

THE RIGHTS OF CHILDREN AND MINORS IN INTERNATIONAL CHARTERS

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1. THE TWENTIETH CENTURY 'CHILDREN CENTURY'

At the beginning of the twentieth century a book was published doomed to a great fortune. Its author, Ellen Key, foretold the twentieth century as 'The Century of the Child'. As many as 64 editions issued in the first six years highlighted a need felt by the society. Although its serious limit is that to put the aims of education in the second place, it shook the European culture.

The 'discovery' of the child did not occur suddenly. Ancient tenets of the Christian thought had already 'overturned' the previous traditions. Nevertheless translating the Christian conceptions into the laws of the 'city of man' is an extremely slow process. Declarations and Constitutions of the eighteenth century devoted themselves of the adult individual only. The modern humanism, being anthropocentric, deriving from the Enlightenment, rationalist, bourgeois and in the end eventually atheistic, is the main inspirer thereof, often in antithesis with the Christian humanism. The laws in '800 did not envisage forms of protection of the minor either, albeit the industrial revolution requires children as labour force.

The historical evolution, pre-legal and legal, is therefore slow. It is necessary to reach the first decades of the twentieth century and in particular its second half to see the child been granted the status of weaker party to be protected but at the same time to be promoted during the process of development of his/her personality towards maturity. The first international charters are created in different places, but with an unique purpose: to define the statute of the child's rights.

As we are unable here to analyse in detail all the documents issued within the international community, after a cursory overview of the early private

charters we will deal in depth with UN and European Charters as compared with the African and Arab ones on one side and with the American convention on the other side.

We anticipate a surprising issue for those belonging to the western culture: in the African Charters we can find principles and concerns from which we should take example.

2. FROM PRIVATE CHARTERS TO UN CHARTERS

2.1. *The Geneva and London Declarations*

The first Charters started from pure charitable needs and had private origin, although addressed to social needs. So the International Committee of the Red Cross published in 1920 the Declaration of the Rights of the Child (Geneva, 6 January 1920).

Adopted by the Assembly of the League of Nations as (first) *Geneva Declaration* (24 September 1924) it outlined some duties¹ of humanity towards children in education, welfare and health.

The *Ligue internationale pour l'éducation nouvelle* launched in 1942 the *Charter of Infancy or London's Charter*, which did not deal with duties of society, but with primary rights to guarantee and provide every child with: the right to be nourished, dressed, housed; the right of medical assistance; the right of access to sources of knowledge and wisdom of the nation, to education and religion.

The International Union for Infancy's Protection published then the (new) *Geneva Declaration* in 1948, including a list of duties of humanity similar to those contained in the first Declaration, with the further addition of measures of assistance and social security.

2.2. *UN Charters*

a) The transition from protection through assistance to protection through rights is found in the *Universal Declaration of Human Rights* (New York, 10 December 1948).

¹ The charter defines the following duties of the humanity concerning the child: to enable his/her normal development, both physically and spiritually; provide him with

It states a list of fundamental rights and freedoms which 'every human being' (therefore children too) must enjoy.

Among them, and first of all, right to life. Article 3, which guarantees it, does not mention the prenatal life. This silence – its necessary notice it – remains in the subsequent International Charters, so there are contrasting opinions every time issues about prenatal life, like abortion, genetic manipulation, and in general assisted procreation are discussed within United Nations.

As for specific protecting rules, besides a generic statement that childhood is entitled 'to a special help and assistance', some articles concern the life condition of children: family as 'the natural and fundamental group unit of society' (Article 16), motherhood and childhood, the right 'to special care' (Article 25) and right to education (Article 26).

A full acknowledgment of rights has not been reached yet. Above all the declaration is not legally binding, not even for the signatory states, as it is neither a treaty nor a convention. It has however an important political value. It constitutes a synthesis of the *jusnaturalistic* American and French traditions with the person-focused Christian thought.² It inspires several subsequent constitutions of European states which place side by side the first generation of human rights (civil and political rights deriving from liberal revolutions) and those of second generation (social rights, work, assistance, education and culture, deriving from the nineteenth century movements for solidarity sake). It is the basis from which the international community starts more specific documents aimed at children and youth (right of third generation so called 'of differences').

Closely linked to the Universal Declaration, the two *International Covenants* (New York, 1966) complete the framework of the international statute of human rights with some specific guarantees. The Covenant on civil and political rights (but not the one on economic, social and cultural rights) recognises the right of individual appeal before the controlling organism (the Human Rights Committee) making justiciable the infringed right.

adequate support in case of dis-hability (to feed him/her when hungry, to cure when ill, to stimulate if retarded, to recover if mislead, to shelter and help if orphan or abandoned); rescue first in case of necessity; help a regular process of socialization (putting him/her in the position to earn his/her living and protect him/her against every kind of exploitation); finally raise him/her with the feeling that his best qualities must be put at service of his fellows.

² The synthesis appears, for instance, in the term 'dignity' added to the term 'rights' (Article 1: 'All human beings are born free and equal in dignity and rights').

b) The *Declaration of the Rights of the Child* (New York, 20 November 1959)³ proceeds from equal rights to the rights of differences with exclusive attention for children.⁴

There appears the statement (since then acknowledged in all subsequent texts as reference for every protection, almost a style clause) which in every situation the 'best interest of the child' must be taken into account.

It represents a lead concept certainly significant in indicating the priorities of protection both by the laws adopted by the States in order to guarantee the special protection of the child (Principle 2) and by those responsible for his/her education and guidance, in the first place his/her parents (Principle 7).

Nevertheless the rarefied formula mentioning the 'best interest' refers back to the personal individuality of the child. Without predefined legal criteria, the formula leaves discretion to legal system of every State to determine the real contents so that implementation becomes largely arbitrary. It results therefrom a protection with a patchy distribution depending on each State, so jeopardizing the characteristic of universality and therefore the inviolability of the right.

Furthermore, in the Charter already the tendency to proliferation of rights can be already outlined, as rights are made to coincide with human needs and in this case the category of right loses its nature. In Principle 6 affection is mentioned along with the right of children to be loved: a feeling important for their growth and central in pedagogy of growth, but difficult to define on legal grounds.

c) A turning point is constituted by the *Convention on the Rights of the Child* (New York, 20 November 1989, entered into force on 2 September 1990), the fruit of ten year of dedicated work. It is the most coherent international text, to which all the subsequent documents will refer regarding specific areas of protection. We will consider it in detail.

³ Like any declaration it does not bind even the signatory States, as it has the value of a moral commitment only. It has however the merit of recognizing a full dignity of being a person to the minor as well as to set up the route in order to stipulate proper international agreements binding for the States.

⁴ The qualifying aspects regard the child's right to be raised under the care and responsibility of the parents, and in any case in a loving atmosphere and a feeling of moral and material security: the right of not being separated from the mother; of being relieved first, of being protected from any form of neglect, cruelty and exploitation in particular in work.

First of all the legal instrument is a step forward: the Convention is no longer a mere exhortation but binds the signatory States and compels them to introduce all the legal measures required in order to enforce it.

It is a step backwards with respect to the above mentioned Covenant on civil and political rights as it does not encompass the faculty to make a complaint for the infringement of the obligations stated herein neither by the Contracting States nor for the individual victim of violation.

The controlling organ (the Committee on the Rights of the Child) has a competence to hear the reports submitted by the contracting States every 5 years. Moreover it performs an addressing duty: makes comments on single reports, advises States on which measures to adopt in order for a better implementation of the Convention, along with general observations on specific subjects addressed to all the Contracting States.

As for the content some observations can be prompted.

c.1. Rights Peculiar to Children

The child, in addition to rights of adults, has peculiar rights which take priority. Among them: right to play, to rest and leisure (Article 31), already treated in the Charter of 1959,⁵ penal guarantees,⁶ right to be heard in any judicial proceeding (Article 12); right of protection against sexual exploitation and sexual abuse (Article 34), against abduction, against sale of and traffic in children (Article 35); right to a family, and therefore to maintain personal relations with both parents, even if they are living in different Countries, or to benefit from an alternative care if the family lacks (Articles 8, 9, 10, 20, 21); the prohibition to enlist people who have not attained the age of fifteen years (Article 38).

To these must be added the personal rights, already guaranteed to everyone in former Charters and reaffirmed in the Convention with respect to children: right to personal identity (Article 7) and to preserve it (Article 8); to freedom of speech, thought, conscience, religion, association, (Articles 12-15); to privacy (Article 16) and to health (Article 24).

⁵ Principle 7: 'Child must be allowed to play and to have leisure time, aiming to educational purpose'.

⁶ Neither capital punishment nor life imprisonment are allowed for children; the detention shall be used only as a measure of last resort and for the shortest appropriate period of time. States must promote laws so that no child alleged as, accused of, or recognised as having infringed the penal law shall be deprived of his/her liberty unlawfully or arbitrarily (Articles 37 and 40).

To the rights of children correspond precise undertakings by the States. For instance, the respect for the sexual personality of the child is coupled by the obligations of the States to protect him/her against exploitation and violence (Article 34). For the first time – must be noticed – this article clearly mentions a very wide and alarming problem, connected with pornography.⁷

c.2. The Relationship Rights: Child and Family

If the right to family is a right peculiar to child, it is too the most important relationship right of children.

About this issue the Convention shows controversial points. To have mentioned in a paragraph of the Preamble the family not only as ‘the fundamental group of society’ but also ‘the natural environment’ for the growth and welfare of children is certainly positive. It is positive as well the request, reported in several provisions, to the States of promoting in their domestic laws the parent-offspring relationship.

Assertion, sometimes heard, that Convention sets children against parents is not correct.

Not only the Convention does not concern with private relationship between child and his/her family, because it (as every convention) binds States, not private citizens. But also suggests that State should not interfere, except for very serious and specific reasons, in relationship between child and his/her ‘natural environment’ (the family) and, on the contrary, that they should help family to take care of and to grow children, giving appropriate support. The subsidiary role of State intervenes when the family lacks means to secure to the children the minimum standard of welfare necessary for their growth (Article 27).

Rather, the Convention is aimed at providing the child the ‘right to parents’ contribution’.⁸ This is inferable from many provisions which guaran-

⁷ This fills the gap left by a more ancient Convention of Geneva (12 September 1923) against circulation and trade of obscene publications, which did not deal with infantile pornography, though at that time it was universally considered forbidden.

⁸ Among these rights: to provide appropriate direction and guidance, in a manner consistent with the evolving capacities of the child, is a duty of parents (Article 5); the parents have the primary responsibility to secure the conditions of living necessary for the child’s development (Article 27); a child shall not be separated from his/her parents, except when such separation is necessary for the best interests of child (Article 9); the child separated from one or both parents must maintain personal relations with both parents, except if it is contrary to the child’s best interests (Article 9.3); it is parents’ right

tee more specific rights and duties. The Convention considers the family rather realistically not only in its physiology, but also in its pathology.

Everyone can easily suppose that the natural and optimal situation of a child living happily in his family may come to an end for many reasons: there are children of separated couples, children in hospitals, street children, during wars there are children orphan or separated from parents or even enlisted as soldiers. General principles, to which domestic legislation of States Parties must be inspired, cope with these situations (and many others which I cannot mention for lack of time).⁹

When child must be protected from his/her own family, the traditional international principle (expressed in various Conventions, for example in European Convention for Human Rights, precisely in Article 8) according to which States are not allowed to interfere with familiar life, cannot be acknowledged.¹⁰ Exactly concerned with sexual abuse on children the European Court of Human Rights (*Stubbing and Others v. the United Kingdom*, 1996) ruled asserting both the positive obligation by the States (Paragraph 62) and the rights of children and other vulnerable individuals to State's protection (Paragraph 64).

It is plain that if family does not exist or is not able to carry on its duties, it is due up to the State to indicate which instruments can fulfil the rights provided by Convention. Article 20 lists possible solutions: foster placement, 'kafalah' of Islamic law, adoption, placement in suitable institutions for the care of children.

Certainly the formulation of some articles does not seem to be very clear and precise: Article 10, for instance, about immigration, suggests that States should consider a request of family reunification 'in a positive, humane and expeditious manner': this very generic formulation conceals the fears felt by rich States about a massive arrival of immigrants if the family reunification is granted too easily. Some Countries (Japan, United

to provide the child with direction towards freedom of manifesting his/her religion or beliefs (Article 14); States shall ensure alternative care for child temporarily or permanently deprived of his/her family environment (Article 20).

⁹ Let's make an example from phenomenon of violence in the family: States Parties shall take all appropriate legislative measures to protect the child 'from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse' (Article 19). ECPAT (NGO against sexual exploitation of children) reports that many sexual abuses happen inside and not outside family.

¹⁰ Article 8 of ECHR recognises to States the right to interfere only in accordance with the law.

Kingdom, Singapore) approved this article under a reservation of a strict interpretation. The Committee on the Rights of the Child, as to it, insists upon ratifying the Convention of 1990 about protection of rights of migrant workers and of their family's members.

c.3. Other Relationship Rights and Social Rights

The variety of rights exceeds the relationship between State-parents-children.

Pedagogy of human development, to which the Convention is inspired, is aimed to growing a subject not only who lives in family, but also who is expected to interrelate with other people in a society structurally and politically organised, and to be provided with cultural stimulations.

Social rights are also protected: first of all the right to primary education, compulsory and available free, and to a higher one (Article 28), regulated in a way consistent with dignity of the child as a human being; secondly (Article 32) the right to a formative job, characterized by progressive training and by absence of conditions of economic exploitation or in any case harmful to the child.

International Labour Organisation (which after World War II became a Specialized Agency of the UN) has intervened since 1992 against the negative consequences of the process of the economic world globalisation on child labour.

More recently, the fight against the 'worst forms of labour', which harms health, morality and safety of the child has become object of several actions for their eradication. *ILO Convention No. 182* (June 1999) and *Recommendation No. 190*¹¹ call upon member States to adopt adequate criminal punishments, to implement integrated actions in favour of prevention, education and formation and to support families with economic and cultural assistance.

The complexity of the themes (economic, ethic, legal) about child labour does not allow now a thorough analysis. The delocalisation, one of the most

¹¹ The variety of the 'worst form of labour' taken into consideration and with respect of which the Convention calls upon States Parties adequate sanctions are: all forms of slavery, compulsory labour, forced recruitment for use in armed conflict, the use of a child for the production of pornography or for the production and trafficking of drugs, work which is likely to harm the health, safety or morality of children.

worrying and difficult problems, drives many factories to open new activities in States (from Asia to Brazil) where they can use low cost manpower. In those Countries exploitation of child labour permits to achieve high market shares thanks to a growth based on export. Answers on this issue by ILO or other international bodies, such as the WTO, are still lacking today.

c.4. *Prevalence of Interests*

As we mentioned above the Convention refers to the 'interest of the child' (it means a young under eighteen years, but in some specific situation the age limit is lowered) as the paramount consideration in the exercise of some rights. The interest of the child is too the superior and general principle.¹²

In legal language interest of the child means prevailing legal test, which implies that in a conflict between right of a child and right of an adult, the first one prevails.

Here appears a very delicate question: is the prevalence of child's right absolute or is it to be assessed taking into consideration the whole familiar structure? The Christian concept of *patria potestas* supports the second solution, in fact the Holy See, ratifying the Convention, made some reservations. The Holy See declares that it interprets the Articles of Convention in a way which safeguards the primary and inalienable rights of parents, insofar as these rights concern education (Articles 13 and 28), religion (Article 14), association with others (Article 15) and privacy (Article 16).

It is important to emphasize that parents are not mentioned in the Charter as persons having rights, but certainly many rights of their children are actuated by them or even they find enlargement in parents' rights-duties. It is not easy to reconcile two principles both coming from the Convention: the principle that the child's rights must be considered inside the family and that the child's rights prevail over those of the family, better of the heads of family, the parents.

Let's make an example: to such an extent is the right to religious education or to sexual one is a right which can be exercised only by the minor himself/herself and from which point, the right is vested in him/her but

¹² 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration' (Article 3).

he/she is prevented from exercising it? Does the 'weighty responsibility of caring education' (quoting a famous definition of Vatican II) bring as a result a primary role by parents?

A detailed legal analysis is lacking up today. It is useful to draw a distinction between relationships inside the family and relationships between the child and the State. In the second case the rights of the child certainly prevail. In the first case the rights of parents prevail according to the 'right to parents' contribution', which lays stress on responsibility of parents and which – as we said above – can be acquired from various conventional provisions.

European Codifications state how to conciliate rights of parents and rights of children. For instance: Italian Law specifies not only the duties of parents to children, but also those of children to parents.¹³ A clearer international provision to precise inviolable rights of children would stimulate every State to adjust its domestic legislation. If the child needs a family is clear that his/her best interest is not achieved when the family is scattered.

Here appears one of the most hot subject of current times. Which model of family must be considered: a traditional family or a, so called, alternative one? For instance there is a discussion about gay couples and their claim of a 'right to a child at any cost' (adoptive or outcome from genetic manipulation). Without thinking to exhaust the complex question, it is necessary to remember that psychologists underline the importance of both paternal and maternal figures for a well balanced growth of children and even of the couple of parents.

The Convention does not adopt a definite position on the matter, but its interpretation could lead, with the authority of an international seat, to favourable interpretation that children are adoptable by homosexual couples. Therefore the definition of the 'prevailing interest of minor' today, more than in the past, should be seriously and deeply pondered.

c.5. *The Right to Life*

The most critical aspect is 'the inherent right to life' (Article 6). It is guaranteed in the triple specification of right to physical and mental integrity

¹³ As for the duties of parents the Italian Civil Code affirms that 'marriage imposes both husband and wife to maintain, teach and educate progeny bearing children's talent, innate inclination and aspirations' (Article 147). The article 315 regarding the children's duties states that 'the child should respect his/her parents and should contribute, according to his/her property and income, to family's welfare, as long as he/she lives with his/her family'.

(Article 19), right to health (Article 24) and, without any details, right to protection from any form of exploitation, prejudicial to any aspects of child's welfare by every person (Article 36).

From articles of Convention it is excluded any possible link with prenatal life, which does not mean only protection of embryo from manipulation or foetus from abortion, but also protection of child before birth, that belongs to the juridical legacy of the civilisation of roman legal tradition (enough to remember the protection of right of unborn child to inherit).

The Convention mentions prenatal life only in the Preamble.¹⁴ It literally speaks of appropriate legal protection before as well as after birth. This assertion, written after a long fight during preliminary works engaged both by those States more sensitive to right to life since conception and by the delegation of the Holy See, is legally material. Preamble and annexes to Treaties – as Article 31 of the Vienna Convention on the Law of Treaties (23 May 1969) affirms – are guide for interpretation of articles. It goes without saying that an article protecting right to life of a future baby since conception would guarantee much more. Preliminary works clearly demonstrate the fear of contradicting laws for abortion of many States.

One can therefore understand that the Holy See by acceding to the Convention on the Rights of the Child (20 April 1990), remained confident that the ninth preambular paragraph will serve as 'the perspective' through which the rest of the Convention will be interpreted. Article 31 of the Vienna Convention is clearly quoted. The Holy See made also some reservations: on Article 24 about family planning education and services: it is necessary to refer only to natural methods morally accepted by the Roman Catholic Church. As we said above, the Holy See made a reservation on its interpretation on articles about education (Articles 13 and 28), religion (Article 14), association with others (Article 15) and privacy (Article 16), so that primary and inalienable rights of parents – first educators of child – are safeguarded.

These extremely delicate points deserve unambiguous definitions. The same words 'child' and 'family', if they are not correctly defined, risk being prejudicial to the right to life and the right to family. It is an objective remark that abortion breaks the right to life of child preventing his/her birth and that

¹⁴ The Convention, affirming that child 'by reason of his physical and mental immaturity, needs special safeguards and care' adds 'including appropriate legal protection, before as well as after birth'.

genetic investigations may persuade to sacrifice the right to life. It is too an objective remark that for family we intend the natural institution, not alternative models, the right is to 'one family' not to 'families'. Nevertheless observations on both remarks prove the clash of opposite opinions.

We notice then that the Committee on the Rights of the Child (which controls the implementation of the obligations of the Convention) often interpreted the Convention with criteria prejudicial of rights of prenatal life, therefore some jurists, designed as components of Committee and chosen among supporters of a line prejudicial of the right of life, affect the decisions of each State.

The Convention could be wider and more punctual also about the right of parents to provide religious and moral education of children.

More recently, the *Optional Protocol to the Convention on the Rights of the Child on the 'sale of children, child prostitution and child pornography'* (signed on 6 September 2000, entered into force on 18 January 2002) intervenes about the more dramatic involution of our social life. It underlines that 'a number of particularly vulnerable groups, including girl children, are at greater risk of sexual exploitation and that girl children are disproportionately represented among the sexually exploited' (Preamble).

Another *Optional Protocol 'on the involvement of children in armed conflict'* (signed on 6 September 2000, entered into force on 12 February 2002) condemns 'the targeting of children in situations of armed conflict and direct attacks on objects protected under international law, including places that generally have a significant presence of children, such as schools and hospitals' (Preamble).

Moreover, on 25 December 2003 entered into force the *Protocol to the United Nations Convention against Transnational Organized Crime* (adopted on 15 December 2000) about trafficking in persons, especially women and children.

In May 2002 took place the most important Conference, the *Special Session of the UN General Assembly on Children*, which was very participated. For the first time the object of discussion was the condition of children. At the end the draft report 'A World Fit for Children' was adopted. It is the new agenda, including 21 specific goals and targets for the next decade, promoting healthy lives; providing quality education for all; protecting children against abuse, exploitation and violence; and combating HIV/AIDS.

2.3. *The Millennium Development Goals*

The Road Map towards the implementation of the United Nations Millennium Declaration states as fourth goal that to reduce by two thirds between 1990 and 2015, the under-five mortality rate. Certainly this is an important initiative, but it does not cope with the problem of the future baby. On the contrary, introducing the protection of the 'reproductive health of the woman' it denies the right to the life of future baby in case of conflict with woman's health.

3. THE CONVENTION ON PROTECTION OF CHILDREN AND COOPERATION IN RESPECT OF INTERCOUNTRY ADOPTION

The intercountry adoption has been often a favourable field for violation of fundamental rights of children and for unclear traffic and procedures. The *Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption* (The Hague, 29 May 1993) approaches different laws and matches its goals with those of the Convention of New York (1989).¹⁵

The new regulation, has raised in many European Countries the number of couples requiring an intercountry adoption; sometimes they are not fully aware that the adopted one comes from a quite different culture.

As some survey investigations report,¹⁶ many couples resort to intercountry adoption as a second choice due to the long delay and complex procedures for national adoption, without being aware of what this type of adoption implies. In similar cases the risk of a dramatic failure grows, not just with reference to the phase of the introduction of the child in the family but mostly with regards to the phase of teenager crisis, a period difficult to manage by unprepared parents. Thence the emerging of ancient prejudices against the 'child coming from faraway', which can poison both the internal relationship within the foster family but also their social life.

¹⁵ They can be summarized along three major lines: a) to ensure that the intercountry adoptions take place in the best interest of the child, b) to establish a system of cooperation amongst Contracting States; c) to secure the recognition in Contracting States of adoptions made in accordance with the Convention.

¹⁶ You can see, for instance, the inquiry made by the Italian Parliament (final document 27 October 2004).

Summing up the culture of acceptance by the candidate couples, which should be supported otherwise by all the interested parties (institutions, youth courts, social services and approved agencies) seems not yet rooted.

4. THE EUROPEAN POSITIONS

4.1. *The European Charters*

The Council of Europe approves the *European Convention on the Exercise of Children's Rights* (Strasbourg, 25 January 1996) based on the Convention of the Rights of the Child.

The discrepancies on the matter of age of majority with European position still too different (ranging between 19 and 21 years) had some relevance in producing a widely shared agreement. One extremely delicate problem was at stake: how far the law could keep the pace with the social phenomenon of the gradual earlier occurrence of psychophysical maturity without favouring a lowering of responsibility of parents or of those in charge of youth education.

Hence derived an arrangement restricted to the participation of minors in those processes where their rights are at stake. The guarantee organ therein introduced – a permanent committee of no more than 7 experts designated by the States – is unable to create a form of supranational control on the domestic compliance of the provisions of the Convention, but can put forth only recommendations.

More recently the Council of Europe adopted the *European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children* (20 May 1980), the *Convention on Cybercrime* (opened for signature on 23 November 2001) and the *Convention on Contact concerning Children* (opened for signature on 15 May 2003).

4.2. The *Charter of Fundamental Rights of the European Union* (Charter of Nice, November 2000; presently second part of the Treaty establishing a Constitution for Europe, signed at Rome on 29 October 2004, so called European Constitution) also deals with the inviolable rights of youth, encompassing rights already guaranteed by UN Conventions¹⁷ and reaffirming the best interest of child as 'prevailing' on that of adults.

¹⁷ Among other duties, we underline: the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary

4.3. Among the European political position it is worth mentioning here the *European Parliament Resolution of 16 March 1989*. Intervening on the ethical and legal problems of genetic engineering it calls on governments and parliaments of the Member States for acting specific law to protect the human embryo, guaranteeing the protection of genetic identity, forbidding experiments aimed at modifying the genetic program of human beings, prohibiting as a criminal offence any commercial use of embryos or foetuses. The rigour, in method as well, of the resolution however was abandoned in the subsequent ones.

5. THE AFRICAN AND ARAB POSITIONS

5.1. *African Declarations and Charters*

Between the 70s and the 90s of the last century the issue of the rights was dealt with Africa.

The relative international instruments reflect the needs of a society conscious at last that the principle of non-discrimination is fundamental in every civilisation. South Africa, a country with the major discriminating tradition, as soon as apartheid vanished puts age among factors of non-discrimination.¹⁸

The definition of children rights is trusted first to the general charters, thereafter to specific documents. Among these the *Monrovia Declaration on the Rights and Welfare of the African Child* (17 to 20 July 1979) and the *African Charter on the Rights and Welfare of the Child*, adopted on 11 July 1990.

Albeit the list of rights is not so different from that present in the Convention on the Rights of the Child, the most peculiar provision of the African Charter appears to be Article 31. It regulates children's responsibility, stating in particular that the child, among other duties, must work for the cohesion of the family, respect his parents, superiors and elders as well as assist them.

to his or her interests; the prohibition of child labour; against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education.

¹⁸ 'The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth'.

The prospect of children duties toward their family, and not only of rights, is certainly a reflection of the communitarian culture alive in Africa. The economically weak structures of the African continent, due to a lack of economic-industrial development, has its point of strength in the socio-political organisation based on the family and clans as primary sites of offspring growth.

Much different is the situation in the other continents. Every cultural homologation can be considered inappropriate. However, apart from careful distinctions, more attention paid to duties and not only to rights could be everywhere the wished countermeasure to fragmentation, which the culture of individual rights is boosting.

The African Charter in addition to offering a more balanced point of view, represents also a remarkable breakthrough in the traditional approach to juvenile justice. For the first time a individual is granted the faculty of making a complaint before an international organ of safeguard for an infringement not only of civil and political rights, but of the economic, social and cultural ones as well – usually considered not justiciable – which imply the adoption of proactive measures and the allocation of resources by the respondent state.

If this new model works, it is conviction of the legal science that the actual framework of child protection in Europe must be likewise reconsidered.

5.2. *Arab Declarations and Charters*

The *Universal Islamic Declaration of Human Rights* (19 September 1981), presented as ‘a declaration for mankind, a guidance and instruction to those who fear God’, based on the Quran and the Sunnah, sets the human rights each Muslim government must implement. But the very limit, which every law can have, due to the principles of Sharia, introduces many constraints to the inviolability of human rights, because it makes them relative instead of absolute, and therefore inviolable. Let’s take for instance, the large number of limitation set by the religious law to the capacity of women, which become unavoidably the incapability of girls.

Also the *Cairo Declaration on Human Rights in Islam of 5 August 1990*¹⁹ and the *Arab Charter on Human Rights* (adopted on 15 September 1994 by

¹⁹ The Declarations considers ‘the fundamental rights and universal freedoms in Islam’ as ‘an integral part of Islamic religion’ and affirms that family is ‘the foundation of socie-

the Council of the League of Arab States by its resolution 5437) envisage a privileged protection for the family, motherhood and infancy (besides elders) but always within the limit of the respect of the Sharia. The Arab Charter, while recalling the death penalty for extremely severe crimes, states that execution can not be carried out on minors below 18, additionally on a pregnant women prior to her delivery or on a nursing mother within two years from the date on which she gave birth (Article 12).

6. THE AMERICAN CONVENTION ON HUMAN RIGHTS

The protection of the baby to be born is clearly guaranteed by the *American Convention on Human Rights*, adopted at San Jose, Costa Rica, on 21 November 1969 and entered into force on 1978. Its Article 4.1 affirms that the right to life shall be protected by law and 'in general, from the moment of conception'.

Among the prescription to which the international community binds the States, this is the only one explicitly addressing the legal subjectivity of the born to be. As this does not forbid dissociated praxis the protection results attenuated.

7. THE UNCERTAIN PROTECTION OF THE MINORS NOTWITHSTANDING INTERNATIONAL CHARTERS

Notwithstanding the international protection, the child today lives in a social context which experiences difficulties to relate with the children world and to understand their needs and rights. Even more so when family is unsteady or is missing, the child is subject to an accelerated process of growth. He/she is involved in the so called 'adultization' risking being deprived in reality of the right of being happily infant in his innocence and ingenuity. On the other hand, the proliferation of human rights, even in the very sensitive field of children rights, poses a risk of misunderstanding, that

ty' (Article 5). About the offspring-parent relationship (Article 7) underlines that 'parents have the right to choose the type of education they desire for their children' but 'provided they take into consideration the interest and future of the children in accordance with ethical values and the principles of the Sharia' (7.2). And only 'in accordance with the tenets of the Sharia' both parents are entitled to certain rights from their children (7.3).

to each single need corresponds a right, without additionally a duty being attached thereto. The category of insatiable right, which starts worrying the most sensible European legal science is applicable to the children rights too.

Neither in the UN Charters nor in the European ones the child is so explicitly recalled to his/her duties towards his/her family. I mentioned above that it is not correct to accuse the Convention on Rights of the Child to put children against parents. Now I add that its auspicious development should be focusing on the duties of children towards their family. In the African Charters this is stated more clearly. In the Arabic Charters the constraints of the Sharia limit the inviolability.

Fragility of the child faces increasing difficulties in rich countries as well in poor ones, though for different reasons.

As investigators on child's deviance report, children often become on one hand a victim of individual and social abuses on the other the actor of violence, as a double faced Janus, expression of scattered values in the communal life itself. Otherwise, he/she faces a radical loneliness which finds its primary cause in a collapse of the family stability and unity. Anglo-Saxon students explain the children's unsettlement with the theory of 'sensation seeking' i.e. looking for, often unaware, strong sensations in new or extreme experiences: a rebellion against social conventions in order to obtain the esteem from others and to win one's own loneliness and fear.

Two recent UNICEF reports, following the Special Session of the UN General Assembly on Children in May 2002 (above mentioned) are dramatically significant. The 2003 Report 'State of the World's Children-Child participation' provides worrying data on children mortality, loss or lack of parents, scanty education, unregistered birth, killing or injuries in war operations, trade of children, mostly girls.²⁰ The 2004 Report 'State of the World's

²⁰ Each year in the world some 11mn children below 5 years die because of diseases which can be prevented by vaccination; 6000 young people are infected by AIDS/HIV every day; 14mn children below 15 lost one or both parents because of AIDS; in the sub-Saharan countries more than 15 % children below 15 are orphans. As for education 120mn children at school age do not attend any school, 53 % of them are females; in sub-Saharan Africa and in Southern Asia more than 50mn girls at school age have no access to education. In 2000 beyond 50mn newborn babies not were registered (41 % of world births). Since 1990 over 2mn children were killed and 6mn severely injured in wars. Children labour is an experience for 1 child out of 8 in the world: about 211mn minors are working, 180 of them between 5 and 17. Trade of children is a 1bn US \$ business per year, involving an esteemed 1,2mn children and young. The trade of girls has seen a remarkable increment of girls from Moldova, Romania and Ukraine, illegally transferred to western Europe by criminal gangs based in Albania, Bosnia and Herzegovina, Kosovo and Former Yugoslavia.

Children-Girls, Education and Development', specifically aimed at the education emergency with special reference to girls, is nonetheless alarming.²¹

To these data must be added those concerning the denial of rights in prenatal life: abortion, disposal of frozen embryos, experiments on stem cells. UNICEF does not mention them. It is a deafening silence, beside being worrying, broken only by the voices of the Churches. Yet everyone should understand that no investment in protecting prenatal life, as well as no investment in children, no attention for the youngest, mean no future for a country, in addition to despising the most precious resources.

In the end, this youth, so cared by the international community for more than 50 years, seems to vanish, if even can be born.

Generalizations are risky. Despite negative events, everyday comforting news are reported of young people involved in their families and societies to live in positive the rights that the international Charters grant to them. Their presence and their initiatives deserve the appellation of 'sentinel of the dawn' given to them by the late Pope John Paul II.

But in order to make this outlook comforting everywhere, it is necessary to put a remedy to the many educational inadequacies, to the merchandising of the society, to the socio-economic problems of the poor countries, to the alienating lifestyles of the rich countries.

What to do? It is a duty to go on proclaiming the children rights in the international seats as well as within the single States. But this is no longer enough. It is mandatory to clarify as soon as possible the ambiguities still present in matter of right to life, offspring-parent relationships, family model, role of the family in social life.

Moreover rights must be enforced by amending, if necessary, the international control instruments. The question is not just to make justiciable those rights guaranteed to children but also to better define the competence of the organs currently established within the international community. For instance the question to be solved, once and for all, is whether it is lawful or not that a technical organ devoid of any political legitimation like the Committee (established for the control of the Convention) may by means of interpretation endanger the right to life, having such an endangerment the

²¹ The 83 % of girls not attending school lives in sub-Saharan Africa, Southern Asia and East Asia. Among the conditions causing this situation we number the distance between schools and dwelling, the lack of drinking water and all these contexts harbour violence in the surrounding as well as within the school itself.

same dignity as that of inviolable rights. The impact of this practice on domestic law ends to modify the correct institutional design, according to which each norm is a product of the democratic consent expressed by the organs politically established for.

Most of all it is urgent to establish 'human ecology' as defined in the encyclical *Centesimus Annus*, recalling that its first form is the family 'in which man receives his first formative ideas about truth and goodness, and learns what it means to love and to be loved, and thus what it actually means to be a person'.