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NEUTRAL LAW AND EUROCENTRIC LAWMAKING: A POSTCOLONIAL ANALYSIS OF THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD

*Maria Grahn-Farley**

INTRODUCTION

The development of international law is entwined with the colonial project. The colonial and postcolonial connection is evident in several international legal concepts.¹ Sovereignty,² international trade,³ and hu-

* Associate Professor of Law, Albany Law School. My interest in the U.N. Convention on the Rights of the Child comes from having been a child rights activist for many years and a National Board Member of Rådda Barnen (Save the Children Sweden), the world's largest child rights nongovernmental organization and the lead agency of the Convention. I would like to thank James Thuo Gathii, Makau Mutua, Donna Young, Peter Halewood, Nancy Ota, Katheryn Katz, and Athena Mutua for their valuable comments and support. I would also like to thank Ajantha Subramanian, Vince Brown, Daria Roithmayr, and Zanita Fenton for having read and commented on earlier versions of this Article. Thanks to Max Shterngel and Laura Scully for excellent editing. This Article has benefited from presentations at Albany Law School and Harvard Law School. I am thankful to Robert Blitt for the invitation to present this Article at the Conference of the Association of American Law Schools, Section on Human Rights, "New Voices in International Human Rights" in January 2009, in San Diego. Finally, I would like to thank my husband, Anthony P. Farley, for sharing the time.

1. See, e.g., MALCOLM N. SHAW, *INTERNATIONAL LAW* 26–27 (5th ed. 2003); Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L. L.J. 1 (1999); Antony Anghie & B.S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflict*, 36 STUD. TRANSNAT'L LEGAL POL'Y 185, 192–93 (2004); James Thuo Gathii, *Alternative and Critical: The Contribution of Research and Scholarship on Developing Countries to International Legal Theory*, 41 HARV. INT'L L.J. 263, 265–66 (2000); Arnulf Becker Lorca, *International Law in Latin America or Latin American International Law?: Rise, Fall, and Retrieval of a Tradition of Legal Thinking and Political Imagination*, 47 HARV. INT'L. L.J. 283 (2006); James Thuo Gathii, *International Law and Eurocentricity*, 9 EUR. J. INT'L L. 184, 185–86 (1998) (book review) [hereinafter Gathii, *Eurocentricity*]. Even those authors who take a less critical position towards international law and human rights, regarding both as important tools for women's and children's rights activists, do not disagree with the view that international law and human rights are Eurocentric. See, e.g., Savitri W.E. Goonsekere, *Human Rights: A Eurocentric Ethic or a Legal Foundation for Freedom, Justice and Peace?*, 7 SRI LANKA J. INT'L L. 81 (1995).

2. See ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 182–90 (2005).

3. See James Thuo Gathii, *Imperialism, Colonialism, and International Law*, 54 BUFF. L. REV. 1013, 1031–33 (2007).

man rights are areas where colonial and postcolonial laws are inter-linked.⁴ The deep structure of international law is still colonial even where the ties between colonial and postcolonial laws are no longer visible. The colonial structure is a European sense of entitlement to international law as essentially European.⁵ This underlying structure reveals itself where Europe guards the boundaries of international law against the dissents of postcolonial States.⁶ I have come to this conclusion by making an in-depth case study of the lawmaking process of the U.N. Convention on the Rights of the Child (“CRC” or “Convention”).⁷ The CRC is the most ratified human rights treaty in the world. In fact, there are more parties to the CRC than Member States in the United Nations.⁸

4. See MAKAU MUTUA, *HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE* (2002); Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L.J. 201, 204–05 (2001).

5. The argument of this Article builds on the scholarship of Third World approaches to international law (commonly abbreviated “TWAIL”), which often assert that international law is inherently colonial in both form *and* substance. See, e.g., ANGHIE, *supra* note 2, at 195. With this Article, I hope to add that, in addition to the more visible links between colonial and postcolonial international law, there is a link between European colonial sentiments and postcolonial European sentiments—a commitment to international law as fundamentally European.

6. The term “postcolonial States,” as used in this Article, refers to mostly non-Western States, many of which were former European colonies. In this Article, I do *not* refer to “postcolonial” as a school of theoretical thought as the term is used by Bhabha or Spivak, among others, in subaltern studies. See generally HOMI K. BHABHA, *THE LOCATION OF CULTURE* (2004); Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in *MARXISM AND THE INTERPRETATION OF CULTURE* (Cary Nelson & Lawrence Grossberg eds., 1988).

7. Convention on the Rights of the Child, Nov. 20, 1989, 144 U.N.T.S. 123 [hereinafter CRC]. The CRC is the first attempt to legislate what previously were moral incitements codified only in declarations, that is, without legally binding effect. Compare *id.*, with Declaration of the Rights of the Child, G.A. Res. 1386, U.N. GAOR, 14th Sess., Supp. No. 16, U.N. Doc. A/4354 (Nov. 20, 1959), and Declaration of the Rights of the Child, League of Nations, O.J. Spec. Supp. No. 23 (1924).

8. The United Nations has 192 Member States, while the CRC has 193 States parties. See Office of the U.N. High Commissioner for Human Rights, Ratifications, Declarations, Reservations, Objections, and Notes to the Convention on the Rights of the Child, <http://www2.ohchr.org/english/bodies/ratification/11.htm> [hereinafter CRC Ratifications, Reservations, and Objections] (last visited Oct. 29, 2008). See also Convention on the Rights of the Child: Reservations and Declarations Made Upon Signature, 1577 U.N.T.S. 168, 168–77 (listing the reservations and declarations, with official translations, of sixteen original States parties upon signing the CRC); List of U.N. Member States, <http://www.un.org/members/list.shtml> (last visited Oct. 29, 2008). The Holy See is a party to the CRC, but not a Member of the United Nations. CRC Ratifications, Reservations, and Objections, *supra*; List of U.N. Member States, *supra*.

Every country is a party to this treaty except the United States of America⁹ and Somalia.¹⁰

A detailed examination of States parties' objections to other States parties' reservations uncovers a colonial dynamic.¹¹ The colonial legacy of international law is not simply a matter of inclusion or exclusion. Nor is it only a matter of neutrality or non-neutrality. Even though the CRC was drafted, adopted, and ratified with the possibility of the inclusion and involvement of almost every country in the world, the colonial structure is still present, not in the substantive legal outcome, but in the legislative process itself.¹²

The CRC appears to be neutral: participation in the drafting process was almost universal, and dissent, in the form of parties' reservations against specific provisions, was spread more or less evenly among regions.¹³ Despite all this, the colonial past is carried through in the stage of objections. International law reveals its colonial structure in the law-

9. The United States was active in the drafting of the CRC, but did not ratify the final text. *See, e.g.*, U.N. Office of the High Comm'r for Human Rights, *Legislative History of the Convention on the Rights of the Child*, vol. I, at 320, U.N. Doc. ST/HR/PUB/07/1 (2007), available at <http://www.ohchr.org/Documents/Publications/LegislativeHistorycrl1en.pdf> [hereinafter *Legislative History I*] (referencing the U.S. proposed reformulation of Article 4); CRC Ratifications, Reservations, and Objections, *supra* note 8 (not listing the United States among those countries that have ratified the CRC).

10. *See* CRC Ratifications, Reservations, and Objections, *supra* note 8. With 185 States parties, the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW") is also a widely ratified human rights treaty and is similar in spirit to the CRC. *See* Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 513 [hereinafter CEDAW]; Office of the U.N. High Commissioner for Human Rights, Ratifications, Declarations, Reservations, Objections, and Notes to the Convention on the Elimination of All Forms of Discrimination Against Women, <http://www2.ohchr.org/english/bodies/ratification/8.htm> [hereinafter CEDAW Ratifications, Reservations, and Objections] (last visited Oct. 30, 2008). However, the CEDAW was adopted in 1979, before the last wave of decolonization and during the height of the Cold War; therefore, unlike the CRC, the CEDAW is neither a postcolonial nor a post-Cold War treaty under the strict meanings of these terms.

11. *See* CRC Ratifications, Reservations, and Objections, *supra* note 8. The reservations and objections at the signing and ratification of the CEDAW followed a similar pattern as the CRC. *See* CEDAW Ratifications, Reservations, and Objections, *supra* note 10.

12. Evidence of a persistent colonial dynamic is apparent in the geographic patterns of reservations and objections. Whereas reservations are quite evenly distributed among regions—Europe, twenty-six; Asia, nineteen, the Middle East, ten; Africa, ten; the Americas, seven; and the Caribbean, two—the objections to reservations are clearly lopsided: all twelve parties making objections are European, and of the twenty-three parties whose reservations received objections, only two are European. *See* CRC Ratifications, Reservations, and Objections, *supra* note 8.

13. *See supra* note 12 and accompanying text.

making process at the moment objections are made against reservations.¹⁴

Theories based solely on exclusion and non-neutrality cannot explain the colonial structure of postcolonial and post-Cold War international law.¹⁵ Exclusion and non-neutrality are no longer as obvious as they were during formal colonialism. The CRC, for example, is a model of inclusion and neutrality, and the presence of a colonial structure is difficult to demonstrate through theories that focus on the substantive results of exclusion and non-neutrality.¹⁶ This Article adds a new argument to the postcolonial critique of international law: that international law is colonial within the legal method itself. Even when both the substance of the law and the procedural rules can be seen as neutral, a deep colonial structure remains.¹⁷

14. See *supra* note 12 and accompanying text.

15. K.J. Keith mentions the principle of “sovereign equality” as an example of a “neutral” principle of international law that also finds support in the legal tradition of the postcolonial State. See K.J. Keith, *Asian Attitudes to International Law*, AUSTL. Y.B. INT'L L. 1, 4 (1967).

16. There is an abundant supply of publications and articles addressing the substance of the CRC. The United Nations Children’s Fund and Save the Children are major publishers in this area. However, what is generally lacking is a thorough legal analysis of the CRC and, particularly, a postcolonial analysis. For a critical analysis of child rights, see Maria Grahn-Farley, *A Theory of Child Rights*, 57 U. MIAMI L. REV 867 (2003). Sonia Harris-Short has offered a postcolonial analysis of the use of the “cultural distinctiveness” claim in the reporting to the U.N. Committee, concluding that this claim was seldom a justification for the noncompliance of States parties that appeared before the Committee. Sonia Harris-Short, *International Human Rights Law: Imperialist, Inept and Ineffective?: Cultural Relativism and the U.N. Convention on the Rights of the Child*, 25 HUM. RTS. Q. 130, 163–64 (2003). Thoko Kaime has undertaken a cultural analysis of both African cultural practices and the cultural values that the CRC represents, contending that once the legitimacy of common values is established, the CRC can be used to challenge certain African cultural practices harmful to children, such as female genital mutilation. Thoko Kaime, *The Convention on the Rights of the Child and the Cultural Legitimacy of Children’s Rights in Africa: Some Reflections*, 5 AFR. HUM. RTS. L.J. 221, 233–34 (2005). Several scholars have examined the implementation of the CRC in developing countries, and there have been a few postcolonial analyses of specific provisions in the CRC. See, e.g., *id.* at 231–33 (analyzing Articles 6 and 3 of the CRC); Bart Rwezaura, *Competing “Images” of Childhood in the Social and Legal Systems of Contemporary Sub-Saharan Africa*, 12 INT'L. J.L. POL. & FAM. 253, 265–66 (1998) (highlighting legal developments in Ghana, Kenya, Tanzania, and Uganda towards implementing the CRC). Nonetheless, there has been no comprehensive postcolonial legal analysis of the legislative process of the CRC.

17. R.P. Anand describes this “belatedness” of the postcolonial State as follows:

[I]t is not surprising to find Asian-African countries protesting against some of the old treaties and several so-called ‘established principles of international

Part I of this Article provides an overview of the CRC, its guiding principles, and its unique status as both a postcolonial and post-Cold War treaty.¹⁸ Examining the reservations made by States parties upon signing and ratifying the CRC, Part II suggests that it is possible for international law not to be colonial. As dissent from the CRC's values is evenly distributed across issues and across the world, the Convention can be considered neutral law. Part III analyzes the objections offered in response to the reservations and notes a significant trend: only European States made such objections and all but two of these objections were directed against the reservations of postcolonial States.¹⁹ This Article concludes from this case study that international law continues to link colonialism and post-colonialism, and that this connection is reflected in Europe's investment in international law as a Western construct and in its continuing disregard for postcolonial challenges.

I. THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD

A. The CRC and Its Guiding Principles

The CRC was adopted unanimously by the U.N. General Assembly on November 20, 1989,²⁰ and entered into force in September 1990, pursuant to Article 49.²¹ The U.N. Committee on the Rights of the Child ("U.N. Committee"), the monitoring body of the CRC as provided in Article 43,²² consists of eighteen members²³ elected by the States parties

law.' Finding several treaties signed during the colonial period, when they had no choice . . . they challenge them and demand their modification. . . . The newly independent States also rebelled against some of the economic and political rights acquired by their former colonial masters . . . which they have felt and still feel are unreasonable and, although accepted by the present international legal order, inequitable.

R.P. Anand, *Asian-African States and International Law*, 15 INT'L & COMP. L.Q. 55, 63-65 (1966).

18. The CEDAW, while similar to the CRC in spirit and universality, is not properly a "postcolonial" or post-Cold War human rights treaty because it was adopted in 1979. See *supra* note 10 and accompanying text.

19. See CRC Ratifications, Reservations, and Objections, *supra* note 8.

20. CRC, *supra* note 7.

21. *Id.* art. 49(1) ("The present Convention shall enter into force on the thirtieth day following the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.").

22. *Id.* art. 43(1) ("For the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention, there shall be established a Committee on the Rights of the Child . . .").

based on their expertise in child rights.²⁴ The Convention covers every person under the age of eighteen.²⁵ To avoid a controversial debate over abortion, the CRC is silent on when life, and therefore childhood, begin.²⁶

There are four guiding principles of the CRC.²⁷ The first principle, articulated in Article 2, is the right not to be discriminated against.²⁸ In addition to the traditional minority protections of race, ethnicity, religion, and class, the CRC includes “legal status” as a protected category.²⁹ Thus, the Convention does not allow for distinctions between legal and illegal residents within a country.³⁰ Providing that a State party shall not

23. As of October 30, 2008, the current members of the U.N. Committee are Alya Ahmed Bin Saif Al-Thani (Qatar); Agnes Akosua Aidoo, Vice-Chair (Ghana); Joyce Aluoch (Kenya); Luigi Citarella (Italy); Kamel Filali, Vice-Chair (Algeria); Maria Herczog (Hungary); Moushira Khattab (Egypt); Hatem Kotrane (Tunisia); Lothar Friedrich Krappmann, Rapporteur (Germany); Yanghee Lee, Chairperson (Republic of Korea); Rosa María Ortiz, Vice-Chair (Paraguay); David Brent Parfitt (Canada); Awich Pollar (Uganda); Dainius Puras (Lithuania); Kamal Siddiqui (Bangladesh); Lucy Smith (Norway); Nevena Vuckovic-Sahovic (Serbia); and Jean Zermatten, Vice-Chair (Switzerland). Office of the U.N. High Commissioner for Human Rights, Committee on the Rights of the Child: Members, <http://www2.ohchr.org/english/bodies/crc/members.htm> (last visited Oct. 30, 2008).

24. See CRC, *supra* note 7, art. 43(2) (“The Committee shall consist of ten experts of high moral standing and recognized competence in the field covered by this Convention.”).

25. See *id.* art. 1.

26. The CRC provides that childhood ends on the eighteenth birthday. See *id.* Morocco suggested the compromise between the pro-choice and pro-life factions, urging deletion of the original wording “from the moment of his birth.” U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights, *Report of the Working Group to Consider the Question of a Convention on the Rights of a Child: Considerations*, ¶¶ 28–30, U.N. Doc. E/CN.4/L.1542 (Mar. 10, 1980) [hereinafter ECOSOC, 1980 *Report of the Working Group*], as reprinted in SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: A GUIDE TO THE “TRAVAUX PRÉPARATOIRES” 115 (1992).

27. See U.N. Committee on the Rights of the Child, *General Comment No. 3: General Measures of Implementation for the Convention on the Rights of the Child*, ¶¶ 6–12, U.N. Doc. CRC/GC/2003/3 (Mar. 17, 2003) (describing the “four general principles” of the Convention).

28. CRC, *supra* note 7, art. 2.

29. *Id.*

30. Norway initiated the inclusion of nonlegal residents for protection under the CRC. See ECOSOC, Comm’n on Human Rights, *Report of the Working Group to Consider the Question of a Convention on the Rights of a Child: Considerations*, U.N. Doc. E/CN.4/WG.1/WP.10 (1981) [hereinafter ECOSOC, 1981 *Report of the Working Group*], as reprinted in *Legislative History I*, *supra* note 9, at 320 (indicating Norway’s proposal to the 1981 Working Group to have each State party apply the Convention “irrespective of the legality of their parents’ stay”). The United States, which is not a State party to the CRC, was nevertheless an active participant in the drafting of the CRC and initially insisted on excluding illegal immigrant children. See *Legislative History I*, *supra* note 9

only “respect,” but also “ensure” the right to nondiscrimination,³¹ Article 2 secures a positive right. To “ensure” a right, a State party must take active steps against discrimination. For example, there is an argument for States parties to actively disseminate the Convention’s principles through affirmative action following the interpretation of the nondiscrimination provision of the International Covenant on Civil and Political Rights (“ICCPR”).³²

“The best interest of the child” constitutes the second guiding principle. Article 3 of the CRC states that a government shall in all matters concerning the child consider his or her best interest,³³ an obligation that has been interpreted expansively in international child rights.³⁴ In its official national budget, the Swedish government, for instance, provides for a child-impact analysis and lists the budget’s consequences for children.³⁵

The third guiding principle, delineated in Article 12 of the CRC, is the child’s right to be heard in all matters regarding the child.³⁶ Through the right to be heard, the CRC establishes the child as a legal subject, a bearer rather than an object of rights.

Finally, set forth in Article 6 of the CRC, the child’s right to life is the fourth guiding principle.³⁷ However, this right is not a negative right as

(indicating the U.S. proposal to the 1981 Working Group to have each State party apply the Convention “to all children *lawfully in its territory*”) (emphasis added).

31. CRC, *supra* note 7, art. 2.

32. See ECOSOC, Comm’n on Human Rights, *General Comment 18*, ¶ 10, U.N. Doc. HRI/GEN/1/Rev. 1 (1989), as reprinted in RACHEL HODGKIN & PETER NEWELL, *IMPLEMENTATION HANDBOOK FOR THE CONVENTION ON THE RIGHTS OF THE CHILD* 22 (4th ed. 2002) (“The principle of equality sometimes requires States Parties ‘to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the’ [ICCPR].”); U.N. Committee on the Rights of the Child, *General Guidelines Regarding the Form and Content of Initial Reports to be Submitted by States Parties Under Article 44, Paragraph 1(a), of the Convention*, ¶ 10, U.N. Doc. CRC/C/5 (Oct. 30, 1991) (“States parties are requested to describe the measures that have been taken or are foreseen, pursuant to article 42 of the Convention, to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.”).

33. CRC, *supra* note 7, art. 3.

34. The Swedish Initial Report to the U.N. Committee interprets the “best interest” provision to include children as a group as well, for example, when budgetary decisions are being made. See U.N. Committee on the Rights of the Child, *Initial Reports of States Parties Due in 1992: Sweden*, ¶¶ 50–52, U.N. Doc. CRC/C/3/Add.1 (Sept. 23, 1992).

35. See *id.* ¶ 14.

36. CRC, *supra* note 7, art. 12.

37. *Id.* art. 6.

in the ICCPR, which proscribes a party from taking a person's life.³⁸ The right to life in the CRC is positive, as the right to survival is one of the preconditions of the right to life, and it encompasses, *inter alia*, the rights to education, healthcare, and an adequate living. Furthermore, the CRC prohibits subjecting the child to capital punishment or a life sentence without the possibility of parole.³⁹ According to Article 4, a State party shall use the "maximum extent of available resources" towards implementing the CRC.⁴⁰ If a country is poor, it is to seek assistance within the framework of international cooperation in order to fulfill its commitments under the Convention.⁴¹

B. The CRC as Both a Postcolonial and Post-Cold War Treaty

The postcolonial critique that international law is inherently colonial and a representation of European values⁴² will be examined in this Section. One version of this critique focuses on the fact that a minority of States created the laws that bind the majority of today's States.⁴³ When the United Nations was founded in 1945, there were fifty-one Member States; today there are 192 Member States.⁴⁴ Obviously, the majority of today's States were not represented in 1648, the other founding moment in mainstream international law.⁴⁵ This is not the case with the CRC,

38. See International Covenant on Civil and Political Rights art. 6(1), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

39. CRC, *supra* note 7, art. 37(a).

40. *Id.* art. 4.

41. For example, the comments of Brazil, Colombia, and Norway stress the importance of international solidarity between developed and developing countries. See ECOSOC, *1980 Report of the Working Group*, *supra* note 26, ¶ 60, as reprinted in *Legislative History I*, *supra* note 9, at 351 (Brazil's proposal invoking "the framework of international cooperation"); ECOSOC, Comm. on Human Rights, Colombia, *Question of a Convention on the Rights of the Child*, ¶ 10, U.N. Doc. E/CN.4/1324/Add.2 (Feb. 14, 1979); *Legislative History I*, *supra* note 9 at 350 (citing Norway's proposal at the 1981 Working Group).

42. See, e.g., Gathii, *Eurocentricity*, *supra* note 1, at 185–86; Goonesekere, *supra* note 1; Kenneth B. Nunn, *Law as a Eurocentric Enterprise*, 15 LAW & INEQ. 323 (1997).

43. The notion that international law is universal is a relatively new idea that came about with the establishment of the United Nations. Before the creation of the United Nations, international law was the law of European and Christian nations. See R.P. Anand, *Family of "Civilized" States and Japan: A Story of Humiliation, Assimilation, Defiance and Confrontation*, 5 J. HIST. INT'L L. 1, 20 (2003). Non-European nations had to "qualify" for international law by proving they were sufficiently "Western." See *id.* at 22.

44. See List of U.N. Member States, *supra* note 8.

45. Mainstream international legal theorists recognize 1648 and 1945 as dates marking the origins of international law. Often, a distinction is drawn between the origin of

however. With 193 States parties,⁴⁶ the CRC has a near-unanimous representation. Scholars like Anghie have connected the origin of international law to the colonial project.⁴⁷ The last major wave of decolonization resulted in the independence of Zimbabwe (1980),⁴⁸ Antigua and Barbuda (1981),⁴⁹ Belize (1981),⁵⁰ and Brunei (1984).⁵¹ In short, the CRC is a postcolonial treaty because the formal period of colonialism had, on the whole,⁵² come to an end by 1989, the vast majority of States parties having attained independence by the time of the CRC's adoption.⁵³

The cultural values argument also criticizes international law as Eurocentric.⁵⁴ Specifically, this argument asserts that the values of the International Bill of Rights⁵⁵ are rooted in Western liberal ideology⁵⁶ and that this body of law places a priority on civil and political rights over social,

international law in 1648 and the origin of modern international law in 1945. See ANGHIE, *supra* note 2, 182–90; SHAW, *supra* note 1, at 25, 30–31.

46. CRC Ratifications, Reservations, and Objections, *supra* note 8.

47. See, e.g., ANGHIE, *supra* note 2, 182–90.

48. U.S. Dept. of State, Background Note: Zimbabwe, Oct. 2008, <http://www.state.gov/r/pa/ei/bgn/5479.htm>.

49. U.S. Dept. of State, Background Note: Antigua and Barbuda, July 2008, <http://www.state.gov/r/pa/ei/bgn/2336.htm>.

50. U.S. Dept. of State, Background Note: Belize, Oct. 2008, <http://www.state.gov/r/pa/ei/bgn/1955.htm>.

51. U.S. Dept. of State, Background Note: Brunei, May 2008, <http://www.state.gov/r/pa/ei/bgn/2700.htm>.

52. There remain nearly seventy non-self-governing territories classified as “dependencies and areas of special sovereignty.” See U.S. Dept. of State, Dependencies and Areas of Special Sovereignty, Dec. 18, 2007, <http://www.state.gov/s/inr/rls/10543.htm>.

53. See CRC Ratifications, Reservations, and Objections, *supra* note 8 (indicating that the CRC was opened for signature on Nov. 20, 1989).

54. Karen Engle writes about the shift in discourse among postcolonial States in the 1990s from a strict cultural approach that sought to assimilate human rights to a deep suspicion that human rights law reinforces a neoliberal political agenda. See Karen Engle, *Culture and Human Rights: The Asian Values Debate in Context*, 32 N.Y.U. J. INT'L L. & POL'Y 291, 291–92 (2000).

55. The Universal Declaration of Human Rights of 1948 (“Universal Declaration”) together with the ICCPR and the International Covenant on Economic, Social and Cultural Rights of 1966 (“ICESCR”) constitute what is often referred to as the International Bill of Rights. See ICCPR, *supra* note 38; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

56. See Makau wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT'L L. 589, 605–06 (1996).

economic, and cultural rights.⁵⁷ The U.N. Committee insists on a holistic view of the CRC and on the interdependency of all the rights in the Convention.⁵⁸ This approach mediates colonial tensions by emphasizing the interconnectedness of different generations of human rights, including the right to one's culture. Article 4 of the CRC acknowledges the economic disparities between the Global North and the Global South, requiring wealthy countries to provide resources to help poorer countries comply with the CRC.⁵⁹

A persistent point of contention during the Cold War was which set of rights should take primacy. Whereas the Marxist-Leninist Eastern Block argued that collective socio-economic and cultural rights are a precondition for the fulfillment of individual civil and political rights,⁶⁰ the countries of the West maintained that the former are grounded in the latter.⁶¹ At the adoption of the Universal Declaration, for example, communist Yugoslavia's U.N. representative articulated the Eastern Block's position, expressing concerns that the Universal Declaration only focuses on the individual, not on the need for a social structure and community within which the individual could enjoy individual rights.⁶² Representatives of many African countries, which recognize collective rights in their regional human rights treaty,⁶³ have also levied similar criticisms.

The CRC is a post-Cold War treaty. The U.N. General Assembly adopted the CRC just a few weeks after the fall of the Berlin Wall on November 9, 1989,⁶⁴ and this historic event figured prominently in the

57. See U.N. GAOR, 3d Sess., 183d plen. mtg., U.N. Doc. A/PV. 183 (Dec. 10, 1948) [hereinafter 183d Plenary Meeting].

58. "Enjoyment of economic, social and cultural rights is inextricably intertwined with enjoyment of civil and political rights." U.N. Committee on the Rights of the Child, *General Comment No. 5: General Measures of Implementation for the Convention on the Rights of the Child*, ¶ 6, U.N. Doc. CRC/GC/2003/5 (Nov. 27, 2003).

59. See CRC, *supra* note 7, art. 4 ("States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, *within the framework of international co-operation.*") (emphasis added).

60. See, e.g., G.I. TUNKIN, *THEORY OF INTERNATIONAL LAW* 80 (William E. Butler trans., Wildy, Simmonds & Hill 2003) (1974).

61. See Alexandra Chistyakova, *The Russian Bill of Rights: Implications*, 24 COLUM. HUM. RTS. L. REV. 369, 376-77 (1993).

62. See 183d Plenary Meeting, *supra* note 57.

63. African [Banjul] Charter on Human and Peoples' Rights, June 27, 1981, arts. 16-24, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (recognizing both the rights of "all peoples" and the rights of "individual[s]").

64. See BBC: On This Day, 1989: Berliners Celebrate the Fall of the Wall, http://news.bbc.co.uk/onthisday/hi/dates/stories/november/9/newsid_2515000/2515869.stm (last visited Sept. 28, 2008); CRC Ratifications, Reservations, and Objections, *supra* note 8.

completion of the drafting of the CRC. The *travaux préparatoires*⁶⁵ reveal that a virtual deadlock took place from the time Poland submitted its “draft resolution” in 1978⁶⁶ all the way to 1988. The end of the Cold War had been anticipated for about a year before the CRC drafting process was completed. During this period, most of the disputed issues between the two Blocks were resolved. The most salient breakthrough was the agreement to adopt an interdependent view of civil and political rights, and social-economic and cultural rights.⁶⁷ And, in brief—as will become clear when I analyze the reservations to the CRC in Part II—the schism between East and West so often reflected in reservations or abstentions is nowhere to be found.⁶⁸

II. DISSENT EXPRESSED IN RESERVATIONS

While it is possible to point to provisions in the CRC that are vulnerable to a postcolonial critique, there are ample examples in the drafting process of efforts to be as inclusive as possible towards the postcolonial States, for instance, through the Working Group to the Commission on Human Rights (“Working Group”).⁶⁹ Compared to the Universal Declaration, the ICCPR, and the ICESCR, which were adopted when most contemporary postcolonial States were still under colonial rule, it is more difficult to make a clear argument that the values of the CRC exclude postcolonial States’ values. However, this is not to say that postcolonial States did not raise objections to certain CRC provisions. One key indicator of such dissent is States parties’ reservations made at the signing and ratification of the CRC.

The CRC has a two-step process for States to become parties to the Convention: Article 46 opens up the CRC “for signature by all States,” and Article 47 notes that the CRC “is subject to ratification.”⁷⁰ Signing

65. See generally DETRICK, *supra* note 26.

66. See *Question of a Convention of the Rights of a Child: Poland, Draft Resolution*, U.N. Doc. E/CN.4/L.1366 (Feb. 7, 1978), reprinted in *Legislative History I*, *supra* note 9, at 32–35.

67. See DETRICK *supra* note 26, at 27.

68. The split over the two covenants—the ICCPR and the ICESCR—is an example of how the Cold War divide was reflected in General Assembly voting: the Eastern Block abstained from voting for the ICCPR, and the Western nations abstained from voting for the ICESCR.

69. See DETRICK *supra* note 26, at 21–22 (“The ‘open-ended’ nature of the Working Group meant that any of the forty-three states represented on the [U.N. Commission on Human Rights] could participate. All other Member States of the United Nations could send ‘observers’ (with the right to take the floor), as could intergovernmental organizations.”).

70. CRC, *supra* note 7, arts. 46–47.

indicates the intention of a State to become a party to the treaty, and ratification indicates that a State has become a party to the treaty. A State party can express its dissent from a treaty provision by making declarations and reservations in connection with the signing and/or ratification of the treaty.⁷¹ Regardless of whether state representatives refer to their unilateral statement as a “reservation” or as a “declaration,” treaty law provides that any unilateral statement functions as a reservation when the statement has an effect on how the State party would be bound by the treaty.⁷² And when a State makes a reservation against a treaty provision, the specific treaty provision binds neither the particular State that made the reservation, nor any other State in relation to this State.⁷³

However, a reservation does not undo the binding effect of the provision in relation to other States.⁷⁴ In short, a reservation is a unilateral expression of a State party’s dissenting position regarding a particular provision in a treaty. States parties need not ask the organizational body for permission or obtain an agreement with other States to make the reservation, except where specifically required to do so by a given treaty.⁷⁵ The position the International Court of Justice took in the *Reservations* case—that is, if the reservation is incompatible with the object and purpose of the treaty, the State making the reservation is not considered a party to the

71. The Vienna Convention on the Law of Treaties (“Vienna Convention”) defines “reservation” as “a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.” Vienna Convention on the Law of Treaties art. 2(d), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. This provision interprets reservations as normative and as expressions of specific values, but it does not take a position on the general strategic value of reservations and objections within treaty law. For an examination of the doctrinal role of CRC reservations and the Vienna Convention, see Lawrence J. Leblanc, *Reservations to the Convention on the Rights of the Child: A Macroscopic View of State Practice*, 4 INT’L. J. CHILD. RTS. 357 (1996). Leblanc concludes that allowing reservations likely facilitated a greater number of States parties ratifying the CRC, but the reservations, many of which were of a general character, make it difficult to assess the CRC’s impact in specific countries. *Id.* at 380. Further, Leblanc finds that the objections made against reservations were, as a group, internally inconsistent; objections were directed to the reservations of some States, but not to others with the same reservation, and there were some general reservations to which no State objected. *Id.* Leblanc’s ultimate conclusion is that such anomalies are to be expected under current treaty law. *See id.*

72. *See* Vienna Convention, *supra* note 71, art. 2(d).

73. *See id.* art. 21(a).

74. *See id.* art. 21(b)(2).

75. *See id.* art. 19.

treaty—was not followed regarding the CRC.⁷⁶ Here, each of the States parties objecting to reservations based on the understanding that they were incompatible with and against the object and the purpose of the CRC nonetheless noted that it still considered the reserving State to be a party to the Convention.⁷⁷

A. Reservations by Geographic Regions

Of the 193 States parties to the CRC, 119 made no reservations upon signing and ratifying the CRC.⁷⁸ A plurality of the remaining seventy-four States that submitted reservations are European.⁷⁹ According to region, the following are the total numbers of reservations: Europe, twenty-six⁸⁰; Asia, nineteen⁸¹; the Middle East, ten⁸²; Africa, ten⁸³; the Americas, seven⁸⁴; and the Caribbean, two.⁸⁵ This empirical evidence suggests that Europe, as a region, was most dissatisfied with the substance of the CRC, followed by Asia.⁸⁶

76. See Reservations to Convention on Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 24 (May 28, 1951) [hereinafter ICJ Advisory Opinion] (“It has . . . been argued that any State entitled to become a party to the Genocide Convention may do so while making any reservation it chooses by virtue of its sovereignty. The Court cannot share this view. It is obvious that so extreme an application of the idea of State sovereignty could lead to a complete disregard of the object and purpose of the Convention.”).

77. See CRC Ratifications, Reservations, and Objections, *supra* note 8.

78. See *id.*

79. See *id.*

80. See *id.* (Andorra, Austria, Belgium, Bosnia-Herzegovina, Croatia, Czech Republic, Denmark, France, Germany, the Holy See, Iceland, Ireland, Liechtenstein, Luxembourg, Malta, Monaco, the Netherlands, Norway, Poland, Serbia-Montenegro, Slovakia, Slovenia, Spain, Switzerland, the United Kingdom, and Yugoslavia).

81. See *id.* (Australia, Bangladesh, Brunei, China, the Cook Islands, India, Indonesia, Japan, Kiribati, Malaysia, Maldives, Myanmar (Burma), New Zealand, Pakistan, Qatar, Republic of Korea, Samoa, Singapore, and Thailand).

82. See *id.* (Afghanistan, Iran, Iraq, Jordan, Kuwait, Oman, Saudi Arabia, Syria, Turkey, and the United Arab Emirates).

83. See *id.* (Algeria, Botswana, Djibouti, Egypt, Mali, Mauritania, Mauritius, Morocco, Swaziland, and Tunisia).

84. See *id.* (Argentina, Canada, Colombia, Ecuador, Guatemala, Uruguay, and Venezuela). Note that the United States is not a party to the CRC and has therefore not made any reservations. See *id.*

85. See *id.* (Bahamas and Cuba).

86. The classification of reserving States into geographic regions is not statistically adjusted for how many States parties to the CRC are in each region. Consequently, such categorization should be regarded only as an indicator of regional patterns.

B. *The Substance of the Reservations*

Examining the reservations' substance reveals that most are clustered around specific issues. There are eight areas into which the majority of reservations can be grouped: child soldiers; the definition of the child; freedom of religion; appeals and legal representation; children in the custody of the State; adoption; minority protection (identity); and general reservations.

1. Child Soldiers⁸⁷

Article 38 of the CRC establishes fifteen, instead of eighteen, as the minimum age for recruitment to armed forces and participation in direct hostilities.⁸⁸ In a surprising turn during the drafting process, the United States, though ultimately not a State party to the CRC, and the Union of Soviet Socialist Republics ("U.S.S.R.") both actively lobbied to promote this minimum age of fifteen.⁸⁹ They argued that the Working Group did not have the mandate "to review existing standards in international law."⁹⁰ Although the U.S.S.R. dissolved prior to the signing and ratification of the CRC, Russia succeeded the U.S.S.R. as a State party to the CRC.⁹¹ Many other States, however, championed a minimum age of eighteen, and the tensions over this issue during the drafting of the CRC ran so high as to threaten consensus adoption by the General Assembly.⁹²

Finally, a compromise was reached: stipulate the age of fifteen in the CRC, but offer an Optional Protocol⁹³ setting eighteen as the age for both

87. The following countries made reservations in connection with Article 38 of the CRC: Andorra, Argentina, Austria, Colombia, Ecuador, Germany, the Netherlands, Poland, Serbia-Montenegro, Spain, Switzerland, and Uruguay. CRC Ratifications, Reservations, and Objections, *supra* note 8.

88. CRC, *supra* note 7, art. 38(2) ("States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities."); *id.* art. 38(3) ("States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces.").

89. See ECOSOC, Comm'n on Human Rights, *Report of the Working Group on a Draft Convention on the Rights of the Child*, ¶¶ 603–04, 608, U.N. Doc. E/CN.4/1989/48 (Mar. 2, 1989) [hereinafter ECOSOC, *1989 Report of the Working Group*], as reprinted in DETRICK, *supra* note 26, at 513–14.

90. *Id.* ¶ 604, as reprinted in DETRICK, *supra* note 26, at 514.

91. Russia became a State party to the CRC in August 1990. CRC Ratifications, Reservations, and Objections, *supra* note 8.

92. See *1989 Report of the Working Group*, ¶ 605, as reprinted in DETRICK, *supra* note 26, at 514.

93. There are two optional protocols to the CRC. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, G.A. Res. 54/263, U.N. Doc. A/RES/54/263 (May 25, 2000); Optional Protocol to the Convention

recruitment to armed forces and direct participation in hostilities.⁹⁴ Reservations made in response to Article 38 grew in number as States unilaterally bound themselves not to militarily recruit children under the age of eighteen, instead of those under fifteen.⁹⁵ The other reservations in connection with Article 38 were made in the form of declarations wherein the State party notes its regret and disappointment with the inclusion of the age of fifteen as the minimum age.⁹⁶ In total, twelve States made reservations with respect to Article 38, all favoring the age of eighteen for military recruitment.⁹⁷ Eight of the countries are from Europe, and four represent the Americas.⁹⁸

2. The Definition of the Child⁹⁹

As previously noted, the CRC drafters deliberately abstained¹⁰⁰ from setting forth in Article 1 when life begins.¹⁰¹ Notwithstanding this obvious attempt to avoid embroilment in the debate on abortion, several reservations regarding Article 1 and its definition of the child were made

on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res 54/263, U.N. Doc. A/RES/54/263 (May 25, 2000).

94. See *1989 Report of the Working Group*, *supra* note 92, ¶ 610, as reprinted in DETRICK, *supra* note 26, at 515.

95. See CRC Ratifications, Reservations, and Objections, *supra* note 8.

96. Argentina's declaration, for example, reads as follows:

Concerning [A]rticle 38 of the Convention, the Argentine Republic declares that it would have liked the Convention categorically to prohibit the use of children in armed conflicts. Such a prohibition exists in its domestic law which, by virtue of [A]rticle 41 of the Convention, it shall continue to apply in this regard.

Id.

97. See *id.*

98. See *supra* note 88 and accompanying text.

99. The following countries made reservations regarding Article 1 of the CRC: Argentina, Botswana, Cuba, Guatemala, the Holy See, Indonesia, Liechtenstein, Malaysia, and the United Kingdom. See CRC Ratifications, Reservations, and Objections, *supra* note 8.

100. Morocco suggested a compromise between the States parties that see life as beginning at conception and those that see life as beginning at birth, delineating childhood with reference to its termination—the eighteenth birthday (a suggestion the Working Group adopted). See ECOSOC, *1980 Report of the Working Group*, *supra* note 26, ¶¶ 29–30, 32–36 (discussing the beginning of life and the termination of childhood).

101. CRC, *supra* note 7, art. 1 (“For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”).

with domestic abortion policies in mind.¹⁰² The reservations are of three types.¹⁰³ Regarding the first, the State party makes an affirmative assertion that the CRC does not cover the unborn child, only the live-born child. The United Kingdom and Cuba made this kind of reservation.¹⁰⁴ The second type involves an overt claim that life begins at conception, a position taken by Argentina, Guatemala, and the Holy See.¹⁰⁵ The representatives of these countries argue that the CRC therefore covers the rights of the unborn child.¹⁰⁶ The third type of reservation, made by Botswana and Indonesia, claims that Article 1 conflicts with national law, but does not further elaborate.¹⁰⁷

3. Freedom of Religion¹⁰⁸

The cultural values critique charges that international law, especially as regards human rights, favors Christian values over those of other religions, especially Islam.¹⁰⁹ As the freedom of religion includes the right to

102. See CRC Ratifications, Reservations, and Objections, *supra* note 8 (Argentina, Botswana, Cuba, Guatemala, the Holy See, Indonesia, Liechtenstein, Malaysia, and the United Kingdom).

103. Liechtenstein's reservation, which asserts that the age of majority is twenty, is outside of the traditional abortion debate. *See id.*

104. *See id.* ("The United Kingdom interprets the Convention as applicable only following a live birth.").

105. *See id.*

106. For example, Guatemala made the following reservation regarding the beginning of life:

With reference to [A]rticle 1 of the Convention, and with the aim of giving legal definition to its signing of the Convention, the Government of Guatemala declares that [A]rticle 3 of its Political Constitution establishes that: '[t]he State guarantees and protects human life from the time of its conception, as well as the integrity and security of the individual.'

Id.

107. *See id.*

108. Reservations to Article 14 of the CRC were made by Algeria, Bangladesh, Djibouti, Indonesia, Iran, Iraq, Jordan, Malaysia, Morocco, the Netherlands, Oman, Poland, Qatar, Singapore, Syria, and the United Arab Emirates. *See id.*

109. See, e.g., ANGHIE, *supra* note 2, at 13–31 (discussing Francisco de Vitoria and the colonial origins of international law); MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960, at 131 (2002) (discussing the "Christian" underpinnings of the "universalism" of early international law theorists such as Grotius and Vattel); SHAW, *supra* note 1, at 22–23 (describing the development of international law in the middle of the seventeenth century as a Christian and European institution).

adopt a new religion,¹¹⁰ it may clash with Islamic views. Since the drafting of the Universal Declaration in 1948, a number of Islamic States have not dissented from the right to belong to any religion, or the right not to be discriminated against because of one's religious beliefs or membership in a minority religion.¹¹¹ Rather, several of these States have objected to allowing people to convert to another religion,¹¹² contending that because Islam is the "right" religion it would be irresponsible for a government to permit people to abandon it.¹¹³

Another argument against the provision granting the right to change religions is that the colonial project was partly realized through Christian missionaries persuading or compelling people to convert.¹¹⁴ Indeed, the role of missionaries in the colonial project, in part, explains why the

110. ICCPR, *supra* note 38, art. 18 ("Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to *adopt* a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.") (emphasis added).

111. *See, e.g.*, 183d Plenary Meeting, *supra* note 57. The Author prefers to use the term "Islamic States" because it is commonly employed in scholarship. It should be noted, though, that these States' commitments to Islam and Shariah law vary in key respects. *See, e.g.*, Tad Stahnke & Robert C. Blitt, *The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim States*, 36 GEO. J. INT'L L. 947, 951 (2005) (assessing the constitutions of "predominantly Muslim states" and finding a "broad assortment of constitutional views—ranging from Islamic republics with Islam as the official state religion to secular states with strict separation of religion and state").

112. During the drafting process, Moroccan representatives explained that, under the law of Morocco, the child inherits his or her religious affiliation through his or her father. *See* ECOSOC, Comm'n on Human Rights, *Report of the Working Group to Consider the Question of a Convention on the Rights of a Child: Considerations*, ¶ 2, U.N. Doc. E/CN.4/1987/WG.1/WP.35 (1987) [hereinafter *Morocco Statement*], as reprinted in *Legislative History I*, *supra* note 9, at 458.

113. *See, e.g.*, 183d Plenary Meeting, *supra* note 57 (setting forth the Egyptian representative's comment exemplifying the positions of certain Islamic States).

114. This conflict is between a Christian positive view on the right to "adopt" a religion and the Islamic critical view that one is born into a religion. The Holy See emphasized the importance of individual choice and the freedom of the individual child to make religious choices. *See* ECOSOC, Comm'n on Human Rights, *Report of the Working Group to Consider the Question of a Convention on the Rights of a Child: Considerations*, ¶ 15, U.N. Doc. E/CN.4/1984/71 (1984), as reprinted in DETRICK, *supra* note 26, at 241. *Compare id.*, with ECOSOC, *Paper Submitted by the Permanent Representative of Bangladesh*, at 2, U.N. Doc. E/CN.4/1986/39, annex IV (1986) [hereinafter *Bangladesh Statement I*], as reprinted in DETRICK, *supra* note 26, at 244 (emphasizing how Article 7, the predecessor to Article 14 in the adopted version of the CRC, "appears to run counter to the traditions of the major religious systems of the world").

freedom of religion provisions remain contested.¹¹⁵ This argument was made during the drafting of the CRC¹¹⁶ and, consequently, the CRC uses modified language compared to the ICCPR. For example, the CRC does not explicitly use the word “adopt” relative to religion.¹¹⁷

Many States made reservations regarding the freedom of religion provisions, which can be grouped as follows:¹¹⁸ Algeria, Djibouti (withdrawn reservation), Iran, Iraq, Jordan, Morocco,¹¹⁹ Oman, Qatar (withdrawn reservation), Syria, and the United Arab Emirates all point to Shariah law.¹²⁰ Bangladesh, Poland,¹²¹ and Singapore reference maintaining parental authority over a child’s religious affiliation.¹²² Indonesia and Malaysia exhibit concern with Article 14 and how it bears upon their domestic legislation.¹²³ And the Netherlands expressly construes Article 14 as including a child’s right to change his or her religion and notes that this is in accordance with Article 18 of the ICCPR.¹²⁴

115. Cf. 183d Plenary Meeting, *supra* note 57 (the comment of the Egyptian representative being an example of early controversy surrounding the freedom of religion provisions in human rights instruments).

116. See *Bangladesh Statement I*, *supra* note 114.

117. Compare CRC, *supra* note 7, art. 14(1) (providing that “States Parties shall respect the right of the child to freedom of thought, conscience and religion”), with ICCPR, *supra* note 38, art. 18 (providing that the right to freedom of religion “shall include freedom to have or to adopt a religion or belief of his choice”).

118. See CRC Ratifications, Reservations, and Objections, *supra* note 8 (Algeria, Bangladesh, Djibouti, Indonesia, Iran, Iraq, Jordan, Malaysia, Morocco, the Netherlands, Oman, Poland, Qatar, Singapore, Syria, and the United Arab Emirates).

119. Morocco’s reservation is typical: “[t]he Kingdom of Morocco, whose Constitution guarantees to all the freedom to pursue his religious affairs, makes a reservation to the provisions of [A]rticle 14, which accords children freedom of religion, in view of the fact that Islam is the State religion.” *Id.*

120. See *id.*

121. See, e.g., *id.* (“The rights . . . shall be exercised with respect for parental authority, in accordance with Polish customs and traditions regarding the place of the child within and outside the family.”).

122. See CRC Ratifications, Reservations, and Objections, *supra* note 8.

123. See *id.*

124. *Id.* (“It is the understanding of the Government of the Kingdom of the Netherlands that [A]rticle 14 of the Convention is in accordance with the provisions of [A]rticle 18 of the International Covenant on Civil and Political Rights of 19 December 1966 and that this [A]rticle shall include the freedom of a child to have or adopt a religion or belief of his or her choice as soon as the child is capable of making such choice in view of his or her age or maturity.”).

4. The Rights to Legal Representation and to Appeal¹²⁵

The rights to a fair trial and to counsel in a criminal trial are cornerstones of civil and political rights. The CRC extends these rights to the child within the juvenile justice system.¹²⁶ The two provisions in Article 40 that provoked the most reservations are the child's right to "legal or other appropriate assistance in . . . his or her defense,"¹²⁷ and the right to appeal a decision when it is "considered to have infringed the penal law."¹²⁸ Differences among the reservations made by States parties are minor.¹²⁹ Germany and Switzerland made reservations to both the right to legal representation in Article 40(2)(v) and the right to appeal in Article 40(2)(ii).¹³⁰ Belgium, Denmark, France, Korea, and Monaco made reservations against the latter provision.¹³¹

125. Belgium, Denmark, France, Germany, Korea, Monaco, and Switzerland made reservations to the provisions regarding the child's rights to legal representation and to appeal. *See id.*

126. CRC, *supra* note 7, art. 40 ("States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.").

127. A related provision protects the child's right "[t]o be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defense." *Id.* art. 40(2)(b)(ii).

128. The child's right to appeal a criminal conviction is protected: "[i]f considered to have infringed the penal law, [a child is entitled] 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." *Id.* art. 40(2)(b)(v).

129. Regarding the right to counsel, Switzerland's reservation is typical: "the Swiss penal procedure applicable to children, which does not guarantee either the unconditional right to assistance or separation, where personnel or organization is concerned, between the examining authority and the sentencing authority, is unaffected." *See* CRC Ratifications, Reservations, and Objections, *supra* note 8. Regarding the right to appeal, Monaco's reservation is typical:

The Principality of Monaco interprets [A]rticle 40, paragraph 2(b)(v) as stating a general principle which has a number of statutory exceptions. Such, for example, is the case with respect to certain criminal offences. In any event, in all matters the Judicial Review Court rules definitively on appeals against all decisions of last resort.

Id.

130. *Id.*

131. *Id.*

5. The Child in the Custody of the State¹³²

The CRC bans giving children the death penalty or life imprisonment without possibility of parole.¹³³ Malaysia and Singapore made reservations against the provision that bans corporal punishment, which falls under inhumane or degrading treatment or punishment.¹³⁴ However, the provision in Article 37 responsible for the most reservations is the demand that juveniles in the custody of the State be separated from adults.¹³⁵ Australia, Canada, the Cook Islands, Iceland, Japan, and New Zealand objected to this obligation.¹³⁶ The justification commonly cited for such reservations is a lack of resources needed to create and maintain separate facilities for adults and children.¹³⁷ Australia's reservation invokes the country's geographic and demographic constraints.¹³⁸

132. Australia, Canada, the Cook Islands, Iceland, Japan, Malaysia, the Netherlands, New Zealand, Singapore, Switzerland, and the United Kingdom made reservations to the provision on the punishment of children. *See id.*

133. CRC, *supra* note 7, art. 37(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 . . .").

134. Singapore's reservation to these provisions reads as follows: "[t]he Republic of Singapore considers that [A]rticles 19 and 37 of the Convention do not prohibit the judicious application of corporal punishment in the best interest of the child." CRC Ratifications, Reservations, and Objections, *supra* note 8.

135. CRC, *supra* note 7, art. 37(c) ("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.").

136. CRC Ratifications, Reservations, and Objections, *supra* note 8.

137. New Zealand's reservation, for example, provides:

The Government of New Zealand reserves the right not to apply [A]rticle 37(c) in circumstances where the shortage of suitable facilities makes the mixing of juveniles and adults unavoidable; and further reserves the right not to apply [A]rticle 37(c) where the interests of other juveniles in an establishment require the removal of a particular juvenile offender or where mixing is considered to be of benefit to the persons concerned.

Id.

138. *Id.* ("Australia accepts the general principles of [A]rticle 37. In relation to the second sentence of paragraph (c), the obligation to separate children from adults in prison is accepted only to the extent that such imprisonment is considered by the responsible authorities to be feasible and consistent with the obligation that children be able to maintain contact with their families, having regard to the geography and demography of Australia. Australia, therefore, ratifies the Convention to the extent that it is unable to comply with the obligation imposed by [A]rticle 37(c).").

6. Adoption¹³⁹

Located in Article 21, the CRC's adoption provision¹⁴⁰ was added on the initiative of Barbados and Germany.¹⁴¹ The reservations against this provision exhibit two main strands, one concerning internal secular matters and the other involving Shariah law.¹⁴²

Argentina, Bangladesh, Canada, Indonesia, the Republic of Korea, and Venezuela made reservations against Article 21 that are secular in nature.¹⁴³ Argentina stresses the need "to prevent trafficking in and the sale of children,"¹⁴⁴ for example, and Canada references practices among its aboriginal peoples.¹⁴⁵ Bangladesh simply notes that "Article 21 would apply subject to the existing laws and practices in Bangladesh."¹⁴⁶

139. The States parties that made reservations regarding adoption are Argentina, Bangladesh, Brunei, Canada, Egypt, Indonesia, Jordan, Kuwait, Maldives, Oman, Republic of Korea, Spain, Syria, the United Arab Emirates, and Venezuela. *Id.*

140. CRC, *supra* note 7, art. 21 ("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.").

141. See ECOSOC, Comm'n on Human Rights, *First Polish Draft Convention and General Comments*, at Barbados comments ¶ 2, Fed. Repub. of Germany comments ¶ 2, U.N. Doc. E/CN.4/1324/ (Nov. 7–8, 1978), as reprinted in DETRICK, *supra* note 26, at 42, 46.

142. During the drafting of the CRC, Algeria, Egypt, Iraq, Jordan, Kuwait, Libyan Arab Jamahiriya, Morocco, Oman, Pakistan, and Tunisia collectively suggested that the "State Parties to the present Convention shall endeavor, in accordance with their domestic laws and legislation, to provide an alternative family for a child who does not have a natural family." See ECOSOC, Comm'n on Human Rights, *Report of the Working Group to Consider the Question of a Convention on the Rights of a Child: Second Reading (1988–89)*, ¶ 2, U.N. Doc. E/CN.4/1989/WG.1/WP.4 (1989), as reprinted in U.N. Office of the High Comm'r for Human Rights, *Legislative History of the Convention on the Rights of the Child*, vol. II, at 547, U.N. Doc. ST/HR/PUB/07/1 (2007), available at <http://www.ohchr.org/Documents/Publications/LegislativeHistoryc2en.pdf> [hereinafter *Legislative History II*].

143. See CRC Ratifications, Reservations, and Objections, *supra* note 8.

144. *Id.* ("The Argentine Republic enters a reservation to subparagraphs (b), (c), (d) and (e) of [A]rticle 21 of the Convention on the Rights of the Child and declares that those subparagraphs shall not apply in areas within its jurisdiction because, in its view, before they can be applied, a strict mechanism must exist for the legal protection of children in matters of inter-country adoption, in order to prevent trafficking in and the sale of children.").

145. *Id.*

146. *Id.* In the drafting process, Bangladesh had expressed concern that foreign missionaries could exploit adoption to proselytize and convert children to Christianity. See ECOSOC, Comm'n on Human Rights, *Paper Submitted by the Permanent Representative of Bangladesh*, at 2, U.N. Doc. E/CN.4/1986/39, annex IV (1986) [hereinafter *Bangladesh Statement II*], as reprinted in *Legislative History II*, *supra* note 142, at 545.

Regarding the second type of reservation, several Islamic States outlaw adoption because it is viewed as inconsistent with Shariah law.¹⁴⁷ For example, Kuwait's reservation seems to equate adoption with the abandonment of Islam.¹⁴⁸ Instead of formal adoption, many Islamic States practice *kafalah*, which does not obscure the original blood relations of the child, but is a permanent change of guardianship.¹⁴⁹

7. Minority Rights: Identity and Culture¹⁵⁰

The identity and culture reservations cover both the right not to be discriminated against, as well as the right to belong to and participate in minority cultures.¹⁵¹ The United States originally opposed the inclusion of illegal immigrants in any elements of the CRC.¹⁵² However, the Unit-

147. See CRC Ratifications, Reservations, and Objections, *supra* note 8.

148. See *id.* ("The State of Kuwait, as it adheres to the provisions of the Islamic Shariah as the main source of legislation, strictly bans abandoning the Islamic religion and does not therefore approve adoption.")

149. Article 20 of the CRC regulating the situation concerning children deprived of their families directly addresses *kafalah* as an option if the child is deprived of his or her family. See CRC, *supra* note 7, art. 20. The *kafalah* system is well-described by Syria in an official note sent to the Secretary General regarding Germany's objection to Syria's reservation:

The laws in effect in the Syrian Arab Republic do not recognize the system of adoption, although they do require that protection and assistance should be provided to those for whatever reason permanently or temporarily deprived of their family environment and that alternative care should be assured them through foster placement and *kafalah*, in care centers and special institutions and, without assimilation to their blood lineage (*nasab*), by foster families, in accordance with the legislation in force based on the principles of the Islamic Shariah.

CRC Ratifications, Reservations, and Objections, *supra* note 8.

150. The Bahamas, Belgium, New Zealand, and the United Kingdom made reservations to the general applicability or coverage of the CRC, and limited the coverage to legal residents in their reservations; France and Oman made a reservation to the minority rights in article 30; Venezuela's reservation links Article 30 with Article 2. See CRC Ratifications, Reservations, and Objections, *supra* note 8.

151. Articles 2 and 30 of the CRC both establish the right to practice a minority culture. See CRC, *supra* note 7, arts. 2, 30.

152. The drafting process shows a split between countries that wanted to include every child and the countries that only wanted to include legal residents. Consider, for example, the comments of Norway and the United States. Norway's comment during the drafting process was that the CRC should cover all children "irrespective of the legality of their parents' stay." See *Legislative History I*, *supra* note 30, at 320. The comment the United States made during the drafting process reads as follows: "[e]ach State Party to the present Convention shall respect and extend all the rights set forth in this Convention to all children lawfully in its territory . . ." U.N. Doc. E/CN.4/1981/WP.1/WP.7 (1981), as reprinted in *Legislative History I*, *supra* note 30, at 320.

ed States withdrew its suggestion to distinguish between legal and illegal residents after a general debate in the Working Group. The CRC thus does not differentiate between the two.¹⁵³ Its goal is to cover all children, regardless of their legal status, in order to eliminate gaps in protection.¹⁵⁴

Nevertheless, the Bahamas, Belgium, New Zealand, and the United Kingdom made reservations that seek to preserve the right to make a distinction between legal and illegal immigrants, especially with regard to accessing the public benefits of the welfare state.¹⁵⁵ France¹⁵⁶ and Oman¹⁵⁷ made reservations against connecting the right to exercise one's minority culture, as articulated in Article 30 of the CRC,¹⁵⁸ with the anti-discrimination provision in Article 2, whereas Venezuela made a reservation linking Article 30 with Article 2.¹⁵⁹

153. See CRC, *supra* note 7, art. 2.

154. See *id.*

155. New Zealand's reservation with respect to legal status is representative:

Nothing in this Convention shall affect the right of the Government of New Zealand to continue to distinguish as it considers appropriate in its law and practice between persons according to the nature of their authority to be in New Zealand including but not limited to their entitlement to benefits and other protections described in the Convention, and the Government of New Zealand reserves the right to interpret and apply the Convention accordingly.

CRC Ratifications, Reservations, and Objections, *supra* note 8. Belgium's reservation strikes a similar chord: "[w]ith regard to [A]rticle 2, paragraph 1, according to the interpretation of the Belgian Government non-discrimination on grounds of national origin does not necessarily imply the obligation for States automatically to guarantee foreigners the same rights as their nationals." *Id.*

156. France's reservation suggests a contradiction between Article 2, grounding the right not to be discriminated against, and Article 30, establishing the right to exercise one's cultural rights: "[t]he Government of the Republic declares that, in the light of [A]rticle 2 of the Constitution of the French Republic, [A]rticle 30 is not applicable so far as the Republic is concerned." *Id.*

157. *Id.* ("The Sultanate [of Oman] does not consider itself to be bound by those provisions of [A]rticle 30 that allow a child belonging to a religious minority to profess his or her own religion.").

158. CRC, *supra* note 7, art. 30 ("In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.").

159. CRC Ratifications, Reservations, and Objections, *supra* note 8.

8. General Reservations¹⁶⁰

The many general reservations constitute one of the most controversial consequences of the near-universal ratification of the CRC.¹⁶¹ Their paramount concern is that the CRC should be subject to religious and/or constitutional constraints.¹⁶² The States parties whose reservations concern religious and moral constraints are the following: Djibouti, which cites religion and tradition; Afghanistan, Brunei, Iran, Kuwait, Mauritania,¹⁶³ Qatar, Saudi Arabia, and Syria, all of which cite Shariah law; and the Holy See,¹⁶⁴ which cites Catholic doctrine.¹⁶⁵ The Cook Islands, Indonesia, Singapore, and Tunisia give secular justifications for their general reservations,¹⁶⁶ most commonly invoking their national constitutions.¹⁶⁷

160. Afghanistan, Brunei, the Cook Islands, Djibouti, the Holy See, Indonesia, Iran, Ireland, Kuwait, Mauritania, Qatar, Saudi Arabia, Singapore, Switzerland, Syria, and Tunisia made general reservations. *See id.* The reservations of the Cook Islands and Singapore reference their constitutions, whereas the reservation of the Holy See references to the Catholic religion and morals. *Id.*

161. The United States and Somalia are the only nonparties to the CRC. *See id.*

162. This approach—of broad-reaching general reservations—echoes certain reservations to the CEDAW. *See* Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399, 1426 (2003).

163. CRC Ratifications, Reservations, and Objections, *supra* note 8 (“In signing this important Convention, the Islamic Republic of Mauritania is making reservations to articles or provisions which may be contrary to the beliefs and values of Islam, the religion of the Mauritania People and State.”).

164. *Id.* (“[The Holy See declares] that the application of the Convention be compatible in practice with the particular nature of the Vatican City State and of the sources of its objective law (art. 1, Law of 7 June 1929, n.11) and, in consideration of its limited extent, with its legislation in the matters of citizenship, access and residence.”).

165. *Id.*

166. *See id.*

167. Singapore’s reservation, for instance, reads:

The Constitution and the laws of the Republic of Singapore provide adequate protection and fundamental rights and liberties in the best interests of the child. The accession to the Convention by the Republic of Singapore does not imply the acceptance of obligations going beyond the limits prescribed by the Constitution of the Republic of Singapore nor the acceptance of any obligation to introduce any right beyond those prescribed under the Constitution.

Id.

C. Summary of the Cultural Values Critique

The reservations States parties submitted do not reveal an overarching disapproval of the CRC or its goals.¹⁶⁸ However, even within the clusters of reservations, States parties were motivated by different concerns covering a wide variety of reasons.¹⁶⁹ Notably, Western countries made reservations to provisions embodying core civil and political rights, including the rights to a fair trial, to appeal, to legal representation, to culture, and to nondiscrimination.¹⁷⁰ The reservations of Islamic States center around the freedom of religion, referencing a disjuncture between Shariah law and the CRC's provisions regarding the freedom of conscience and adoption.¹⁷¹ Another significant religious divide is between Catholic countries, which insist that life begins at conception, and States parties that fix the legal entitlement to human rights at birth.¹⁷²

In sum, the apparent disagreements can be traced to competing cultural values, but these disagreements are quite evenly spread among States parties and across the CRC. Some points of contention, such as the freedom of religion and certain aspects of the issue of adoption, may partly originate from a colonial context, but do not exclusively have colonialism as their origin and reason.¹⁷³

168. There is a distinction between claiming that the CRC process does not represent a general bias against specific cultures and arguing that the CRC process does not indicate any biases at all. My argument is not that the process of drafting, signing, and ratifying the CRC was without bias, but, rather, that the biases evident in the process were not limited to a single region or culture. In fact, the biases evident in the process were directed at, or apparent in, the actions of representatives of many regions and cultures. Bonny Ibhawoh has written about the danger of taking a static view of culture, which would undercut the cultural legitimacy of human rights. See Bonny Ibhawoh, *Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State*, HUM. RTS. Q. 838, 841–42 (2000).

169. For example, in the reservations to the CRC's provision on adoption, some States parties made religiously motivated reservations, and others made reservations with reference to internal administration of the matter. See *supra* notes 139–49 and accompanying text.

170. See CRC Ratifications, Reservations, and Objections, *supra* note 8.

171. See *id.*

172. See *id.*

173. In the drafting of CRC, Bangladesh suggested a modification regarding adoption in order to avoid a conflict with Islamic inheritance law, and also suggested a provision further protecting orphans from proselytization. See *Bangladesh Statement II*, *supra* note 146, at 544–45. Morocco echoed the concerns of Bangladesh regarding inheritance law. See ECOSOC, Comm'n on Human Rights, *Report of the Working Group to Consider the Question of a Convention on the Rights of a Child: Considerations*, ¶ 2, U.N. Doc. E/CN.4/1987/25 (1987), as reprinted in *Legislative History II*, *supra* note 142, at 545.

III. EUROPE'S REACTION TO POSTCOLONIAL DISSENT

The postcolonial critique is not as easily applied to the CRC as to human rights instruments adopted before the final stages of colonialism. It is daunting to levy a postcolonial critique against the CRC, given its almost universal ratification and the inclusion of postcolonial States in the drafting of the Convention. While the remains of a colonial legacy may be found in both the context of the CRC and parties' reservations, it would be a struggle to argue that postcolonial States disapproved of the very treaty that they ratified, especially when the reservations are relatively balanced geographically.¹⁷⁴ This Article now proceeds to analyze the objections made against reservations, where the deep colonial structure of international law becomes strikingly clear.

If a State party does not want to be bound by or indeed does not agree with a reservation made by another State party, it may communicate an objection to the reservation. Objections to reservations are regulated by Article 51 of the CRC and Article 19(c) of the Vienna Convention, both of which provide that a State party may object to a reservation that is "incompatible with the object and purpose" of the Convention.¹⁷⁵ The Vienna Convention also states, "A reservation incompatible with the object and purpose of the present Convention shall not be permitted."¹⁷⁶ However, in contrast to the parties that made objections in connection with the Genocide Convention, each State objecting in connection with the CRC insisted on the reserving State still being bound by the Convention, even when the reservation in question was perceived as being incompatible with the object and purpose of the treaty itself.¹⁷⁷

Unlike the more fragmented patterns apparent in the reservations, a unified theme emerges after analysis of the objections to reservations. All twelve States parties objecting to reservations made at the signing and ratification of the CRC are European: Austria, Belgium, Denmark, Finland, Germany, Ireland, Italy, the Netherlands, Norway, Portugal, Slovakia, and Sweden.¹⁷⁸ Twenty-three States parties' reservations received objections, and of these countries, only two are European.¹⁷⁹ Mul-

174. See *supra* notes 78–86 and accompanying text.

175. Vienna Convention, *supra* note 71, art. 19(c).

176. *Id.*

177. Compare CRC Ratifications, Reservations, and Objections, *supra* note 8, with ICJ Advisory Opinion, *supra* note 76, at 24.

178. See CRC Ratifications, Reservations, and Objections, *supra* note 8.

179. The remaining States parties whose reservations received objections are Bangladesh, Botswana, Brunei, Djibouti, Indonesia, Iran, Jordan, Kiribati, Kuwait, Malaysia, Myanmar (Burma), Oman, Pakistan, Qatar, Saudi Arabia, Singapore, Syria, Thailand, Tunisia, Turkey, and the United Arab Emirates. See *id.*

multiple States parties can object to the same reservation, and each State party can deliver multiple objections; there were a total of eighty-nine objections.¹⁸⁰ Again, only two objections are directed towards reservations of European countries; the Netherlands directed objections to the reservations of Andorra and Liechtenstein. The remaining eighty-seven are against the reservations of non-Western countries.¹⁸¹

A. Objections to Reservations

In the legislative process, the objection phase is the first occasion where the States parties relate directly to each other rather than to the document. That is, before the objection phase, all discussions and negotiations are focused on the treaty itself, either through drafting or through dissent to the material outcome of the drafting process in the form of reservations. By the time that States parties make objections, the treaty text is complete.

Regarding the CRC, the general reservations prompted the majority of objections. With the exception of the Holy See, non-European countries made the general reservations, all of which are either normative (i.e., based on religious and/or moral premises) or legalistic (i.e., grounded in the supremacy of national legislation relative to the CRC).¹⁸² With the exception of Afghanistan and the Holy See, States parties that made general reservations in reference to religion met with objections.¹⁸³ Afghanistan made a general reservation upon signing the CRC, but its representatives did not follow up with a specific reservation at the moment of ratification.¹⁸⁴ Of the States parties whose general reservations invoke national legislation, Indonesia, Singapore, and Tunisia received objections, while the Cook Islands did not receive any.¹⁸⁵

The reservation of the Holy See, to which no State party objected, reads: “[t]he Holy See, in acceding to this Convention, does not intend to

180. *See id.*

181. *See id.*

182. Again, the reservations of Afghanistan, Brunei, Djibouti, the Holy See, Iran, Kuwait, Mauritania, Qatar, Saudi Arabia, and Syria refer to religious and/or moral constraints, whereas the reservations of the Cook Islands, Indonesia, Singapore, and Tunisia refer to the limiting effect of national legislation. *See id.*

183. Madhavi Sunder describes the role of religion relative to international law thus: “[s]imply put, religion is the ‘other’ of international law.” Sunder, *supra* note 162, at 1402. Sunder argues that international law treats religion as something irrational and primitive and, further, that the view of religion as a private matter obscures many human rights violations against women that take place in the name of religion. *See id.* at 1403–04.

184. *See* CRC Ratifications, Reservations, and Objections, *supra* note 8.

185. *See id.*

prescind in any way from its specific mission which is of a religious and moral character.”¹⁸⁶ Compare this reservation made by the Holy See with the reservations of Iran and Indonesia, which prompted objections. Iran’s reservation states: “[t]he Government of the Islamic Republic of Iran reserves the right not to apply any provisions or articles of the Convention that are incompatible with Islamic Laws and the international legislation in effect.”¹⁸⁷ And Indonesia’s reservation notes: “[t]he ratification of the [CRC] 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.”¹⁸⁸ Austria’s objection to the reservations of Brunei, Kiribati, Malaysia, and Saudi Arabia is framed as follows: “Austria could not consider the reservation[s] . . . as compatible with the provisions essential for the implementation of the object and purpose of the [CRC].”¹⁸⁹

It is understandable that, on legal and child rights grounds, so many countries objected to the general reservations, which could sharply limit the rights of children in these reserving countries. It is puzzling, however, that the general reservations made by the non-Western States were the only reservations that prompted reservations from European States parties. The reservations against the antidiscrimination requirements in Article 2 of the CRC and the holding of nonsovereign territories are just as sweeping as the other general reservations. They withhold human rights protections from large populations of children, but, strangely, they passed without objections.

B. The Reservations Against the Universal Applicability of the CRC

The goal of the CRC was to secure universal coverage of children’s rights through two steps: achieving universal ratification, and certifying that every child within each jurisdiction was covered by the Convention. As noted previously, full coverage within the jurisdictions of States parties is established by Article 2 of the CRC, which does not distinguish between legal and illegal residents.¹⁹⁰ However, the Bahamas, Belgium,

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. See CRC, *supra* note 7, art. 2 (“States Parties shall respect and ensure the rights set forth in the present Convention to *each child within their jurisdiction* without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth *or other status.*”) (emphases added).

New Zealand, and the United Kingdom made reservations to the general applicability of the CRC and limited its coverage to legal residents.¹⁹¹ Despite the fact that these reservations compromise the core intent and purpose of the CRC, there were no objections to these reservations.

C. The Invisibility of Colonialism During the Ratification of the CRC

The legal status of children within the remaining nonsovereign territories, most of which are formerly colonial islands, was never an issue under public discussion,¹⁹² from the drafting and adoption process all the way through to ratification. The status of these children vis-à-vis the CRC was communicated postratification in the form of an exchange of notes between States parties.¹⁹³ With the exception of arguments between the United Kingdom and Argentina concerning which country held rightful dominion over the Falkland Islands, the legitimacy of these holdings was never questioned.¹⁹⁴

Argentina, China, Denmark, the Netherlands, and the United Kingdom communicated their positions regarding the applicability of the CRC in territories outside national boundaries under their control.¹⁹⁵ At no point during the signing, ratification, waging of objections, or exchanging of notes was the legitimacy of external control over these territories questioned.

D. Summary of Europe's Reactions to Postcolonial Dissent

International law's origin in the colonial encounter is significant and affects even postcolonial legislation such as the CRC. The very concept of sovereignty serves as an example. Much was made of the reference to Islamic law in the general reservations. Judge Sir M. Zafrulla Khan of the International Court of Justice explains that, for those who follow Islamic law, it is impossible to place any law higher than the law of Allah: "[i]n Islam the concept of the Sovereign is entirely different (from in Eu-

191. *See supra* note 155 and accompanying text.

192. These nonsovereign territories include Anguilla, Aruba, Bermuda, the British Virgin Islands, the Cayman Islands, the Ducie and Oeno Islands, the Falkland Islands (Malvinas), the Fore Island, Greenland, Henderson, Hong Kong, the Isle of Man, Macao, Montserrat, the Netherlands Antilles, Pitcairn, St. Helena, the St. Helena Dependencies, South Georgia and the South Sandwich Islands, the Turks and Caicos Islands, and Tokelau. *See CRC Ratifications, Reservations, and Objections, supra* note 8.

193. *See id.*

194. *See id.*

195. *See id.*

rope) [sic]. Absolute sovereignty pertains to Allah alone.”¹⁹⁶ It is this aspect of the general reservations that gave rise to Europe’s uniform response as manifested in its objections.¹⁹⁷

However, in her article examining the role of cultural relativism in the interactions between the U.N. Committee on Human Rights and States parties, Sonia Harris-Short shows that the Islamic States’ general reservations do not serve to avoid CRC-mandated obligations, as European objectors had feared.¹⁹⁸ The facts that Europe reacted to non-European concepts of sovereignty, that Europe did not take issue with the holding of nonsovereign territories, which could jeopardize coverage of the full Convention to large populations of children, and that Europe made reservations to exclude illegal immigrant children from the entire Convention are evidence of Europe’s sense of entitlement to international law and its investment in keeping international law Eurocentric. In short, European States were more concerned that Islamic States parties had declared international law to be limited by Islamic law than with ensuring that *all* children were granted rights.

CONCLUSION

The colonial structure of international law does not derive solely from the law itself. My argument is that the deep colonial structure is a European sense of prerogative to international law as essentially European. The deep colonial structure of international law is present through direct links between colonial and postcolonial laws in legal concepts and areas such as sovereignty, international trade, and human rights. A full postcolonial critique, however, is difficult to impose upon the CRC, as the drafting process was inclusive of postcolonial States, and the Convention has been ratified by every country, except the United States and Somalia. Postcolonial States have wholeheartedly embraced the CRC through their ratifications.

For this reason, the CRC provides such an interesting case study of what role colonialism might have in an international law that is considered postcolonial—postcolonial in the sense that formal colonialism had ended by the time of its making. This case study of the CRC shows that while the deep colonial structure transcends law made during colonial times and transcends legal concepts originating in colonial times, the co-

196. M. Zafrulla Khan, *Islam: Concept, Law and World Habeas Corpus (A Foreword)*, 1 RUTGERS-CAM L.J. 160, 160 (1969).

197. This position is more clearly stated in the 1990 Cairo Declaration of Human Rights in Islam, which notes that all human rights law is subject to Islamic law. See U.N. GAOR, 2d Sess., Agenda Item 11, U.N. Doc. A/CONF. 157/PC/35 (1992).

198. See Harris-Short, *supra* note 16, at 135–36.

lonial structure endures in the legislative process of international law, underlying treaty-making procedure even when the treaty is facially neutral.

The CRC was drafted with the intention of avoiding some obvious controversies such as abortion,¹⁹⁹ freedom of religion,²⁰⁰ and the economic disparity between the Global North and the Global South.²⁰¹ Despite these efforts for consensus, many States made reservations.²⁰² The States that lodged these reservations are geographically diverse, and the provisions with which these reservations took issue are varied, thereby suggesting that the CRC embodies neutral, if not quite universal, values.²⁰³ In contrast, the objections against reservations share two striking features. All the objections were made by European countries, and the recipients are overwhelmingly non-European countries.²⁰⁴ Moreover, the reservations that received the most objections are those challenging the boundaries of international law by asserting alternatives to European interpretations, alternatives that refer to Shariah law or to national constitutions.²⁰⁵

It is difficult to deny the European sense of privilege when the only States parties to object to reservations are European, and twenty-one of the twenty-three parties against whom these objections were directed are postcolonial States. Moreover, no States parties objected to European reservations that are equally broad in scope, such as excluding a noncitizen child from the CRC or constraining a child's right to exercise his or her culture, reservations that seem to undercut the CRC's express goal of universal coverage. Similarly, States parties that hold jurisdiction outside of their main territories stipulated in reservations that they retain the ability to decide whether the CRC applies to children living in these territories, and these reservations failed to generate any objections. A study of representative postcolonial legislation reveals that even if it is possible to legislate "neutral" international law, such law does not operate in a vacuum, but rather in an international community in which European na-

199. See CRC, *supra* note 7, art. 1 (defining a "child" as "every human being below the age of eighteen years").

200. *Id.* art. 14 (deliberately abstaining from using the word "adopt" with reference to religion).

201. *Id.* art. 4 (suggesting that compliance with the CRC by poor countries may be achieved through "the framework of international co-operation").

202. See CRC Ratifications, Reservations, and Objections, *supra* note 8.

203. *Id.*

204. *Id.*

205. *Id.*

tions continue to proceed as if they were entitled to a Eurocentric international law.