

12-15-2015

Reinforcing the Identity of the African Children's Rights Committee: A Case for Limiting the Lust for Judicial Powers in Quasi -Judicial Human Rights Mechanisms

Solomon T. Ebobrah

Follow this and additional works at: <https://digitalcommons.osgoode.yorku.ca/thr>



Part of the [Human Rights Law Commons](#)

Citation Information

Ebobrah, Solomon T.. "Reinforcing the Identity of the African Children's Rights Committee: A Case for Limiting the Lust for Judicial Powers in Quasi -Judicial Human Rights Mechanisms." *The Transnational Human Rights Review* 2. (2015) : 1-31.

DOI: <https://doi.org/10.60082/2563-4631.1012>

<https://digitalcommons.osgoode.yorku.ca/thr/vol2/iss1/1>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in The Transnational Human Rights Review by an authorized editor of Osgoode Digital Commons.

REINFORCING THE IDENTITY OF THE AFRICAN CHILDREN'S RIGHTS COMMITTEE: A CASE FOR LIMITING THE LUST FOR JUDICIAL POWERS IN AFRICAN QUASI-JUDICIAL HUMAN RIGHTS MECHANISMS^{±*}

SOLOMON T EBOBRAH*

Established as a quasi-judicial treaty supervisory body rather than an international court, the African Committee of Experts on the Rights and Welfare of the Child struggles for relevance in the African human rights system where most non-state stakeholders arguably prefer organs with clear judicial powers. Thus, similar to the experiences of its older counterparts, the Committee appears to be under subtle pressure to substitute or at least reinforce its quasi-judicial character with more judicial powers and action. In essence, the Committee suffers from the uncertainty that prevails in international law regarding the definition of the term quasi-judicial; and the unclear distinction between quasi-judicial bodies and international courts. This paper seeks to contribute to addressing that uncertainty within international human rights law by showing that an important defining distinction between quasi-judicial bodies and international courts is the purpose for their respective establishment. Accordingly, the paper simultaneously highlights the need to retain the Committee in its original character and challenges the view that quasi-judicial bodies are established only because states desire to water-down treaty obligations by creating supervisory bodies that lack power to challenge violative state action. This paper also argues that quasi-judicial bodies have their own intrinsic value in promoting the implementation of international human rights standards so that forcing quasi-judicial bodies to act like international courts defeats the purpose and thus, the value of quasi-judicial bodies.

1. IN ORDER TO ENHANCE its relevance and acceptance as a mechanism for human rights protection, the African Committee on the Rights and Welfare of the Child (African Child Rights Committee or Committee) appears to be labouring under subtle pressure to alter its identity. The Committee appears to be caught between acting like the quasi-judicial body (QJB) that it is and acting like an international court (IC) that it is not. Twenty five years after it was established under the *African Charter on the Rights and Welfare of the Child*¹ (African Children Charter), the Committee remains largely unknown, overshadowed by the more illustrious judicial-acting organs

^{±*} This research is funded by the Danish National Research Foundation Grant no. DNRF105 and conducted under the auspices of iCourts, the Danish National Research Foundation's Centre of Excellence for International Courts.

* Professor of Law, Niger Delta University, Wilberforce Island, Nigeria; Researcher, iCourts, Centre of Excellence for International Courts, University of Copenhagen, and Extra-ordinary Lecturer, Centre for Human Rights, University of Pretoria. LLB (RSUST), LLM, LL.D (Pretoria). EMAIL address: sebobrah@yahoo.co.uk.

¹. *African Charter on the Rights and Welfare of the Child*, OAU Doc. CAB/LEG/24.9 (1990) which entered into force on 29 Nov 1999[*African Children's Charter*].

of the African human rights system (AHRS). The Committee is generally perceived as an ineffective organ which has yet to live up to its vast potentials for protecting the rights of children in Africa.² In a largely judicialized AHRS in which institutional success is commonly recorded and measured partly in terms of litigation concluded before continental organs, some of the criticism arguably relates to the Committee's on-going struggle with its adjudicatory³ work. Apart from the less-than-robust reception it receives from non-state actors, the Committee struggles for attention from African states. The African Union (AU) itself is accused of neglecting the Committee while state parties are considered to be unwilling to engage with it.⁴ One effect of such negative perception and evaluation is that stakeholders put the Committee under pressure to enhance its relevance by taking on a more judicial character.

Against the background above, this article contends that negative assessment of the Committee's work results from the use of an unsuitable evaluation framework, prompted by a common practice of expecting QJBs to act like ICs. Making a case for the Committee to resist pressure to imitate ICs, this article contends that when QJBs cave in to such pressure, uncertainty regarding the distinction between ICs and QJBs is perpetuated. The article argues that definitions that hold out processes and quality of decisions as the main distinction between QJBs and ICs reinforce pressure on QJBs to mimic ICs. Accordingly, *purpose* is proposed as an additional element to distinguish between QJBs and ICs with potential to reduce pressure and release QJBs to serve the roles originally envisaged for them by their creators.⁵ Historical evidence suggests that

². See for instance Frans Viljoen, *International Human Rights Law in Africa* 2nd edn (Oxford: Oxford University Press, 2012). The limited, though growing NGO activity around the Committee and the dearth of scholarship on the Committee's work can be seen as other evidence of dissatisfaction with its work.

³. Adjudicatory is used loosely to mean decision making in contestation between two parties. As at 2015, the Committee had received three communications and disposed of two.

⁴. Gina Bekker, "The African Committee of Experts on the Rights and Welfare of the Child" in Manisuli Ssenyonjo, ed, *The African Human Rights System: 30 Years After The African Charter On Human And Peoples Rights* (Leiden/Boston : Martinus Nijhoff Publishers, 2012)

⁵. The original roles envisaged for QJBs are highlighted *infra*.

treaty negotiators and state representatives usually had distinctive expectations of QJBs and of ICs.⁶ Thus, QJBs should represent an alternative path to treaty monitoring than is offered by ICs. This perception of distinction may well be the basis on which states decide whether to endorse the establishment of any particular treaty supervisory mechanism. States rationally decide whether to establish an international court or any other institutional design instead of a court.⁷ Deliberateness in choice of institutional designs generally presupposes an 'ability to anticipate the consequences of particular types of institutions'⁸ such that function (and therefore, assessment) of an international body should follow its form.

Notwithstanding the distinctiveness of their design, QJBs are increasingly pressured to behave like ICs and some have adapted their practices to be more judicial. Facing dissatisfaction with its work and confronted with comparative references to allegedly more powerful QJBs, the Committee is encouraged to act like an IC by increasing its own powers. This raises the question whether the Committee is established and funded to perform the same functions as ICs. Linked to this is the question whether the quasi-judicial design of the Committee has any real implications for the Committee's work and for the rights, duties and expectations of its stakeholders. Put differently, why do states sometimes establish a QJB instead of an IC if they intend to achieve the same result?

An impression that emerges from the literature is that treaty negotiators prefer QJBs because African States hope to avoid effective supervision of their treaty obligations.⁹ This understanding of intention to water-down supervision prompts the human rights community's

⁶. The *travaux preparatoire* of the *European Convention on Human Rights* is illustrative of this point.

⁷. Also see Dinah Shelton, "Form, Function and the Power of International Courts", (2009) 9 Chi J Int'l L, 537 at 541.

⁸. Lisa Martin & Beth Simmons, "Theories and Empirical Studies of International Institutions", (1998) 52 Int'l Org 729 at 749.

⁹. Nsongurua Udombana, "Toward the African Court on Human and Peoples' Rights: Better Late than Never", (2000) 3 Yale H R & Dev J 45, illustrates this approach.

claim or sense of duty to beat states at their own game by forcing QJBs, like the Committee, to transform into de facto ICs. But does insincerity explain the motivation for the design of the Committee? Do QJBs not have their own intrinsic value in promoting respect for international human rights norms? Will visualizing the Committee on a template based on the original functions of QJBs improve popular and scholarly assessment of its work? To answer these questions, a modest comparative archival research method is employed to extract data from the founding and working documents of the three regional human rights systems. A legal doctrinal approach is however employed for analysis of the data.

This article is divided into five main sections, with this introduction as the first section. In section II, a descriptive analysis of the Committee is presented, highlighting its features but also showing how purpose distinguishes the Committee as a QJB, from ICs. Drawing on proxy evidence, Section II also argues that negative assessment triggers pressure on the Committee to imitate ICs as it searches for relevance in a crowded field. Section III considers whether the design of the Committee negatively impacts on its potential to protect the human rights of children. Taking into account the functions of ICs and factors that enhance state socialization in international law, this section asks whether the judicial features of ICs are more suitable for advancing international human rights standards. Holding out purpose as an important distinction between QJBs and ICs, section IV invites the use of a different template for assessing the Committee by reconceptualising some of the Committee's functions in a different light. Section V summarizes the main arguments and conclusions of the paper.

2. THIS COMMITTEE IS NOT A COURT!

Generally, QJBs in regional human rights systems are so similar to ICs in form and actual functioning that it is often difficult to assert that they are different types of bodies.¹⁰ Yet, when States chose the Committee as the supervisory organ of the *African Child Rights Charter* they effectively rejected the idea of creating an IC as the treaty's organ.¹¹ So, what differentiates a QJB from an IC? Why and how is the Committee an alternative path to implementation of the *African Child Rights Charter*? What factor(s) trigger the Committee's search for a different identity than it was created with?

The African Committee of Experts on the Rights and Welfare of the Child (i.e. the Committee) is established in article 32 of the *African Child Rights Charter*.¹² The Committee's explicit purpose is 'to promote and protect the rights and welfare of the child'.¹³ To achieve its purpose, the Committee is empowered to collect and document information as well as to commission inter-disciplinary assessments of problems relating to child rights with the aim of making recommendations to governments.¹⁴ Other functions of the Committee include the formulation of principles and rules for the protection of children's rights, cooperating with other institutions and organisations involved in the promotion and protection of children's rights, monitoring the implementation and protection of Charter rights, interpreting the *African Children*

¹⁰. QJBs in the UN human rights system are somewhat distinct from their regional counterparts in terms of functions, powers and processes. This article focuses on regional human rights QJBs.

¹¹. Owing to the dearth of literature on the history of the African Child Right's Committee, the literature on the African Commission on Human and Peoples Rights (African Commission) is adapted for the analysis. This is because the Committee is modeled after the African Commission and the Committee's establishment is motivated by some (if not all) of the arguments that have been advanced for the establishment of the African Commission.

¹². The Committee which consists of 11 members was formally constituted in 2001.

¹³. The inclusion of 'protection' as a purpose has been widely been interpreted as indicative of a judicial or at least juridical function. This article challenges that wisdom.

¹⁴. *African Children's Charter*, *supra* note 1, art 42(a).

Charter upon request and performing any other duty assigned by the parent organisation.¹⁵ However, the Committee's three outstanding functions are those related to its mandate to receive periodic reports from state parties,¹⁶ receive and consider communications¹⁷ and undertake investigation that the Committee considers appropriate for its work.¹⁸

Despite the Committee's mandate to 'protect' and its power to receive and consider communications – two features relied upon to support the claim of a right to exercise powers of a judicial nature – there is no evidence that States intended the Committee to function as a court.¹⁹ Since its establishment was partly motivated by a desire to improve on the United Nations (UN) Convention on the Rights of the Child (CRC) in terms of utility and efficacy of treaty supervision, the Committee enjoys more powers than the CRC's supervisory body.²⁰ Yet, although both the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR) existed as models of human rights courts at the time the African Children Charter was adopted, African States did not create a court. Instead, despite the criticism that had trailed the work of the African Commission on Human and Peoples' Rights (ACmHPR or African Commission), the structure, mandate, functions and powers of the Committee were made significantly similar to those of the ACmHPR leading at least two authoritative commentators to

¹⁵. *Ibid.*

¹⁶. *Ibid* art 42.

¹⁷. *Ibid* art 44.

¹⁸. *Ibid* art 45.

¹⁹. Regarding the African Commission, scholars and the Commission argue that the protective mandate revolves around the communications procedure. See Frans Viljoen & Lirette Louw, "The Status of the Findings of the African Commission: From Moral Persuasion to Legal Obligation", (2004) 48:1 J Afr L 6 -7.

²⁰ See for instance Karin CJM Arts, "The international protection of children's rights in Africa: The 1990 OAU Charter on the rights and welfare of the child" (1993) 5 RADIC 155 arguing that the Committee is more progressive and result-oriented.

observe that the Committee ‘resembles’²¹ or ‘duplicates’ the African Commission.²² This must mean a rejection of the idea of a court under the *African Children Charter* since the ACmHPR itself is the result of a decision not to establish a court. In relation to the Commission, Viljoen makes this point when he asserts that ‘When the African human rights system was forged ... the possibility of an African human rights court was raised but rejected’ because of perception that it was ‘premature to establish a judicial institution’.²³ This decision was a deliberate and rational choice of the States that signed up to the *African Charter*.²⁴ Thus, by creating the Committee in similar format, African States effectively indicated their preference for an institution that is not a court.

Notwithstanding the rejection of the idea of a court, the communications procedure of the Committee (like that of the ACmHPR) represents authorization to exercise powers of a judicial nature and is commonly seen as one of the main thrust of the ‘protective’ mandate. Commentators generally refer to the communications mandate in glowing terms. While some believe it represents the Committee’s ‘potential to break new grounds’,²⁵ others see it as one of the ‘key elements’ for enhancing ‘the Committee’s visibility and credibility as a separate body within the African human rights system’.²⁶ Such perceptions drive a tendency to criticise QJBs that lack powerful communications procedures. For instance, despite the Committee’s efforts in improving the States

²¹. Frans Viljoen, “Supra-national human rights instruments for the protection of children in Africa: The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child” (1998) 31 *CILSA* 199 at 210. In another work, Viljoen states that the Committee “mirrors” its ‘mother institution the African Commission’. See Viljoen, *supra* note 2 at 399.

²². Curtis FJ Doebbler, “A complex ambiguity: The relationship between the African Commission on Human and Peoples’ Rights and other African Union Initiatives Affecting Respect for Human Rights” (2003) 13 *Transnat’l L & Contemp Probs* 7 at 15.

²³. Frans Viljoen, “A human rights court for Africa and Africans”, (2004) 30 *Brook. J. Int’l L.* 1 at 4

²⁴. Ndombana, *supra* note 9, 74; Viljoen, *supra* note 23 at 6.

²⁵. Amanda Lloyd, “Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: Raising the Gauntlet”, (2002) 2 *The Int’l J of Children’s Right* 187.

²⁶. Lorenzo Wiakefield & Usang Assim, “Dawn of a new decade? The 16th and 17th Sessions of the African Committee of Experts and the Rights and Welfare of the Child”, (2011) 11:2 *Afr Hum Rts L J* 699 at 706.

reporting procedure, some have opined that ‘the contribution of the Committee to the protection of human rights of children in Africa has been yet to be fully determined’ because ‘the primary contribution of the Committee to the protection of human rights ... has been through the examination of state reports’.²⁷ Faced with such challenges to its relevance, the Committee strives for a more legally powerful communications procedure, making a case that ‘greater use of this procedure should be encouraged...’²⁸ possibly to enhance its ‘visibility and credibility’.

On its own, emphasis on the communications procedure does not alter the Committee’s identity even if it could cause a somewhat unhealthy focus on that aspect of the Committee’s work. However, the pressure that Non-Governmental Organisations (NGOs) and scholars put on QJBs to strengthen their communications procedures by according their decisions binding legal effect comparable to decisions of ICs, carries the potential to alter the identity and purpose of the Committee.²⁹ According to common understanding among NGOs, by so doing QJBs are supposed to coerce like ICs, instead of working to persuade states. The literature on the early days of the ACmHPR’s work provides ample proxy example of such pressure. One influential commentator argued for instance, that the African Commission ‘stands as a toothless bulldog’ which can only bark but not bite.³⁰ This position is based on the commonly held view that a fundamental weakness of the communications procedure of QJBs in Africa is that the resulting decisions are recommendations which are not final³¹ and are not considered to be legally binding.³² This ‘non-

²⁷. Doeblbler, *supra* note 22 at 15.

²⁸. 2015- 2019 Draft Strategic Plan of Action of the Committee, 7.

²⁹. In informal interviews with the present author in July 2013, citing the ‘progress’ made by the African Commission, some stakeholders urged the Committee to take the initiative to be more assertive.

³⁰. Ndombana, *supra* note 9 at 64; Rachel Murray & Elizabeth Mottershaw, “Mechanisms for the Implementation of Decisions of the African Commission on Human Rights” (2014) *Human Rights Quarterly* Vol. 36:2 349.

³¹. Viljoen, *supra* note 23 at 13; Jeremy Sarkin, “The African Commission and the African Charter: Comparative lessons from the European Court of Human Rights” (2011) 18 SA J Int’l Aff 281 at 284. The African Commission’s decisions become final when they have been presented to the political organs of the AU in the Commission’s annual report.

³². Rachel Murray & Elizabeth Mottershaw, *supra* note 30 at 351.

binding nature of findings' and 'the weak legal basis for remedies' are seen as the reason why states would not comply and therefore explains why the impact of the decisions remain low.³³ While these analyses appear to aptly capture veritable shortcomings of QJBs, they result from viewing QJBs with comparative lenses in which ICs are the comparator. They also give the impression that a human rights supervisory mechanism is only (or at least more) effective when it has the power to bind states by mere pronouncement. In reaction to such comparison, QJBs such as the Committee consciously or unconsciously strive to behave like courts despite their quasi-judicial character. So what does it mean to say that the African Children's Committee is a quasi-judicial body?

Although the terms are commonly used in international law literature, 'quasi-judicial' or 'quasi-judicial body' are hardly defined or described.³⁴ As for ICs, Shelton defines a court as 'both an independent body that answers legal questions according to principles and rules of law, and the physical space where judicial proceedings occur'.³⁵ She considers 'physical space and proceedings' as factors that distinguish 'non-judicial bodies' from courts.³⁶ Viljoen and Louw generally identify three features (powers) that distinguish judicial bodies – 'consideration of complaints in line with the rules of natural justice', 'delivering legally reasoned judgment and the ordering of remedies'.³⁷ Romano prefers to describe and sets out seven criteria that qualify an international judicial body or court. For Romano, the body must be permanent, established by an international instrument, apply international law, decide cases on the basis of rules of procedure

³³. Viljoen, *supra* note 23 at 14; Sarkin, *supra* note 31 at 284.

³⁴. Historically, the term 'quasi-judicial' has earlier usage in Constitutional and Administrative Law where it was applied to 'describe certain kinds of powers wielded by ministers or government departments but subject to a degree of judicial control in the manner of their exercise'. Thus, it may have been used in the context of separation of powers to refer to 'functions which lie on the borderland between the judicial and executive spheres'. See HWR Wade, 'Quasi-judicial' and its background' (1949) 10 Cambridge L. J 216-240.

³⁵. Shelton, *supra* note 7 at 538.

³⁶. *Ibid.*

³⁷. Viljoen & Louw, *supra* note 19 at 14.

which precede the case in question and cannot be modified by the parties, render decisions that are legally binding, be manned by permanent independent adjudicators whose appointment precedes the case(s) and consider cases that involve at least one sovereign state or international organisation.³⁸ Distinguishing between bodies that use ‘adjudicative means’ and ‘non-adjudicative means’, Romano argues that the legal quality of decisions effectively distinguishes between ICs and QJBs.³⁹

By these analyses, the procedure by which complaints are determined and the legal quality of the resulting decisions are the two main features that distinguish QJBs from ICs. Procedure is an *including* feature since a non-judicial-body is termed quasi-judicial in the sense of being ‘like-a-court’ only when it adopts complaint-handling-processes characteristic of courts. Quality of decision is then an *excluding* feature in the sense that mechanisms without competence to make legally binding decisions cannot be seen as courts even if they employ judicial procedures. From this standpoint, the pressure to be ‘more judicial’ invites QJBs to aspire to make their decisions binding if they are to be taken more seriously. While this is not to suggest that decisions of QJBs must never be implemented by states in order for those bodies to remain ‘quasi-judicial’, it means that decisions of QJBs do not bind automatically by mere fact of pronouncement by the body – an issue regarding the nature of its institutional authority. Rather, such decisions are implemented when the target states are convinced without the external pressure invoked by the mere binding legal quality of the order—a function of recognition of the intellectual authority of the body. This article focuses on the excluding features that contrast these bodies. Hence, what is generally

³⁸. Cesare PR Romano, “The proliferation of international judicial bodies: the pieces of the puzzle”, (1999) 31 NYU J Int’l L & Pol 714 -715; Cesare PR Romano, “A taxonomy of international rule of law institutions”, (2011) 2 J Int’l Disp Settlement 241, 251 – 256.

³⁹. Cesare, (1999) *supra* note 38 at 714. According to him, ‘This last element rules out a large number of compliance monitoring mechanisms and bodies whose outcome is typically a mere recommendation which is subsequently scrutinized by a larger political organ’.

considered to be a major flaw in the design of QJBs is in fact one of the main features that distinguishes them from ICs and attempting to rectify that so-called flaw is tantamount to altering the identity of the Committee.

The founding instruments of the three regional human rights systems elucidate claims regarding the key distinctions between QJBs and ICs. Like ICs, regional human rights QJBs are established by international treaties.⁴⁰ All three regional QJBs are also composed of independent experts who enjoy diplomatic immunities equivalent to judges of ICs. Each has authority to receive petitions from states and non-state actors against states parties, while the African and Inter-American Commissions are mandated to undertake a range of other activities including to receive state reports.⁴¹ All three QJBs have permanent existence with permanent secretariats even though their members only work part-time. Each QJB monitors the implementation of international treaties and principles (substantive law) applying fact-finding and (adversarial) adjudicatory processes previously established by rules of procedure adopted as international documents.⁴² On these grounds, QJBs share most of the features and processes that define international courts.

⁴⁰. Although the European Commission for Human Rights is now defunct, it is used (in the present tense) in this article for comparative purposes. *The African Charter on Human and Peoples Rights* adopted on 27 June 1981, OAU Doc. CAB/LEG/67/3 rev.5, 21 ILM 58 1982 entered into force on 21 October 1986[*African Charter*] and the *African Children's Charter* *supra*, note 1 are instruments for the African Commission and the Committee respectively. The *European Convention for Protection of Human Rights and Fundamental Freedoms* No. 4, 1950, 213 U.N.T.S. 221, XI [Original ECHR] established the defunct European Commission for Human Rights. The Inter-American Commission for Human Rights (IACmHR) is far more complicated in terms of founding instruments. At least three instruments establish and/or state the functioning structure of the IACmHR. It was created by international resolution and the adoption of its statute as an international instrument by the Organisation of American States. However, the American Convention of Human Rights [*American Convention*] and the Charter of the Organisation of American States (OAS) are also a relevant treaty for the Inter-American Commission. See www.oas.org/en/iachr/mandate/Basics/1.INTRO.Eng.pdf. Also see Fernando Volio, "The Inter-American Commission on Human Rights", (1981) 30 Am U L Rev 65.

⁴¹. See *African Children's Charter*, *supra* note 1, art 44; *African Charter* *supra* note 40, arts 46-55; *American Convention on Human Rights* 26, Nov. 22, 1969, O.A.S.T.S. N° 36, 1144 U.N.T.S. 123, art 44 and; *Original ECHR*, *supra* note 40, arts 24-25. The ECmHR was slightly different since beyond acting as a sift, its handling of petitions was specifically aimed at reaching amicable settlement. In the case of the IACmHR, the communications mandate was granted in 1965 subsequent to its establishment, to enhance its effectiveness.

⁴². Founding treaties empower QJBs to draw up their own rules of procedure. The procedures respect the rules of natural justice. For eg, *African Children's Charter*, *supra* note 1, art 38; *American Convention*, *supra* note 40, art 39.

Despite these similarities, some distinctions can be identified. In terms of processes, some (not all) QJBs are required to or generally reserve the discretion to sit in private when they consider communications.⁴³ Further, QJBs undertake functions akin to those of investigating judges in certain civil law jurisdictions in the sense that they are more actively involved in fact-finding than ICs.⁴⁴ Crucially, unlike the ‘binding’ decisions of ICs, decisions of QJBs are generally considered as ‘not-binding’ on states.⁴⁵ This distinction arises partly from the fact that whereas in relation to ICs there are treaty provisions that require ratifying states to ‘undertake to comply with the judgment’, no comparable treaty undertaking is usually made in relation to QJBs.⁴⁶

Consequently, in theory, in the event of non-compliance, a threat of enforcement by political organs of regimes attaches to judgments of ICs whereas no clear sanction regime attaches to findings and reports of QJBs.⁴⁷ Thus, notwithstanding what the QJB considers to be the legal status of its decisions (its binding quality), those decisions can only be branded as binding when state parties (as a collective) recognize an obligation to coerce an offending state to comply. From this perspective, decisions by ICs such as the Inter-American Court of Human Rights attributing binding quality to the decisions of human rights QJBs can be understood as examples of how

⁴³. *The African Charter*, *supra* note 40, art 59 imposes confidentiality on the ACmHR’s measures until approved by the AU Assembly. Accordingly, Rule 31 of the Rules of Procedure of the African Commission on Human and Peoples’ Rights 2010 adopted by the African Commission on Human and Peoples’ Rights during its 2nd ordinary session held in Dakar (Senegal) from February 2 to 13, 1988 and revised during its 18th ordinary session held in Praia (Cabo-Verde) from October 2 to 11, 1995, states that private sessions shall be confidential. Communications are considered at these private sessions. Similarly *African Children’s Charter*, *supra* note 1, art 44 requires communications to be ‘treated in confidence’. The *Original ECHR*, *supra* note 40, art 33 required the ECmHR to meet in camera. The IACmHR Rules of Procedure, art 68 require that body to hold public hearings except exceptional circumstances require otherwise.

⁴⁴. QJBs exercise different degrees of power to investigate.

⁴⁵. This is what scholars like Romano consider to be the main distinction between ICs and QJBs. The result of communications proceedings is not a judgment but generally a report of facts, opinions, conclusions and recommendations sent to relevant authorities.

⁴⁶. In the case of the ECmHR, states undertook to regard as binding decisions of the Committee of Ministers which considers the ECmHR’s report. See *Original ECHR*, *supra* note 40, art 32(4).

⁴⁷. Viljoen & Louw, *supra* note 1 at 3 differentiate between ‘binding’ from an international perspective and from a national perspective. They argue that from the international perspective, sanctions follow non-compliance (enforcement) whereas from the national perspective, an obligation to give effect in the domestic system arises (implementation). It is not clear whether they intend that these two are separate and independent of each other.

international organs cave in to pressure to alter the quasi-judicial identity and character of QJBs. While this is not to suggest that decisions of QJBs should be ignored, those decisions do not depend on the enforcement by the collective for their efficacy.

In human rights regimes, the legal quality of decisions does not always guarantee compliance just as it does not always translate to decisions being ignored by states. For instance, apart from Nigeria and Botswana that have at some point categorically renounced any obligation to implement a decision of the African Commission on the grounds that it carried no binding legal force,⁴⁸ African states generally either implement decisions of the African Commission or find excuses for non-implementation other than a denunciation of their binding legal quality.⁴⁹ Conversely, despite the legally-binding quality of judgments of the ECOWAS Community Court of Justice, the Gambia has not always complied with judgments delivered by that court against it.⁵⁰ Notwithstanding these anecdotes, the legally-binding quality of decisions is a major distinction between QJBs and ICs. Hence, one way to explain compliance with the supposedly non-binding decisions would be the effort made by the QJBs to act like ICs for instance by producing 'well-reasoned judicial opinions'.⁵¹ Whatever the explanation, the blurring boundaries between the 'binding decisions' of ICs and the 'non-binding decisions' of QJBs, mostly resulting from the efforts of the QJBs reduces the value that can be assigned to the legally-binding quality of decision

⁴⁸. Viljoen & Louw *supra* note 19 reports that this was the approach of Nigeria's military rulers in a line of case. On Botswana, see Murray & Mottershaw *supra* note 31 on the events following Comm 313/05 Good v Botswana before the African Commission.

⁴⁹. From Viljoen & Louw's approach, this can be explained as a consequence of the African Commission's insistence that its decisions are binding, at least from the national perspective of binding. But when it is considered that no consequence (other than community opprobrium) attaches to non-compliance, it is difficult to link implementation to the binding status of the decision.

⁵⁰. Gambia's reaction to the decision of the ECOWAS Court in *Ebrimah v Gambia*, (2008) AHRLR 171 is instructive.

⁵¹. Douglass Cassel, "Inter-American Human Rights Law, Soft and Hard" in D Shelton ed *Commitment and Compliance: The Role Of Non-Binding Norms In The International Legal System* (Oxford: Oxford University Press, 2000).

as an excluding feature. It also demonstrates how mimicry enables QJBs to convincingly pretend to be ICs, thereby amplifying the need to identify additional features to distinguish ICs from QJBs.

One such additional feature that distinguishes between QJBs and ICs has to be the *purpose* for the establishment of these bodies. Purpose can be explicit in the listed mandate or implicit in the overall analysis of functions and outcomes weaved throughout the founding instruments. In all three regional systems, human rights courts are established specifically to ‘interpret and apply’ relevant human rights instruments.⁵² Conversely, QJBs are generally established to ‘promote and protect’ the rights provided for in relevant instruments.⁵³ From the perspective of their ordinary (dictionary) meanings, two distinct roles are envisaged by the consistent choice and use of these words. The terms ‘interpretation’ and ‘promotion’ are fairly straightforwardly distinct. However, the term ‘protect’ appears to be equated with the term ‘application’, leading to the conclusion that in order to protect effectively, QJBs such as the Committee need to act judicially.⁵⁴ While ‘application’ means an ‘act of administering’⁵⁵ or ‘act of making a rule ... operate or become effective’⁵⁶, the term ‘protect’ means to ‘make sure that somebody or something is not harmed’⁵⁷ or ‘to keep something from being harmed’.⁵⁸

⁵². *Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights* adopted in Ouagadougou, Burkina Faso on 9 June 1998 and entered into force on 25 January 2004, art 3; original ECHR, *supra* note 40, art 45 and European Convention for Protection of Human Rights and Fundamental Freedoms (as amended 2010) art 32; *African Charter*, *supra* note 40, art 60.

⁵³. The *African Charter*, *supra* note 40, art 45; *African Children’s Charter*, *supra* note 1, Art 42; the *African Charter*, *supra* note 40, art 45 alludes to ‘promote respect for and defense of human rights’. The mandate to ‘ensure the observance of engagements undertaken ... in the ... Convention’ in the original ECHR, *supra* note 40, art 19 relates to both the ECmHR and the ECtHR. However, while the court’s actual mandate is further outline, the ECmHR has no other mandate beyond art 19.

⁵⁴. See Viljoen and Louw *supra* note 19 at 7 who argue that the ‘only plausible means’ by which the African Commission can protect ‘is through findings...

⁵⁵. Merriam-Webster Collegiate Dictionary, 11th ed, (Massachusetts: Springfield Press 2003).

⁵⁶. Oxford Advanced Learners’ Dictionary, 8th ed, (Oxford: Oxford University Press, 2010)61.

⁵⁷. *Ibid.*

⁵⁸. Merriam-Webster, *supra* note 55.

It can be argued that whereas 'application' presupposes bringing the consequence of non-compliance to bear within a regime, to 'protect' is more akin to the law enforcement role in domestic system which involves preventive work but may also include the task of setting the machinery of justice in motion where all else has failed. In other words, whereas the purpose of ICs is distinctively to apply or cause the sanction regime to apply reactively in the event of breach, the 'protective' purpose of QJBs could be to proactively engage to avoid harm or to reduce the impact of harm before the necessity to invoke sanctions is activated. Where the preventive actions do not yield desired result, the QJB may by its considered opinion (legal opinion), presented in the form of a report, trigger other bodies (political or judicial) to apply sanction.⁵⁹ This interpretation of purpose can also be deduced from the myriad activities that QJBs are empowered to undertake to assist states enhance implementation of treaty obligations as compared to the single activity of ICs. The bulk of these activities relate to finding, collating and disseminating information to different actors (courts, political actors and civil society) for use to pressure states to implement their obligations.

Since the main accepted differences between QJBs and ICs in international human rights exist more in degree than anything else, recognizing *purpose* for establishment as a separate distinction potentially avoids a conflation of roles. Thus, it can be ventured that a QJB is a body of independent experts authorized to undertake a range of juridical and non-judicial activities aimed at managing information to enhance state implementation of international obligations. This is the working definition on which the rest of this paper advances. In this role, the focus is not on the power to bind states, but more on the ability of the Committee to attract the cooperation of states in the management of information.

⁵⁹. This interpretation is supported by a reading of the *Travaux Préparatoire* of the European Commission and the records of the early meetings of the OAS leading to the establishment of the Inter-American Commission.

III. SOCIALIZING STATES FOR HUMAN RIGHTS: A JOB FOR THE COURTS?

Treaty supervisory mechanisms are useful when they help steer state behaviour towards respect for international obligations. Shaping state behaviour occurs through a process of socialization by regime actors, including international judicial and non-judicial bodies.⁶⁰ Thus, the most effective human rights regimes have to be those that successfully cause states to implement their obligations. Does conceptualizing the African Children's Committee as a non-judicial actor reduce its potential to socialize states?

Proponents of the view that international law matters in shaping state conduct generally consider coercion and persuasion as two key ways in which this occurs.⁶¹ These concepts also represent two leading theoretical approaches to explaining compliance in international law. According to the enforcement approach, states are more likely to implement their international obligations when a mechanism comparable to the coercive apparatus in national legal systems looms to be applied in the event of violation.⁶² The managerial approach, takes the view that information, guidance and assistance supplied in a 'cooperative problem-solving' manner will enable states implement their international obligations without any need for coercion or threat of coercion.⁶³ Thus, whereas the enforcement approach conceptualizes compliance as a function of

⁶⁰. Ryan Goodman and Derek Jinks, "How to influence states: socialization and international human rights law", (2004) 54 Duke L J 621 – 703. Some scholars generally hold the view that international law hardly affect state conduct so that any evidence of compliance can be explained as coincidence. See for instance, FA Boyle, "The irrelevance of International Law: The schism between International law and International politics", (1980) 10 CAL W INT'L LJ 193.

⁶¹. Goodman & Jinks *supra* note 60, argue that acculturation is a third form by which socialization occurs. The analysis in this paper applies coercion and persuasion.

⁶². See Jonas Tallberg, "Paths to Compliance: Enforcement, Management and the European Union", (2002) 56 Inter'l Organizations 609 for a summary.

⁶³. *Ibid.*

the threat or use of sanctions, the managerial approach views (and therefore advocates) implementation as dependent on a regime's ability to enhance the capacity of states through increased 'transparency and simplification of rules'.⁶⁴

Despite the horizontal, anarchic nature of the international system, coercion and persuasion are veritable but distinct concepts that offer alternative paths for implementation of international human rights standards. Goodman and Dink eloquently articulate the essence of these opposing concepts when they argue that the crux of coercion lies in the ability to 'influence the behaviour of ... states by escalating the benefits of conformity or the cost of non-conformity through material rewards or punishments'.⁶⁵ On the flip side, the essence of persuasion, they contend, is the capacity to 'influence state behaviour through processes of social learning and other forms of information conveyance'.⁶⁶ As a mechanism of socialization, coercion depends on the existence of power relations in which the coercing entity enjoys superior power and is in a position to either confer or withhold costs and benefits. Thus, the effectiveness of a coercive regime depends both on the value affected states attach to regime incentives as well as on prediction of the regime's capacity to apply coercion when necessary. The effectiveness of persuasion on the other hand, would depend on the provision of information valued by the affected state and the ability of the persuading entity to convince states on the intrinsic worth of the desired action.

Regional human rights treaty bodies and activities can be categorized as either coercion-oriented or persuasion-oriented. At a general level, state reporting activities can be categorized as persuasion-oriented activities while the communications procedures come under coercion-oriented

⁶⁴. Steven Roper & Lilian Barria, "Judgments of the European Court of Human Rights: A Test Case for Enforcement and Managerial Theories of State Compliance", (2011) The American Political Science Association Annual Meeting, Seattle, WA, USA.

⁶⁵. Goodman & Jinks, *supra* note 60 at 633.

⁶⁶. *Ibid* at 365.

activities.⁶⁷ Similarly, treaty bodies can either be coercion-oriented or persuasion-oriented entities. Lacking power to bind states but understood as a mechanism for information management, the African Child Rights Committee falls in the category of persuasion-oriented bodies. ICs, as entities with authority to make legally binding decisions, fall in the category of coercion-oriented bodies. Generally, the legally-binding quality of their decisions presupposes that sanctions will follow states' failure to comply with orders of ICs. However, it is critical to bear in mind that ICs are not necessarily the coercive arm of their respective regimes since they, as courts, do not have their own means of imposing or withholding costs and benefits. That capacity often resides in the most powerful political organs of these regimes.⁶⁸ At best, ICs are bearers of the threat of sanction or coercion since they are empowered to make the determination whether (and when) state conduct warrants the application of coercion and to express that determination to the offending state and the coercive arm alike.

Understanding ICs and QJBs generally as coercion-oriented and persuasion-oriented bodies respectively, are ICs potentially more effective since they can unleash the coercive arm of a regime on erring states? In this regard, it is important to recall that coercion 'does not necessarily change the preference of the actor and may be ineffective if the state considers the expected benefits of non-conformity to exceed the costs of sanction'.⁶⁹ From this perspective of cost-benefit analysis by states, insofar as the bearer of the threat of coercion is not simultaneously the coercive arm of the regime, the cost of non-compliance is not multiplied by increasing the number of bodies with authority to convey the threat of sanction. Although proponents of more judicial-acting role for QJBs would argue that the moral weight on recalcitrant states is heavier when more

⁶⁷. However, it will be argued *infra* that the communications procedure can be persuasion-oriented when undertaken by QJBs.

⁶⁸. Usually plenary bodies of Ministers and Heads of Governments.

⁶⁹. Goodman & Jinks, *supra* note 60 at 633.

international bodies find a state in violation, there is no evidence that the moral weight of a non-binding decision is lesser than that of a legally binding decision.⁷⁰ Thus, the argument that the cost of non-compliance is not raised by an increase in the number of threat-bearers is both a justification for keeping the roles of QJBs and ICs distinct as it is a claim that the African Child Rights Committee will not necessarily become more effective if its communications procedure is more powerful or its decisions are termed binding.

Further analysis of the comparative advantage of ICs can be made on the basis of a modest evaluation of the benefits deliverable by human rights courts. Murray and Mottershaw identify three expectations that human rights communities have of adjudicatory processes.⁷¹ First, there is expectation that the decisions will 'offer redress to victims of human rights'. Second, decisions are supposed to 'prevent future violations'. Third, 'a better understanding of the content and obligations in question' should emanate as a consequence of adjudication. Without suggesting that they are exhaustive, these expectations provide a basis for evaluating comparative worth of ICs.

As institutions for enforcing compliance with international law,⁷² ICs commonly order redress for victims of rights violation. However, it is debatable whether the threat of sanction significantly influences states' decisions to redress victims as ordered by ICs. Apart from the fact that states are unlikely to impose sanctions on other states for each failure to redress individual victims, human rights regimes generally lack incentives sufficient to coerce states to comply with IC orders.⁷³ Thus, the mere fact that decisions are legally binding and assure or invite the application of coercion does not significantly make human rights regimes more effective.

⁷⁰ Botswana's assertion that it is not obliged to comply with the African Commission's decision in *Good v Botswana* denies the existence of a legal obligation but does not affect the moral obligation on that state to comply with its international obligation.

⁷¹ Murray & Mottershaw, *supra* note 31 at 350.

⁷² Shelton *supra* note 6 at 542.

⁷³. Regimes linked to economic integration communities are obvious exceptions.

The best evidence that ICs guarantee redress for individual victims of human rights violations comes from the European and Inter-American human rights systems. Accordingly, the pressure on QJBs to imitate ICs has arguably been influenced by the perception that the effectiveness of those systems largely depends on the competence of their courts to make legally binding decisions. For instance, Udombana asserts that ‘increasing knowledge in Africa of the experiences and successes of the Inter-American and European courts of human rights’ has been an impetus for the establishment of an African human rights court.⁷⁴ In his view, ‘unlike the regional human rights commissions, state governments almost universally respect judicial orders of the regional human rights courts’.⁷⁵ Similarly, Sarkin offers a variety of commentaries on the European system as evidence that the effectiveness of a human rights regime is assured when states comply with legally binding decisions of ICs.⁷⁶

While the relative effectiveness of these systems is undisputed, the link between compliance and the mere qualification of decisions as binding is contestable. Treaties are binding on parties yet states occasionally violate treaty obligations. State practice also shows that a number of bilateral and multilateral commitments are essentially gentlemen’s agreement yet that fact alone has not prevented states from respecting obligations based on such agreements that lack legally binding quality. The UN human rights system also provides compelling evidence that a human rights system can attract respect from state even when the decisions of its monitoring mechanisms lack binding legal quality. Despite its shortcomings, the UN system continues to provide leadership

⁷⁴. Ndombana, *supra* note 9 at 78.

⁷⁵. *Ibid.* Also see Viljoen, *supra* note 22 at 14 on the expectation that legally binding decisions will enhance effectiveness of the system.

⁷⁶. Sarkin, *supra* note 31 at 288 – 289. Sarkin cites Buerghenthal and Shelton who found that ‘the decisions of the European Court are routinely complied with by European Governments. He also refers to Beach (2003) for the claim that the ECtHR enjoys ‘considerable normative power, with the member states almost always respecting the rulings of the European Court of Human Rights’. However, Sarkin does not conclude that the African human rights system will become effective once its supervisory institutions acquire competence to make legally binding decisions.

in human rights such that it also passes as an effective international human rights regime.⁷⁷ Thus, supposedly non-binding decisions are potentially viable means of socialization without any threat of coercion, insofar as target states are persuaded of their worth.

Absent a causal relationship between the legally-binding quality of decisions and the rate of state compliance, it is difficult to attribute effectiveness of those human rights systems merely to the *bindingness* of the decisions. In fact, scholars assert that regional human rights courts also face challenges of non-compliance particularly from states experiencing domestic democratic challenges.⁷⁸ Scholars also argue convincingly that other factors contribute to the effectiveness of human rights regimes.⁷⁹ This challenges the assumption that states will redress violations immediately an IC authorized to make binding decisions makes a pronouncement. While ICs do order relief for violation of rights, states do not always implement such orders and the binding quality of decisions does not always trigger implementation.

Whether the legal quality of decisions and the threat of sanctions borne by ICs influence domestic efforts to prevent future violations is also highly debatable. Future violations are avoided when offending national laws are brought in line with international standards and state officials alter their rights-violating conducts. In theory, ICs can undertake international constitutional review functions and exercise authority to rule that national laws are in 'conflict with higher order obligations'.⁸⁰ However, practice shows that ICs may flag affected national laws as being inconsistent with international standards but are generally not empowered to strike down such laws

⁷⁷. For instance, the UN High Commissioner for Human Rights remains one of the most prestigious human rights roles in the globe.

⁷⁸. See Murray & Mottershaw, *supra* note 33 for example.

⁷⁹. *Ibid.*

⁸⁰. Karen Alter, 'The multiple roles of International Courts and Tribunals: Enforcement, Dispute Resolution, Constitutional and Administrative Review' in Jeffrey L. Dunoff & Mark A. Pollack eds, *Interdisciplinary Perspectives on International Law and International Relations* (Cambridge: Cambridge University Press, 2012) 345 - 370

in the same way national constitutional courts would do.⁸¹ Further, states enjoy discretion in relation to amendment of national laws according to national legislative practices and this is not affected by the bindingness or otherwise (legal quality) of the decision that has flagged the inconsistency. Thus, the coercive force of a human rights regime is generally not applied to compel amendment of national laws. State officials are also not threatened by the jurisdiction of regional human rights courts so that conviction that rights are intrinsically valuable rather than fear of sanction would best explain any change of conduct on their part. The fact-specific and narrow contextual nature of adjudicatory procedure further restricts the potential for preventing future violations since ICs are unlikely to capture all foreseeable scenarios of possible violations in the context of a given case. Moreover, complaints of repeat-violations in the European human rights system demonstrates that even the most respected courts have not successfully prevented future violations. Thus, while ICs may occasionally influence states to avoid future violations, this is not necessarily because they bear the threat of sanction or have competence to make binding decisions.

As regards the capacity to enhance understanding of the content of rights treaties, while the institutional authority of courts might be influential in legal systems based on judicial precedence, this is not necessarily the case in international adjudicatory practice. Generally, decisions in international litigation only bind parties to the specific case even though increasingly reference to earlier jurisprudence is becoming common in international adjudicatory practice. However, such reference to earlier case-law is more attributable to a combination of institutional and intellectual authority of the earlier adjudicator(s) than merely to the binding quality of the decision.⁸² For instance, in both the African and Inter-American systems, elucidation of rights by regional commissions has consistently shaped the contents of treaties despite the fact that the decisions of

⁸¹. The practice of the ECtHR best exemplifies this.

⁸². This is reinforced by the fact that qualification for appointment into ICs and QJBs are not materially different.

these commissions lack binding legal quality. The African experience even shows that the African Commission has so far contributed more to development of content-understanding of the *African Charter* than any other institution. In other words, human rights communities are persuaded rather than coerced into accepting the authority of interpretation made by treaty supervisory bodies. Hence, it is difficult to sustain a claim that ICs are more likely to enhance better understanding of the contents of human rights treaties. It is also not possible to convincingly argue that the Committee's decision will be more authoritative if it acts like an IC.

Even where the legal quality of decisions makes significant difference in delivering on community expectations, a number of other practical challenges could restrict that significance. Under some national constitutions, international law (including decisions of ICs) does not enjoy immediate and direct force of law in the domestic legal system.⁸³ In such legal systems, judicial actors jealously protective of domestic judicial authority are more likely to be resistant to any 'foreign' judicial decision that purports to usurp domestic judicial authority. The silent power tussle that is likely to ensue potentially creates difficulty in cases where national judiciaries have a role to play in the implementation of international decisions. Resistance may also prevent national judiciaries from acknowledging any interpretation of rights, perceiving international case-law as a threat rather than as 'additional material to support judicial law making at the national level'.⁸⁴ Specific to the rights of children, perception that binding decisions potentially alter the power relations at the domestic level may also affect the reception of international decisions at the national level.

Overall, direct and proxy evidence from international adjudicatory practice does not support any claim that competence to make legally binding decision (with its attendant conveyance

⁸³. For example, Constitution of the Federal Republic of Nigeria 1999.

⁸⁴. Martin & Simmons, *supra* note 8 at 749.

of the threat of coercion) makes ICs better mechanisms for rights protection. Instead, there is basis to argue that ICs do not cover the field of state socialization in human rights. Although, there is also insufficient evidence to conclude that QJBs are more effective institutions, situations exist in which the absence of a sense of compulsion is more likely to secure implementation. Thus, acknowledging the weakness of overreliance on coercion invites regimes to combine coercion-oriented and persuasion-oriented mechanisms without pressurizing the one to imitate the other.

Experiences from the African and Inter-American human rights systems show that QJBs are equally potent agents of socialization. Both the African Commission and the Inter-American Commission on Human Rights have been relatively successful in attracting state cooperation in their respective work. While some may argue that regional QJBs became more effective only as they gravitated towards imitating ICs by asserting more authority for their decisions, such claims arguably both exaggerate the socializing influence of legal nomenclature and undermine the persuasive socializing capacity of intellectual authority. Decisions are not binding just because they are termed binding either by treaty or by institutions but because states pledge to comply with those decisions upon pain of sanction imposable by the collective. Practice shows that threat of sanctions does not even always coerce states into compliance. It is also apparent that the pronouncements of international non-judicial bodies become increasingly authoritative when the community of users recognize their expertise in the given area.⁸⁵ Thus, absent states' pledge to comply with its decision upon pain of sanctions, the African Child Rights Committee (the Committee) gains no additional value by asserting that its decisions are binding or that it has the powers that ICs have.

⁸⁵ The work of bodies like The United Nations Educational, Scientific and Cultural Organization (UNESCO) is an example in this regard.

Instead, its value lies in maintaining itself as an alternative path to implementation of its founding treaty and growing its intellectual authority on child right issues. Recognizing its distinct identity and purpose allows the Committee to focus on strengthening its tools of persuasion through improved information management. Accordingly, mimicking ICs arguably alters the Committee's identity and denies the African human rights system the benefit that ought to accrue from having both coercion-oriented and persuasion-oriented mechanisms to monitor implementation of the *African Children Charter*. With the African Court of Human and Peoples Rights performing the system's coercive-oriented functions, allowing the African Child Rights Committee to retain and develop its quasi-judicial features has to be more useful to the system.

IV. THE COMMITTEE: GOING FROM BAD COPY TO BUDDING ORIGINAL

Once it is agreed that *purpose* should distinguish and drive the work of the African Child Rights Committee, the challenge shifts to considering how this can shape the way the Committee approaches its assignments. The need to avoid duplication of functions assigned to ICs and to reduce the 'anxiety of influence'⁸⁶ that the Committee faces in trying to emulate the African Commission's self-transformation must inspire the reconstruction of the alternative framework on which the Committee can perform useful functions and be evaluated on its own terms. QJBs in the UN human rights system provide a snap-shot in this regard. As Secretary-General Ban Ki-Moon has asserted, they 'stand at the heart of the international human rights protection system as engines translating universal norms into social justice and individual well-being' because the system 'provides authoritative guidance on human rights standards, advises on how treaties apply in

⁸⁶ Generally see H Bloom's *The Anxiety of Influence*, (Oxford: Oxford University Press, 1973), arguing that the primary challenge rising poets take on is to do better than more established poets.

specific cases and informs state parties of what they must do to ensure that all people enjoy their human rights'.⁸⁷ The Committee can achieve similar results without necessarily transforming into a different institution insofar as it is able to reframe its activities around its purpose as a mechanism for persuading implementation through effective information management. Some of the ways in which this can be done are discussed below:

A. THE COMMUNICATIONS PROCEDURE AS A TOOL FOR NORM CLARIFICATION; ADVICE ON THE APPLICABILITY OF NORM TO FACTS; AND COLLATION OF INFORMATION GENERALLY

Although it may not be the Committee's most impactful activity yet, the communications procedure is arguably the most celebrated and anticipated innovation that the African Children Charter has introduced.⁸⁸ Under the traditional framework, this procedure is still very weak and underdeveloped even as its usage has been extremely limited.⁸⁹ Perceived as a mechanism to condemn states for violations of children's rights and to pronounce redress for individual victim(s), the communications procedure is adversarial and expected to culminate in binding decisions. In this perspective, the Committee is a detached umpire wielding the hammer of the regime to judge recalcitrant states that are expected to feel obligated to comply with relevant orders when found in violation.⁹⁰ A consequence of this framework is that in order to avoid liability before the Committee a state has to switch on a defensive rather than a cooperative mode in reaction to the communications procedure.

As a persuasion-oriented body for information management, the objective of the Committee's communications procedure would be to enhance state capacity to implement Charter-

⁸⁷. Cited by Aslan Abashidze, "The process of strengthening the human rights treaty body system" in AJ Belohlavek, N Rozehnalova and F Cerny eds, *The role of governmental and non-governmental organizations in the 21st Century* (New York: Juris Publishing, 2014) 4.

⁸⁸. Viljoen, *supra* note 21 at 210.

⁸⁹. As at 31 July 2015, only 3 communications had been received by the Committee out of which one had been concluded.

⁹⁰. The Nubian Children case represents this picture.

obligations by assisting them with norm clarification, advice on the applicability of norms to specific factual contexts as well as collation and dissemination of relevant information. This objective relates to the idea that states resort to international bodies when their domestic institutions fail to address issues of concern.⁹¹ Failure on the part of national institutions can be attributed either to inability or unwillingness. Where failure is a result of unwillingness to implement a state's international obligations, cooperation might not be forth-coming and coercion (if effective in that regime) becomes the more appropriate option.⁹² However, where the failure of national institutions arises from inability –unfamiliarity with the nature and scope of treaty obligations, difficulty in determining whether particular facts invite application of international norms or plain lack of capacity to determine the nature of appropriate remedy - the state is likely to be more cooperative and willing to assist the Committee find a suitable resolution of the alleged violation. Thus, where national institutions fail because they truly lack capacity, the Committee's role as a body of independent expert is more useful when it persuades state actors (including national courts) to accept a best possible approach to implementation. In that situation, the Committee's conclusion on any communication takes the form of an authoritative legal opinion⁹³ that becomes stimulus for implementation and reduces resistance from the state and its actors, including the courts. Such an approach does not rely either on the legal quality of the Committee's decision nor on the regime's threat of coercion for socialization of the state. In any case, the actual link between these and state compliance is yet to be established.⁹⁴

⁹¹ Martin & Simmons, *supra* note 7 at 752. This point is exemplified by the principle of exhaustion of local remedies which allows national institutions to first attempt to remedy alleged violations.

⁹² In such cases, regimes that rely on national judiciaries for enforcement will find resistance from those institutions. Zimbabwe before the SADC Tribunal is a prime example as national courts in Zimbabwe were unwilling to execute the Tribunal's decision.

⁹³ The *Travaux Préparatoire* of the ECHR indicate that negotiators understood the ECmHR to be legal opinions.

⁹⁴ Generally see Murray & Mottershaw, *supra* note 33 at 355.

The difference between an IC's approach and a QJB's approach to the communications procedure should determine how the Committee is evaluated and whether it is a bad copy or an original actor. As coercion-oriented mechanisms, ICs are bearers of their regime's threat of sanction and convey that threat to a violating state in applying the relevant treaty. As international law enforcers ICs determine whether a violation has occurred, sanctions are applicable on the given facts and whether the state violator should be the target of those sanctions. The IC temporarily transfers the regime's threat and weight of sanction to the aid of the wining litigant and orders the state to act or refrain from acting in a certain way at the risk of those sanctions. In legal parlance, the IC makes a mandatory order to apply the relevant treaty. In contradistinction, the Committee as a persuasion-oriented mechanism is essentially a conveyor of information. Unlike courts, the Committee has wide mandate to gather relevant information regarding a given compliant, either independently or with cooperation from the parties to a communication. Like ICs, the Committee can interpret the norms vis-à-vis the given facts to determine whether a violation has occurred. It then takes a different path by conveying that information to the state in the form of a declaration of authoritative legal opinion instead of an order.⁹⁵ If it considers that the facts amount to a violation, the Committee would advise the state on how to rectify the situation and bring itself into compliance. In legal parlance, only a declaration is made and the state retains the discretion as to how to proceed. This approach does not prevent the Committee from 'protecting' rights as the entire process aims at persuading the state (and its actors) to 'voluntarily' change conduct and bring itself in line with its international obligations. Critically, under this conceptualisation,

⁹⁵. Where an international court lacks human rights jurisdiction but still hears a case involving human rights, its actions are toned down to the equivalent actions of a quasi-judicial actor. It offers an interpretation but does not make an order. Instead, it makes a declaration and allows the state concerned to decide whether it wants to utilize the recommendation. A court in this toned-down capacity does not (or at least is not expected to) transfer the regime's threat of sanction to the wining litigant. It stops at 'informing' the parties that the wining litigant could have enjoyed the benefit of the regime's sanctions structure had the court been mandated to issue that threat in that issue area. The budding human rights jurisprudence of the East African Court of Justice exemplifies this.

assessment of the Committee's effectiveness cannot – in the main – be on the basis of the rate of state compliance with its decisions, but on the value of information that it is able to collate and disseminate regarding violations of children's rights.

B. STATE REPORTING FOR INFORMATION GATHERING AND CONSTRUCTIVE DIALOGUE

State reporting is not a function of ICs but constitutes one of the main pillars of the 'promotional' mandate of QJBs such as the Committee.⁹⁶ Originally, the state reporting procedure generally aims at promoting constructive dialogue between a supervisory mechanism and the reporting state to enhance the capacity of states to fulfil their treaty obligations.⁹⁷ Increasingly bowing to pressure to transform into more powerful, therefore coercive-oriented bodies, QJBs are taking an arguably more confrontational approach to state reporting, sometimes employing it as a tool for enhancing state compliance with decisions made in the communications procedure.⁹⁸ Either as a consequence or a trigger of this change of direction, default in state reporting obligations and withholding of relevant information from reports submitted have also become quite common even in relation to the Committee.⁹⁹

In a reconstructed framework, the state reporting procedure of the Committee would have to focus on strengthening constructive dialogue but also aim at collation and dissemination of quality information. In this regard, the Committee's effort would be directed at assisting reporting states with constructive recommendations aimed at enhancing capacity to fulfil treaty obligations rather than creating a perception that reporting is for assessment purposes. Additionally, information from state reports would have to be managed and disseminated in ways that provide

⁹⁶. *African Children's Charter*, *supra* note 1, art 43.

⁹⁷. In respect of the UN CRC, see Rebecca Rios-Kohn, "The Convention on the Rights of Children" (1997-98) 5 Geo J. on Fighting Poverty 139- 149.

⁹⁸. For instance, Viljoen (2012) 349 shows that state reporting is now 'aimed at assessing' state adherence to treaty obligations. However, see Viljoen's discussion of the aims of state reporting at 350.

⁹⁹. See Abashidze, *supra* note 87 at 7 on challenges associated with state reporting procedure of QJBs.

other state parties critical comparative information regarding how treaty obligations are engaged by all state parties, creating room for collective search for means of addressing similar challenges.

V. CONCLUSION

Twenty five years after it was established by treaty and fourteen years after it was first inaugurated, the African Child Rights Committee continues to battle for recognition even within its immediate constituency –the African human rights system. Without significant powers similar to those of the African Court on Human and Peoples Rights and having yet to self-transform into a more powerful entity in the manner that the African Commission on Human and Peoples’ Rights is believed to have done, the Committee remains the proverbial less fortunate cousin. This article has argued that the pressure to self-transform to become (or at least appear) more powerful like ICs has led to something akin to anxiety of influence and threatens the quasi-judicial identity and character of this Committee. The article has argued that the pressure plays out in passive and active forms either when the Committee is ignored or assessed as ineffective by the human rights community. Taking the view that the pressure results from using/adapting the framework for assessment of ICs to QJBs such as the Committee, this article has also proposed a reconsideration of the distinction between ICs and QJBs, arguing that *purpose* is an important element of that distinction. This article concludes that if purpose is taken into consideration, a different evaluation framework should be used for assessing the work of QJBs such as the Committee. In such a reconstructed framework, the Committee will not only find its own original functions and therefore become more useful to the system but will attract more positive assessment that will eventually lead to elimination of the pressure to transform.

