’s Children 1999 is devoted to education and combines a rights approach with the agency’s more traditional developmental and humanitarian discourse. Similarly, UNESCO’s World Education Report (op.cit. note 198) focuses on the right to education.
Conclusion

This chapter showed that while street children have been an integral part of the development of the rights of the child, they are not mentioned in child rights treaties. The chapter examined the relevance of the main principles of the rights of the child to street children. It demonstrated that legal minority can be seen as a debilitating status in general, but that it is especially problematic for street children who cannot depend on adults. The chapter also showed that the CRC contains general principles, which have a mitigating effect on the concept of minority, and should be used when applying the rights of the child to street children.

The evolution of the right to education can be advantageous to street children as it introduces concepts such as lifelong learning and education for all. However, the main principles of the right to education, notably the concept of compulsory primary education, are also problematic for street children, as they are based on common assumptions about children. However, the purposes of education, such as the development of the child’s personality and abilities, and the strong relationship between education and other rights can also be useful when applying provisions on the right to education to street children.

Finally, the analyses of existing international sources of law and instruments helped to determine the type and level of protection available for street children’s education. Provisions of particular interest to street children in this respect are few and not legally binding. This means that the importance of the right to education for street children is mostly limited to the general human rights treaties, which do not take street children’s specificity into account. Street children’s place in legally binding international human rights law is an invisible place, based on the assumption that the rights of the child are universally applicable and adequate.
CHAPTER IV

International human rights law and the protection of street children’s right to education

Chapter III showed that while there are no specific instruments dealing with street children’s right to education, many instruments guarantee the right to education in general, or include provisions that can be applicable in the implementation of street children’s education. This chapter examines how these provisions can benefit street children and respond to their educational needs through legal guarantees included in international law. First, it identifies the beneficiaries and duty-bearers of the right to education, and then examines the obligations of duty-bearers. It also examines these obligations considering the interconnectedness of the right to education with other rights. Finally, this chapter reviews and assesses monitoring mechanisms available at the international level in light of their usefulness for the implementation of street children’s right to education.

1. Actors in the implementation of the right to education

1.1 Beneficiaries of the right to education

One can look at the right to education from different angles: as the right to be educated (or to receive education), the right to educate (or to establish schools), or the right to choose education (or to educate children according to one’s convictions). If one considers the right to be educated, the child is clearly the primary beneficiary, because she receives education to improve her knowledge and skills and contribute to her personal development. In this role, the child has the right to receive education at all levels and information about educational and vocational options. The right to education is strongest at the primary level, where the child has a right to compulsory schooling. The child has the right of access to secondary education and to higher education, which can be subject to individual capacities. Despite the child’s uncontested rights as beneficiary of education, the future adult is also considered as a direct beneficiary.\(^{432}\) The adult’s interests are seen as linked to the society’s development and stability. The beneficiary of these wider goals is the state, which gains a productive and peaceful

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\(^{432}\) Eckelaar finds it useful to determine children’s interests in terms of the future adult’s interests (op.cit. 311). According to Campbell, such a view downgrades the importance of the child as a person (“The Rights of the Minor: as a person, as a child, as a juvenile, as a future adult” in Alston et al., op.cit. note 6: 1-23).
population, as well as good relations with other nations.\textsuperscript{433} In fact, it is important to realize that education not only benefits the family, the local community, and even society as a whole, but that it is often promoted as such. From a human rights point of view this can lead to a dangerous path where individual worth is measured in terms of productivity. It might lead to a situation where certain individuals' education can be neglected, because the direct benefits to society could seem less obvious.\textsuperscript{434} This should not concern street children, as their removal from the street and placement into educational institutions is often linked to the protection of society.

The second perspective of the right to education is more complicated. Provisions on the right to education usually designate the state as having the primary responsibility for this right by establishing a system of schools and respecting the freedom of individuals or bodies to establish educational institutions. The latter obligation shows, however, that the state is not the sole beneficiary of the right to educate. Other beneficiaries can be parents themselves, who might have the right to educate their children outside of any school system, or other private persons who want to establish and run schools. However, the role of parents and private bodies is mainly to assist the state in the provision of education – parents by encouraging and facilitating their children’s school attendance,\textsuperscript{435} and private schools by providing additional educational opportunities, similarly to the role of NGOs, as recognised in the WDEFA.\textsuperscript{436} The state remains the primary beneficiary of this right as it has considerable power over the quality, methods and substance of teaching in private schools.\textsuperscript{437}

As to the third perspective of the right to education – the right to choose education – it is explicitly a parents’ or legal guardians’ right. The parents’ right is probably limited to the right to choose a school, or to provide education at home if they can prove that education corresponds to national standards.\textsuperscript{438} This right serves mainly

\textsuperscript{433} Grover describes the objective advantages of providing education for street children (\textit{op.cit.} note 20).
\textsuperscript{434} See Coady, “Theory, Rights and Children”, in Alston et al., \textit{op.cit.} note 6: 43-51; Progress report, \textit{op.cit.} note 201.
\textsuperscript{435} It is unclear, however, whether parents also have the duty to encourage their children’s education once they have completed compulsory schooling, or if they can demand that their children stay at home or find work to help them. This can depend on the understanding of the child’s best interests. See Vittachi, \textit{Stolen Childhood: In Search of the Rights of the Child}.
\textsuperscript{437} As derived from the State’s standard-setting powers. See e.g. CRC Article 28(2) or CADE Article 5(b)(c).
\textsuperscript{438} See e.g. the British Education Act of 1944 (c.31) (replaced in 1962 and 1996). This right has been recognised by the European Commission on Human Rights (see \textit{Family H v. UK}, 1984, 37 D & R 105).
the interests of national minorities, and is limited by the state’s power to recognise or reject educational institutions, in conformity with human rights provisions. Human rights provisions seem to imply that the right to choose is not a children’s right. Yet, it is noteworthy that the CRC, unlike other human rights treaties, does not include a provision on parents’ right to choose education for their children, which may only be understood implicitly in Article 5 on parental direction and guidance. As parental guidance is framed with the notions of evolving capacities of the child and exercise by the child of her rights, the Convention provides grounds for the argument that children could make the choice of appropriate education themselves with the help of their parents. 439 Combined with the principle of the best interests of the child and the child’s right to express his views, the concept of the evolving capacities of the child could be developed further from the mere consideration of children’s views. Detrick argues that the liberty of children to choose schools for themselves, other than those established by public authorities, can be derived from Article 12(1) of the CRC. 440 Street children could benefit from such an interpretation, since their educational needs are often best catered by private organisations providing alternative education.

1.2 Duty-bearers of street children’s right to education

1.2.1 From families to international organisations: crucial, yet secondary roles

While only governments are accountable for violations of international obligations at the international level, 441 it does not make civil society escape all responsibility. The adoption and adaptation of international obligations at the national level involves making citizens and organisations aware of their responsibilities and providing adequate mechanisms to respond to complaints. If the state fails to make

439 Van Bueren argues that children should have the right to be educated according to their own convictions by referring to European and American jurisprudence (Kjeldsen, op. cit. note 221 and Wisconsin v. Yoder et al., Supreme Court of the United States, 406 US 205 (1972)). See Van Bueren, op. cit. note 22: 342-347. While these cases do not prove general acceptance of this view, which was only raised in separate opinions, they show potential for such an interpretation of the freedom to choose education. A Belgian case, in which a sixteen-year-old child was allowed to receive education according to her preference, could set a precedent. However, the case concerned less the recognition of the child’s right to choose education, than an application of the best interests of the child principle (A.M. v. K.N., O.M. et l’asbl Institut d’enseignement secondaire general La Retraite du SacréCoeur cited in Tomaševski, op. cit. note 22: 44).


individuals and organisations accountable at the national level, and if it does not enable them to exercise their responsibilities in relation to the implementation of international legal obligations, it fails to respect its own obligations.\textsuperscript{442} The South African case of \textit{Grootboom} illustrates states' obligations in support of this, and clarifies that the state must enable other agents in society to provide housing and create conditions for access to housing at all economic levels.\textsuperscript{443}

While giving states the main role, non-binding documents specify non-state actors' duties.\textsuperscript{444} For example, the Plan of Action of the World Summit for Children contains duties for governments, families, communities, NGOs, other national institutions and international organisations. According to the Salamanca Statement and Framework of Action on special education, NGOs can play an important role in “developing new ideas and pioneering innovative delivery methods”; they can “play the roles of innovator and catalyst and extend the range of programmes available in the community”.\textsuperscript{445} The importance of NGOs lies partly in their size, which makes it easier for them to cater for the needs of specific groups of children, while their freedom allows them to develop innovative educational methods. Also, their costs are low, their outreach networks are more effective than those of governments, and they have more credibility in communities.\textsuperscript{446} States can benefit from educative innovations emanating from NGOs, and from sharing the responsibility of educating all children. Cooperation can take different forms, and should respect the principle of autonomy of NGOs.\textsuperscript{447} For example, states can mandate NGOs to carry out certain programmes; programmes can be implemented jointly by the government and NGOs, for example combining educators from NGOs and governmental infrastructure; the state can train educators from NGOs to work in schools; NGO educators can train school teachers to work with street children; states can collect and disseminate examples of best practices within the NGO community and use them also to develop governmental programmes for street children, or general guidelines.\textsuperscript{448}

\textsuperscript{443} See Grootboom, \textit{op. cit.} note 383: 35.
\textsuperscript{444} See e.g. “Riyadh Guidelines” (paragraphs 20, 38, \textit{op. cit.} note 332); WDEFA, Article 7 (\textit{op. cit.} note 195).
\textsuperscript{445} \textit{Op. cit.} note 224: 66. See also the Dakar Framework for Action (e.g. paragraphs 9, 16, 39, 46, 48, 53, 54, \textit{op. cit.} note 202)
\textsuperscript{446} Stromquist, \textit{Literacy for Citizenship – Gender and Grassroots Dynamics in Brazil}, 1997.
\textsuperscript{447} See CRC Committee General Comment 5, \textit{op. cit.} note 147: 58.
\textsuperscript{448} Different solutions have been adopted. In Kenya, informal schools enjoy support from the government. However, the government has not properly integrated these schools into the formal school system, and it is not easy for children from informal schools to transfer into formal schools. See Munyakho, \textit{Kenya}:
International organisations have a role in promoting and strengthening cooperation between states and NGOs. Through international cooperation, they help the transfer of knowledge, techniques and resources. They can also help with the exchange of knowledge and experience between countries in their endeavour to find solutions to educational problems. For example, they can organise training for those who are involved in planning and running educational programmes for different groups of children. Moreover, international organisations have a role in monitoring human rights, and establishing international standards in relation to education. This includes the development of human rights indicators and guidelines for interpretation of human rights provisions, for example defining core obligations. After all, international organisations are the forum for the development, the codification and the promotion of international human rights. They can therefore be key actors in the definition of street children’s right to education.

The CRC gives a significant role to parents. Parents have duties arising from the child’s right to education, including the responsibility to educate their children, to provide guidance and the means necessary for the child to receive education in conformity with all CRC’s articles, in particular Articles 5 and 27. Article 27 actually stipulates that “parents and others responsible for the child” have the primary responsibility to secure adequate conditions of living for the child, and states are to assist parents to implement this right. Other individuals concerned with the right to education are of course children themselves. Their duty arises from the compulsory nature of primary education. However, as Chapter III explained, the right to compulsory

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449 The resolutions of the UNGA on “Rights of the Child” call for international cooperation to improve the situation of street children (resolutions 57/190, 55/79, 54/149). Resolution 53/128 particularly, encourages states parties to the CRC to request technical advice and assistance for initiatives aimed at improving the situation of street children.

450 For example UNICEF, UNESCO and the World Bank have actively supported street child programmes, including through publications and conferences on the subject.
primary education has not been interpreted as the child's duty to receive education, but rather as their sustained right to receive education.

1.2.2 The primacy and complexity of states' role

States' primary responsibility for the implementation of children's right to education entails negative duties, positive duties, as well as minimum core obligations, which states are responsible for fulfilling irrespective of their level of development, and of their political and legal systems. Obligations arising from the right to education are not easy to interpret. First, the right is to be achieved "progressively" (CRC Article 28), depending on states' "available resources" (Article 4). States are asked to take "appropriate measures" or "every appropriate means" to implement that right. This gives them very little guidance and considerable freedom of conduct. Second, the right involves all categories of rights, including elements that have to be implemented instantly. Third, it includes many obligations of result without any timeframe, other than those imposed by states' reporting obligations.

a) Positive, negative and minimum core obligations

The categories of rights mentioned in the previous chapter have been mostly used because, according to traditional theories of rights, the classification of rights also allows also for the classification of state obligations. According to these theories, the right to education is classified within second-generation human rights because it entails a positive obligation for states to act in order to guarantee that right to everybody. However, current analysis of human rights shows that all rights require both positive and negative action from states. This has been successfully demonstrated by human rights scholars and also by human rights bodies. Although classification might be considered helpful in achieving an elaborate definition of the right to education, in

451 Van Bueren even argues that the right to education is a non-derogable right (op.cit. note 22). However, because the right to education is subject to "progressive realisation", it is contestable that anything else than the freedom from discrimination or parents' right to choose education for their children could be non-derogable. Nevertheless, the "standstill" effect could be invoked.

452 Problems of implementation often arise with regard to federative systems, as only the federal government has obligations under international law, while it claims not to be responsible for the actions taken at state level. Denying responsibility for violations of international human rights norms at the national level has been addressed by several human rights monitoring bodies. (See e.g. Concluding Observations to the Periodic Report submitted by Australia, UN doc. CERD/C/304/Add.101). See also ICESCR Article 28, ICCPR Article 50, and especially Article 28 of the Pact of San Jose.

453 States are to report on the implementation of the CRC to the Committee on the Rights of the Child every five years.

454 ICESCR Committee General Comment 13 affirms: "The right to education, like all human rights, imposes three types or levels of obligations on States parties: the obligations to respect, protect and fulfil." (op.cit. note 204: 46). See also 380.
understanding its full scope, and in analysing state obligations, it allows for a perception that rights follow a hierarchy and that state obligations are limited to those traditionally assigned to each category. Despite the widespread acknowledgement of the importance of education, a "second generation" label would clearly undermine the implementation of that right, which would not be considered a priority. It is therefore a welcome change that the discourse on generations of rights has given way to strong assertions about the indivisibility, universality and interdependence of human rights.\footnote{It is actually more accurate to say that the indivisibility and interdependence of rights are being rediscovered, as these were a starting point for the UDHR. See Eide & Rosas, \textit{op.cit.} note 380: 15. More recently, equal attention to all rights is promoted in the Vienna Declaration and Programme of Action (see paragraph 5, \textit{op.cit.} note 413).}

States' negative duties arising from the right to education involve respecting the freedom of individuals and private bodies to establish educational institutions and respecting families' choice of children's education. Negative duties also include non-discrimination in the form of abstention from using discriminatory measures, the abstention from retrogressive measures, and the duty to refrain from making prohibited reservations to the convention in the context of ratification.\footnote{See Chapter III, and Kuper, \textit{op.cit.} note 314.} States' positive obligations arising from the right to education are more varied. Essentially, states are responsible for ensuring that there is a functioning school system at all levels. This implies the establishment of a public school system and/or encouraging the establishment of private educational systems. An ensuing duty is that of quality control. The state is to lay down educational standards in conformity with the purposes of education listed in human rights instruments, and to make sure that private institutions respect these in addition to other human rights standards. This horizontal effect has been clarified by the CRC Committee, which has determined that states are to develop appropriate mechanisms to ensure that private institutions respect the aims of education, the general principles of the CRC, health, safety, suitability of staff and competent supervision.\footnote{CRC Guidelines for Periodic Reports, \textit{op.cit.} note 298: 115.}

The state's duty to ensure that every child receives education implies that education should be free and compulsory at least at the primary level. In addition, it can necessitate a variety of measures ranging from the provision of work for parents, to registering children at birth. These measures are essential as part of the state's positive duty of non-discrimination, which entails special measures in favour of vulnerable
groups, including consideration for their specific needs, whether linguistic, financial, religious or other. Grover states, "the failure of the educational system to provide the extra assistance that these children require results all too often... in practice of a denial of access to education", which amounts to discrimination. This statement is in line with General Comment 13 of the ICESCR Committee, which explains that the child’s right to equal access to education includes three dimensions: non-discrimination, physical accessibility and economic accessibility. The Special Rapporteur on the Right to Education has also highlighted the necessity for state intervention in order to guarantee the right to education when access is denied because of social exclusion, economic necessity, or traditional practices. This duty is clearly indicated in Article 11(3.e) of the African Children’s Charter, and its importance has been recognised for street children, especially among the NGO community.

Both the African Children’s Charter and the CRC include provisions on the obligation of the state to encourage attendance and reduce drop-out rates. The state should offer additional educational programmes to children who have dropped out of school prematurely, especially basic education. This could even be envisaged as a form of reparation for failure to implement their right to compulsory primary education. In this regard, the state should also be responsible for providing equivalences and bridges between non-formal and formal educational systems. In relation to non-formal systems, the state could encourage and support best practices which allow some children to receive basic education adapted to their needs. Although it is traditionally understood that the state only has a non-interference duty regarding the setting up of private educational institutions, this should be different in certain cases, if provision of

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458 See e.g. CHR resolution on “The Right to Education” (UN doc. E/CN.4/2003/L.22), urging states to “take all appropriate measures to eliminate obstacles limiting effective access to education by... children living in the street”.
459 Grover, op.cit. note 20: 28. Grover further notes that “in order for these vulnerable at-risk children to receive the help they need, schools must become a pro-active force in ensuring that these children receive health, welfare and other services they require” (ibid., 31).
462 At the UN GA Special session on Children in 2001, the statement of the Child Rights Caucus asked governments in partnership with other actors to “Ensure education for children not normally reached or best served by the education system including... children living on the street” (“A Child Rights Agenda for the Coming Decade”, Report, 10). In the outcome document of the Special session, governments commit to ensure access to education for street children (op.cit. note 202: 16).
463 Article 11(3)(d) and Article 28(1)(e) respectively.
464 See the Belgian linguistic case, op.cit. note 145.
education by the state does not guarantee that all children receive education.\textsuperscript{465} In concordance with Himes and Saltarelli this author would therefore argue that in addition to the obligations to respect, protect and fulfil, states also have the obligation to facilitate private initiatives that allow more effective implementation of human rights norms.\textsuperscript{466}

As to minimum core obligations, they represent the minimum level of implementation that is necessary in all states and in all circumstances. While the core obligations arising from the right to education have not been formally and unanimously identified, they have been defined by the ICESCR Committee as: the right of access to public educational institutions and programmes on a non-discriminatory basis; ensuring that education conforms with the objectives of education; providing free and compulsory primary education; providing for secondary, higher and fundamental education; ensuring free choice of education subject to conformity with minimum educational standards.\textsuperscript{467} Although the provision of fundamental education is crucial for street children, the Committee overemphasises public education. What seems crucial is the provision of a minimum level of education (i.e. basic education) to all children and the respect of the freedom of education. These entail at least the establishment of a school system, the provision of free and compulsory education at the primary level as positive measures; compliance with the principle of non-discrimination, respect for the freedom of establishment of educational institutions and for choice of education as negative measures. Additional measures might be required, such as support to private institutions, in compliance with the principle of non-discrimination. Minimum core obligations presuppose the existence of minimum core rights, as rights and corresponding obligations are inseparable. This means that it is not enough for the state to take measures which guarantee the most basic form of the right to education to most children, but that each child has a minimum entitlement.\textsuperscript{468}

\textsuperscript{465} While in some countries the government has taken full responsibility for non-formal education, most cases include some form of cooperation between the state and NGOs, especially regarding funding arrangements (Dave et al., Meeting the Basic Learning Needs of Out of School Children: Non-Formal Approaches).

\textsuperscript{466} Himes & Saltarelli, Implementing the Convention on the Rights of the Child, resource Mobilization in Low-Income Countries. See also ICESCR Committee General Comment 14, op.cit. 442: 42.

\textsuperscript{467} ICESCR General Comment 13, op.cit. note 204. Previous suggestions are narrower, and sometimes limited only to the freedom aspect of education (see Coomans, “Identifying Violations of the Right to Education”, 20 SIM Special).

\textsuperscript{468} This author does not support the approach, which regards the minimum core obligations as related to society-wide levels of benefit, instead of individual exercise of rights (Eide, op.cit. note 380. See also Leckie, op.cit. note 143).
b) Scope of measures required for the implementation

All these obligations – negative, positive, progressive or core – imply certain measures from states, including budgetary, legislative and structural measures, public information and the adoption of policies and programmes. Legislation relevant to children's educational rights is all-encompassing and includes legislation on birth registration, child welfare, and child labour. In addition to crystallising what already has been accepted,469 law offers the possibility of adopting new norms. The adoption of international human rights instruments and their implementation through adequate legislation helps to foster behavioural change,470 which in turn plays a part in the formation of custom.471 Perhaps the most important advantage of law at the national level is its enforceability, based on the well-established principle of law, *ubi ius, ibi remedium*.472 Nevertheless, as pointed out in this thesis, children's minority status can be an obstacle to this right in many countries, where they have to be represented in order to benefit from a legal action. Therefore, street children's NGOs and advocates have an important role to play in the promotion and protection of the rights of street children. While the case of street children's right to education has not been examined in a court, other notable case law show how courts can be used to enforce ESC rights embodied in national law.473

The adoption of legislation is not sufficient, as recognised in the cases of Grootboom and *International Commission of Jurist v. Portugal*,474 and needs to be supported by other measures. For education, allocation of resources is a critical issue, as the right to education has a strong "provision" component. The importance of structural measures is also undeniable as they involve the creation of governmental institutions and independent bodies that are responsible for promoting the rights of the child,

471 The enactment of laws speeds up the process whereby a norm becomes customary law and acts as proof of practice and *opinio juris*. The lesser importance of time as a factor contributing to the formation of custom has been acknowledged by the ICJ in the North Sea Continental Shelf, op.cit. note 397: 43.
473 Concerning the right to education, see e.g. Campaign for Fiscal Equity et al. v. the State of New York et al., Supreme Court of New York, , 719 NYS 2d 475, 2001 (SR 2005) and MC Mehta v. State of TN, Supreme Court of India, (1996) 6 SCC 756.
monitoring implementation, gathering data, etc. An independent child rights commissioner, or ombudsperson could play a crucial role in monitoring children’s right to education. As part of structural changes, notable measures include those taken to increase the participation of children through children’s councils and school bodies, child protection delegates, children’s legal shops, children’s parliaments, etc., where issues such as education can be debated. In some countries street children have been able to benefit from these, but this usually happens only if these bodies are specifically set up for them. Structural measures also include the creation of coordination bodies and mechanisms to ensure that different departments dealing with issues concerning children at different levels cooperate and have clear mandates. In many countries only one ministry or department is responsible for street children, and therefore not all aspects of their lives are addressed by government programmes. One should also consider establishing structures to facilitate the coordination between governmental and non-governmental programmes for street children.

Policies are needed to define country-specific goals and timeframes for implementation and monitoring. Policies give a concrete meaning to “appropriate measures”, “progressive realisation”, “maximum extent”, and “available resources”, which are used in connection to the right to education. The Guidelines for Periodic Reports encourage states parties to the CRC to adopt a comprehensive national strategy for children, such as a national plan of action on children’s rights. Children’s right to education also necessitates educational policies, which, according to the CADE, should promote equality of opportunity in education, including for children who have dropped out of school. The WDEA calls for a “supportive policy context”, where supportive policies in the social, cultural and economic sectors should be put in place for the realization of universal basic education. In a similarly integrative spirit the Vienna Declaration and Plan of Action ask for children to be incorporated into countries’ general national plan of action. The same logic can be applied to street children, who should explicitly be integrated into the national plan of action for children. This would avoid their further marginalisation, while allowing the implementation of specific programmes for them. The coordination of economic and social policies is also

475 See Ruxton, Implementing Children’s Rights – What can the UK learn from international experience?
476 See Hill & Tisdall, Children and Society, Chapter 2.
477 See Swift, op.cit. note 268, and “First National Congress” (op.cit. note 229).
478 See also Article 4(c), op.cit. note 121.
479 Article 8, op.cit note 195.
480 Paragraph 47, op.cit. note 413.
important for the implementation of the right to education, especially as vulnerable
groups are concerned. It is crucial to ensure that policies are not conflicting and that
economic policies do not have adverse consequences on children who are in a
vulnerable position. This would also help linking educational and social services,
which cannot be separated in the case of street children.

2. Implementation of other rights: the principle of interrelatedness

This section develops the concept of interrelatedness of human rights and
examines rights that are of specific relevance to the right to education. The study shows
how the interpretation and implementation of different human rights provisions may
affect street children’s education.

2.1 Freedom from discrimination

This thesis has shown how the principle of non-discrimination can be applied to
the right to education from different angles, and how it has sometimes been interpreted
in a limitative way, as in the CADE. Chapters II and III discussed, for example, the fact
that affirmative action is not regarded as illegitimate discrimination. This is made clear
in the CRC, as the preamble states: “children living in exceptionally difficult
conditions... need special consideration”. The African Children’s Charter, in Article
11(3)(e), introduces categories of children whose educational opportunities should
specifically be protected: pregnant, gifted and disadvantaged children. These provisions
are important to street children, who can belong to these other categories. The reference
to “gifted children” is an good reminder of the fact that children’s capabilities and
ambitions should not be judged on their appearances. Other bases for legitimate
discrimination are “age and maturity” (Article 12) and the “evolving capacities” of the
child (Article 5) in the CRC. It was noted earlier that the CRC, in Article 2, considers
only discrimination in relation to the application of rights provided by the Convention,
and therefore, does not consider discrimination on grounds of age. With this omission it

481 For example the ICESCR Committee has shown concern about the negative effects of structural
adjustment programmes and economic liberalization policies on the enjoyment of ESC rights in Brazil,
“in particular by the most disadvantaged and marginalized groups.” Concluding Observations to the
Initial Report submitted by Brazil, UN doc. E/C.12/1/Add.87, 16). Cohn states that compliance with the
structural adjustments have resulted in a reduction of 40.5% in investments in the social area, and 12.3%
specifically in education (“Uma avaliação sobre o estado dos compromissos no Brasil”,
482 Studies of street children have shown that there are talented children among them as in any other group
(see Aptekar, op.cit. note 27).
lost an opportunity to remedy the lack of reference to age in other human rights instruments. The list of grounds for discrimination in the two International Covenants (Article 2) is open-ended, and "other status" should be understood as covering minority, which is an important determinant of a person's condition in society. Freedom from discrimination on basis of age can also be seen from the side of children who are too old to receive certain rights. In relation to the right to education, this can be understood as the right to receive free basic education after the age of compulsory education.

The grounds for discrimination advanced by the CRC are similar to the Covenants, but include the consideration of the child's dependency: "the child's or his or her parent's or legal guardian's race, colour, sex, language..., or other status" (emphasis added). Paragraph 2 protects the child from discrimination "on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members" (emphasis added). This extended protection is not advantageous for street children who are disconnected from their family. It is true that street children are often treated as children of sex workers or illegitimate children simply because of their status as street children, but protection from discrimination on the basis of their own activities, such as working on the streets, would be more relevant to their independent way of life. Specifically, street children may be discriminated against because of their main characteristics, which are their habitat and the lack of supervision by responsible adults. Although homelessness and separation from parents are covered by "other status", a more explicit reference to those conditions would ensure better protection of street children.

Article 21(1) of the African Children's Charter aims to protect children from harmful social and cultural practices that affect children's welfare, dignity and development, "in particular customs and practices discriminatory to the child on the grounds of sex or other status". This is an important addition to the general provision of non-discrimination, as it recognises that attitudes towards certain groups of children are harmful practices that result in discrimination against them. Discrimination against

483 See Chobeaux, "Quelles méthodes d'action pour intervenir auprès des enfants marginalisés dans l'espace urbain?", in Tessier, op.cit. note 33: 327-328.
484 This was suggested by the Canadian representative during the drafting of Article 2, but the American representative opposed the idea on the grounds that children may be legitimately punished by their parents or guardians for their activities and expressed opinions (Detrick (ed.), The United Nations Convention on the Rights of the Child, A Guide to the "Travaux Préparatoires", 146-147). This shows how drafters did not consider the different issues at hand when addressing the needs of street children compared to children who live under parental authority.
street children translates into lack of opportunities and denied access to the same facilities and services as children whose situation is "regular". Previous chapters showed how this affects street children's right to education in terms of access and acceptability of education.

2.2 Right to life, survival and development

Article 6 of CRC sets the child's right to life and, in the "maximum extent possible", to survival and development. It is one of the general principles of the rights of the child, and it is a basic prerequisite for children's enjoyment of the right to education. It is notable that the Supreme Court of India has considered the right to education to be implicit in the right to life, as education is basic to the dignified enjoyment of life.\(^{485}\) Article 6 is significant to street children whose life is often threatened, not only by summary executions by death squads\(^{486}\) and other murders or disappearances,\(^{487}\) but also because of lack of adequate food, health care and shelter, risks linked to an unhealthy and dangerous living environment, and consequences of substance abuse. This requires the state to take positive measures for the implementation of this article.\(^{488}\)

Article 6 is also important to street children as it links the right to life to both survival and development. Survival and life are basic conditions for the enjoyment of other rights. The linkage to development makes these concepts more dynamic, and should ensure, theoretically at least, that states take positive steps and strive to allow children to fully exercise all other rights. In this regard, Article 15(c) of the American Convention on Human Rights is notable, as it requires states parties to "adopt special measures for the protection of adolescents in order to ensure the full development of their physical, intellectual and moral capacities" (emphasis added).


\(^{486}\) Incidences have especially occurred in Brazil, South Africa, Haiti, Kenya, Guatemala and Colombia.

\(^{487}\) The Declaration on the Protection of All Persons from Enforced Disappearances (op.cit. note 424) is relevant here, as are the 1921 International Convention for the Suppression of the Traffic in Women and Children as amended by 1947 Protocol (Australian Treaty Series 1922 No. 10, and 1947 No. 17), the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (96 UNTS 271), and the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (26 UNTS 3).

\(^{488}\) In an unprecedented case concerning the torture and murder of five street children in Guatemala, the Inter-American Court of Human Rights adopted a wide interpretation of the right to life, requiring states to take positive measures for the protection of a dignified life. See Villagran Morales, op.cit. note 114.
Living conditions are linked to the child’s personal development, and guaranteed by Article 27 of the CRC. This article specifies that “development” includes physical, mental, spiritual, moral and social development. When read separately, Article 27 lacks precision and limits the responsibility of the state to helping parents in implementing the right. The right to an adequate standard of living is stated in more concrete terms by Article 11 of the ICESCR, which includes the right to food in addition to clothing and housing. The state’s responsibility in finding solutions to housing problems should thus be stated more clearly in relation to children. Article 14(2)(c) of the African Children’s Charter guarantees the right to adequate food and safe drinking water, as does Article 24(2)(c) of the CRC. Another relevant provision in the CRC is Article 26, which recognizes the child’s right to social security. However, this article seems difficult if not impossible to apply to street children who experience the same problems as adult homeless people who have fallen through the social safety net. Once deprived of a home address, they can neither apply for regular jobs, nor receive unemployment or other social benefits, including education. Moreover, the article’s wording “right to benefit from social security”, instead of the right to social security, seems to indicate that parents, not children, are the direct recipients of this right. This clearly discriminates against street children, as well as children heads of households, who would better benefit from the same right stated in more direct terms in ICESCR’s Article 9.

The scope of the right to development goes further than the above-mentioned articles. The CRC Committee has even included a civil rights approach to the right to survival and development by asking that the right be ensured “in a manner compatible with human dignity, and to prepare the child for an individual life in a free society.” In fact, the child’s right to development includes most rights of the Convention.

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489 The ICESCR Committee emphasises that the right to housing applies to everyone, “regardless of age, economic status, group or other affiliation or status” (General Comment 4, op. cit. note 112: 6). The right to housing could be considered together with the concept of right of abode. The Hong Kong Court of Final Appeal, in Chan Kam Nga and Others v. Director of Immigration, stated that “the right of abode in a place is the right, in the eyes of the law, to call a place home: coming and going at will; staying as long as you like”, (judgment of 29.1.1999, 1 HKLRD 3, 6).

490 However, the CRC mentions “application for benefits made by or on behalf of children”. In many countries there are age limits to this right. Concerning the UK, the Committee has been worried that the increasing number of youth begging and sleeping on the streets is linked to this age limit (see Concluding Observations on the Initial Report submitted by the United Kingdom, UN doc. CRC/C/15/Add. 34, 15.2.1995, 15). Cockburn presents another view, suggesting that being able to receive social security grants without adult assistance would cause children to opt for street life (op. cit. note 80).

491 See Guidelines for Periodic Reports, op. cit. note 298: 40.
depending on the definition of development – physical, spiritual, cognitive, moral and civil, or social development, and its links to the right to education are indisputable.

2.3 Civil rights and freedoms

The first civil right that applies to street children is the right to a name and nationality and to registration at birth guaranteed by Article 7 of the CRC. It is also recognized expressly as a children’s right by the ICCPR in Article 24. The CRC adds to it the child’s right to know and be cared for by his parents “as far as possible”. This implies that theoretically no child with parents alive should have to become a street child against his own will. Article 8 of the CRC adds the child’s right to keep or recover her identity. This article is more relevant to street children, who are usually older children. Identity is one of the only factors that link the street child to the rest of society and protect him from exploitation. The street child’s identity is at risk because of his severed links to all institutions. If he lacks formal identity, his access to those institutions, including health care facilities or schools, will be inhibited. The problem is aggravated by street children’s common reluctance to reveal their real identity. The ICCPR also reinforces the right to an identity by stipulating in Article 16 that everyone will be recognised as a person before the law. This could be an important addition to street children’s rights, as reminders of them being persons and subjects of law are never too many.

Other important civil rights for street children are the freedoms of expression, thought, and conscience. These rights have an influence on how education is imparted and how street children can participate and express themselves, including on choices in education. Of course, by being street children and refusing to conform to societal norms, street children already express those freedoms, which are basic human rights. They are not redefined in the CRC, but their inclusion in articles 12 to 17 is an accomplishment, as they are participatory rights, differing greatly from the previously recognized protection rights. Article 13 guarantees the right to expression and includes the freedom to seek and receive information. These are significant, but difficult to apply to street children, who have little access to sources of information and, furthermore, are usually

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493 “Children on the street have a “front stage, back stage” personality. They present themselves the way they want you to see them” (Rheihat quoted in Black, op. cit. note 448: 21).
treated as young and inferior. The article specifies that the freedom of expression includes oral expression, writing, print, art, or any other media of the child's choice. The importance of the use of art as a form of expression for street children and professionals working with them has been ascertained on many occasions and in different societies. The limit to the exercise of this right – rights of others, and public order, safety and morals – could be used as an excuse to limit street children's freedom of expression, as their mere existence is sometimes considered a public menace.

The right to freedom of association and peaceful assembly is guaranteed by CRC's Article 15. Like the rights to freedom of expression, thought and conscience, it allows people to be different and provides a means for the expression of personal identity. This article should protect street children's life on the streets in groups, and allow them to take part in street education. Article 15 should also empower street children to organise themselves into groups, including street children's conferences and marches, for the protection of their interests, including their educational interests. Restrictions are the same as those stipulated in Article 13, and carry the same concern about people's natural bias against street children. These children are actually often denied this right, as police raids tend to target groups of children rather than individuals. Moreover, restrictions are usually stricter for children, as the use of public space for other than transit is considered as deviant behaviour and may be a status offence.

Article 17, which is closely linked to Article 13, has great potential for the education of street children, as it focuses on the role of the media and the production of materials for children. Article 14, which guarantees the child's right to freedom of thought, conscience and religion, applies to street children except for paragraph 2, stipulating the rights and duties of parents to provide direction to the child in the exercise of this right. Article 12 is a key provision which is linked to all the previous ones, because it ensures that children should not only be allowed to voice their opinions, but that they should also be listened to. Article 12 should advantage street children, who

494 See Hafen and Hafen's view of children as inferior, op. cit. note 18: 476.
495 Forms of art include drama and dancing as well as tagging and graffiti, which are not tolerated in most societies. In the Philippines a street children's musical "Goldtooth" about life on the streets has met considerable success and has enabled the street children to educate the public about their problems. The role of street art is explored in Tessier (ed.), A la Recherche des Enfants des Rues, 357-469.
496 See Stöcklin, op. cit. note 25: 71-75.
497 See e.g. La Cecla, op. cit. note 68; and notes 169 and 278.
have gained maturity through their survival on the streets, and enable them, for instance, to contribute in designing suitable programmes for them.\textsuperscript{498}

2.4 Work, leisure and cultural activities

Article 31 of the CRC is related to ICESCR’s Article 7(d), which recognizes every person’s right to rest, leisure and holidays, and to its Article 15, which acknowledges the right to participate in cultural life and to benefit from science and culture — a dimension missing in the CRC. CRC’s approach thus limits children’s right to participate in cultural and recreational activities. Street children’s lack of options for entertainment and restricted access to organised activities often lead them to activities such as gambling and drugs, which counter the effect of recreational activities as a means to promote self-esteem and trust. As a result, these children are frequently harassed and denied the right to rest. The violation of the right to leisure and rest can thus be harmful to the health and development of street children, and prevent their enjoyment of their right to education, even when this is available.

International law focuses on the prohibition of harmful work, and it does not guarantee the right to work for children.\textsuperscript{499} Many working children would like the right to work to be recognized for children as it is for adults, comprising \textit{inter alia} the freedom to work, protection of employment, the right to employment services and to just and favourable conditions of work.\textsuperscript{500} Legalizing children’s work would give them certain social guarantees, and this is why children in several countries across continents have marched both against the exploitation of child labour and for the recognition of children’s work. In India, street children have also exercised their right to freedom of assembly and association by organising themselves in trade unions, often with the help of NGOs. Nevertheless, such unions are not always officially recognised because of children’s age.\textsuperscript{501} Child labour is generally perceived as exploitative, when its

\textsuperscript{498} While “maturity” may be subject to interpretation, street children’s capacity to analyse their life and needs and articulate them in a coherent way has been observed in many instances, and especially in street children’s congresses. See e.g. Munyakho, \textit{op.cit.} note 448; Szanton Blanc, \textit{Urban Children in Distress, Global Predicaments and Innovative Strategies}, 392.

\textsuperscript{499} CRC Article 32, ICESCR Article 10(3), ILO conventions no.138 and 182 (\textit{op.cit.} notes 348 and 360).

\textsuperscript{500} Different components of the right to work are included in the ICESCR (Article 6), the European Social Charter and ILO Conventions (see note 402).

educational and developmental benefits for many older children should be better explored, as concluded in Chapter III.

2.5 Social reintegration and forms of care

Article 39 deals with the rehabilitation of child victims and therefore it has a strong connection with the right to education. However, unlike Article 40 on children in conflict with the law, it fails to mention education as a form of recovery and social reintegration. As Chapter II explained, street children are often denied opportunities for social rehabilitation, because street child projects prefer focussing on preventive measures. The most common form of rehabilitation for street children has been their placement in institutions. Several articles deal with the question of institutions as alternative care for children. However, none mention the important role of education in institutions and the need to regulate education. Article 18 simply asks states to ensure the “development of institutions, facilities and services for the care of children”, while Article 20, commonly considered as “street children’s article”, provides for special protection and assistance, including alternative care, to children deprived temporarily or permanently of their family environment, implying that the child is unwillingly away from her family. The article assumes that alternative care is the best solution for all children, and encourages the placement of street children in institutions, as other forms of alternative care, such as adoption, are not easily applicable to street children. Article 25, dealing with the periodical review of children placed in institutions, seems to ignore private institutions, while street children are vulnerable in the care of NGOs.  

While the question of placement of children in institutions is disputable, the article is useful in the context of public institutions, misleadingly labelled as “educational”, where many street children suffer terrible conditions.

Family is an important element in street children’s rehabilitation. This thesis has demonstrated how the difficult conditions in street children’s families are often first to cause these children to drop out of school, while parents have the primary responsibility for their children’s education. The CRC, especially in articles 9 and 18, gives great

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importance to the role of the family in children’s well-being. The obligation of the state to assist families in their responsibilities towards their children is stated in several conventions. The responsibility of parents should be further explored and used with respect to street children, as most of them have parents, and wish they could live with their family in better conditions. The Convention states that separation from parents does not absolve either parent from the responsibilities of parenting, when experience shows that many of them refuse that role and street children who try to go back home are often sent back to the street by their own parents. The South African case of Jooste v. Botha clarified that the parent-child relationship has two aspects: “the economic aspect of providing for physical needs and the intangible aspect of providing for the psychological, emotional and developmental needs of the child.” Although the intangible aspect cannot be legally enforced, the best interests of the child demand an environment of love, affection and consideration. While the link between parents and “hard core” street children might be severed in some cases, implementation of parental obligations towards children, as set by the CRC, could at least prevent many children from becoming estranged from their communities once they start spending time on the streets. These parental duties do not exonerate states from their obligation to provide education to all children and to assist families in their responsibilities towards children.

While the CRC is in line with previous instruments about the importance of the family, it is less clear about the notion of family and employs different terms throughout the convention. This might lead to confusion as to the respective roles of each member of the family or community vis-à-vis the child. Although flexible notions may be an asset for street children, CRC provisions on family do not allow any meaningful role to be granted to street children’s peer groups or social and volunteer workers, such as street educators, who might have developed special relationships with

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504 Similarly to Article 20, Article 9 excludes any element of will from the child. In line with this perspective, Hodgkin and Newell suggest that street children’s rights could be breached under Article 9 by assumptions that they are best provided for away from their original family (op.cit. note 170: 121-122).

505 CRC Article 18, ICESCR Article 10, Article 20 of the African Charter, Article 15(d) of the American Convention, with more limited wording.

506 In the African Children’s Charter parental responsibilities (Article 20) are even clearer than in the CRC, and the child is expressly entitled “to the enjoyment of parental care and protection” (Article 19), as in the Pact of San Jose (Article 16).


509 Ibid, 208-209.

510 See Principle 6 of the 1959 Declaration (op.cit. note 251) and ICCPR Article 23(1).

511 See articles 5, 10, 18, 20, 23.
the children without being their legal guardians.\textsuperscript{512} Granting a significant role to street children’s support groups instead of or in addition to their formal family has been recognised by many researchers and street child activists.\textsuperscript{513} Whereas the concept of family has been discussed in human rights case law, this has usually been limited to the determination of the legal guardians of a child, and jurisprudence is yet to challenge the most basic meaning of “family”.\textsuperscript{514}

3. The role of monitoring mechanisms in improving street children’s right to education

This section examines the effectiveness of various international, regional and national mechanisms for monitoring the implementation of the right to education.\textsuperscript{515} It also explores how these mechanisms can be used to enhance street children’s chances to enjoy the right to education as defined in this thesis.

3.1 Monitoring options and their relevance to street children’s right to education

3.1.1 Treaty-based bodies

The UN human rights treaty bodies have special characteristics despite their common monitoring practices.\textsuperscript{516} The CRC Committee can be noted for having given an especially important role to NGOs in the monitoring process, while also receiving information from other inter-governmental bodies. As the Committee is not empowered to receive individual or state communications, the only way that street children can use the Committee to advance their educational rights is by relying on NGOs or by petitioning governments to include their concerns in their reports.\textsuperscript{517} Other human rights treaty monitoring bodies can provide different advantages. For example, the ICESCR

\textsuperscript{512} Legal instruments that only use the term “family” may be more conducive to flexible interpretation. For instance ICESCR General Comment 4 on the right to housing insists that “the concept of family must be understood in a wide sense” (op.cit. note 112: 11).

\textsuperscript{513} See e.g. Ennew, op.cit. note 58.

\textsuperscript{514} The ECHR has repeatedly stated that the concept of family life “is not confined solely to marriage-based relationships and may encompass other de facto “family” ties where the parties are living together outside of marriage.” (Keegan v. Ireland, Judgment of 26.5.1994, Series A No. 290, 44; Kroon and Others v. The Netherlands, Judgment of 27.10.1994, Series A No. 297-C, 30.) It should be noted, however, that the Inter-American Court has expressed itself on the notion of “next of kin”, defining it as encompassing all persons linked by close kinship (Villagran Morales et al. Case: Reparations, judgement of 26.5.2001, Series 6, No.77, 68). Depending on the definition of “kinship”, the notion of “next of kin” could be linked to that of “family” in the context of the rights of the child.

\textsuperscript{515} This thesis does not consider new and potential mechanisms instituted by the UN human rights system reform since 2006, such as the Human Rights Council (see UN High Commissioner for Human Rights, \textit{The OHCHR Plan of Action: Protection and Empowerment}; GA resolution 60/251).

\textsuperscript{516} See Manual on Human Rights Reporting, op.cit. note 291 and Byrne, op.cit. note 350.

\textsuperscript{517} The role and potential of the Committee is more thoroughly examined in Chapter VI.
Committee has made more extensive use of its mandate to initiate studies and publish general comments on specific articles of the Covenant, thus providing important tools for the interpretation of the right to education and the implementation of ESC rights in general. The ICCPR Committee considers individual complaints from states that have signed the first Optional Protocol. This procedure is too cumbersome for street children to use directly, and moreover it is not very relevant to street children’s right to education, because the only ICCPR provision on education concerns parents’ freedom to choose education for their children. Articles that could be of relevance to street children’s education in the ICCPR are Article 7 on the freedom from degrading treatment or punishment, Article 18 on the freedom of thought, conscience and religion, Article 19 on the freedom of expression, and Article 21 on the right to peaceful assembly. Other treaties that offer complaints mechanisms also deal nearly exclusively with civil and political rights.

The mechanisms provided by CERD and CEDAW’s Optional Protocol could, however, be more relevant to street children – the first for street children who suffer additional discrimination because of their ethnic or racial origin and the second for street girls. More interestingly, the Optional Protocol to the CRPD offers an individual complaint mechanism that, theoretically, could be used by street children with disabilities, as the Convention expressly protects the rights of children with disabilities.

One should also mention the inter-state complaint procedure instituted by the Protocol Instituting a Conciliation and Good Offices Commission for the UNESCO Convention against Discrimination in Education, even though it has not been used to date. The ILO also has relevant mechanisms to deal with street children’s right to education through its Committee of Experts on the Application of the Conventions and Recommendations. The Committee deals with the right to education regularly under Convention No.111 on Discrimination in employment and occupation.

518 The ongoing discussion about the need to provide similar mechanisms for ESC rights is noteworthy (See Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, UN doc. E/CN.4/1997/105). The CRC Committee also stresses that ESC rights must be justiciable (General Comment 5, op. cit. note 147: 25). The CRPD, with its Optional Protocol, offers an interesting development. While some argue that it is a purely non-discrimination treaty, it includes many “provision rights”.

519 See CEACR Reports, <http://webfusion.ilo.org/public/db/standards/normes/appl/>. For observations and requests of interest to street children, see e.g. the Committee’s request to the Nepalese government at its 61st session (1990) to report on measures taken to “increase equality of opportunity and treatment in employment, occupation and education for minors, women and persons belonging to “backward classes” of citizens” (at 2). See also the Committee’s observation at its 70th session (1999) regarding New Zealand and the enhancement of “access of women and ethnic minorities to non-traditional fields of education” (at 6).
member state, or the Governing Body of the ILO may submit a complaint regarding the effective compliance of the provision of any ILO convention. Employers' and workers' organisations can also submit a complaint against a member state. The ILO procedures are relevant to street children's right to education, especially because of provisions concerning vocational education, but in practice one cannot imagine street children using these complex mechanisms, which usually require action to be instigated by a workers' organisation or by a state against another one.520

Regional human rights treaty monitoring mechanisms offer the most interesting protection for street children. The ECHR can receive complaints from states parties and individuals concerning the violation of the European Convention on Human Rights. The Court and the Commission521 have dealt with numerous cases concerning children, but none on independent homeless or other marginalised children.522 Despite the strict admissibility requirements, the length of the procedure and the lack of provisions relevant to street children's right to education in the European Convention, it is noteworthy that the Court has sometimes interpreted the Convention in an extensive way, that it has examined complaints lodged by children themselves, and that its decisions are binding and can offer compensation. Since 1998, the European Social Charter offers the possibility for collective complaints.523 This can provide a useful procedure for street children in relation to their right to vocational training and the relationship between their right to education and their right to work.524 It is especially relevant as NGOs, which usually are the entities caring for street children, can make complaints.

The Inter-American system is perhaps more interesting, as an action can be brought against any American country by reference to the American Declaration of the Rights and Duties of Man. Cases can also concern violations of the Protocol of San Salvador, which protects ESC rights. A petition can be submitted by an individual, by a

520 It was noted previously that the freedom of assembly and related labour rights are not usually considered as applicable to minors. This makes it more difficult for street children to use ILO complaints mechanisms.
521 Prior to Protocol No.11 amending the Convention and instituting a single Court in 1998.
522 Interestingly, the first case initiated by a minor and considered by the Commission concerned a teenager who had run away with her boyfriend, and who challenged the authorities' decision to return her home against her will (X & Y v. The Netherlands, op.cit. note 407).
523 ETS No. 035 amended by Protocol, ETS No. 142.
524 Notably, the first complaint (International Commission of Jurists v. Portugal, Collective complaint No.1/1998, decision on the merits, 10.9.1999) was made by the International Commission of Jurists and concerned the prohibition to work for children under fifteen years in Portugal (Article 7).
group of individuals or by a NGO that has been recognised by the Organisation of American States (OAS). The petitioners do not need to be the victims of a violation, and the violation itself can concern an individual, several victims as a result of a specific incidence or practice, or a widespread and systematic violation against named victims. This system is the only one that has already been used on behalf of street children, and it shows the importance of letting a diversity of individuals and groups take action on behalf of others. The only drawback is that individuals and groups can bring action solely before the Commission, which can only make recommendations. However, the case of Villagran Morales shows that the Commission can refer a case to the Court on behalf of street children. This was the first time that children were the subjects of a resolved Court case in the Inter-American system. However, it needs to be clarified that the case concerned the murder of street children, and therefore street children themselves were not the beneficiaries of the Court decision, but rather the children’s families.

As to the African system, the Commission on Human and People’s Rights examines reports and receives complaints from individuals, groups, NGOs and states concerning individual or massive scale human rights violations. This is not a very interesting procedure for street children, as in case of individual violations, all proceedings are confidential, the Commission cannot take further action after having considered a case, and the publication of its report depends on the decision of the Assembly of the Organization of African Unity (OAU). The African Children’s Charter could offer better protection of street children’s rights. In addition to monitoring, the Committee, formed in 2001, can formulate new principles and interpret the Charter when requested by states, the OAU and any person or institution recognised by it. Moreover, it can receive complaints from any person, group or NGO recognised by the OAU or the UN. Considering that the Charter offers similar protection as the CRC and includes a detailed provision on the right to education, it should be a significant tool for ensuring implementation of street children’s right to education in Africa.

525 In this case Casa Alianza, an NGO, presented the case to the Commission on behalf of the families of murdered street children in 1994. In 1997 the Commission referred it to the Court, which condemned the state of Guatemala in 1999 and ordered it to pay reparations to the families in 2001 (op.cit. notes 114 and 514).

526 Earlier cases were only examined by the Commission. See Baby Boy v. US, case no.2141, Res.23/81, 16.01.1981, and Roach and Pinkerton v. US, case no.9647, Res.3/87, 22.09.1987.
Committee is still in the early stages of the state reporting procedure, and has initially adopted a role that focuses on promotion of rights, resource mobilisation, and securing ratifications. Therefore, country visits are very different from the originally intended investigation power. However, even with this initial approach it will be interesting to see what initiatives are taken regarding the right to education, as this has been identified as one of the priority areas requiring attention.

3.1.2 Other actors and mechanisms

International human rights provisions give monitoring roles indirectly to certain actors through their inclusion in the mandate of treaty bodies or in the implementation duties of states. As mentioned earlier, NGOs and relevant international organisations and agencies can provide information to treaty bodies. The CRC Committee has institutionalised this by examining alternative country reports from NGOs. Casa Alianza has proved how NGOs can have an essential role in the monitoring process and in representing street children in judicial proceedings nationally and internationally. NGOs can also provide more participatory opportunities to children than governments, for example in the preparation of country reports. This is not general practice, however, and is likely to ignore marginalised children, as consultation often happens through official channels, such as schools. Individuals can also be directly part of the monitoring process. By lodging complaints, they point to areas where the government has failed its duties to respect, protect or provide, even where the direct defendant is a private person. For example, a street child bringing a claim against a non-formal school run by a NGO because of the improper conduct of a teacher, would show the government’s failure to ensure an adequate standard of education through regular inspection and teacher training.

Enabling civil society to participate in implementation and monitoring is part of states’ duties, involving the existence of an effective national justice system. National courts should be competent to deal with violations of international human rights, which

527 In its report to its fifth session, the Committee notes that the guidelines for initial reports have been sent to all states (Cinquième réunion du Comité africain d'experts sur le droit et le bien-être de l'enfant, Nairobi, 8-12.11.2004, <http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/au/humanrights/ACRWC5repfr.pdf>)


529 See note 525.

530 See e.g. Canadian Coalition for the Rights of Children, The UN Convention on the Rights of the Child: How does Canada Measure Up?
have been included in national legislation or have acquired a status within national legislation, permitting their direct use in courts. This includes ESC rights, which are increasingly recognised as justiciable by national courts. 531 Theoretically street children should be allowed to bring a case to court, and it should also be possible to bring cases on their behalf, especially as many countries have restrictions on the right of minors to institute legal proceedings. The legitimacy of such restrictions is debatable, while authors such as King and Trowell argue that judicial proceedings are not always the best solution for children. 532 Motivations for such restrictions remain highly questionable, especially when no other (non judicial) option is available for children’s direct use. In countries where popular or class actions are allowed, all street children could benefit from a court decision concerning a single case brought by or on behalf of street children and involving, for example, their educational rights. 533 This is a more realistic option considering street children’s situation. Non-judicial mechanisms may be easier for street children to use, where they exist. A good example of a mechanism with a multiple supervisory function is the office of ombudsman for children (or children’s commissioner). 534 Ombudsmen have different mandates in different countries, their main tasks being advocacy for the rights of the child, ensuring that new laws do not contradict the best interests of the child, attracting media attention to specific problems concerning children, and lobbying for adequate political action. 535 They act as a voice for children and can be powerful advocates for marginalised children who are not targeted by mainstream policies. In some cases children have access to a complaint mechanism involving the ombudsman, who can conduct investigations and propose solutions or refer the case to other authorities. The CRC Committee encourages the setting up of independent national human rights institutions specialising in the rights of the child, such as ombudsmen, who should reach out in particular to the most vulnerable

531 See Leckie, op.cit. note 143. However, Leckie notes that remedies have rarely been available. Justiciability of ESC rights has been successfully tested notably by the highest courts in South Africa, Canada, Finland and India (a landmark case is Grootboom, op.cit. note 383).

532 King & Trowell, op.cit. note 96.

533 Class actions are an effective way to change a situation that relates to a specific “class” of people. A noteworthy case is Minors Oposa v. Factoran, Philippine Supreme Court, Judgment of 30.07.1993, 224 SCRA 792. For public interest litigation, see Bandhu Mukti Morcha v. Union of India and Others, Supreme Court of India, Judgment of 16.12.1983, (1984) 3 SCC 161. See also Veerman, op.cit. note 6: 120.

534 In some countries, the office has only been set up at the provincial level (e.g. in Canada and Australia) or even at the municipal level (e.g. Jerusalem). In some other countries, such as Finland and Sweden, this office is nongovernmental, hence not based on legislation.

and disadvantaged children, such as those living on the streets. The Committee also favours institutions that have the power to provide remedies for breaches of children’s rights.

Human rights mechanisms that are not related to treaties are rarely relevant to street children’s right to education. The most important ones are the thematic mechanisms set up by the CHR – special rapporteurs and working groups – that receive and seek information about certain types of human rights violations. The most relevant of them is the Special Rapporteur on the right to education. The mandate of the Special Rapporteur is the following:

(i) To report on the status... of the progressive realization of the right to education, including access to primary education, and the difficulties encountered in the implementation of this right...;

(ii) To promote... assistance to Governments in working out and adopting urgent plans of action... to secure the progressive implementation... of the principle of compulsory primary education free of charge for all...

(iii) ... to promote the elimination of all kinds of discrimination in education;

(iv) To develop a regular dialogue and discuss possible areas of collaboration with relevant United Nations bodies, specialized agencies and international organizations in the field of education...

(v) To identify possible types and sources of financing for advisory services and technical cooperation in the field of access to primary education;

(vi) To ensure... coordination and complementarity in the work carried out in the framework of Sub-Commission resolution 1997/7...

The first Rapporteur, Tomasevski, embarked on the study of the meaning of the right to education without systematically monitoring its implementation. Her successor since August 2004, Munoz Villalobos, seems to have adopted a similar approach. Points (i), (ii) and (iii) of the mandate could be used for the improvement of street children's...
educational situation. Until now, the special rapporteurs have not dealt with education that is specifically relevant to street children, as they focus on formal education. Calls have been made for a Special Rapporteur on street children, but mostly in response to violence against street children, and the appropriateness of a separate mechanism remains controversial even among NGOs working with street children.542

Another non-treaty mechanism that should theoretically be relevant to street children’s right to education is UNESCO’s Committee on Conventions and Recommendations, which is mandated to receive communications from individuals, groups of individuals and NGOs concerning human rights violations falling within UNESCO’s competence, and whose procedure is confidential. The complaints mechanism is used on a regular basis, but most cases concern violations of civil and political rights of teachers, journalists, and other professionals whose field of activity falls within UNESCO’s competence.543 From observation, it seems that civil society actors dealing with vulnerable groups, and especially with ESC rights are not aware of such international mechanisms and not trained to use them effectively. At the regional level, the American human rights system includes the IACHR’s Special Rapporteur on Children, whose mandate is to monitor the situation of children in the region. This mechanism seems totally to lack visibility and impact in the region.

3.2 Provisions for interpretation of the right to education

Interpretation of international human rights treaties is crucial to assist states in implementing provisions and to help monitoring bodies assess implementation. This is all the more so as human rights treaties do not provide clear advice on states’ duties and employ phrases, such as “use their best efforts”, “appropriate”, “effective”, “feasible”, and “necessary” measures, that can lead to confusion and require interpretation.

3.2.1 General international law

General international treaty law includes rules for treaty interpretation, which are especially relevant concerning disputes between states in relation to a treaty to

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542 See Resolution 1997/24 of the Sub-Commission on Human Rights, requesting the CHR to consider the appointment of a special rapporteur on the human rights situation of street children (op.cit. note 418). See also Consortium for Street Children UK, Written submission to the Committee on the Rights of the Child, Day of General Discussion, “State Violence Against Children”, Calling for a Special Rapporteur on Street Children. Some member organisations of the Consortium have criticised this attempt to draw street children further away from mainstream human rights.

543 When children’s right to education is on the agenda, it only relates to issues of an international political importance (information from Committee members 11.1999).
which they are parties. While human rights treaties are generally not subject to disputes, using rules of interpretation is essential for assuring that treaties’ provisions are applied in an optimal way to their beneficiaries – individuals. Monitoring bodies have no formal authority to interpret treaties, but they have a key role in ensuring that states parties do not interpret human rights provisions in a restrictive way or in a way that is contrary to the whole purpose and spirit of the treaty. For example, the CRC Committee helps states to expand their appreciation of the Convention’s provisions through shared expertise. The Committee, like other human rights treaty monitoring bodies, can use several channels to interpret the Convention, including concluding observations to states parties’ reports, guidelines and lists of issues for reporting, general comments and general discussions. The CRC Committee has never specifically addressed the issue of street children during its days of general discussion or in its general comments. However, it has mentioned them in connection with specific topics, which show that the Committee recognises street children’s special situation and the need to adopt special measures for them. For example, in the General Comment on HIV/AIDS and the rights of the child, the Committee states that children should have the “right to access adequate information related to HIV/AIDS prevention and care, through formal channels... as well as informal channels (e.g. those targeting street children...)”. Such a comment can be extended to children’s right to informal education, when this targets street children better than formal education. In the General Discussion on state violence against children, the Committee recognised that homeless children living on the street are among the most vulnerable to violence, and recommended that states promote education or employment training without institutionalisation. In its General Discussion on children without parental care, the Committee drew attention to groups of children in need of special support measures, including street children, and noted the lack of statistics on children in informal care or without care, such as street children.

544 The ICCPR Committee considers general provisions on treaty interpretation inapplicable to human rights conventions, which do not include the element of reciprocity (General Comment 24 on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant, UN doc. HRI/GEN/1/Rev.2, 161).
546 General Comment 3, ibid., 16.
549 Ibid., 44. It is notable that despite the relevance of the subject, no street children’s organisations were represented at the day of General Discussion.
The General Comment on children with disabilities calls for an individualized approach that which “takes full account of the special needs and the capacities of the child” in dealing with street children with disabilities.\textsuperscript{550} These types of comments help to link different human rights and adapt them to street children’s situation. Other monitoring bodies also have a role to play in making human rights provisions more applicable to street children. While ICCPR and ICESCR Committees have not yet mentioned street children, some of the General Comments they have issued can be used for improved implementation of human rights to street children.\textsuperscript{551}

According to the Vienna Convention on the Law of Treaties,\textsuperscript{552} a treaty should be interpreted in good faith in conformity with the ordinary meaning given to the terms of the treaty in their context and in the light of the treaty’s object and purpose. Other instruments related to the treaty should be considered as part of or together with the context. Supplementary means of interpretation include the preparatory work and circumstances of the conclusion of the treaty. This means that the preamble and the \textit{travaux préparatoires} should be examined when interpreting the CRC. Reference in the Preamble to “children living in exceptionally difficult conditions” who “need special consideration”, could support interpretation in light of street children’s special circumstances. Street children should also benefit from effective and evolutive interpretation\textsuperscript{553} of human rights provisions, especially if interpretation is used as a tool to take their special needs into account. In this regard, documents posterior to the CRC may feed into the interpretation of the convention, especially through the practice of judicial, quasi-judicial and other bodies.\textsuperscript{554}

\subsection*{3.2.2 Principles applicable to the rights of the child}

The principles which underlie the CRC should be used for interpretation additionally to the previously mentioned methods. In the absence of a single list containing these principles, reference is often made to the list defined by the CRC

\textsuperscript{550} \textit{Op.cit.} note 545: 76. \\
\textsuperscript{551} See e.g. ICCPR Committee General Comments 17 (\textit{op.cit.} note 108) and 18 (\textit{op.cit.} note 145), and ICESCR Committee General Comments 4 (\textit{op.cit.} note 112) and 13 (\textit{op.cit.} note 204). \\
\textsuperscript{552} See Brownlie, \textit{op.cit.} note 396: 388. \\
\textsuperscript{553} Effective and teleological approaches to interpretation are not part of general rules of international law, but often applied in connection to human rights treaties. See Waldock, \textit{op.cit.} note 388: 535-547. \\
\textsuperscript{554} The CRC Committee regularly refers to other binding and non-binding instruments in its General Comments. See also Chapter VI.
Committee as explained in Chapter III. In its Guidelines for Periodic Reports, the Committee asks states parties to report on the implementation of Article 28 of the CRC by indicating *inter alia* the measures adopted to ensure respect for the general principles of the Convention, thereby indicating that the right to education cannot be separated from the Convention's general principles.

The CRC Committee has used the principle of non-discrimination in its General Comment on the aims of Education. In this Comment, the Committee gives examples of how children might be discriminated against in relation to Article 29 of the CRC, and shows that discrimination in education goes beyond denial of access. For example, gender discrimination can be manifest in curricula that are inconsistent with the principles of gender equality, or unfriendly environments which discourage girls' participation. Such descriptions thus help to interpret the right to education in light of the principle of non-discrimination. Similarly, descriptions of discrimination against street children, as presented in this thesis could be used to enlarge the meaning and application of the right to education. For example, denial of their need to work or teaching methods that discourage their attendance are forms of discrimination.

The principle of the best interests of the child is different from non-discrimination, as it allows a case-by-case approach for each child, instead of looking at the situation of a group of people who are discriminated against because of common characteristics. In connection with the right to education, the CRC Committee has used the principle of the best interests of the child to interpret Article 29 of the Convention as emphasising child-centred education. This is understood as meaning:

that the key goal of education is the development of the individual child's personality, talents and abilities, in recognition of the fact that every child has unique characteristics, interests, abilities, and learning needs. Thus, the curriculum must be of direct relevance to the child's social, cultural, environmental and economic

555 See General guidelines regarding the form and content of initial reports to be submitted by States Parties under article 44, paragraph 1(a), of the Convention, UN doc, CRC/C/5; Guidelines Periodic Reports, *op.cit.* note 298. Different principles are suggested in Binh, *Facts About the Rights of the Child*, and Byrne, *op.cit.* note 350, listing articles 2, 3, 12 and 41, and articles 1, 3, 8 and 12, respectively. Kuper suggests that at least articles 2, 3 and 12 be considered as general principles (*op.cit.* note 314: 109).


557 General Comment 1, *op.cit.* note 203. This General Comment affirms that Article 29 "draws upon, reinforces, integrates and complements a variety of other provisions and cannot be properly understood in isolation from them." (at 6). In this regard, the Committee mentions specifically the Convention's general principles.

context and to his or her present and future needs and take full account of the child's evolving capacities; teaching methods should be tailored to the different needs of different children.\(^{559}\)

This paragraph shows how the best interests principle is key in interpreting the right to education in a way that makes it accessible and acceptable to street children. The combination of the best interests principle with non-discrimination should help to ensure that types of education, contents and methods that have proved to be in the best interests of street children would be applied to them systematically. Indeed, it is easier to define obligations and monitor their implementation in relation to a group, instead of each individual child, however desirable this may be. However, the principle of the best interests of the child can function as a safeguard right, to avoid rigid application of group rights. Even though this thesis has attempted to show the similarities between street children, every child is unique, and some street children might need individualised educational arrangements.

The significance of the principle of the respect for the views of the child has been described in this thesis. The CRC Committee notes also that the application of Article 12 together with Article 29 means that children should be able to participate in school life.\(^ {560}\) This should apply to the general school system and to other educational arrangements. With respect to public schools, it is especially significant to highlight the importance of the participation of all children, as marginalised children are often left out of consultative processes. Experience shows that active participation gives people a sense of ownership, which heightens their sense of responsibility and respect.

As to the principle of the right to life, survival and development, the thesis noted that it is a prerequisite to the exercise of all other rights. The three aspects of Article 6 of the CRC should influence the implementation of the right to education in relation to street children. For example, because of street children's survival needs, education should not be detached from their street life. Street children's various development needs call for education not to be offered in isolation, but together with other services.\(^ {561}\) This can also be understood in the CRC Committee's insistence upon a holistic approach to education,\(^ {562}\) and the Committee's understanding that educational

\(^{559}\) Ibid., 9.
\(^{560}\) Ibid., 8.
\(^{561}\) See Grover, op.cit. note 20.
\(^{562}\) General Comment 1, op.cit. note 203: 12.
opportunities must provide a balance between physical, mental, spiritual, emotional, intellectual, social and practical dimensions. Education should, for example, be offered in a way, which allows street children to develop their social skills and prepare them for different responsibilities in an independent life. This means, for instance, addressing street children’s need for work and vocational training as an integral part of their education. The CRC Committee adds that education focused on accumulation of knowledge, competition and leading to an excessive load of work on children can hamper children’s harmonious development, and that therefore, education should be child-friendly, inspiring and motiving to the individual child.

Conclusion

This chapter examined the implementation of street children’s right to education from a theoretical point of view. It identified children as the main beneficiaries of the right to education and states as the main duty-bearers. The chapter recognised the complexity of states’ role in implementing the right to education. It explored ways of cooperation between states and NGOs in order to provide education to street children in the most effective way, acknowledging that their educational needs are best catered for by non-formal education.

The chapter also examined different human rights, which are intimately connected to street children’s right to education. The implementation of these rights reinforces the right to education, and is therefore crucial for its implementation. Some of these rights, namely the general principles of the CRC, can also be used in order to interpret provisions on the right to education and adapt them to the situation of street children. Unfortunately, existing monitoring mechanisms have not made use of such extensive and flexible interpretations of the right to education, even though human rights treaty bodies sometimes use their mandate to provide evolutive interpretations of specific rights. Monitoring mechanisms have largely ignored street children, except for questions concerning their exploitation and abuse. Moreover, the great majority of these mechanisms are not relevant to street children’s right to education, nor do they provide remedies in case of violations of rights.

563 Ibid. This list corresponds closely to the Committee’s interpretation of the child’s right to development to include physical, mental, spiritual, moral, psychological and social development. (Guidelines Periodic Reports, op.cit. note 298: 40).
564 General Comment 1, op.cit. note 203: 12.
CHAPTER V

National protection of street children’s right to education – the case of Brazil

This chapter provides a test case for the theoretical findings and discussions of the previous chapters. This author has chosen to examine the impact of international child rights legislation on the education of street children in Brazil specifically, because of the country’s long-standing experience in dealing with street children. Brazil is a pioneer in addressing issues concerning street children, and probably the most widely known and cited example in literature on street children. It is the first country to have received international attention on this issue and has served as a model for other countries in their attempts to deal with street children. The focus of the case study is the municipality and state of Rio de Janeiro, which has been considered, to a certain extent, as the centre of Brazil’s experience with street children.

1. Research methodology

The examination of national protection of street children’s right to education in Brazil is based on this author’s field trips to Brazil (cities of Rio de Janeiro and Brasilia) in April and December 2002. During those trips she conducted semi-structured and unstructured interviews in Portuguese and English\(^\text{565}\) with various actors directly or indirectly involved in the implementation of street children’s right to education. Discussions varied in length from half an hour to three hours approximately, and covered questions on national practice relating to street children’s education, national legislation, as well as the implementation of international law. Annex II includes the questions that were used to guide interview discussions in a flexible manner. Specific questions were chosen from that list depending on the role of the person interviewed. All in all thirty-seven interviews were conducted with officials from municipal, state and federal level government departments, researchers and academics, diplomats, politicians from the municipal and federal legislatures, representatives of the legal profession, of municipal and state level children’s councils, of NGOs, and

\(^{565}\) This thesis uses the definitions of different types of interviews in Kirby et al., Experience, Research and Social Change, 135. An interpreter was used on occasion, depending on availability. At most times, the author relied on her knowledge of Portuguese and was able to speak in English with some of the interviewees.
intergovernmental organisations, social workers and educators, including former street children.\textsuperscript{566}

While this author had numerous conversations, including unstructured interviews through an interpreter, with street children attending street child programmes, she chose not to incorporate findings from those interviews in this thesis, as the findings confirmed those of existing research. It was not considered necessary to duplicate the considerably more extensive work of anthropologist, sociologist and others, whose research is covered in this thesis. As explained in Chapters I and II, most literature on street children describes the life of these children and is based on field work conducted amongst them. Moreover, collecting views of street children would require giving due consideration to specific ethical and methodological questions pertaining to interviews with children in general, as well as gaining a position of trust with these untrusting children. Researchers gain trust by spending months with a group of children in the streets, and learning to speak "their language". Such commitment was neither possible for this research, due to time and resource constraints, nor was it the object of this research, which is to examine the state of international law in relation to street children, instead of describing their condition.

In addition to hand-written notes from interviews and personal observations by this author, the analysis in this chapter is based on relevant literature, as well as national laws, policy documents and information in print or in electronic format from different institutions collected throughout the research period within and outside Brazil. While all interviews cover only the municipality and state of Rio de Janeiro, in addition to the federal level, literature used to assess Brazil's implementation of international law and street children's educational situation is wider in scope. Historical and current examples from other parts of the country are cited to support findings in Rio, and to provide examples of interesting practices. On the basis of this work, it was possible to conduct an analysis of the role of all actors involved in street children's education as well as relevant national institutions and historical circumstances.

\textsuperscript{566} See Annex II for the list of institutions represented in the interviews. The majority of interviewees (twenty-two) were representatives or affiliates of NGOs, including street educators and former street children, while ten were representatives of municipal, state and federal government bodies.
2. A country profile

2.1. The political and socio-economic context

After about twenty years of military regime and restricted or inexistent civil and political rights, Brazil went through a liberalisation process that culminated in the 1988 Constitution for the new federative republic. Although the Constitution provides for an adequate framework, the country has been criticised for having an inefficient judiciary, and weak government agencies. The inefficiency of the judiciary seems to be backed by an uncooperative state, which makes the work of the Public Ministry difficult and ineffective. Generally, internal divisions within different agencies and conflicts with other institutions have hampered the effective functioning of the federal democracy. Additional problems are inequalities between municipalities and regions. Decentralisation has also led to inaction and lack of coordination. The federal government is easily let off the hook, as it can limit itself to developing policies and delegating their implementation to states and municipalities.

Brazil is an emerging economy and it is classified by the World Bank as belonging in the medium to high-income category. Despite impressive figures, a great challenge lies ahead to improve the lives of these people, nearly half of who live in absolute poverty. Regional differences in wealth are enormous and Brazil has one

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567 Brazil had only ratified the CERD (in 1969).
568 See Core document forming part of the reports of States Parties: Brazil, UN doc. HRI/CORE/I/Add.53, 14-18.
569 See e.g. DFID, Brazil Country Strategy Paper, LACAD/DFID; Pinheiro, Democratic Consolidation and Human Rights in Brazil, Working Paper no.256; ICCPR Committee, Concluding Observations to the Periodic Report submitted by Brazil, UN doc. CCPR/C/BRA/CO/2, 7-8, 13, 17.
570 The Public Ministry is responsible for the defense of the juridical order, the democratic regime, and social and individual rights and interests. See Political-administrative organisation of Brazil, Core document, op. cit. note 568: 19-38, Article 127 of the Constitution.
571 None of the 68 cases brought against state authorities had been examined by December 2002 (interview with the former president of Rio’s Municipal Council for Children’s Rights, Jorge Barros, Rio 20.12.02). See also Adolescents in the custody of the FEBEM, op. cit. note 39.
574 See Pilotti & Rizzini, “The (Dis)Integration of Latin America and its Impact on Children”, in Rizzini, op.cit. note 280: 45; Carlos Chagas Foundation, Brazilian Issues on Education, Gender and Race.
575 Figures differ according to sources: from just over 18% to just under 50%. See IACHR, Report on the Situation on Human Rights in Brazil, 1997, OEA/Ser.L/VII.97, doc. 29, rev. 1, Chapter II, 6.
576 Interview with Jussara De Goias, President of the National Movement for Street Children (MNMMR), 13.12.02.
of the worst world records in income distribution.\footnote{See Marcilio, "A lenta construção dos direitos da criança brasileira – Século XX", <www.direitoshumanos.usp.br/bibliografia/mluiza.html>; Epstein, \textit{op. cit.} note 20: 298; Pinheiro, \textit{Democratic Consolidation, op. cit.} note 569: 17; \textit{Core document, op. cit.} note 568; IACHR Report, \textit{op. cit.} note 575: Chapter II, 4.} It can be argued that the country’s capacity to provide for its population has been hampered by “harsh class divisions, racism and political corruption”,\footnote{Bay, \textit{Brazil: A Country Profile}, <www.pueblito.org/issues/brazil_profil.htm>.} and that without these “it would be possible to eliminate poverty in Brazil at a cost of less than 1\% of GNP”.\footnote{World Bank, \textit{Brazil: A Poverty Assessment}, 18.} One can even talk about an unofficial “apartheid” that strives to keep Brazil’s poorest population in \textit{favelas}.\footnote{Hecht, \textit{op. cit.} note 14: 211-214; CERD Committee, Concluding Observations to the Periodic Report submitted by Brazil, 1996, UN doc. CERD/C/304/Add.11, 4, and 2004, UN doc. CERD/C/64/CO/2, 13.} Poverty is linked to racial discrimination, as the non-white population in Brazil accounts for 62.4\% of the poor, and 50\% of the non-white population lives below the poverty line.\footnote{IACHR Report, \textit{op. cit.} note 575: Chapter II, 11; Initial Report submitted by Brazil to the Committee on Economic, Social and Cultural Rights, UN doc. E/1990/5/Add.53, 376.} Social exclusion means that access to basic social services, health and education is on an unequal basis.\footnote{Cassania & Barker, “Briefing Notes on Brazil – Exploring the Parameters of Fundamental Change”, 2.9.1997; UNICEF Brasil, \textit{Situação da Adolescência Brasileira}, 8.} The difference in treatment in all services and government departments is striking depending on each person’s social status and personal connections.\footnote{For different estimates, see IBGE, \textit{Indicadores Sociais – Crianças e Adolescentes}; UNICEF, \textit{State of the World’s Children 2001}; US Department of State, \textit{Country Report on Human Rights Practices – Brazil 2001}.} This situation partly explains the rapid rural-to-urban migration, and the growth of slum communities.\footnote{See Mickelson, \textit{op. cit.} note 71: 44-47.}

All above-mentioned factors influence the situation of children in Brazil, who compose nearly half of Brazil’s population.\footnote{See DaMatt a \textit{op. cit.} note 46.} More than a third of all children live in poverty.\footnote{See Initial Report, \textit{op. cit.} note 581: 489, 503.} Because of poverty and rural-to-urban migration leading to inhuman living conditions, Brazil has witnessed family disintegration, increasing numbers of female-headed households and problems of drug and alcohol abuse, as well as domestic violence.\footnote{See Mickelson, \textit{op. cit.} note 71: 44-47.} As explained in earlier chapters, these conditions lead to an increased presence of children in the streets. Because of the difficulties in counting street children, and disagreements over definitions, estimated numbers have fluctuated considerably: from two million to over thirty million.\footnote{See Hecht, \textit{op. cit.} note 14: 98-99.} However, since the 1990s, a distinction has
been made between children of and on the streets, making the numbers of children of the streets drop dramatically.\textsuperscript{589} For example in Rio de Janeiro and in São Paolo, the population of street children was estimated at 797 and 895 respectively in 1993.\textsuperscript{590} Using the research carried out in these cities, Hecht has estimated the number to be anywhere between 13,000 and 39,000 street children in the whole country. He rightly points out that these numbers are nowhere near the millions from popular imagination, but still represent “an enormous and frightening number”.\textsuperscript{591}

2.2. The human rights situation

At the legislative level, human rights became a reality with the 1988 Constitution, which protects human rights.\textsuperscript{592} An important aspect is that the Constitution allows for popular action, enabling any citizen to take part in a proposed appeal against any act prejudicial to public interest.\textsuperscript{593} For the implementation of constitutional guarantees, national independent organs for the defence of human rights have been set up,\textsuperscript{594} and a National Human Rights Plan (PNDH) has been adopted.\textsuperscript{595} The main governmental organ is the Secretariat of Human Rights, which coordinates the federal government’s human rights policy and monitors the implementation of the PNDH.

Since its democratisation, Brazil has become a party to all UN and regional human rights conventions.\textsuperscript{596} It is a country with a monist legal tradition, and all treaties to which Brazil is party go into effect immediately after ratification.\textsuperscript{597} Some even argue

\textsuperscript{589} See Perez, “Street Children in Brazil”, information sheet from the Brazilian Embassy in London. However, up-to-date statistics are lacking (Summary Record of the 973rd meeting: Brazil, UN doc. CRC/C/SR.973, 12).

\textsuperscript{590} See Impelizieri, \textit{op.cit.} note 14: 11.

\textsuperscript{591} Hecht, \textit{op.cit}, note 14: 101.

\textsuperscript{592} Constitution adopted on 5.10.1988 and revised by Constitutional Amendments up to 47/2005.

\textsuperscript{593} Article 5 (LXXIII).

\textsuperscript{594} The Defence Council for the Rights of the Human Person (CDDPH), which investigates claims and serves as a channel for dialogue between the Ministry of Justice and civil society; and the Federal Attorney General’s Office for Citizen’s Rights (PFDC), which serves as a kind of ombudsman at the federal level to ensure that human rights are respected.

\textsuperscript{595} The PNDH (Presidência da República, Secretaria de Estado dos Direitos Humanos, \textit{Programa Nacional de Direitos Humanos}) has a section on the protection of equality and addresses, in particular, discrimination against different groups, such as children and adolescents. In 2002, a modified PNDH II was launched with the aim of incorporating economic, social and cultural rights. This latest version calls for the strengthening of programmes for children in a vulnerable situation (Ministério da Justiça \textit{Programa Nacional de Direitos Humanos}, 134).


\textsuperscript{597} Article 5 of the Constitution.
that human rights included in international conventions ratified by Brazil become fundamental rights of the same constitutional force as those rights listed in Brazil’s Constitution.\(^{598}\) Brazil has been examined in relation to all categories of human rights by UN treaty bodies. The Concluding observations of different treaty bodies, as well as regional and NGO reports, show similar concerns.\(^{599}\) They focus on the penitentiary situation,\(^{600}\) torture, police violence and summary executions, organised crime, racial discrimination, domestic violence, different forms of exploitation of children, the consequences of decentralisation on implementation and coordination, and the lack of knowledge about international law and obligations at all levels.\(^{601}\) All monitoring bodies, including those traditionally focused on civil and political rights, have addressed issues related to the country’s socio-economic situation.\(^{602}\) They refer to the great differences in wealth between regions, extreme inequalities and social injustice, including imbalances in access to basic services, and the absence of effective measures and remedies for disadvantaged and vulnerable groups to uphold their rights.\(^{603}\) Brazil’s Initial report to the ICESCR recognises that the social security system does not work in favour of the disadvantaged.\(^{604}\) Concerning labour laws and workers rights, the government observes that the informal sector is not easy to control.\(^{605}\) For example, unemployment benefits can only be claimed by those in the formal market, who are contributing to the social security system.\(^{606}\) The report recognises that child rights have not been properly implemented in the country.\(^{607}\) It dwells on the issues of child labour and irregular adolescent labour, which are seen as an ill to eliminate, although the government recognises the complexity of the issue.\(^{608}\) The report also refers to Brazil’s


\(^{599}\) ICCPR, ICESCR, CERD and Concluding Observations on Brazil (respectively: op.cit. notes 13& 569, 481 and 580); CRC Committee, Concluding Observations on the Initial Report submitted by Brazil, UN doc. CRC/C/15/Add.241); IACHR Report, op.cit. note 575; the Global Justice Annual Report (Human Rights in Brazil 2002).

\(^{600}\) Including the situation of children in institutions. See CRC List of issues to be take up in connection with the consideration of the initial report of Brazil, UN doc. CRC/C/Q/BRA/1.


\(^{602}\) The Report of the IACHR (op.cit. note 575) understandably focuses on civil and political rights, as the Protocol of San Salvador has been in force only since 1999. (However, see Yanomani Indians v. Brazil, C.H.R. 7615, OEC/Ser.L. V/II/66 doc. 10 rev. 1 (1985)). In a recent case concerning adolescents incarcerated in prisons and victims of torture and maltreatment, the right to education was among the alleged violations of child rights (Adolescents in the custody of the FEBEM, op.cit. note 39).

\(^{603}\) ICESCR Concluding Observations, op.cit. note 481: 15, 17, 18.


\(^{605}\) Ibid., 126. However, the government finds that its labour programmes are reaching youth and that advances have been made: see explanations on PLANFOR (National Worker Qualification Plan) for the professional training of 15 to 21 year-old youths (at 65-119).

\(^{606}\) Ibid.,275.

\(^{607}\) Ibid.,301.

\(^{608}\) Ibid.,319-370.
Welfare Law\textsuperscript{609}, which creates a social protection system directed at the most vulnerable segments of society, including assistance to destitute children and adolescents, who have special needs because of poverty, exclusion and social risk.\textsuperscript{610}

Among the problems identified by the IACHR were "the problems of street children,"\textsuperscript{611} primarily meaning torture and summary executions. Similar concern is voiced by the CRC Committee.\textsuperscript{612} This minimizes the existence of other rights, when focus on other basic rights, such as education, could be used to prevent graver violations affecting street children's lives. This was recognised by a Special Investigative Commission on Summary Executions in São Paulo in 1991, cited by the IACHR.\textsuperscript{613} The CRC Committee also includes the implementation of basic rights in its recommendations related to street children.\textsuperscript{614}

Other problems in the field of human rights relate to people's relationship with law in general. Belief in personal networks and the impunity of the law, and fear of corrupted authorities explain the fact that Brazil's implementation of its human rights obligations has not been successful, and that people have not been used to claiming their rights.\textsuperscript{615} In fact, DaMatta claims that people are more inclined to talk about the obligations of the state to provide them with services, rather than embracing the concept of individual rights.\textsuperscript{616} As public institutions seem to be created only for the poor – the rich not needing them – service delivery is laden with social stigma and is not seen as a way to implement the human rights of all.\textsuperscript{617} These problems are linked to the fact that common citizens are hardly educated, do not understand the law or know how to use it to advance their interests. Needless to say that the most marginalised, such as street

\begin{footnotesize}
\begin{enumerate}
\item Basic Social Welfare Law (LOAS), Law No. 8.742, 7.12.1993.
\item Brazil's Initial report, \textit{op.cit.} note 581: 361.
\item IACHR \textit{Report, op.cit.} note 575: 6 and Chapter V: Violence against minors.
\item The CRC Committee notes with concern the significant number and vulnerability of street children (Concluding Observations, \textit{op.cit.} note 599: 64). Brazil's Initial Report to the CRC recognizes the situation of street children as dramatic (UN doc. CRC/C/3/Add.65, 242-246).
\item Among causes of violence against street children the Investigative Commission cited: dramatic socio-economic conditions in the peripheral areas of large urban centres; limited role of schools in combating violence; lack of police training; shortcomings of the child protection system; the lack of street educators to serve the needs of children and adolescents (IACHR \textit{Report, op.cit.} note 575: Chapter V, 19-25).
\item The Committee recommends that the state party provide street children with "...educational opportunities in order to support their full development." (Concluding Observations, \textit{op.cit.} note 599: 65).
\item See ICESCR Concluding Observations, \textit{op.cit.} note 481: 18; ICCPR Concluding Observations 2005, 17.
\item DaMatta \textit{op.cit.} note 46. See also Pinheiro, \textit{Democratic Consolidation, op.cit.} note 601.
\item See also Rizzini et al., \textit{op.cit.} note 35.
\end{enumerate}
\end{footnotesize}
children, are the last to benefit from the law and to use its mechanisms, because of all these obstructing factors.

3. Ingredients for the protection of street children's right to education

Starting with a historical overview, this section examines the possibilities offered to street children in Brazil to exercise their right to education in terms of the existing children's rights framework, as well as laws and programmes on education.

3.1. Child protection policies and children's rights movement

3.1.1 From legitimate oppression

In Brazil, as in "Northern" countries, initial preoccupation for children at the end of the nineteenth century translated into laws regulating child labour. In line with international trends, the protection of poor children went hand in hand with the protection of society from those children. In the early twentieth century institutes for the rehabilitation of vagrants, beggars and other vicious youth sprang up in different parts of the country. This trend of protecting the society from budding criminals grew stronger in the later decades. In the 1920s the difference between “children” and poor children, i.e. “minors”, became clear and sanctioned by legislation. These legal steps were accompanied by the setting up of official establishments for the protection of abandoned and delinquent children, and this marked the beginning of Brazil's infamous public policy of institutionalisation. As most of the activities of these children were not prohibited by law, Cordeiro de Lima Melo notes that the terminology of measures applied to them had to be changed through this special “protection” legislation: “sentence” (julgamento) became “guardianship” (tutela) and “prison” (prisão) became “internment” (internamento).

619 Decrees no. 439 of 1890 and no. 1313 of 1891.
620 Such as the Institute of Protection and Assistance to Childhood, 1899 and the School of Prevention “15th of November”, 1903 in Rio.
621 Law (no.4242 of 1921) creating the Service of Protection of Abandoned and Delinquent Children. Children without problems, i.e. middle and upper-class children, were covered by general legislation and fell under the jurisdiction of the Family Judge, whereas “minors” (children without qualifications or means of subsistence, with a legal guardian judged incapable of guardianship, or orphans) had their own legislation with the 1927 Code of Minors and their own Minors’ Judge.
Until the 1970s, further progress was made in the protection of children at work, the regulation of criminal responsibility and education. Child work was generally accepted if regulated. A good example was Casa do Pequeno Jornaleiro (house of the little newspaper vendor), created in 1938. This programme recognised the existence of street work and sought to regulate it. It was innovative in a sense that it sought to help children in the non-formal sector without “rescuing” them. In 1940, the Service of Assistance to Minors (SAM) was created under the Ministry of Justice to help combat and prevent juvenile delinquency, as well as autonomous forms of existence among children, such as unregulated street work. After harsh criticism for violent repression of institutionalised children, the government replaced SAM with the National Child Welfare Foundation (FUNABEM), and the state-level affiliates (FEBEM), which ran referral centres and closed institutions. Despite a theoretical shift of emphasis from a correctional model to a welfare model, the assistance provided to street children was not very different from before. Internment of children was still a systematic solution for children in need of protection or in conflict with the law.

Because of the failure of public policies for poor children, and especially street children, many non-governmental initiatives appeared in the 1970s, offering alternatives to institutionalisation, for example the República do Pequeno Vendedor (Republic of Small Vendors) in Belém and Pastoral do Menor (Pastoral of Minors) in São Paulo. The first studies on marginalised and street children also came out at that time, including one conducted by a parliamentary commission of enquiry. Despite new interest in poor children and debates spurred by the International Year of the Child, a new Minors’ Code was approved in 1979, widening the chasm between “children” and

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623 The Constitution of 1934 prohibited work for children of fourteen without a legal permit, night work for children under seventeen and work in unhealthy conditions for those under eighteen, and the Constitution of 1946 raised the age of night work to eighteen. These regulations were in line with international trends. See ILO conventions of 1919 (Minimum Age (Industry) Convention, No.5), (Night Work of Young Persons (Industry) Convention No.6); 1921 (Minimum Age (Agriculture) Convention No.10); 1932 (Minimum Age (Non-Industrial Employment) Convention, No.33); 1937 (Minimum Age (Industry) Convention No.59 (Revised) and Minimum Age (Non-Industrial Employment) Convention No.60 (Revised)); 1946 (Night Work of Young Persons (Non-Industrial Occupations) Convention No.70). See: <http://www.ilo.org/ilolex/english/convdisp1.htm>.
624 Decree-law no.2848 (1940) raised criminal responsibility to eighteen.
625 In 1969 primary education became compulsory for children between seven and fourteen.
626 Decree No.2024.
628 See Altoe, op.cit. note 503: 77-83.
"minors",629 based on the doctrine of "irregular situation".630 Whether they were major criminals, abandoned by their family, or found working on the streets, poor children would fit into the same category and be institutionalised in FEBEM's "crime schools".631 The detention conditions encouraged criminality, which in turn reinforced people's perception of street children as criminals and led to the institutionalisation of even greater numbers of destitute children.632

3.1.2 To the construction of citizenship

While the government reinforced its stance on minors, civil society became increasingly active in denouncing the government's repressive policy and in and offering alternative solutions. Meanwhile, the military regime started opening up, which gave grass roots movements more room to act. Their principles drew on Freire's theories of education based on the fact that everybody can learn, that poor people are actors, and that their experiences and life context have to be used in their education.633 Action was based on outreach work and children's participation,634 and many programmes included the new concept of the educator as facilitator who would meet children where they live. The concept of street educator was copied later in many other countries. These new trends allowed also the liberal forces in the government to join forces with the civil society. In 1982 the government started running the Alternative Project for Assistance to Street Children together with UNICEF.635 The First Latin American Seminar on Community Alternatives for assistance to Street Children held in Brasilia in 1984 helped to establish the notion of alternative services to street children. This also encouraged the change from the use of the term "minors" to "street children".

The movement progressed rapidly in 1985, when the National Movement of Street Boys and Girls (MNMMR) was created during a national meeting of local groups working for street children, constituted of governmental and non-governmental

629 Similarly to ignoring the 1924 Declaration on Children's Rights in the drafting of the 1927 Minors' Code.
630 The doctrine came from the OAS Inter-American Children's Institute. The concept was incorporated by the Brazilian Association of Minors' Judges, as it corresponded to the Brazilian legislative tradition of only taking children into account once they are in an irregular situation in relation to their family.
631 See Altoe, op.cit. note 503: 78-83.
633 Freire, Pedagogy of the Oppressed, and O Papel do Educador.
634 See Gomes da Costa & Schmidt-Rahmer, Brazil: Children Spearhead a Movement for Change; Swift, op.cit. note 26.
635 The project was to build on the expertise of various non-governmental initiatives by identifying projects and disseminating successful activities (Freire, Paulo Freire e educadores de rua. Uma abordagem critica. Projeto Alternatives de Atendimento aos meninos de rua).
activists. This NGO became a coalition of street children, educators and advocates, and was the first initiative of its kind, operating at local, state and national levels. In 1986, the MNMMR organised the First National Street Children Congress, where 500 children, representing various street children’s groups, were able to express themselves and voice their concerns. They were therefore instrumental in building their own image as citizens, instead of dangerous marginals. The MNMMR became very active in the general child rights movement in the country, especially as part of different campaigns for the inclusion of children’s rights in the Constitution that was being drafted. One of them resulted in a petition with over a million signatures, many of them by children. These campaigns led to the creation of the National Non-governmental Forum for the Defence of Children’s Rights (Forum DCA), which became one of the principal actors, next to the National Congress, during the drafting of the Constitution. The work of the Forum was a stimulus for the creation of other entities of defence of children’s rights throughout the country.

3.2. Laws and mechanisms protecting children

3.2.1 The Constitution and the Statute of the Child and Adolescent

The result of the massive movement for the rights of the child was the adoption of the doctrine of “integral protection” of children and the equal inclusion of all children. According to some authors, this doctrine is based on the 1959 Declaration on the Rights of the Child, but it is even more evident in the CRC’s holistic approach. Article 227 of the Constitution reflects the substance discussed during the drafting of the CRC, and it has been hailed for incorporating CRC principles a year before the adoption of the Convention. The article states:

It is the duty of the family, society and the State to guarantee the child and the adolescent, with absolute priority, the rights to life, health, food, education, leisure, professional training, culture, dignity, respect, freedom, family and social life, and to protect them from all forms of negligence, discrimination, exploitation, cruelty and oppression.

636 Swift relates in detail the creation of the MNMMR and its participation in the nation-wide social movement, which linked the situation of street children to child rights (op.cit. note 268).
639 Da Silva, op.cit. note 618.
After this first victory for the rights of the child, the campaign continued for the enactment of legislation in conformity with the constitutional provisions, and culminated with the adoption of the Statute of the Child and the Adolescent (ECA), which came into force in 1990.640

The ECA has been acclaimed as one of the most progressive pieces of child legislation in the world, and even “the best child protection legislation in the world” by former UNICEF director Grant.641 The legislative work corresponded to the adoption of the CRC, and on that front, Brazil supported the CRC unconditionally and ratified it without reservation in 1990. Upon ratification, Brazil thus did not have to enact new legislation, because the new piece of legislation incorporated a child rights perspective that was compatible with the CRC. The “integral” protection of children and adolescents is reinforced in the National Plan of Action.642

The Statute has even been said to protect children’s rights better than the CRC, and yet it does not include some of the fundamental components of the international rights of the child, such as the concept of best interests of the child. Nevertheless, Justice Siro Darlan from Rio’s Juvenile Tribunal of first instance, and one of the ECA’s most vocal advocates, is adamant that the Statute covers all principles of the international rights of the child.643 It could be possible to understand the best interests of the child as implicitly included in the principle of “absolute priority” embedded in Article 4.644 If the best interests principle is indeed included, then the Brazilian provision gives children better protection than the CRC, which considers the principle to be only a primary consideration, while “absolute” implies that it is the primary consideration. However, absolute priority can have a narrower meaning than the best interests principle, implying only priority for children at a macro level, without giving each child individual attention as understood in the CRC principle.645 The ECA does

640 ECA Law 8069/90. While children and adolescents correspond to the age groups of zero to twelve and thirteen to eighteen respectively, this thesis uses the term “children” to mean both groups, as this is the terminology used in the international rights of the child.
641 Cited in Klees et al., op.cit. note 627: 83.
642 Pronaica, Law no. 8642, and Presidente Amigo da Criança e do Adolescente, Ordinance, No.54.
643 Interview with Darlan, 17.12.02. The point was reiterated during the examination of Brazil’s Initial Report to the CRC. See Summary Record, op.cit. note 589: 50.
645 For example, in the case of Ministério Público v. Estado do Rio Grande do Sul (Public civil action No. 596017897, Sétima Câmara Cível, Tribunal de Justiça do RS, judgment of 12.03.1997), the Tribunal of
seem to limit the application of absolute priority to specific areas, prompting the CRC Committee to recommend that the principle "be duly reflected in all legislative acts, policies and programmes as well as in judicial and administrative decisions." Children’s right to be heard is not a general principle in Brazilian law either, but linked to specific articles, especially in chapter II on the right to freedom, respect and dignity. Another principle that has received a different interpretation in Brazilian child rights law is non-discrimination. In international human rights law this principle has been interpreted as including non-discrimination and special measures, as analysed in Chapter II, while in Brazil, it has been understood as formal equality between children. In relation to education, the principle is thus to include all children in the same schools and to provide them with uniform education.

The ECA contains detailed provisions to make the Statute work in practice. These include specific provisions on different forms of violation of child rights. In certain cases the protection of individual and collective rights and interests is possible through representation by the Public Ministry, different levels of government, or associations for the defence of children’s rights. Such action can be taken in case of violation of specifically listed rights, many of which pertain to street children’s right to education: compulsory education; regular night-time education; supplementary programmes involving the supply of didactic school material; transportation and health assistance; social assistance services; access to health services; and education and vocational training for children deprived of liberty. In addition, the ECA provides for the establishment of bodies for its implementation and monitoring. The main body for the direct implementation of the ECA is the Guardianship Council, which is a permanent and autonomous non-jurisdictional entity. The Council’s role is to safeguard the daily well-being of children by applying protective socio-educational measures, assisting and advising parents and guardians. It can also submit cases to the judicial authority and represent children before child welfare agencies. The national,
state and municipal Councils for the Rights of the Child and Adolescent are policy and decision-making and oversight bodies, composed of representatives of government agencies and civil society, that ensure the conformity of municipal laws to the ECA. The National Council (CONANDA) sets the principles that councils can adapt to their local needs and priorities. For example, the principles set at the fourth National Conference of Children’s and Adolescents’ Rights in 2002 focused on the problem of violence and its effects on children, and the Municipal Council of Children’s Rights (CMDCA) in Rio chose to work with the following priorities: shelters, domestic violence, assistance to victimised children, and the reinsertion of street children, while the State Council of Children’s Rights (CEDCA) of Rio selected adolescents in conflict with the law, sexual violence and child labour.

3.2.2 Relevance of legislation to street children and their educational needs

While the ECA does not mention street children specifically, it includes articles that are applicable to them more specifically than CRC articles, and some of them have special importance for street children’s right to education. Article 16(I) on the right to go, come and remain in public places could be understood as giving street children the right to stay on the streets without fear of arrest, and outlawing the criminalization of vagrancy. Significantly in this respect, articles 17 and 58 provide for the right of respect for the identity, autonomy and values of the child, including their social and cultural backgrounds. These articles are thus consistent with the teachings of Freire and others who recognise street children’s distinct culture and its importance. Article 17, which includes provisions on children’s participation in community life and political life also provides a basis for street children’s participation in programmes for them, including education.

652 CONANDA, Pacto pela Paz - Propostas Aprovadas na Plenaria Final, IV Conferência Nacional dos Direitos da Criança e do Adolescente.
653 Interview with Barros (note 571).
654 Interview with the President of the Council, Tiana Sento Sé, 17.12.02.
655 However, it includes an exception clause which can restrict this right considerably, though understandably not in a way that violates the rights of the child.
656 Article 17 includes the right to respect, consisting of the inviolability of the physical, psychic and moral integrity of the child, encompassing the preservation of the image, identity, autonomy, values, ideas and beliefs, personal spaces and objects. Article 58 includes respect for the cultural, artistic and historical values specific to the social context of the child in the educational process, and the freedom of creation and access to the sources of culture.
Other articles address the right to education. Article 54(I) guarantees the right to basic education, *including for those who did not have access to education at the proper age*. The provision thus takes the state obligation to provide free and compulsory primary education further from the narrow concept of primary education, and therefore helps to combat discrimination against children who have dropped out of school. Article 57 on research, experiments and new proposals in education also contributes to the flexibility of education and recognises the special needs of marginalised children.\(^{658}\) Article 54(VI) on the provision of night-time education suited to the condition of the working adolescent also allows for more flexible education, as it recognises the need for some older children to work. This view is included also in articles on work and vocational training, which ensure labour and social security rights to adolescents, prohibit harmful work, allow for salary in educational work, and ensure that vocational training is suited to the labour market.\(^{659}\) The ECA therefore extends work-related rights to children, unlike international law, which only prohibits harmful work.

An important cluster of articles for street children deals with shelters (*abrigos*) as part of socio-educational programmes for children.\(^{660}\) While the CRC has failed to address shelters, the ECA covers this extensively. Shelters are recognised as an option for street children, and children enrolled in them are protected through registration obligations, which are only granted to organisations that run programmes according to the principles of the Statute.\(^{661}\) Article 92 provides further protection of street children who have integrated shelter programmes, by ensuring that children are treated with respect and with their interests in mind.\(^{662}\) Indeed, street children in shelters can be in a very vulnerable situation and cases of abuse and mistreatment are quite common, not only in Brazil.\(^{663}\) Interestingly however, these articles are followed by provisions dealing with the internment of children in shelters.\(^{664}\) Internment in this context is

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\(^{658}\) Article 57 encourages research, experiments, new proposals with regard to the calendar, division of grades, curriculum, methodology, didactics and evaluation so as to include children excluded from compulsory basic education.

\(^{659}\) Articles 60-69.

\(^{660}\) Articles 90-92.

\(^{661}\) Article 90.

\(^{662}\) Principles established by Article 92 include personalised treatment of children in small groups, development of activities in a context of coeducation, non-separation of groups of siblings, avoiding the transfer of children to other shelters, participation in local community life, participation of persons from the community in the educational process. The director of the shelter is considered the child’s guardian.


\(^{664}\) Articles 93-97.
understood as applying to children in conflict with the law. These articles often also apply to street children, guaranteeing their rights in different institutions when deprived of liberty. However, provisions on shelter programmes for children “in need”, and for children in conflict with the law can create confusion between these two different purposes of care.

A similar confusion can emerge from the part of ECA on protection measures. This part, which seems to target street children more than other provisions, lists measures that can be taken to protect children when rights guaranteed by the Statute are violated. Measures include the following:

I - transfer to the parents or guardian by means of a statement of responsibility
II - temporary guidance, support and monitoring
III - obligatory enrolment and attendance in government basic education institutions
IV - inclusion in community or government programmes of family, child and adolescent assistance
V - requisition of medical, psychological or psychiatric treatment in hospital or outpatient system
VI - inclusion in a government or community programme of aid, orientation and treatment of alcoholics and drug addicts
VII - shelter in entities
VIII - placement in foster family

Positive aspects are that children’s pedagogical needs are to be duly considered, and that shelters are to be seen as a temporary and exceptional measure. The Municipal Council of Children’s Rights of Rio de Janeiro has taken the protection of children in shelters even further, and created guidelines for shelters, by developing every point mentioned in Article 92 of the ECA, setting the responsibilities of each institution involved with the implementation and monitoring of the rights of the child with regard to shelter programmes.

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665 Provisions on juvenile justice follow in articles 103-128, where internment in an institution is only possible for the most serious offences, and guarantees a range of rights for the “interned” child. This part looks at the situation of child offenders from the point of view of their rights, instead of the obligation of the institution (articles 95-97), and reviews all the “socio-educative measures” that can be taken for them. Guarantees set by Article 94 include observance of all children’s rights, personalised treatment, an environment of respect and dignity of the child, preservation of the child’s identity, education and vocational training, informing the child of his situation, periodic review of placement, providing support for those who have left the programme, obtaining documents for children who do not have them.

666 Article 92-102.

667 CMDCA, Política de Abrigo para Crianças e Adolescentes do Município do Rio de Janeiro.

668 The Municipal Secretariats for Education, Social Development, Health, Housing, Labour, Culture, Sports and Leisure, Public Security, the Guardianship Council, the Children’s Jurisdiction, NGOs, and the Judge of the second instance for children.
3.3. Educational achievements

3.3.1 The official picture

In addition to developments in children’s rights, Brazil’s educational situation has also evolved over the past century. Although primary education has been theoretically free to all citizens since 1824,\(^{671}\) major improvements in primary education were made after the economic crisis of the 1980s.\(^{672}\) According to UNESCO, constant progress has been made at the primary level, which can be seen in increasing school enrolment.\(^{673}\) The Ten-Year Plan for Education for All was even surpassed in 1998 with its net enrolment rate of 95% for all children of compulsory schooling age. Quantitative developments are therefore indisputable at the primary level, although the government acknowledges that qualitative improvements lag behind.\(^{674}\) And yet, at the UN GA Special Session on Children, Brazil stated that its priority is to achieve greater access to basic education, in accordance with its programme: All Children in School (*Toda Criança na Escola*).\(^{675}\)

Literacy in general has also become a focus area since the 1990s. Both the government and NGOs offer literacy programmes for youth, including programmes that provide special classes for students with an age/grade gap, as well as programmes targeting out-of-school youth through youth and adult education. The latter are for people over the compulsory school age, who have “a certain experience in life and are part of the labour force, and who therefore possess quite a different background from children and adolescents who form the target audience of regular primary education”.\(^{676}\) This can certainly be useful for street children. However, there tends to be a difference between non-formal education provided by NGOs, which is often not recognised by the government, and more official “extra-school education”, which is favoured by the

\(^{671}\) Guaranteed by the 1824 Constitution and confirmed by the law of 15.10.1827. However, this law was not implemented.

\(^{672}\) See Wong & Balestino, *op.cit.* note 20.

\(^{673}\) *EFA 2000 Assessment, op.cit.* note 225: 3.

\(^{674}\) Brazil’s Initial Reports (ICESCR), *op.cit.* note 581: 747; (CRC), *op.cit.* note 612: 450, 468, 476-478.

\(^{675}\) Lockwood, “Summary and Analysis of the Country Statements presented at the UN General Assembly’s Special Session on Children”, prepared for the office of Senator Landon Pearson; Brazil’s Initial Report, *op.cit.* note 612: 470.

government, and does not usually reach the most marginalized segments of population. 677

3.3.2 Legislative and policy framework

The 1986 National Conference of Education was devoted to the drafting of the Brazilian Constitution and the priorities identified at the Conference were, to some extent, reflected in the Constitution. 678 Notably, the Constitution determines the State’s duty towards education to be effectuated through the guarantees of:

I. free, compulsory elementary education, including assurance that it will be offered gratuitously for all who did not have access to it at the proper age;
II. progressive universalisation of gratuitous secondary school education;
VI. provision of regular night courses adequate to the student’s condition;
VII. assistance to elementary school students through supplementary programmes of school books, educational supplies, transportation, food, and health assistance.

Access to compulsory and free education is a subjective public right, and the Government’s failure to offer compulsory education or offering it irregularly implies liability of the proper authority. 679

Interestingly, therefore, the Constitution allows for litigation if the right to education is violated, including with respect to those who have passed the age of compulsory education. Public education accounts for 91% of primary education \( \text{\textit{educação fundamental}} \), 680 and the functioning of private schools, including those run by NGOs, is conditional of prior accreditation. For street children, the advantage is quality control and the disadvantage is that educational options are mostly limited to formal education in public schools. Secondary education \( \text{\textit{educação médio}} \), which is also part of basic education, consists of high school and/or vocational training, and is only available to students who have completed primary education. This makes it mostly inaccessible to street children. Basic courses in the form of non-formal education are offered to qualify and retrain workers of different schooling levels.

677 Both non-formal education and formal extra-school education are called \textit{ensino suppletivo} (supplementary education), and are part of education legislation. These are not distinguished by the Ministry of Education, although the latter can lead to formal diplomas (see Verhine, \textit{op.cit.} note 192).
679 Article 208.
Most of these and other regulations are included in the 1996 Law on the Basis and Guidelines of Education (LDB).\footnote{Law No.9394, 20.12.1996.} The Law contains several provisions that are of relevance to street children, and could be used to develop adequate education for them. The principles and goals of education include the respect for freedom and regard for tolerance, the valorisation of extra-scholar activities, and the link between schooling, work and social practices.\footnote{Article 3(IV), (X), (XI).} The Law also includes provisions on special education, which could be used in a large sense, covering all those with special learning needs.\footnote{Article 4(III).} Other notable types of education covered are night-time education, and education for youth and adults.\footnote{Article 4(VI), (VII).} There are also articles that allow for flexibility in education,\footnote{Article 15, 25, 26.} and the possibility to organise education according to the learning needs of the group.\footnote{Articles 23, 24(III), (IV), (V).}

According to Wong and Balestino, the LDB does not explicitly mandate programmes or practices to address the education needs of marginalized youth, but it does create an opening for national entities to introduce such programmes by calling for the enrolment of all school age children, and providing special courses to undereducated youth and adults.\footnote{Title IX. See Wong & Balestino, op. cit. note 20.} This author believes that the other provisions mentioned above also contribute to this opening. However, she agrees with the authors in that this law, as a very specific tool,\footnote{Especially in Title V concerning the pedagogy in different levels and types of education.} has missed the opportunity to address the specific needs of marginalised people, such as street children, and therefore to make the government responsible for the creation of adequate programmes.

Other legislative instruments, such as the National Curricular Directives (DCN)\footnote{Resolutions CNE/CEB No.2, 7.4.98 and No.3, 26.6.98.} for primary and secondary education combined with the National Curricular Parameters (PCN),\footnote{Ministry of Education MEC/SEF, 1997 (1\textsuperscript{a} a 4\textsuperscript{a} Series), 1998 (5\textsuperscript{a} a 8\textsuperscript{a} Series).} give more details on curricula to be followed at different levels, as well as on teacher training. In addition to general content areas, the PCNs include cross-disciplinary themes, such as ethics, cultural pluralism, health, sex education and the environment. Key learning outcomes consist of knowledge in those areas, the capacity to learn, to think critically, to adapt to new conditions, and the exercise of citizenship. In order to reach these goals, education methods and programmes have to be diversified and take students' background and current reality into account. Curricula are to be
developed according to the principles of interdisciplinarity and contextualisation, meaning that education must include knowledge of issues linked to the students’ and their communities’ reality. According to Wong and Balestino, these two concepts are the first significant mandate in federal policy for educational work done by NGOs, and for the inclusion of marginalised youth and their realities into education.\footnote{Wong & Balestino, \textit{op.cit.} note 20.} This author agrees on the significance of these instruments, as the LDB only mentioned the \textit{possibility} for flexibility, and the need to adapt to local needs, instead of students’ needs. However, while the Directives and Parameters include several provisions ensuring that students’ differences be taken into account, such provisions mostly concern secondary education, and they do not specifically legitimise the educational work of NGOs. Rather, they make the government responsible for the adoption of adequate curricula, possibly through the assistance of NGOs.

The document related to teacher preparation and professional development also includes provisions that are compatible with the curricular guidelines, and can be used to develop an adequate educational framework for street children.\footnote{Teacher preparation and professional development (\textit{Diretrizes Curriculares Nacionais para a Formação de Docentes da Educação Infantil e dos anos iniciais do Ensino Fundamental, em nível médio, na modalidade Normal}), Resolution CNE/CEB No.2.} For example, it requires teachers to have special skills in providing education to indigenous peoples and students with special needs.\footnote{Article 1.} This could be extended to street children. More importantly, it mandates teachers to identify and address issues and challenges that emerge in school, and to use educational practices and strategies that prepare students for their future roles in society, considering their learning styles, socio-economic reality, cultural diversity, ethnicity, and gender.\footnote{Article 2.} Moreover, school administration is to create educational programmes and practices that foster student independence, responsibility and ability to be proactive in their social context.\footnote{Article 6.} This is very important in order to make street children aware of their situation, and help them be in charge of their lives.

Legislation also provides for special provisions for the education of youth and adults (EJA), which is considered as a type of basic education.\footnote{A resolution establishing the DCN for the Education of Youth and Adults (DCNEJA) sets the framework for this education, establishing that institutions providing EJA should follow the LDB and that the DCN for primary and secondary education should be applied depending on the level of education (Resolution CNE/CEB no.1).} The DCNEJA
provides additional points that relate to the special situation of the target group, because this group needs reparation from a situation of violation of their right to education, as well as equality of opportunity in life through education. The main principles in EJA are that youth have to be at least fifteen to enrol in education corresponding to the primary cycle, and eighteen for the secondary cycle. Once again the right to education is limited by age groups. EJA necessitates special pedagogical models to suit the learning needs of adults, but the organisation of courses, their duration, and structure depend on each state. However, within states, situations of out-of-school youth and adults can be heterogeneous, and it could have been more appropriate to leave the discretion of organization of courses to municipalities or organisations providing education.

Legal provisions on education, including enforcement mechanisms, also exist in connection with human rights, and more specifically children's rights. ECA provisions give considerable importance to education in general, socio-educational measures for children in need of rehabilitation or protection, and adolescent work. Generally, education has benefited from the advancement of children's rights through child rights legislation on education and its application. This is shown, for example, in the increasing support by the judiciary.697

While the country has ratified all major international human rights instruments that include provisions on the right to education, it has been more active at the regional level. Regional initiatives can have greater potential for street children, because issues can be dealt with in more concrete terms by countries with similar cultural, political and social contexts, including similar experiences with street children.698 For example, education has been part of regional agreements, such as the 1992 Declaration of Lima and the 1994 Narino Accord, which are directly linked to the implementation of the CRC and the World Summit on Children.699 Conferences specialised on education have

697 For example in a case involving a seriously deficient school in a municipality that claimed the lack of resources to remedy the situation, the judge used the Statute to argue that the "absolute priority" accorded to the rights of the child demanded a remedy, and suspended a municipal construction project until funds were found for the school (Klees et al., op.cit. note 627: 90).
698 See Pilotti & Rizzini, op.cit. note 574.
699 Instruments reprinted in Edmonds & Fernekes, Children's Rights: A reference handbook, 160-171. The Narino Accord identifies common goals for education, including developing alternative models for initial education; reducing repetition; raising the quality of primary education; introducing changes to the curriculum; training teachers; ensuring that school hours are appropriate to the needs of the country and allow effective learning; identifying strategies to reduce desertion; and developing options for vocational education and technical training.
also taken place, and have resulted in an Inter-American Program of Education. This programme can be used to develop policies for street children, as it seeks to “support the formulation of public policies designed to universalise access to quality education for all sectors of the population, with special concern for at-risk group” (emphasis added). It also seeks to “promote the execution of specific support programs targeting socio-economically at-risk boys, girls, youth and adults through actions sufficient to address the magnitude of their needs”; and to “contribute to the identification, synthesis and diffusion of successful innovations in education for work and youth development”. A priority line of action within the framework of this programme from which street children could benefit is Strategies of Bilingual and Intercultural Education for Peace, Citizenship and Sustainability, which lists among actions needed research concerning “the rights of the most vulnerable populations... which suffer from a socially disadvantaged position and need access to an education that is sensitive to their values and sociocultural uniqueness”.

3.4. Mobilisation for street children – local initiatives

3.4.1 Typical programme models

The major programme for street children run by the Municipality of Rio de Janeiro, *Vem Pra Casa* (Come Home), falls under the Secretariat for Social Development. Its basic approach is to contact children on the streets, and try to convince them to leave the street. Children who offer resistance are taken to the reception centre (*Central de Recepção*), where they are registered and their cases examined. From there, children are directed to families, or other places or institutions, according to the decision of the Guardianship Council or the Juvenile Judge, where necessary. Some of these children, for whom returning home is not an immediate option, are taken to a temporary shelter, where they are offered socio-pedagogical activities that help them develop a will for self-knowledge and to reconstruct their individual and collective identity. The aim is to help children think critically, improve their self-esteem, offer them concrete opportunities, and prepare them for employment. From the shelter,

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701 Ibid., 6.

702 Resistance is taken seriously, as the police (Delegation of Protection to the Child and the Adolescent) participates in the street child pick-up operations. In some cases the police will not hesitate to use force, including armed force, against children who refuse to leave the street, even if these are looked after by a recognised organisation. See incident of 27.2.03 described infra.

703 Magalhães et. al, op.cit. note 228.
children are directed to their families, or, if not possible, to shelter houses (Casas de Acolhida). These houses prepare children to reintegrate their homes or to become autonomous once they reach majority. The shelters function on an open house basis, where children go to school and engage in other activities, including job training, outside the house. Inside the house, rules are based on children’s participation and workshops are organised on relevant issues, including the rights of the child, sexuality, and house matters. Children who stay in the houses until they become eighteen can move to the Republic of Youth (República de Jovens), which helps youngsters become independent. The youth share flats for a determined period of time, during which they are supervised, and have to be involved in some lucrative activity. The assistance offered to them is progressively reduced to help them become independent. Unfortunately, space is very limited, and this opportunity is offered to only a maximum of 25 youth in all of Rio. Other agencies are also involved, and offer additional programmes, although none address the same issue as the Republic of Youth. For example the state-level Foundation for Childhood and Adolescence (FIA) runs a programme called “From the Street to the School” (Da Rua Para a Escola) promoting education and the strengthening the family environment, and the office of the juvenile judge has a programme of education for parents (Escola de Pais), to achieve a better success rate of home reintegration for street children.

There are many more programmes offered by NGOs, one of the main ones being São Martinho. This organisation is composed of a socio-educational centre, children’s homes, a defence centre, and projects aimed at preventing the street child phenomenon, reintegrating children in conflict with the law, and preparing youth for the world of work.704 The socio-educational centre is the first point of contact for street children, who can use the centre on weekdays during daytime to wash, receive medical care, meals, sports or art workshops, and pedagogical activities, including literacy classes. The centre’s aim is to help street children to resocialise and return to their families. When this is not possible, children are taken to São Martinho’s homes or other institutions, where children live in a safe family environment, and are offered socio-educative activities. Other projects provide children with the opportunity to learn a trade and to get preparation courses to integrate the labour market. The defence centre offers socio-legal defence for children, and coordinates with other legal defence centres.

São Martinho and many other non-governmental and governmental organisations that specifically deal with street children in Rio are part of a network, *Rede Rio Criança*, which coordinates the actions of these entities. The network offers training for people who work in direct contact with street children, conducts studies, develops databases on street children, and participates in different child rights fora. Cooperation exists both between different NGOs of the network and between NGOs and government entities. For example, for the programme Vem Pra Casa, the Secretariat for Social Development uses the “homes” of NGOs as part of its network of shelters. It also uses the ideas and programmes of NGOs. The Republic of Youth, for example, is an initiative of the NGO Ex-Cola. According to Orenha, coordinator of Vem Pra Casa, the municipality uses the expertise of NGOs and provides financial assistance to them. In fact, many of the Vem Pra Casa staff who work at the Municipality are from NGOs. Both NGOs and the government use the existing pool of programmes to redirect children to different projects, according to availability and each organisation’s specialisation, such as programmes for pregnant girls, children in conflict with the law, children with HIV/AIDS, or children with a drug addiction.

While organisations have differences as to their target group, programmes they offer or ways of working with children, it is possible to determine a general model that applies more or less across the different organisations. The principle on which they work is that of returning children to their families and communities. When this is not immediately possible, non-formal education steps in, either on the street, in day centres, or in shelter homes. The role of non-formal education is to prepare street children to life in mainstream society by means of socialisation, conflict resolution, participation in designing and adopting rules, etc. Non-formal education is directed at street children who are still on the streets and cannot receive any other education, and it is also a component of shelter programmes. None of the governmental or non-governmental organisations provide education that matches formal education. Rather, they offer

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705 Interview, 18.12.02.
706 The MNMMR is different from other organisations, as it does not attempt to return children to their families or to offer them direct services, but to empower them. Moreover, its non-formal education does not focus on returning children to school, but rather offers recreational, sports and cultural activities, as well as education that encourages critical awareness in the children.
additional education in the form of school reinforcement classes and classes and workshops on extra-curricular topics.\textsuperscript{707}

\subsection*{3.4.2 Alternative educational models}

Despite the nature of current programmes for street children, non-formal education is possible as an alternative to formal education, as proved by an experience in Rio, initiated in 1984. The founders of the school, Tia Ciata, were educationalists involved in creating a programme for youth within the newly established integrated Centres of Public Education (CIEPs). Surprised at the numbers of street children attending the programme, they explored a different methodology to teach these children. According to Tiana Sento Sé and Ligia Costa Leite, two of the original founders, the school was a great success among street children, as it allowed a change within the public school to meet the needs of street children.\textsuperscript{708} Teachers were trained to deal with children whose attendance was not regular and who were used to freedom. According to Sento Sé, the methodologies were not revolutionary and came directly from some private schools, where teaching was based on the students' experiences and learning needs. However, the experience only lasted four years. According to the Municipality, it was better for street children to be educated in regular schools, based on low numbers of children attending and graduating. The founders of the school, on the contrary, insist that the numbers show the success of the school,\textsuperscript{709} and assert that its closure was purely due to political circumstances.

Although the experience has not been repeated in Rio, some other interesting experiences exist in Brazil, especially in terms of partnerships between the government and the civil society. One is a school for street children in Brasilia - Escola do Parque. It offers street children a faster course and is financed by the government through the Education Foundation of Brasilia, while run by an NGO. Another one is a more original partnership between an NGO, Projeto Axé, and the municipality of Salvador, in the state of Bahia. Axé is one of the most notable organisations working with street children, and

\textsuperscript{707} Findings based on literature on the following organisations in Rio de Janeiro and/or interviews with some of their representatives: São Martinho, Vem Pra Casa, Projeto Uerê, Se Essa Rua Fosse Minha, Childhope, Pastoral do Menor, Ex-Cola, Task Force Brasil, MNMMR, Terra dos Homens, Fé e Alegría, IBISS, Cruzada do Menor, Roda Viva. Some of these organisations, such as the latter one, do not deal with street children specifically any longer.

\textsuperscript{708} Interviews with Sento Sé (note 654) and Leite (3.12.02).

\textsuperscript{709} Numbers in Leite, \textit{Meninos de Rua - A Infância Excluída no Brasil}. 
has been cited as a success internationally.\textsuperscript{710} It functions like most street children’s NGOs, but goes beyond helping street children to leave the streets. It has integrated street children’s education within public schools, and developed a special pedagogy, the Pedagogy of Desire, to suit street children. The municipality has adopted Axé’s pedagogical methodology, and the NGO provides training for public school teachers. Street children therefore receive specialised education in regular schools, as well as non-formal education, such as music, dance, or production workshops from Axé. According to Rita Ippolito from the Ministry of Justice, Axé is Brazil’s best experience for street children, because it has achieved the insertion of the problems of street children into public policy.\textsuperscript{711} One downside of the project is that it requires students to be sponsored by their legal guardian to be enrolled in public school, which can be difficult for those street children who have lost contact with their family.

Other interesting projects have been developed through NGO-government partnerships in the area of education. While they do not target street children specifically, two are worth mentioning. The Solidarity in Literacy Program (Alfabetização Solidária)\textsuperscript{712} works in municipalities that have low level of literacy, and in big metropolitan areas, where higher literacy rates mask lower rates within favelas. The interesting characteristic of the programme is that it associates different partners: universities train teachers; the municipality provides infrastructure; and private companies provide funds. Street children can benefit from the programme if a local NGO mobilises them and uses the programme. Alfabetização Solidária is not an alternative to schooling, but a first step in the literacy process, the only way in which the government supports and recognises non-formal education.\textsuperscript{713} Making Room (Abrindo Espaços)\textsuperscript{714} focuses on the problem of violence and uses school to create a culture of non-violence among youth. It is a pilot project of schools that open on week-ends to offer children extra-curricular activities. This discourages children from getting


\textsuperscript{711} Interview, Department of the Child and Adolescent, Ministry of Justice, 13.12.02.

\textsuperscript{712} Alfabetização Solidária started in 1997 as a governmental project linked to Solidarity Community (Comunidade Solidária) - a public-private joint effort dedicated to the promotion of citizen participation and partnership between the state and civil society to help fight poverty in Brazil, but became an NGO in 1998.

\textsuperscript{713} \textit{A capacitacão docente em debate – Revista do Programa Alfabetização Solidária}, vol.1, no.1; interview with Tatiana Gebrim Teles, Alfabetização Solidária, 13.12.02.

\textsuperscript{714} The programme has different names in the states and municipalities where it has been applied (e.g. “Schools of Peace” in Rio).
involved in violence, and improves their perception of school. Some communities have taken up this project on an individual basis, based on UNESCO’s research. These initiatives seem to be based on the afore mentioned CIEPs, which offered all-day schooling, including meals, tutorials, extra-curricular activities, counselling and medical services, in addition to the regular classes. CIEPs would also open on week-ends, offering recreational activities to local communities. According to their founder Ribeiro, these schools demonstrated that all children could learn, but that some need special assistance due to their circumstances. The CIEPs in their initial form have nearly completely disappeared, but are still in great demand by low-income working parents. Some CIEPs include residential facilities and are now part of FIA’s programme “Student Resident” (Aluno Residente), for children needing temporary shelter.

4. Ingredients for a sour dish – street children’s right to education in reality

The picture that is painted in the previous section must be mitigated with general problems in the implementation of the ECA and education. There is also a more specific ingredient that sours the picture – discrimination, which influences the perception of street children generally, and in the context of child rights and education.

4.1. General problems

4.1.1 Implementation of the rights of the child

While analysis of human rights problems in Brazil focus mostly on police violence, prisons, and indigenous populations, one can also add the implementation of the ECA to the list of human rights failures in the country. Despite much optimism
related to the ECA, Brazil has not lived up to its expectations. At the time of the visits in 2002, this author had to rely on development indicators, as well as national literature and interviews with representatives of different sectors of the population to assess the situation, as the CRC Committee had not yet monitored Brazil’s implementation of the CRC. It took Brazil ten years to prepare a report for submission because of blocked discussions between the government and civil society. Other reasons include the lack of knowledge about the CRC in Brazil. The ECA is not seen as a result of the CRC, but the consequence of the internal social movement. It is even suggested that the ECA outweighs the CRC, which is thus not needed as a reference point. This is contrary to the official version which portrays the ECA as directly inspired by the CRC, or by the Declaration on the Rights of the Child. In fact, Brazilians refer to the Declaration more than the Convention. The most widely cited Rio’s children’s judge, said that the ECA was based on the “Universal Declaration on the Rights of the Child”, and that all international principles were incorporated in the Statute.

Whether the Statute is perceived to be a result of the international child rights movement or only a national achievement, its correct implementation would advance the implementation of the CRC. The Statute’s main assets for implementation are the structures it establishes for monitoring and implementation – the Children’s Rights and Guardianship Councils. The establishment of these councils has been a slow and unequal process. Differences between states and municipalities are enormous in terms of the actual establishment of these councils and their effectiveness. Problems include NGO-government partnership, differences in political affiliation of city leaders and

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720 However, see Swift, op. cit. note 26.
721 See e.g. UNICEF, State of the World’s Children (op. cit. note 586) and Situação da Adolescência, op. cit. note 585.
722 The government’s preference was to submit one report, rather than separate governmental and non-governmental reports (interview with Human Rights Counsellor Ana Perez, Embassy of Brazil in London, 27.6.02.) In the end, an alternative NGO report was also prepared by ANCED and Forum DCA (Report of Civil Society on the Situation of the Child and the Adolescent in Brazil).
723 Interview with Irene Rizzini, 13.9.02; Impelizieri, op. cit. note 14: 15.
724 Interview with Gary Barker, Director of Instituto Promundo, Rio, 4.2.02.
725 See Perez, op. cit. note 589.
727 Interview (note 642), and Darlan, op. cit. note 598. The reference to the UN Declaration came up during several interviews with child rights advocates. According to Andressa Caldas from Justiça Global, there is very little knowledge about international law in Brazil (interview, Rio, 17.12.02).
728 See IBAM, Os conselhos de direitos da criança e do adolescente e os conselhos tutelares no Brasil: dados da pesquisa nacional.
insufficient funds. Although the federal government is responsible for the distribution of funds to benefit all councils, some municipalities lack the structures to use that money, and the decentralised model does not allow for smooth transfer of resources. Another factor affecting the implementation of the ECA is the lack of knowledge about the Statute among all segments of society. Child rights are not a widely accepted and understood concept, and they are still linked to juvenile justice. This can be seen especially in the public reaction to child rights inspired lenience towards juvenile offenders and the deinstitutionalisation of marginalised youth, with calls for lowering the age of criminal responsibility. Even the Public Ministry, which also has an important role in defending children's rights through the ECA, has been accused of inaction, and of focussing on juvenile delinquency. Teachers also oppose the ECA, because they are afraid that it would give children unlimited rights. There is also lack of knowledge concerning child rights mechanisms. Even if practically all councils are in place now, people are not aware of them and do not know how to use them. The lack of knowledge is true for professionals too, such as teachers, social workers, psychologists, the police, and judges. Another reason put forward for the difficult implementation of the ECA is civil society's difficult participation, as the whole country is used to top-down initiatives, management and decision-making.

730 Interviews with Barker (note 724) and Barros (note 571), according to whom most municipalities oppose the ECA. See also Swift, op.cit. note 26: 32.
731 Klees et al., op.cit. note 627; interviews with Darlan (note 643) and Barros (note 571); Rizzini et al., op.cit. note 35.
732 Interview with Barker (note 724).
734 Interview with Pedro Pereira, Centre of Defence of the Rights of the Child and Adolescent of São Martinho, 17.12.02.
735 Interviews with Leite (note 708), Pereira (above), and a MNMMR street educator from Campinas, São Paulo, MNMMR Third National Meeting of Advocates, 13.12.02.
737 ECA Chapter V.
739 Interviews with Pereira (note 734) and MNMMR street educator (note 735). Similarly, the Ministry of Education has refused the inclusion of the ECA into the national curriculum (Interview with the President of the Commission on Human Rights and sub-Commission on Children’s Rights, Orlando Fantazzine, 12.12.02).
742 Interviews with Fantazzine (above) and Barker (see note 724). Many people believe the Councils to provide social assistance rather than defence of rights.
744 Jeffrey, “Life Changes Slowly for Brazil’s Street Children”, New World Outlook, May-June 1997; interview with Moema Miranda from the research organisation IBASE (16.12.02), who finds that the civil society has lost its edge since the adoption of the ECA.
Many studies also criticise the lack of real democracy in the country. Probably one of the worst problems is the lack of political will to advance the rights of the child. The existence of progressive legislation is conveniently used as an excuse to avoid action, and old structures are maintained. For example, FEBEMs still exist in certain municipalities. While many have changed their name, they have not changed their working methods. This is highlighted in the case of Adolescents in the custody of the FEBEM, which an NGO brought to the IACHR in 2000, and which concerns the terrible conditions of adolescents incarcerated in FEBEM units of São Paulo since 1992. The lack of political will is exacerbated by conflicts between different sectors of authority, such as the judiciary and the police, and the lack of pressure groups to maintain children’s rights on the political agenda.

4.1.2 Education

The achievements in the education sector reviewed in this Chapter have to be weighed against major problems that have been identified as repetition, causing an age-grade gap, over-enrolment and dropping-out. One document presents it bluntly: “Out of 100 students that start the first grade: 50 quit in the first or second year, 37 finish the fourth grade, 17 finish the eighth grade, 9 finish high-school, 6 go to university.” It is thus fair to say that educational attainment is low even though enrolment is high, which does not make Brazil compliant of the CRC provision on education. Indeed, the country had an apparent intake in primary education of nearly 170% in 2002, due to repetition and late entry. Repetition causes students to drop out, as it has a negative effect on students’ self-image and performance. Despite these facts, there are very few programmes tackling these issues, which are intimately linked to enrolment rates. Bolsa Escola is the federal government’s main, if not only, programme to reduce

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744 Bay, op.cit. note 578.
745 Klees et al., op.cit. note 627.
748 Klees et al., op.cit. note 627.
749 Jeffrey, op.cit. note 742.
750 See Initial Reports to the ICESCR (op.cit. note 581: 760) and the CRC (op.cit. note 612: 478).
751 “Schools and Education in Brazil”, <www.brazilbrazil.com/schools.html>.
752 According to CRC Article 28(e).
754 See e.g. Birdsall & Sabot (eds.), Opportunity Forgone – Education in Brazil.
dropout rates,\(^{755}\) and it addresses only the issue of children’s need to work to support their families. Helping families financially does not improve the adaptability and acceptability of education, which are inadequate for many reasons, such as deficient teacher training,\(^{756}\) causing repetition and drop-out. Repetition has a repercussion on the cost of education, which has been addressed in some states by eliminating repetition, with the result of having children finish primary schooling illiterate.\(^{757}\) Additionally, the impressive enrolment rates have to be analysed in the context of differences based on region and children’s socio-economic backgrounds. Unequal educational achievements are recognised in Brazil’s initial report to the ICESCR Committee.\(^{758}\)

Moreover, the bottleneck in education is caused by neglect of other types and levels of education. Secondary education is especially of bad quality in Brazil, and according to Barker, it is worse than in poorer South American countries.\(^{759}\) Few students manage to pass the examinations necessary to enter university, unless they can afford private tuition. Even the government admits that the best secondary schools are private and expensive, and restrict poor students’ access to universities.\(^{760}\) Higher education is better, but only accessible to the elite. Vocational education has also been neglected, and there are very few programmes. Moreover, these fall under the Ministry of Labour, and are therefore detached from educational efforts.\(^{761}\)

While the government and UNESCO hail the country’s educational achievements, scholars and NGOs are more critical. For example, many authors have criticised the lack of collaboration between NGOs, municipalities and states. According to Dos Santos, “the Constitution neither established a clear division of responsibilities over primary education between states and the municipalities, nor addressed the problem of regional and intra-regional disparities in education”.\(^{762}\) The model of decentralisation and the size and heterogeneity of the country can indeed be problematic

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\(^{755}\) Other programmes could be mentioned: Garantia de Renda Minima (guaranteed minimum income), Merenda Escolar (school lunch), and Programa National do Livro Didático (national textbook programme).

\(^{756}\) See Schwartzman, op.cit. note 718.


\(^{759}\) Interview (note 724).


\(^{761}\) Interview with Yvonne de Mello, Director of Projeto Uère, 3.4.02.

in the area of education, as the role of the federal government is only to provide technical and financial assistance to the states and municipalities for the development of their educational systems and for the priority attention to compulsory schooling. Moreover, UNESCO finds that lack of resources is a serious obstacle to achieving results, and this is reflected in budgetary retreats. This kind of problem is not accepted by some authors, who consider Brazil a rich country and find that the problem lies in the government's priorities.

UNESCO acknowledges these critiques, but encourages the government to prioritise access to education before tackling its quality. Moreover, UNESCO criticises detractors for only attacking the federal government, while there is more will to improve the situation at that level than at municipal levels, where development depends on the people in charge in municipal governments. Indeed, the Brazilian public educational system has been accused of being corrupted because of clientelismo, which is most apparent in municipalities. UNESCO also finds that each organisation or sector of society that voices criticisms has a very narrow agenda. For example, some are only interested in special education, while others criticise youth and adult education. However, it is only logical that organisations and individuals specialise and voice their concerns in specific areas. This provides a more professional and accurate picture of each educational area separately. It is the responsibility of the government to consider all these criticisms and suggestions and use them to develop general and specialised policies.

4.2. Problems related to discrimination

4.2.1 Discrimination against street children

The perception of children by the general public and authorities has determined actions for them. The existence of street children has been acknowledged in Brazil for a long time, and they were always seen as a threat to society. With a practice of rounding

763 "Education in Brazil", op. cit. note 760.
765 See Mickelson, op. cit. note 20: 30.
766 Interview with Mariani (note 715).
767 See Mickelson, op. cit. note 20; Plank, The Means of Our Salvation. Public Education in Brazil, 1930-1995; Stromquist, op. cit. note 446; Verhine, op. cit. note 189; Dos Santos, op. cit. note 762.
768 Alston also recognises that it is in the very nature of NGOs to have specific agendas and to advocate for specific policies ("Beyond 'Them' and 'Us': Putting Treaty body Reform into Perspective", in Alston & Crawford (eds.), The Future of UN Human Rights Treaty Monitoring).
up street children and placing them in institutions, and the discriminating ambit of the Minors' Code, legislation and practice, before the adoption of the ECA, thus clearly discriminated against children who were found outside the family context. Today, despite the development of the rights of the child, public perception of street children has not changed. They suffer from discrimination on several grounds, often because of poverty. Belonging to the lower social classes affects people's education levels and access to services, for instance. Another ground for discrimination, closely linked to poverty, is race. Discrimination on this ground has always existed in Brazil, but only recently it has been acknowledged in human rights circles. Street children also suffer from discrimination because of their severed family links. This is apparent in people's fear of children who are not controlled by adults. Of course some street children get involved in crime, but it would be unfair to single them out, as they are not representative of Rio's growing drug-related criminality. In the last few years this fear has manifested itself in calls for the institutionalisation of street children, who have been roaming streets more freely since the adoption of the ECA. Police roundups are often the result of requests from specific communities to have their streets "cleaned". While death squads have become rarer since the publicity brought by the "Candelaria massacre", street children do not escape violence from the police. An incident of shooting of street children in 2003 by military and civil policemen had the backing of all authorities involved. In line with this official attitude, calls for the reduction of the age of criminal responsibility are backed by many politicians, such as the Municipal Councillor of Rio de Janeiro who heads the Commission on Children's and Adolescents' Rights. While he recognises that children and adolescents in conflict with the law are manipulated by adults, the Councillor believes that society needs to be protected from them, by sending those adolescents to prison, and reducing the number of street children. As sixteen-year-olds are allowed to vote, they should be responsible for their acts. The Councillor clearly has not considered the fact that marginalised people, such as street children, probably do not vote, while they are more likely to be pushed into criminal activities than their more fortunate peers. Such testimonies of

770 Interviews with Leite (note 708) and Miranda (note 742).
772 See Chapter II.
773 Information received from São Martinho's Legal Defence Centre on 28.02.03.
774 Interview, op. cit. note 47.
775 See also Report of Civil Society, op. cit. note 722: 65.
discrimination against street children abound, and all those who work for street children are able to tell that their situation has not changed much with the advent of the ECA.\footnote{776 See Cordeiro, op.cit. note 622.}

Some of this discrimination might be based on the view that street children received excessive attention during the 1980s and early 1990s,\footnote{777 See Chapter II.} with high numbers of shelters and NGOs working for street children.\footnote{778 See Valladeres & Impelizieri, Invisible Action: A Guide to Non-Governmental Assistance for Underprivileged and Street Children of Rio de Janeiro.} In the 1980s street children served as a cause to push for child rights in the country, and once the legislative goal was achieved, they lost much of their importance. The MNMMR was therefore more of a tool for reformists than a movement initiated and run by street children.\footnote{779 Interview with Rizzini (note 723), and information received in English from MNMMR.} It is also evident that the measures taken for street children had not produced the desired effects, as they were based on simplistic assumptions, such as the need to save street children and to send them back home and to school. An additional problem came from trying to assess the impact of projects on street children, while the complexity of their situation, their fluctuation between locations, the unreliability of numbers, and the difficulties in monitoring their situation after their reintegration into schools and home, made the identification of quantitative and qualitative indicators too complicated. Indicators identified by funders, such as success in school, were too simplistic, as well as unrealistic for individual programmes.\footnote{780 See Gambone & Arberton, Safe Havens: The Contribution of Youth Organizations to Healthy Adolescent Development, 3.} Because of inevitably poor results, especially at short term, funding has been reduced for street child projects, leading many former street children’s organisations to widen their target group.\footnote{781 Information from Cruzada do Menor, <www.cruzadadomenor.org.br/oquee.htm> is typical of this tendency. After years of assistance to children with tuberculosis from 1920 to 1985, the organisation shifted its attention to street children, a lucrative topic, and to a wide target group in 1994.} This includes the main street children’s organisation – MNMMR, and its understanding of street children now includes all destitute children.\footnote{782 However, there are debates within the Movement as shown in discussions at the Third National Congress of Advocates, Brasilia 13-15.12.02. The President of the MNMMR is of the opinion that the Movement should not lose sight of its original purpose and should focus on street children (Interview, note 576).} This is in line with the new tendency to focus on preventive measures, which are essential, but which by nature exclude street children. Clearly this discriminates against street children, as there is less research about their...
situation, while they are included in general poor children’s programmes that are not likely to reach them.\textsuperscript{783}

4.2.2 Discrimination and child rights law

Street children are not only discriminated against in practice through people’s attitudes, but also in relation to law. Several observations have to be made concerning the contents of the ECA. First, the Statute emphasises the role of the family, which has been defined in the ECA as “the community formed by the parents or either one of them and their descendants”.\textsuperscript{784} This is thus a narrow definition, which cannot be interpreted to include street children’s support group. Similarly, all other forms of relationships identified as “Foster Family” are formalised and strictly regulated.\textsuperscript{785} The Statute, therefore, does not seem to recognise autonomous children and their need to have access to means of independent living. The role of the family is also important in shelter programmes, where NGOs are to preserve the child’s family bonds and to integrate the child in a foster family when the family of origin cannot afford to keep him.\textsuperscript{786} No alternative options are considered for the time when children need to leave the shelter, such as other forms of communal or independent living. Although provisions on shelter programmes are quite extensive, there is no mention of commonly used day-centres, which offer street children direct services without requiring commitments.

Even some of the articles of special significance to street children contain elements of discrimination. Provisions on work are not clear about the child’s rights in work. They prohibit work for children under sixteen, except as apprentices\textsuperscript{787} and state that labour and social security rights are ensured to apprentices over fourteen.\textsuperscript{788} Aside from the ECA, Article 405 of the Consolidated Labour Legislation (CLT) also regulates child work and bans certain types of work for adolescents.\textsuperscript{789} This includes street work, except when authorized by a juvenile judge.\textsuperscript{790} Most street children thus live in an illegal situation.\textsuperscript{791} The ECA clearly provides no protection to children working in the non-formal sector. It does not address some children’s need to work or to receive

\textsuperscript{783} For an opposite view, see Rizzini \textit{et al.}, \textit{op.cit.} note 35.
\textsuperscript{784} Article 25.
\textsuperscript{785} Custody, Guardianship and Adoption.
\textsuperscript{786} Articles 92(I),(II).
\textsuperscript{787} Article 60. Constitutional amendment No.20 raises the right to work to sixteen (previously fourteen), and the right to an apprenticeship to fourteen (previously twelve): Initial Report, \textit{op.cit.} note 581: 346.
\textsuperscript{788} Article 65.
\textsuperscript{789} Decree-law No.5452, 1.5.1943, last amended in 2005.
\textsuperscript{790} Initial Report, \textit{op.cit.} note 581: 341.
\textsuperscript{791} The government recognises that child work is on the rise, underpaid and unprotected. \textit{Ibid.}, 337.
vocational training, except for those over fourteen. The restriction on economic rights can also be understood in Article 15, which identifies children as "subjects of civil, human and social rights guaranteed by the Constitution and in law". Political and economic rights may be included in human rights, but their omission was probably intentional, as they do not traditionally apply to children.\textsuperscript{792}

Another article with discriminatory effects on street children, is the right to go, come and remain in public places and community spaces, except as determined by legal restrictions.\textsuperscript{793} While this right seems favourable to street children, one cannot overlook the meaning of "legal restrictions". Restrictions include the prohibition to stay on the streets, and the right is really that of coming and going to get from one point to another. According to Judge Darlan, the street is no place for children.\textsuperscript{794} This view is shared by all those providing programmes for street children, as their main object is to get children off the streets. Especially in the case of government programmes, children are to be removed forcefully from the street if they do not cooperate.\textsuperscript{795}

The most flagrant proof of discrimination against street children is in the part of the ECA dealing with children in need of protection or socio-educative measures. As these two groups are dealt with together in a separate part of the Statute (Parte Especial), whose provisions concentrate on juvenile offenders,\textsuperscript{796} it is clear that there is still a focus on children in "irregular circumstances".\textsuperscript{797} Protection measures are to be taken when rights guaranteed by the Statute are violated by act or omission of the society or state, by fault, omission or abuse from the parents or guardians, or by reason of their conduct.\textsuperscript{798} The measures listed legitimise the general policy to reintegrate children in their families or shelters. While the measures are not theoretically punitive in

\textsuperscript{792} It is important to specify that in Brazil, children can vote at sixteen and they are capable of personally performing acts entailing civil responsibility. Between 16 and 21, they can contract obligations, with authorisation from their legitimate representatives. Generally, children are legally incapable until eighteen, except by parental concession, a judge's decision, marriage, the holding of a public job, completion of junior high school, graduation from a higher education institution, or the setting up of a civil or commercial business with their own resources.\textsuperscript{793} Article 16(l).\textsuperscript{794} Interview (note 643).\textsuperscript{795} Magalhães et. al, op. cit. note 228. There are even groups of volunteers who assist the municipality and the police by helping to collect the children and sending them home or to shelters (Interview with a volunteer (Rio, 10.12.02), who had seen busloads of street children taken away, without knowing where they end up).\textsuperscript{796} See Adorno, op.cit. note 618: 112; Cordeiro Santiago, "Reflexões sobre o Estatuto da Criança e do Adolescente", \textit{Curso de Direito}, <http://www1.jus.com.br/doutrina/texto.asp?id=1644>, \textsuperscript{797} See Cordeiro, op.cit. note 622.\textsuperscript{798} Articles 98-102.
nature, the fact that they are imposed on children without provision of children’s participation gives them a repressive tone. As to street children’s educational rights, acknowledged throughout this part of the Statute, the provisions give no information on the type of education that should be provided, and no indication on the recognition and status of non-formal education. The assumption is that organisations running these shelters are to enrol children in public schools and offer them additional activities. Moreover, education in this context can be considered more as a measure of “social hygiene” than a child’s right.

The insistence by child rights advocates, such as Judge Darlan, that the Statute is for all children, and not just poor children, is therefore not very convincing. The ECA deals with street children separately from the general provisions, but not specifically enough to address their particular problems. It lumps street children together with other children living in poverty, often in conflict with the law. The Statute thus fails to address either of the principles of non-discrimination, which are equality and special attention. It has neither succeeded in mainstreaming street children’s rights within child rights, nor has it dealt with them separately. Instead, it has mainstreamed them within rights applicable to children in “irregular situations”.

4.2.3 Discrimination in education

“Education is bad for all children, it is worse for the poor and worst for the marginalised.” Despite its clear formulation in the 1988 Constitution and the LDB, and its inclusion in the ECA as a right benefiting all children, education is a right that discriminates against street children in its formulation and implementation. Discrimination against street children takes direct and indirect forms and affects the accessibility, acceptability, adaptability and availability of education. All these forms of discrimination add to the generally grim picture, proving the quasi-impossibility of educational success for marginalised children. The educational problems of street children have been recognised by the IACHR, which asked the government to “Protect the life and integrity of ‘children of the street’ and ‘children in the street’ and adopt effective measures to promote their education, rehabilitation, and integration into society.”

799 Cordeiro, op.cit. note 622.
801 Leite, interview (note 708).
Concerning accessibility of education, street children lack access to a recognised form of basic education in Brazil. First, they need a legal guardian to register them at school, which is impossible during their street life. Children also need to be registered by their parents to other educational programmes, or referred to them by a children’s judge. Second, children can be denied entry to school for lack of identity papers. A person without identification is considered a marginal and has no claim to services. Many street children do not have such papers, and many lack birth registration. Only street children who stay in shelters can have these problems solved, as the organisation running the shelter becomes temporarily their legal guardian. This is especially the case for organisations that have a legal centre for the defence of children’s rights. Other organisations can take the cases to the Guardianship Council on behalf of a child. However, even with the help of such an organisation, registration can be problematic. According to a lawyer from São Martinho’s defence centre, the law on the gratuity of civil registration, which has been in force for four years, is still not always implemented in practice.\(^803\) He also cites pregnancy as an additional ground for discrimination in access to education, which is likely to affect street girls. Another issue is that of the accessibility of private schools and tuition, which seem to be the only way for children to progress at school. However, the government does not provide scholarships for private education, and only a few organisations offer such possibilities for street children. The only governmental financial help is the programme Bolsa Escola, which gives money to parents for every child they send to school. This is more of an incentive for parents to help combat child labour, than an incentive for the child to go to school.\(^804\)

Accessibility is linked to the availability of education. The fact that street children have to get to services, instead of services coming to them, is a classic approach of street children’s programmes.\(^805\) It has been accepted that street children are most likely to use services if these come to their living areas. The issue of availability also includes the existence of catch-up courses for children who have not completed

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803 Interview (note 734).
804 The programme has been criticised for inefficiency and waste of resources, as it has been abused on many occasions (Interview with Fantazzine, see note 739). Yet, it is much praised by the government and UNESCO (Interviews with Mariani (note 715), and Olga Salgado, State Secretariat for Social Action and Citizenship (SEASC), Rio, 5.12.02). See also Werthein, Children and Youngsters in Need: Lessons drawn from UNESCO/Brazil.
805 The exception is street educators who can direct children to the right services.
their primary education. While the government does provide such courses free of charge, the LDB regulates the entry of youth in these courses to those fifteen and over. This means that younger adolescents who might have no education or only one or two years of schooling have to go to regular schools, where their age difference will make their chances of success less likely. Another gap in the availability of education is the lack of vocational training, as discussed earlier. Special education is not available to street children either, as it is understood in its narrow sense.

This aspect is clearly linked to the adaptability of education. Street children receive non-formal education on the streets and in day-centres. Non-formal education is not recognised by the government and can only be of a supplementary nature to reinforce formal education, or to include sports, culture and leisure activities. This is despite the proven fact that non-formal education, understood as including alternative teaching methods, is what works best for street children. This has been demonstrated in some cases in Brazil, such as the experience in Rio with Tia Ciata or the programme developed by Projeto Axé. As Sento Sé said, such education would be ideal within the public education system, as the school needs to adapt to the child instead of the child to the school. A child who is not able to adapt will become marginalised first within the classroom, and eventually in society. Many other people share the opinion that schools need to be flexible in their curricula and methods, and teachers trained to adapt to street children's needs. In fact, as the bases for this approach are already recognised in educational legislation, such a change would only require political will and budget for teacher training. Political will does not exist, and the government persists in keeping with old methods and inflexible rules. NGOs requesting to have a public school in their programme's premises, have been faced with refusal on the grounds that a school

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806 In accordance with ECA Article 54.
807 See the discrepancy between the EFA 2000 Assessment (op. cit. note 225) and national legislation (ECA Article 54 III).
808 The fact that the government does not want to recognise non-formal education is confirmed by the World Bank, which also considers that NGOs should not implement educational programmes (presentation by Senior Education Economist: “Bolsa Cidada: Innovative Brazilian Program to address street children”, Washington, 9.1.2001). While some non-formal education projects are supported by the government, the country provides no information system on such education, making it difficult to estimate the number of programmes developed, people affected, and other quantitative aspects (information from UNESCO's Education Sector, Brasilia, 19.03.03).
809 See Chapter II.
810 Interview (note 654).
811 For example Leite (interview, note 708), Miranda (interview, note 742), and Ippolito (interview, note 711).
812 See the LDB and resolutions CNE/CEB (op. cit. notes 689, 696).
813 See Soares “Quality and Equity in Brazilian Education”, Seminar, University of Oxford, 11.2.03.
814 See Wong & Balestino, op. cit. note 20.
cannot exist in a NGO. Projects that receive funding from the government are only the ones that can cooperate with the government, with the price of losing their independence.

If public schools are not adaptable, they are not acceptable either. The contents and methodology of teaching are too far from street children’s experiences, contrary to the provisions of educational directives. This is true for most children from poor backgrounds. Brazilian culture is not recognised as one including the culture of people form an African or Indian origin, and even less a street culture. The curriculum thus embeds racism and discrimination against poor classes. Moreover, the quality of education is low irrespective of cultural sensitivities. In the words of Fantazzine, 97% of access to school does not mean 97% of access to education. He finds that education requires addressing certain basic elements, such as nutrition, health and housing. Even without these, the quality of education suffers form the low status of teachers, which contributes to teachers’ lack of interest in students. The problem is exacerbated in the NGO sector. Because of the situation, teachers are not motivated and can go on strike for extended periods of time. The fact that in the past two decades the middle classes have left the public school to send their children to private schools speaks volumes about the quality of teaching in public schools.

Improvements in availability, adaptability and acceptability would require the allocation of resources, either through an increase in resources allocated, or the redistribution of money. However, this is unlikely to happen in a way that would benefit street children, especially that they are of no concern to the Ministry of Education, and there exists no policy concerning street children’s education. For example, most

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815 Interview, note 761.
816 Epstein’s view supports this, as he states (referring to Brazil): “Non-radical NGOs get government support and preferential treatment as long as their activities are viewed as non-threatening and protecting the status quo” (op.cit. note 20: 299). Also, interview with Miranda (note 742).
817 Interview with Lidia Leite (note 708).
818 Interview, note 739.
819 Interview with Leite (note 708).
820 According to Miranda, educators are from poor backgrounds with little pay and training, having to do the job that the government refuses to do (interview, note 741).
821 It is notable that Rio’s juvenile judge of first instance ruled on 8.10.2002 that teachers on strike would have to resume teaching in Rio’s federal secondary schools, or have to pay a fine for each student left without instruction. This was based on the right to education guaranteed by the ECA. The decision would have been more constructive had it made the government responsible for the action of the teachers. O Globo, 9.10.2002.
822 Every time this author tried to approach someone from the Ministry of Education at the federal, state or municipal level, she was either ignored or referred to the departments dealing with social development.
federal government programmes to fund education target the poorest regions and municipalities, but none of these will affect most of street children, who live in big cities, i.e. in wealthy municipalities. As to different levels and forms of education, priority is given to primary education, which is the responsibility of municipalities. This is an improvement from the previous tendency to favour higher education, but it does not include remedial education or basic education given outside primary schools. Catch-up classes and EJA are not likely to be well funded, as the general principles on funding of education in public schools do not apply to them. They fall under the jurisdiction of the federal government, which is more likely to favour higher education.823 Literacy courses are in fact considered separately from education, and are for people over fifteen only.824 While the government fund some programmes to improve education, these have been described as inefficient, costly and not benefiting all children.825 Lack of resources is therefore not a reason for the lack of adequate programmes, but rather inefficient use of resources.

Conclusion

One must recognise great improvements considering different aspects of children's rights, education and attention to street children in Brazil. Street children have benefited from the child rights movement, especially with the awareness of the ECA.

You can hear kids on the streets today say they're going to the council to complain. You can hear kids, when they're detained by the police demand to know charges against them. You can hear kids cite you chapter and verse about their right to live on the street if they have no other place to go. You never heard this ten years ago. So there is a beginning of a change in consciousness... at least the denial of these rights is being discussed.826

Unfortunately, this achievement cannot be taken for granted. Although there is great potential to move forward, steps have already been taken back in the tendency to

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823 Catch-up classes, physical education, sports and special education absorb only 2.9% of expenditures in the field of education (Initial Report, op.cit. note 581: 778).
824 While 10.11% of children aged ten to fourteen are illiterate, compared to 5.36% of those between fifteen and eighteen (EFA 2000 Assessment, op.cit. note 225: 6).
825 Interviews with Leite (note 708) and Fantazzine (note 739).
826 Guirgel cited in Jeffrey, op.cit. note 742.
mainstream street children, not within main children’s rights, but among all children in
difficult circumstances. Their best interests are not analysed, rather, street children are
identified as actual or potential juvenile offenders. This need not be the case, as Brazil’s
laws and some of the regional policies offer great potential for street children, including
the right to receive basic education after the age of compulsory education; provision of
night-time education for working children; provision of supplementary programmes,
such as health and food programmes; the encouragement of research to find ways to
include those excluded from education; and the right to vocational training. Education
also has an important role as part of protection and socioeducational measures.

Even if the economic climate does not allow the country to spend more on
education, much could be achieved with rethinking the spending priorities in the field of
education. For example, teacher training would improve education for all children
generally and street children specifically. One should also include children and teachers
in reforms. What is needed is political will, which cannot develop without a more active
and critical civil society. As many child rights or education specialists have suggested,
schools need to adapt to children. If these were run with the help of NGOs, making non-
formal education part of public education, the cost would be minimal. Such experiences
should be formally part of a national policy, if not included in a law, so that they need
not depend on favourable political conditions at the local level and on a few activists.
CHAPTER VI
Concluding discussion: challenges and ways forward

This concluding chapter presents a synthesis of the previous findings concerning street children's specific situation, their place in international law, and provisions on non-discrimination and education that can be used to protect their right to education. The chapter also summarizes the situation of street children's education at the national level by examining problems related to the implementation of international law. Analysis of these findings will help to draw links between the theory and practice of the application of the right to education to street children. To further explore the sufficiency and relevance of international law to street children, the chapter examines how international law can be used to improve the implementation of street children's right to education and to develop understanding of the right to education. In doing so, the discussion addresses the potential of existing instruments and mechanisms, which needs to be weighed against the possibility of creating more appropriate and efficient ones, and draws conclusions that set the tone for future directions.

1. International legal framework and national implementation: synthesis of findings

1.1. Street children and international law approaches towards the protection of groups

Chapter II described street children's common characteristics using existing literature from around the world in the fields of sociology, anthropology, education and health. It came to the conclusion that street children come from different backgrounds and might lead different lives on the street, fluctuating between street life and more stable life, but that one characteristic exists that allows defining them as a group: their independence. Because these children have become used to an independent way of life, they find it increasingly difficult to readapt to an institutionalised life and to social rules. This characteristic has a bearing on their educational situation and requirements for their educational success. Most of these children have little primary education and do not receive any formal education during their street life. It is in fact difficult to assume that independent children could be required to follow formal education in the same way as other children. Education that is best adapted to street children is non-formal, which allows for flexible curricula, times and places of education. It should specifically take
into consideration street children’s life, survival and development in a context of street life.

It can therefore be inferred that education can be used to illustrate street children’s special situation and de facto group status. However, as this thesis argued in Chapters II and III, international law has not recognised street children as a specific group, although some non-binding instruments mention them. This lack of formal recognition is contrary to the steps that have been taken in international law to address the specific circumstances of other groups, whose rights have not been protected sufficiently in general human rights instruments. These groups include, inter alia, racial minorities, refugees, women, and more recently indigenous people, persons with disabilities and child soldiers. In fact, the tendency to mention street children separately has been decreasing rather than increasing since the mid-1990s, and the aforementioned non-binding instruments have not been used as a first step towards the recognition of street children’s group status. One reason for this could be the narrow view of street children’s lives that these instruments help to propagate, or references to them merely as examples within lists of children in difficult circumstances. Another reason can be found in the double trend in international law, which was explained in Chapter II: one trend increasing the number of groups needing special attention through specific instruments and mechanisms, and the other limiting the creation of new rights and mainstreaming groups within existing human rights systems.

The first trend recognises differences in people’s situation and the lacunae of general human rights instruments in protecting rights of all. To explain this it can be noted that the first human rights instruments were the result of discussions among a limited number of countries, which were not representative of all regions, cultures and levels of development. Moreover, these instruments were mostly discussed and adopted by men from the leading groups in society. This has resulted in a lack of essential viewpoints reflected in instruments, notably those concerning ethnic and social origin, gender and age. Even the CRC was discussed among adults and did not receive significant inputs from children, while NGOs were actively involved, representing larger segments of society. Similarly, the most marginalised disability groups, such as

827 See especially the evolution of UN GA resolutions addressing the issue of street children with its gradual shift from specific resolutions on street children to a simple reference to them among other children in difficult circumstances (note 419).
persons with serious, multiple or intellectual disabilities, were absent or underrepresented in the discussions on a convention on the rights of persons with disabilities. The most marginalised, such as street children, are the least likely to see their concerns reflected in general human rights instruments. This first trend remedies to the absence of viewpoints from all groups by the adoption of new instruments which include the concerns of those who have been ignored in general human rights instruments.

The second trend in international human rights law is mainstreaming – avoiding singling out groups, which can lead to their stigmatisation and marginalisation. This approach considers the term “vulnerable” degrading and contributing to seeing certain groups as helpless and in need of protection, rather than empowerment. The new trend is therefore to eliminate these groupings and special attention, which is considered as counterproductive and costly. Focus is on general empowerment of all individuals through their inclusion in development policies and community-based programmes. In this context, street children, who are simply regarded as children in difficult circumstances, are included in mainstream programmes for children living in poverty. Theoretically, this seems like a good way to achieve equality, but in reality it further marginalises street children, as mainstream programmes do not reach them. In fact, these programmes have no effect on street children, since they address the general causes of poverty, abuse and neglect that do not affect street children, who are not part of families and communities. These programmes assume that, in every case, children want to be saved from work, and that this can be done through educational and income-generating programmes targeting their parents. While poverty reduction programmes are valuable, especially in terms of preventing children from turning to the streets, special attention is necessary to protect the rights of street children. This author would therefore favour the first trend, which aims to guarantee human rights for all, and to fight discrimination against “vulnerable” groups through the adoption of new instruments and the adaptation of existing rights to suit the particular circumstances of these groups.

1.2. Protecting street children’s right to education in international law

Street children’s independence makes it difficult to apply general rights of the child to them. In Chapters III and IV, analysis showed that the rights of the child are based on the assumption that a triangular relationship exists between the state, the
parents and the child, making parents the intermediaries between the state and the child. Subsequently, many of the rights covered by the CRC are not applicable to street children as they are formulated. These articles presuppose the existence of parents or other legal guardians in the life of every child, and adequate guidance and support from parents for children to exercise their rights. The Convention does include provisions on children who do not have parents or who have been separated from their parents. However, these provisions do not consider the case of children who have left their families. Solutions offered, such as adoption and institutionalisation, are either unrealistic or undesirable in street children's situation. Of course, all other human rights conventions are also theoretically applicable to street children, as they are to all human beings, but, as Chapter III explained, children's minority status prevents them from exercising all "adults' rights", such as political rights or labour rights. This legal status is problematic for street children, who lead de facto independent lives. These children do not rely on legal guardians to protect and promote their rights, and they are prevented from exercising many of these rights on their own. In fact, because of common assumptions about children, had a special provision on street children been included in the CRC, it might have been inadequate because of insufficient understanding of the issue at the time of drafting. The provision would probably have been protective in nature, attempting to fit street children forcefully into the mould that society has fabricated for children. In the spirit of the CRC, children belong to a family; they should go to school and not work; and they should be cared for by responsible adults who listen to their children and consider their best interests when making decisions for them. With increased understanding of the situation and status of street children since the adoption of the CRC, this author considers that it would be appropriate to carry out further research in order to find solutions for the protection of street children's rights, based on the example of the right to education offered in this thesis.

As this thesis has demonstrated, the lack of formal recognition of street children as a group in international law has a definite bearing on their right to education. Chapter III showed that no international human rights treaty mentions street children specifically, and it is understood that the rights of the child, as embodied in the CRC,

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828 However, the list provided in Article 20 of the CRC is non-exhaustive.
829 As discussed in Chapter II.
830 See discussion on options infra.
offer the best protection of human rights to street children. Therefore, CRC Article 28 is understood to guarantee their right to education. However, as was argued in Chapter II, the right to education, as formulated in Article 28 (and in other conventions) only concerns compulsory primary education. While this is not specified in international law, education in the national context is generally understood as formal education limited to a specific age group.\textsuperscript{831} The right to compulsory primary education through the formal state education system does not take into account the reality of children who have to, and want to, work to earn a living; who have dropped out of school; and who thus cannot be expected to complete primary education within the official age limits. Most of these children are actually educated through more flexible educational programmes organised by NGOs, while such education is neither recognised nor regulated through legal provisions on the right to education.

Upon clearer examination of international law, however, provisions of relevance to street children in the area of education do exist. As Chapter IV demonstrated, many instruments can be used to interpret others, and certain provisions, such as the general principles of the rights of the child, can be instrumental in this regard. There are provisions in general international human rights law that can be used to support the basic guidelines for street children’s education, which consist of flexibility, adaptability and non-formality.\textsuperscript{832} The CRC especially shows the interrelatedness and interdependence of all human rights. For example, the right to education, street children’s right to development and their best interests should positively influence one another for the holistic implementation of the rights of the child. Provisions, such as the principle of the best interests of the child; the child’s right to preserve her identity, to be heard, not to be discriminated against, to receive education that develops the child’s personality, talents and abilities to their fullest potential; the need to reduce drop-out rates and encourage regular attendance; and the provision of different forms of secondary education, including vocational training, can be very useful for street children’s education. Such provisions can be utilised to support measures regarding flexible working hours, alternative teaching methods and curricula; the participation of street children in planning and evaluating programmes; the organisation of lucrative

\textsuperscript{831} In Brazilian legislation the ECA provides an exception, as it guarantees the right to education to all those who have not received primary education, regardless of their age. See Chapter V.

\textsuperscript{832} See examples of such provisions in Table 1, Annex I. The UNESCO Convention on Discrimination in Education is not part of this list, because it focuses on formal discrimination and condemns special attention to different groups. The Convention is critically analysed in Chapter III.
activities and the preparation for the formal job market; and the provision of additional services, such as those related to health, counselling, shelter and nutrition.

This thesis also explored the protection provided by non-binding instruments as part of international "soft" law. Chapter III showed in particular that there is a plethora of noteworthy guidelines in instruments, such as resolutions and outcome documents of international conferences, some of which include street children specifically in their provisions. Such instruments can be useful for the recognition of street children as a specific group, although they only tend to draw attention to the difficult situation of street children instead of addressing the particularities of their situation and offering alternative solutions. Moreover, emphasis is usually placed on the life and survival of street children, instead of the whole range of rights to which street children are entitled. Such limited focus is not conducive to the recognition of street children as a group with a special status affecting all areas of their lives. Instruments with a role in the international protection of street children’s right to education mostly come from specialised organisations. 833 While the work of these organizations does not necessarily follow a human rights approach, it can contribute to greater understanding of certain concepts within human rights and set standards in that context. The yearly reports of UNESCO and UNICEF are crucial for monitoring the status of children in the world, or the situation of education, 834 even though neither organisation has used them yet to report specifically on the situation of street children’s right to education. UNESCO has set important education standards, especially as part of its policy documents on “Education for All”, which call for flexibility in teaching, partnerships with civil society, focus on students’ needs and on excluded groups. 835 Some provisions even mention street children, and yet UNESCO has not developed guidelines or standards for their education, while it supports and develops programmes for street children. 836 Other instruments, such as relevant UN GA resolutions, treaty bodies’ general comments, and

833 See Table 2, Annex I. Table 2 does not include all pertinent provisions or instruments that have been mentioned in this thesis, only the ones that include key concepts and language for the implementation of street children’s right to education. The Salamanca Framework of Action (op.cit. note 224) is included as it has potential for wider application than only children with disabilities. 834 Especially relevant is UNICEF’s State of the World’s Children, (op.cit. note 586), which focuses on education. 835 The most detailed provisions are in the Dakar Framework for Action with its commentary (op.cit. note 202). 836 The UNESCO Education Programme for Children in Difficult Circumstances includes special projects for street children. Moreover, UNESCO regularly organises conferences and other events on street children.
outcome documents of world conferences provide a detailed framework that can be used to street children's advantage, because they reinforce the message contained in EFA.

In addition, using the “4-A”-scheme determined by the Special Rapporteur on the Right to Education (availability, accessibility, acceptability and adaptability) would be a helpful tool for the interpretation of the right to education. For example, availability can be improved through reach-out programmes to street children, and not assuming that street children can be sent to school away from their surroundings at regular hours. Best examples of education that reaches street children are street education programmes. The accessibility of education to street children implies that educational institutions should not have restrictions affecting street children, especially relating to registration, home address, birth certificate, family and personal situation, such as pregnancy. Education should also be financially accessible to street children. Not only should school fees be prohibited, but there should also be an understanding that street children need to provide for themselves. Education could therefore leave some time for children to work during the day, or organise lucrative education-related workshops, such as a sheltered business providing vocational training. For education to be acceptable, it has to be regulated, to respect human rights, and include quality control over contents, methods and staff. There is ample jurisprudence on the obligation of the state to ensure quality of education through elaboration of standards and monitoring of compliance to these standards, even when education is provided by private entities.837 As has been shown through examples and view of practitioners throughout this thesis,838 a very important aspect of education is its adaptability to the situation of street children. The contents of education need to respond to the type of knowledge acquired by street children on the streets, and build on that knowledge to make education relevant to street children’s lives, whether they decide to stay on the streets or not. Education should therefore be very practical, but also provide street children with universal basic education, allowing them to continue in mainstream education if they wish.

837 See e.g. Ingrid Jordebo Foundation of Christian Schools and Ingrid Jordebo v. Sweden, European Commission on Human Right, application no. 11533, decision of 6.3.1987, 1 EHRR, 125; State of Maharashtra v. Vikas Suhebrao Roundale and Others, Supreme Court of India, judgment of 11.8.1992, (1993) 4 SCC 435. In the Belgian Linguistics case, the ECHR stated that the right to education “by its very nature calls for regulation by the state” (op.cit. note 145: 5).
838 Especially in Chapters II and V.
1.3. National implementation: revealing the connection between theory and practice

While this thesis started by arguing that street children’s rights are not adequately covered by existing legal instruments, it also gave a glimpse of the potential of international law in protecting the rights of street children. It was thus necessary to examine whether, in practice, the implementation of the rights of the child leads to adequate protection of street children’s right to education through laws, policies and programmes.839

1.3.1 The relevance of the Brazilian case study

This author faced a multitude of problems in the process of examining the implementation of international law at the national level, and this led her to question the relevance of case studies. The main problem here lies in the choice of a case study, as it is difficult to compare the implementation of international law at the national level because of countries’ different political, legal and other systems, in addition to the differing situations of street children in all countries. From a legal point of view, a considerable distinction lies between monist and dualist legal traditions, even though the consequences of commitment to international obligations should be the same in every country, as was suggested in Chapter IV. Although the CRC Committee does not explicitly favour a particular legislative model, it has usually welcomed the approach of monist countries, which allow for an examination of the Convention’s implementation by national courts.840 It also welcomes steps to incorporate the CRC into national law when that is not automatic,841 and criticizes countries for not making the Convention part of domestic law, as this entails that the courts can refer to the Convention only for interpretation of national law.842 Brazil would theoretically fit into this favoured model, as it has a monist legal tradition and therefore recognises the CRC as part of the law of the land. Other models can also be successful. Drzewicki points to the extensive use of

839 This test of realisation of rights of street children takes us back to the history of the rights of the child, which were not realised through the implementation of the international Covenants, and this justified the drafting of the CRC. See Chapter III.
841 See CRC General Comment 5, op. cit. note 147: 20. Here the Committee adds that incorporation should mean that the provisions of the Convention can be directly invoked before the courts and applied by the national authorities.
international principles by national courts in dualist countries. This can lead to more effective implementation than in monist countries, where there might be lack of knowledge about international law by national courts, or where particular conventions or provisions are not considered as self-executing. For example, in South Africa the connection between human rights guaranteed in the country and internationally recognised human rights has been explicitly stated by the Constitution and the practice of courts, despite the country's dualist approach to international law. In Canada and Australia, where there is no such constitutional principle, courts have used international treaties, even those that have not been incorporated domestically, in statutory interpretation.

Another difference exists between centralised and decentralised political systems. As was suggested in Chapter IV, these national characteristics should not have a bearing on states' responsibility with regard to their implementation duties. In fact, treaty monitoring bodies have criticised some states for using the excuse of a federative system to ignore their international obligations. Chapter V showed how Brazil's federal system has affected the country's efficiency in terms of the implementation of legislation and policies. It is easy for the federal government to devolve responsibilities to state and local governments, thus denying its own responsibility in a variety of areas.

843 Drzewicki, "The Status of International Human Rights Instruments in Domestic Law", in Rosas (ed.), International Norms in Domestic Law, Finnish and Polish Perspectives, 1-14. National courts often have to determine whether a treaty provision is self-executing or not when a party relies on it to support a claim. Sometimes the court decision is contrary to a ruling by international courts. For example, the Paris Court of Appeal decided that Articles 6 and 13 of the European Convention did not have a self-executing character (judgment of 29.02.1980), whereas the ECHR considers all the provisions of the Convention to be directly applicable in states parties (see Vermeire v. Belgium, judgment of 29.11.1991, Series A, vol.214-C, 25). The French Supreme Court has also taken a negative stance on the direct applicability of the CRC (Cass. iere civ., 10.03.1993). This has been criticized by the CRC Committee (Concluding Observations on the Initial Report submitted by France, UN doc. CRC/C/15/Add.20, 12. For a contrast, see Concluding Observations on the Initial Report submitted by Chile, UN doc. CRC/C/15/Add.22, and Concluding Observations (Belgium), op.cit. note 843). See also Pas & Vandaele "International Human Rights Treaties and their Relation with National Law", in Verhellen, op.cit. note 7: 285-304; Alen & Pas, "The UN Convention on the Rights of the Child's Self-Executing Character", in Verhellen, op.cit. note 335: 165-186; Rosenezveig, "The Self-executing Character of the Children's Rights Convention in France", in Verhellen & Spiesschareit (eds.), Children's Rights: Monitoring Issues, 187-197.


846 See note 452.
This is what could happen in South Africa with the new Children's Bill.\footnote{The Bill (\textit{op.cit.} note 57) was drafted by the South African Law Reform Commission between 1997 and 2002. Since then it became the object of negotiations among various governmental departments and the Cabinet. There has been much controversy over the latest draft, which was split into two bills, the but s.75 Bill (Children's Act) was passed by the National Assembly on 14.12.2005. For different versions of the Children's Bill, see <http://web.uct.ac.za/depts/ci/plr/cbill.htm#top>.} The earlier version of the draft Bill covered the situation of street children with an unprecedented magnitude. For instance, the draft Bill dealt with shelters and drop-in centres for street children, and recognised children's sexuality.\footnote{Its Chapter 17 dealt with shelters and drop-in centres, including their registration, minimum norms and standards, and the role of municipalities. The Bill also provided for the confidential distribution of condoms to children. The areas of improvement for street children in this Bill are well analysed in Cockburn, \textit{op.cit.} note 80. Cockburn also notes important areas that have been neglected in the Bill, such as street work or programmes provided in shelters and drop-in centres.} The adopted version still includes some innovative points, such as the diversity of family forms in South Africa.\footnote{According to the draft Children's Bill, a "family member" can mean "...any other person with whom the child has developed a significant relationship, based on psychological or emotional attachment, which resembles a family relationship" (\textit{op.cit.} note 57).} However, since the interdepartmental process in 2003, drastic excisions were made to the Bill, and many important areas, such as those pertaining to street children, were removed from the Bill, because they were determined as belonging to the areas of competence of provincial governments. In concrete terms, this means that the national government does not recognise its responsibility towards the implementation of street children’s rights, and limits its action to the protection of the rights of the child in the most general terms.\footnote{See e.g. Proudlock, "Update of the Children's Bill" <www.childrenfirst.org.za>.}

Other circumstantial differences can also make it difficult to compare countries' achievements in the area of human right. For instance, the fact that South Africa, since the end of \textit{apartheid}, has been very committed to international human rights law is due in great part to the fact that human rights violations committed by the previous regime were the main tool used by the opposition during their liberation struggle. The new Constitution, therefore, reflects the need for universally recognised human rights to be guaranteed at the national level.\footnote{Liebenberg, \textit{Human Development and Human Rights – South African Country Study}, UNDP Human Development Report 2000 Background Paper.} Similarly, the Brazilian Constitution is an outcome of an internal struggle against an undemocratic regime, but the strengthening of the civil society in Brazil and the gradual weakening of the military dictatorship were an internal affair, compared to the international support received by the national liberation movements in South Africa. A lesser, yet valid reason for the use of international law as a base for national human rights in one country, and the reliance on national norms in
another country, is cultural and languistic. South Africa is part of the Commonwealth and English is widely understood among its people, while in Brazil, the great majority of people speak Portuguese only, and the country has historically had less important ties with the international community. This makes UN documents, like human rights treaties and comments from monitoring bodies, less accessible, as they are systematically disseminated only in the six official languages of the UN. In Brazil, for instance, the UN Declaration on children’s rights has been broadly disseminated in Portuguese, while the CRC remains widely unknown. The language barrier also means that the people of that country, including NGOs, are less active in providing information for and participating in international meetings, such as the yearly sessions of the CHR, or those of the CRC Committee. This and many other problems are of course not unsolvable, nor do they have the same impact on all countries, but one should be aware of them when addressing the implementation of international human rights norms in specific contexts.

1.3.2 Lessons learned from the case study

Literature from Brazil and other countries abounds descriptions of successful street children’s projects that respect the rights of the child, provide non-formal education and other constructive activities, and allow street children to “graduate” to a better life. This is because NGOs have been the main actors in developing and executing educational programmes for street children. Because of their specialisation, NGOs can target specific groups. Government priorities are very different and focus on quantity and cost-effectiveness. It is generally recognised that “policies on street children are virtually non-existent”.852 Governmental programmes target a wide range of children in few areas, focussing on poverty reduction, the prevention of marginalisation and the capacity-building of communities. There has been a decreasing interest in groups with specific needs, such as street children, as seen in the case of Brazil. These groups are not important enough because of their numbers, and they have no political power to claim their rights. Moreover, programmes for street children have proven to be difficult to run successfully, because governments are interested in short-term results and impressive statistics. When specific programmes for street children do exist at the government level, these tend to follow traditional approaches, favouring the containment approach through institutionalisation.

852 Ennew, op.cit. note 82: 412.
While programmes run by NGOs generally cannot be considered as part of states’ implementation of their legal obligations towards these children, the share of states in the implementation of these programmes has to be studied carefully. As was argued in Chapter IV, there are many ways of cooperation between governments and NGOs. Often, NGO programmes are at least partially financed by the government. In other cases, such as the programme *Vem pra Casa* in Rio de Janeiro, the government uses NGO programmes for the implementation of its own street child programmes. There is therefore real collaboration between the state and NGOs, which can show that the state is not ignoring its obligations towards street children, but rather it is using and supplementing existing experience and resources. However, one needs to be aware that in most of these cases the official link with the government makes NGOs less free to experiment, and as the case study of Brazil showed, NGOs tend to conform to governmental policies in order to attract funding and support. In some cases, NGOs simply have no choice and must implement governmental programmes, such as in Vietnam’s primary education programme. In other cases governmental support to NGOs is less direct, and might translate into indirect financial assistance, for example through tax cuts, or through the adoption of laws and regulations that create an enabling environment for NGO initiatives. Yet in other cases, governments recognise the validity of NGO education programmes, and thereby create bridges between non-formal and formal education systems. As some studies have pointed out, such support to NGOs is in the interest of states, who can satisfy their obligations towards street children without “reinventing the wheel”. It is also in the interest of street children, who benefit from education adapted to their situation. While NGOs in many countries count on the support of the government, this support is generally not systematic and tends to be limited to the municipal level. This means that the whole country is not covered, and that the central government itself is not involved. Furthermore, support usually only covers a small number of programmes. Many of these are so-called “jewel boxes” whose success and holistic and individual approach lie in their size, and makes their replication difficult. Some authors have criticised “jewel boxes” for their limited reach.

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853 See *supra* note 448.

854 It is interesting to note that the January 2003 version of the South African draft Children’s Bill (see note 57) presented the opportunity to establish a national strategy for children in especially difficult circumstances, including street children, which must “promote the engagement of non-governmental organisations in the development and the implementation of programmes and projects giving effect to those strategies” (paragraph 232(1/c)). This provision is unfortunately not included in the adopted version.
or, on the contrary, warned against trying to adapt them to larger scale projects. Clearly not all practices are replicable, but as Blunt argues, the principles of successful models are. States could therefore use these principles to develop their own programmes or to provide support to NGOs by building networks and providing training, for example. This would allow a greater number of children to benefit and to be integrated into state policies.

In addition to supporting NGO programmes, some states have adopted impressive legislation, the implementation of which would seem to be beneficial to street children's educational situation. Brazil is a good example, given its constitutional protection of child rights and its model child rights legislation. The ECA allows for concrete mechanisms to be put into place to ensure the implementation, monitoring and enforcement of children's rights. The country has also adopted a national plan for children and has generally endorsed the holistic approach that underlies the CRC. Many other countries have failed in this and laws on children, such as the UK 1989 Children Act, often only cover questions of child welfare, adoption and juvenile offenders. Ennew suggests that in order to examine legislation affecting street children, one should look at legislation concerning family life (e.g. registration, welfare system), employment (e.g. street vending, begging, conditions of work), law and order (e.g. right of assembly, alcohol and drug use) and laws affecting particular groups of children. To this list should be added education, housing, social security, and urban planning.

There are of course discrepancies between Brazilian law and international law, and Chapter V pointed especially to the general principles of rights of the child and the historical legacy of children in “irregular situations”. Despite different understanding and use of concepts of the rights of the child, the main problem concerns implementation. As Chapter V demonstrated, the crucial provisions on flexibility, research about best practices, students' needs and quality education generally have not been put into practice, as the state has contented itself with improving quantity in

856 Blunt, op.cit. note 20: 22. See also Chapter II.
857 This Act is very limited in scope and child rights principles have hardly been extended to other areas (see Lansdown & Newell, op.cit. note 208). It has been used as a model in some other countries, such as Bulgaria. The South African Child Care Act (amended in 1996) has also been criticised for not having been changed enough after the adoption of the CRC (See Sloth-Nielsen, "The contribution of children's rights to the reconstruction of society: Some implications of the constitutionalisation of children's rights in South Africa", 4 International Journal of Children's Rights, 323-344).
858 Ennew, op.cit. note 364.
859 ECA articles 54, 57, 58, 60-69, and LDB articles 3, 4, 15, 23-26.
education. More attention on quality education would reduce repetition and dropout rates, and this has only recently started to be recognised by different national actors. If the provisions on the flexibility of education and attention to students’ needs were properly implemented, this would have to result in specific programmes for street children, either through state programmes or strengthened cooperation between the state and NGOs. Strengthened cooperation should not signify the curtailment of the freedom of NGOs to innovate.

2. The potential of international law in protecting street children’s right to education

This section explores the potential of current international law instruments and mechanisms, as well as the need for new instruments and mechanisms to better protect street children’s right to education. Instruments cannot be seen separately from mechanisms and bodies, because instruments give legitimacy and substance to the work of human rights bodies, which in turn, through various mechanisms, bring instruments to life. Because of this dynamism, this section mostly focuses on mechanisms.

2.1. Options related to instruments

In Chapter III, this thesis looked at international instruments and their provisions that are of relevance to street children and their right to education. The findings show that existing human rights provisions do not cover adequately street children’s educational needs, and therefore they cannot ensure that street children enjoy the right to education. This section therefore explores the possibility of adopting a human rights instrument for street children. A new instrument could either codify street children’s rights – such as the right to non-formal education, or serve as a guide to interpret and implement existing rights for street children. Generally speaking, new rights or implementing guidelines should focus on the opposing factors that make implementation of the rights of the child difficult for street children: their minority status and their independence, their need for security and their refusal to settle down.

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860 A provision on the right to non-formal education would spell out the conditions and characteristics of such education, including quality requirements and links with formal education.
2.1.1 A binding instrument

Questioning the need to elaborate a new instrument pertains to all vulnerable groups that have been left out in the international legislative process. As earlier chapters explained, conventions on women, children and migrant workers, for instance, are the result of questioning the adequacy of the protection provided by general international human rights law to all groups. Recently, the CRPD was adopted by the UN GA, and a declaration on the rights of indigenous peoples – traditionally the first step towards a convention – is being considered.861 As the process towards new instruments on these two groups shows, there is recognition of the special situation of certain groups and concern for human rights violations against them. At the same time, very valid arguments against new conventions are being put forward.862 First, many countries have expressed the need to implement existing conventions before adopting new ones, a principle which is included in the 1993 Vienna Declaration on Human Rights.863 This point is valid, as a legion of conventions on every possible subject could detract attention from the most basic rights and make the task of monitoring impossible for international and national bodies. The existence of conventions with overlapping provisions, the scarce resources of the UN treaty monitoring machinery, and the burden of multiple reporting obligations on governments have been widely described.864 Second, there is a risk of marginalizing issues if they are treated separately, and, as has been suggested, there is a general trend towards mainstreaming. If mainstreaming is successful, issues such as those linked to the situation of street children could be examined periodically by existing international treaty and non-treaty bodies, such as the CRC Committee, or the HRC.

861 See supra note 86 for CRPD and note 90 for the Declaration on the Rights of Indigenous Peoples.
863 Op. cit. note 413: II.A.6. However, the text shows that the Conference is more concerned about the creation of new human rights than about the codification of existing rights in new instruments.
Arguments for new conventions are equally convincing. It has been explained that treaty bodies lack resources and time to study additional issues in detail. The CRC Committee, for instance, had to be enlarged as it lacked sufficient time to examine each state report and to discuss specific issues with state representatives during its sessions. A new instrument addressing issues not expressly mentioned in current human rights conventions would thus help to lighten the load of existing human rights monitoring bodies. It is clear that a new convention for a group such as street children would be in line with the recognition in international law of special measures which are necessary for the achievement of equality. While mainstreaming is a significant tool for achieving equality, if used without initial special measures, it can have the effect of sidelining issues that are not considered priority issues, and that are not backed by powerful advocacy groups. This is the case presently with the tendency to deal with street children together with all other children in difficult circumstances. For gender issues, by contrast, it is the special attention through the women’s convention and the special bodies within the UN that has guaranteed increased mainstreaming of gender in all areas. Regarding persons with disabilities, initial arguments about the need to mainstream their issues within the general human rights framework have been abandoned in favour of a convention that should guarantee the protection of their rights, as well as encourage the mainstreaming of their rights. The two sides of the coin in mainstreaming can also be encountered in the discussion concerning the reform of UN treaty monitoring bodies. As there have been calls for an integrated monitoring body, Alston points to the following:

[I]t can be argued that a single committee would facilitate the effective integration of different concerns, such as racial and sex-based discrimination, children’s and migrant workers’ rights, and economic, social and cultural rights. The counter-argument is that some of those concerns might simply be glossed over and that the supervisory process would no longer serve to galvanize those sectors of the Government and of the community dealing with, or interested in, a specific issue.

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865 See e.g. views of Mexico in “Views submitted by Governments”, op.cit. note 862; Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, UN doc. A/58/118, Annex II.

866 Mainstreaming is the task of the UN Office of the Special Adviser on Gender Issues.


869 “Long-term Approaches”, op.cit. note 864: 22. This reasoning can also be used in the discussion about the need for new conventions, such as one for street children, or other vulnerable groups.
As far as street children are concerned, the case for a new convention may not be strong enough, because they are a sub-group of a vulnerable group—children—and should not receive more attention than other children whose rights are violated. Arguably, the CRC could be supplemented by optional protocols, this being the case already for children in armed conflict and sexually exploited children. However, experience has shown that optional protocols may not be as effective as conventions for advocacy at the national level, as they are much less known and are ratified by fewer states than the "mother treaty". Moreover, as Tistounet argues, states may be more likely to make reservations to specific treaties than to more generic ones, which would be the case for optional protocols. In addition, optional protocols are thought to undermine the "mother treaty" or other existing binding instruments, although there does not seem to be sufficient proof of this claim. Despite the lack of proof, this is often the argument used against the adoption of any new international instrument or new human rights.

2.1.2 A non-binding instrument

Aside from the adoption of a new convention or an optional protocol, another option could be the elaboration of a declaration on the rights of street children. This would be weaker than an optional protocol, which is a treaty. Moreover, the adoption of such an instrument would probably not receive much support, as it could be seen as a first step towards a convention. An example of the difficulty in drafting such a declaration is manifested in the elaboration process of the Declaration on the Rights of Indigenous Peoples, which was drafted more than ten years ago, but has still not been

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870 Tistounet, "The Problem of Overlapping among Different Treaty Bodies", in Alston & Crawford, op.cit. note 768: 397. As of 8.2.2007, the Optional Protocol on children in armed conflict had declarations (many positive) from 89 states parties and one reservation for 110 ratifications, and the Optional Protocol on the prostitution and sale of children had declarations from 10 countries and 7 reservations for 113 ratifications (compare with reservations made by 47 of the 193 states parties to the CRC). Other, older, instruments do not confirm this rule either. For example, as of 8.2.2007, the Optional Protocol to the ICCPR, had declarations or reservations from 25 countries for 109 ratifications. The ICCPR itself has been ratified by 160 states, 58 of which have made reservations or declarations.


872 For example in the debate concerning the so-called "third generation rights". See e.g. Alston, "A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?", 29 Netherlands International Law Review, 307-322. This was also brought up in the discussions on a new convention on the rights of persons with disabilities. See e.g. discussion on the draft article on children with disabilities in Ad Hoc Committee Daily Summary (Landmine Survivors Network), Vol. 3, #5, <http: //www. rightsforall. org/docs/summary_01_09_04. doc>, and Vol. 4, #5, <http: //www. un. org/esa/socdev/enable/rights/ahec3sum28may. doc>.
approved. Sometimes such non-binding instruments are favoured as a compromise between states seeking a convention and those who do not wish to commit themselves formally, and because of the speedier negotiation and adoption process involved. As Wilkins points out, non-binding instruments have the advantage of allowing implementation even if a country would not have ratified a treaty on the same subject.

Moreover, non-binding instruments allow for implementation in a more flexible way, without resource-related commitments. However, the example of the Declaration on the Rights of Indigenous Peoples shows that consensus on a declaration is not necessarily easier than consensus on a treaty. This is partly because a declaration can lead to the adoption of a treaty on the same subject, or become customary law, and partly because states give importance to these instruments to which they commit themselves.

The effects of non-binding instruments have been mostly studied in the context of environmental law, but there are a number of examples in human rights law as well. Among non-binding human rights instruments the UDHR is most cited as bearing legal effect and having led to the drafting of legally binding instruments. Even conference declarations have been considered by some authors, such as Wilkins and Szasz, to have some binding effect. Declarations are said to be intentions of commitment and expressions of consensus, and therefore there is a presumption of compliance. The effect of non-binding instruments can be seen in the way they are applied by states. While it would seem clear that states take their reporting obligations more seriously when binding treaties are at stake, some authors, such as Szasz, argue that soft law instruments are generally observed, and often not less than international binding norms.

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874 For example, discussions on the possible drafting of a convention on the rights of persons with disabilities in the 1980s led to the adoption of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities (*op. cit.* note 127), as there was not enough support for the elaboration of a binding instrument.
876 Many authors have noted that non-binding instruments can become customary law by crystallizing emergent rules of law or by attracting uniform practice by participating states. See Wilkins, *ibid.*; Schachter, "The UN Legal Order: An Overview", in Schachter & Joyner (eds.), *United Nations Legal Order*, 3-26; Hannum, "Human Rights", in Schachter & Joyner, *ibid*; Szasz, "General Law-Making Processes", in Schachter & Joyner, *ibid*: 35-108. Some have even argued that customary law can be created by the elaboration process of conference declarations (see Schachter, *ibid*: 4). The ICJ in the Nicaragua case (*op. cit.* note 397: 188) considered that opinio juris may be deducted from consent to UN GA resolutions.
877 See e.g. Wilkins, *op. cit.* note 875; Kanchara, "Some Considerations Regarding Methods of International Regulation in Global Issues: "Sovereignty" and "Common Interests", in Brown Weiss (ed.), *International Compliance with Nonbinding Accords*, 81-117. See also Szasz, *op. cit.* note 876.
According to him, this proves their legal effect. From another standpoint, Shelton points out that it is difficult to prove state compliance with any international legal norm, whether hard or soft. For proof of compliance, one should look for legislative changes after the adoption of an international instrument, as well as relevant national case law. Many national legal cases have referred to the UDHR and sometimes to other soft law instruments, such as the 1959 Declaration on the rights of the child.

Case law shows that international law – soft or hard – is especially helpful for the interpretation of national law. It has even been argued that non-binding instruments, such as conference declarations, should be used by national courts as authoritative interpretation of international law. In Baker v. Canada, the Canadian Supreme Court stated that the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review. The Supreme Court of India, in Vishaka v. State of Rajasthan, further clarified that international conventions and norms must be used to construe the meaning and content of constitutional guarantees in the absence of national laws. The South African Constitution provides for the use of such international norms and standards by national courts in the interpretation of national laws, and the inclusion of non-binding instruments as part of international law has been clarified by the President of the Constitutional Court. The effect of soft law thus goes beyond education and awareness-raising. Case law indeed shows that courts do not automatically distinguish between binding and non-binding instruments.

However, as Chinkin and Shelton point out, there are various types of non-binding instruments, and one should consider the content, context and other factors to

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880 Szasz, op. cit. note 876: 36, 39, 46-47.
885 Op. cit. note 882. Using international binding and non-binding instruments, the Court formulated guidelines and norms on the prevention of sexual harassment.
887 Chinkin emphasizes the educational role of non-binding instruments. However, she recognizes that each case has to be looked at specifically to understand the possible impact of non-binding instruments (Chinkin, “The Challenge of Soft Law: Development and Change in International Law”, 38 International Comparative Law Quarterly, 850-865).
assess the type of instrument in question and its possible legal effects.\textsuperscript{888} Even declarations can be of different types. Some, such as the UDHR, that have been adopted by all member states of an organisation, have more moral and political authority than instruments that have only been adopted by a smaller number of states, such as outcome documents of certain conferences. Likewise, UN GA resolutions theoretically have the same legal force as declarations. While they may even seem weaker than declarations, which often have a higher moral authority, in practice, their legal force depends on the subject of the resolution, the condition in which they were adopted and state practice.\textsuperscript{889} Instruments that emanate from technical bodies, such as documents of treaty monitoring bodies, or from international NGOs, should have weaker legal force. The next section will further examine non-binding instruments that emanate from treaty monitoring bodies, as they are by nature very different from declarations.

2.2. Options related to mechanisms

As this thesis demonstrated, especially in Chapter IV, mechanisms can be used to develop the meaning of human rights provisions in international treaties. They can also be used to further the implementation and enforcement of states' international human rights obligations through regular reporting and complaints mechanisms. Moreover, they can promote the use of non-binding international instruments as guides in the implementation of treaties and as tools for the interpretation of law. Through different mechanisms, human rights bodies can generate or use soft law to further develop existing human rights law. Such soft law includes \textit{inter alia} general comments and concluding observations of human rights treaty bodies, and reports and recommendations of non-treaty bodies, such as special rapporteurs and working groups.\textsuperscript{890} Although these are not legally binding on states, Szasz argues that they are part of international law, because states often comply with them.\textsuperscript{891} For example, national courts sometimes refer to them\textsuperscript{892} and in many cases there is some follow-up on

\textsuperscript{888} Chinkin points to the various types of instruments with different negotiation processes, forms, participants, subject matters, purposes and monitoring procedures (\textit{ibid:} 855). Shelton suggests a typology of soft law instruments, with the main division between normative and non-normative texts (\textit{op.cit.} note 881). See also Szasz, \textit{op.cit.} note 876: 96-97. One should also be aware that treaties are non-binding instruments in countries that have not ratified them. These treaties can and have been used by courts in countries not parties to them. See e.g. \textit{Thompson v. Oklahoma}, Supreme Court of the United States, 487 US 815 (1988).


\textsuperscript{890} See the typology introduced by Shelton, \textit{op.cit.} note 881.

\textsuperscript{891} Szasz, \textit{op.cit.} note 876.

\textsuperscript{892} See note 881.
the implementation of these comments, guidelines and recommendations. While this author would consider as international law strictly speaking only those instruments that have been agreed internationally, she recognises that all instruments emanating from international bodies – whether intergovernmental or not, belong to the broader international human rights normative framework. Non-binding instruments, especially those of independent expert bodies, weigh less from a legal perspective, but they can have significant influence on state practice and on the implementation of binding instruments. These instruments can be especially useful as guides in interpretation and implementation of international obligations. The following section explores how existing and potential human rights bodies can use mechanisms of creation and application of soft law to develop street children’s right to education, based on the existing rights of the child.

2.2.1 Maximising the mandate of the Committee on the Rights of the Child

a) Role of national and international jurisprudence

The main mechanisms that can be used for the implementation of street children’s right to education are provided by the CRC Committee. These include the Committee’s general treaty monitoring mandate with its review of state reports, its general days of discussion, and its general comments. Through these mechanisms and instruments, the Committee has an important role in making sure that existing conventions are interpreted and implemented in an evolving way, as explained in Chapter IV. This helps to secure attention to and redress for new human rights violations. Using evolving interpretation would make it possible, for example, to extend special measures recognised for some groups of children to street children as well. In this way, the special attention given to children from minorities or refugee children, for example, could be used to extend attention to other groups too, such as street children. To illustrate this, the concept of “special needs” in education, which is usually linked to children with disabilities, can be understood as applicable to all children whose needs in

893 For example follow-up conferences to international conferences, where declarations and plans of action were adopted. See e.g. the Dakar World Conference on EFA, which followed the Jomtien Conference (op.cit. note 202).
894 Notably, the GA resolutions on “The Plight of street children” (resolutions 47/126, 48/136 and 49/212) and on “Rights of the Child” (resolutions 50/153, 51/77, 52/107 and 53/128) recommend “that the Committee on the Rights of the Child and other relevant treaty-monitoring bodies give attention to [the plight of street children] when examining reports from States Parties".
895 The UN GA has invited the CRC Committee “to consider the possibility of a general comment on street children” (resolution 47/126), and reiterated this invitation twice (resolutions 48/136 and 49/212).
education require special attention. As was argued in Chapter II, special education for all children with special learning needs can be adapted to each case and provided in an integrated way, or separately depending on the needs, wishes and best interests of children. The Committee can promote such understanding of street children's rights by using national case law to build its own jurisprudence.

There are many examples of national, regional and international case law on the adaptation of education to special groups, especially linguistic minorities and children with disabilities. For example, in *Autism-Europe v. France*, the European Committee of Social Rights examined French law and practice related to the education of children with disabilities and specifically children with autism. The French law stipulates that the state is responsible for paying for the education of children with disabilities by integration into ordinary classes, by making qualified staff available to establishments and services set up by other ministries, by public law entities or authorised non-profit bodies, or by entering into contracts with private education establishments. More specifically, the law provides that a person with autism is to receive “multidisciplinary provision catering for his or her specific needs and difficulties.” However, a disproportionate number of children with autism were not receiving adequate education, thus amounting to indirect discrimination. Similar interpretation of discrimination can be used in relation to street children's education. The CRC Committee could show how national legislation for children with disabilities can be extended to other groups whose situation would best be addressed by similar provisions, and the Committee could monitor the implementation of these provisions in light of the principle of non-discrimination. Also in relation to persons with disabilities, the Canadian Supreme Court, in *Eaton v. Brant County Board of Education*, ruled that placement decisions should take into account the child's best interests and special needs, and that equality has to be made meaningful from the child's point of view. This case, which determined that it is not in the best interests of all children to be integrated into

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896 Theoretically "special needs" is not limited to children with disabilities, but programmes on special needs usually target this group. Interview with officials from the Special Education Division at UNESCO, October 1999. See also Chapter II.
898 Article L.351-1 of Act no. 89/486 of 10 July 1989 (Education Code). The law adds that "Such provision shall be adapted to the condition and age of the individual and have regard to the resources available. It may be educational, therapeutic or social."
899 *Autism-Europe*, op.cit. note 897: 52, 54.
900 (1997) 1 S.C.R. 241, at 77. More specifically the Court stated: "Integration can be either a benefit or a burden depending on whether the individual can profit from the advantages that integration provides." (at 69).
mainstream education, could also be applied to street children. Such cases concerning specific groups can be applied mutatis mutandis to street children by the CRC Committee in its thematic or country-specific recommendations. In applying national case law, legislation and practice to street children, the Committee can refer to the principle of non-discrimination and the reference to "other status" in discrimination clauses in international human rights treaties to include groups not expressly listed. For example in the Autism-Europe case, the European Committee of Social Rights considered "other status" in Article E of the (revised) European Social Charter to include persons with disabilities. The concept of indirect discrimination is especially valuable in the case of street children, as in the words of the European Committee of Social Rights, "...indirect discrimination may arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all." The CRC Committee could thus also adapt general principles of non-discrimination found in case law to the right to education. In that regard, the jurisprudence on equality and non-discrimination cited in Chapter II could provide a basis for the promotion of diversity in education in order to guarantee equality of opportunity. Such interpretation is supported by Azir in relation to Egyptian law.

While the CRC Committee does not emit jurisprudence through decisions in complaints procedures unlike some other treaty bodies, it can issue general comments, which are the main source of jurisprudence of UN human rights treaty bodies. Despite the lack of enforcement power of the Committee over its concluding observations or general comments, the jurisprudence of human rights treaty bodies is not without legal value. Some authors consider it as soft law that is of lesser value than

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902 Ibid: 52.
903 See e.g. Thlimmenos, op. cit. note 150, Minority Schools; op. cit. note 163; Juridical Condition and Human Rights of the Child, op. cit. note 99; Belgian Linguistics case, op. cit. note 145.
904 According to the Egyptian Supreme Administrative Court, "equality means non-discrimination between individuals of the same category or of similar legal status or position" (Case no. 161, 29.6.1957, Abu Shady & Attia (eds.), The Collection of Principles Issued by the Supreme Administrative Court). Azir adapts this principle to education by affirming that it entails the following requisites: same standards of basic education for everyone; diversity of curriculum to accommodate different abilities, inclinations, environments and community needs; and guaranteeing equal opportunities for those who cannot keep up with mainstream education (due to personal or social factors) with the provision of compensatory education (op. cit. note 363).
905 All UN human rights treaty bodies have followed the practice of the ICCPR Committee, which is expressly mandated to issue general comments (ICCPR Art. 40(4)).
declarations, but that is nevertheless part of international human rights law. The jurisprudence of human rights treaty bodies, which provides interpretation of international human rights law and adapts and applies it to specific cases, has been used by national courts for the interpretation of national law, in addition to international normative instruments. The influence of treaty bodies can also be seen in their practice of questioning state parties’ reservations to treaties. It has been argued by some authors, such as Chinkin, that treaty monitoring bodies are the most suited to determine the validity of states parties’ reservations, and that this role has been accepted by states.

Areas where the CRC Committee could have an influential role to play are those that are not explicitly covered by the CRC. The Committee can show how the CRC covers these areas by issuing guidelines on the implementation and interpretation of the Convention. For example, in a General Comment on Article 28, the Committee could explain how this article relates to the education of street children. It could also have used the opportunity in connection with General Comment on Article 29 to elaborate how the principles in education apply to different children with special needs. Without specifying groups of children, the Committee could have elaborated on the importance of non-formal education, partnerships between the government and the non-profit sector, as well as the need to provide education that is adapted to children’s “special needs” in a wide sense, as opposed to the narrow and stigmatizing meaning connected to disability. Days of general discussion are another way to include street children’s rights within the child rights discourse. The CRC Committee has already held such discussions on specific groups of children, such as children with disabilities and indigenous children. The Days of general discussion have been the occasion for the CRC Committee to give constructive recommendations concerning the implementation of the rights of these groups of children. For example, concerning indigenous children,

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906 Shelton notes that “secondary” soft law formulates hard law in the application of this law to specific cases and that secondary soft law can even be harder than primary soft law declaring new standards (op. cit. note 881: 141). Others, such as Hannum, would not consider documents, such as studies and reports by human rights bodies as part of human rights law (op. cit. note 876: 339).

907 See e.g. South African Constitutional Court and Indian Supreme Court judgments: In Re Gauteng, op. cit. note 844; Vishaka, op. cit. note 882.

908 Chinkin, “Reservations and Objections to the Convention on the Elimination of All Forms of Discrimination Against Women”, in Gardner (ed.), Human Rights as General Norms and a State’s Right to Opt Out: Reservations and objections to human rights conventions, 79. This is specifically so for human rights treaty bodies, as general international treaty law is unsuited to human rights treaties, which are not based on reciprocity. Notably, the CRC Committee has included a question on reservations in its Guidelines for Periodic Reports (op. cit. note 298: 11).
the Committee recommended that states take “measures to eradicate child labour, including through the provision of informal education where appropriate.”

(emphasis added) Similar recommendations could be made concerning street children through the interpretation of existing rights, without adding new rights. In doing so, the Committee can expressly use non-binding international instruments as tools for interpretation, which it has already done in many instances, and as examples of commitments states have made by elaborating and signing such documents. As we have seen, especially in Chapter III, these instruments often provide more detailed measures for the implementation of international human rights. Judicial and quasi-judicial bodies at different levels have an important role in encouraging and facilitating the use of non-binding instruments, especially by using them for the interpretation of legal norms. For example, the Inter-American Court of Human Rights in its advisory opinion on the Juridical Condition and Human Rights of the Child, referred to the Declaration on the Rights of the Child, the 1994 International Conference on Population and Development and the 1993 World Conference on Human Rights. Unfortunately, human rights treaty bodies have only made use of non-binding instruments in a scarce and unorganised way in the development and interpretation of human rights. Soft law could be used more effectively as a tool for the development and advancement of human rights. References to non-binding norms, such as the World Declaration on Education for All, by judicial and quasi-judicial bodies at international and national levels would be an essential step towards the development of jurisprudence on street children’s right to education.

Another way for the CRC Committee to include street children without new treaty provisions would be through the insertion of additional points in the Guidelines for Periodic Reports. The Committee could include street children under paragraph 108 on categories or groups of children who do not enjoy the right to education, and also by asking for more specific points relating to the right to education. The following are

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609 General Discussion on the rights of indigenous children, Recommendations, Committee on the Rights of the Child, 34th session (15.9.-3.10.2003), Unedited version, 19.

910 For example, in its General Comment on Article 29, the Committee refers to its recommendations adopted during the Days of Discussion on children and HIV/AIDS and on children and the media, to the Dakar Framework for Action, the Salamanca Statement, the 1993 World Conference on Human Rights and to General Comments 5 and 13 of the ICESCR Committee (General Comment 1, op. cit. note 203).

examples which, added to the existing Guidelines, could improve the implementation of the right to education for street children:

- Mechanisms to adapt education to the learning needs of students, especially children who have been marginalised by or from the state education system.
- Measures taken to adapt vocational education to the immediate and future needs of children, depending on children's age and considering the options provided by the labour market.
- Cooperation with all non-public educational initiatives for the development and conduct of new and alternative forms of education.
- Measures adopted for the school enrolment of children without parental support, in the spirit of the best interests of the child and respecting the views of the child.
- Measures to ensure that children with an age-grade gap receive adequate education considering their views, evolving capacities and best interests.
- Information on the adoption of education curricula and policies, including teaching methods and materials: who is involved in their development, how do they apply to the country as a whole and to particular areas or groups.
- The status of teachers in society, their role within the education system and in the classroom.
- Measures to provide pre and in-service training for teachers in different teaching methods and in adapting to different learning needs.
- The status of street educators and other non-formal teachers, their role within the general education system and the provision of training to them.
- Cooperation between schools and social services, including the existence of social workers, health professionals and psychologists within schools.

b) Development of principles on the rights of the child

In addition to using jurisprudence to develop the rights of the child, the CRC Committee can also use and develop concepts and principles of the rights of the child. For example, the Committee could develop the concept of minority. While it has been argued in Chapters II and III that this can be a debilitating concept for street children, it is also linked to the concept of special protection, which is explicitly stated in General

912 Guidelines for Periodic Reports, op.cit. note 298: 106-108.
Comment 17 of the ICCPR Committee and Article 16 of the Pact of San Jose.\textsuperscript{913} The need for special protection is based on children's particular situation as persons at early stages of physical and psychological development, and to their vulnerability linked to their minority status. It can therefore also be used to provide special measures for children who are in a particular situation within the general group of children, especially knowing that minority status can make some children even more vulnerable than others.

Additionally, the CRC includes the concept of "evolving capacities of the child", which can also be of assistance in providing special measures to children. This author agrees with Lansdown's approach of using the evolving capacities of the child as a principle of interpretation in international human rights law.\textsuperscript{914} The CRC Committee should further develop it as a principle of the Convention, in addition to the four principles it originally singled out. While the principle of evolving capacities is expressly stated in Article 5 and included in alternative terms in Article 12, it should be an underlying principle for all articles of the convention. The evolving capacities principle allows a case by case approach (for each child, in each cultural context) to balance the participation and protection aspects of child rights in relation to various aspects of life, including education, work, judicial proceedings and placement in care. Consideration for the various levels of development of children of different ages should be directly linked to the principle of the best interests of the child and to the determination of special protection measures for children. As the thesis has explored, the concept of minority itself comprises different degrees depending on the child's age, and the Committee recognises this by asking states to provide information, in its reporting guidelines on Article 1, on the ages at which children are conferred responsibilities in various areas of life.\textsuperscript{915} The CRC Committee could take the principle of evolving capacities further, move away from rigidly determined age limits, and provide guidelines on how to determine children's capacities in relation to specific rights.\textsuperscript{916} Such an approach would be beneficial to street children, who do not fit into the Western-inspired model of childhood, and who have capacities that have evolved differently from children who are sheltered and integrated within their families and communities. Understanding "capacities" in the life context of each child within her

\textsuperscript{914} Lansdown, \textit{op. cit.} note 236.
\textsuperscript{915} Guidelines for Periodic Reports, \textit{op. cit.} note 298.
\textsuperscript{916} Lansdown also recognises the fact that children do not only acquire competencies through age, but that other factors, such as experience and culture are to be taken into consideration. (\textit{op. cit.} note 236).
environment would lead to the understanding that work can be beneficial to children in some circumstances and that children's capacities evolve in their work. In relation to street children's right to education, the understanding of children's capacities should be reflected in the type of education children receive (in terms of curriculum and teaching methods) and in the assessment of their educational achievements.

c) Partnership with NGOs

The CRC Committee, as well as other committees, should promote the use of information received from NGOs. This is important, as NGOs cover a wide range of interests and they are active in monitoring situations from different perspectives at the country level. While the CRC Committee is the only international human rights treaty monitoring body that has institutionalised the participation of NGOs in monitoring through the system of alternative reports, it could build on its current practice. The challenge would be to involve the largest possible number of NGOs, as many local NGOs are not aware of international monitoring mechanisms and of the possibility to participate in international monitoring of human rights norms. Organisations working with street children especially tend to be small and not linked to bigger international NGOs. The dissemination of this kind of information nationally to all NGOs should be one of the important questions addressed by all committees during their sessions with state representatives. Also, the CRC Committee could contribute to the establishment of an international NGO to promote rights of street children. This could be one of the recommendations of a general day of discussion on street children. There is precedence on this with the establishment of an NGO on children with disabilities after the General Day of Discussion on this subject. International NGOs specifically working for the promotion and protection of the rights of street children would be able to coordinate inputs on the implementation of street children's rights in the context of national reporting to the CRC Committee. They could also assist in the establishment of national NGO networks on street children. Additionally, such NGOs could initiate judicial proceedings on behalf of street children at the national level or in other appropriate instances, such as in the IACHR. 917 According to Shelton, activities of NGOs form the basis for most decisions rendered by international human rights bodies. 918 Moreover,

917 For example, CEJIL (Center for Justice and International Law) has initiated many court actions in South American countries and in the Inter-American human rights system. Shelton also notes that NGOs play a significant role in filing complaints on behalf of victims and preparing amicus curiae in court cases (op.cit. note 881: 130).

918 Ibid: 130.
NGOs can add incentives for compliance to international treaties, including positive public opinion and assistance to governments.⁹¹⁹

2.2.2 Complementing the role of the Committee on the Rights of the Child

In addition to interpretation provided by the CRC Committee, thematic mechanism, such as special rapporteurs and working groups could be used to develop and promote rights of street children.⁹²⁰ First, existing mechanisms could address issues related to street children within their mandates. For instance, the Special Rapporteur on the Right to Education could consider the education of street children, and generally look into the issue of non-formal education, including the risks and benefits of such education, the role of the government, and NGO-government cooperation on this matter. This type of approach has been recommended by the CRC Committee with regard to indigenous children.⁹²¹ Children already are a crosscutting theme and examined by various thematic mechanisms, and the HRC could request all mechanisms to focus on children and situations that are not covered in existing treaties.

Second, a thematic mechanism could be set up to deal with the rights of vulnerable children in situations not covered by the CRC. Not limiting the mandate of the mechanism to street children would allow for flexible and evolving definitions of groups that need special attention and would keep the list open. However, a mechanism specifically for street children would ensure that the question of street children stays on the agenda until their situation has improved or until they have been mainstreamed in policies, legislation and human rights monitoring. Mandates of existing special rapporteurs and working groups offer inspiration as to possible activities and powers of a new thematic mechanism. These mandates range from conceptual studies to more

⁹¹⁹ Ibid: 142.
⁹²⁰ The GA has called upon “special rapporteurs, special representatives and working groups of the Commission on Human Rights and of the Subcommission on the Prevention of Discrimination and Protection of Minorities, within their mandates, to pay particular attention to the plight of street children” (resolutions 47/126, 48/136 and 49/212). See also resolutions 55/79, 57/190. While this section will not examine the role of intergovernmental bodies, such as the GA or the HRC, the thesis recognizes that these bodies have an important role in alerting to specific situations and general trends, and their pronouncements have more weight than those of bodies composed of independent experts. While intergovernmental bodies are instrumental in setting up new monitoring bodies and defining their mandates, they themselves cannot regularly monitor street children’s right to education, or similar issues of lesser political importance. It is notable, however, that the GA has repeatedly addressed the issue of street children (see resolutions above), although this has not translated into increased attention to street children within the organisation.
practical action, and despite differences, they share many common activities. As some thematic mechanisms have engaged into normative work, it could be appropriate also for a mechanism on street children or other vulnerable children not explicitly covered by the CRC, to develop guidelines on street child-related policies and programmes and on the implementation of their rights. Other activities should include: defining issues that need to be monitored; undertaking country visits; receiving reports from different sources; engaging in dialogue with all stakeholders; issuing recommendations and following-up on their implementation; and providing analyses to contribute to a better understanding of the subject. Some mandates seem better suited for a special rapporteur, and some for a working group. As an individual, a special rapporteur may be better placed to deal with focused issues, such as street children – not only because of limitations, but also because of the capacity to act as a powerful spokesperson, while a working group could be mandated to identify groups that need special attention. A working group may also be better suited for normative work, for example the elaboration of guidelines on the protection of rights of marginalised groups within the existing human rights framework.

An alternative procedural addition is the establishment of a complaints procedure that would allow for the development of international case law. This could encourage national courts to address issues that they have so far ignored. Opportunities already exist at the regional level with the European and Inter-American human rights systems. While no case has so far involved street children’s right to education, there have been separate cases involving education and street children. The scope for

922 For example the mandate of the Special Rapporteur on the right to education was, initially at least, highly conceptual, while that of the Special Rapporteur on the sale of children, child prostitution and child pornography provides for monitoring the situation through country visits. 923 See Manual for Special Rapporteurs/Representatives/Experts and Chairpersons of Working Groups of the Special Procedures of the Commission on Human Rights and of the Advisory Services Programme (UN doc. E/CN.4/2000/4), providing unified guidelines to special mechanisms of the CHR. 924 For example the Representative of the Secretary-General on internally displaced persons developed Guiding Principles on Internal Displacement, (UN doc. E/CN.4/1998/53/Add.2, Annex), and the Working Group on Arbitrary Detention developed a framework for action. 925 See e.g. Guiding Principles on Internal Displacement (ibid.). Comments made earlier in this chapter regarding the legal value of documents issued by the CRC Committee apply with regard to other human rights mechanisms. 926 On street children, see Villagran Morales, op.cit. note 114. On education, see examples in Chapter II. Nevertheless, case law on the right to education is very limited in both regions. The European Social Committee has so far examined one collective complaint concerning the right to education (Autism-Europe, op.cit. note 897), and the European Court cases have touched on limited topics, because of the narrow understanding of the right to education in the European Convention. The Inter-American Court on Human Rights has not yet dealt with a case on the right to education included in the Protocol of San Salvador. However, the Commission has declared the admissibility of a case involving the violation of Article 13 of the Protocol of San Salvador, in addition to other rights from the American Convention, in
international case law, however, remains limited given the lack of complaints mechanisms within many treaty bodies especially those monitoring the right to education.\textsuperscript{927} Furthermore, their interpretations of specific provisions and recommendations to states are not binding. While the Optional Protocol to the CRPD has the potential to enable the submission of communications by street children with disabilities, it remains to be seen whether children will utilise this avenue and whether the committee will consider violations of rights only on the grounds of disability-based discrimination.

It remains unlikely that an international judicial body specifically responsible for examining violations of the rights of the child is to be established. For its part, the CRC Committee has maintained a rather diplomatic stance to monitoring. The inclusion of an optional protocol to the CRC for the examination of complaints has been discussed among child rights specialists,\textsuperscript{928} but so far, it is deemed contrary to the Committee's position.\textsuperscript{929} Moreover, there is some reluctance at the national level to judicialise children's rights,\textsuperscript{930} arguably due to the tension between children's rights and those of their parents, which in turn may clash with those of the state. Whereas many child rights lawyers would prefer to avoid this conflict, this triangular relationship has produced a situation marked by a lack of relevant jurisprudence (opposing the child and the state) that could potentially contribute to the definition of street children's rights.

A solution may lay in the creation of an international child rights complaints mechanism to remedy the lack of jurisprudence and to improve the situation of street children. Its effect would increase significantly if it could be used by child rights

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927 UNESCO provides for an inter-state complaint procedure in relation to CADE, but this has not been used to date. If it were ever to be used, it would be very unlikely that cases would concern street children for reasons already explained, but nevertheless, it could open the door to a wider interpretation of the Convention. UNESCO's non-treaty complaint mechanism is in use and could be used for street children, but the mechanism has had very limited reach so far, as discussed in Chapter IV.


929 It should be noted that the Committee was also initially opposed to the adoption of the CRC optional protocols on children in armed conflict and the sale of children, child prostitution and child pornography (See CRC Committee, Report on the sixth (special) session, UN doc. CRC/C/29; Comments on Guidelines for a Possible Draft Optional Protocol, Commission on Human Rights, Inter-sessional open-ended working group on a draft optional protocol to the Convention on the Rights of the Child, UN doc. E/CN.4/1994/WG.14/2/Add.1). This did not prevent the establishment of a working group to draft the protocols, and their subsequent adoption by the GA.

930 See e.g. King & Trowell, op.cit. note 96.
advocacy groups on behalf of children, as in the Inter-American context. This could be
the mandate of a new special rapporteur who, in addition to monitoring and analysing
the situation of street children and possibly other vulnerable groups, could also act as an
international ombudsman931 who is empowered to examine collective cases. Experience
shows that collective complaints and public interest litigation have had a considerable
impact specifically on the implementation of ESC rights.932 However, this author
believes that examining individual cases from around the world could be too ambitious
of a mandate for one person. It would be thus more realistic for a working group, such
as the Working Group on Disappearances to undertake such sizeable task.933

931 See Schweitzer, op.cit. note 255.
932 See Centre for Housing Rights and Evictions, Litigating Economic, Social and Cultural Rights:
Achievements, Challenges and Strategies.
933 Such a working group can even provide remedies in some individual cases, while these bodies are not
formally of quasi-judicial nature. The Working Group on Arbitrary Detention provides an even better
example.
Conclusions

This thesis examined whether international law adequately protects the rights of groups that it does not explicitly mention. It selected street children and their right to education as a test case for the study. The discussion started with the hypothesis that because street children are not recognised as a specific group in international law, their rights cannot be adequately protected. To test the validity of this hypothesis, the discussion began by examining street children as a group and defined their characteristics through surveying a wide range of literature on street children based on representative case studies. On the basis of this, it became apparent that there were common characteristics related to children's life on the streets and their relationship with their families, and one that made them especially different from other children who live in difficult circumstances: their independence and the weak or inexistent ties they kept with their legal guardians. After analysing these finding, the thesis examined a set of questions related to the notion of group: which groups are recognised in international law, and what does it mean to be a recognised group in international law; why are groups singled out in law and what are the consequences of this. The subsequent analysis found that an increasing number of groups receive special attention through human rights, and that such attention was generally based on discrimination against people with certain common characteristics. Such discrimination makes these groups "vulnerable" and less susceptible of exercising their human rights. Subsequently, these groups need measures that protect them from discrimination and place them on an equal footing with other people. In the meantime, equality should not be achieved at the expense of sacrificing identity. This would be impossible in the case of gender or racial minority in any case, and people from less organic groups should also be able to retain their defining characteristics, including religion, culture and language. International law therefore provides for special measures to combat discrimination against "vulnerable groups", to enable these groups to retain their identity and to exercise all their human rights.

In the case of the right to education, the principle of non-discrimination translates into special measures for groups who tend to suffer from discrimination in this area. This concerns nearly all groups, as discrimination in education is common, and affects its availability, accessibility, acceptability and adaptability. For example, linguistic minorities are discriminated against if they do not receive education in their
own languages, while learning the main language of their country. Similarly, children with disabilities are discriminated against if they are not given the opportunity to learn through methods and means of communication that are adapted to their abilities and that develop their capacity to function and interact with all people. The test case of education can also be used to determine whether street children's rights are adequately covered by general human rights. A clear sign of discrimination against street children is demonstrated with the failure of the state to educate them even where primary education is universal. This author explained the conditions that must be met for street children to enjoy their right to education. Specifically, the discussion highlighted the need for education to be flexible in terms of access, location, contents and methods. Important characteristics of potentially successful education for street children are its voluntary nature, focus on small groups and individual attention, as well as links with other services. Formal education does not offer these conditions because of the regulations concerning access to education, formal and hidden costs, the age-grade gap, the strict discipline, and theoretical subjects that are far from their daily lives. As has been suggested, it is essentially clear that NGOs are most adequately equipped to carry out this form of education, even though the main responsibility should lie with governments as part of their obligation to educate all children.

In practice, street children's education is provided on an ad hoc basis, mostly by NGOs, and its quality and suitability to street children vary considerably from one programme to another. This thesis has examined whether this situation is due to the state of international law, which does not recognise street children as a specific group. Chapter III studied different international instruments and reaffirmed that no binding human rights instrument at the international or regional level mentions street children specifically, while a number of non-binding instruments do recognise street children's situation. The latter are valuable for acknowledging the need to give special attention to street children. Moreover, as this thesis has demonstrated, existing international law, including the broader human rights normative framework, does include the basic principles which are needed for the definition of specific elements that constitute and guarantee street children's right to education. One such element is the concept of flexibility. Nevertheless, existing non-binding instruments have not clearly spelled out specific instructions for street children's education, and one needs to read between the lines or gather a collection of provisions from different instruments to define comprehensive guidelines. Moreover, the fact that they are not binding makes them less
authoritative, as states signatories to these documents have no formal obligation to implement them. This explains why non-binding instruments seem to be used in a more disorganised way than treaties by all stakeholders. They also seem to be used less by states, and more by international organisations to which they provide mandates for the design of their programmes and policies.

Due to the soft legal nature of non-binding instruments, it was essential to take a closer look at provisions in human rights conventions that might be of relevance to street children’s education, and that would more likely be implemented. Several provisions were pertinent as they could be used to reinforce street children’s educational rights. The general principles of the CRC are key provisions because, considering street children’s special situation, it would be impossible to admit that traditional schooling could be in their best interests or that it could contribute to their development. Moreover, traditional methods of teaching do not take children’s views into account – an especially crucial aspect in the case of adolescents who have been used to living on their own and fending for themselves. The most fundamental principle for street children is non-discrimination, which is the most widely asserted human rights principle. The combination of the principle of non-discrimination and the provisions on the right to education should ensure that street children receive quality education that is fully accessible and adapted to their needs. This is in light of the understanding that differential treatment does not always amount to discrimination. On the contrary, it can prevent discrimination by allowing full exercise of rights by certain groups that find themselves in a different situation and at a disadvantage from the majority. This is the case for street children and, as this thesis has shown, special measures and rights are required for groups like street children, as they are required for children in general.  

Non-discrimination thus necessitates special measures instead of the uniform treatment of all and mechanical mainstreaming. While there has been a general tendency towards mainstreaming, there is also a strong tendency towards special attention, as provided for in the Vienna Declaration and Programme of Action.

After examining different instruments, this thesis discussed how relevant provisions in binding and non-binding instruments can be used by national and international human rights bodies for the interpretation of human rights and the

935 See Chapter III.
elucidation of connections between them. However, this has not been tested in practice. At the national level, while some courts have referred to different types of international instruments, interpretation of international law has not been used in connection to street children and their right to education. At the international level, despite repeated recommendations and invitations by the UN GA, monitoring bodies have not used their competence to advise states on the implementation of street children’s right to education through existing provisions. This is partly attributed to the lack of time and resources faced by treaty bodies, which makes it impossible for them to monitor all specific issues. It may also be due to the shortcomings of existing monitoring procedures or of members of the different committees. These criticisms themselves constitute an additional proof of the apparent inadequacy of international human rights law and its mechanisms to deal with very specific situations or groups that are not adequately covered by human rights conventions. Recently, these criticisms have been used to support the elaboration of a convention on the rights of persons with disabilities and the establishment of a specific body to monitor the implementation of the convention, thereby confirming the importance of special measures in protecting rights of vulnerable groups.

As the findings of this study highlighted the shortcomings of international law in conjunction with its potential use to protect street children’s right to education, it was essential to test the value of the international human rights system through a case study of national implementation. Brazil was chosen among other possible countries, as it has a long history of active involvement with programmes for street children, and it has often been a model for other countries interested in implementing street children’s programmes. Brazil has made much progress since the days it used to institutionalise street children systematically and consider them as delinquents. A strong civil society movement pushed for the rights of the child in Brazilian legislation in the 1980s. This movement used street children as examples of children whose rights were violated, and these children themselves became advocates for change. The movement culminated in

936 See note 882.
937 See UN GA resolutions on “The plight of street children”, op.cit. note 417.
938 As listed in Annex II.
940 See notes 865, 867, and interventions of e.g. Serbia and Montenegro, Liechtenstein and the International Disability Caucus at the seventh session of the Ad Hoc Committee (Rehabilitation International, UN Convention on the Rights of Persons with Disabilities, Daily Summaries, Seventh session, Volume 8, #15, <http://www.rehap-international.org/un/index.html>).
the adoption of new children's legislation, which was recognised as exemplary and in line with the principles of the CRC. This legislation does not mention street children specifically but includes many provisions of relevance, such as provisions on education (articles 54 and 57) and on shelters (articles 90 to 97). Moreover, Brazil has other pieces of legislation and regulations that are very relevant to street children's education, especially the LDB and DCN.

Unfortunately, the legislation has not been implemented to its fullest extent for many different reasons and street children are far from being among the country's priorities. The priority with regard to education is to send all children to school, while provisions on flexible education and on giving children individual attention have remained theoretical. NGOs are still the main providers of education for street children and governmental programmes are very scarce and largely depend on municipalities. Moreover, street children's education in these non-formal settings is not considered part of the state's obligation to provide education to all children, but rather as social welfare measures. This shows a big gap between the legal framework and practice. In addition, responsibility for implementing the right to education is transferred from the central government to the provincial states and municipalities. The government is therefore limiting its responsibility for the implementation of international obligations. It also seems clear that there is restricted influence from international norms at the national level. Even though it might have seemed that the drafting of the ECA happened simultaneously with the drafting of the CRC and that the international sphere was influencing the national, a closer examination showed that national circumstances were probably more conducive to the development of the rights of the child in Brazil.

In fact, this study demonstrates the difficulty in proving connections between the international legal framework and the national one. The international framework influences the national to some extent, and this is easier to see when legislation is enacted shortly after an international treaty comes into force. At the same time, the national sphere influences the international one, as new conventions are often the result of proposals by states, whose laws are already in conformity with the new instrument, or who are interested in improving that specific area at the national level. Concurrently, the case study also demonstrates how the role of law remains indisputable in improving the lives of people despite weak connections between international human rights standards and action at the national level. In Brazil, street children felt empowered by and
contributed to the legislative process in the 1980s. At the same time their movement grew and drew attention to their plight. At present, most street children are aware of the ECA and that they can complain if they are treated in violation of the law. Child rights advocates have been using this law to lobby the government for changes and to take cases to court. As street children do not know how to use the law in the most effective way, and as they have restrictions because of their minority status and the triangular relationship between the state, parents and the child, the thesis underscored the important role of lawyers and child rights advocates in taking up the cause of street children’s right to education. They could make a case for street children’s right to education by using existing national laws and regulations concerning the rights of the child and education. In doing so, they are well positioned to sensitise the existing monitoring and implementation bodies to examine this situation, as it is only one of many issues that need to be addressed to improve the lives of children nationally.

Despite the apparent inadequacy of international law and weak linkages between the international and national spheres, this thesis found that it is possible to build on existing mechanisms and instruments to improve street children’s right to education, and by extension, the rights of other excluded groups. The thesis looked at the possibility of adding new instruments to protect the rights of street children and concluded that such an option would be impractical. While a new instrument would give high status and visibility to street children’s rights, it would probably not be the best solution because of the related high costs, as well as the lack of political interest due to the few numbers of street children **stricto sensu** compared with other groups whose rights require special attention. A new instrument, especially a treaty, is more likely to receive a positive response if there has been prior sustained attention to the target group internationally, and if the group represents a sizeable proportion of the population. The analysis of existing instruments also showed that necessary elements for street children to exercise their right to education already exist. Such a thorough study of international norms should be conducted for all excluded groups to determine whether existing instruments can be used to protect their rights without the addition of new instruments. The main challenges lie in the interpretation of provisions, linking these together, and using non-binding instruments to create guidelines.

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941 For example, persons with disabilities, who are said to compose 10% of the world’s population, and who have received sustained attention since the 1970s through non-binding instruments and an international decade devoted to them.
Given this, guidelines should inform states on how to implement the right to education in a way that reaches all children and is practical to them. There is potential in international law and its mechanisms for meeting these challenges. This author suggests that the CRC Committee would be the ideal body to provide guidelines on street children’s right to education. For example, it could include relevant elements in its Guidelines for Initial and Periodic Reports, hold a day of general discussion on the topic, and possibly issue a general comment on the implementation of the right to education. Other mechanisms, such as thematic mechanisms, should be used to complement the role of the CRC Committee. For example, the Special Rapporteur on the Right to Education could include the concerns of street children in his studies and he could also examine the role of non-formal education in the provision of basic education to all children. In this context, the Special Rapporteur should clarify the obligations of states in relation to the right to education, including non-formal education where it is best suited. Increased cooperation between human rights treaty monitoring bodies and thematic mechanisms would be essential to ensure that all aspects of rights of groups are covered in a consistent way.

This thesis also explored the possibility of adding new mechanisms to facilitate the implementation of existing instruments. Particularly, the thesis examined the potential of a new thematic mechanism, such as a special rapporteur or a working group. It would be difficult for a special rapporteur to monitor the situation of a group of children worldwide, but such a spokesperson with a focused mandate on street children could have a considerable awareness-raising role. This author also envisions the role of a working group mandated to identify groups that are overlooked by international law and underserved. Moreover, the mechanism, depending on the mandate, could provide guidelines for the interpretation of specific rights, as the Special Rapporteur on the Right to Education has done regarding the right to education and its “4-As”, which are now widely used and complement articles 28 and 29 of the CRC. The creation of such bodies would depend on the priorities of the new HRC, and the reform of the UN human rights system offers a renewed opportunity to include groups that have been previously excluded.

In the final analysis, it is only fair to state that street children’s right to education is not adequately addressed in international human rights law and, although it received
increasing attention internationally since the end of the 1970s, such interest has faded. There is now a general tendency to group street children together with other children living in poverty, and to focus on prevention instead of working with children who already are on the streets. This approach leaves many children without protection and without education that is suitable to their needs. Responses differ in countries around the world and, while there are good examples, there is no positive systematic response to the situation of street children, who are not considered a group as understood in this thesis. Street children’s issues are not viewed as human rights issues unless these children are tortured, killed or locked up in detention centres. Their daily needs are still considered the responsibility of the welfare and social sphere rather than that of human rights law, as is typical with other “vulnerable groups”. This is why street children’s needs are attended to, more often that not, by social welfare agencies and charitable organisations.

Street children’s case is similar to that of other groups whose rights were initially not adequately covered by international law. Situations of children, women, persons with disabilities, migrants and persons with HIV/AIDS were also first not considered as human rights problems, and they were part of other fields only, such as social welfare, health and criminal justice. While street children are a sub-group of a currently recognised group in international law – children – the same problem applies to them as to other excluded groups, as they are not adequately represented by their group for reasons explored in this thesis. To determine whether a group should be considered as a “vulnerable group” in international law, one needs to examine discrimination against people allegedly belonging to a group and the practical applicability of existing international norms to them. In case of discrimination based on group characteristics and in case of the inapplicability of some or all of human rights to members of a group, special measures should be applied as the positive obligation related to the principle of non-discrimination. While this thesis has contrasted special measures with mainstreaming, this author believes that a combination of both approaches provides the best protection for marginalised groups. With regard to street children, this author has thus suggested the inclusion of questions on street children in the Guidelines for reports by the CRC Committee, in addition to targeted mechanisms for research, awareness-raising and the development of a normative framework for the implementation of street

942 Focusing on accessibility and availability of education, instead of adaptability and acceptability, are typical of this trend. See UN GA resolutions op.cit. notes 417, 419.
children’s rights. Only such explicit and detailed references to them in the context of all categories of rights could lead to recognising them as a specific group in international law. Without such recognition, and despite the existence of potentially useful principles and provisions, they are not likely to receive attention systematically at international and national levels.

As with other groups previously excluded by international law, it would be crucial to encourage the involvement of lawyers in the promotion and protection of the rights of street children and in filling the gap in literature on street children, where the legal perspective is still absent. Unlike social welfare, development and charity approaches, human rights are a powerful political tool. Increasing interest in the rights of street children by legal practitioners and researchers could therefore lead to calls for more attention to these children at the international level, including by the monitoring bodies of international human rights treaties. This, in turn, would influence national law and practice. Education about human rights is equally important and would help to empower street children themselves to use the existing mechanisms at national, regional and international levels. International law is a complex tool to use with its multilayered mechanisms, grey areas and contested authority, but its great scope, flexibility and universal principles make it an effective tool that education makes accessible to all.
ANNEX I

Table 1.
Relevant provisions for street children’s right to education in binding international and regional instruments\textsuperscript{943}

<table>
<thead>
<tr>
<th>Instrument</th>
<th>Provisions</th>
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<tr>
<td>CRC</td>
<td>Arts. 28 (1)(d)(e), (2); 29; 2 (1); 3 (1); 6; 12 (1)</td>
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<tr>
<td>ICESCR</td>
<td>Art. 13 (1), (2)(b)(d), (4)</td>
</tr>
<tr>
<td>CRPD</td>
<td>Art. 24 (2)(c)(e)</td>
</tr>
<tr>
<td>African Children’s Charter</td>
<td>Art. 11 (1), (2), (3)(d)(e), (5), (6), (7)</td>
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<tr>
<td>Prot. of San Salvador</td>
<td>Art. 13 (1), (2), (3)(b) (d), (5)</td>
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Table 2.
Relevant provisions for street children’s right to education in non-binding instruments

<table>
<thead>
<tr>
<th>Instrument</th>
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<tr>
<td>GA Resolution 49/212\textsuperscript{944}</td>
<td>Para. 2, 5-9</td>
</tr>
<tr>
<td>GA Special Session</td>
<td>Para. 16, 44(11)</td>
</tr>
<tr>
<td>Outcome document</td>
<td></td>
</tr>
<tr>
<td>ICESCR Committee</td>
<td>Para. 6 (e) (d), 7, 12, 13, 15, 16, 22, 24, 26, 32, 33, 57</td>
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<td>General Comment 13</td>
<td></td>
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<tr>
<td>CRC General Comment 1</td>
<td>Para. 2, 4, 8, 9</td>
</tr>
<tr>
<td>CRC General Comment 9</td>
<td>Para. 67</td>
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<tr>
<td>Riyadh Guidelines</td>
<td>Para. 24, 27, 30, 47</td>
</tr>
<tr>
<td>World Summit for Children</td>
<td>Para. 20, 22</td>
</tr>
<tr>
<td>Plan of Action</td>
<td></td>
</tr>
<tr>
<td>Vienna Declaration on Human Rights</td>
<td>Para. 24</td>
</tr>
<tr>
<td>World Declaration on Education for All</td>
<td>Art. 1, 3, 5, 6</td>
</tr>
<tr>
<td>Dakar Framework for Action</td>
<td>Goals ii, iii; para. 4, 16, 19, 33, 36, 52, 66, 67, 70</td>
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<td>(Expanded commentary)</td>
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<tr>
<td>Dakar regional frameworks</td>
<td>Sub-Saharan Africa: para. 3.1, 3.2, 4.2, 4.2.1, 4.2.4, 4.2.5, 5-6</td>
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<tr>
<td>For action</td>
<td>The Americas: para. 2-9</td>
</tr>
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<td></td>
<td>The Arab States: para. 58, 59</td>
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<td></td>
<td>Asia and the Pacific: IV A 2-4, B 2 3 5, appendix V</td>
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<td>Europe and North America: 2, 3.4, 3.5, 3.7</td>
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<tr>
<td>Salamanca Framework for Action</td>
<td>Para. 28, 30, 36, 56, 66</td>
</tr>
</tbody>
</table>

\textsuperscript{943} Provisions in bold are especially relevant. Those in italic are necessary for the interpretation of other articles.

\textsuperscript{944} And similar provisions in other relevant GA resolutions, as explained supra in notes 417 and 419.

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ANNEX II

1) List of guiding questions used for interviews in the case study of Brazil

National practice
1. What educational programmes are offered to street children?
2. Are programmes for street children specific to that group?
3. How do street children benefit from programmes for disadvantaged children in general?
4. Is non-formal education available and if yes, what is its status?
5. Can formal education be flexible and adapted to the needs of specific groups?
6. Are there other groups that receive special attention and special educational programmes (e.g. indigenous children)?
7. What are the respective roles of NGOs and the government in providing education for street children?
8. Are there NGO programmes recognised by the government?
9. Does the government use and institutionalise ideas tested by NGOs?
10. How would you describe street children’s educational needs?
11. Have street children been asked about their educational needs?
12. How do they feel about the education that is offered to them?
13. How would you measure the success of a programme?
14. What is the aim of education?
15. What is the ultimate goal of programmes for street children?

National law
16. Are national laws adequate?
17. What are the main obstacles to the implementation of laws?
18. Which laws that protect street children’s right to education?
19. What are the main laws that regulate education?
20. What are the channels that people can use to complain about the violation of their rights/ laws on education? Are they available to children?
21. Have there been any cases, and if yes, with what outcomes?

International law
22. How would you describe Brazil’s implementation of the CRC?
23. How is the implementation monitored and who is responsible?
24. Does the federal/ decentralised system have advantages/ disadvantages for the implementation of international human rights?
25. Why is there no report to the Committee on the Rights of the Child?
26. Is there knowledge about the CRC among the general population and among practitioners?
2) List of institutions represented in interviews

<table>
<thead>
<tr>
<th>Name of institution</th>
<th>Translation/ description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Centro Internacional de Estudos e Pesquisas sobre a Infância (CIESPI), Departamento de Serviço Social, Pontifícia Universidade Católica do Rio de Janeiro (PUC-RIO)</td>
<td>International Centre of Studies and Research on Childhood (research centre within a university)</td>
</tr>
<tr>
<td>Instituto de Psiquiatria (IPUB), Universidade Federal do Rio de Janeiro (UFRJ)</td>
<td>Institute of psychiatry (research institute within a university)</td>
</tr>
<tr>
<td>Projeto Uère</td>
<td>NGO (street children)</td>
</tr>
<tr>
<td>Task Brazil</td>
<td>NGO (fundraising for projects in Brazil)</td>
</tr>
<tr>
<td>Embassy of Brazil in London</td>
<td></td>
</tr>
<tr>
<td>Instituto Promundo</td>
<td>NGO (strengthening community based organisations)</td>
</tr>
<tr>
<td>Secretaria de Estado de Ação Social e Cidadania (SEASC)</td>
<td>State Secretariat for Social Action and Citizenship</td>
</tr>
<tr>
<td>Secretaria Municipal de Desenvolvimento Comunitário (SMDS)</td>
<td>Municipal Secretariat for Community Development</td>
</tr>
<tr>
<td>Rede Rio Criança</td>
<td>Network of street child NGOs in Rio</td>
</tr>
<tr>
<td>Associação Projeto Roda Viva</td>
<td>NGO (socially marginalised children)</td>
</tr>
<tr>
<td>Casa Jimmy</td>
<td>NGO (street children’s home)</td>
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