



International  
Commission  
of Jurists

KENYAN SECTION | Since 1959



# THE ROLE OF REGIONAL MECHANISMS IN CURBING THE RISE OF ATROCITY CRIMES IN AFRICA

**Published by**

The Kenyan Section of the International Commission of Jurists (ICJ Kenya)

ICJ Kenya House, Off Silanga Road, Karen

P.O Box 59743 - 00200, Nairobi, Kenya

Tel: +254-20-2084836/8 | +254 720 491549

Email: [info@icj-kenya.org](mailto:info@icj-kenya.org)

Website: [www.icj-kenya.org](http://www.icj-kenya.org)

**Design and Layout by:**

Ndolo Anderson

Lead Graphics Designer - ICJ Kenya

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## Introduction

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By Sharon Tarisai Dzaro<sup>1</sup>

## **The Role of Regional Mechanisms in curbing the rise of Atrocity crimes in Africa**

Atrocity crimes are defined as violation of international criminal law that falls under the historically defined international crimes of genocide, war crimes and crimes against humanity.<sup>2</sup> Examples of atrocity crimes include rape, sexual slavery, forced pregnancy, any form of sexual violence<sup>3</sup> and the crime of apartheid. Regional Mechanisms are part of the overall security architecture of the Union, which has the primary responsibility for promoting peace, security and stability in Africa.<sup>4</sup> Regional human rights systems were developed to reflect regional values and offer a more specific framework than the UN system.<sup>5</sup> Such a framework can resonate more strongly with local realities and allow for different approaches to enforcing standards. There are three main regional systems of protection of human rights namely the Organization of American States, the Council of Europe and the Organization of African Unity or the African Union.<sup>6</sup>

Before delving into the discussion, it is important to note that human rights are not the *lex specialis* for international crimes. Human rights are civil in nature and do not necessarily deal with criminal issues. The moment one mentions international crimes, there is need hence to address them under two bodies of law viz International Humanitarian Law and International Criminal Law. Some could argue that there is a nexus between human rights and atrocity crimes in that continuous violation of rights can lead to atrocity crimes while some could argue that there are human rights violations that result from atrocity crimes hence the two can be addressed conjointly. Therefore, for the progression of this writeup, the thrust of this paper is to uncover the duty of Regional Mechanisms in taming the advance of human rights violations that are as a result of atrocity crimes or that could lead to atrocity crimes.

1 Sharon Tarisai Dzaro is a Zimbabwean lady who holds a Bachelor of Laws Honors Degree (LLB) with the Midlands State University. She works as a legal practitioner and human rights activist at the Legal Resources Foundation (LRF) in Zimbabwe and she is currently with the Kenyan Section-International Commission of Jurists seconded by LRF-Zimbabwe as a Regional Exchange Professional.

2 Global centre for the Responsibility to Protect, Background Briefing: Defining the Four Mass Atrocity Crimes, February 2018, page 1, (Para 2) <https://www.globalr2p.org/publications/defining-the-four-mass-atrocity-crimes/>

3 Above, Para 3

4 Fatsah Ouguergouz, *La Charte africaine des droits de l'homme et des peuples – Une approche juridique des droits de l'homme entre tradition et modernité* (Paris, Presses Universitaires de France, 1993 (Publications de l'Institut universitaire de hautes études internationales, Genève)), p. xxv.

5 Keba Mbaye, *Les droits de l'homme en Afrique* (Paris, Editions A. Pedone/Commission Internationale de Juristes, 1992), p. 161.

6 Douglass Cassel, *A Framework of Norms: International Human Rights Law and Sovereignty*, 2001



The African Commission on Human and Peoples' Rights<sup>7</sup> is a classic example of Regional Mechanisms and this author is going to make mention of it quite often in this writeup. According to Article 31, the African Commission on Human and Peoples' Rights consists of eleven members serving in their individual capacity. Article 30<sup>8</sup> illuminates that the Commission has the twofold function. Firstly, it focuses on promoting human and peoples' rights, and, secondly, protecting those rights. including the right to receive communications both from States and from other sources

Regional mechanisms offer redress to victims of Human Rights violations where national mechanisms fail the victims or are found in wanting. All States have laws that provide protection of human rights be it in the Constitution or other pieces of legislation. However, some State actors happen to be the perpetrators of human rights violations and in instances like those, regional mechanisms step up to protect the victims. When the State is the perpetrator in Human Rights violations, it is important to seek redress beyond national borders and that is when Regional Mechanisms come into play.<sup>9</sup> An example is drawn from the case of ***Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya***<sup>10</sup> popularly known as the ***Endorois Case*** whose summary is as follows;

In the 1970s, the Kenyan government evicted hundreds of Endorois families from their traditional lands around the Lake Bogoria area in the Rift Valley, to create a game reserve for tourism. In response, and after pursuing legal options at the national level, the Endorois Welfare Council, assisted by fellow ESCR-Net members, Minority Rights Group International and the Center for Minority Rights Development, took the case to the African Commission on Human and Peoples' Rights (ACHPR). In 2010, the ACHPR issued a judgment stating that the Kenyan government had violated the African Charter on Human and Peoples' Rights, specifically the rights to religious practice, to property, to culture, to the free disposition of natural resources, and to development.<sup>11</sup>

The case clearly illuminates the role of regional mechanisms in taming human rights violations especially where local laws fail victims or where the State is the perpetrator.

7 African Commission on Human and Peoples' Rights, 1987 [https://au.int/sites/default/files/treaties/36390treaty0011\\_\\_african\\_charter\\_on\\_human\\_and\\_peoples\\_rights\\_e.pdf](https://au.int/sites/default/files/treaties/36390treaty0011__african_charter_on_human_and_peoples_rights_e.pdf)

8 African Commission on Human and Peoples' Rights, 1987.

9 The African Commission on Human and Peoples' Rights Examination of State Reports, 14th Session, December 1993: Ghana, to be found on the following web site: <http://www1.umn.edu/humanrts/achpr/sess14/complete.htm>.

10 Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya-276/2003

11 ESCR-Net, June 5, 2018 <https://www.escri-net.org/news/2018/endorois-case>

Additionally, regional mechanisms have a responsibility of containing the growth or advance of Human Rights violations in relations to atrocity crimes in that they may open their doors where local remedies are found to be unavailable, have been unduly prolonged or are ineffective. Regional Mechanisms give audience to victims of violations of rights in relation to atrocity crimes. It must be understood however that Regional Mechanisms cannot just intervene in the affairs of a State as it will be going against the international law principles of State Sovereignty. Put simply, this principle basically entails the right of a State to rule itself and those who live within its territory, to choose its own constitution, form of government, and economic system, to write and enforce its own laws, to exercise a territorial monopoly on publicly sanctioned use of force through its police and military, to set its own taxes and allocate the spending of government revenues, to exercise police powers to regulate the economy and society and to enter into agreements with other States. International human-rights law, by definition, limits State Sovereignty, it restricts how governments may treat their own citizens within their own borders<sup>12</sup> and this contradiction can be addressed in a separate paper.

More so, to combat the increase of atrocity crimes in Africa, Regional Mechanisms monitor compliance of member States by conducting investigations and publishing reports. Some go on to adjudicate individual petitions alleging violation of rights. Article 30 of the African Charter<sup>13</sup> states that the Commission has the right to receive communications both from States and from other sources in relation to human rights violations. Regional Mechanisms resultantly conduct investigations from the reports or communications that they would have gotten and publish reports of their findings. This assists in keeping human rights violations under control if states are aware of the fact that their actions can be publicized.

Further, some Regional Mechanisms like the African Court may also hear applications on a referral basis from NGO's with observer status. However, the court may only hear claims against an African Union member State that has ratified the 1998 Protocol on the African Charter and consented to the court's jurisdiction. Otherwise, no standing. Additionally, the African Court can issue an advisory opinion at the request of any member State or organization recognized by the African union.

Adding on, Regional Mechanisms contribute on taming the escalation of human rights violations by protecting and promoting Human Rights. In Article 45 of the African Charter on Human and Peoples' Rights<sup>14</sup>, the Commission's mandate includes the protection and promotion of human and peoples' rights through two procedures. First is the communication procedure and Article 55<sup>15</sup> of the same permits individuals and organizations to submit communications.

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- 12 Douglass Cassel, A Framework of Norms: International Human Rights Law and Sovereignty, 2001, page 2
  - 13 African Union. African Charter on Human and Peoples' Rights. African Union, 1981.
  - 14 African Union. African Charter on Human and Peoples' Rights. African Union, 1981.
  - 15 African Union. African Charter on Human and Peoples' Rights. African Union, 1981.



These communications will be regarding the status of Human Rights in a particular state and where reports of violations have been reported, the system then protects the victims. The second procedure is the special mechanisms procedure such as the Working Group on Economic, Social and Cultural Rights which regularly consults with NGOs in order to better protect and promote economic and social rights.<sup>16</sup>

Further, the African system may also create subsidiary mechanisms for monitoring compliance such as rapporteurs, committees and working groups. Advocates can also bring any issues relating to human rights violations to the monitoring arm of the African Commission. This may result in in-depth examination of issues relating to human rights in a particular country and to recommendations to the government to improve the rights of persons.

Regional Mechanisms has both the individual complaints procedure and the interstate procedure. For individual complaints to be admissible, they must satisfy the requirements in Article 56 of the African Charter.<sup>17</sup> As regards Inter State complaints, Article 47 and 48 of the African Charter<sup>18</sup> are noteworthy in their exposition of the right of a state to bring a claim against another State in writing stating that state's violations of the provisions of the African Charter as provided for in Article 49 of the Charter.<sup>19</sup> For inter-state communications, the African Charter emphasizes in Article 50<sup>20</sup> the need to exhaust all domestic remedies unless the Commission decides that local remedies either did not exist or the procedure for achieving them is unduly long. The Commission shall prepare a report stating the facts and its findings and in accordance to Article 52<sup>21</sup>, the report will be sent to the States concerned and communicated to the Assembly of Heads of State and Government. Article 55-59<sup>22</sup> are worth taking note of with regards to the procedure taken when a complaint has been made against a state by another state. The case of ***DRC vs BURUNDI AND UGANDA COMMUNICATION 227/99***<sup>23</sup> is a locus classicus it being the first and only interstate dispute that has heard under the African Human Rights System.

From the above, it is apparent that regional human rights systems have become an important feature of international human rights law. At the same time there is a danger that states who wish to escape global scrutiny may opt to submit themselves to the less exacting monitoring systems and many claims that they should not be subjected to international supervision.

16 Charles Carter, *The Regionalization of Conflict and Intervention*, international Peace Academy, 2003, Page 5-6

17 African Union. *African Charter on Human and Peoples' Rights*. African Union, 1981.

18 African Union. *African Charter on Human and Peoples' Rights*. African Union, 1981.

19 African Union. *African Charter on Human and Peoples' Rights*. African Union, 1981.

20 African Union. *African Charter on Human and Peoples' Rights*. African Union, 1981.

21 African Union. *African Charter on Human and Peoples' Rights*. African Union, 1981.

22 African Union. *African Charter on Human and Peoples' Rights*. African Union, 1981.

23 *DRC V Burundi and Uganda Communication-227/99*.

Likewise, regional human rights systems have the potential to break away from universal aspirations embodied in key international instruments such as Universal Declaration of Human Rights<sup>24</sup> by posing less stringent standards of human rights protections. Consequently, the question arises whether regional human rights systems for human rights monitoring do strengthen or weaken each other.

In reflection of the discussion above, this author thus provides the following recommendations to ensure Regional Mechanisms repress the progression of human rights violations that result from atrocity crimes or that may possibly lead to the commission of atrocity crimes. Firstly, regional bodies must visit signatory states to assess the extent of human rights violations. In doing so, regional bodies will have an appreciation of the true status quo. This is from the reality that States down play the state of affairs or extent of violations in their territories to avoid international scrutiny so it is an abstract responsibility to the globe. By visiting the individual states, regional bodies will get true and precise reports and resultantly deal with the violation accordingly by ensuring perpetrators are held accountable.

Adding on, as a recommendation to regional bodies to gag the escalation of human rights violations that may result in the commission of atrocity crimes or that are as a result of atrocity crimes there is need to strengthen International Law. This can be done by coming up with enforcement mechanisms that can be employed on States that fail to comply with regional treaty obligations that they are signatories to. As it stands, States can do whatever they want whether or not it is detrimental to the enjoyment of human rights because they are aware of the fact that no one will hold them accountable for their actions. What then is the point of having international law if it lacks enforcement mechanisms. A balance of some sort should be stroked between States' Responsibility and States' Sovereignty

Article 34 of the Vienna Convention on the law of treaties states that, "A treaty does not create either obligations or rights for a third State without its consent".<sup>25</sup> This article creates problems on its own in the sense that States can sign as many treaties and conventions as they please and still not be obligated unless they consent to it and consent is indicated by domesticating the treating. This process is termed rectification in legal terms and it takes a very long period of time. Some States can deliberately procrastinate the domestication of international treaties especially when they are the perpetrators of the human rights violations. The recommendation that would follow to enable regional bodies to subdue the advance of human rights violations that are as a result of atrocity crimes or that may lead to atrocity crimes is that the period of rectification of treaties and conventions should be short and signing of treaties must immediately create some obligations on a third State.

<sup>24</sup> Universal Declaration of Human Rights, 1948.

<sup>25</sup> Vienna Convention on the Law of Treaties 1969 [https://legal.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf)



Lastly, regional bodies can increase the number of times that States report and States must be mandated to do so. The State reporting process is a fundamental component in monitoring the implementation of a treaty or human rights instrument<sup>26</sup> especially when there are no enforcement mechanisms for States that may choose not to comply. Article 62<sup>27</sup> states that States must report every two years. This is a long time to report considering the fact that a lot can happen in a year with regards to Human Rights and human rights violations let alone two years. Events like elections, economic affairs only to mention just but a few can be triggers to human rights violations hence reports on state affairs should be submitted frequently so ensure continuous repression of human rights violations that can lead to atrocity crimes or that may be a result of atrocity crimes.

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26 Centre for Human Rights Pretoria: The State Reporting Process under the African Commission <https://www.maputoprotocol.up.ac.za/state-reporting>

27 African Union. African Charter on Human and Peoples' Rights. African Union, 1981.

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