

PROCEDURAL GUARANTEES IN THE PROHIBITION OF COLLECTIVE EXPULSION UNDER SECTION 12(5) OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

Ogholaja Edebharia Olayemi*

O. K. Edu**

Brown Etareri Umukoro***

Abstract

The prohibition of mass expulsion under Article 12(5) of the African Charter on Human and Peoples' Rights serves as an important safeguard against the arbitrary removal of non-nationals. This study examines whether procedural guarantees are within the provision despite the absence of procedural requirements. The study adopts a doctrinal research methodology based on the analysis of the international and regional human rights instruments. A comparative approach is also employed to assess protections available under the European and Inter-American human rights systems. The findings posit that though Article 12(5) prohibits discriminatory mass expulsions, its implementation requires a procedural safeguard to prevent arbitrary removals. The study also finds that the due process guarantee has been incorporated into the Charter through the interpretation of the African Commission jurisprudence. However, challenges such as the excessive reliance on state sovereignty continue to hinder its effectiveness. The study concludes that Article 12(5) should be interpreted as containing both substantive and procedural protections. It recommends the adoption of regional guidelines providing procedural safeguards in expulsion proceedings and also the

* Faculty of Law, Dennis Osadebay University, Asaba, Delta State, Nigeria; email: ogholaja.olayemi@dou.edu.ng, <https://orcid.org/0009-0009-9721-1640>.

** Faculty of Law, Delta State University Oleh Campus, Nigeria. Email: okedu@delsu.edu.ng | ORCID: <https://orcid.org/0000-0002-4385-1120>

*** Faculty of Law, Delta State University Oleh Campus, Nigeria. Email: beumukoro@delsu.edu.ng | ORCID: <https://orcid.org/0000-0002-5385-7820>

incorporation of these standards into domestic laws of African States.

Keywords: Collective expulsion; African Charter; Article 12(5); due process; procedural guarantees; migrants' rights; African Commission; human rights.

1. INTRODUCTION

The prohibition against arbitrary expulsion is a principle under international law that safeguards Refugees and non-nationals from expulsion by a host state.¹ Similarly, Collective or mass expulsion refers to the removal of a group of foreigners from a State without a reasonable and objective examination of the particular circumstances of each concerned.² Accordingly, Article 12(5) of the African Charter on Human and Peoples' Rights (ACHPR) provides that expulsion of non-nationals shall be prohibited when it is based on national, racial, ethnic, or religious grounds. Thus, Article 12(5) of the Charter was adopted due to the mass deportations and forced removals by Sovereign States of Africa during post-independence, as large groups of foreigners were collectively expelled based on nationality, ethnicity, race, and religion. The expulsion of Asians from Uganda in 1972 by the Idi Amin regime was an example of collective expulsion that was motivated by political, economic, and nationalist considerations rather than by legitimate legal grounds.³

The African Charter under Article 12(5) adopts the wording "mass" rather than "collective expulsion" of non-nationals, unlike its regional counterparts that emphasized collective expulsion. The provision states that "the mass expulsion of non-nationals shall be prohibited"

¹ . Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007) 524–29.

² *Čonka v Belgium* (2002) 34 EHRR 51564/99, para 59.

³ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217, art 12(5).

and further defines such expulsion as one aimed at national, racial, ethnic, or religious grounds.⁴

However, despite the minimum protection under Article 12(5) of the African Charter, there are challenges in the interpretation and implementation of the said provision. The reference to mass expulsion constitutes a problem, as it refers to the discriminatory nature of the expulsion rather than to the absence of procedural safeguards.⁵ This approach is different from other regional conventions that is concerned with whether the individuals affected were granted an individualized examination before expulsion. As a result, it is uncertain whether Article 12(5) adequately protects foreigners from being expelled as a group without fair procedures.⁶

Accordingly, scholars have criticized the limitation in the African Charter. According to Viljoen the wording of Article 12(5) creates ambiguity in the scope of protection against foreigners, particularly where non-nationals are expelled based on race, ethnicity, nationality, or religion.⁷ On the other hand, the African Commission proffers that human rights jurisprudence places much reliance on procedural safeguards in determining whether an action constitutes collective expulsion, with no consideration placed on discriminatory intent.⁸

On this note, the study seeks to examine the procedural safeguards to individual assessment and legal representation under Article 12(5) and

⁴ Ibid.

⁵ *Institute for Human Rights and Development in Africa v Angola* (2008) AHRLR 43 (ACHPR 2008) paras 67–70.

⁶ *N.D. and N.T. v Spain* App Nos 8675/15 and 8697/15 (ECtHR, Grand Chamber, 13 February 2020) paras 193–201

⁷ Frans Viljoen, 'Africa's Contribution to the Development of International Human Rights and Humanitarian Law' in E Sahle (ed), *Human Rights in Africa: Contemporary Debates and Struggles* (Palgrave Macmillan 2019) 278–282.

⁸ *Union Inter Africaine des Droits de l'Homme and others v Angola* (2000) AHRLR 18 (ACHPR 1997) paras 15–20.

also to reconcile the tension between substantive anti-discrimination protection and procedural silence. The general findings will suggest whether Article 12(5) must be interpreted not only as a prohibition of mass expulsion but also as an implicit guarantee of due process in all expulsion decisions affecting non-nationals.

2. CONCEPT OF MASS EXPULSION UNDER ARTICLE 12(5)

The Provisions of Article 12(5) of the African Charter on Human and Peoples' Rights provides that “the mass expulsion of non-nationals shall be prohibited,” particularly where such expulsion is directed against national, racial, ethnic, or religious groups. This principle plays a major role within international human rights law because it uses different language from other regional human rights instruments...⁹ The European and American conventions, for example, use the term “collective expulsion,” while the African Charter in turn expresses the concept of “mass expulsion.” These terminological distinctions are not merely semantic but reflect the evolution of the socio-political circumstances that led to the drafting of the Charter.¹⁰

The human rights Charter was established as a result of the practice of mass deportations and forced removals during the post-independence in Africa as many African States were engaged in the expulsion of large groups of non-nationals, often on the basis of nationality, ethnicity, race, or religion. The 1972 expulsion of Asians from Uganda under the regime of Idi Amin was a notable example of mass expulsion motivated by political, economic, and nationalist

⁹ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217, art 12(5).

¹⁰ European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221, Protocol No 4, art 4; Inter-American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) OAS Treaty Series No 36, art 22(9).

considerations rather than by legitimate legal grounds.¹¹ Hence, the essence of the drafting of the Charter is to prohibit not only the physical removal of foreigners but particularly the discriminatory expulsion of identifiable groups.¹² Just as the European Convention emphasizes the absence of individualized examination, Article 12(5) focuses on the discrimination of persons who belong to a particular group. Thus, the emphasis on non-discrimination broadens the philosophy of the African Charter, which is more concerned with the protection of peoples in the society.¹³

Nevertheless, the term mass expulsion cannot only be understood to denote discrimination as in reality, it also involves the removal of individuals based on group identity without any meaningful consideration of their personal circumstances. Thus, the differences between individual expulsion and mass or collective expulsion depend on the requirement of individualized assessment and available remedies.¹⁴ An individual expulsion is based upon a careful evaluation of the specific circumstances of the person concerned, including factors like immigration and family status, and other relevant humanitarian grounds. However, mass expulsion in its ordinary terms

¹¹ Inside Final Days of Idi Amin's Chaotic Expulsion of Asians' *Daily Monitor* (12 September 2021) <<https://www.monitor.co.ug/uganda/magazines/people-power/inside-final-days-of-idi-amin-s-chaotic-expulsion-of-asians--3547274>>accessed 21 June 2026.

¹² Stanley Ibeawuchi Okoye, 'International Law and the Expulsion of Aliens' (1975) 12 *Nigerian Journal of International Law* 45, 48–50; see also Ugandan Government expulsion of Asians (1972).

¹³ *Malawi African Association and Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000) paras 131–135.

¹⁴ *Hirsi Jamaa and Others v Italy* App No 27765/09 (ECtHR, Grand Chamber, 23 February 2012) (2012) 55 EHRR 21, paras 177–85.

refer to affected persons as a homogeneous category as they are expelled solely because they belong to a particular group.¹⁵

These differences in both terms are fundamental under the scope of Article 12(5) in the sense that the removal of persons without examining their individual circumstances may increase the risk of arbitrariness and injustice, as the absence of individualized assessment deprives the affected persons of the opportunity to challenge the arbitrary removal as provided for under international law. Consequently, mass expulsion does not only violate the principle of non-discrimination but also undermines fundamental requirements of procedural fairness.¹⁶

One important characteristic of Article 12(5) is that it does expressly enumerate procedural safeguards applicable in expulsion proceedings, unlike Article 13 of the International Covenant on Civil and Political Rights and Protocol No. 7 to the European Convention on Human Rights. Though the provision is silent on matters such as the right to be heard, access to legal representation and effective remedies' it should however not be interpreted as an exclusion as recent human rights jurisprudence has increasingly recognizes that the prohibition of collective or mass expulsion cannot be effectively implemented without procedural safeguards. The interpretation of Article 12(5) requires an examination of individual circumstances and respect for basic due process before any removal, as the expulsion must be consistent with the object and purpose of the Charter in line with the principles of international human rights law.¹⁷

¹⁵ Malcolm D Evans and Rachel Murray (eds), *The African Charter on Human and Peoples' Rights: The System in Practice 1986–2006* (Cambridge University Press 2008) 143–145.

¹⁶ *Union Inter Africaine des Droits de l'Homme and others v Angola* (2000) AHRLR 18 (ACHPR 1997) paras 15–20.

¹⁷ Human Rights Committee, *General Comment No 15: The Position of Aliens under the Covenant* (11 April 1986) UN Doc HRI/GEN/1/Rev.9 (Vol I).

Accordingly, the interpretation of Article 12(5) should be understood to encompass both substantive and procedural dimensions. It is Substantive in that it prohibits discriminatory expulsions directed against particular groups while on the other hand is Procedural because it requires States to ensure individualized assessment and respect for due process guarantees before any expulsion measure is undertaken. Thus, the interpretation of the dual nature of the Charter strengthens its effectiveness and aligns with the African human rights system with contemporary international standards governing the treatment of non-nationals.¹⁸

3. JURISPRUDENTIAL DEVELOPMENT OF ARTICLE 12(5) OF THE AFRICAN CHARTER

The main importance of Article 12(5) of the African Charter on Human and Peoples' Rights is the interpretative work of the African Commission on Human and Peoples' Rights. While the provision expressly prohibits the mass expulsion of non-nationals directed against arbitrary expulsion, it is also limited in its substantive scope and procedural implications. Accordingly, Article 12(5) provides for the jurisprudence that expanded the meaning of its protective reach.¹⁹

One notable feature of Article 12(5) is its brevity. Unlike its other regional counterparts, the Charter does not expressly define the term mass expulsion nor its procedural safeguards before expulsion measures are taken. This has necessitated a purposive interpretation by the African Commission to ensure the effective protection of foreigners against arbitrary and discriminatory removals.²⁰ The jurisprudential development of Article 12(5) reflects a gradual shift

¹⁸ Rachel Murray, *The African Charter on Human and Peoples' Rights: A Commentary* (Oxford University Press 2019) 274–279.

¹⁹ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217, art 12(5);

²⁰ *Ibid.*

from a limited scope of understanding on discriminatory group expulsions towards a larger conception of the principles of due process and individual justice. The African Commission has consistently interpreted this provision that the prohibition of mass expulsion is not limited to physical removal on a large scale but on the decision-making process and the absence of individual circumstances of affected persons.²¹

In the case of *Institute for Human Rights and Development in Africa v Angola*, the Commission held that the mass removal of non-nationals without adequate procedural safeguards constituted a violation of Article 12(5). The Commission derives its principle from the European human rights jurisprudence which affirms that expulsion measures must reflect the proper examination of every individual circumstances. This decision in African human rights law provide for the connect nexus of the prohibition of mass expulsion with procedural fairness.²²In another case of *Good v Botswana* ²³ the Commission reaffirmed that States must exercise their immigration powers in accordance with human rights obligations. The Commission held that State must respect the principles of legality and due process to prevent arbitrary expulsion. The decision suggest that procedural fairness constitutes an indispensable component of lawful expulsion practices under the Charter.²⁴

The Commission's jurisprudence further interprets Article 12(5) to have comply to international human rights standards as its consistent links with Articles 60 and 61 of the African Charter permit the Commission to draw inspiration from international law and

²¹ Ibid.

²² Union Inter Africaine des Droits de l'Homme and others v Angola (2000) AHRLR 18 (ACHPR 1997) paras 20–21

²³ Good v Republic of Botswana (2010) AHRLR 43 (ACHPR 2010) paras 159–200.

²⁴ Ibid.

comparative human rights instruments. Also, the global standards relating to collective expulsion have strongly influenced the interpretation of Article 12(5), on the requirement of individualized assessment and the protection against arbitrary removal.

The evolution of Article 12(5) reveals a normative development in the African human rights system. Though the provision focuses on mass discrimination, the Commission has extended the protection to encompass procedural guarantees in expulsion cases. This implies that Article 12(5) has grown from merely discrimination into a larger safeguard against arbitrary expulsion.²⁵ This development is important because it bridges the gap between the substantive prohibition of mass expulsion and the procedural mechanisms to prevent it. The Commission recognizes that the prohibition of mass expulsion cannot be enforced unless individuals are allowed to be heard on a case-by-case basis. Accordingly, individualized assessment and access to remedies with respect for due process have become an important component of Article 12(5).²⁶ The provision is therefore dynamic under the African human rights system, as the African Commission's interpretation has transformed its limited principle of protection into a broader source of protection for foreigners. This, in turn, promotes the Charter's contribution to protecting migrants' rights through procedural justice in Africa.²⁷

²⁵ Malcolm D Evans and Rachel Murray (eds), *The African Charter on Human and Peoples' Rights: The System in Practice 1986–2006* (Cambridge University Press 2008) 146–148.

²⁶ Vincent Chetail, *International Migration Law* (OUP 2019) 259–266.

²⁷ *Union Inter Africaine des Droits de l'Homme and others v Angola* (2000) AHRLR 18 (ACHPR 1997)

4. IMPLEMENTATION CHALLENGES OF ARTICLE 12(5) ACHPR

In spite of the value of the provision in the Charter within international law, the implementation is constrained by challenges that weaken its effectiveness as the limitation remains a major obstacle. The provision under Article 12(5) is narrow and does not set out procedural safeguards. This in turn creates interpretative uncertainty and leaves States with the discretion in expulsion decisions. Consequently, the protective scope of the provision depends on the judicial interpretation rather than obligation which in the circumstances weakens its enforceability in practice.²⁸

Also, the weak enforcement further undermines the provision of the Charter even though the African Commission and the African Court may have developed progressive jurisprudence, compliance by States remains inconsistent. This enforcement gap indicates that when a violation is established, implementation is often delayed or ignored thereby reducing the deterrent effect of the system.²⁹ Furthermore, the power vested on States in migration control poses challenges as States often justify expulsions on grounds of national security and immigration regulation. In practice, the justifications supersede individual protection leading to collective expulsions without proper procedural safeguards. This tension between sovereignty and human rights protection remains one of the obstacles to the realization of Article 12(5).³⁰

²⁸ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217, art 12(5); Frans Viljoen, *International Human Rights Law in Africa* (3rd edn, Oxford University Press 2019) 382–385

²⁹ African Court on Human and Peoples' Rights, *Beneficiaries of late Norbert Zongo and Others v Burkina Faso* (2014) App No 013/2011; Frans Viljoen (n 1) 420–421

³⁰ James Crawford, *Brownlie's Principles of Public International Law* (9th edn, Oxford University Press 2019) 505–508.

However, not minding the limitations, the provision in principle should not be narrowed on purely substantive prohibition but as both substantive and procedural. This is necessary to protect the object and purpose of the African Charter in the sense that A where expulsion is permissible, it must comply with minimum due process standards, including individualized assessment and fairness guarantees.³¹ This approach promotes coherence within international human rights law and the African system with broader international standards that recognize procedural fairness as an element of lawful expulsion.³²

5. PROCEDURAL GUARANTEES (COMPARATIVE ANALYSIS WITH OTHER REGIONAL CONVENTIONS)

Article 12(5) of the African Charter posit that the effectiveness of its principle depends on the procedural safeguards as its guarantees are important to ensure that the prohibition operates in reality and not a declaration.³³

Conversely, the procedural guarantees are not codified in Article 12(5) but are inferred under the interpretation of Articles 7 and 12 which is the right to fair trial and freedom of movement and protection against arbitrary expulsion.³⁴ From the above provision, there are several safeguards including individual assessment, the right to be heard, access to legal representation, interpretation services, and effective remedies. These safeguards are to prevent automatic removal that ignore individual circumstances.

³¹ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986)

³² Frans Viljoen, *International Human Rights Law in Africa* (3rd edn, Oxford University Press 2019) 417–21.

³³ *Malawi African Association and Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000) Para.131-135

³⁴ *African Charter on Human and Peoples' Rights* (adopted 27 June 1981, entered into force 21 October 1986) OAU Doc CAB/LEG/67/3 Rev 5, art 12(5).

However, other regional conventions provide more procedural protection against collective expulsion. For example, the European Convention on Human Rights under Article 4 of Protocol No. 4 prohibits the collective expulsion of aliens.³⁵ The European jurisprudence has further strengthened procedural guarantees by requiring individualized examination of each case in spite of security concerns³⁶ as it held that failure to provide a genuine individual assessment amounts to a violation. Similarly, the American Convention on Human Rights provides a stronger safeguard under Article 22(9) which prohibits the collective expulsion of aliens³⁷ The Inter-American Court of Human Rights has interpreted this provision to require strict procedural fairness and the opportunity to challenge expulsion decisions.³⁸

Comparatively, while the African Charter prohibits mass expulsion targeted at specific groups, it does not set out the procedural steps required before removal. This silence places interpretative responsibility on the African Commission that has gradually incorporate the procedural guarantees into the Charter through its jurisprudence.³⁹ while the African Charter aligns substantively with global human rights norms against collective expulsion, it suffers procedural articulation. The European and Inter-American conventions

³⁵ *Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)* (adopted 4 November 1950, entered into force 3 September 1953) ETS No 5, art 4. of Pro.4

³⁶ *Čonka v Belgium* App No 51564/99 (ECtHR, 5 February 2002) paras 59-63

³⁷ Organization of American States, American Convention on Human Rights (Pact of San José, Costa Rica) (22 November 1969). Art 22

³⁸ *Haitians and Dominicans of Haitian Origin in the Dominican Republic (Provisional Measures)*, Order of 18 August 2000, Inter-Am Ct HR (Ser E) No 3 (2000) para 14.

³⁹ Frans Viljoen, *International Human Rights Law in Africa* (2nd edn, Oxford University Press 2012) 278–282

demonstrate a developed framework where procedural safeguards are embedded in treaties and reinforced by judicial interpretation. This comparative perspective supports the argument that Article 12(5) must be interpreted to incorporate full procedural protections, ensuring parity with other regional human rights regimes.

6. CONCLUSION

Article 12(5) of the African Charter protects against mass and discriminatory expulsions of foreigners as it reflects the protection of human dignity and prevent the recurrence of injustices associated with group expulsions within the African human right system.

However, the true strength of Article 12(5) depends on its interpretation. The narrow limits of the provision as to discrimination is insufficient. Instead, the provision must be understood in a broader sense that incorporates procedural guarantees.

The study demonstrates that key safeguards are not optional but essential within any meaningful understanding of the prohibition of collective expulsion.

Conversely, Article 12(5) must be read as both substantive protections that is protection against discriminatory mass expulsion and procedural protections as to ensuring fairness and due process in expulsion decisions. This dual interpretation is crucial in preventing abuse of state power.

Accordingly, the interpretation of Article 12(5) functions as a robust shield against arbitrary state action while strengthening the protection of foreigners and other vulnerable groups within Africa.

7. RECOMMENDATIONS

- i. The African Union should adopt a Protocol to the African Charter that codifies procedural safeguards in expulsion cases. This would remove ambiguity and strengthen legal certainty within the African human rights system.
- ii. The African Commission should issue guidelines on Article 12(5) clarifying the minimum procedural standards applicable to all expulsion decisions. This would ensure uniform interpretation against inconsistent national practices.
- iii. The African Court should adopt a robust jurisprudential approach by affirming that procedural fairness is a requirement of Article 12(5). Expulsion cases should be used to establish binding regional standards on due process in migration control.
- iv. Member States should incorporate Article 12(5) into domestic immigration and constitutional frameworks. National laws should prohibit mass expulsion and establish procedural steps before any removal decision.
- v. States should invest in training immigration police officials on human rights-compliant expulsion procedures.
- vi. African States should fund legal aid systems to ensure that non-nationals facing expulsion have access to legal representation to prevent arbitrary removals.
- vii. The African Union should develop a monitoring mechanism on expulsion practices within Member States. Periodic reporting and peer review mechanisms should be used to assess compliance with Article 12(5) and procedural standards.
- viii. There should be a wide migration framework that harmonizes expulsion procedures across African States. Such a framework should align with the African Charter to reduce disparities between national immigration laws.