

**RESERVATIONS TO THE CONVENTION
ON THE RIGHTS OF
THE CHILD :**

**A Look at the Reservations of
Asian State Parties**

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RESERVATIONS TO THE CONVENTION ON THE RIGHTS OF THE CHILD : A Look at the Reservations of Asian State Parties

This paper looks at reservations that Asian countries have made to the Convention on the Rights of the Child. The eight countries, Bangladesh, China, India, Indonesia, South Korea, Myanmar, Pakistan and Thailand, that ratified by 29 January 1993, will be discussed. The emphasis will be on explaining how each reservation affects the work of NGOs at the national level - what national NGOs need to look for, what they can do.

Each reservation will be discussed on a country-by-country basis in the second part of this paper. Since the Convention on the Rights of the Child (CRC) is a legal document, some basics about treaty reservations will be discussed in the first part of the paper.

I. THE BASIC RULES ABOUT RESERVATIONS TO TREATIES

1. What is a "Convention"?

"Convention" is another word for "treaty". When countries - or states - make a treaty, they are making promises to each other. These promises create rights and obligations which are legally and politically binding.

2. How is a human rights treaty different ?

Human rights treaties, such as the CRC, are different from other types of treaties. The promises that states make in human rights treaties give rights to individuals. Also, as more and more states ratify a treaty, the treaty standards can become international standards that all states will be expected to live up to whether or not they have ratified the treaty.

The promises that a state makes in a human rights treaty are, in effect, promises to make whatever changes are necessary to meet the treaty standards. If a state's constitution conflicts with a treaty standard, or if a law or administrative practice is in conflict, the state, in effect, promises to change the constitution, law or practice. States can, of course, have higher standards, but the treaty standard is the minimum.

Some treaty standards cover the behaviour of the public. In these cases, the state promises to change social practices. For example, in the CRC, states promise to "take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children" (art. 24.3).

Human rights treaties are also different because, by ratifying a treaty, the state allows the international community to criticize how it is living up to the treaty standards. For example, in the CRC each state must write a report on its implementation of the Convention, which will then be reviewed at public sessions by a Committee of experts.

3. What is a "reservation"?

A reservation is a statement that a state makes at the time of ratification which either puts a limit on a right or cuts out a right altogether.

International human rights are the supreme standard - any law or practice in conflict with them must be changed. When a state ratifies the CRC, its laws and practices can be listed in the order of their supremacy :

CRC
Constitution
Laws and administrative practices
Social practices.

A reservation to the CRC changes this supremacy, it either puts a CRC right in a lower place on the list or removes the right.

South Korea's reservation to the article on adoption safeguards says, "The Republic of Korea considers itself not bound by the provisions of paragraph (a) of art. 21". The effect of this reservation is to remove article 21 (a) from the treaty : the treaty standards set in that paragraph do not apply in South Korea; the Government has made no promise to change any law or practice which conflicts with that paragraph.

Bangladesh's reservation to the same adoption article says, "Article 21 would apply subject to the existing laws and practices." The reservation does not remove the article, but the standards are lowered : if any law or social practice in Bangladesh is contrary to the treaty standard, the Government has made no promise to change the law or practice.

Because of their reservations, South Korea and Bangladesh are not parties to exactly the same Convention. However, it is still correct to say that they are "parties to the CRC" because it is understood, without being expressed, that a reservation has removed part of the treaty.

A reservation not only limits, or eliminates, the international human rights of individuals, but it also limits the rights of other states to enforce the treaty standards. Since South Korea has not promised to live up to the adoption safeguards set by CRC art. 21(a), other states do not have the right to criticize South Korea's failure to live up to that article. Without South Korea's promise to

live up to the standard, enforcement action by another state might be a violation of South Korea's sovereignty.

There are limits to sovereignty, however. Some human rights are so widely accepted as fundamental that states may take enforcement action against violations even if the violating state made a reservation or even if it did not ratify a treaty. Violating the right to life by genocide is an extreme example.

A reservation only affects the article, or paragraph of an article, that is specified. For example, South Korea's reservation to art. 21(a) does not affect the rest of art. 21 nor any other article. Many CRC articles give overlapping protection. When children's advocates are faced with a reservation to one article, they must see how other articles, which have not been reserved to, can be applied.

4. Declarations

A "declaration" is different from a "reservation". When a state ratifies a treaty, it can make a declaration explaining what it understands a word or sentence in the treaty to mean. Myanmar's declaration says, "Myanmar interprets national security as encompassing the non-disintegration of the Union". Such an "interpretative declaration" has the legal effect of limiting the state's promise, but it is different from a reservation. The difference is the intention. The state's intention in a reservation is to exclude or modify a treaty standard, while the state's intent in a declaration is to explain what it understands that standard to be.

Another kind of declaration gives an explanation of the state's policy. These declarations often look like mini political speeches and are sometimes made to satisfy political interests at home which might otherwise oppose ratification.

Sometimes, unfortunately, the wording that a state uses is so unclear that it is difficult to tell if the state has made a declaration or a reservation.

5. Are reservations legal ?

Since human rights treaties set minimum standards, is it legal to make a reservation ? The answer is yes and no.

During the negotiation of a treaty, complete agreement on all issues is usually not possible. Reservations are a practical way to get the largest number of states to be parties - it allows a state to eliminate what it does not agree with. Of course some limit must be put on reservations or the objective of a treaty would be destroyed.

A state can make a reservation to the CRC, but, "A reservation incompatible with the object and purpose of the present Convention shall not be permitted." (CRC art. 51.2). Since the CRC does not say who decides "incompatibility" or

who has the job to "not permit" an incompatible reservation, the answers must come from general principles of international law.¹

A state can only make reservations or declarations at the time it ratifies a treaty. Each state that is already a party has the right (and duty) to decide if another state's reservation is compatible. If a state party finds the reservation incompatible, it can reject the ratifying state as a party. In that case, no treaty is formed between the two states. Note that it is not the reservation that is rejected, it is the reserving state that is rejected as a treaty partner.

The decision to reject a reserving state is a mixed decision : it is part legal, part political. The legal part is deciding if a reservation is incompatible. The political part is deciding whether to enforce CRC art. 51.2 by rejecting the state as a party.

Any state party that does not promptly reject the reserving state is considered to have accepted the reserving state as its treaty partner. The treaty between them is modified according to the reservation.

Any state that later ratifies the treaty must decide, at the time of its ratification, whether to reject as a treaty partner any prior state party that has made a reservation.

Under this system it is certainly possible for treaty relations to become very complicated : not all the treaty parties may be partners with each other. But this has not happened with the CRC. Out of 128 parties, 33 have made reservations, but none has rejected another state. (Figures accurate as of 29 January 1993).

The two important points to keep in sight are these: Reservations are not unilateral. While a decision to make a reservation is unilateral, the reserving state cannot become a party unless another state decides to accept it. And the decision to accept or reject is part legal, part political.

6. Objections to reservations

There is another option that a state party has when faced with a reservation. It can accept the reserving state as a treaty partner but make an objection to the reservation. The objection has no legal effect, however. It is only a statement of disapproval.

7. Can a reservation be taken back ?

A state can cancel, or withdraw, its reservation at any time. A withdrawal has the legal effect of putting the reserved article back into the treaty.

¹ The Vienna Convention on the Law of Treaties (1969) covers reservations, but it is only binding between those states which have ratified it.

Sometimes a reservation is too broad, that is, it cuts out too many rights when compared to what the government's concern is. There are two things a government can do about an unnecessarily wide reservation. First, it can make a partial withdrawal. For example, if a reservation says "subject to existing laws and practices", dropping the words "and practices" is a partial withdrawal. A partial withdrawal will narrow a reservation, thereby giving more rights.

Second, a state can clarify a broad reservation by making a policy statement explaining how the reservation will be interpreted and applied. The policy statement can take many forms : an administrative order, decree, legal opinion , or even a press release. Policy statements can give government officials important guidance in how to implement the reservation, which can be useful to NGOs in their advocacy.

8. How is the work of a national NGO affected by a reservation ?

The effect of a reservation on a national NGO's work will depend on which role the NGO is playing. Three main roles that NGOs play are :

- to investigate. The first step in protecting children's rights is to investigate the actual conditions of children. This includes not only studying the state's laws and regulations, but also government practices and social practices. The inspection of juvenile jails, examining the quality of medical care at a refugee camp, looking at the teaching methods and materials in schools are all parts of investigation. A reservation to the CRC does not change this work.

- to evaluate. In order to make a decision about the best interests of children, there must be an evaluation of how a practice impacts on children. While some effects on children will be obvious, sometimes experts will be needed. Also, since a decision about "best interests" reflects social values, the wider community must be involved at some point. A reservation does not change this work.

- to advocate. The goal of advocacy is change - to improve children's lives by bringing state and social practices up to treaty standards. This is where a reservation will cause the most problems for national NGOs.

When a right is protected by the CRC, a national NGO can say to its government -

- by ratifying the CRC, the government gave legal rights to children; it must now respect those rights.

- by ratifying the CRC, the government has promised to make the necessary changes; now the government must live up to its promises.

- CRC rights are international standards; the government must make changes to comply with these standards.

- the international community insists that the government lives up to international standards; the country's reputation, foreign aid, and even trade can be hurt if human rights are being violated.

A reservation either takes away or reduces the power of these arguments.

How a reservation affects advocacy will depend upon what the NGO's objective is : to implement the CRC with the reservation in place, or to get the reservation withdrawn or narrowed.

In either case, good advocacy requires an NGO to know the law. When there is a reservation to one CRC article, NGOs must advocate on the basis of other CRC articles, as well as the nation's laws and cultural values. Also, most states have ratified other human rights treaties, which must also be used in advocacy. ²

Misunderstanding the law can create problems. For example, government officials might misunderstand a reservation, implementing it in a way that unnecessarily limits children's rights. In these cases, NGOs must know the law better than the government officials do; educating government officials is an important part of advocacy.

Effective advocacy also requires knowing the facts. A government that really wants to protect its children may make changes, despite a reservation, when NGOs document how children are being hurt by a specific law or practice. Getting international co-operation also requires well-documented facts.

The following discussion of each reservation will help NGOs to know both the law and what facts to look for.

² While there are many human rights treaties, the two Covenants of 1966 most closely parallel the CRC: The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.

II. COUNTRY - BY COUNTRY REVIEW OF RESERVATIONS

1. BANGLADESH

Bangladesh 's two reservations are to the articles on religious freedom and adoption safeguards.

CRC art. 14.1 - Freedom of thought and religion

CRC art. 14.1 says :

States Parties shall respect the right of the child to freedom of thought, conscience and religion.

Bangladesh's first reservation says : **"The Government of the People's Republic of Bangladesh hereby enter our reservations on article 14, paragraph 1."**

By this reservation, Bangladesh has removed paragraph 14.1 from the Convention.

The first thing to notice about the reservation is how broad it is. CRC art. 14.1 not only protects the child's right of religious freedom, but also protects "freedom of thought [and] conscience." From the drafting history of this article, it is clear that Bangladesh was concerned that Islamic law would be violated if the CRC permitted children to change their religion. Many other Islamic states had this same concern. But Bangladesh 's reservation could have been worded narrowly to take care of this concern. Instead, it eliminated the entire paragraph, including both the right to "thought"- which includes political, historical and scientific ideas, as well as "conscience"- which includes more than religion.

National NGOs can ask their Government to narrow the reservation to cover only the change of religion problem. The Government could make a partial withdrawal of the reservation, or, at least, a policy statement to narrow the reservation.

There are several good reasons for asking the Government to narrow the reservation. First, during the drafting of the CRC, Bangladesh's only concern was a child's changing from the Islamic faith. In the early years of the drafting, Bangladesh was on the drafting group on the religious freedom article. The working group approved, through consensus, an article which gave the child the right "to have or adopt a religion or whatsoever belief of his choice and freedom". [This wording was taken from the International Covenant on Civil and Political Rights, which Bangladesh has not ratified.] Several years later, Bangladesh objected to this wording , saying, "It appears to infringe upon the

sanctioned practice of a child reared in the religion of his parents." Other Islamic states also objected because it would allow a child to change his religion.³

In later years, Bangladesh joined eight other Islamic states to propose a different text. During the debates, Bangladesh opposed giving children the "unmitigated" right to change their religion. Finally, a paragraph was put in the article to "respect the rights and duties of parents... to provide direction to the child in the exercise" of its rights. (CRC art. 14.2). The present wording was then adopted by consensus.

Of the Islamic states that participated in the final drafting of the Convention and have since ratified it, Egypt, Kuwait and Tunisia made no reservation to article 14. Only two of the Islamic participants in the drafting have made reservations. Pakistan said article 14 would be "interpreted in light of the principles of Islamic laws and values." [Pakistan's reservation is discussed below.] Only Jordan reserved to all of article 14.⁴

Since the reservation goes far beyond Bangladesh's concern, this is a good reason to ask that the reservation be narrowed.

The second reason to ask for a narrowing is the high value placed on these freedoms in the Bangladesh Constitution. (Articles 28.1, 39.1, and 41.1.) While the Constitution may not require children to have these rights to the same extent as adults, these freedoms are nevertheless constitutional rights in Bangladesh.

If NGOs find cases where children's right to thought, conscience and religion are not respected, there are steps to take despite the reservation. First, NGOs can defend the rights of children using the Bangladesh Constitution. Second, there are other articles in the CRC which directly or indirectly protect a child's right to have and express a belief : CRC arts. 12, 13, 16, 29(c) and (d), 30 and 31. The reservation does not affect these articles.

CRC art. 21 - Adoption safeguards

CRC art. 21 says :

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall :

³ The history in this and the following paragraph is from Johnson, "Cultural and Regional Pluralism in the Drafting of the Convention on the Rights of the Child," in Freeman and Veerman (eds.), The Ideologies of Children's Rights, Kluwer (1992).

⁴ Several Islamic states that did not participate in the final drafting have ratified the CRC : those that did not make a reservation to art. 14 were Sudan and Yemen; those that did make a reservation were Djibouti, Maldives and Indonesia [discussed below].

(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

(b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;

(c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

(d) Take all appropriate measures to ensure that, in intercountry adoption, the placement does not result in improper financial gain for those involved in it;

(e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

Bangladesh's reservation to this article says : "Also, article 21 would apply subject to the existing laws and practices in Bangladesh."

When the reservation makes article 21 safeguards "subject to the existing laws and practices", what is Bangladesh promising to do ? The Government is saying that if any law or practice is contrary to the article 21 safeguards, then it does not promise to make any changes. In other words, existing laws and practices are superior to CRC art. 21.

Bangladesh may have made this reservation out of respect for Islamic law which does not permit adoptions. If this was Bangladesh's reason, the reservation was not necessary.

The CRC was drafted very carefully not to conflict with the Islamic prohibition of adoption. There is no right to adoption in CRC art. 20. Instead, there is a right to "alternative care" that is "in accordance with national law." *Kafala* [a type of care legally recognized in Islamic states] is specifically mentioned. Also, CRC art. 21 only applies to those states "that recognize and/or permit the system of adoption." From a legal point of view, therefore, an Islamic state does not need to make a reservation to either CRC art. 20 or 21 to preserve the supremacy of Islamic law regarding adoption. However, if Bangladesh wanted to be extra sure, it could have made a narrow reservation simply stating that adoptions are not permitted between persons to who Islamic law applies.

Since adoptions are permitted between non-Muslims, the reservation cuts out important safeguards. If the reason for the reservation is respect for Islamic law, then the reservation is too broad.

In their investigative role, national NGOs can study Bangladesh adoption laws and practices to find out what safeguards there are for both domestic and foreign adoptions, and if there are any adoption abuses. (Note that article 21 requires that the best interests of the child be the "paramount consideration". This is a higher standard than "a primary consideration" in article 3.1, or "their basic concern" in article 18.1. Under Bangladesh's laws and practices, how much importance is given in decision-making to the child's "best interest" ?)

Why did the Government make the reservation and word it so broadly ? National NGOs can discuss this with the Government. But discussion can involve advocacy. If there are cases of adoption abuses, then documenting them is important in motivating the Government to take reform action.

In advocating for adoption reform, NGOs can use other articles in the Convention. Many CRC rights over-lap : the best interests standard (art. 3.1), the child's right to be heard (art. 9.2, 12.1, 13.1), special care and assistance (art. 20.1), cultural continuity (art. 20.3, 30), freedom from exploitation (art.11.1, 36), and the right to be cared for by the natural family (art. 2.1, 8.1, 9,10,16,18, 22.2), can all be applied to adoptions, despite the reservation.

In summary, the Government did not need to make a reservation to CRC art. 21 to protect Islamic law. NGOs can therefore ask for a withdrawal or narrowing of the reservation.

2. CHINA

China's one reservation is to the right to life :

CRC art. 6 - Right to life

CRC art. 6 says :

- 1. States Parties recognize that every child has the inherent right to life.**
- 2. States Parties shall ensure to the maximum extent possible the survival and development of the child.**

China's reservation reads :

[T]he People's Republic of China shall fulfil its obligations provided by article 6 of the Convention to the extent that the Convention is consistent with the provisions of article 25 concerning family planning of the Constitution of the People's Republic of China and with the provisions of article 2 of the Law of Minor Children of the People's Republic of China.

Article 25 of China's Constitution reads : "The state promotes family planing so that population growth may fit the plans of economic and social development." [A copy of the Law of Minor Children was not available to the author.]

China's reservation makes it clear that abortion is not contrary to CRC art. 6. From a legal point of view , China did not have to make the reservation to do this. During the drafting of the CRC, the abortion controversy was settled by a compromise : unborn children are recognized in the Preamble only (which does not give any rights); article 6 does not define "child", so the issue is left up to the law of each state.

But China's reservation does not say "abortion" or "unborn child". By using the words "family planning", does China's reservation go beyond abortion? Does it permit infanticide ? - for sex selection ? to eliminate handicapped children ? in cases of economic hardship ?

Infanticide is a criminal offence under the Chinese Marriage Laws.⁵ The author assumes it is not permitted under the Law of Minor Children, but this must be verified by NGOs.

⁵ The law says: "Infanticide by drowning and other acts harmful to infants are prohibited" (800910.3 art.15). The English translation leaves an ambiguity whether all infanticide, or only infanticide by drowning, is prohibited. Note that infanticide for sex selection or against handicapped children is discrimination prohibited by CRC art. 2.

3. INDIA

India's one statement is about the economic exploitation of children.

CRC art. 32 - Working children

CRC art. 32 reads :

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:

(a) Provide for a minimum age or minimum ages for admission to employment;

(b) Provide for appropriate regulation of the hours and conditions of employment;

(c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

India's only statement when it ratified the CRC was about working children :

While fully subscribing to the objectives and purposes of the Convention, realising that certain of the rights of Child, namely those pertaining to the economic, social and cultural rights can only be progressively implemented in the developing countries, subject to the extent of available resources and within the framework of international co-operation; recognising that the child has to be protected from exploitation of all forms including economic exploitation; noting that

for several reasons children of different ages do work in India; having prescribed minimum ages for employment in hazardous occupations and in certain other areas; having made regulatory provisions regarding hours and conditions of employment; and being aware that it is not practical immediately to prescribe minimum ages for admission to each and every area of employment in India - the Government of India undertakes to take measures to progressively implement the provisions of Article 32, particularly paragraph 2(a), in accordance with its national legislation and relevant international instruments to which it is a State Party.

The Government did not say whether this is a declaration or a reservation.

Human rights advocates often talk about some rights being "progressive rights", that is, rights that cannot immediately be carried out fully because of a country's poverty. The government can only carry out these rights step-by-step, or progressively, as it develops economically. Many CRC articles specifically say that a right is "progressive" or subject to the state's "financial capacities", (articles 4, 23, 24, 26, 27 and 28).

India may have intended its statement to be a declaration that article 32 is such a progressive right. The Government is promising, in effect, to go as fast as it can in changing labour practices that affect children.⁶

Whether this is a declaration or a reservation, NGOs will still have to investigate child labour, set advocacy priorities, and lobby for government reform action in competition against other interests. The two biggest problems - poverty and the political power of businesses that use children - will be the same.

The economic exploitation of children is one problem that directly connects to what goes on in other countries : children's labour keeps the price of goods down, which is what foreign (as well as domestic) consumers want. When CRC art. 4 refers to economic rights being carried out "within the framework of international co-operation", this should mean not just foreign aid but also international team work. As India's economy is linked to the world's, so must the

⁶ India may have intended the statement to be a reservation, however. First, it is doubtful that article 32 is a progressive right because it requires a state to "take...measures to ensure" without any qualification for limited finances. Second, the words, "undertake...in accordance with national law", are like the words that other states have used in making reservations. Third, when it says that immediate implementation is "not practical", it could be referring to political problems such as the businesses that use child labor. However, for progressive rights, the only acceptable excuse is poverty, not politics. Finally, since the only concern specifically stated is the setting of minimum ages, the statement unnecessarily covers the whole article 32 and not just 32. 2(a). National NGOs should ask the Government to confirm whether this is a declaration or a reservation.

work of national NGOs be linked to that of international NGOs on the problem of working children.

4. INDONESIA

When Indonesia ratified the CRC, it made a statement three paragraphs long, which contains both a declaration and a reservation.

The first paragraph in Indonesia's statement reads :

The 1945 Constitution of the Republic of Indonesia guarantees the fundamental rights of the child irrespective of its sex, ethnic origin or race. The Constitution prescribes those rights to be implemented by national laws and regulations.

This statement is a declaration, but why it was made is not clear. Perhaps it is an introduction to the next two paragraphs of the statement.

Also, the statement is not accurate. It says the Constitution "guarantees the fundamental rights of the child irrespective of its sex, ethnic origin or race". However, the Constitution only says : "All citizens shall have the same status in law and in the government and shall, without exception, respect the law and the government" (art. 22.1). Notice that the Constitution only protects citizens and that sex, race and ethnic discrimination are not specifically mentioned.

The second paragraph in Indonesia's statement reads :

The ratification of the Convention on the Rights of the Child by the Republic of Indonesia does not imply the acceptance of obligations going beyond the constitutional limits nor the acceptance of any obligation to introduce any right beyond those prescribed under the Constitution.

The wording is difficult to understand. But no matter how it is interpreted, the legal effect is the same : Indonesia makes no promise to change any law or social practice to live up to the CRC. This is a sweeping reservation.

It helps to understand the reservation by breaking it into two parts. The first part reads :

The ratification of the Convention ... does not imply the acceptance of obligations going beyond the Constitutional limits....

This part can be interpreted in two ways. The Government might be saying that it will not take any implementation action if such action is prohibited, or not authorized by (is "beyond the limits of"), the Constitution. (However, it should be noted that the CRC does not require a state to violate its constitution, but to change it when necessary for implementation.) Or the Government might be saying that it makes no promise to change the Constitution to carry out the Convention.

Neither interpretation should create any practical problems. Indonesia's Constitution contains many human rights articles, which are probably enough to fully carry out the CRC. In the investigative role, NGOs can work with legal experts to compare the Constitution to the Convention to make sure there are no constitutional problems in implementation.

The sweeping effect of the reservation comes from the second part :

The ratification of the Convention... does not imply the acceptance of ... any obligation to introduce any right beyond those prescribed under the Constitution.

The phrase "prescribed under the Constitution" probably means a right made under the authority of the Constitution, which would include legislation, regulations, decrees and orders.

The Government appears to be saying that if a right in the CRC is not also found in an Indonesian law (constitution, statute, regulation, order, etc.), then the Government does not promise to make a new law to implement the CRC. If Indonesian law conflicts with the CRC, there is no promise to change the law. If a social practice is contrary to the CRC, there is no promise to make a law for the purpose of changing the social practice. In other words, the Government makes no promise to change.

Just how sweeping the reservation is can be shown by some examples. The Constitution gives the right of education to "every citizen" (art. 31). Let us assume that a non-citizen, a refugee, is discriminated against in education. The Government might say that it does not have to obey the non-discrimination article (CRC art. 2) because to do so would "introduce" a new right - the right of a non-citizen to education.

Another example : The Constitution says, "The Government shall develop Indonesian national culture" (art. 32). The Government might say that the minority and indigenous rights in CRC art. 30 go beyond the national culture recognized in the Constitution , and, therefore, do not have to be implemented.

These examples are possible effects of the reservation. However, we do not know yet how the Government will apply the reservation.

What we do know is that the reservation changes the order of supremacy of the CRC. Indonesia's reservation puts everything, including social customs, above the standards of the CRC, which can be shown by the following comparison.

CRC without reservations

CRC
Constitution
Laws and administrative practices
Social practices

CRC with Indonesia's reservation

Constitution
Law and administrative practices
Social practices
CRC

The Government has not refused to make changes. But by refusing to promise to make any change, it has rejected the idea of treaty standards and the duty to live up to those standards. No other party to the CRC has gone this far in refusing to make promises to change.

Norway and Ireland objected to this reservation. A statement disapproving the reservation was made by Portugal. No state has rejected Indonesia as a treaty partner.

Indonesia may not have intended the reservation to be so sweeping. In their investigative role, NGOs need to discuss this reservation with the Government. If the Government intended a less sweeping effect, it can clarify its intention by making a policy statement. A clarification is important because if the reservation is misunderstood, the CRC will not be carried out correctly.

The third paragraph in Indonesia's statement says :

With reference to the provisions of articles 1, 14, 16, 19, 21, 22 and 29 of the Convention, the Government of the Republic of Indonesia declares that it will apply these articles in conformity with its Constitution.

Despite the word "declares", this is a reservation, not a declaration, because the intention is to limit the seven articles.

There are two confusing things about this reservation. Since the reservation in the second paragraph of the statement (discussed above) already has removed any promise to make changes, the third paragraph is unnecessary. Why, then, did the Government specify these seven articles ?

Another confusing thing is that most of these seven articles have no clear counterpart in the Constitution. How, then, can they be applied "in conformity with" the Constitution ? For example, how do the words "in conformity with the Constitution" limit the definition of the child (CRC art.1), or adoption safeguards (CRC art. 21), or refugee rights (CRC art. 22) ?

Several articles do have some counterpart in the Constitution, but the effects of the "in conformity with" limitation are not clear. Several examples will illustrate the confusion :

- The Constitution guarantees "the freedom of the people to profess and to exercise their own religion" (Art. 28). Does the Government interpret this as a collective right which, under the reservation, can limit the child's individual freedom under CRC art. 14 ?

- The Constitution says, "The Government shall create and execute [a] system of national education provided by law" (Art. 31). Does the Government have different education goals which it wants to over-ride the goals in CRC art. 29 ?

- The Constitution states, "freedom of speech and of the press and similar freedoms shall be provided by law" (Art. 28). Are the CRC rights of privacy (CRC art. 16) and information access (CRC art. 17) "similar freedoms", and if so, how are they affected by the "provided by law" qualification ?

The reservation to these seven articles is both broad and confusing. Four states objected to this reservation : Norway, Finland, Sweden and Ireland. Disapproval was expressed by Portugal.

The Government would not have picked out these seven CRC articles if it did not oppose them or see some constitutional problem in implementation. National NGOs will have a lot of work to do discussing the reservation with the Government, and trying to get interpretative statements or (partial) withdrawals.

Most of the work of the NGOs, however, will be to investigate and to evaluate - to find out what the actual practices are and how they affect children. Each specific advocacy strategy must then be built around the specific practices, and their effects on children.

5. SOUTH KOREA

South Korea 's reservation is to three articles : contact with parents, adoption safeguards and the right to appeal. The reservation says :

**The Republic of Korea considers itself not bound
by the provisions of paragraph 3 of article 9,**

paragraph (a) of article 21 and subparagraph (b) (v) of paragraph 2 of article 40.

CRC art. 9.3. - Contact with parents.

CRC art. 9.3 reads :

States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

South Korea's reservation removes art. 9.3 from the Convention.

Article 9.3 applies when a child has been separated from a parent, which can happen in many different situations :

1. Family cases

- Parents never married. If the parents have never married, the mother might have total custody, with the father having no visitation rights. Also, there will be cases where a child does not know who the biological father is. When artificial insemination has been used, usually there is no ongoing contact between the child and the natural father.

- Divorced. When parents get divorced, visitation might be limited by law or a judge's decision.

- Separated. When parents are married but separated, the custodial parent may restrict visitation, or the separated parent might not want to see the child.

In all of these situations, contact has been denied. Under article 9.3 the state must only "respect" visitation, not "ensure" it. However, any state action which limits contact - whether by law, court order, administrative decision, etc - must "respect" the right to contact, and can only be based on the child's best interest.

Because of the reservation, South Korea does not promise to respect visitation in family cases. The Government is reserving the right to limit visitation for reasons other than the child's best interests. The Government must still make the child's best interest "a primary consideration" under CRC art. 3.1, but other reasons, such as traditional sex roles in child rearing, or a parent's privacy or convenience, can now be used.

Children in family cases will need strong advocacy. Because of the reservation there is a greater danger that children's interests will be sacrificed to the interests of adults and social customs.

Despite the reservation, a child of unmarried parents is protected from discrimination. Under CRC art. 2.1, a child's right to visit a parent cannot be limited because of that parent's sex or marital status. Under article 2.2, South Korea has promised to prevent this kind of discrimination.

2. Imprisonment and other state-caused separations

Separation also occurs when the state removes a child because of abuse or neglect, or when the child is arrested for a crime. Mental illness and serious handicap can result in the child being put in an institution.

South Korea's reservation eliminates the right of contact and the best interests rule of CRC art. 9.3 in these cases. However, other CRC articles give over-lapping protection. Whenever a child is "deprived of liberty", there is a right to family visits "save in exceptional circumstances", under article 39 (c). Under article 9.1, the state can cause involuntary separation (involuntary from the parent's point of view) only when it is "necessary for the best interests of the child".

Separation also occurs when a parent is put in jail or a mental hospital. The right to contact in these case is probably covered by article 3.1 : the child's best interests is only "a primary consideration."

3. International cases

A child can be separated from a parent by a political border, for example in the case of refugees and exiles, or when the parents are of different nationalities and the non-citizen parent is outside the country. South Korea's reservation does not affect these cases because they come under CRC art. 10.2. (Also, article 2 prohibits discrimination based on a parent's citizenship or other status.)

In summary, despite South Korea's reservation to article 9.3, the right to family contact and the best interest rule still apply in state-caused separations because of CRC art. 9.1 and 39 (c). The problem area is, therefore, family cases, which is where NGOs need to put their investigation and advocacy efforts.

CRC art. 21 (a) - Adoption safeguards

CRC art.21 (a) reads :

States Parties that recognize and/or permit the

system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall :

(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary.

CRC art. 21 (a) protects children from several types of adoption abuses in both foreign and domestic cases. It requires the state to set up a court or agency ("competent authority") which will look at each adoption case :

- to make sure that any so-called "orphan" really has no parents or relatives, and

- to make sure that when a parent gives up a child that the parent is doing it voluntarily and fully understands the consequences. Counselling can be required to help the parent make the decision. (Although "counselling" is not defined in the CRC, it should be interpreted to mean whatever is necessary to help the parent, including legal, psychological and social worker counselling.)

South Korea's reservation removes all of article 21 (a).

National NGOs can take several steps. First, they can find out why the Government made the reservation. Perhaps it was worried about the expenses of counselling. Notice however that the rest of article 21 still applies. In all adoptions, despite the reservation, "the best interests of the child shall be the paramount consideration." No other article in the Convention places the child's interest above everything else. In adoption cases, a government cannot cut costs at the expense of the child : children's best interests are "paramount".

Whatever the reasons are, NGOs can ask the Government to reconsider the reservation in light of its promise to make the child's interest "paramount."

Second, NGOs can investigate whether the safeguards in current law and practice give enough protection. If there are actual cases of children being adopted against the will of the parents, or if the parents are being pressured or deceived, NGOs can show the Government the need for article 21(a) safeguards.

Third, NGOs can study the adoption laws and practices. The "paramount consideration" requirement should be interpreted broadly to cover every aspect of adoption. This high degree of protection is necessary because adoption affects many other rights in the Convention, especially the rights to continuity of family, identity, culture, ethnicity and nationality. (CRC arts. 7.1, 8.1, 9, 10, 16, 18, 20.3, 22.2, 30). Do all the present laws and practices in South Korea make the child's best interest "paramount" ?

CRC art. 40 (b)(v) - Right of appeal

CRC art. 40(b)(v) says :

Every child alleged as or accused of having infringed the penal law has at least the following guarantees...if considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law.

Under article 40 (b)(v), a child has the right to appeal in "penal" cases, which includes juvenile delinquency as well as criminal cases. An appeal can question both the conviction (the "decision") and the sentence ("measures imposed") , whether it be punishment or rehabilitation.

South Korea's reservation eliminates all of article 40 (b)(v). The Government makes no promise to permit appeals in penal cases.

The right to appeal is generally considered a basic right. [See International Covenant on Civil and Political Rights, art. 14.5. South Korea has ratified the ICCPR.] ⁷

The purpose of an appeal is to correct mistakes. In penal cases the mistakes include :

- 1) The conviction of innocent people,
- 2) Violations of procedural safeguards, and
- 3) Unfair sentences.

Unfair sentences are a particular problem. While the CRC has strong procedural safeguards (art. 37 (d), 40 (a) and (b)), it is weak on rehabilitation (art. 37(b) , (c) and (d), 40.1 and .4). During the drafting of the CRC, a right to treatment or rehabilitation was considered but dropped; it is now only something

⁷ Norway is the only other country that made the same reservation to the CRC 40(b) (v). Five other states made reservations, but they were qualified : Belgium, Denmark, France, Germany and Tunisia. Iceland made a declaration.

that must be "take[n] into account." (CRC art. 37 (c), 40.1; note that "reintegration" means rehabilitation.)

There are several practical problems which limit children's rehabilitation. First, government policy, or the attitude of an individual judge, might favor punishment over rehabilitation. Second, rehabilitation is often limited by lack of money or training. The more dangers there are that a child will not get rehabilitation, the more need there is for safeguards such as the right to appeal.

In discussing the reservation with the Government, NGOs can point out that CRC art. 3.1 requires the best interests of children be "a primary consideration". Certainly protecting a child from mistakes in penal cases is in the child's best interest. NGOs can work with lawyers, social workers and other professionals to evaluate how well current safeguards work to correct mistakes. Also, NGOs can advocate the child's right to appeal under ICCPR, art. 14.5.⁸

6. MYANMAR

Myanmar made long statements about two CRC articles : freedom of association (art. 15) and freedom from inhumane treatment (art. 32).

CRC art. 15 - Freedom of association

CRC article 15 states :

1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.

2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

Myanmar's statement about freedom of association is made up of three paragraphs. The first paragraph is a declaration :

⁸ If a child is put in an institution for the purpose of rehabilitation but does not receive treatment, then there is a CRC right to challenge the legality of the detention which is independent of the right to appeal. Under CRC art.37, "imprisonment...shall be in conformity with the law; " "every child...shall be treated ...in a manner which takes into account the needs of persons of his or her age"; and "every child...shall have the right ...to challenge the legality of the deprivation of his or her liberty."

The Union of Myanmar interprets the expression "the law" in article 15, paragraph 2, to mean the laws, as well as the decrees and executive orders having the force of law, which are for the time being in force in the Union of Myanmar.

There is nothing unusual about this interpretative declaration.

The second statement is neither a declaration nor a reservation, but an opinion :

The Union of Myanmar understands that such restrictions on freedom of association and freedom of peaceful assembly imposed in conformity with the said laws, decrees and executive orders as are required by the exigencies of the situation obtaining in the Union of Myanmar are permissible under article 15, paragraph 2.

Myanmar is giving its opinion that its present restrictions on association meet the standards of the CRC. The Government could have made a reservation to exclude the present restrictions from its promise to live up to international standards, but it chose to give an opinion instead. Opinions invite disagreement. By promising to live up to the standards of CRC art.15, the Government has agreed to allow the international community to be the judge of its compliance.

The CRC has a built-in exception, or "derogation", to freedom of association. Under article 15.2, some restrictions are allowed if they would be "necessary in a democratic society". The CRC does not require a state to be a democracy. But in order for a limitation on association to meet CRC standards, the limit must be - in nature and degree - what would be necessary if the state were democratic. The international community has the right to judge whether the current restrictions in Myanmar meet this standard and does not have to accept Myanmar's opinion.

The third paragraph in the statement is an interpretative declaration :

The Union of Myanmar interprets the expression "national security" in the same paragraph as encompassing the supreme national interest, namely, the non-disintegration of the Union, the non-disintegration of national solidarity and the perpetuation of national sovereignty, which constitute the paramount national causes of the union of Myanmar.

There is nothing noteworthy about this declaration.

CRC art. 37 - Torture and other inhumane treatment

CRC art. 37 says :

States Parties shall ensure that :

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Myanmar's reservation to this article is in three paragraphs :

The Union of Myanmar accepts in principle the provisions of article 37 as they are in consonance with its laws, rules, regulations, procedures and

practice as well as with its traditional, cultural and religious values. However, having regard to the exigencies of the situation obtaining in the country at present, the Union of Myanmar states as follows:

Nothing contained in article 37 shall prevent, or be construed as preventing, the Government of the Union of Myanmar from assuming or exercising, in conformity with the laws for the time being in force in the country and the procedures established thereunder, such powers as are required by the exigencies of the situation for the preservation and strengthening of the rule of law, the maintenance of public order (ordre public) and, in particular, the protection of the supreme national interest, namely, the non-disintegration of the Union, the non-disintegration of national solidarity and the perpetuation of national sovereignty, which constitute the paramount national causes of the Union of Myanmar.

Such powers shall include : the powers of arrest, detention, imprisonment, exclusion, interrogation, inquiry and investigation.

Myanmar's reservation does not remove art. 37, but makes the rights subject to national security and public order. By the reservation, Myanmar is claiming the right, for the purpose of national security or public order, to :

- 1) Use torture to get information from children,
- 2) Arrest children for any reason whatsoever,
- 3) To deny children in jail any contact with their parents or a lawyer,
- 4) To keep children in jail indefinitely without trial,
- 5) To keep children in the same jail as adults,
- 6) To keep children locked up in cruel and degrading conditions, and
- 7) To use the death penalty against children.

The reservation does not make these practices legal. The Government is only refusing to promise not to do these things to children. (Myanmar has not ratified the Convention Against Torture nor the ICCPR, which also prohibit many of these practices.)

Is this reservation "incompatible with the object and purpose" of the Convention ? (CRC art. 51.2). The preamble of the CRC shows that the goal is to give children the "special safeguards and care" that they need. Many of the rights at stake in the reservation, including freedom from torture, are generally

considered "non-derogable" rights, that is, rights that can never be excluded or limited for any reason, including national security.

Out of 127 other parties to the CRC, only Germany, Ireland and Portugal objected to the reservation. No state prohibited the reservation by rejecting Myanmar as a treaty party.

In human rights, as in other areas of life, "actions speak louder than words". By not objecting to harmful reservations or by permitting incompatible reservations, the international community runs the risk of lowering standards and undermining the work of national NGOs.

Although children's rights to humane treatment under art. 37 have been limited by the reservation, other articles still give overlapping protection. The right to life (art. 6), administration of justice standards (art. 40), and the best interests rule (art. 3), for example, still apply, and are not subject to the reservation.

7. PAKISTAN

All CRC articles

Pakistan's one statement applies, which it expressly calls a reservation, to the entire Convention: **"The provisions of the Convention shall be interpreted in the light of the principle of Islamic Law and Values."**⁹

By this reservation, Pakistan is making Islamic laws and values supreme; there is no promise to change any law or practice to live up to the CRC if the change would violate an Islamic law or value.

Pakistan's reservation, is one of the most sweeping that any state has made.¹⁰ There are three things that make this reservation unusually broad: (1) it applies to all the CRC; (2) not only are religious laws superior to the CRC, but also "values"; (3) the reservation is vague; we do not know which religious law or value the Government believes is in conflict with which CRC article.

⁹ The phrase, "interpreted in light of", is ambiguous. If a word in the Convention is unclear, or if the application of a CRC article to a particular situation is uncertain, then the Convention must be "interpreted". The general rule is that a treaty is interpreted according to the ordinary meaning of the words used and in the light of the object and purpose of the treaty. It does not make sense to say that the CRC will be "interpreted in light of" religious laws or values. (Also, the words, "the principle of", add to the ambiguity.) Since the Government has expressly labeled the statement as a reservation, the intention is to limit the promise to make changes. Unless the Government states otherwise, the phrase should be interpreted to mean "subject to" Islamic Laws and values.

¹⁰ Djibouti is the only country with a similar sweeping reservation: "...[Djibouti] should not consider itself bound by any provisions or articles that are incompatible with its religion and its traditional values." By the addition of "traditional" values, this reservation is broader than Pakistan's.

Does this sweeping reservation mean that Pakistan is not committed to the Convention ? There are positive and negative points to be made.

First, on the positive side, we can expect that governments will avoid implementing the CRC in ways that violate basic rules or values of their societies. Since many CRC rights are stated in general terms or are qualified, there is plenty of room for a government to interpret a CRC article so that it is consistent with fundamentals. While full implementation of the CRC may require countries to make basic changes in some attitudes and customs, this is not the same as changing fundamental laws or values. Also "changing" a fundamental is not necessarily the same as "violating" a fundamental. (For example, amending a constitution is different than violating one). What makes Pakistan's reservation stand out is not that the Government is refusing to violate fundamentals. The reservation is unusual because the Government can so concisely say what its fundamentals are and , that it is candid in saying that it will not violate them.

An expert on Islamic family law, who has studied the successes and failures of reforms efforts, has stressed the need to root reforms in Islamic tradition :

Some of the most important and fundamental reforms of [pre-Islamic] customary law were made by the *Quran* in order to improve the status of women and strengthen the family in Muslim society.

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Profound social forces in modern times have affected the status and roles of women and the family in Muslim society. This process has been accompanied by reforms in Muslim family law which have sought to respond to as well as to foster social change.

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While the reforms introduced through legislation and judicial decision in Pakistan might have been needed, their lack of a systematic Islamic rationale creates serious problems. First, it raises questions as to the Islamic character of the laws and the relationship of the reforms to the body of traditional law. Second, following from this unresolved theoretical and methodological question, the apparent discontinuity of many reforms with traditional *fiqh* brings them under heavy fire from the masses of the population who tend to be more conservative in outlook.

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If reform is to be truly accepted by the majority of Muslims in each country, and if they are to produce a law that is both comprehensive and consistently developed, these reforms must be based on a systematic methodology whose Islamic roots can be demonstrated.

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If *Quranic* values are applied correctly, Muslim society can accommodate social change in the twentieth century while preserving its link with the history of the Islamic tradition.¹¹

Pakistan's reservation might be viewed as a promise to its people that it will implement each CRC right in a way that is consistent with, or rooted in, Islamic law and values.

Second, to carry out the CRC requires making value choices. Phrases such as "best interests of the child", the child's "well-being" and "appropriate measures" are not objective standards. They cannot be applied without making value choices. Also, the CRC refers many times to culture, religion, spiritual development and morals, all of which require value choices.¹² Pakistan is reserving the right to have the Islamic religion control value choices.

Why should any country be concerned about making its religion the reference point for value questions ? By ratifying the CRC, a state allows others to criticize its laws, policies and customs. A government may be worried that not all states will respect the principle of cultural diversity. One way a government might try to protect its people from having foreign values imposed on them is to state, at the time of ratification, which value system will be the reference point.¹³

Third, a state may be concerned that in the future a treaty will be interpreted contrary to the meaning of the words of the treaty or the state's intention at the time of ratification. A reservation is one way a state can try to prevent new interpretations from being imposed on it.¹⁴

11 Esposito, *Women in Muslim Family Law*, Syracuse Univ. Press (1982), pp. 4,48,99,101,132.

12 CRC references to culture : art 4, 17(a) and (b), 20.3, 23.3, 30, 31.1 and 31.2; see also 5 and 21(a); to religion : art. 2.1, 14.1 and .3, 20.3, 29.1(d), and 30; to morals : art.10.2, 13.2 (b), 14.3, 15.2, 27 .1 and 32.1; and to spiritual health and development : art.17, 23.3, 27.1, 32.1. Many other articles refer to such aspects of culture as privacy, dignity (and its opposite, degrading treatment), honor and reputation. Also, all articles referring to rights and duties of parents are closely related to culture.

13 If Pakistan's only intention is to make Islam the reference point for value choices, it could have made a declaration instead of a reservation.

14 The history of the European Convention on Human Rights gives examples of the European Court using regional standards to strike down a law which reflects national standards. Also, by using the "living text" principle of interpretation, the European Court of Human Rights changes the meaning of words when, in its opinion, the treaty standards need to be made up to date. For example, the European Court struck down a popular law that permitted corporal punishment on the Isle of Man. The Court said the present day standard, not the standard at the time of

Looking at Pakistan's reservation in a positive light, it may not show any lack of commitment to children's rights. To the contrary, by paying attention to moral and political aspects of implementation, the Government may be showing that it is taking children's rights seriously.

On the other hand, there are negative things to say about the reservation. First, Pakistan is almost alone in making such a broad reservation. While many states probably are concerned that their religion or culture be respected, they did not think it was necessary to make such a wide reservation. Second, while the Committee on the Rights of Child monitors implementation of the CRC, it does not have the right to make legal rulings like a court does.

Third, a number of countries made broad reservations when they signed the Convention. But later when they ratified the CRC, they made only a few reservations.¹⁵ Prior to ratifying the CRC, many states reviewed their national laws to see if there were any conflicts. Some of these reviews involved the public in conferences and workshops. As a result, states found it was not necessary to make broad reservations.

A reservation which makes the CRC subject to religious laws and values assumes that there may be a conflict. NGOs can ask the Government if it has analyzed the Convention to see if there are any conflicts with Islam. If there are no conflicts, then NGOs can ask that the reservation be withdrawn. If there are conflicts, NGOs can ask the Government to identify them, and to narrow the reservation so that only the specific conflicts are covered.

Fourth, while a state's desire to preserve the society's religious foundation must be respected, the state itself must respect diversity of religious beliefs. Three articles in the CRC guarantee religious freedom (arts. 2, 14, and 30). But what is the effect of the reservation on these articles ? For example, does the Government consider that religious tolerance is a "principle of Islamic law and values" ? Also, are the CRC rights of non-Muslim children affected by the reservation, or are only those of Muslim children subject to Islamic law and values ?

The Pakistan Constitution contains the right to religious freedom (Art. 20), as well as several articles that prohibit religious discrimination. Therefore, we might expect that the Government does not intend the reservation to affect the

ratification, is the test for when punishment is "degrading". The Court said that the European Convention "is a living instrument which... must be interpreted in light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member states of the Council of Europe in this field." Tyrer Case, A. 26 (1978).

¹⁵ A state becomes a party to a treaty when it ratifies it, not when it signs it. When Kuwait signed the CRC, it made a reservation to "all provisions of the Convention that are incompatible with the laws of Islamic Shariah and the local statutes in effect." But a year and a half later when it ratified the CRC, it made reservations only to two articles (art. 7 and 21).

rights of non-Muslim children. However, NGOs must discuss with the Government what its intentions are.

Fifth, the reservation is vague, especially because of the word "values". The biggest problem with a vague reservation, like with a vague law, is that a government may be arbitrary. When a problem comes up, the danger is that a vague reservation will be used as an excuse not to make changes.

It will help to clear up some of the vagueness if the Government would explain :

- What is meant by "Islamic law", *Shariah* only, or *friqh* also ?
- Who can decide what "Islamic law and values" are, for the purpose of implementing the CRC ?
- Who has the authority to "interpret" the Convention "in light of" Islamic law and values ?

Looking at Pakistan's reservation in a negative light, it may look like the Government has not taken the CRC as seriously as other states have. In fact, when Sweden objected to Pakistan's reservation it said that the reservation "may create doubts about [Pakistan's] commitment" to the objective and purpose of the CRC. (Norway made a similar objection, while Finland and Ireland expressed their objections differently. No state rejected Pakistan as a treaty partner.)

Until the Government explains why it made the statement, it is difficult to say whether it should be viewed in a positive or negative light. What is clear, however, is the action that national NGOs must take. A discussion of the Convention must be held between the Government and NGOs, and the discussion must include the general public as well as religious leaders and scholars. How specific laws and practices impact on children must be looked at, then evaluated under the "best interests" standard, and then compared to the CRC articles as well as to Islamic laws and values.

The Government's attitude towards children's rights will be important in how productive the discussion will be. But the attitudes of NGOs are also important. By focusing on how the CRC can help put religious values into practice, the dialogue can produce harmony rather than unnecessary confrontation.

8. THAILAND

Thailand made a reservation to three articles : the rights to name and nationality (art. 7), refugees (art. 22), and educational goals (art. 29). The reservation says :

The application of articles 7, 22 and 29 of the Convention on the Rights of the Child shall be subject to the national laws, regulations and prevailing practices in Thailand.

By making this reservation, Thailand does not promise to make any changes if its laws or social customs conflict with these three articles. (While "prevailing practices" might only refer to government practices, this paper assumes it refers to social customs.)

CRC art. 7 - Name, nationality, etc.

CRC art. 7 states :

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Because CRC art. 7 covers many different rights, each will be discussed separately. But first one point needs to be made. All the rights in article 7.1 are seriously qualified by article 7.2 : "The state shall ensure the implementation of these rights in accordance with their national laws." This has the same effect as a reservation : national laws are made the supreme standard over the CRC. Because of the built-in qualification of 7.2, art. 7.1 almost gives no "rights" at all.

1. Registration of Births

CRC art. 7.1 says, "The child shall be registered immediately after birth." This does not say the child has the right to be registered. The wording is important. Because paragraph 7.1 makes registration a duty of the state, it is not a "right" qualified by 7.2.

While mandatory registration of births is in tension with the right of privacy (art. 16.1), registration gives many benefits to children. Registration can prove the child's age, which is important when it comes to laws about child labour, marriage and voting. Registration shows family relationships, important in child support, inheritance, citizenship, some government benefits, adoption, and ethnic

identity. When families are split by war or natural disasters, registration can help trace relatives. Registration also gives the government a data base to measure birth rates and population changes throughout the country, which can help in health and education planning. The government can also monitor infant and child mortality, and look for differences in geographic region, sex, ethnic group, or social classes.

Experience shows that poor people in general, and rural families in particular, register births less often. This is partly because of social custom and partly due to registration not being a government priority. Because of these problems, and because of the importance of registration, the CRC art. 7.1 makes registration a state duty.

By the reservation, Thailand does not accept the duty; it makes no promise to change its laws or social practices to improve registration of births.

The first step NGOs can take is to ask the Government why it made a reservation to this duty. Perhaps the Government does not seriously object to this duty; maybe its reservation was worded too broadly and can be narrowed.

Second, NGOs can find out what the rate of birth registration is under current laws and practices. In particular, differences in geographic area, sex and ethnic groups should be looked for. Third, since registration is important to so many other rights, NGOs can advocate that other articles, especially CRC arts. 2, 3 and 4, require registration for proper implementation, despite the reservation.

2. Name

CRC art. 7.1 also says, "The child... shall have...the right from birth to a name...". This is qualified by 7.2; a state promises to implement the right only "according to national law." (Likewise, under art. 8, the rights to identity and name that a state promises to protect are only those "recognized by law".)

Thailand's reservation makes the right to a name subject to its laws and regulations. This only repeats the built-in qualification of article 7.2. However, the reservation goes one step further and makes the right to a name subject to "prevailing practices."

Even though the reservation reduces the right to almost nothing, it does not eliminate it from the CRC. This is important because all CRC rights are protected from discrimination under CRC art.2. For example, if a child is stigmatized by a name because its parents were not married, article 2 requires the state to end the discrimination because it is based on the parents' marital status.

NGOs can investigate if any Thai law or custom regarding names hurts children. Despite the reservation, the Government must "ensure the child such

protection... as is necessary" (art. 3.2), and must protect the child from discrimination (art. 2).

3. Nationality

CRC art. 7.1 says, "The child... shall have... the right to acquire a nationality...". The purpose of this part of article 7.1 is to protect children from being stateless, that is, the problem of not getting citizenship of any country at birth.

There are three cases where a child might be stateless, depending on a state's law: (1) when each parent is a citizen of a different country, (2) when the child is born outside the country where the parents are citizens, (such as in the case of refugees, foreign workers and illegal immigrants), and (3) an abandoned child whose country of origin cannot be determined.

CRC art.7.1 does not give much protection against being stateless. Article 7.1 does not give a child born within a state's jurisdiction the right to citizenship of that state. The words, "to acquire a nationality", leave the state free to define citizenship as it sees fit. Furthermore, implementation of the right is qualified by paragraph 7.2.

Thailand's reservation repeats the built-in limit of 7.2. The reservation also adds "prevailing practices", but this should not make any difference because citizenship is defined by law not custom. [Paragraph 7.2 refers to "relevant international instruments". This is referring primarily to the Convention on the Reduction of Statelessness, which Thailand has not ratified.]

Much of the work of national NGOs will be the same with or without the reservation. NGOs will have to work with attorneys who are experts in Thai citizenship law to see if statelessness is a problem.

If any cases of statelessness are found, then Thai law must be examined to see if sex or marital discrimination is the cause of the problem. If so, then CRC art. 2 requires the Government to change the law, despite the reservation¹⁶. Finally, in deciding whether to give a stateless child Thai citizenship, the child's best interests must be "a primary consideration"(art. 3.1). The "best interests" standard applies to a child's individual application for citizenship as well as to legislation on citizenship for children.

¹⁶ CRC art.7.2 creates an exception to the non-discrimination article 2. Some states grant citizenship based on place of birth. Other states grant citizenship based on the citizenship of one or both parents. While CRC art 2 prohibits discrimination based on a parent's "status", it probably does not prohibit making citizenship depend on the citizenship status of the parents. First, there is no evidence in the drafting history that CRC art.2 was intended to prohibit this kind of citizenship law. Second, to the contrary, the drafting history shows that the right to nationality was qualified by CRC art. 7.2 in order to permit each state to decide its own citizenship laws. Third, since the purpose of a citizenship law is to permit a state to discriminate (on matters of residency, voting, etc.), a specific article on citizenship will probably be interpreted as creating an exception to the non-discrimination article.

4. To know and be cared for by the parents

Finally, CRC art. 7.1 says, "The child... shall have...as far as possible, the right to know and be cared for by his or her parents." These rights are also subject to the built-in reservation of 7.2.

The word "know" means to "know the identity of" the parent. There are several situations where a child might not know a parent's identity : the mother is not married (either she does not know or does not want to say who the father is), adoption, artificial insemination, sex abuse cases (rape or incest), and abandonment.

There are also many situations where a child is not cared for by both parents: unmarried, divorced or separated parents, adoption, social customs which place child-rearing with a member of the extended family, families separated by war, natural disasters and economic hardship, and abandonment.

These problems are caused by a combination of things - the free choice of the parent, social custom, the law and external forces. Under CRC art. 7, the state is not promising to do very much about these problems because of the "as far as possible" qualification and the built-in reservation of 7.2.

Thailand's reservation repeats the limitation of article 7.2. and adds "prevailing practices". The Government is therefore not promising to make any changes in law or social customs to help children know and be cared for by their parents.

The rights to know and to be cared for by parents seem out of place in article 7 because they are family rights covered under other articles, (CRC arts.9, 10, 18, etc.). However, they were placed in article 7 because, like name and nationality, they are part of a child's identity. Article 7 is trying to emphasize that a sense of identity is important to psychological well-being, which is as important as physical well-being.

In light of the weakness of these article 7 rights, the advocacy work of NGOs is to see how other articles can protect the child's sense of identity and the rights to know and to be cared for by its parents. Many of the rights in the Convention connect in some way to the child's family rights : separation (3.2, 9, 10, 21, 25, 37(c)); unlawful interference (8); abuse (19, 34, 35), adoption abuses (21); economic problems (26, 27); refugees (22). Above all, the state must "ensure... such protection and care as is necessary"; and "in all actions concerning children" the children's best interests must be "a primary consideration" (3.1 and 2). The reservation does not affect these other articles.

CRC art. 22 - Refugees

CRC art. 22 says :

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.

Thailand's reservation makes this article subject to "national laws, regulations, and prevailing practices."

CRC art. 22 gives three protections to refugee children. First, the state promises to help refugee children get the rights which are "applicable" to them. This promise, however, does not give any additional rights to refugees. Under CRC art. 4, the state already must implement all CRC rights.

Second, the state promises to co-operate, as it "consider[s] appropriate", with NGOs and IGOs in their efforts to protect refugee children and trace their families. Again, this does not give additional rights to refugees. A state's promise to co-operate which is qualified by "as it considers appropriate" is almost not a promise at all. Also, under CRC art. 3, the state must give "protection and care" to all children and must always make their best interests "a primary

consideration." Implementation of CRC art. 3 would necessarily require cooperation.

Third, when a refugee child has no family, (is "unaccompanied"), the state promises to give that child "the same protection" as any child gets under CRC art. 20. Article 20 gives "alternative care" to children who are temporarily or permanently without a family, which includes foster care, adoption (or *kafala*), and institutional care. The "same protection" should not be interpreted to mean the same general level of care, but the same programmes and benefits without any distinction for being a non-citizen or a refugee.

The right to the "same protection" is an important right, but it probably is not an additional right. CRC art. 2.1 prohibits all discrimination based on "status", which should include refugee status. In fact, CRC art. 2 goes further than CRC art. 22 because no refugee child, even those with their family, can be discriminated against for being a refugee.¹⁷

If article 22 does not give any special rights to refugee children, then why is it in the Convention ? Part of the reason is historical. In the original draft of this article, refugee children were to be given two special rights : the right to family reunification and the right to be placed in their own cultural group. While these rights were dropped from the final draft, the article was still kept in the Convention in order to call attention to the needs of refugee children.

Thailand's reservation subjects article 22 to its laws and "prevailing practices". The Government does not promise to change its laws or social customs if either conflicts with CRC art. 22.

Because article 22 does not really give refugee children any new rights, Thailand's reservation should not make any legal difference. However, the reservation should not be taken lightly. The Government had a reason for making the reservation, and that reason may affect its laws and practices. The first step for NGOs always is to find out what the Government's concern is.

Perhaps the Government is worried that if it promises to give "the same protection" to refugee children, then the international community will take less responsibility for refugees. Or perhaps the Government was concerned that giving "the same protection" would require it to remove unaccompanied children from refugee camps. (Removing children might break cultural continuity and force assimilation rather than prepare children for repatriation back to their home countries. The CRC requires Thailand to respect identity, nationality and ethnic minority culture, under articles 8, 30 and 31). Or the Government may not

¹⁷ On the issue of discrimination, there is tension in the Convention between equality and special treatment. CRC art. 2.1 prohibits discrimination "of any kind" based on "language, religion...ethnic or social origin", while CRC art. 20 requires that "due regard shall be paid" to these same things. Since art. 20 has application to a specific situation, it is an exception to art. 2.

have been willing to accept an article in which a key term, "refugee", was not defined, especially when it had many Cambodians with disputed status living in the country. (The concept of refugee has expanded over the past thirty years, and there is no single definition accepted by all states. In such a situation, however, Thailand could have made a declaration of how it will interpret the term.) But there is no way to know what the Government's reason is without asking.

Although the reservation should make no legal difference, it may create practical problems. Government officials might think, incorrectly, that the reservation permits them to treat refugee children differently. An important part of NGO advocacy is educating officials : Thailand has promised to apply the non-discrimination and best interests articles (arts. 2 and 3) to all children, and this includes refugee children.

CRC 29 - Goals of education

CRC art. 29 says :

1. States Parties agree that the education of the child shall be directed to :

(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;

(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

(e) The development of respect for the natural environment.

2. No part of the present article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

CRC art. 29 is different from the rest of the Convention because it does not speak about children's rights. Instead, it is a statement of the goals of education.

By making a reservation, Thailand does not agree with article 29's statement of goals. The Government is saying that it can have other or different goals according to its "laws, regulations, and prevailing practices".

How will this reservation affect children ? This question cannot be answered in the abstract. Only when the Government says what specific Thai laws and customs it wants to promote, contrary to CRC art. 29, can the impact on children be discussed.

However, several points can be made about article 29. The first point has already been mentioned - article 29 does not directly give rights to children, but only speaks of goals.¹⁸ Second, the list of goals is complete or exclusive : the words "shall be directed to", rather than "shall include", probably do not permit other goals. Third, the goals are very abstract and idealistic (such as "full potential"); they describe one vision of an ideal society rather than a specific plan of education. Fourth, the goals reflect the ideals of the states and NGOs which participated in the drafting of the Convention.

Fifth, there is tension between article 29 and the rights of the family. Under CRC art. 18.1, "Parents... have the primary responsibility for the upbringing and development of the child". It should follow from this that parents have the primary role in defining educational goals. Also, the CRC recognizes the right of the extended family and community to give "direction and guidance" (art. 5), as well as the child's own right of participation (art. 12.1). By stating the goals of education in article 29, children, parents, and the community have been bypassed in the setting of the goals.

Sixth, in a way article 29 gives more to adults than it does to children. Adults work for political change in many ways. They can work to directly change the laws or the politicians who write the laws, or they can work for future social

¹⁸ The only specific right to education is the "progressive" right to free primary education in art. 28. Literacy is an implied right under art. 28, but is not an explicit goal under art. 29. Handicapped children have qualified rights to education under art. 23.

change by influencing what children are taught in school. Perhaps the most important practical effect of article 29 is the use that adults can make of the goals to shape what is taught in schools according to the adults' agendas. Article 29 not only recognizes that schools are ideological battlegrounds for adults, but it has taken sides in the battle. However, the CRC does not require that the adults who are active in battles over school curriculum make the best interests of children their "paramount", or "basic", or even "a primary" consideration. (Parents must make their own children's best interests their "basic", but not paramount, concern under CRC art. 18.1.)

Article 29 is different from the other articles in the Convention and these six points help show what the differences are.¹⁹

What if a law or social practice encourages intolerance, inequality of the sexes, or disrespect for ethnic groups contrary to CRC art. 29 ? Will the reservation hurt children by permitting these practices ?

No. The reservation does not make any practice legal; the Government only rejects the statement of educational goals. Other CRC articles give rights to children to protect them from harmful practices. The Government's promises to end discrimination (art. 2), to make children's best interest "a primary consideration" (art. 3.1), and to give "protection and care" (art. 3.2) are the keys to advocacy.

The investigation and evaluation work of national NGOs should not be affected by the reservation, but advocacy will change. In fact, NGOs can use the reservation to advantage. The debate on the goals of education is open in Thailand. National NGOs can focus the discussion on the best interests of children (as children now and as future adults), and involve the parents, community, government - and the students - in the building of consensus.

Eventhough article 29 does not directly give any rights the reservation should not be taken lightly. Article 29 gives implied rights. For example, the goal of promoting "the spirit of understanding, peace, tolerance...among all peoples" implies the right of minority children to have the government take action to achieve this harmony.

¹⁹ These six points can be shown by one example. Teaching respect for "national values" is on the list, but teaching respect for the nation itself is not. Nor is "respect" for the nation the same as patriotism and nationalism, which are feeling of admiration, affection, and devotion for one's country that go beyond mere respect. Likewise, teaching respect for the King of Thailand may be put under "national values", but "respect" may not be enough. While it is proper for a tourist to respect the King, does not the prevailing practice in Thailand call for more from a citizen ? Because the list of goals is probably exclusive, teaching an attitude beyond respect, for king or country, may not be a permissible educational goal under the CRC art.29. By contrast, the African Charter on the Rights and Welfare of the Child has a different view on nationalism : "The education of the child shall be directed to... the preservation of national independence and territorial integrity; [and] the promotion and achievement of African Unity and Solidarity" (art. 11.2).

Thailand has a reason in making the reservation, and NGOs will need to discuss this with the Government.

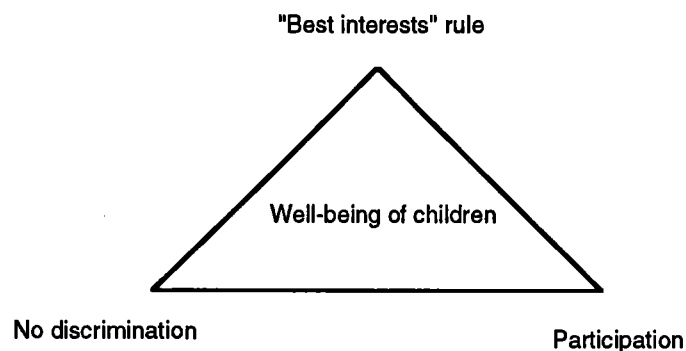
III. CONCLUSION

Several points came up again and again in the review of each state's reservations. First, NGOs must discuss the Convention with their governments. It is often unclear why a reservation was made, or even whether a statement is a reservation or a declaration.

Second, NGO advocacy begins with finding out what is happening to children. A reservation does not change the investigation and evaluation work of NGOs.

Third, NGO advocacy will depend upon what the objective is : (1) to implement the CRC with a reservation in place, or (2) to get the government to withdraw a reservation, or (3) to narrow it.

Fourth, most of the problems facing children are covered by more than one CRC article. When there is a reservation, NGOs must use other articles, (as well as state laws and social and religious values, and other human rights treaties). There are three articles that overlap so much that they can be said to underlay the Convention : the "best interests" rule, non-discrimination, and the right to participate.²⁰ These three rights are so important to the well-being of children and so inter-related, that it is helpful to think of them as a triangle :



These three rights are the keys to advocacy, whether or not there is a reservation.

Fifth, successful NGO advocacy must involve the general public and must emphasize how the CRC both reflects and supports traditional values.

²⁰ Best interests rule : art. 3.1, 9.1, 18.1, 20.1, 21, 37 (c) and 40.2 (b) (iii). Non-discrimination : art. 2; see also 22.2 and 30). Participation : while each CRC right is in some way a right of participation, some articles are explicit : 9.2, 12.1, 13.1, 23.1, 30, 31 and 40.2 (b).

Finally, while the CRC applies only to governments, NGOs can apply it to themselves, especially the best interests rule, non-discrimination, and the right to participate. By applying the "triangle of rights" to themselves at every step of the way, NGOs will not only be setting an example, they also will be making the Convention's principles a reality for children right now.