

## **CASTAN CENTRE KID'S RIGHTS SYMPOSIUM 24 APRIL 2012**

### **THE LIKELY IMPACT OF THE 3<sup>RD</sup> OP: THE NEED TO DEVELOP A STRATEGY TO AVOID IRRELEVANCE AND OBLIVION**

**John Tobin**

[j.tobin@unimelb.edu.au](mailto:j.tobin@unimelb.edu.au)

#### *Abstract*

The adoption of the Third Optional Protocol by the UN General Assembly in December 2011 has been hailed as the greatest legal victory for children since the adoption of the CRC. Proponents of the Protocol have claimed that the individual complaint mechanism available under the Protocol will provide children with an effective remedy for violations of their rights and create a body of jurisprudence that will address the uncertainties that often characterize children's rights. But there is a great deal of skepticism about the capacity of the Protocol to deliver tangible benefits for children. This paper will outline the elements of a strategic vision with respect to the use of the Optional Protocol that is designed to address the concerns of its skeptics.

#### **Context**

Director of the UN Human Rights Division about the drafting of the CRC

I also thought there was something wrong with our priorities. It was easier to draft a declaration on the rights of children than to devise practical measures for the protection of human rights

challenge = how to develop a strategy to ensure that the OP does make a practical contribution to the protection of children's rights ('the value add')

3 considerations:

1. An identification of the arguments used by advocates to justify the OP ('the likely impact')
2. An examination of how the HR skeptic would respond to these arguments ('the unlikely impact')
3. An attempt to map a vision to ensure that the OP does not become irrelevant or indeed harmful (in terms of an inefficient allocation of advocacy resources)

## 1. THE ADVOCATE'S POSITION AS TO THE IMPACT OF THE OP

- (i) Strengthen IN framework for protection of kid's rights
  - Provide children with effective remedy
  - Individual complaint where rights given concrete meaning and practical effect (Yangshee Lee, former Chair of the CRC Committee)
  
- (ii) Achieve international legal equality for children's rights
  - Only Treaty with no communication procedure
  - Additional rights for kids not covered by other T
  - Other Ts do not have child sensitive procedures
  - Recognise that kids rights are real rights not 'mini rights' (Newell)
  
- (iii) Develop normative content of kids rights
  - Only have GC and CRC unclear (also have committee observations)
  - Need case law to produce jurisprudence
  - Case law can shape public policy and judicial decision making
  
- (iv) Involves minimal burden on States
  - no new rights
  - Will not interfere with states domestic mechanisms
  - Must exhaust domestic remedies first
  - Complement existing domestic measures for protection
  - Low cost of implementation
  
- (v) Provides opportunity for HR leadership by states that sign and ratify

## 2. THE SKEPTIC'S POSITION

- (i) Individual complaints mechanisms under HR treaties may offer a remedy but they are **not effective**
- consider experience in Australia with complaint mechanisms
  - Toonen = success but special circumstances because fed govt position was aligned with HRC views
  - All other cases esp re refugee largely ineffective in protecting the rights of complainants including those matters involving children eg: Bhaktiaryi, Baban etc
  - Process slow – 2-3 years which is of greater significance to children
  - Thus no practical effect and no concrete meaning
  - Moreover reliance on litigation type measures to protect HR also involve inefficient allocation of scarce advocacy resources
- (ii) Achieve international legal equality for children's rights may achieve formal equality but does not g'tee rights
- Misplaced argument
  - a system of formal legal equality does necessarily mean children are any more likely to achieve effective protection of their rights in practice
  - the real assessment is the extent to which HR actually protects kids rights in the substantive sense
- (iii) Normative development
- skeptics would not quarrel that kids rights are underdeveloped and under-theorised
  - but would question capacity for CRC Committee to deliver persuasive jurisprudential reasoning
  - No HR treaty body has ever given consideration to the development of an appropriate interpretative methodology
  - So while embraced by advocates overlooked/dismissed by courts and policy makers

- Reflects Waldron idea of ‘autonomous interpretation’ or Kennedy’s complaint about ‘sloppy humanitarian sentiment’

Consider also:

- Nettle J – ‘long on assertion but short on reason’
- Comment applies to work of all committee bodies
- Thus expectation re capacity to develop meaning of rights under CRC unrealistic

(iv) minimal burden argument

- disingenuous
- true that no new rights and arguably cost of ratification is therefore minimal
- but if expect mechanism to deliver effective remedy
- must also expect that states will be required to take substantive measures to implement the views of the Committee
- this will involve significant cost and disruption of internal political priorities
  - o consider eg refugees, indigenous kids, child protection, child care

(v) State leadership

- ratification does not reflect or demand leadership
- absence of a coercive mechanism to compel compliance means that states are able to ratify without any consequences
- call for state leadership fails to acknowledge the reality of IN political relations
- indeed provides an alibi for states who are driven by self interest
- also note that only handful of states have signed OP to CRC and may well follow fate of OP to ICESCR (not yet in force)

### 3. THE NEED FOR A STRATEGIC VISION

[if able to secure ratifications and bring into force then...]

- (i) acknowledge sociological insights into behavioral change
  - coercion, persuasion (frame in way that resonates – eco, political, religious etc), acculturation (not legalism or moralism)
  - develop strategy that generates political costs for states for non compliance with kids rights or political gain for compliance
  - develop strategy that is framed in way that resonates with decision makers whose actions impact on kids (public and private incl parents)
  - contribute to a culture where kids rights are seen as being integral to the resolution of matters which impact on kids
    - aim must be **internalization** of values underpinning kids rights
    - project far more complex than lodging a complaint with the CRC Committee
- (ii) must accept that IN litigation has a limited role to play in this strategy
  - litigation appeals to advocates (esp lawyers) because of association with rule of law and accountability
  - But if limited in domestic context where capacity for enforcement is real, then even more so at the IN level
  - Eg: Grootboom case – Irene Grootboom died 10 years after the case still homeless and TAC case – women still without access to antiretrovirals
- (iii) be wary that IN litigation does not cause distraction from opportunities available within domestic jurisdictions
  - within Australia – Vic Charter and ACT Bill of Rights; also have CW Joint Committee of Human Rights

- consider CJ Warren VSC – citing a HCrt Judge: ‘what has happened in Vic? The bar has not seized the moment or exploited the opportunities provided by the charter’ ‘It is an observation I pass onto you’
- (iv) but recognise that IN HR litigation still plays a modest role
- question is how we do it – informed by principles that inform all strategic litigation (Centre for Reproductive Rights and Interights or HRLC)
  - collaborative, coalition building, multidimensional strategy, client focused, reflective , media savvy etc
  - individual complaints undertaken in isolation may succeed before the Committee but will have little if any prospect of persuading a state to address the violation
- (v) recognise and advocate role clarification for each actor
- **advocates** – to be reminded that strategic litigation principles apply (avoid over enthusiasm)
  - **States** – to be reminded of obligation to act in good faith;
    - must publicise OP and views of Committee widely and effectively by ‘*appropriate and active means and in accessible formats to adults and children alike*’ (art 17 OP);
    - also instrumental benefit of protecting kids rights (eg: kinder – eco benefit; maternity leave – eco benefit) [remember persuasion]
  - **Committee** – must adopt more rigorous approach to development of jurisprudence (demonstrate awareness of Stanley Fish’s idea of interpretative communities and the making of meaning – the meaning of HR can longer be the sole province or appeal of HR advocates; it must persuade all those actors whose acts/omissions impact on children;
  - **IN system:** must provide sufficient resources to hear complaints in timely manner and undertake follow up procedure

Must ensure other agencies work collaboratively with Committee and states when requested to provide assistance (art 15 OP)

### CONCLUSION

- Upon adoption of OP to CRC Michael French SCF representative
  - This must be the considered the greatest legal victory for the children of the world in 22 years.
- Dangerous approach which raises false hopes and expectations
- Must see this initiative through the eyes of the child
- Over 2 billion children in the world – 100s of millions would have cause to lodge a complaint with the CRC Committee but vast majority will never have that chance and of the few that do, it remains doubtful that a favourable view will address their HR violation in any practical sense – this is not the basis for a great legal victory
- This does not mean that complaint mechanism under OP irrelevant or condemned to oblivion
  - [it is worth noting that UNICEF (NY) did not issue a media release when the OP was adopted]
- Challenge = have to work hard together to develop a strategic vision that will enable the complaint mechanism to make some contribution, however modest to the effective protection of children's rights