

KENNETH GOOD V. BOTSWANA

**COMMUNICATION SUBMITTED FOR CONSIDERATION UNDER ARTICLE
56 OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS**

Before

The African Commission on Human and Peoples' Rights
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On behalf of

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By

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A. THE PARTIES

We refer the African Commission on Human and Peoples' Rights ("African Commission") to Section A of the Communication submitted on behalf of Kenneth Good (the "Applicant") by his representatives on October 1, 2007 (the "Good Communication"), which describes the principal parties to the Communication.

The Open Society Justice Initiative ("Justice Initiative") pursues law reform activities grounded in the protection of human rights and contributes to the development of legal capacity for open societies. It has offices in Budapest, Hungary; New York, the United States; and Abuja, Nigeria. Its principal activities include submitting legal opinions before national and international courts on questions of law in which it has specialized expertise.

The Justice Initiative has a particular interest and specialized expertise in issues raised by this case that involve critical issues of interpretation of the African Charter on Human and Peoples' Rights ("African Charter") relating to impermissible denial of the protections of the African Charter to non-citizens. The Justice Initiative has specialized expertise in international legal assurances of equality in the enjoyment of protected rights and equal treatment before the law, and has previously filed cases before the African Commission in connection with these issues.

B. STATEMENT OF FACTS

The Applicant, Kenneth Good, a 74-year-old Australian national, was lawfully and continuously resident in Botswana for fifteen years (from August 1990 to May 2005), working as a professor of political studies at the University of Botswana.¹ Mr. Good lived in Botswana with his 17-year-old daughter Clara, a secondary school student who depended on her father for support and who has lived most of her life in Botswana.

On February 18, 2005, the President of Botswana, Festus Gontebanye Mogae, issued a declaration labeling Mr. Good an "undesirable inhabitant of or visitor to Botswana" pursuant to his authority under Section 7(f) of the Botswana Immigration Act, and ordered Mr. Good's expulsion pursuant to this determination.² At the time he issued this declaration, the President did not provide any reasons for his determination.³ Only during the course of legal proceedings did the President claim that he was acting on national security grounds in ordering the professor's deportation. Even then, the President did not identify particular conduct that, in his judgment, posed a threat to

¹ Good Communication, para. 6.

² Court of Civil Appeal of the Republic of Botswana, Civil Appeal No. 028 of 2005, Good v. Botswana, p.3.

³ Good Communication para. 11 ("The Applicant was not given reasons for this decision, nor was he given any opportunity to contest it."); *see also* Good v. Botswana, p.3 (citing in full the President's Declaration, which states: "In the exercise of the powers vested in me by Section 7(f) of the Immigration Act...I...declare Kenneth Good to be an undesirable inhabitant of or visitor to Botswana.").

national security.⁴ Indeed, Mr. Good's work in Botswana was of a scholarly nature, including preparing publications for academic, peer-reviewed journals.⁵

The circumstances surrounding the expulsion order indicate that Mr. Good was expelled on pretextual grounds in retaliation for his writing an article espousing a view with which the President disagreed but which constitutes protected speech under Article 9(2) of the African Charter. The President's declaration that Mr. Good should be expelled as an 'undesirable inhabitant' came in the same month that Mr. Good published an article critical of presidential succession in Botswana and just five days before a paper based on this article was to be presented at the University of Botswana.⁶ Mr. Good was given 56 hours to arrange for his departure, during which time he filed an urgent appeal for judicial review.⁷ During the three months that Mr. Good's case was pending before the Botswana High Court, Mr. Good was never detained, indicating that even the Government recognized that his continued presence in Botswana did not pose a threat to national security.⁸

Mr. Good was arrested and deported from Botswana on May 31, 2005, the day of the decision of Botswana High Court, which unanimously dismissed his application with costs.⁹ Mr. Good was separated from his daughter upon his deportation.¹⁰

C. SUPPLEMENTARY LEGAL ARGUMENTS

The legal arguments set forth in this section are intended to supplement those presented in Section D of the Good Communication. This submission focuses on Botswana's impermissible use of the Applicant's national origin and status as a basis for denying him the full enjoyment of his rights under the African Charter. It thus further develops the arguments set forth in the Good Communication.

For reasons explained in Section D of the Good Communication, Botswana violated the Applicant's rights under Articles 1, 2, 7, 9, 12(4), and 18 of the Charter. Botswana denied each of these rights on impermissible grounds. More particularly, using as a pretext its authority to regulate immigration, Botswana violated several of the Applicant's rights under the Charter, including his right to freedom of expression and family life, on the basis of his national origin and status.

- 1. Botswana¹¹ violated the Applicant's rights under the African Charter by applying its immigration law in a manner inconsistent with its obligation to protect the rights of non-nationals equally with those of nationals and thereby placing the Applicant outside the protection of the African Charter on the basis of his national origin and status.**

⁴ See Good Communication, paras. 13-16.

⁵ Good Communication, para. 9.

⁶ Good Communication, para. 10.

⁷ Good Communication, paras. 12-13.

⁸ Good Communication, para. 24.

⁹ Good Communication, paras. 16-18.

¹⁰ Good Communication, para. 18.

¹¹ Botswana ratified the Charter on July 17, 1986.

Botswana's violations¹² of the Applicant's substantive rights under the Charter, including his right to freedom of expression (Article 9) and his right to protection of his family (Article 18) represent a failure to apply the protections of the African Charter to non-citizens in its territory, even when, as in the case of Professor Good, they are lawful residents. This contravenes Botswana's obligation, set forth in Article 1 of the African Charter, to "recognize the rights...enshrined in this Charter and ...give effect to them."¹³ Under general principles of treaty interpretation, and in the words of the Vienna Convention on the Law of Treaties, "...a treaty is binding upon each party in respect of its entire territory"¹⁴—and in respect of every individual in its territory without distinction based upon their nationality. Thus Article 2 of the African Charter provides that "[e]very individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as ... national and social origin ... or other status."¹⁵

The principle that non-citizens should be granted the same rights as citizens was recognized in 2004 by the High Court in Zambia in a case very similar to this one and in terms that capture the core principles at stake in this case. Roy Clarke, a long-term legal resident but not a citizen of Zambia, was about to be deported in retaliation for a political satire he had published in a newspaper. The editor of the newspaper, a Zambian citizen, could be charged with no crime since none had been committed. The High Court ruled, "*Mr. Clarke's activities are lawful and if he was a Zambian he would have not been punished. Our Constitution does not create one set of offences for aliens, and other offences for Zambians. Equality is the symbol of liberty....*"¹⁶

The principle of equal treatment for non-citizens is implicitly as well as explicitly embedded in the African Charter, evidenced by the fact that none of the Charter's provisions specifies that it applies to citizens only except for Article 13, which pertains to political participation and access to employment in the public service. The omission of a similar reference to citizens in every other article reinforces what is already plain: all other Charter rights pertain fully and without distinction to every individual present in the territory of the state party.

The Botswana Immigration Act, pursuant to which the violation of the Applicant's rights was carried out, distinguishes individuals who may be expelled at the proverbial

¹² Botswana has not taken legislative action to incorporate the Charter into its domestic law and the Charter is not directly applicable in its national courts. This does not, however, affect Botswana's obligations under the Charter. Once a state ratifies the Charter, it is legally bound to comply with its provisions. *See e.g. African Charter on Human and Peoples' Rights*, Art. 1; *Commission Nationale des Droits de l'Homme et des Liberties v. Chad*, 74/92, para. 20; *Amnesty International and Others v. Sudan*, 48/90, 50/91, 52/91, 89/93, para. 40; *International Pen and Others (on behalf of Saro-Wiwa) v. Nigeria*, 137/94, 139/94, 154/96, 161/97, para. 116. On the state's obligations under the Charter notwithstanding a dualist systems of law, *see Civil Liberties Organization v. Nigeria Communication*, 129/94, paras. 12, 16.

¹³ *African Charter on Human and Peoples' Rights*, Article 1.

¹⁴ *Vienna Convention on the Law of Treaties*, Article 29. Indeed, states may be obligated in some circumstances to respect the provisions of treaties they have signed even outside their territory.

¹⁵ *African Charter on Human and Peoples' Rights*, Article 2 (emphasis added).

¹⁶ *Clarke v. Attorney General of Zambia, An Application for Leave to Apply for Judicial Review by Roy Clarke*, High Court for Zambia at the Principle Registry, 2004/HP/003, 382-383 (emphasis added).

stroke of the presidential pen from those whose rights are protected, on the basis of their nationality alone, no matter how many rights are thereby infringed. In the Applicant's case, even his long-term, legal residence in the Botswana did not save him from expulsion for conduct that is protected under the African Charter and which is not a crime under the law of Botswana. This amicus brief argues that this starkly different treatment of citizens and non-citizens in the enjoyment of rights assured by the African Charter is impermissible under the Charter. Had the Applicant posed an objective danger or threat to Botswana his expulsion might have been justified despite attendant interference with some rights, but even non-citizens are protected from arbitrary and unjustified state action.

The Commission has made clear that the assurance of rights without distinction based on grounds including national origin is essential to the Charter itself. In its words, Article 2 of the Charter "lays down a principle that is essential to the spirit of [the Charter], one of whose goals is the elimination of all forms of discrimination and to ensure equality among all human beings."¹⁷ Article 2 sets a high standard: it does not contain an exception such that the African Charter's protections do not apply to non-citizens.

Despite this fundamental guarantee, recent years have seen numerous expulsions of individuals by states parties to the Charter, apparently acting on the flawed premise that they need not apply the protections of the African Charter in full measure to non-citizens. If it were accepted, this premise would create a perverse incentive for states to deprive their citizens of recognition of their citizenship as a prelude to depriving them of other rights.

In two important cases concerning the expulsion of alleged non-citizens, the Commission has found substantive violations of the African Charter even where the victims were not or might not be citizens.¹⁸ In the case of *John K. Modise v. Botswana*,¹⁹ opposition political activist John Modise protested to the African Commission when Botswana summarily revoked its recognition of his Botswana citizenship and he was repeatedly deported without due process to South Africa, although he was not a South African citizen. The Commission found that Botswana violated Articles 3(2), 5, 12(1)-(2), 14 and 18(1) of the Charter by declaring Mr. Modise a non-national and repeatedly expelling him in violation of due process norms, even once it became clear that he was not a citizen of any neighboring country and was therefore, if Botswana did not recognize his citizenship, *de facto* stateless.²⁰ For years prior to the Commission's decision on Mr. Modise's case, Botswana treated him as if, once having had recognition of his citizenship withdrawn, he did not enjoy the full protection of the African Charter—an error Botswana repeats in the case at hand.

The African Commission likewise rejected the premise that states do not owe non-citizens full protection of their rights under the African Charter in *Communication*

¹⁷ 210/98 Association Mauritanienne des Droits de l'Homme v. Mauritania para. 131.

¹⁸ 212/98 Amnesty International v. Zambia and 97/93 John K. Modise v. Botswana.

¹⁹ John K. Modise v. Botswana, paras. 1-8.

²⁰ John K. Modise v. Botswana, paras. 88, 91-94.

212/98 Amnesty International / Zambia. Steven Banda and John Lyson Chinula, leaders of the party that had ruled Zambia since independence, were deported by the successor government elected in 1991 on the grounds that they were not Zambian citizens and were a threat to order and national security. While the Commission accepted that the victims were not Zambian citizens, it found that Zambia had violated Article 12(4) of the Charter, which prohibits expulsion of non-nationals legally admitted in a territory of a State Party without “a decision taken in accordance with the law.” The Commission found:

“[T]he Zambian courts did not consider the obligations of Zambia under the African Charter. The court also failed to rule on the alleged reason for the deportation, namely, that his presence was likely “to endanger peace and good order in Zambia...”. There was no judicial inquiry on the basis in law and in terms of administrative justice for relying on this ‘opinion’ of the Minister of Home Affairs for the action taken. The fact that Banda was not a Zambian by itself, does not justify his deportation. It must be proved that his presence in Zambia was in violation of the laws. To the extent that neither Banda nor Chinula were supplied with reasons for the action taken against them means that the right to receive information was denied to them (Article 9(1)).”²¹

Notwithstanding its acceptance of the fact that the victims may not have been citizens of Zambia, the Commission found that their expulsion was politically motivated and violated the rights to equal protection (Article 2), due process (Article 7(1)(a)), freedom of conscious (Article 8), freedom of expression (Article 9(2)), freedom of association (Article 10), and family life (18(1) and 18(2)) of the African Charter.

Similarly, Botswana’s expulsion of the Applicant in the case at hand, which cannot be justified by his status as a non-citizen alone but which, under national law, was not required to be justified or explained by any other objective criteria, violated his rights under the African Charter because it deprived him of his work, his freedom of expression, and his home and family, without justification contrary to Charter Articles 2, 9(2) and 18(1).

2. Botswana’s refusal to extend to the Applicant the protections of the African Charter on the basis of his non-citizen status is inconsistent with other human rights instruments and principles which, under the African Charter, the Commission may consider.

The interpretation of the African Charter urged in this submission is reinforced by reference to a wide range of other instruments, which the Commission may consider in its interpretation of the Charter. Article 60 of the Charter provides: “The Commission shall draw inspiration from international law on human and peoples’ rights...”.

²¹ 212/98 Amnesty International/Zambia, para. 41.

Numerous international instruments, both universal²² and regional,²³ make clear that prejudicial distinctions based on citizenship status or national origin are a violation of universal human rights principles that are relevant to the African Commission's interpretation of the Charter.²⁴ The prohibition of racial and ethnic discrimination may thus be broadly defined to include national origin. The International Court of Justice has

²² See, e.g., Universal Declaration of Human Rights, Art. 2 (“Everyone is entitled to all the rights and freedoms set forth in this Declaration, *without distinction of any kind, such as* race, colour, sex, language, religion, political or other opinion, *national or social origin*, property, birth or other status.”) (emphasis added); International Covenant on Civil and Political Rights, Art. 2(1) (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, *without distinction of any kind, such as* race, colour, sex, language, religion, political or other opinion, *national or social origin*, property, birth or other status.”) (emphasis added); International Covenant on Economic, Social and Cultural Rights, Art. 2(2) (“The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised *without discrimination of any kind as to* race, colour, sex, language, religion, political or other opinion, *national or social origin*, property, birth or other status.”) (emphasis added); Convention on the Rights of the Child, Art. 2(1) (“States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction *without discrimination of any kind*, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, *national, ethnic or social origin*, property, disability, birth or other status.”) (emphasis added).

²³ See, e.g., European Convention on Human Rights, Art. 14 (“The enjoyment of the rights and freedoms set forth in this Convention shall be secured *without discrimination on any ground such as* sex, race, colour, language, religion, political or other opinion, *national or social origin*, association with a national minority, property, birth or other status.”) (emphasis added); American Convention on Human Rights, Art. 1 (“The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, *without any discrimination* for reasons of race, color, sex, language, religion, political or other opinion, *national or social origin*, economic status, birth, or any other social condition.”) (emphasis added); Draft Arab Charter on Human Rights (2004), Art. 2 (“Each State party to the present Charter undertakes to ensure to all individuals subject to its jurisdiction the right to enjoy the rights and freedoms set forth herein, *without distinction on grounds of* race, colour, sex, language, religious belief, opinion, thought, *national or social origin*, wealth, birth or physical or mental disability.”) (emphasis added).

²⁴ The Preamble of the African Charter on Human and Peoples' Rights provides:

The African States...coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa and to promote international cooperation having *due regard to the Charter of the United Nations and the Universal Declaration of Human Rights*; ...[r]ecognizing on the one hand, that fundamental human rights stem from the attributes of human beings which justifies their national and international protection and on the other hand that the reality and respect of peoples rights should necessarily guarantee human rights; ...[c]onscious of their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and *undertaking to eliminate...all forms of discrimination* (emphasis added).

The Commission has in fact looked to international human rights instruments in previous jurisprudence. For instance, in *Social and Economic Rights Action Center (SERAC) & Anor v. Nigeria*, the Commission noted that “in accordance with articles 60 and 61 of the African Charter, this communication is examined in the light of the provisions of the African Charter and relevant international and regional human rights instruments and principles.” *Social and Economic Rights Action Center (SERAC) & Anor v. Nigeria* 155/96, para. 49; see also *Curtis Francis Doebbler v. Sudan*, 236/00, para. 38; *Huri-Laws v. Nigeria*, 225/98, para. 41.

recognized the underlying prohibition of this type of discrimination to be an obligation *erga omnes*.²⁵

In interpreting the United Nations Charter, the International Court of Justice (ICJ) has affirmed that human rights apply to all individuals, regardless of national origin.²⁶ International human rights bodies have repeatedly afforded human rights protections to non-citizens as well as citizens. The Committee on Economic, Social and Cultural Rights, which monitors states parties' compliance with the International Covenant on Economic Social and Cultural Rights ("ICESCR"), has said, for example, that "the principle of non-discrimination extends to all persons of school age residing in the territory of a State party, *including non-nationals, and irrespective of their legal status*."²⁷ It has applied the principles of the ICESCR Rights to non-nationals in numerous other contexts as well.²⁸

The Human Rights Committee, which monitors states parties' compliance with the International Covenant on Civil and Political Rights ("Covenant" or "ICCPR"), has likewise affirmed that human rights guarantees set forth in the Covenant extend to non-citizens as well as citizens.²⁹ It has found, for example, that differences in pension treatment of former members of the French Army on the basis of nationality constituted discrimination and confirmed that discrimination based on nationality is prohibited by the ICCPR.³⁰ The Human Rights Committee has determined that legislation granting restitution must not discriminate among the victims of the prior confiscation based upon their citizenship.³¹ And it has found that a law that prevented non-nationals from serving

²⁵ The International Court of Justice has described the prohibition of racial discrimination as an obligation *erga omnes*. (International Court of Justice, *Barcelona Traction, Light and Power Co*, ICJ Reports 1970) International Law Commission, *Expulsion of Aliens: Memorandum by the Secretariat*, U.N. Doc. A/CN.4/565 (2006), para. 264 ("By the end of the twentieth century, the principle of non-discrimination may have attained the status of a generally recognized principle of international law or customary international law.")

²⁶ See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* (Advisory Opinion, I.C.J. Reports 1971, 16, para. 57) (emphasis added) "To establish...and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or *national or ethnic origin* which constitute a denial of fundamental human rights is a flagrant violation of the purpose and principles of the Charter." (emphasis added); see also *Barcelona Traction, Light and Power Company, Limited, Judgment*, I.C.J. Reports 1970, 32, para. 34; *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, second phase, I.C.J. Reports 1966, 286-301 (Dissenting Opinion of Judge Tanaka), 455-456, 464, 467- 469 (Dissenting Opinion of Judge Padilla Nervo), and 154-155, 158-172 (Separate Opinion of Judge van Wyk); International Law Commission, *Expulsion of Aliens: Memorandum by the Secretariat*, U.N. Doc. A/CN.4/565 (2006), para. 266.

²⁷ Committee on Economic, Social and Cultural Rights, General Comment 13 (emphasis added).

²⁸ See, e.g., Committee on Economic, Social and Cultural Rights, *Concluding Observations on the Netherlands*, U.N. Doc. E/C.12/1/Add/25 (1998); the United Kingdom and Northern Ireland, U.N. Doc. E/C.12/1994/19 (1994); Belgium, U.N. Doc. E/C.12/1994/7 (1994).

²⁹ See David Weissbrodt, *Preliminary Study on the Rights of Non-Citizens*, U.N. Doc. E/CN.3/Sub/2/2001/20 (2001), para. 51 ("[T]he Human Rights Committee has consistently reaffirmed that, with the exceptions of Articles 13 [which permits expulsion of aliens in accordance with law, providing for due process] and 25 [which grants citizens certain rights to participate in public affairs] the rights under the [ICCPR] must be respected and ensured with regard to all persons with out distinction of any kind.")

³⁰ *Gueye et al v. France*, 196/85, ICCPR.

³¹ *Adam v. Czech Republic*, 586/1994, ICCPR.

as representatives on a work council constituted discrimination since the law's distinction between nationals and non-nationals had no rational or objective foundation.³² The Committee's General Comment 15 on the position of aliens under the ICCPR reaffirms that non-citizens enjoy the general rights set forth in the ICCPR.³³

The European Convention on Human Rights (the "ECHR") likewise extends human rights protections to citizens and non-citizens alike.³⁴ The European Court of Human Rights (the "European Court") has found that "very weighty reasons" would be required to permit differential treatment based on nationality under the ECHR.³⁵ Applying this general principle in specific contexts, the European Court has determined, *inter alia*, that

³² Karakurt v. Austria, 965/2000, ICCPR.

³³ General Comment 15 states:

In general, the rights set forth in the [ICCPR] apply to everyone, irrespective of reciprocity, and *irrespective of his or her nationality* or statelessness. *Thus, the general rule is that each one of the rights of the [ICCPR] must be guaranteed without discrimination between citizens and aliens.* Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the [ICCPR], as provided for in article 2 thereof. This guarantee applies to aliens and citizens alike. Exceptionally, some of the rights recognized in the Covenant are expressly applicable only to citizens (Art. 25), while article 13 applies only to aliens. However, the Committee's experience in examining reports shows that in a number of countries other rights that aliens should enjoy under the [ICCPR] are denied to them or are subject to limitations that cannot always be justified under the [ICCPR].

General Comment 15 to the ICCPR, paras. 1, 2 (emphasis added). The General Comment further states:

Aliens thus have an inherent right to life, protected by law, and may not be arbitrarily deprived of life. *They must not be subjected to torture or to cruel, inhuman or degrading treatment or punishment;* nor may they be held in slavery or servitude. *Aliens have the full right to liberty and security of the person.* If lawfully deprived of their liberty, they shall be treated with humanity and with respect for the inherent dignity of their person. Aliens may not be imprisoned for failure to fulfill a contractual obligation. *They have the right to liberty of movement and free choice of residence;* they shall be free to leave the country. Aliens shall be equal before the courts and tribunals, and shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge or of rights and obligations in a suit at law. Aliens shall not be subjected to retrospective penal legislation, and are entitled to recognition before the law. They may not be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence. *They have the right to freedom of thought, conscience and religion, and the right to hold opinions and to express them.* Aliens receive the benefit of the right of peaceful assembly and of freedom of association.... Aliens are entitled to equal protection by the law. *There shall be no discrimination between aliens and citizens in the application of these rights.* These rights of aliens may be qualified only by such limitations as may be lawfully imposed under the [ICCPR].

Id., para. 7 (emphasis added).

³⁴ See Exclusion, Equality Before the Law and Non-Discrimination. Proceedings of a seminar organized by the Secretariat General of the Council of Europe in cooperation with the International Center for Sociological, Criminal and Penitential Research and studies (INTERCENTER) of Messina, Italy (Taormina Mare, Italy, Sept. 29 – Oct. 1, 1994), at 135 ("The provisions of the [ECHR] are in principle applicable without any distinction to citizens within any given State, citizens of other member States, aliens or stateless persons.").

³⁵ Gaygusuz v. Austria, 17371/90, 16/09/1996.

there is no objective and reasonable justification for the differential treatment of French nationals and non-nationals in the granting of allowances for disabled adults.³⁶

The International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”), recognizes states parties’ discretion over matters of nationality, including differential treatment of citizens and non-citizens. Even so, the Committee on the Elimination of All Forms of Racial Discrimination, charged with monitoring states parties’ compliance with CERD, specified in its General Comment 30 that this discretion “must be construed so as to avoid undermining the basic prohibition of discrimination; hence, it should not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in particular in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.”³⁷

3. Exceptions to the general principle of non-discrimination based on national origin and status are limited and should be construed narrowly.

As noted earlier some rights, such as the right to vote, may be limited to citizens.³⁸ Beyond certain limited areas, however, distinctions as to the rights of citizens and non-citizens are presumptively invalid.³⁹ Any distinctions must further a legitimate aim and be objectively justifiable and proportional.⁴⁰

³⁶ Koua Poirrez v. France, 40892/98, 30/09/2003.

³⁷ The CERD states that it “shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.” International Convention on the Elimination of All Forms of Racial Discrimination, Art. 1, para. 2. The Committee on the Elimination of Discrimination has, however, “affirm[ed] that article 1, paragraph 2, must not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in other instruments, especially the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.” Committee on the Elimination of Discrimination, CERD General Recommendation 11, para. 3; *see also* CERD General Recommendation 30, para. 2. Moreover, while “[CERD] is silent on the question of discrimination in respect of expulsion,” the Committee observes: No significance is to be attached to this circumstance, however, since the civil rights listed in that Convention are taken from the Universal Declaration of Human Rights which was silent on expulsion generally; and this was so less for reason of principle than because of European preoccupations in 1948.” Richard Plender, *International Migration Law* 476 (rev’d. 2d ed., 1988); *see also* International Law Commission, Expulsion of Aliens: Memorandum by the Secretariat, U.N. Doc. A/CN.4/565 (2006), n. 529.

³⁸ “The major human rights treaties acknowledge the inherent dignity and equal and inalienable rights of all. *In respect of fundamental rights, they recognize no distinction between the national and the non-national*, but do acknowledge the continuing authority of the state to maintain distinctions between citizens and non-citizens in certain areas of activity.” Guy S. Goodwin-Gill, “Migration: International Law and Human Rights,” in *Managing Migration* 167 (Bimal Ghosh, ed. 2000) (citations omitted) (emphasis added); *see also* International Law Commission, Expulsion of Aliens: Memorandum by the Secretariat, U.N. Doc. A/CN.4/565 (2006), n. 581; “Every *citizen* shall have the right and opportunity...[t]o take part in the conduct of public affairs... , to vote and to be elected, ...[t]o have access, on general terms of equality, to public service in his country.” International Covenant on Civil and Political Rights, Art. 25 (emphasis added); “No one shall be arbitrarily deprived of the right to enter *his own country*.” International Covenant on Civil and Political Rights, Art. 12(4) (emphasis added).

³⁹ “Provisions of international law make clear that, with respect to all rights except political participation and exit and entry, distinctions between citizens and noncitizens are presumptively invalid.” James A.

However, in the case at hand, Botswana limited the freedom of expression of the Applicant, relying on the state's general right to control immigration as a pretext. Freedom of expression (Article 9(2)) is a fundamental right afforded to all people under the Charter, not one that is limited to citizens. The right to protection of family life (Article 18(1)) is likewise not limited to citizens. Indeed, the rights of the Applicant infringed upon by Botswana are guaranteed even in the context of expulsion. The rights of the family, for instance, should be preserved even when states undertake otherwise legitimate measures to deport or expel aliens.⁴¹ Yet Botswana disregarded the Applicant's rights of the family; his deportation, occurring only hours after a decision was rendered by the Botswana High Court, separated him from his 17-year-old daughter. The Applicant's child was forced to remain in Botswana alone, with no other family members in the country, in order to finish her schooling.⁴²

Likewise, freedom of expression should not be compromised when expulsion takes place.⁴³ In the case at hand, Botswana infringed upon the Applicant's freedom of expression by using his academic writing as a political scientist on presidential

Goldston, Holes in the Rights Framework: Racial Discrimination, Citizenship, and the Rights of Noncitizens, 20 Ethics & Int'l Affairs 3, 321, 341 (2006).

⁴⁰ See Warwick McKean, *Equality and Discrimination under International Law* 287 (1983) ("Distinctions are reasonable if they pursue a legitimate aim and have an objective justification, and a reasonable relationship of proportionality exists between the aim sought to be realized and the means employed. These criteria will usually be satisfied if the particular measures can reasonably be interpreted as being in the public interest as a whole and do not arbitrarily single out individuals or groups for invidious treatment."); see also International Law Commission, Expulsion of Aliens: Memorandum by the Secretariat, U.N. Doc. A/CN.4/565 (2006), para. 260; Terje Einarsen, "Discrimination and Consequences for the Position of Aliens," 64 Nordic J. Int'l L. 429, 431-2 (1995) ("[D]istinctions must pursue a *legitimate aim* and have an *objective justification* and a *reasonable relationship of proportionality* between the aims sought to be realized and the means employed."); International Law Commission, Expulsion of Aliens: Memorandum by the Secretariat, U.N. Doc. A/CN.4/565 (2006), n. 535.

⁴¹ See International Law Commission, Expulsion of Aliens: Memorandum by the Secretariat, U.N. Doc. A/CN.4/565 (2006), para. 449 ("The expulsion of aliens should be carried out in conformity with international human rights law concerning the rights of the family. The expulsion of an alien involving the separation of a family may require a stronger justification in terms of the interests of the State in removing this person from its territory.") (citations omitted).

⁴² Good Communication, para. 118.

⁴³ According to the International Law Commission:

The expulsion of aliens should be carried out in conformity with international human rights law concerning freedom of expression. In the *Case of Piermont v. France*, the European Court of Human Rights considered that the expulsion of the applicant from French Polynesia had been a violation of her freedom of expression guaranteed by article 10 of the European Convention on Human Rights. The expulsion was ordered as a reaction to the applicant's participation in a political debate and her denunciation of the continuation of nuclear testing and the French presence in the Pacific. Given the circumstances of the case, namely the peaceful and authorized character of the demonstration and the fact that the latter did not provoke any disorder, the Court reached the conclusion that "[a] fair balance was accordingly not struck between, on the one hand, the public interest requiring the prevention of disorder and, on the other, Mrs. Piermont's freedom of expression."

International Law Commission, Expulsion of Aliens: Memorandum by the Secretariat, U.N. Doc. A/CN.4/565 (2006), para. 476 (citing European Court of Human Rights, *Case of Piermont v. France*, Judgment (Merits and Just Satisfaction), 27 April 1995, Application numbers 15773/89 and 15774/89, para. 77).

succession as a pretext for labeling him an “undesirable inhabitant or visitor” in Botswana and ordering his expulsion. This publication was of a peaceful and scholarly character, rendering the government’s response a violation of the universal human right to free expression.⁴⁴ Just as the European Court has condemned the use of immigration grounds as a pretext for accomplishing other purposes in violation of ECHR rights, this Commission should continue to ensure that states parties to the African Charter do not abuse their authority to regulate immigration to deny rights that apply equally to non-citizens and citizens.⁴⁵

National courts facing similar factual situations have found the deportation of an alien in connection with the publication of an article to infringe on freedom of expression and the right to non-discrimination on the basis of national origin. As described above, in 2004, the High Court for Zambia heard the case of Roy Clarke, a resident alien, who faced deportation by the Zambian Permanent Secretary in the Ministry of Home Affairs in connection with his publication of a satirical article in a local newspaper. The article was of a peaceful nature and did not merit such a response from Zambia. As part of its holding, the High Court made the following relevant comments:

“[T]he Managing Editor of the Post Newspapers adopted the satirical article and published it because it is not unlawful,” and the publication “*did not trigger coercive powers.*” The Court continued, “Deportation in any event is a grave sanction, as most courts in the common law jurisdiction have long recognized. Deportation places the liberty of an individual at stake. Though *deportation* is not technically a criminal proceeding, it *visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom (Zambia). Deportation has a far harsh[er] impact on most resident aliens than many conceded punishments*; uprooting the alien from home, friends, family and work would be severe regardless of the country to which the alien was being returned, breaking these attachments inflicts pain [rather] than preventing [such pain] from being made.”⁴⁶

D. CONCLUSION

In conclusion, Botswana used the pretext of national security and the President’s discretion over immigration law and to deny the Applicant his human rights as guaranteed by the African Charter. Consistent with prior jurisprudence, the Commission should find that Botswana impermissibly declined to apply to the Applicant the protections it was bound to ensure under the African Charter. Such a move would be an important step in arresting the disturbing trend of sweeping deprivations of rights

⁴⁴ See Good Communication, Section D.III.

⁴⁵ Case of Bozano v. France, App. No. 9120/80, Eur. Ct. Hum. Rts., Judgment of Dec. 18, 1986, ¶¶ 60-61 (finding breach of Article 5(1)(f) where a “deportation procedure was abused . . . for objects and purposes other than its normal ones”).

⁴⁶ Clarke v. Attorney General of Zambia, An Application for Leave to Apply for Judicial Review by Roy Clarke, High Court for Zambia at the Principle Registry, 2004/HP/003, 382-383 (emphasis added).

perpetrated by African states on the grounds of national origin or status in violation of the African Charter.

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Date

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