

## The right to return to one's country in Africa: Article 12(2) of the African Charter on Human and Peoples' Rights

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**Summary:** *At the height of the COVID-19 pandemic many African countries barred people, including citizens and foreign nationals, from entering or leaving their territories. This was the case although article 12(2) of the African Charter on Human and Peoples' Rights provides that '[e]very individual shall have the right to leave any country including his own, and to return to his country'. However, article 12(2) also provides that '[t]his right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality'. Article 12(2) of the African Charter provides for the rights both to leave and to return to one's country. In this article the discussion is limited to the right to return. Unlike other regional human rights treaties in Europe, the Americas and the Arab world where the right to return to or enter one's country is reserved for citizens only, the African Charter does not expressly limit this right to citizens. This raises the question of whether the right to return to one's country is reserved for citizens or nationals only. In answering this question, one of two arguments could be made. The first argument is that the right to return under article 12(2) is reserved for citizens only (the strict approach). The second argument is that it is applicable to both citizens and to a few categories of foreign nationals (the broader approach). The jurisprudence of the*

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*African Commission and the African Court shows that these bodies have adopted the strict approach. This could be attributed to the fact that the communications they have so far dealt with have been filed by citizens (de jure or de facto) or on behalf of citizens. However, these bodies are likely to adopt a broad approach should the facts of the case(s) so require. In the constitutions of most African countries, states have also taken a strict approach. This article explains why it is better to take a broader approach when dealing with article 12(2) of the African Charter. This argument is made by partly comparing and contrasting article 12(2) of the African Charter with other regional and international instruments that protect the right to return. The article also demonstrates how the right to enter or return to one's country has been approached in the constitutions of different African countries.*

**Key words:** *return; article 12(2); African Charter; one's country; entry; African Court; African Commission*

## 1 Introduction

Article 12(2) of the African Charter on Human and Peoples' Rights (African Charter)<sup>1</sup> provides that '[e]very individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.' Many African countries have ratified the International Covenant on Civil and Political Rights (ICCPR).<sup>2</sup> Article 12(4) of ICCPR provides that '[n]o one shall be arbitrarily deprived of the right to enter his own country'.<sup>3</sup> During the initial phase of the COVID-19 pandemic, countries in different parts of the world put in place measures to combat and prevent the spread of the Corona virus. One such measure was a restriction on the movement of people to and from these countries.<sup>4</sup> These measures not only

1 African Charter on Human and Peoples' Rights, adopted on 27 June 1981, OAU Doc CAB/LEG/67/3/Rev.5.

2 International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966. For the ratifications, see [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en) (accessed 25 March 2021).

3 The Court of Justice of the Economic Community of the West African States held that art 12(2) of the African Charter and art 12(4) of ICCPR are applicable to the movement of both people and goods. See *Ugwuaba v State of Senegal* (ECW/CCJ/JUD/25/19) [2019] ECOWASCJ 1 (28 June 2019).

4 For the measures taken by countries outside Africa to restrict the movement of people to and from their territories, see F Mégret 'COVID-19 symposium: Returning "home" – Nationalist international law in the time of the Coronavirus' *OpinioJuris* 30 March 2020, <http://opiniojuris.org/2020/03/30/covid-19->

impacted on citizens, but also on migrants (including refugees)<sup>5</sup> and non-nationals (whether or not they had resided in the countries in question).<sup>6</sup> In order to give effect to this measure, ports of entry such as airports and borders were generally closed.<sup>7</sup> Three African countries, Senegal,<sup>8</sup> Namibia<sup>9</sup> and Ethiopia,<sup>10</sup> notified the Secretary-General of the UN that they had derogated from provisions of ICCPR including from article 12. Because the African Charter does not include a provision on derogation, it does not impose an obligation on state parties to notify the African Union (AU) of any derogation in cases of an emergency. This could explain why none of the African countries informed the AU that they had derogated from any of the provisions of the African Charter during the COVID-19 pandemic. It is also important to remember that the African Commission on Human and Peoples' Rights (African Commission) has held that all the rights in the African Charter are non-derogable.<sup>11</sup> African countries restricted the movement of people in different ways. Some countries, such as Lesotho,<sup>12</sup> Uganda<sup>13</sup> and Ghana,<sup>14</sup> prohibited all people, including citizens, from returning to their countries during

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symposium-returning-home-nationalist-international-law-in-the-time-of-the-coronavirus/ (accessed 25 March 2021).

- 5 P Pillai 'COVID-19 symposium: COVID-19 and migrants – Gaps in the international legal architecture?' *OpinioJuris* 4 April 2020, <http://opiniojuris.org/2020/04/04/covid-19-symposium-covid-19-and-migrants-gaps-in-the-international-legal-architecture/> (accessed 25 March 2021).
- 6 L Piccoli, J Dzankic & D Ruedin 'Citizenship, migration and mobility in a pandemic (CMMP): A global dataset of COVID-19 restrictions on human movement' (2020) 16 *PLoS One* 1, <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0248066> (accessed 25 March 2021).
- 7 The airports and borders were open for cargo and essential services and also for the evacuation of foreign nationals.
- 8 See <https://treaties.un.org/doc/Publication/CN/2020/CN.298.2020-Eng.pdf> (accessed 25 March 2021).
- 9 See <https://treaties.un.org/doc/Publication/CN/2020/CN.303.2020-Eng.pdf> (accessed 25 March 2021).
- 10 See <https://treaties.un.org/doc/Publication/CN/2020/CN.243.2020-Eng.pdf> (accessed 25 March 2021).
- 11 See *Constitutional Rights Project & Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999) para 41, where the African Commission held that '[I]n contrast to other international human rights instruments, the African Charter does not contain a derogation clause. Therefore limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances. The only legitimate reasons for limitations of the rights and freedoms of the African Charter are found in article 27.2, that is, that the rights of the Charter "shall be exercised with due regard to the rights of others, collective security, morality and common interest".'
- 12 Regulation 3(1) of the Public Health Act, 1970: Public Health (COVID-19) Regulations, 2020 (2) (Legal Notice 41 of 2020) (6 May 2020) provided that '[I]n]o persons are allowed into or out of Lesotho during the period of lockdown'.
- 13 See *Uganda v Hon Sam Kuteesa & Others* (HCT-00-CR-CM-CV-0010-2020) (30 August 2020) (private prosecution instituted against a cabinet minister who brought his family members into Uganda contrary to the COVID-19 regulations barring entry into Uganda).
- 14 Regulation 5(1) of the Imposition of Restrictions (Coronavirus Disease (COVID-19) Pandemic) Instrument 2020 (Executive Instrument 64 of 2020) (23 March 2020) (the restriction was for two weeks but could be extended).

the height of the pandemic. Other countries, such as South Africa,<sup>15</sup> Botswana<sup>16</sup> and Zimbabwe<sup>17</sup> allowed not only citizens but also permanent residents (in the case of South Africa) or residents (in the case of Zimbabwe and Botswana) to return. Countries such as Namibia<sup>18</sup> and Malawi<sup>19</sup> allowed citizens, permanent residents, those domiciled in these countries and those who were lawful residents (in the case of Namibia) or ordinary residents (in the case of Malawi) to return. Although there was a general prohibition on the movement of people to and from these countries, there were exceptions with regard to those people who were essential for the movement of cargo, goods and services. After realising that several rights in the African Charter, including the right to freedom of movement, were being violated or limited, the African Commission called upon state parties to the African Charter to ensure that human rights are protected in the fight against COVID-19.<sup>20</sup> In particular, the African Commission called upon state parties to ensure that the right to freedom of movement of migrants, refugees, asylum seekers and stateless persons was protected in the fight against COVID-19.<sup>21</sup>

In different African countries the implementation of COVID-19 regulations was challenged on grounds such as inadequate provision of essential services for the most vulnerable;<sup>22</sup> that they were passed contrary to the Constitution;<sup>23</sup> and that they were in violation of

- 15 See Regulation 41(2) of the Disaster Management Act 2002: Regulations relating to COVID-19 (Government Notice R480 of 2020) (29 April 2020). See also generally Temporary Measures in Respect of Entry into or Exit Out of the Republic in Order to Prevent and Combat the Spread of the COVID-19 (Government Notice 416 of 2020) (26 March 2020).
- 16 See Regulation 2 of the Public Health (Prohibition of Entry into Botswana) Order 2020 (Statutory Instrument 31 of 2020) (20 March 2020); Regulation 2 of the Public Health (Prohibition of Entry into Botswana) Order 2020 (Statutory Instrument 37 of 2020) (24 March 2020).
- 17 Regulation 8(1)(a) of the Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) Order 2020 (Statutory Instrument 83 of 2020) (28 March 2020).
- 18 Regulation 10(1) of the Stage 4: COVID-19 Regulations (Proclamation 28 of 2020) (29 June 2020).
- 19 Regulation 14(1) of the Public Health (Corona Virus Prevention, Containment and Management) Rules 2020 (Government Notice 5 of 2020) (9 April 2020).
- 20 Resolution on Human and Peoples' Rights as Central Pillar of Successful Response to COVID-19 and Recovery from its Socio-Political Impacts – ACHPR/Res. 449 (LXVI) 2020.
- 21 Resolution on Human and Peoples' Rights (n 20) para 13.
- 22 *Markham & Another v Minister of Health and Child Care & 3 Others* (HH 263-20, HC 2168/20) [2020] ZWHHC 263 (15 April 2020) (Zimbabwe). The argument that the government should have passed regulations to provide food, water and cash hand-outs to the most vulnerable during the lockdown was dismissed by the Court because the applicants cited wrong respondents. See also *Centre for Food and Adequate Living Rights (CEFROHT) v Attorney-General* (Miscellaneous Cause 75 of 2020) [2020] UGHCCD 157 (4 June 2020) (Uganda) where the application to compel the government to issue guidelines to provide food for the most vulnerable during the pandemic was dismissed.
- 23 *NEF & Others v President of the Republic of Namibia & Others* (HC-MD-CIV-MOT-GEN-2020/00136) [2020] NAHCMD 248 (23 July 2020) (the Court held that

rights such as the right to family life.<sup>24</sup> However, there is no reported case where a person challenged the regulations relating to the right to enter one's country during the pandemic. The constitutions of different African countries provide for circumstances in which nationals and non-nationals may return to their countries. The African Commission and the African Court on Human and Peoples' Rights (African Court) have handed down a few judgments on article 12(2) of the African Charter. Since most African countries have ratified the African Charter,<sup>25</sup> courts in some of these countries may find the jurisprudence of the African Commission and African Court persuasive when interpreting the relevant constitutional provisions on the right to enter or return to one's country. I highlight case law from some African countries in which courts have interpreted the right to enter or return to one's country. I shall first briefly explain the right to enter or return under article 12(2) and how the African Commission and African Court have interpreted this provision.

## 2 Understanding article 12(2) of the African Charter

As mentioned above, article 12(2) of the African Charter provides for the rights to leave and return to one's country.

Although the African Commission has adopted a General Comment on the right to freedom of movement, it thus far is limited to article 12(1) of the African Charter.<sup>26</sup> Article 12(1) of the African Charter provides that '[e]very individual shall have the right to freedom of movement and residence within the borders of a state provided he abides by the law'. It is beyond the scope of this article to discuss how the African Commission and African Court have interpreted article 12(1).<sup>27</sup> The African Commission has not yet explained its understanding of article 12(2) through a General Comment. However, as the discussion below illustrates, it has dealt with some communications on article 12(2). Article 12(2) provides for two rights. The first is the right to leave any country<sup>28</sup> and the second

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some regulations were unconstitutional). See also *State (on application of Lin Xiaoxiao et al) v The Director General – Immigration and Citizenship Services and The Attorney-General* (Judicial Review Case 19 of 2020) [2020] MWHC 5 (03 April 2020) (the Malawian High Court explaining the circumstances in which a state of emergency may be declared).

24 See, eg, *CD & Another v Department of Social Development* (5570/2020) [2020] ZAWCHC 25 (14 April 2020) (movement of children).

25 Morocco is the only country in Africa that is yet to ratify this treaty.

26 See General Comment 5 on the African Charter on Human and Peoples' Rights: The Right to Freedom of Movement and Residence (art 12(1)), adopted 10 November 2019.

27 For the relevant case law on art 12(1), see General Comment 5 (n 26).

28 In *Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso* (2001) AHRLR 51 (ACHPR 2001) para 47 the African Commission held that

right is the right of a person to return to his country.<sup>29</sup> Both rights are available to 'every individual'. However, whereas every individual has a right to leave 'any country, including his own', the right to return is only available when the individual in question is returning to 'his country'. This raises the issue of whether the right to return to one's country is reserved for citizens or nationals only. In answering this question, one of the two arguments could be made. The first argument is that the right to return under article 12(2) is reserved for citizens only (the strict approach). The second argument is that it is applicable to both citizens and to a few categories of foreign nationals (the broader approach). Although the African Commission has handed down many decisions, very few of these deal with a communication addressing the right to return under article 12(2). Similarly, the African Court, to a limited extent, has dealt with the right to return under article 12(2).

Unlike some of the provisions of the African Charter which provide that some rights are for citizens only,<sup>30</sup> the right under article 12(2) is for 'every individual'. Likewise, unlike other regional human rights instruments, such as article 3(1) of Protocol 4 to the European Convention on Human Rights (European Convention),<sup>31</sup> article 22(5) of the American Convention on Human Rights,<sup>32</sup> and article 22 of the Arab Charter on Human Rights,<sup>33</sup> where the right to return to or

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'[t]he communication alleges that on 6th August 1995, Mr Nongma Ernest Ouédraogo, Secretary General of the political party known as "Bloc Socialiste Burkinabé" was prevented from leaving the national territory, following the publication by the said party of a statement on the situation in the country. Information available to the Commission does not point to any threat to public security or morality that either the journey or even the person of the said Mr Ouédraogo could have represented. Therefore, it agrees that there was violation of Article 12(2).'

29 In *Jawara v Gambia* (2000) AHRLR 107 (ACHPR 2000) para 70 the African Commission referred to the right under art 12(2) as 'the right of ingress and egress'.

30 See eg art 13 which provides: '[1] Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law. [2] Every citizen shall have the right of equal access to the public service of his country. [3] Every individual shall have the right of access to public property and services in strict equality of all persons before the law.'

31 Art 3(2) of Protocol 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto Strasbourg (16.IX.1963) provides that '[n]o one shall be deprived of the right to enter the territory of the state of which he is a national'. The European Court of Human Rights has observed that art 3(2) is applicable to nationals. See *Khlaifia & Others v Italy* (Application 16483/12) (15 December 2016) para 46; *Shchukin & Others v Cyprus* (Application 14030/03) (29 July 2010) paras 143-145.

32 Art 22(5) of the American Convention on Human Rights, adopted at the Inter-American Specialised Conference on Human Rights, San José, Costa Rica, 22 November 1969 provides that '[n]o one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it'.

33 Art 22 of the Arab Charter on Human Rights (15 September 1994) provides that '[n]o citizen can be expelled from his own country, or deprived of the right to

enter one's country is available to citizens only, the African Charter does not expressly provide that the right to return to one's country is applicable to citizens or nationals only. It may thus be argued that, literally interpreted, 'every individual' under article 12(2) of the African Charter does not necessarily mean every citizen or national. Otherwise, the drafters of the Charter would have expressly stated so as they did with regard to other provisions of the Charter. This interpretation is strengthened when article 12(2) is read, for example, with article 13 of the Charter which provides for the rights of 'every citizen', on the one hand, and of 'every individual', on the other.

The above interpretation would be in line with the interpretation the Human Rights Committee recently adopted when dealing with the right to enter one's country under article 12(4) of ICCPR. As mentioned above, article 12(4) of ICCPR provides that '[n]o one shall be arbitrarily deprived of the right to enter his own country'. In its General Comment 27 the Human Rights Committee observed:<sup>34</sup>

The wording of article 12, paragraph 4, does not distinguish between nationals and aliens ('no one'). Thus, the persons entitled to exercise this right can be identified only by interpreting the meaning of the phrase 'his own country'. The scope of 'his own country' is broader than the concept 'country of his nationality'. It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. This would be the case, for example, of nationals of a country who have there been stripped of their nationality in violation of international law, and of individuals whose country of nationality has been incorporated in or transferred to another national entity, whose nationality is being denied them. The language of article 12, paragraph 4, moreover, permits a broader interpretation that might embrace other categories of long-term residents, including but not limited to stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence. Since other factors may in certain circumstances result in the establishment of close and enduring connections between a person and a country, States parties should include in their reports information on the rights of permanent residents to return to their country of residence.

Although in its earlier case law the Human Rights Committee had held that article 12(4) is applicable to citizens only,<sup>35</sup> this position

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return to it'.

34 General Comment 27, Freedom of Movement (art12), UN Doc CCPR/C/21/Rev.1/Add.9 (1999) para 20.

35 *Stewart v Canada* Communication 538/1993, UN Doc A/52/40, Vol II 47 (HRC 1996); *Giosue Canepa v Canada* (CCPR/C/59/D/558/1993) (20 June 1997); *Toala v New Zealand* Communication 675/1995, UN Doc CCPR/C/63/D/675/1995 (HRC 1998).



has recently changed and the Committee, relying on General Comment 27, had expanded the categories of people, in addition to citizens, who are protected under article 12(4) of ICCPR.<sup>36</sup> This is the case although the *travaux préparatoires* of article 12(4) show that the drafters of this provision made it very clear that it is applicable to citizens only and the arguments that it should be extended to permanent residents, long-term residents and stateless persons were rejected.<sup>37</sup> The jurisprudence of the African Commission and African Court suggests that the Commission and the Court are likely to interpret article 12(2) as referring to the rights of citizens and a limited category of non-nationals to return to their countries. The jurisprudence of the African Commission is discussed first followed by that of the African Court.

## 2.1 The African Commission and article 12(2)

In one of its earlier decisions the African Commission expressed no opinion on whether the respondent state had violated article 12(2). This was the case although the applicants, whose citizenship had been contested by the Zambian government, had argued that their deportation to Malawi violated their right under article 12(2).<sup>38</sup> However, in its later decisions the African Commission dealt with article 12(2). For example, in *Huri Laws v Nigeria*<sup>39</sup> the complainant, a non-government organisation (NGO), argued that the Nigerian government had arrested its senior employees (Nigerian nationals) whenever they came back from abroad on human rights-related

36 *Stefan Lars Nystrom v Australia* (CCPR/C/102/D/1557/2007) (1 September 2011); *Jama Warsame v Canada* (CCPR/C/102/D/1959/2010) (1 September 2011); *Deepan Budlakoti v Canada* (CCPR/C/122/D/2264/2013) (29 August 2018).

37 See, generally, Economic and Social Council, Commission on Human Rights, 6th session, Comments of Governments on the draft International Covenant on Human Rights and measures of implementation (4 January 1950) (E/CN.4/353/Add.1); Summary record of the 150th meeting of the Commission on Human Rights held on 10 April 1950 (E/CN.4/SR.150) (17 April 1950); Economic and Social Council, Commission on Human Rights Summary record of the 151st meeting held on 10 April 1950 (E/CN.4/SR.151) (19 April 1950); Commission on Human Rights, 8th session: summary record of the 315th meeting (E/CN.4/SR.315) (17 June 1952); General Assembly, 14th session, Draft International Covenant on Human Rights: Report of the Third Committee (A/4299) (3 December 1959); General Assembly, 14th session, official records, 3rd committee, 954th meeting, Thursday, 12 November, 1959, New York (A/C.3/SR.954); General Assembly, 14th session, official records, 3rd committee, 957th meeting, Monday, 16 November, 1959, New York (A/C.3/SR.957).

38 Eg, in *Amnesty International v Zambia* (2000) AHRLR 325 (ACHPR 1999) the complainants, prominent politicians in Zambia, were deported to Malawi on the allegation that they were not Zambian citizens and were a threat to national security. They argued, *inter alia*, that their deportation was contrary to art 12(2) of the African Charter. However, although the Commission found that Zambia had violated several provisions of the African Charter, it did not express its opinion on whether or not art 12(2) had also been violated.

39 *Huri Laws v Nigeria* (2000) AHRLR 273 (ACHPR 2000).



missions. It argued that 'when re-entry points become sites of frequent harassment and arrest, freedom of movement is infringed' if such arrests cannot be justified on the basis of article 12(2).<sup>40</sup> The Commission referred to article 12 of the African Charter and held that the arrests and detention of the complainant's senior employees at ports of entry 'not being in consonance with the above restrictions is, therefore a violation of the victims' right to freedom of movement under article 12(1) and (2) of the African Charter'.<sup>41</sup> In this communication, the Commission does not clearly explain how the right under article 12(2) was violated. It blurs the distinction between the right to freedom of movement within the borders of the country (article 12(1)) and the right to return to one's country (article 12(2)).<sup>42</sup> Likewise, in *Modise v Botswana*<sup>43</sup> the African Commission held that the deportation of the complainant from Botswana to South Africa, despite the presence of compelling evidence to show that he was a citizen of Botswana, 'infringed upon his right to leave and to return to his country guaranteed by article 12(2) of the Charter'.<sup>44</sup> In *Elgak v Sudan*<sup>45</sup> the African Commission found a violation of article 12(2). In this case the complainants, human rights defenders, were forced to flee Sudan as a result of being harassed and intimidated by the government for their human rights work.<sup>46</sup> They argued that 'their continued human rights work, coupled with the complete impunity with which the authorities perpetrated the violations against them, has prevented them from returning to Sudan'.<sup>47</sup> Against that background the Commission held:<sup>48</sup>

As Sudanese nationals, the Commission considers that Mr Monim Elgak and Mr Amir Osman have a right of return to their country except if it can be shown that their return will be a danger to national security, law and order or public health or morality. This not being the case in the present Communication and without any information from the Respondent State to the contrary, the Commission considers that their

40 *Huri Laws* (n 40) para 50.

41 *Huri Laws* para 51.

42 See also *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2004) para 81 where the African Commission held that '[t]he allegation of mass transfer of persons from the eastern provinces of the Complainant State to camps in Rwanda, as alleged by the complainant and not refuted by the respondent, is inconsistent [*sic*] with Article 18(1) of the African Charter, which recognises the family as the natural unit and basis of society and guarantees it appropriate protection. It is also a breach of the right to freedom of movement, and the right to leave and to return to one's country guaranteed under Article 12(1) and (2) of the African Charter respectively.'

43 *Modise v Botswana* (2000) AHRLR 25 (ACHPR 1994).

44 *Modise* (n 44) para 93.

45 *Elgak v Sudan* Communication 379/09) (ACmHPR 14 March 2014).

46 *Elgak* (n 46) para 120.

47 *Elgak* para 125.

48 *Elgak* para 126.

apprehension of a well-founded fear of persecution by the authorities should they return, is a violation of Article 12(2) of the Charter in respect of Mr Amir Suliman and Mr Monim Elgak.

In this communication, the Commission emphasised the fact that the right to return to one's country is not absolute. However, it can be limited only on the basis of one of the grounds under article 12(2). In *Open Society Justice Initiative v Côte d'Ivoire*<sup>49</sup> the complainant represented members of an ethnic group of children and grandchildren of migrants who were born and had lived in Côte d'Ivoire for all or most of their lives. They argued, *inter alia*, that the government's policy of refusing to recognise them as Ivorian citizens resulted in their inability to obtain passports and travel outside their country.<sup>50</sup> They also argued that some of them were issued with identity papers but that those who had travelled abroad 'were also later denied the renewal of their identity papers and were prevented from travelling, including being prevented from returning to visit their parents in Côte d'Ivoire'.<sup>51</sup> The African Commission referred to its earlier jurisprudence and held that 'the refusal [*sic*] to deprive a foreign resident of his residence permit without a justifiable reason automatically prevents him from moving from one place to another within the territory of the host State'.<sup>52</sup> The Commission concluded:<sup>53</sup>

[O]wing to the lack of identity documents, the Dioulas have suffered restriction in their movements within Côte d'Ivoire as well as the enjoyment of the freedom to leave the country and to return to the same ... [P]ersons belonging to the Dioula ethnic group who have emigrated to other regions of the world have then had the renewal of their identity and travel documents refused. They could not return to Côte d'Ivoire. As a result of the preceding conclusions, the Commission observes that such acts violate the provisions of Article 12 of the Charter.

In this Communication the African Commission recognised the fact that many people of the Dioula ethnic group had been denied Ivorian nationality contrary to the African Charter and called on the Ivorian government to amend its legislation to address this problem.<sup>54</sup> In other words, the Commission considered these people to be *de facto* citizens of Côte d'Ivoire. The above jurisprudence of the Commission shows, *inter alia*, that nationals have a right to return to their country and this right can only be limited by the state if it can show that their return is prohibited on one or more of the grounds under article

49 *Open Society Justice Initiative v Côte d'Ivoire* Communication 318/06).

50 *Open Society Justice Initiative* (n 50) para 71.

51 As above.

52 *Open Society Justice Initiative* (n 51) para 160.

53 *Open Society Justice Initiative* para 161.

54 *Open Society Justice Initiative* paras 191-196.

12(2). This jurisprudence also shows that a state party violates article 12(2) if it creates an environment which makes it almost impossible for nationals to return to their country.<sup>55</sup> In other words, for the right under article 12(2) to be violated, the state party does not have to expressly bar nationals from returning to their country. In all the cases in which the African Commission has dealt with article 12(2), the complainants have been nationals of the respondent states<sup>56</sup> or the Commission was of the view that they had been denied or deprived of nationality contrary to the relevant provisions of the African Charter.<sup>57</sup> Put differently, the Commission considered them to be *de facto* nationals. Therefore, it has not been necessary for the Commission to express its opinion on whether article 12(2) is also applicable to non-nationals. However, the Commission's reasoning in cases where it has considered some people to be *de facto* citizens who have a right to identity documents and not to be denied citizenship contrary to the African Charter creates room for the argument that the Commission is likely to adopt a broad interpretation of article 12(2) of the African Charter.

## 2.2 The African Court and article 12(2)

Since its establishment, the African Court has handed down three judgments dealing with article 12(2).<sup>58</sup> These judgments are discussed in the order in which they were decided. The first case in which the African Court dealt with the right under article 12(2) was that of *Anudo v Tanzania*.<sup>59</sup> In this case the applicant, a Tanzanian citizen, was stripped of his nationality by the Tanzanian authorities

55 See also *Ouko v Kenya* (2000) AHRLR 135 (ACHPR 2000) where the Commission found a violation of art 12(2) because the harassment of the complainant by the government forced him to flee Kenya and there was no guarantee that he would not be harassed by the government on his return. See also *Rights International v Nigeria* (2000) AHRLR 254 (ACHPR 1999) para 30.

56 See also *Malawi African Association v Mauritania* (2000) AHRLR 149 (ACHPR 2000) para 126 where the Commission held that '[e]victing Black Mauritians from their houses and depriving them of their Mauritanian citizenship constitutes a violation of article 12(1). The representative of the Mauritanian government described the efforts made to ensure the security of all those who returned to Mauritania after having been expelled. He claimed that all those who so desired could cross the border, or present themselves to the Mauritanian Embassy in Dakar and obtain authorisation to return to their village of birth. He affirmed that his government had established a department responsible for their resettlement. The Commission adopts the view that while these efforts are laudable, they do not annul the violation committed by the State.'

57 *Open Society Justice Initiative* (n 50); *The Nubian Community in Kenya v The Republic of Kenya* Communication 317/2006.

58 In *Lucien Ikili Rashidi v United Republic of Tanzania* (Application 9/2015) (Judgment of 28 March 2019) the Court found, *inter alia*, that Tanzania had violated art 12(1) of the African Charter when it deported the applicant, a foreign national from the Democratic Republic of the Congo, to Burundi although he was legally residing in Tanzania.

59 *Anudo v Tanzania* (Merits) (2018) 2 AfCLR 248.

and deported to Kenya. He argued, *inter alia*, that his deportation was a violation of his rights to 'freedom of movement and residence in his own country as guaranteed by Article 12 of the Charter'.<sup>60</sup> However, he did not specifically allege that Tanzania had violated his right under article 12(2) of the African Charter. This explains why the Court observed that the application alleged 'the violation of three fundamental rights: (i) the applicant's right to nationality and the right not to be arbitrarily deprived of his nationality; (ii) the right not to be arbitrarily expelled; and (iii) the right to have his cause heard by a court'.<sup>61</sup> However, the Court added that the application, in addition to those rights, also involved the alleged violation of 'other incidental rights'.<sup>62</sup> The Court held that the evidence before it showed that the applicant was a Tanzanian national and that in stripping him of his nationality and deporting him to Kenya, Tanzania had acted arbitrarily and violated the applicable international law principles.<sup>63</sup> The Court observed that although the applicant had not specifically alleged a violation of article 12(2),

[i]n the opinion of the Court, the relevant portion of this provision which relates to the instant matter is Article 12(2), in particular, the right 'to return to his country'. In the instant case, the Court will consider this aspect, notwithstanding the fact that the Applicant left the Respondent State's territory involuntarily.<sup>64</sup>

After finding that the applicant had been arbitrarily deprived of his nationality, the question the Court had to answer was 'whether a citizen can be expelled from his own country or prevented from returning to his country'.<sup>65</sup> Against that background, the Court referred to the Human Rights Committee's General Comment 27 in which the Committee indicated the circumstances in which a state party to ICCPR may prevent a person from entering his country.<sup>66</sup> The Court added that if Tanzania had considered the applicant a foreign national, his deportation should have complied with article 13 of ICCPR.<sup>67</sup> The Court concluded that the applicant's right under article 13 of ICCPR had been violated.<sup>68</sup> Although the Court did not express its opinion on whether Tanzania had violated article 12(2), its observation that one of the questions it was dealing with was 'whether a citizen can be expelled from his own country or

60 *Anudo* (n 60) para 14.

61 *Anudo* para 61.

62 *Anudo* para 62.

63 *Anudo* paras 63-88.

64 *Anudo* para 96.

65 *Anudo* para 97.

66 *Anudo* para 98.

67 *Anudo* para 100.

68 *Anudo* paras 105-106.

prevented from returning to his country'<sup>69</sup> creates the room for the argument that the Court considered the right under article 12(2) to be applicable to citizens.

The issue of the right under article 12(2) again arose in the case of *Robert John Penessis v United Republic of Tanzania*.<sup>70</sup> The applicant was convicted of being in Tanzania illegally and sentenced to imprisonment. However, even after having served his sentence, he was not released from prison. The Minister of Home Affairs ordered his expulsion from Tanzania after serving his sentence. However, the applicant argued that he was born in Tanzania and that his conviction and expulsion amounted to him being arbitrarily stripped of nationality. The government argued that the applicant was not a Tanzanian citizen but rather a dual citizen of South Africa and the United Kingdom.<sup>71</sup> The applicant argued, *inter alia*, that his expulsion amounted to a violation of articles 12(1) and (2) of the African Charter.<sup>72</sup> He added that the fact that the right to freedom of movement is provided for in the Universal Declaration of Human Rights (Universal Declaration) and ICCPR means that it is a fundamental right and that 'this right involves not only movement within the country but also protection from forced expulsion or displacement'.<sup>73</sup> He submitted that according to articles 12(1) and (2) of the African Charter 'every individual has the right to move freely within a country, the right to leave the same, including his or hers, and return to it, subject only to restrictions provided by law and required for the protection of national security' and that he had 'neither threatened the Respondent State's public order nor breached Article 12 of the Charter'.<sup>74</sup> He added that as a Tanzanian citizen, he 'has the right to freedom of movement, including the right to leave and return to his country' and that the jurisprudence of the African Commission shows that the right to freedom of movement was guaranteed to nationals and non-nationals.<sup>75</sup> The state reiterated its submissions that the evidence had showed that the applicant was a foreign national who was on its territory illegally.<sup>76</sup> In resolving this issue, the Court referred to articles 12(1) and (2) of the African Charter<sup>77</sup> and to article 12(1) of ICCPR<sup>78</sup> and held that

69 *Anudo* para 97.

70 *Robert John Penessis v United Republic of Tanzania* (Application 13/2015) (Judgment of 28 November 2019).

71 *Robert John Penessis* (n 71) paras 4-8.

72 *Robert John Penessis* paras 10 and 22.

73 *Robert John Penessis* para 112.

74 *Robert John Penessis* 113.

75 *Robert John Penessis* para 115.

76 *Robert John Penessis* paras 117-120.

77 *Robert John Penessis* para 121.

78 *Robert John Penessis* para 122.

[t]he right to freedom of movement as enunciated under article 12 of the Charter is guaranteed to 'every individual' lawfully present within the territory of a state regardless of his national status, that is, regardless of whether or not he or she is a national of that state. According to article 12 of the Charter and of ICCPR, this right 'may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality'.<sup>79</sup>

The Court added that whereas a state is entitled to enact legislation imposing restrictions on foreign nationals who intend to enter its territory, such restrictions must comply with the state's international law obligations.<sup>80</sup> The Court further held that according to the evidence before it, the applicant was presumed to be a Tanzanian national and that, therefore, he was in the country lawfully and had the right to freedom of movement.<sup>81</sup> In holding that the state had violated article 12(2) of the Charter, the Court reasoned that

[t]he Applicant has been convicted, detained and sentenced for illegal entry and still continues to be in prison even after having served the two (2) years' prison sentence that was meted out to him in 2010. The Respondent State has not provided any justification for restrictions that would fall under the provision of Article 12(2) of the Charter such as protection of national security, law and order, public health or morality warranting the restriction of the Applicant's freedom of movement.<sup>82</sup>

The above judgment raises a few points that should be emphasised. First, the right to freedom of movement is to be enjoyed by both nationals and non-nationals. This is so because the Court interpreted the words 'every individual' to be broad enough to accommodate both categories – nationals and non-nationals. If this interpretation is to be extended to article 12(2), the implication is that the right to return is also available to non-nationals. However, because the Court had already found that the applicant was a citizen of Tanzania, one would not have expected it to specifically decide whether a foreign national had a right to return to a country in which he or she was not a citizen. Had the applicant been a foreign national, the Court would in all likelihood have relied to the Human Rights Committee's General Comment 27 to decide whether or not he was one of the very few exceptions of non-nationals who have a right to return. This is so because the Court relied on the same General Comment when dealing with the issue of the restrictions on the right to freedom of movement. Second, the Court blurs the distinction between article

<sup>79</sup> *Robert John Penessis* para 123.

<sup>80</sup> *Robert John Penessis* para 124.

<sup>81</sup> *Robert John Penessis* para 125.

<sup>82</sup> *Robert John Penessis* para 126.

12(1) and Article 12(2) of the African Charter. Yet, as evidenced by the text of article 12 and the African Commission's General Comment 5,<sup>83</sup> these are distinct rights. It does this by holding that the restrictions on the right to enter one's country under article 12(2) are also applicable to the rights under article 12(1). This article argues that this approach is not supported by the text of article 12 of the African Charter. The restrictions under article 12(2) are only applicable to the right under this specific, namely, article 12(2).

The third case in which the African Court has dealt with article 12(2) is that of *Kennedy Gihana & Others v Rwanda*.<sup>84</sup> All the applicants were Rwandan nationals who were living in exile in South Africa and their passports had been revoked by the Rwandan government without affording them a chance to be heard.<sup>85</sup> They argued, *inter alia*, that the invalidation of their passports amounted to an arbitrary deprivation of their nationality which rendered them stateless and violated many of their rights, including their right to freedom of movement.<sup>86</sup> The Court held that although the government had the power to invalidate the applicants' passports, it had to demonstrate that the revocation of the passports 'was done in line with the relevant international standards'.<sup>87</sup> The Court added that those 'pertinent aforementioned international standards are set out in article 12(2) of the Charter as this provision provides for the right to freedom of movement to which the issue of possession of passports relates'.<sup>88</sup> The Court further held that the provisions of article 12(3) of ICCPR are similar to those of article 12(2) of the African Charter,<sup>89</sup> and that

[i]n view of the aforesaid provisions, the Respondent State ought to have demonstrated that the revocation of the Applicants' passports was for the purposes of the restrictions set out in Article 12(2) of the Charter and Article 12(2) and (3) of the ICCPR. The Respondent State has not provided any explanation regarding the revocation of the Applicants' passports.<sup>90</sup>

The Court further held that international law prohibits countries from expelling their nationals or rendering them stateless.<sup>91</sup> It observed that in terms of Rwandan law, the applicants were required to be in

83 General Comment 5 on the African Charter: The Right to Freedom of Movement and Residence (art 12(1)).

84 *Kennedy Gihana & Others v Rwanda* (Application 17/2015) (Judgment of 28 November 2019).

85 *Kennedy Gihana* para 3.

86 *Kennedy Gihana* paras 5 & 77.

87 *Kennedy Gihana* para 88.

88 *Kennedy Gihana* para 89.

89 *Kennedy Gihana* para 90.

90 *Kennedy Gihana* para 91.

91 *Kennedy Gihana* para 106.



possession of valid Rwandan passports to be able to travel to Rwanda as citizens.<sup>92</sup> The Court held that

[b]y arbitrarily revoking the Applicants' passports, the Respondent state deprived them of their traveling documents and consequently prevented them from returning to their country and traveling to other countries and thus exercising their right to freedom of movement as provided under Article 12(2) of the Charter.<sup>93</sup>

Against this background, the Court concluded that Rwanda had violated article 12(2) of the African Charter.<sup>94</sup>

In this case, the Court also links the right under article 12(2) to nationality. This is understandable as all the applicants were Rwandans. However, the Court's reasoning that the restrictions under article 12(3) of ICCPR and, by implication, the reasoning of the Human Rights Committee, are also applicable to the right to return to one's country under article 12(2) of the African Charter and should not create the impression that the right to enter one's country under article 12(4) of ICCPR is also subject to the restrictions under article 12(3) of ICCPR. This is because unlike article 12(2) of the African Charter, which provides for specific circumstances in which the right to return to one's country may be restricted, article 12(4) of ICCPR provides that the right should not be 'arbitrarily' taken away. This distinction is important because, unlike the African Charter which provides for the rights to leave any country and to return to one's country in one paragraph, these rights are provided for in separate paragraphs of ICCPR and, therefore, are subject to different restrictions.

### **3 Examining article 12(2) in light of the Universal Declaration and ICCPR**

Another point to make about article 12(2) is that it provides for every individual's right to 'return to his country'. This is the same language used in article 13(2) of the Universal Declaration which is to the effect that '[e]veryone has the right to leave any country, including his own, and to return to his country'. However, it is different from the language used in article 12(4) of ICCPR which provides for 'the right to enter his own country'. For a clear understanding of the difference in the two provisions, one may benefit from the drafting history of article 12(4) of ICCPR.

92 *Kennedy Gihana* para 107.

93 *Kennedy Gihana* para 108.

94 *Kennedy Gihana* para 109.

The earlier draft of article 12(4) of ICCPR provided that '[a]nyone is free to return to the country of which he is a national'.<sup>95</sup> However, it was later amended to provide that 'anyone shall be free to enter the country of which he is a national'.<sup>96</sup> In explaining the rationale behind replacing the word 'return' with 'enter', the representative of the United States at the Commission of Human Rights, which was entrusted by the UN General Assembly to come up with the draft ICCPR, argued that the 'amendment was intended to extend the right accorded by guaranteeing to persons born abroad the right to enter the country of which they were nationals'.<sup>97</sup> This rationale was supported by delegates from countries such as Lebanon,<sup>98</sup> India<sup>99</sup> and Chile.<sup>100</sup> The delegate from the Philippines said that he supported the amendment because 'persons who wished to clear themselves of charges against them would be free to enter the country of which they were nationals'.<sup>101</sup> Thus, there are two possible interpretations of article 12(2) of the African Charter. Strictly interpreted, the right under article 12(2) of the African Charter can only be claimed by a person, whether or not a citizen, who has already been in the country in question and where he or she is interested in returning to this country. In other words, they are exercising the right of return. They are returning to the country in which they have been living. This would exclude citizens who have never been to such a country, for example, those who were born abroad. Broadly interpreted, it also covers citizens who were born abroad and who wish to enter a given country and also non-nationals who have lived in the country in question and would wish to return to it.

It is argued that the broad interpretation should take precedence over the strict interpretation. This is so because it protects the right of a citizen to enter his or her country (irrespective of whether they have been in that country before) and it also enables a non-citizen to enjoy the rights associated with his return to a country in which he or she had been living. In more than one communication the African Commission has held that the deportation or expulsion of

95 Report of the 5th session of the Commission on Human Rights to the Economic and Social Council, Lake Success, New York, 9 May-20 June 1949 (E/1371, E/CM.4/350) (23 June 1949) 32.

96 Economic and Social Council, Commission on Human Rights, 6th session, Comments of Governments on the draft International Covenant on Human Rights and measures of implementation (4 January 1950) (E/CN.4/353/Add.1) (Annex).

97 Summary record of the 150th meeting of the Commission on Human Rights held on 10 April 1950 (E/CN.4/SR.150) (17 April 1950) para 48.

98 Summary record (n 98) para 54.

99 Summary record paras 58-60.

100 Summary record paras 63-65.

101 Economic and Social Council, Commission on Human Rights Summary record of the 151st meeting held on 10 April 1950 (E/CN.4/SR.151) (19 April 1950) para 54.

non-nationals should not be done contrary to the African Charter. In particular, these should not be carried out in violation of the rights in the African Charter, including the right to family life.<sup>102</sup> This interpretation should be extended to the issue of preventing non-nationals from returning to countries in which they had lived for a long time and where, for example, they have family ties.

The final comment to be made on the right under article 12(2) of the African Charter relates to the circumstances in which this right may be limited. Article 12(2) of the African Charter provides that the right to return to one's country 'may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality'. This means that the right to return to one's country is not absolute. However, there are very limited circumstances in which this right can be restricted. First, there has to be a law that imposes restrictions on this right. Second, there are only four circumstances in which the law can restrict the right to enter one's country, namely, (i) for the protection of national security; (ii) for the protection of law and order; (iii) for the protection of public health; and (iv) for the protection of morality. This means that any law that is enacted to restrict the right under article 12(2) has to be aimed at achieving one or more of the above aims, otherwise it would be contrary to article 12(2). This explains why, as mentioned earlier, many countries closed their borders in the early stages of the COVID-19 pandemic to prevent citizens and non-citizens from 'bringing' the Corona virus into their territories. This was done to protect public health. Unlike under article 12(4) of ICCPR where a state can restrict the right to enter one's country provided the restrictions are not arbitrary, state parties to the African Charter have very little room to manoeuvre. This is so because the purposes for which the restrictions may be imposed are specifically provided for in article 12(2) of the African Charter. The Human Rights Committee has also explained the circumstances in which the right to enter one's country under article 12(4) of ICCPR may be restricted. The Human Rights Committee's General Comment does not provide examples in which a state may be justified in preventing a person from entering his country. It gives general guidelines to the following effect:<sup>103</sup>

In no case may a person be arbitrarily deprived of the right to enter his or her own country. The reference to the concept of arbitrariness in this context is intended to emphasise that it applies to all state action, legislative, administrative, and judicial; it guarantees that even interference provided for by law should be in accordance with the

<sup>102</sup> *Good v Republic of Botswana* Communication 313/05) paras 209-215.

<sup>103</sup> General Comment 27, Freedom of Movement (art12) UN Doc CCPR/C/21/Rev.1/Add.9 (1999) para 21.

provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable. A state party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country.

In its jurisprudence on article 12(4), the Human Rights Committee held that deporting a permanent resident from his country of residence, on the ground of his criminal record, to a country with which he has no social or economic links whatsoever, would be contrary to article 12(4) especially if the permanent resident is a rehabilitated offender.<sup>104</sup>

Against that background, we now illustrate how the right to return to or enter one's country has been addressed in the constitutions of different African countries. This is important because it was on the basis of these constitutions that many African countries, including those that did not notify the UN Secretary-General about their derogations from some of the provisions of ICCPR, restricted the right to freedom of movement during the COVID-19 pandemic.

#### 4 The right to return to or enter one's country in African constitutions and case law

African countries have dealt with the right to return in different ways. In some countries it is referred to as the right to enter one's country,<sup>105</sup> whereas in others it is referred to as the right to return to one's country.<sup>106</sup> In other countries, citizens have the right to enter and also return.<sup>107</sup> As mentioned above, the drafting history of ICCPR shows that these two terms do not mean one and the same thing.

<sup>104</sup> *Jama Warsame v Canada* (CCPR/C/102/D/1959/2010) (1 September 2011); *Deepan Budlakoti v Canada* (CCPR/C/122/D/2264/2013) (29 August 2018).

<sup>105</sup> Art 17(1) of the Constitution of Tanzania (1977); art 21(2) of the Constitution of Somalia (2012); art 25(2) of the Constitution of Seychelles (1993); art 41(1) of the Constitution of Nigeria (1999); art 13(b) of the Constitution of Liberia (1986); art 39(3) of the Constitution of Kenya (2010); sec 21(3) of the Constitution of South Africa (1996); art 66(1)(a) of the Constitution of Zimbabwe (2013).

<sup>106</sup> See, eg, art 25 of the Constitution of Tunisia (2014); art 60(2) of the Constitution of Sudan (2019); art 27(2) of the Constitution of South Sudan (2013); art 26(2) of the Constitution of Rwanda (1993); art 1(3) of the Constitution of Gabon (2011); art 32(2) of the Constitution of Ethiopia (1994); art 19(9) of the Constitution of Eritrea (1997); art 21 of the Constitution of Côte d'Ivoire (2016); art 48 of the Constitution of Chad (2018); art 49(2) of the Constitution of Cape Verde (1980); art 46(2) of the Constitution of Angola (2010); art 22(1) of the Constitution of Congo (Brazzaville) (2015); art 62 of the Constitution of Egypt (2014); art 22(1)(c) of the Constitution of Zambia (1991); art 33 of the Constitution of Burundi (2008).

<sup>107</sup> See, eg, art 29(2)(b) of the Constitution of Uganda (1995).

However, for the purposes of the discussion below, unless otherwise expressly stated in a relevant constitutional provision, the words 'enter' and 'return' will be used interchangeably.

In most countries the right to return is only applicable to citizens or nationals<sup>108</sup> whereas in a few other countries it is available to 'all persons',<sup>109</sup> to 'every person',<sup>110</sup> or to 'any resident'.<sup>111</sup> In some African countries courts have dealt with the right to return to one's own country. For example, the Constitutional Court of Zimbabwe held that a regulation that prohibited a citizen from entering Zimbabwe violated his right to enter his country and was unconstitutional.<sup>112</sup> The South African Constitutional Court<sup>113</sup> and the Kenyan High

108 Art 46(2) of the Constitution of Angola (2010); art 49(2) of the Constitution of Cape Verde (1980); art 48 of the Constitution of Chad (2018); art 22(1) of the Constitution of Congo (2015); art 21 of the Constitution of Côte d'Ivoire (2016); art 19(9) of the Constitution of Eritrea (1997); art 32(2) of the Constitution of Ethiopia (1994); art 1(3) of the Constitution of Gabon (2011); art 25(3) of the Constitution of The Gambia (2018); art 39(3) of the Constitution of Kenya (2010); art 13(b) of the Constitution of Liberia (1986); art 41(1) of the Constitution of Nigeria (1999); art 26(2) of the Constitution of Rwanda (1993); art 25(2) of the Constitution of Seychelles (1993); art 21(2) of the Constitution of Somalia (2012); art 27(2) of the Constitution of South Sudan (2011); art 60(2) of the Constitution of Sudan (2019); art 17(1) of the Constitution of Tanzania (1977); art 25 of the Constitution of Tunisia (2014); art 29(2)(b) of the Constitution of Uganda (1995); art 22(1)(c) of the Constitution of Zambia (1991); art 66(1)(a) of the Constitution of Zimbabwe (2013); sec 21(3) of the Constitution of South Africa (1996); art 62 of the Constitution of Egypt (2014); art 22(1)(c) of the Constitution of Zambia (1991); art 33 of the Constitution of Burundi (2008).

109 Art 30 of the Constitution of the Democratic Republic of the Congo (2005) provides that '[a]ll persons who are on the national territory have the right to circulate freely in it, to establish their residence in it, to leave it and to return to it, under the conditions established by the law'. See also art 26(1) of the Constitution of Swaziland (2005); art 21(1)(g) of the Constitution of Ghana (1996); art 15(1) of the Constitution of Mauritius (1968); art 24(4) of the Constitution of Morocco (2011); art 21(1)(i) of the Constitution of Namibia (1991).

110 Art 39(2) of the Constitution of Malawi (2017); art 18(1) of the Constitution of Sierra Leone (1991).

111 Art 12(1) of the Constitution of Madagascar (2010) provides that '[a]ny resident Malagasy has the right to leave the national territory and to return to it within the conditions established by the law'.

112 *Madzimbamuto v Registrar General & Others* (CCZ 114/13) [2014] ZWCC 5 (4 June 2014).

113 In *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 para 18 the Court held that '[t]he right, in terms of the ICCPR, to enter a particular country is accordingly reserved for nationals only. This would reserve to States Parties the right to regulate nationality, citizenship or naturalisation.' See also *Nandutu & Others v Minister of Home Affairs & Others* 2019 (5) SA 325 (CC) para 98.

Court<sup>114</sup> and Court of Appeal<sup>115</sup> referred to article 12(4) of ICCPR and held that the right to enter one's own country applied to citizens only. This should be understood against the background that the constitutions of these countries provide that the right to enter one's country is for citizens only. This raises the question as to the compatibility of these constitutional provisions with article 12(4) of ICCPR as interpreted by the Human Rights Committee in General Comment 27 and the relevant case law mentioned above. It also means that this approach could be contrary to article 12(2) of the African Charter if it is interpreted to mean that it provides for the right of every individual, as opposed to citizens only, to return his or her country.

The constitutions of some of these countries in which the right to entry is reserved for citizens also require courts to refer to international law in interpreting the Bill of Rights.<sup>116</sup> Even in some countries where the constitutions do not require courts to refer to international law when interpreting the Bills of Rights, courts often refer to international law.<sup>117</sup> Should courts in these countries be confronted with the issue of whether a foreign national who belongs to one of the exceptions

114 In *Mohammed Ibrahim Naz v Cabinet Secretary Responsible for Matters Relating to Citizenship and the Management of Foreign Nationals & Another* [2013] eKLR para 27 the High Court held that '[t]he right to enter, remain in and reside in Kenya is restricted to citizens, both by the Constitution and under international law'. In this case a Pakistan national, who was on a working permit in Kenya for less than two years, was deported and he argued, *inter alia*, that he had a right to return to Kenya as he had a family in that country. See also *Kamal Jadva Vekaria v Director-General, Kenya Citizens and Foreign Nationals Management Service* [2016] eKLR para 32; *Sebasyan Kryvskyy v Criminal Investigations Department Nairobi & 3 Others* [2015] eKLR 7; *Coalition for Reform and Democracy (CORD) & 2 Others v Republic of Kenya & 10 Others* [2015] eKLR para 395; *Bashir Mohamed Jama Abdi v Minister for Immigration and Registration of Persons & 2 Others* [2014] eKLR.

115 *Attorney-General v Kituo Cha Sheria & 7 Others* [2017] eKLR 11-12.

116 See, eg, sec 39(1)(b) of the Constitution of South Africa (1996); sec 46(1)(c) of the Constitution of Zimbabwe (2013).

117 This is the case in countries such as Uganda and Rwanda. The case law from Uganda include *Carolyn Turyatamba & 4 Others v Attorney-General & Another* (Constitutional Petition 15 of 2006) [2011] UGCC 13 (8 August 2011) and *Law & Advocacy for Women in Uganda v Attorney-General* (Constitutional Petition 8 of 2007) [2010] UGCC 4 (28 July 2010) (the Court refers to different human rights treaties); *Ssebuliba Kiwanuka v Musisi Kiwanuka* (Miscellaneous Cause 249 of 2019) [2019] UGHCCD 184 (27 September 2019) (Convention on the Rights of Persons with Disabilities and the Convention against Torture). Case law from Rwanda include *In Re Akagera Business Group (Petition for the Repeal of the Legal Provision Inconsistent with the Constitution)* RS/SPEC/0001/16/CS (23 September 2016) (the Court referred to ICCPR); *In Re Murorunkwere*, RS/Inconst/Pén.0001/08/CS (26 September 2008) (the Court referred to the Convention on the Elimination of All Forms of Discrimination against Women); in *Nyirakamana & Others v Mukasharangabo & Others* RS/REV/INJUST/CIV0007/15/CS (4 December 2015) (the Court referred to the Convention on the Elimination of All Forms of Discrimination against Women); *Re Mugisha* RS/INCONST/SPEC 00002/ 2018/SC (24 April 2019) (the Court referred to ICCPR); *In Re Murorunkwere*, RS/Inconst/Pén.0001/08/CS (26 September 2008) (the Court referred to the Convention on the Elimination of All Forms of Discrimination against Women).

developed by the Human Rights Committee on article 12(4) has a right to enter these countries, they may consider such a foreign national a *de facto* citizen for the purpose of ensuring that they enter these countries. The Kenyan Court of Appeal has adopted this approach, albeit in a different context. Article 39 of the Constitution of Kenya provides that '(1) Every person has the right to freedom of movement; (2) Every person has the right to leave Kenya; (3) Every citizen has the right to enter, remain in and reside anywhere in Kenya.' It is clear that the rights under article 39(3) are applicable to citizens only. In *Attorney-General v Kituo Cha Sheria & 7 Others*<sup>118</sup> the government issued a directive to the effect that all refugees should leave the urban areas and report to refugee camps. The urban-based refugees argued, *inter alia*, that this directive violated their right to freedom of movement under article 39 of the Constitution. The government argued that the rights under article 39(3) are not applicable to non-citizens. The Court of Appeal held that

[t]he question that arises is whether the express application of entry, remaining and residence rights to citizens means that non-citizens cannot enter, remain or reside anywhere in Kenya. We think at once that such a conclusion would on the face of it be absurd and is not borne out by the text itself.<sup>119</sup>

The Court further held that

it must be recalled that the right of freedom of movement and residence is provided for within the Bill of Rights. As such, our interpretation of the provision relating thereto has to accord with the interpretative guidance which, fortunately for us, is provided by the Constitution itself. Article 259(1) enjoins courts to interpret the Constitution in a broad and purposive as opposed to a narrow and mechanistic manner.<sup>120</sup>

The Court explained the principles applicable to constitutional interpretation and stated that the Bill of Rights must be interpreted in a manner that furthers the rights of individuals and communities and that the rights of individuals are not granted by the state. Rather, they are inherent in every human being.<sup>121</sup> Against that background, the Court held:<sup>122</sup>

The enumeration of various rights and fundamental freedoms in the Bill of Rights is indicated to be a guide as to the content of rights. It is not meant to be exhaustive, however, so that one cannot be heard to say that unless a right is expressly provided then it does not exist

118 *Attorney-General v Kituo Cha Sheria & 7 Others* [2017] eKLR.

119 *Attorney-General v Kituo Cha Sheria* (n 118) 8.

120 *Attorney-General v Kituo Cha Sheria* 9.

121 *Attorney-General v Kituo Cha Sheria* 9-10.

122 *Attorney-General v Kituo Cha Sheria* 10.



and cannot be claimed. So long as a right exists by recognition or is conferred by law, that right is equally valid and efficacious unless and to the extent only as it may be inconsistent with the Bill of Rights in chapter 4. We take that to mean that if some right exists independent of the Bill of Rights but has the effect of undermining or compromising the constitutionally declared Bill of Rights, then the constitutional provision prevails.

The Court added that refugees have the right to choose where to reside in Kenya but that this right is not absolute. The Court presented the following factors to substantiate its conclusion: the Bill of Rights does not expressly exclude refugees from the rights provided for under article 39(3); the Bill of Rights applies to all in Kenya; the Bill of Rights has to be interpreted in line with international law; international treaties ratified by Kenya are part of Kenyan law; article 12(4) of ICCPR is applicable to both nationals and non-nationals; the Human Rights Committee in its General Comment 27 has stipulated the circumstances in which the right to freedom of movement may be limited; and the UN Refugees Convention provides for the refugees' right to freedom of movement which means that the Bill of Rights cannot take away this right.<sup>123</sup> The central argument that the Court advanced is that the mere fact that a right is not expressly mentioned in the Bill of Rights does not mean that that right should not be recognised in Kenya. Such a right will be recognised in Kenya as long as it is provided for in international law and its recognition does not violate the Bill of Rights.

The Court's reasoning above may be extended to foreign nationals who regard Kenya as their own country. The challenge is that unlike in the case of refugees where their rights are expressly provided for in the Refugees Conventions,<sup>124</sup> article 12(4) of ICCPR and article 12(2) of the African Charter are silent on the right of non-nationals. However, the jurisprudence and practice of the Human Rights Committee show that article 12(4) of ICCPR is applicable to some categories of non-nationals. This means that it could be extended to a limited number of non-nationals. These could include those who were born in Kenya and have lived in Kenya all their lives and have no other nationality,<sup>125</sup> and those foreign nationals who have lived in

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<sup>123</sup> *Attorney-General v Kituo Cha Sheria* 11-12.

<sup>124</sup> See, eg, the Convention Relating to the Status of Refugees (1951); the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (1969).

<sup>125</sup> Kenyan case law shows that some people were born in Kenya and lived in Kenya and have no other nationality but they are struggling to be granted Kenyan citizenship. See, eg, *Kamal Jadvia Vekaria v Director-General, Kenya Citizens and Foreign Nationals Management Service* [2016] eKLR.

Kenya for many years and have families there.<sup>126</sup> In some cases, the High Court has held that foreign nationals who are in Kenya lawfully have rights under article 39 without specifying which rights.<sup>127</sup>

In some countries, such as Chad,<sup>128</sup> the Constitution does not contain a specific or general provision limiting the right to return to one's country. However, in most countries this right is subject to some conditions. For example, the Constitution of Angola provides that the right to return is 'without prejudice to any restrictions arising out of the fulfilment of legally established duties'.<sup>129</sup> The right is subject to conditions established by law<sup>130</sup> or it is 'limited only by a respect for the public order'.<sup>131</sup> In countries where the right is subject to limitations, countries have adopted different approaches on how such restrictions may be imposed. In some countries such restrictions can be imposed only by a judicial officer and for a limited period of time,<sup>132</sup> whereas in others such limitations may be imposed by judicial or administrative means.<sup>133</sup> In other countries the right can only be restricted 'by law'.<sup>134</sup> In this case, the criteria such laws must meet are not provided for. In some countries where the constitutions provide that such a right can be limited by legislation, the criteria that such legislation must meet are also provided for. For example, article 26(1) of the Constitution of Eritrea provides that the right to return, as in the case of other rights, 'may be limited only in so far as in the interests of national security, public safety or the economic well-being of the country, health or morals, for the prevention of public disorder or crime or for the protection of the rights and freedoms of others'.<sup>135</sup> Article 26(2) of the same Constitution provides:

126 See, eg, *Republic v Cabinet Secretary, Ministry of National Security and Interior Co-ordination & 3 Others; Ex parte Shukri Adihafid & Another* [2014] eKLR (an Ethiopian national who had worked in Kenya for approximately five years and had a family in Kenya was deported and his application to return to Kenya was dismissed by the Court on the ground that he was not a citizen). See also *Republic v Director, Department of Immigration Services & 2 Others Ex parte Michael Olanrewaju Adeboye* [2017] eKLR.

127 *Egal Mohamed Osman v Cabinet Secretary, Ministry of Interior and Co-ordination of National Government & 2 Others* [2015] eKLR paras 40-42.

128 Art 48 of the Constitution (2018) provides that '[e]very Chadian has the right to circulate freely in the interior of the national territory, to leave it and to return to it'.

129 Art 46(2) Constitution of Angola (2010).

130 Art 30 of the Constitution of the Democratic Republic of the Congo (2005); art 12(1) of the Constitution of Madagascar (2010); art 24(4) of the Constitution of Morocco (2011).

131 Art 1(3) of the Constitution of Gabon (2011).

132 Art 49(2) of the Constitution of Cape Verde provides that '[r]estrictions on the rights set forth above [[to leave, return and emigrate] may only be imposed through judicial decision, and must always be temporary in nature'.

133 Art 22(2) of the Constitution of Congo (2015).

134 Art 21(3) of the Constitution of Côte d'Ivoire (2016); art 60(2) of the Constitution of Sudan (2019).

135 Art 26(1) of the Constitution of Eritrea (1997).

Any law providing for the limitation of the fundamental rights and freedoms guaranteed in this Constitution must (a) be consistent with the principles of democracy and justice; (b) be of general application and not negate the essential content of the right or freedom in question; (c) specify the ascertainable extent of such limitation and identify the article or articles hereof on which authority to enact such limitation is claimed to rest.

The constitutions of other African countries also provide for clear circumstances in which the right to return may be limited or derogated from. This applies especially to cases of public emergencies, to protect public order, to protect the rights and freedoms of others, or pursuant to a court order and such limitations must be necessary in a democratic society.<sup>136</sup> However, in some countries the constitutions do not provide for specific circumstances in which the right to return may be limited. In these constitutions, the right to return, as in the case of many other rights in the constitution, is subject to a general limitation or interpretation clause. For example, article 32(2) of the Constitution of Ethiopia provides that '[a]ny Ethiopian national has the right to return to his country'. Article 32 does not provide for the limitations on the right to return. However, it should be read with article 13(2) of the same Constitution which provides:

The fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and international instruments adopted by Ethiopia.

Thus, since article 12(4) of ICCPR provides that the right to return cannot arbitrarily be limited and article 12(2) of the African Charter provides for circumstances in which the right to return may be restricted, Ethiopia can enact legislation or adopt measures that restrict the right to return as long as that legislation or those measures are not arbitrary and not contrary to article 12(2) of the African Charter.

<sup>136</sup> Arts 26(2)-(6) of the Constitution of Swaziland; art 21(2) of the Constitution of Namibia (1990); art 35 of the Constitution of The Gambia (2018); art 21(4) of the Constitution of Ghana (1996); arts 24 & 25 of the Constitution of Kenya (2010); art 86 of the Constitution of Liberia (1986); arts 44 & 45 of the Constitution of Malawi (2017); art 15(3) of the Constitution of Mauritius (1968); art 41(2) of the Constitution of Nigeria (1999); art 26(3) of the Constitution of Rwanda (1993); art 25(3) of the Constitution of Seychelles (1993); art 18(3) of the Constitution of Sierra Leone (1991); arts 38 & 131 of the Constitution of Somalia (2012); art 190 of the Constitution of South Sudan (2013); art 17(2) of the Constitution of Tanzania (1977); art 49 of the Constitution of Tunisia (2014); arts 43 & 44 of the Constitution of Uganda (1995); arts 22(2) & (3) of the Constitution of Zambia (1991); arts 86 & 87 of the Constitution of Zimbabwe (2013); sec 36 of the Constitution of South Africa (1996).

In cases where constitutions provide for the circumstances in which the right to return may be limited, a person who alleges that his right to return has been violated can rely exclusively on the constitution for his or her argument. However, in countries where the constitutions provide that the right to return is subject to law, a person who alleges that his or her right to return has been violated has to rely on both the constitution and the law to substantiate his or her argument. The challenge is that if the constitution is silent on the specific circumstances in which such a right may be limited or derogated from, legislators may enact legislation that provides for many grounds on which a citizen or person may be barred from returning to his or her country. Should this happen, such legislation has to be assessed against the yardstick provided for under article 12(4) of ICCPR, which is to the effect that the limitation on the right to return should not be arbitrary, and article 12(2) of the African Charter.

The constitutions of some African countries are silent on the right of return.<sup>137</sup> However, this does not mean that the right to return is not guaranteed in those countries. For example, the Constitution of the Comoros is silent on the right to return. However, the same Constitution provides that upon ratification, a treaty becomes part of Comoros law and is superior to any law.<sup>138</sup> Since the Comoros ratified the African Charter (in June 1986) which provides for the right to return to one's country, citizens of the Comoros have a right to return by virtue of this treaty. Likewise, the Constitution of Mozambique does not provide for the right to return.<sup>139</sup> However, it provides that international treaties that are ratified by Mozambique are part of the domestic law.<sup>140</sup> The position is the same in the Constitutions of Cameroon<sup>141</sup> and Djibouti.<sup>142</sup>

In some countries where the constitutions are silent on the right to enter or return to one's country, the constitutions also provide that states are bound by international treaties on condition that those

137 See, eg, the Constitution of Comoros (2018); art 55(2) of the Constitution of Mozambique (2007) provides that '[a]ll citizens shall be free to travel inside the national territory and abroad, except those who have been legally deprived of this right by the courts'.

138 Art 12 of the Constitution (2018).

139 Art 55 of the Constitution of Mozambique (2007) provides: '(1) All citizens shall have the right to take up residence in any part of the national territory. (2) All citizens shall be free to travel inside the national territory and abroad, except those who have been legally deprived of this right by the courts.'

140 Art 18 of the Constitution.

141 Art 45 of the Constitution of Djibouti (2008).

142 Art 70 of the Constitution of Djibouti (2010).

treaties are not contrary to these constitutions.<sup>143</sup> It could be argued that if an international treaty, for example, the African Charter, provides for the right to enter one's country and the same right is not provided for in national constitutions, such an international treaty is contrary to the constitution and, therefore, such right is not recognised in these countries. However, this argument would be unsustainable in light of articles 26 and 27 of the Vienna Convention on the Law of Treaties (1969) (Vienna Convention). Article 26 of the Vienna Convention provides that '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith'. Article 27 of the same treaty provides that '[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. Therefore, even in countries in which their constitutions do not provide for the right of citizens to enter their countries, such citizens have that right by virtue of international law.

## 5 Conclusion

In this article I have discussed how the right to enter or return to one's country is protected in the African Charter and in the constitutions of different African countries. I have also demonstrated the circumstances in which this right may be restricted in both the African Charter and the constitutions of different African countries. I have demonstrated that the circumstances in which this right may be restricted in the constitutions of some African countries are broader than those permitted under article 12(2) of the African Charter. However, these circumstances could be justified under article 12(4) of ICCPR. This could cause a tension on the part of these countries between complying with article 12(2) of the African Charter and article 12(4) of ICCPR. I have also demonstrated that according to article 12(2) of the African Charter and article 12(4) of ICCPR, the right to return to or enter one's country is not absolute. According to article 12(2) of the African Charter, the right to return to one's country may be restricted on the ground of, among others, the protection of public health. Thus, African states that barred people from entering their territories during the COVID-19 pandemic could argue that they were justified in doing so on the basis of article 12(2) of the African Charter. However, this raises the question of whether invoking one of the grounds under article 12(2) (for example public health) is sufficient to justify the barring of citizens and residents from returning to their countries as happened in some countries such as Uganda, Ghana and Lesotho during the early phase of the COVID-19

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<sup>143</sup> See, eg, art 116 of the Constitution of Comoros (2018); art 62 of the Constitution of Djibouti (2010).

pandemic. I argue that the use of the word 'or' as opposed to 'and' before 'morality' in article 12(2) means that those grounds should be interpreted disjunctively. In other words, a state can limit the right to return on any of the four grounds under article 12(2). I argue that in invoking the limitations of the right to return under article 12(2), proportionality should be the guiding principle.<sup>144</sup> In other words, are the measures adopted to bar a person from returning to their country proportionate to the real or perceived danger that they pose should they return? If the answer is in the affirmative, then the measures are justified. If the answer is in the negative, then the measures are not justified. In the case of preventing the spread of an epidemic, it is important that the focus is not solely on the need to prevent or combat the spread of the virus. The personal circumstances of the person who is being barred from returning to his or her country should be taken seriously, for example, the social and economic circumstances in the country in which he or she is presently living. Another important factor is that before a state bars a person from returning to his or her country, it should first explore the possibility of putting measures in place to prevent or mitigate the real or perceived danger that he or she poses on his return. For example, if the argument that the person in question is barred from returning to their country because they could be or in fact are carrying a virus and that on their return they will infect other persons with that virus, the state should ensure that such a person returns in strictly-regulated circumstances. For example, they should be screened and, where necessary, quarantined and treated (if they are carrying the virus) and only be released when they are cured and no longer pose a danger to society. The state should pay for the cost of quarantine if the returnee is unable to do so. I have also argued that article 12(2) of the African Charter should be interpreted as applicable to citizens and a limited category of non-citizens.

<sup>144</sup> The African Court on Human and Peoples' Rights and the African Commission have explained the meaning of proportionality in the context of art 27(2) of the African Charter. See *Tanganyika Law Society v Tanzania* (Judgment, 9/2011; 11/2011) (ACtHPR, 14 June 2013) para 106.1 (and the jurisprudence discussed thereunder).