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### The Right to Remain

Timothy E. Lynch

*University of Missouri - Kansas City, School of Law*

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# THE RIGHT TO REMAIN

Timothy E. Lynch\*

*Abstract:* Article 12.4 of the International Covenant on Civil and Political Rights (ICCPR) states, “No one shall be arbitrarily deprived of the right to enter his own country.” Citizens clearly enjoy Article 12.4 rights, but this article demonstrates that this right reaches beyond the citizenry. Using customary methods of treaty interpretation, including reference to the ICCPR’s preparatory works and the jurisprudence of the Human Rights Committee, this article demonstrates that Article 12.4 also forbids States from deporting long-term resident noncitizens—both documented and undocumented—except under the rarest circumstances. As a result, the ICCPR right to remain in one’s own country is a right that should be particularly valuable to the many people in the world who have lived in, and established a relationship with, a country which is not their country of citizenship—including lawful permanent residents, long-term refugees, Dreamers and other long-term undocumented residents, and people born in countries without birthright citizenship. These people cannot be deported from the countries they call home.

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\* Associate Professor of Law, University of Missouri-Kansas City School of Law; M.B.A., Kelley School of Business, Indiana University; J.D., Harvard Law School; B.A., University of Chicago. Please send correspondence to the author at [lynchte@umkc.edu](mailto:lynchte@umkc.edu). This article can be found at <http://ssrn.com/author=969133>. This article is a revised and updated version of one section of an article by the same author entitled *The ICCPR, Non-Self-Execution, and DACA Recipients’ Right to Remain in the United States*, published in 2020 in the *Georgetown Immigration Law Journal*. 34 GEO. J. IMMIGR. L. 323 (2020).

## INTRODUCTION

Article 12.4 of the International Convention on Civil and Political Rights (ICCPR) states, “No one shall be arbitrarily deprived of the right to enter his own country.”<sup>1</sup> Since the right to enter one’s own country necessarily entails the right not to be deported, exiled, banished, or expelled<sup>2</sup> from one’s own country, Article 12.4 can be restated as providing that everyone has the *right to remain* in their own country.<sup>3</sup>

It is readily assumed that such a right is enjoyed by a country’s citizens, but customary rules of treaty interpretation demonstrate that this ICCPR right extends beyond a nation’s citizenry. It is a right that is also enjoyed by noncitizens who have strong attachments to a country. In fact, the scope of Article 12.4 is so broad that it encompasses even undocumented noncitizens who have such attachments.

However, the ICCPR does permit nonarbitrary expulsion.<sup>4</sup> This raises the question of how to distinguish between arbitrary expulsion and nonarbitrary expulsion. To expel a citizen from their own country and prohibit them from reentering is so far removed from modern societal norms that it is hard to imagine what would qualify as a nonarbitrary expulsion.<sup>5</sup> Expelling noncitizens, however, is not far removed from current societal norms. Expulsions of noncitizens may feel more acceptable<sup>6</sup> and are, therefore, at first blush, more likely to seem nonarbitrary. However, when anyone is removed

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<sup>1</sup> International Covenant on Civil and Political Rights art. 12.4, Dec. 16, 1966, T.I.A.S. 92-908, 999 U.N.T.S. 171 [hereinafter ICCPR].

<sup>2</sup> Black’s Law Dictionary defines *banishment* and *exile* as synonyms. *Exile*, BLACK’S LAW DICTIONARY (11th ed. 2019). *Exile* is defined as “[e]xpulsion from a country, esp. from the country of one’s origin or longtime residence; banishment.” *Id.*

<sup>3</sup> Numerous commentators have asserted the same. *See, e.g.*, Hum. Rts. Comm., General Comment 27 on Freedom of Movement, U.N. Doc. CCPR/C/21/Rev.1/Add.9, ¶ 19 (1999) [hereinafter CCPR General Comment 27] (Article 12.4 “implies the right to remain own’s country”); Hum. Rts. Comm., Adoption of Views on Communication No. 538/1993, *Stewart v. Canada*, U.N. Doc. CCPR/C/58/D/538/1993, at 20 (Nov. 1, 1996) (dissenting opinion of Elizabeth Evatt & Cicilia Medina Quiroga, co-signed by Francisco José Aguilar Urbina) [hereinafter CCPR *Stewart*] (“If a State party is under an obligation to allow entry of a person, it is prohibited from deporting that person.”); *id.* at 23 (dissenting opinion of Prafullachandra Bhagwati) (“[A]rticle 12, paragraph 4, protects everyone against arbitrary deportation from his own country...”). *See also* U.N. GAOR, 14th Sess., 954–59th mtgs., U.N. Doc. A/C.3/SR.954–A/C.3/SR.959 (1959) (making it abundantly clear that the States negotiating the ICCPR contemplated that Article 12.4 would include a prohibition against expulsion (exile)); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) (“[D]eportation is a drastic measure and at times the equivalent of banishment or exile...”).

<sup>4</sup> ICCPR, *supra* note 1, art. 12.4.

<sup>5</sup> In the United States, it is unconstitutional to banish American citizens since such banishments violate the Constitution’s prohibition against the infliction of “cruel and unusual” treatment. *Trop v. Dulles*, 356 U.S. 86, 101–03 (1958) (describing banishment as “a fate universally decried by civilized people”).

<sup>6</sup> Indeed, we label the banishments of non-immigrants from their own countries with the less dramatic words “deportation” and “removal.”

from a country with which they have strong attachments, their removal results in the loss of relationships, including perhaps the loss of a home, friends, family, property, a professional career, and the like.<sup>7</sup> That loss and pain can be felt equally between citizens and noncitizens.

Customary rules of treaty interpretation show that “arbitrarily” as used in Article 12.4 is actually an exceedingly strict standard. Only in extremely rare cases may a State expel someone from their own country. This is true for both citizens and noncitizens, and for both documented and undocumented noncitizens.

As a result, the ICCPR right to remain in one’s own country is a right that should prove to be particularly valuable to the many people in the world who have lived in, and established a relationship with, a country which is not their country of citizenship—including lawful permanent residents, long-term refugees, Dreamers and other long-term undocumented residents, and people born in countries without birthright citizenship. These people cannot be deported from the countries they call home.

By using customary rules of treaty interpretation, as codified in the Vienna Convention on the Law of Treaties (VCLT),<sup>8</sup> and by referencing and supporting the jurisprudence of the Human Rights Committee (which has come to a similar set of conclusions), this article demonstrates the validity of this interpretation of ICCPR Article 12.4. Again, Article 12.4 provides that “[n]o one shall be arbitrarily deprived of the right to enter his own country.” The ambiguous terms in Article 12.4 that require interpretation are “his own country” and “arbitrarily.” This article will interpret those terms. Specifically, in Part I, this article interprets the phrase “own country” as it is used in Article 12.4. Part II interprets the word “arbitrarily.” Part III addresses the incorrect suggestion that the interpretation of these two terms might be interrelated.

Before concluding this introduction, a few additional prefatory comments are appropriate. First, this article will use the words “expulsion,” “banishment,” and “exile” largely interchangeably.<sup>9</sup> With regard to noncitizens, the words “deportation” and “removal” will also be used. Second, although normative arguments support some of the following analysis, this

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<sup>7</sup> Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (asserting that deportation can result in the “loss . . . of all that makes life worth living”). Justice Frankfurter would repeat this lament three decades later. Galvan v. Press, 347 U.S. 522, 350 (1954). See also Fong v. United States, 149 U.S. 698, 759 (1893) (Field, J., dissenting) (“The punishment [of deportation] is beyond all reason in its severity. . . . As to its cruelty, nothing can exceed a forcible deportation from a country of one’s residence, and the breaking up of all the relations of friendship, family and business there contracted.”).

<sup>8</sup> United Nations Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

<sup>9</sup> BLACK’S LAW DICTIONARY, *supra* note 2.

article is primarily engaged in interpreting Article 12.4 of the ICCPR and is not making a wholesale normative or moral argument for the right to remain.<sup>10</sup> Third, Article 12.4 is binding only on those States who are parties to the ICCPR (and who have not otherwise made a reservation regarding Article 12.4). The vast majority of the United Nations membership are States parties to the ICCPR.<sup>11</sup> When describing the international obligations States have pursuant to Article 12.4, in order to avoid clumsy writing, this article will often not expressly limit the scope of this obligation to the ICCPR States parties, leaving it to the reader to imply this limitation. Fourth and finally, the substance of much of the article can also be found in a previous work the author published in 2020. That publication, however, focused on the plight of DACA recipients and other Dreamers in the United States, and spent considerable time expounding on the ostensible non-self-executing nature of the ICCPR within the United States' constitutional system.<sup>12</sup> This article updates and reshapes that discussion of Article 12.4 and repurposes it for an international audience by stripping away most references to issues specific to the United States and focusing solely on the interpretation of Article 12.4.

## I. THE INTERPRETATION OF ONE'S "OWN COUNTRY"

The ICCPR provision, "[n]o one shall be arbitrarily deprived of the right to enter his own country,"<sup>13</sup> contains two terms that are ambiguous and

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<sup>10</sup> For moral arguments that jibe with the legal argument presented herein and the principles that apparently animate the ICCPR, see Joseph H. Carens, *Global Justice: Who Gets the Right Stay?*, BOSTON REV. (Jan. 23, 2018), <http://bostonreview.net/global-justice/joseph-h-carens-who-gets-right-stay> ("[T]he moral right of states to apprehend and deport irregular migrants erodes with the passage of time" and suggesting that a right to stay vests after only ten years); Linda Bosniak, *Being Here: Ethical Territoriality and the Rights of Immigrants*, 8 THEORETICAL INQ. L. 389, 392, 405 (2007) (promoting the normative value of "ethical territoriality," the view that a person should have rights vis-à-vis the State by virtue of their presence within that State's territory, including, perhaps, on the basis their "lead[ing] a life" within the territory, the right not to be deported; and asserting that "ethical territoriality honors the egalitarian and anti-caste commitments to which liberal constitutionalism purports to aspire"); see generally JOSEPH H. CARENS, IMMIGRANTS AND THE RIGHT TO STAY (2010); Elizabeth F. Cohen, *Reconsidering US Immigration Reform: The Temporal Principle of Citizenship*, 9 PERSP. POL. 575 (2011).

<sup>11</sup> As of the date of publication, there are 173 ICCPR States parties. *ICCPR, Accession, Succession, Ratification Table*, UNITED NATIONS [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) (last visited May 9, 2022).

<sup>12</sup> See Timothy E. Lynch, *The ICCPR, Non-Self-Execution, and DACA Recipients' Right to Remain in the United States*, 34 GEO. IMMIGR. L.J. 324 (2020).

<sup>13</sup> ICCPR, *supra* note 1, art. 12.4. There are no exceptions to this rule except for the ICCPR's general derogation provision, which can only be triggered "[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed." *Id.* art. 4.1. Compare ICCPR, *supra* note 1, art. 12.4 with G.A. Res. 217(III) A, Universal Declaration of Human Rights art. 13 (Dec. 10, 1948) [hereinafter UDHR] ("Everyone has the right to leave any country, including his own, and to return to his country.").

require interpretation. The first is “own country” (or “his own country”). The second term is “arbitrarily.” To interpret these terms, we turn to the customary rules of treaty interpretation as codified in the VCLT.

The customary methods of treaty interpretation, including examination of the preparatory works, along with an examination of the jurisprudence of the Human Rights Committee, strongly suggest that a country is someone’s “own country” if their ties to that country are extensive and deep enough. Consequently, a country can be a noncitizen’s own country (including even when the noncitizen is undocumented).

### A. *Customary Rules of Treaty Interpretation*

The VCLT states that a treaty is to be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>14</sup> The VCLT permits recourse to additional means of treaty interpretation if the application of the primary treaty interpretation rule yields a meaning that is “ambiguous or obscure” or “manifestly absurd or unreasonable.”<sup>15</sup> Such supplemental means of interpretation include analysis of the preparatory works associated with the treaty’s negotiation and adoption.<sup>16</sup>

#### 1. *Ordinary Meaning*

The ordinary meaning of “country” is plain and requires no elaboration here. The word “own” (or the phrase “his own”) is another matter.<sup>17</sup> A relevant definition of the word “own” is “of, relating to, or belonging to oneself or itself (usually used after a possessive to emphasize the idea of ownership,

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<sup>14</sup> VCLT, *supra* note 8, art. 31.1.

<sup>15</sup> *Id.* art. 32.

<sup>16</sup> *Id.*

<sup>17</sup> The Chinese, French, Russian, and Spanish versions of the ICCPR are as “equally authentic” as the English version. ICCPR, *supra* note 1, art. 53.1. The Chinese version of Article 12.4 is “人人进入其本国之权，不得无理褫夺。” The French, “Nul ne peut être arbitrairement privé du droit d'entrer dans son propre pays.” The Russian, “Никто не может быть произвольно лишен права на въезд в свою собственную страну.” And the Spanish, “Nadie podrá ser arbitrariamente privado del derecho a entrar en su propio país.” See VCLT, *supra* note 8, art. 33.3 (“The terms of [a] treaty are presumed to have the same meaning in each authentic text.”); *id.* art. 33.4 (“[W]hen a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 [of the VCLT] does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.”). It is beyond the scope of this article to independently interpret the non-English versions.

interest, or relation conveyed by the possessive.)”<sup>18</sup> This definition is rather nebulous, and one runs the risk of engaging in confirmation bias when trying to apply it, at least in the context of one’s “own country.” Nevertheless, some initial observations can be made. First, one cannot possess a country like one can possess a car or a house, of course, but a person can be “of” a country or can have a “relationship to” a country or an “interest” in a country. Second, there is nothing inherent in the word “own” (or “his own”) that would limit its applicability to citizens of a country.

With regard to the ordinary meaning of the entire phrase “his own country,”<sup>19</sup> it would appear that the country of one’s citizenship qualifies as an “own country” of that person. After all, the relationship of citizenship is a strong one.<sup>20</sup> But a country could also be one’s “own” if a person has strong and intimate relationships to, or interests in, that country, especially if he or she does not have such connections to another country. Factors to consider in order to determine if a country is one’s “own” might include the length of one’s residence, family connections, friends and other social ties, professional relationships, professional credentials earned and recognized in the country, ability to speak the language(s) of the country, acculturation in the country, intention to remain in the country, and so on.<sup>21</sup>

## 2. Context

Regarding the context of the phrase “his own country,” it is particularly notable that Article 12.4 does not use the word “citizen” or “national.” It does not speak of “the country of which he is a citizen” or “the country of which he is a national.” Additionally, the subject of Article 12.4 is “no one”—not

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<sup>18</sup> *Own*, DICTIONARY.COM, <https://www.dictionary.com/browse/own> (last visited May 9, 2022). Merriam-Webster provides a similar definition: “belonging to oneself or itself.” *Own*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/own> (last visited May 9, 2022).

<sup>19</sup> It is curious that Article 12.4 does not refer to “one’s country,” but rather refers to “one’s *own* country.” However, there appears to be no relevant or substantive difference between the two phrases. Indeed, there is nothing in the ordinary meaning or context of Article 12.4 or in the object and purpose or the negotiating history of the ICCPR that would suggest that the insertion of “own” between “one’s” and “country” was anything other than a reflection of natural English usage.

<sup>20</sup> It seems wholly possible, however, that someone might not have any particularly intimate ties or special links to the country of one’s citizenship such that that country would not constitute their “own country” within the meaning of Article 12.4. However, this article is largely hostile to any possibility of interpreting Article 12.4 in such a way that a person might not have the right to enter their country of citizenship.

<sup>21</sup> See Memorandum from Alejandro N. Mayorkas, Sec’y of Homeland Sec., to Tae D. Johnson, Acting Dir., U.S. Immigr. & Customs Enf’t., Guidelines for the Enforcement of Civil Immigration Law (Sept. 30, 2021), <https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf> (stating that one of the “mitigating factors” that might prevent the removal of someone from the United States is their “lengthy presence in the United States”).

“no citizen” or “no national.” Indeed, Article 12.4 conspicuously avoids the terms “citizen” and “national.” The significance of these observations is particularly strong since the ICCPR refers to “citizens” and “nationals” in other provisions,<sup>22</sup> strongly suggesting that the countries that adopted the ICCPR did not intend to confine Article 12.4 rights to citizens (or nationals) alone.

It might be argued that ICCPR Article 13 somehow limits the scope of Article 12.4 to citizens alone. Article 13 states, “An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law. . .,” and provides some other procedural safeguards.<sup>23</sup> Some might argue that since the ICCPR provides a process for expelling noncitizens (“aliens”), a noncitizen cannot possibly have the right to remain in a host country.<sup>24</sup> This conclusion, however, is not dictated by Article 13 at all. Article 13 simply demands that certain due process protections be applied before a country can expel a noncitizen who is lawfully present in its territory, not that any and all noncitizens can be expelled provided such protections are afforded.<sup>25</sup> Noncitizens are entitled to these due process protections provided they are “lawfully” within the country, *and* they are entitled to remain in their host countries provided those host countries are, or have become, their own.<sup>26</sup> Indeed, the process of providing due process protections should reveal facts that could enable an administrative or judicial body considering expulsion to

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<sup>22</sup> *E.g.*, ICCPR, *supra* note 1, art. 25(a) (granting the right to “take part in the conduct of public affairs, directly or through freely chosen representatives” only to citizens); *id.* art. 25(b) (granting the right “to vote and to be elected” for public office only to citizens); *id.* art. 25(c) (granting “access... to public service” only to citizens); *id.* art. 28(2) (limiting the composition of the Human Right Committee to “nationals” of States parties); *see also id.* art. 29(2) (stating that persons nominated to the Human Rights Committee “shall be nationals of the nominating State”); *id.* art. 31(1) (“The Committee may not include more than one national of the same State.”).

<sup>23</sup> *Id.* art. 13.

<sup>24</sup> *See, e.g.*, CCPR *Stewart*, *supra* note 3, ¶ 12.3.

<sup>25</sup> *See Ahmadou Sadio Diallo* (Rep. of Guinea v. Dem. Rep. of Congo), Judgment, 2010 I.C.J. Rep. 639, ¶ 65 (Nov. 2010) (“[I]t is clear that while ‘accordance with law’... is a necessary condition for compliance with [art. 13], it is not the sufficient condition...[T]he applicable domestic law must itself be compatible with the other requirements of the [ICCPR].”) [hereinafter ICJ Diallo].

<sup>26</sup> *But see CCPR Stewart*, *supra* note 3 (arguing that an alien either qualifies for Article 12.4 treatment or for Article 13 treatment, but never both). One concurrence and several dissenting opinions criticized this approach, and it was later abandoned by the Human Rights Committee. *See also infra* notes 106–22 and accompanying text.



conclude that the host country has become that person's own country.<sup>27</sup> Such a determination would foreclose the possibility of expulsion.<sup>28</sup>

### 3. *Object and Purpose*

The interpretation of “his own country” must also be made “in light of the object and purpose” of the ICCPR. Its object and purpose can be gleaned from its preamble, which states that it is to enhance “freedom, justice and peace in the world” through the “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family.”<sup>29</sup> These rights are understood to “derive from the inherent dignity of the human person.”<sup>30</sup> More concretely, the object and purpose of the ICCPR is to restrict States from impinging on the freedoms of human individuals and, in some cases, to obligate States to provide certain services to people so that their freedoms and dignity can be better realized.<sup>31</sup> But this does not provide much direct interpretive guidance since States are certainly free to act in a variety of ways to restrict the human individual. The ICCPR does not render States impotent.

However, given that the focus of the ICCPR is the protection of people, typically in their capacity as human individuals, and the corresponding restrictions on State behavior it demands, it would be reasonable, if not incumbent, to interpret ambiguous terms and phrases within the ICCPR in a way that favors the human individual and disfavors State restrictions on freedoms of the human individual.<sup>32</sup> As the Human Rights Committee's

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<sup>27</sup> More precisely, only aliens “lawfully in the territory of a State Party” are entitled to due process protections, whereas Article 12.4 applies to everyone, both lawfully present aliens and unlawfully present ones. It might seem curious at first blush that unlawfully present aliens are not explicitly entitled to due process protections but yet may be entitled to a more valuable right—the right to remain in a country. However, the more valuable or fundamental a right, the more important it is to award to everyone. And, regardless, an alien whose host country has become their own country is, by virtue of Article 12.4, lawfully within the territory of the country.

<sup>28</sup> Admittedly, there is no ICCPR provision that expressly requires due process rights be granted to undocumented noncitizens who are undergoing deportation processes. This observation does not undermine the fact that these individuals may have the right to remain in the country. And due process rights can be found in other sources of law besides the ICCPR.

<sup>29</sup> ICCPR, *supra* note 1, pmbl.

<sup>30</sup> *Id.*

<sup>31</sup> See generally Burns H. Weston, *Human Rights*, 6 HUM. RTS. Q. 257 (1984); THE OXFORD HANDBOOK ON INTERNATIONAL HUMAN RIGHTS LAW (Dinah Shelton ed., 2013).

<sup>32</sup> The *pro homine* principle encourages the interpretation of human rights treaties that increases the protection of the human person as opposed to interpretations that protect State sovereignty. Valerio de Oliveira Mazzouli & Dilton Ribeiro, *The Pro Homine Principle as an Enshrined Feature of International Human Rights Law*, 3 INDON. J. INT'L & COMP. L. 77 (2016). See also *Asakusa v. City of Seattle*, 265 U.S.

Prafullachandra Bhagwati stated in his dissent in *Stewart v. Canada*, the human rights in the ICCPR are “rights of the individual against the State; they are protections against the State and they must therefore be construed broadly and liberally.”<sup>33</sup> If the answer to the question of whether a country can be a noncitizen’s own country is somewhat uncertain even at this point in our analysis, a broad and liberal interpretation of the ICCPR, one motivated for the protection of the individual, must yield the answer: Yes, a country can be a noncitizen’s own.<sup>34</sup>

#### 4. *Preparatory Works*

As stated earlier, the VCLT permits recourse to additional means of treaty interpretation if the application of the primary method of treaty interpretation yields a meaning that is “ambiguous or obscure” or “manifestly absurd or unreasonable.”<sup>35</sup> It may be fair to conclude that the answer to the question of whether a noncitizen can enjoy Article 12.4 rights remains somewhat ambiguous even after applying the primary methods of treaty interpretation. And, indeed, it is likely that some people may consider it manifestly absurd and/or unreasonable that noncitizens would be entitled to

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332, 342 (1924) (“Treaties are to construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights which may be claimed under it and the other favorable to them, the latter is to be preferred.”); *Disconto Gesellschaft v. Umbreit*, 208 U.S. 570, 581 (1908) (“[T]reaties should be liberally interpreted with a view to protecting the citizens of the representative countries in rights thereby secured.”).

It is a common response to such arguments that state “sovereignty” somehow militates against the obligation of States to conform to international immigration laws, but it is the very nature of international law, including international human rights and immigration law, to limit sovereign powers. The ICCPR is international law, and its States parties are legally bound to adhere to its provisions. International law that concerns immigration is not exempted. See Louis Henkin, *That “S” Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 *FORDHAM L. REV.* 1 (1999). Indeed, many people have rights pursuant to regional economic integration treaties to cross international frontiers into countries of which they are not citizens, and arguments of “sovereignty” do not undermine these rights. See, e.g., Consolidated Version of the Treaty on the Functioning of the European Union, arts. 26, 45, May 9, 2008, 2008 O.J. (C 115) 47; Acuerdo sobre Regularización Migratoria Interna de Ciudadanos del Mercosur, Bolivia y Chile [Agreement on Regularization of Internal Migration of Citizens of Mercosur, Bolivia and Chile], Ley No. 3577 [Law No. 3577], 14-08-2008 (Para.); Protocol Relating to Free Movement of Persons, Residence and Establishment, 1 *OFFICIAL J. ECOWAS* 3 (1979).

<sup>33</sup> *CCPR Stewart*, *supra* note 3, at 23.

<sup>34</sup> See also *Session v. Morales-Santana*, 137 S.Ct. 1678, 1700 (2017) (citing *Rogers v. Bellei*, 401 U.S. 815, 834 (1971)) (recognizing in a case concerning citizenship requirements under the Immigration and Nationality Act that Congress considers “the importance of *residence in this country* as the talisman of dedicated attachment.”) (emphasis added); ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW*, VOL. II, 442 (1972) (“[I]t has never been envisioned that there should be any group of underprivileged refugees, subject to the whims of the authorities... [A]s a state would not dream of expelling its own nationals . . . there is hardly any reason for a state to press too hard for the expulsion of refugees [, and, therefore,] after a period of *some three years*, the interests of the refugee in remaining where he is, must normally be held to override any other consideration.”) (emphasis added).

<sup>35</sup> VCLT, *supra* note 8, art. 32.

maintain permanent residence in their host countries despite the host countries' wishes. (Certainly, others would see no absurdity or unreasonableness in such an interpretation.) The use of additional means of interpretation, therefore, seems wholly appropriate.<sup>36</sup>

The supplemental means of interpretation consist essentially of an examination of the preparatory works (negotiation history or *travaux préparatoires*)<sup>37</sup> associated with the treaty's negotiation and adoption and, more generally, the circumstances of the text's adoption.<sup>38</sup> The preparatory works of Article 12.4 confirm the interpretation above.

The ICCPR was negotiated under the auspices of the United Nations starting in the years immediately after World War II. It was heavily negotiated, and its text was concluded in December 1966.<sup>39</sup> The preparatory works associated with Article 12.4 shed some light on its meaning. Most significantly, in November 1959, a few days prior to the adoption of the current form of Article 12.4, Canada, at a meeting of the Third Committee of the General Assembly, formally proposed to amend the draft of the text of what would become Article 12.4, suggesting language that no one could be deprived of the right to enter "the country of which he is a citizen."<sup>40</sup> Such

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<sup>36</sup> The VCLT allows the use of additional interpretation methods in order to "confirm the meaning" resulting from the application of the primary interpretation method. *Id.*, art. 32. Thus, even if we were to conclude that the meaning generated solely from the primary method of interpretation—here, at this point, that noncitizens may enjoy Article 12.4 rights—is neither manifestly absurd, manifestly obscure, ambiguous nor obscure, it is a worthwhile exercise to examine the preparatory works associated with Article 12.4 and the circumstances of its negotiation.

<sup>37</sup> It has been suggested that giving considerable weight to negotiation history in the context of a multilateral treaty is somewhat problematic since not all treaty parties participate in the treaty negotiations and because resort to legislative history is contrary to the legal traditions of many States. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 325, note 1 (AM. L. INST. 1987). *But see* Draft Articles on the Law of Treaties with Commentaries, [1966] 2 Y.B. INT'L COMM'N 233, U.N. Doc. A/6309/Rev.1 (observing that States considering accession to a treaty have access to its *travaux préparatoires*).

<sup>38</sup> VCLT, *supra* note 8, art. 32.

<sup>39</sup> *Status of Treaties: International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION, [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) (last visited May 12, 2022).

<sup>40</sup> U.N. GAOR, 14th Sess., 954th mtg. at 231–32, ¶ 25, U.N. Doc. A/C.3/SR.954 (Nov. 12, 1959) [hereinafter ICCPR Preparatory Works SR.954]. The draft of Article 12 submitted for the General Assembly's consideration in November of 1959 was as follows:

1. Subject to any general law of the State concerned which provides for such reasonable restrictions as may be necessary to protect national security, public safety, health or morals or the rights and freedoms of others, consistent with the other rights recognized in this Covenant:
  - a. Everyone legally within the territory of a State shall, within that territory, have the right to (i) liberty of movement and (ii) freedom to choose his residence;
  - b. Everyone shall be free to leave any country, including his own.
2.
  - a. No one shall be subjected to arbitrary exile.

language would clearly exclude noncitizens from the benefit of the right to enter and to remain in their host countries. This proposal, however, was met with relatively widespread opposition from other member States of the committee.<sup>41</sup>

Some countries opposed granting the right of entry to citizens alone because a State can manipulate who is, and who is not, a citizen. It was observed that any State that wanted to exile a citizen could simply withdraw citizenship and thus avoid the obligations of Article 12.4.<sup>42</sup> Curiously, no State proposed language that would limit the scope of Article 12.4 to citizens while providing an exception in the event of State manipulation.

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b. Subject to the preceding sub-paragraph, anyone shall be free to enter his own country.

Draft Int'l Covenants on Hum. Rts., U.N. Doc. A/4299, ¶ 3 (Dec. 3, 1959).

There is abundant reason to conclude that the text of the language of Article 12.2.b. that was introduced in 1959 to the General Assembly was adopted by early State drafting subcommittees to include noncitizens. Ten years earlier, Lebanon first formally introduced the idea of including a right to return to a country. U.N., Econ. & Soc. Council, Comm'n on Hum. Rts., Draft Int'l Covenant on Hum. Rts., Lebanon: Amends. to Art. 11, U.N. Doc. E/CN.4/215 (May 20, 1949) (proposing "... every one has the right... [t]o leave any country, including his own, and to return to his country"). The Commission on Human Rights would instead adopt a counter-proposal by France providing that "[e]veryone is free to return to the country of which he is a national." U.N. ESCOR, 5th Sess., 106th mtg. at 8–10, U.N. Doc E/CN.4/SR.106 (June 8, 1949). A year later, Australia proposed using the phrase "his own country." U.N., Econ. & Soc. Council, Comm'n on Hum. Rts., Comments of Governments on the Draft Int'l Covenant on Hum. Rts. and Measures of Implementation, at 8, U.N. Doc. E/CN.4/353/Add.10 (Mar. 22, 1950); U.N., Econ. & Soc. Council, Comm'n on Hum. Rts., Rep. on the Work of Its Sixth Session, at 23, U.N. Doc. E/1681 (May 25, 1950). Australia argued that the right to return to a country should extend to people who "had established their home in [a] country" or who "had long resided in a country and might be said to have settled there, although they might still retain the nationality of some other country." U.N. ESCOR, 6th Sess., 151st mtg., ¶¶ 49, 52, U.N. Doc. E/CN.4/SR.151 (Apr. 19, 1950). Australia's amendment was rejected by a vote of seven to six with one abstention. *Id.* ¶ 66. Australia persisted and two years later, in 1952, Australia proposed replacing "the country of which he is a national" in the then-current version of what would become paragraph 2(b) above with "his own country." U.N., Econ. & Soc. Council, Comm'n on Hum. Rts., Draft Int'l Covenant on Hum. Rts. and Measures of Implementation: Revised Amend. to Art. 8, U.N. Doc. E/CN.4/L.189/Rev.1 (May 29, 1952). Australia argued that the right should extend to people who have a "permanent residence" in a country, and the expressions "citizen" or "national" were inadequate to cover all such people. U.N. ESCOR, 8th Sess., 315th mtg., at 6, U.N. Doc. E/CN.4/SR.315 (May 29, 1952). This time the Commission on Human Rights adopted Australia's proposal by a vote of ten to two with six abstentions. U.N. ESCOR, 8th Sess., 316th mtg. at 5, U.N. Doc. E/CN.4/SR.316 (May 29, 1952). Thus, it was this eighth session of the Economic and Social Council's Commission on Human Rights that adopted the language reprinted above, the language that would be submitted to the General Assembly in 1959 for its consideration. *See also* MARC J. BOSSUYT, GUIDE TO THE "TRAVAUX PRÉPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 260–65 (1987).

<sup>41</sup> U.N. GAOR, 14th Sess. 957th. mtg. at 241, ¶ 1, U.N. Doc. A/C.3/SR.957, (Nov. 16, 1959) [hereinafter ICCPR Preparatory Works SR.957].

<sup>42</sup> *See, e.g.*, ICCPR Preparatory Works SR.954, *supra* note 40, ¶ 35 (Summary Statement of Italy). Framed another way, a State could choose who *not* to give citizenship to, thus denying those persons the rights associated with citizenship. States have an almost unrestricted sovereign right to decide for themselves who is and is not their citizens, despite the fact that such decisions may be discriminatory or ungenerous. *See generally* Peter J. Spiro, *A New International Law of Citizenship*, 105 AM. J. INT'L L. 694 (2011) (acknowledging this fact but suggesting that it might be changing).

After receiving only limited support, Canada withdrew its proposed amendment.<sup>43</sup> It is not apparent otherwise to what extent the negotiating States contemplated or intended Article 12.4 to encompass noncitizens, let alone undocumented noncitizens. Many States acknowledged that the language “his own country” was vague.<sup>44</sup> Of the sixty or so States that participated in these negotiations, only four declared for the record, either after Canada withdrew its proposal or in contemplation of such a withdrawal, that they understood 12.4 to be limited to either citizens or nationals: Canada,<sup>45</sup> Czechoslovakia,<sup>46</sup> Japan,<sup>47</sup> and the United Kingdom.<sup>48</sup> One State, Saudi Arabia, declared an opposing sentiment, observing that “it would be dangerous to make the right of everyone to enter his own country dependent on the fact of being a national. To include that idea of being a national would open the way to arbitrary action and help to increase the number of refugees.”<sup>49</sup> No country remarked upon the Saudi statement.<sup>50</sup>

Although an analysis of the preparatory works does not yield a perfectly conclusive understanding of whether the negotiating countries intended the

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<sup>43</sup> ICCPR Preparatory Works SR.957, *supra* note 41, ¶ 1 (Summary Statement of Canada).

<sup>44</sup> *E.g., id.* ¶ 13 (Summary Statement of India); *id.* ¶ 19 (Summary Statement of the United Kingdom).

<sup>45</sup> *Id.* ¶ 1 (Summary Statement of Canada,).

<sup>46</sup> U.N. GAOR, 14th Sess., 958th mtg. at 245, ¶ 5, U.N. Doc. A/C.3/SR.958 (Nov. 17, 1959) [hereinafter ICCPR Preparatory Works SR.958] (Summary Statement of Czechoslovakia declaring that Czechoslovakia understands Article 12.4 as articulating a right to enter a country “whose citizenship had been bestowed upon the person in question in accordance with that State’s laws and regulations”). Czechoslovakia’s statement seems distastefully self-serving, however, since it seems largely motivated by Czechoslovakia’s desire not to be held liable to or for any of the 2.5 million ethnic Germans forcefully expelled by Czechoslovakia from Czechoslovak territory in the immediate aftermath of World War II in an Allied-sanctioned ethnic cleansing process that Czechoslovak President Edvard Beneš referred to as “the final solution of the German question.” *Id.* (“Those [Sudeten] Germans were not Czechoslovak citizens and Czechoslovakia was not their own country.”). Hundreds of thousands of ethnic Germans were killed or died from hunger, illness, and suicide during the expulsion campaigns in Czechoslovakia and elsewhere in Eastern Europe. *See generally* R.M. DOUGLAS, ORDERLY AND HUMANE: THE EXPULSION OF THE GERMANS AFTER THE SECOND WORLD WAR (2012).

<sup>47</sup> U.N. GAOR, 14th Sess., 956th mtg. at 239, ¶ 30, U.N. Doc. A/C.3/SR.956, (Nov. 13, 1959) [hereinafter ICCPR Preparatory Works SR.956] (Summary Statement of Japan declaring that Japan understands Article 12.4 as articulating a right to enter a country of which a person is a “national”).

<sup>48</sup> ICCPR Preparatory Works SR.957, *supra* note 41, ¶ 19 (Summary Statement of the United Kingdom). Additionally, the delegate from Pakistan stated that in order to take advantage of Article 12.4, a person “should always be able to prove, in accordance with the law of the country concerned, that he was a national of the country.” ICCPR Preparatory Works SR.956, *supra* note 47, ¶ 1 (Summary Statement of Pakistan); ICCPR Preparatory Works SR.954, *supra* note 40, ¶ 36 (Summary Statement of Pakistan). The delegate from Yugoslavia formally thanked Canada for withdrawing its amendment, which it considered “superfluous.” ICCPR Preparatory Works, SR.957, *supra* note 41, ¶ 7 (Summary Statement of Yugoslavia).

<sup>49</sup> ICCPR Preparatory Works SR.957, *supra* note 41, ¶ 25 (Summary Statement of Saudi Arabia).

<sup>50</sup> Afghanistan formally thanked Canada for withdrawing its amendment since that amendment could “give rise to restrictive interpretations.” *Id.* ¶ 15 (Summary Statement of Afghanistan). It is not evident what Afghanistan was specifically contemplating. Italy also formally thanked Canada for withdrawing its amendment. *Id.* ¶ 28 (Summary Statement of Italy). The United States delegate made no remarks about whether Article 12.4 was or should be limited to citizens or nationals.

scope of Article 12.4 to include noncitizens,<sup>51</sup> the following observations are warranted. First, an amendment to explicitly limit the scope of Article 12.4 to citizens was roundly rejected. Second, the States parties knew that “his own country” was vague and yet were comfortable enough to adopt this language. These two observations alone strongly suggest that the right contained in Article 12.4 is not limited to citizens (or nationals) of a State. And third, absent a reservation, a State’s declared understanding made during the process of negotiations of what a treaty provision should mean is not dispositive as to that provision’s meaning, even regarding the provision’s application to that particular State.

*B. Jurisprudence of the Human Rights Committee*

The Human Rights Committee was established pursuant to the ICCPR<sup>52</sup> and is tasked with evaluating the implementation of the ICCPR by the States parties and with making general comments regarding the interpretation and application of the ICCPR.<sup>53</sup> Pursuant to the first Optional Protocol of the ICCPR, several States parties have recognized the competency of the Human Rights Committee to receive and consider complaints from individuals who believe that one or more of their ICCPR rights are being, or are about to be, violated by that State party.<sup>54</sup>

The States parties have not, however, designated the Human Rights Committee as the authoritative interpretive body of the ICCPR. In fact, there is no institution, judicial or otherwise, designated with the authority to definitively interpret the ICCPR for all parties.<sup>55</sup> Nevertheless, the Human Rights Committee has interpreted and applied the ICCPR’s human rights provisions far more than any other institution. Its reports, comments, and adopted views are particularly considered and should inform our

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<sup>51</sup> For a discussion of how the debate on the inclusion of the word “arbitrarily” and the meaning of the word “exile” shed some light on this issue, see *infra* Section II.A.4.

<sup>52</sup> ICCPR, *supra* note 1, art. 28.

<sup>53</sup> *Id.* art. 40.4.

<sup>54</sup> Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171. As of May 2022, 117 States have recognized this competency. *Optional Protocol to the ICCPR*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-5&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&clang=_en) (last visited May 12, 2022).

<sup>55</sup> For a discussion of which interpretive bodies have (and do not have) the authority to interpret treaties, see Ernest A. Young, *Treaties as “Part of Our Law,”* 88 TEX. L. REV. 91, 95–97 (2009). See also Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 YALE. L.J. 1762 (2009) (asserting that supranational bodies lack authority to definitively interpret treaties vis-à-vis the United States).

understanding of the meaning of the ICCPR.<sup>56</sup> Ideally, all parties to the ICCPR, as with any treaty, should understand and interpret the ICCPR uniformly. The Human Rights Committee can be influential in bringing about a harmonized understanding.<sup>57</sup> Consequently, it is illuminating to see how the Committee has interpreted and applied Article 12.4.

The Human Rights Committee has stated, unsurprisingly, that the country of one's nationality (or citizenship) qualifies as one's "own country."<sup>58</sup> But the Committee has invariably also stated that the phrase "his own country" is "broader than the concept 'country of his nationality.'"<sup>59</sup> This latter conclusion is based largely on the ordinary meaning of the text of Article 12.4,<sup>60</sup> the fact that the provision is not expressly limited to "nationals,"<sup>61</sup> and the fact that the negotiating States in 1959 rejected Canada's proposal to limit reentry rights to citizens.<sup>62</sup> The Human Rights Committee has repeatedly elaborated upon its interpretation, saying that Article 12.4 "embraces, at the very least, an individual who, because of his special ties to or claims in relation

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<sup>56</sup> See generally ICJ Diallo, *supra* note 25, ¶ 66 (asserting that the ICJ "should ascribe great weight" to the interpretations adopted by the Human Rights Committee, in large part in order "to achieve the necessary clarity and the essential consistency of international law"); Sandy Gandhi, *Human Rights and the International Court of Justice: The Ahmadou Sadio Diallo Case*, 11 HUM. RTS. L. REV. 535, 527–55 (2011) (acknowledging that although the Human Rights Committee's General Comments "are not in themselves strictly speaking binding ... they constitute an authoritative guidance and interpretation of [the ICCPR]").

<sup>57</sup> United States Supreme Court Justice Antonin Scalia was a proponent of uniform interpretation of multilateral treaty provisions and respecting others' reasonable interpretations. See Justice Antonin Scalia, Sup. Ct. Justice, Remarks to the American Enterprise Institute: Outsourcing American Law (Feb. 21, 2006).

<sup>58</sup> E.g., CCPR Stewart, *supra* note 3, ¶¶ 12.3–12.4 (stating that "his own country" "embraces" the concept "country of his nationality" and that there is a set of people "in addition to nationals" that Article 12.4 protects); *id.* at 20 (dissenting opinion of Elizabeth Evatt and Cecilia Medina Quiroga, co-signed by Francisco José Aguilar Urbina) ("[A] person's 'own country' would certainly include the country of nationality..."); CCPR General Comment 27, *supra* note 3, ¶ 20 ("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."); Hum. Rts. Comm., Adoption of Views on Communication No. 2264/2013, *Budlakoti v. Canada*, U.N. Doc. CCPR/C/122/D/2264/2013, ¶ 9.2 (Apr. 6, 2018) [hereinafter CCPR *Budlakoti*]. Although the Human Rights Committee, in the context of Article 12.4, speaks of a person's "nationality" instead of person's "citizenship," it can be implied that nationality encompasses (or is at least synonymous with) citizenship in this regard. See CCPR General Comment 27, *supra* note 3, ¶¶ 19, 20 (asserting that Article 12.4 gives a person the right to enter the country that is the person's "State of nationality" even if that person had been born outside that country and had never been there before and noting that like citizenship, nationality is "acquired at birth or by conferral").

<sup>59</sup> See, e.g., CCPR General Comment 27, *supra* note 3, ¶ 20 (continuing that the scope of "his own country" is "not limited to nationality in the formal sense, that is, nationality acquired at birth or by conferral"); CCPR *Budlakoti*, *supra* note 58, ¶ 9.2; CCPR Stewart, *supra* note 3, ¶ 12.3; Hum. Rts. Comm., Adoption of Views on Communication No. 1557/2007, *Nystrom v. Australia*, ¶ 7.4, U.N. Doc. CCPR/C/102/D/1557/2007 (July 18, 2011) [hereinafter CCPR *Nystrom*]; Human Rights Committee, Adoption of Views on Communication No. 1559/2010, *Warsame v. Canada*, ¶ 8.4, U.N. Doc. CCPR/C/102/D/1559/2010 (Sept. 1, 2011) [hereinafter CCPR *Warsame*].

<sup>60</sup> CCPR General Comment 27, *supra* note 3, ¶ 20; CCPR Stewart, *supra* note 3, ¶ 12.4.

<sup>61</sup> CCPR General Comment 27, *supra* note 3, ¶ 20; CCPR Stewart, *supra* note 3, ¶ 12.4.

<sup>62</sup> CCPR Stewart, *supra* note 3, ¶ 12.5.

to a given country cannot there be considered a mere alien.”<sup>63</sup> The Committee has repeatedly asserted that there are factors other than nationality which may establish close and enduring connections between a person and a country, connections that may be stronger than those of nationality. According to the Committee, the words “his own country” invite consideration of such matters as long-standing residence, close personal and family ties, and intention to remain, as well as to the absence of such ties elsewhere.<sup>64</sup>

The Human Rights Committee has interpreted and applied Article 12.4 in response to six individual communications from noncitizens facing deportation from their host States. In its most recent three cases, *Nystrom v. Australia* (2011),<sup>65</sup> *Warsame v. Canada* (2011),<sup>66</sup> and *Budlakoti v. Canada* (2018),<sup>67</sup> the Committee deemed each of the countries in question to be the noncitizen’s “own country” since the noncitizen’s personal ties to that country were sufficiently strong.

In 2011, in *Nystrom v. Australia*, the Human Rights Committee concluded that Australia was Stefan Lars Nystrom’s “own country” even though Mr. Nystrom was not an Australian citizen.<sup>68</sup> He was a Swedish citizen and held an Australian permanent residency visa until the Australian immigration authorities decided to deport him.<sup>69</sup> Mr. Nystrom’s parents immigrated to Australia from Sweden before he was born.<sup>70</sup> While pregnant with Mr. Nystrom, his mother visited Sweden and gave birth to him there, returning to Australia with Mr. Nystrom when he was twenty-five days old.<sup>71</sup> Mr. Nystrom had few ties to Sweden, never learned Swedish, and had not been in direct contact with any family members there. He spent his whole life, apart from his first twenty-five days, in Australia.<sup>72</sup> He had close ties with his mother, sister, and nephews in Australia.<sup>73</sup> He was not married and had no children.<sup>74</sup> Neither he, nor his parents, had ever applied for Australian

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<sup>63</sup> See, e.g., *id.* ¶ 12.4; CCPR *Nystrom*, *supra* note 59, ¶ 7.4; CCPR *Warsame*, *supra* note 59, ¶ 8.4; CCPR *Budlakoti*, *supra* note 58, ¶ 9.2.

<sup>64</sup> CCPR *Nystrom*, *supra* note 59, ¶ 7.4; CCPR *Warsame*, *supra* note 59, ¶ 8.4; CCPR *Budlakoti*, *supra* note 58, ¶ 9.2; see also CCPR General Comment 27, *supra* note 3, ¶ 20.

<sup>65</sup> CCPR *Nystrom*, *supra* note 59.

<sup>66</sup> CCPR *Warsame*, *supra* note 59.

<sup>67</sup> CCPR *Budlakoti*, *supra* note 58.

<sup>68</sup> CCPR *Nystrom*, *supra* note 59, ¶ 7.5.

<sup>69</sup> *Id.* ¶¶ 1.1, 2.2, 2.4. In fact, pursuant to the terms of his visa, one called an “Absorbed Persons Visa,” he was allowed to vote and run for local elective office. *Id.* ¶ 3.3.

<sup>70</sup> *Id.* ¶ 2.1.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* ¶ 2.2.

<sup>73</sup> *Id.* His parents divorced when he was five, and he had not been in much contact with his father.

<sup>74</sup> *Id.* at 22, ¶ 2.3 (dissenting opinion of Gerald L. Neuman and Yuji Iwasawa).



citizenship.<sup>75</sup> He was thirty-one years old when Australia first issued a deportation order against him.<sup>76</sup> Because of his cultural, social, and familial ties to Australia and his lack of personal relationships anywhere else, the Human Rights Committee deemed Australia to be Mr. Nystrom's "own country" as that phrase is used in Article 12.4 of the ICCPR.<sup>77</sup> As such, Australia was prohibited under the terms of the ICCPR from arbitrarily expelling him.<sup>78</sup>

Also in 2011, in *Warsame v. Canada*, the Human Rights Committee concluded that Canada was Jama Warsame's "own country" even though Mr. Warsame was not a Canadian citizen.<sup>79</sup> He was born in Saudi Arabia to Somali parents.<sup>80</sup> He did not have Saudi citizenship, Somali citizenship, or any other citizenship.<sup>81</sup> He came to Canada with his parents at age four and received permanent residency status at age eight as a dependent of his mother.<sup>82</sup> He was raised in Canada and had limited ability in the language of his parents.<sup>83</sup> He claimed to have close relationships with his mother and sister in Canada.<sup>84</sup> He was not married and had no children.<sup>85</sup> He apparently never applied for Canadian citizenship.<sup>86</sup> He was twenty-two years old when he received his first deportation order.<sup>87</sup> Because of his cultural, social, and familial ties to Canada, and his lack of personal relationships anywhere else, the Human Rights Committee deemed Canada to be Mr. Warsame's "own country" as that phrase is used in Article 12.4 of the ICCPR.<sup>88</sup> As such, Canada was prohibited from arbitrarily expelling him.<sup>89</sup>

<sup>75</sup> *Id.* ¶¶ 2.6, 4.9. He claimed that he had always assumed he was an Australian citizen and that he only learned otherwise at age twenty-nine when the State brought up the possibility of canceling his visa. *Id.* ¶ 2.6.

<sup>76</sup> *Id.* ¶¶ 2.1, 2.4. Australia decided to deport him because of his extensive criminal activity. For a discussion of his crimes and Australia's decision to deport him, see *infra* Section II.B.1.

<sup>77</sup> CCPR *Nystrom*, *supra* note 59, ¶¶ 7.4–7.5.

<sup>78</sup> For a discussion of the meaning of "arbitrarily" as used in ICCPR Article 12.4 and the Human Rights Committee's decision regarding Nystrom, see *infra* Part II.

<sup>79</sup> CCPR *Warsame*, *supra* note 59, ¶ 8.5.

<sup>80</sup> *Id.* ¶¶ 2.1, 8.5. The Canadian authorities assumed that Somalia would recognize him as a citizen as soon as he applied, even though he had not been registered in Somalia and had never been to Somalia. *Id.*

<sup>81</sup> *Id.* ¶¶ 4.2, 4.4.

<sup>82</sup> *Id.* ¶ 2.2.

<sup>83</sup> *Id.* ¶¶ 2.5, 4.4, 8.5.

<sup>84</sup> CCPR *Warsame*, *supra* note 59, ¶¶ 3.6, 5.10.

<sup>85</sup> *Id.* ¶ 4.9.

<sup>86</sup> *Id.* ¶ 6.6.

<sup>87</sup> *Id.* ¶¶ 2.1, 2.3. Canada decided to deport him because of his extensive criminal activity. For a discussion of his crimes and Canada's decision to deport him, see *infra* Section II.B.1.

<sup>88</sup> CCPR *Warsame*, *supra* note 59, ¶¶ 8.4–8.5.

<sup>89</sup> For a discussion of the meaning of "arbitrarily" as used in ICCPR Article 12.4 and the Human Rights Committee's decision regarding Warsame, see *infra* Part II.

Most recently, the Human Rights Committee concluded in 2018 in *Budlakoti v. Canada* that Canada was Deepan Budlakoti's "own country" even though Mr. Budlakoti was not a Canadian citizen.<sup>90</sup> He was born in Canada to Indian parents who had arrived in Canada four years earlier on diplomatic passports to work as domestic servants for Indian diplomats.<sup>91</sup> He lived in Canada his whole life, always considered himself Canadian, and believed he was a Canadian citizen.<sup>92</sup> His parents eventually became Canadian citizens, but formally, Mr. Budlakoti only had permanent residency status under Canadian immigration law.<sup>93</sup> Mr. Budlakoti had a younger brother who was a Canadian citizen by birth.<sup>94</sup> Mr. Budlakoti appears to have been largely estranged from his family, having left home at age thirteen,<sup>95</sup> and at times he had been a ward of the State.<sup>96</sup> He had no spouse and no children.<sup>97</sup> For a brief period of time, he had a small construction business that he started at age nineteen.<sup>98</sup> He had visited India only once, for two weeks, when he was eleven.<sup>99</sup> He was not proficient in any Indian language and claimed not to be familiar with any Indian culture or with any Indian customs.<sup>100</sup> India did not recognize him as a citizen.<sup>101</sup> He was twenty-two years old when Canada issued its first deportation order against him.<sup>102</sup> Because of his cultural, social and familial ties to Canada, and his lack of personal relationships anywhere else, the Human Rights Committee determined Canada was Mr. Budlakoti's "own country" as that phrase is used in Article 12.4 of the ICCPR.<sup>103</sup> As such, Canada was prohibited from arbitrarily expelling him.<sup>104</sup>

It is worth noting that Mistert Nystrom, Warsame, and Budlakoti each either lawfully entered his respective country or was born to parents who were

<sup>90</sup> CCPR *Budlakoti*, *supra* note 58, ¶¶ 9.2–9.3.

<sup>91</sup> *Id.* ¶¶ 2.1, 9.3. Canada normally recognizes everyone born in the territory of Canada as a Canadian citizen. However, Mr. Budlakoti fell into one of the exceptions. Pursuant to Canadian citizenship law, he was not a Canadian citizen because his parents were in Canada in a diplomatic status. *See id.* ¶ 4.14.

<sup>92</sup> *Id.* ¶¶ 2.1, 9.3. In fact, the Canadian passport authorities issued him a Canadian passport, erroneously, when he was 13 years old based on his birth certificate. *See id.* ¶ 2.4. Based in part on his misunderstanding, he never applied for citizenship. *See id.* ¶¶ 2.4, 4.4.

<sup>93</sup> *Id.* ¶¶ 2.4, 4.4.

<sup>94</sup> *Id.* ¶ 2.3.

<sup>95</sup> CCPR *Budlakoti*, *supra* note 58, ¶ 4.16.

<sup>96</sup> *Id.* ¶ 5.3.

<sup>97</sup> *Id.* ¶ 4.4.

<sup>98</sup> *Id.* ¶ 3.1.

<sup>99</sup> *Id.* ¶¶ 3.1, 9.3.

<sup>100</sup> CCPR *Budlakoti*, *supra* note 58.

<sup>101</sup> *Id.* ¶¶ 5.3, 6.2.

<sup>102</sup> *Id.* ¶¶ 1.1, 2.6. Canada decided to deport him because of his extensive criminal activity. For a discussion of Mr. Budlakoti's crimes and Canada's decision to deport him, see *infra* Section II.B.1.

<sup>103</sup> CCPR *Budlakoti*, *supra* note 58, ¶¶ 9.2–9.3.

<sup>104</sup> For a discussion of the meaning of "arbitrarily" as used in ICCPR Article 12.4 and the Human Rights Committee's decision regarding Budlakoti, see *infra* Part II.

lawfully in the country. However, the Human Rights Committee's evaluation of the factors that led it to conclude that each man was within his own country never included the fact that they were lawfully admitted into the country or born in the country to parents who had been lawfully admitted.<sup>105</sup> The Committee's analysis focused on the number, strength, and nature of ties—familial, social, cultural, linguistic, and professional—each person had to the relevant country. The circumstances and legality of their initial entry were irrelevant.

It is also worth noting that, with these three cases, the Human Rights Committee abandoned an earlier exception to the principle that a country can be one's "own country" based solely on that person's ties to that country. This exception can be termed the *Stewart* doctrine, after *Stewart v. Canada*,<sup>106</sup> the first case in which the Committee interpreted Article 12.4 in the context of an attempted deportation of a noncitizen.

Like *Misters Nystrom, Warsame, and Budlakoti*, Charles Stewart had lived nearly all his life in a country, Canada, which was not the country of his citizenship. He was a British citizen who had lawfully entered Canada with his family when he was seven years old and lived in Canada until being deported almost three decades later.<sup>107</sup> He had been married to a Canadian woman and had two young children, both of whom had been born in Canada and were Canadian citizens.<sup>108</sup> Except for an older brother who had previously been deported, all of his closest relatives lived in Canada.<sup>109</sup> He had never applied for citizenship.<sup>110</sup> Mr. Stewart was facing deportation as a result of his criminal activity.<sup>111</sup> Despite Mr. Stewart's strong personal ties to Canada, and despite his lack of extensive ties to any other country, the Human Rights Committee concluded that Canada was *not* Mr. Stewart's "own country" for the simple—and perplexing—reason that Mr. Stewart had not attempted to acquire Canadian citizenship.<sup>112</sup>

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<sup>105</sup> Granted, in none of these cases did the Human Rights Committee have to wrestle with a situation in which the child entered unlawfully or was born to parents who were present unlawfully; thus it is not surprising that the Committee did not expressly highlight this or wrestle with a hypothetical opposite situation. CCPR *Budlakoti*, *supra* note 58, ¶¶ 2.1–2.4; CCPR *Nystrom*, *supra* note 59, ¶ 2.1; CCPR *Warsame*, *supra* note 59, ¶ 2.2. *But see infra* Section II.B.2 (discussing this situation).

<sup>106</sup> CCPR *Stewart*, *supra* note 3.

<sup>107</sup> *Id.* ¶ 2.1, 2.2.

<sup>108</sup> *Id.* ¶ 2.1.

<sup>109</sup> *Id.*

<sup>110</sup> CCPR *Stewart*, *supra* note 3, ¶ 2.2. Stewart claimed that he believed that he was a Canadian citizen until it was discovered during a criminal prosecution that he was not. *Id.*

<sup>111</sup> *Id.* ¶ 2.4

<sup>112</sup> *Id.* ¶¶ 12.2–12.9. The Human Rights Committee in *Stewart* concluded that citizens of a country, of course, could call the country of their citizenship their own, but noncitizens rarely could. The *Stewart*

The *Stewart* majority justified this narrow interpretation on the assertion that if a noncitizen had lived in country for so many years, as Mr. Stewart had done with Canada, that country had a “right” to expect the noncitizen to apply for citizenship and be burdened with all the obligations of citizenship.<sup>113</sup> Since Mr. Stewart had not applied, Canada could not be deemed his own country. The fact that any citizenship application Mr. Stewart might have submitted would likely have been denied on account of his criminal record did not trouble the *Stewart* majority since such “disability was of his own making.”<sup>114</sup>

There seems to be nothing in the language, context, or preparatory work of Article 12.4 that allows for this *Stewart* exception. Additionally, there is a deep internal tension in the Human Rights Committee’s reasoning in *Stewart*. According to the *Stewart* exception, it is the length of time that a noncitizen has been in a country that warrants that country’s “right” to expect that

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majority listed some examples of noncitizens it would include within the scope of Article 12.4. These examples were the following: (i) “nationals of a country who have there be [sic] stripped of their nationality in violation of international law;” (ii) “individuals whose country of nationality has been incorporated into or transferred to another national entity whose nationality is being denied them;” and (iii) “stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence.” CCPR *Stewart*, *supra* note 3, ¶ 12.4. Although it is abundantly clear that this list was merely illustrative and non-exhaustive—and, indeed, it is a list of situations to which the application of Article 12.4 seems wholly unobjectionable—a handful of committee members in *Nystrom* and *Warsame*, cases examined fifteen years later, would cling to the *Stewart* interpretation, and strongly suggest that this *Stewart* list comprised the only categories of noncitizens who enjoy Article 12.4 rights. *E.g.*, CCPR *Nystrom*, *supra* note 59, at 25 (dissenting opinion of Sir Nigel Rodley, Helen Keller, and Michael O’Flaherty); CCPR *Warsame*, *supra* note 59, at 22 (individual opinion of Sir Nigel Rodley). Notably, the *Nystrom* and *Warsame* committee members who seem to suggest that this list is exhaustive were nationals of developed, immigrant-receiving States—Helen Keller (Switzerland); Gerald Newman (United States); Michael O’Flaherty (Ireland); Yuji Iwasawa (Japan); Nigel Rodley (UK); and Kirster Thelin (Sweden). For the committee members and their nationalities, see Hum. Rts. Comm., Rep. on the Work of Its 100th Session, 101st Session, 102nd Session, U.N. Doc. A/66/40, at 232 (2011). In the recently decided *Budlakoti* case, however, not a single committee member who participated in the examination of Mr. Budlakoti’s communication—including the participating committee members from immigrant-receiving States (e.g., France, Israel, Italy, South Africa, and the United States)—maintained the limited interpretation of Article 12.4 asserted by the *Stewart* majority. CCPR *Budlakoti*, *supra* note 58. For the committee members and their nationalities, see Hum. Rts. Comm., Rep. on the Work of Its 120th Session, 121st Session, 122nd Session, U.N. Doc. A/73/40, at 13 (2018). *See also* CCPR General Comment 27, *supra* note 3, ¶ 20 (making it clear that other factors besides those listed in *Stewart* “may in certain circumstances result in the establishment of close and enduring connections between a person and a country”).

<sup>113</sup> CCPR *Stewart*, *supra* note 3, ¶ 12.8 (“Countries like Canada, which enable immigrants to become nationals after a reasonable period of residence, have a right to expect that such immigrants will in due course acquire all the rights and assume all the obligations that nationality entails. Individuals who do not take advantage of this opportunity and thus escape the obligations nationality imposes can be deemed to have opted to remain aliens in Canada. They have every right to do so but must also bear the consequences.... Individuals in these situations must be distinguished from the categories of persons described in [Article 12.4].”).

<sup>114</sup> CCPR *Stewart*, *supra* note 3, ¶ 12.6. The fact that Mr. Stewart thought for so long that he was a Canadian citizen and thus would have no need to apply for Canadian naturalization likewise did not concern the *Stewart* majority. *Id.* ¶ 2.2.

noncitizen to apply for and, presumably, receive citizenship—but that same length of time and the presumed eligibility to obtain citizenship is not in itself enough to qualify that same country to be that noncitizen’s own. For some reason, the noncitizen must take the administrative steps necessary to apply for and receive citizenship in order to enjoy the right not to be exiled as provided in Article 12.4.<sup>115</sup> This appears to be contrary to the Committee’s repeated assertions elsewhere that Article 12.4 can be enjoyed by both citizens and noncitizens.<sup>116</sup>

As stated above, the *Stewart* majority seemed to justify this conclusion on the belief that long-term noncitizens are somehow escaping the obligations of citizenship. The *Stewart* majority, however, does not state what those obligations are. Indeed, it is challenging to think of a list of obligations that are not only triggered only after one becomes a citizen<sup>117</sup> but are also so burdensome that they serve as the *quid pro quo* for the right not to be banished from your own country.

The *Stewart* doctrine can lead to patently absurd results. Consider someone like the real-life Marguerite Grimmond, a woman who was born in the United States but moved to Scotland at age two with her Scottish mother and lived in the United Kingdom for the following seventy-eight years without acquiring British citizenship and without receiving explicit permission from the British government to stay. In 2007, upon returning to the United Kingdom from her first overseas trip at age eighty, she was told by British immigration authorities that she would be deported and had to leave the United Kingdom within four weeks.<sup>118</sup> Since she had never applied for citizenship (and thus

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<sup>115</sup> The Human Rights Committee acknowledged that there would be an exception when the host country placed “unreasonable impediments on the acquiring of nationality.” CCPR *Stewart*, *supra* note 3, ¶ 12.5. *But see id.* at 23 (dissenting opinion of Prafullachandra Bhagwati) (objecting generally to the narrow interpretation of the majority arguing, in part, that “it is the sovereign right of a State to determine under what conditions it will grant nationality to a non-national. It is not for the Committee to pass judgment whether the conditions are reasonable or not....”).

<sup>116</sup> See sources cited *supra* note 59.

<sup>117</sup> Possible obligations include an obligation of national service (including registering for such service), the obligation to pay taxes on income earned while living and working abroad, and/or the obligation to make oneself available for jury duty. *But see* 50 U.S.C. § 3802 (requiring “every male citizen of the United States[] and every other male person residing in the United States” (except for lawfully present nonimmigrants) to register for the draft) (emphasis added); *Who Needs to Register*, U.S. SELECTIVE SERV. SYSTEM, <https://www.sss.gov/Registration-Info/Who-Registration> (last visited May 9, 2022) (explaining the requirement that male immigrants register for the draft); INTERNAL REVENUE SERV., PUBLICATION 519, U.S. TAX GUIDE FOR ALIENS, <https://www.irs.gov/pub/irs-pdf/p519.pdf> (last visited (May 9, 2022) (requiring resident aliens to pay foreign earned income tax).

<sup>118</sup> *Pensioner Wins Deportation Fight*, BBC NEWS (June 20, 2007), [http://news.bbc.co.uk/2/hi/uk\\_news/scotland/tayside\\_and\\_central/6223440.stm](http://news.bbc.co.uk/2/hi/uk_news/scotland/tayside_and_central/6223440.stm). After eventually receiving authorization to stay, Mrs. Grimmond reportedly said, “I was trying to put a brave face on things, but I was a bit churned up inside at

never “incurred the obligations of citizenship”), pursuant to the *Stewart* doctrine the United Kingdom would not be her “own country.” Presumably, she would easily qualify for citizenship, but for whatever reason, she did not apply. Perhaps it never seemed important to her because she was British in every sense that mattered in her life. Perhaps she lacked the sophistication or the inclination to apply. Perhaps she did not know she was not a citizen. Given that Article 12.4 is not expressly limited to citizens, it is extraordinarily difficult to see how the United Kingdom was not Mrs. Grimmond’s own country for purposes of that provision.<sup>119</sup>

For these and other reasons, the *Stewart* majority’s interpretation of “his own country” triggered vigorous dissenting individual opinions by six Committee members.<sup>120</sup> The *Stewart* doctrine was applied by Human Rights Committee majorities in two later cases<sup>121</sup> before being abandoned,

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the thought that I might have to move to America because I don’t know anyone there ... I know the weather is better across there, but I am quite happy here in rainy old Scotland, and it is nice to know I am here legally at long last.” *Id.* Mrs. Grimmond also would not have met any of the three exceptions articulated in *Stewart*. See CCPR *Stewart*, *supra* note 3, ¶ 12.4; *supra* note 112.

<sup>119</sup> In this case, Mrs. Grimmond can claim two countries as “her own” as result of her relationships with them. The United States is her own country by virtue of her citizenship relationship with it, and the United Kingdom is her own country by virtue of her other personal relationships with that country. There is nothing within Article 12.4 that limits a person to only having one country they can call their own, and those with dual (or more) citizenships would have more than one own country. See also CCPR *Stewart*, *supra* note 3, at 23 (dissenting opinion of Prafullachandra Bhagwati) (“It is quite conceivable that an individual may have two counties which he can call his own: one may be a country of his nationality and the other, a country adopted by him as his own country.”).

<sup>120</sup> See, e.g., CCPR *Stewart*, *supra* note 3, at 20 (dissenting opinion of Elizabeth Evatt and Cecilia Medina Quiroga, co-signed by Francisco José Aguilar Urbina) (“For the rights set forth in Article 12, the existence of a formal link to the State is irrelevant; the Covenant is here concerned with the strong personal and emotional links an individual may have with the territory where he lives and with the social circumstances obtaining in it. This is what Article 12, paragraph 4, protects.”); *id.* at 23 (dissenting opinion of Prafullachandra Bhagwati) (arguing that the consequence of not becoming a citizen cannot be the forfeiture of an ICCPR right, and observing, “it is because the author is not a Canadian national that the question has arisen[,] and it is begging the question to say that Canada could not be regarded as ‘his own country’ because he did not or could not acquire Canadian nationality.”); *id.* at 18 (concurring opinion of Laurel B. Francis) (opining that Canada, at some point in time, had been Mr. *Stewart*’s “own country”). Manfred Nowak, a scholar who served as the U.N. Special Rapporteur on Torture from 2004 to 2010, referred to the *Stewart* rationale as “controversial” and “unfortunate” and characterized the dissenting opinions as “more convincing.” MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY, 285–86, (2d ed. 2005).

<sup>121</sup> Hum. Rts. Comm., Adoption of Views on Communication No. 558/1993, *Canepa v. Canada*, at 9, U.N. Doc. CCPR/C/59/D/558/1993 (Apr. 3, 1997) () [hereinafter CCPR *Canepa*] (citing *Stewart* in denying Article 12.4 rights to a 23-year-old Italian citizen who had lived in Canada continuously since the age of five since he had not applied for Canadian citizenship and was otherwise ineligible for Canadian citizenship on account of his criminality); Hum. Rts. Comm., Adoption of Views on Communication No. 1011/2001, *Madafferi v. Australia*, at 9, U.N. Doc. CCPR/C/81/D/1011/2001 (July 26, 2004) [hereinafter CCPR *Madafferi*] (citing *Stewart* in denying Article 12.4 rights to a 40-year-old Italian citizen who had lived in Australia for the previous eleven years, had an Australian citizen wife and four Australian citizen children, had siblings in Australia, and had his own retail business, since he had not applied for Australian

justifiedly, afterwards.<sup>122</sup>

## II. THE INTERPRETATION OF “ARBITRARILY”

Recall that the full text of Article 12.4 reads, “No one shall be *arbitrarily* deprived of the right to enter his own country.”<sup>123</sup> Therefore, a State is permitted to nonarbitrarily deprive someone of their right to enter their own country, or, by extension, expel someone from their own country, thus raising the question of what “arbitrarily” means within the context of Article 12.4.

The customary method of treaty interpretation, along with an analysis of the ICCPR’s preparatory works and the jurisprudence of the Human Rights Committee, clearly establish that the word “arbitrarily” in Article 12.4 has an extremely broad scope, which is to say, that opportunities for nonarbitrary banishment are exceedingly rare. Indeed, even a concern for national security,

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citizenship—having assumed incorrectly that marrying an Australian citizen made him an Australian citizen—and, after deportation proceedings commenced, was rejected for Australian citizenship on account of his criminality as a younger man in Italy). The *Canepa* opinion triggered several dissenting opinions, some citing to their earlier dissents in *Stewart*. CCPR *Canepa*, *supra* note 121, at 11 (dissenting opinion of Elizabeth Evatt and Cecilia Medina Quiroga); *id.* at 10 (concurring opinion of Martin Scheinin); *id.* at 12 (dissenting opinion of Christine Chanet) (“The deliberate use of [the] vaguer and hence broader term [“his own country”] indicates that the drafters of the Covenant did not wish to limit the scope of the text in the manner decided by the Committee.”).

<sup>122</sup> In each of these three later cases, *Budlakoti*, *Nystrom*, and *Warsame*, none of the noncitizens who were the subjects of deportation proceedings sought citizenship. And if they had, it appears likely that each would have been denied because of their extensive criminal records.

The Human Rights Committee also employed ICCPR Article 12.4 in a case in 2000 to help it decide whether New Zealand had withdrawn citizenship from five Western Samoans in violation of the ICCPR. Although the communication’s Samoan authors did not explicitly make a claim that New Zealand had violated Article 12.4, the Committee concluded that at the time of the withdrawal New Zealand was not any of the authors’ “own country” as understood in Article 12.4, and, hence, the withdrawal of their citizenship and subsequent deportation did not violate the ICCPR. At the time of the withdrawal, the authors were in their 50s and 60s, had never lived in New Zealand, and did not even know that they had had New Zealand citizenship. In fact, by the time of withdrawal, only one of the authors had even set foot in New Zealand, and that was for a short-term visit. Hum. Rts. Comm., Adoption of Views on Communication No. 675/1995, *Toala v. New Zealand*, U.N. Doc. CCPR/C/63/D/675/1995 (Nov. 2, 2000). Curiously, the Human Rights Committee received several individual communications that did not charge a State party with a violation of Article 12.4 but whose underlying facts suggest that the authors, who were all noncitizens challenging the right of their host countries to deport them, would have had more than plausible, if not winning, Article 12.4 claims. *See, e.g.*, Hum. Rts. Comm., Adoption of Views on Communication No. 1792/2008, *Dauphin v. Canada*, U.N. Doc. CCPR/C/96/D/1792/2008 (July 28, 2009) (describing the author as a 22-year-old Haitian citizen without significant links to Haiti who lawfully came to Canada at age two with his family and otherwise lived all his life in Canada, most of the while assuming he was a Canadian citizen); Hum. Rts. Comm., Adoption of Views on Communication No. 2387/2014, *A.B. v. Canada*, U.N. Doc. CCPR/C/117/D/2387/2014 (July 15, 2016) [hereinafter CCPR *A.B.*] (describing the author as a 37-year-old Somali citizen who fled Somalia at age eleven and arrived in Canada at age thirteen with his mother where he was recognized as refugee and given permanent residency).

<sup>123</sup> ICCPR, *supra* note 1, art. 12.4 (emphasis added).

public order, or public health would not necessarily entitle a State to banish someone from their own country. This interpretation also strongly suggests that it would be arbitrary to banish a noncitizen merely because that person had entered the country, or stayed in the country, without explicit permission from the State government.

A. *Customary Law of Treaty Interpretation*

1. *Ordinary Meaning*

There are many dictionary definitions of “arbitrary.” Two from the online Oxford English Dictionary that plausibly fit the context of Article 12.4 are as follows: “Derived from mere opinion or preference; not based on the nature of things; hence, capricious, uncertain, varying” and “Unrestrained in the exercise of will; of uncontrolled power or authority, absolute; hence, despotic, tyrannical.”<sup>124</sup> Black’s Law Dictionary defines “arbitrary” with regard to judicial decisions as “founded on prejudice or preference rather than on reason or fact.”<sup>125</sup> Each of these definitions would appear to grant a State considerable latitude in choosing whether to deprive someone of their right to enter their country or to expel someone from the country. Under these definitions, for example, it may not be “arbitrary” to banish someone based on a law that provides that all citizen criminals can be banished. However, the context of the word’s use, along with the object and purpose of the ICCPR and the negotiating history of Article 22.4, strongly points in the opposite direction.

2. *Context*

The context of the use of the word “arbitrarily” strongly suggests that States do not have broad latitude to prevent someone from entering their own country or to banish someone from their own country. The word “arbitrarily” is used in the context of a prohibition against banishment. Because of the extremely harsh nature of banishment,<sup>126</sup> one should assume that a human rights instrument would permit banishment under only the rarest circumstances, and thus a State must have a compelling reason for banishing

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<sup>124</sup> *Arbitrary*, OXFORD ENGLISH DICTIONARY ONLINE, <https://www.oed.com/view/Entry/10180> (last visited May 9, 2022).

<sup>125</sup> *Arbitrary*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>126</sup> See, e.g., *Trop*, 356 U.S. at 102 (describing banishment as “a fate universally decried by civilized people”).



someone for the banishment not to be “arbitrary.” Certainly, the ICCPR would not permit a country to banish a citizen merely because it was done pursuant to some black letter law or based on some articulable facts.

The broader context of Article 12.4 within the ICCPR also sheds some light on the interpretation of the word “arbitrarily.” Article 12 contains the treaty’s free movement provisions. Article 12.1 provides for freedom of movement within a country and the freedom to choose one’s residence.<sup>127</sup> Article 12.2 provides for the freedom to leave countries.<sup>128</sup> Of all these movement rights, the right not to be denied entry to one’s own country—including the right not to be banished—is not only the most valuable but also the least likely to be restricted. In fact, States rarely, if ever, banish citizens in the twenty-first century. It is primitive, unjust, and unnecessary. Meanwhile, however, States often restrict internal movements, including the freedom to choose one’s residence (e.g., exclusions from private or government property, exclusions from dangerous places, incarceration, zoning ordinances) and often restrict people from leaving the country (e.g., incarceration, parole restrictions).

The remaining Article 12 provision, Article 12.3, provides that these three other freedom of movement provisions—the freedom of internal movement, the freedom to choose one’s residence, and the freedom to leave any country—can be restricted under the following conditions: the restrictions must be provided by law, must be “consistent with other rights recognized in the [ICCPR],” and must be “necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others.”<sup>129</sup> Those conditions are very strict.

The right to enter one’s country, however, is not subject to the exceptions listed in Article 12.3. A State can deprive someone of the right to enter their own country if such deprivation is not “arbitrary,” thus suggesting that this freedom may be permissibly restricted either more readily or less readily than a State may restrict the other movement freedoms. Since the right to enter one’s country seems like a much more valuable right, and one that is rarely, if ever, denied (as to citizens, at least), the restriction on States that prohibits them from preventing people from entering their own countries must be more absolute than the restrictions on the deprivations of the other

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<sup>127</sup> ICCPR, *supra* note 1, art. 12.1. (“Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.”).

<sup>128</sup> *Id.* art. 12.2 (“Everyone shall be free to leave any country, including his own.”).

<sup>129</sup> *Id.* art. 12.3.

movement freedoms.<sup>130</sup> In other words, the deprivation of the right to enter one's own country can be arbitrary *even if* the State were to deem such deprivation necessary to protect national security, public order, public health or morals or the rights and freedoms of others. Therefore, "arbitrarily" must have a particularly broad meaning, one that would capture nearly all State actions that deprive a person of the right to enter their own State.<sup>131</sup>

### 3. *Object and Purpose*

The object and purpose of the ICCPR also point in the direction of this interpretation since, as discussed above,<sup>132</sup> we should interpret ambiguous terms and phrases within the ICCPR in a way that favors the human individual and disfavors State restrictions.

Given all of this, "arbitrarily" in the context of Article 12.4 would seem to include not just notions of reasonableness but also notions of strict proportionality and utter necessity. Having articulable "reasons" to expel is not enough. In order for someone's banishment to be nonarbitrary, the achievement of a State goal that results from the banishment must be important enough so as to be proportionate to the great harm that banishment

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<sup>130</sup> *But see, e.g.*, Comm'n on Hum. Rts., 6th Sess., 151st mtg., *supra* note 40, at 10 (summarizing the American representative's characterization of banishment as a lesser deprivation because "a person deprived of the right to return to the country of which he was a national has, after all, the rest of the world in which to move and choose a residence, whereas a person deprived of the right of liberty of movement of choosing his residence within the borders of a State and of leaving his own, was in a far more serious predicament"). This view downplays the hardship imposed on an individual who has no strong ties in another country, and furthermore, it is not always the case that someone facing deportation has a country of citizenship. *See, e.g.*, CCPR *Budlakoti*, *supra* note 58, ¶ 9.4; CCPR *Warsame*, *supra* note 59, ¶ 8.6.

<sup>131</sup> The word "arbitrarily" is used in three other provisions of the ICCPR. For a discussion of these provisions and a discussion of the Human Rights Committee's interpretation of each, *see infra* note 159. It might be assumed that the word means the same thing in each provision, and, if so, it would be necessary to do an interpretation of the word in each context and then triangulate into the "correct" definition. However, based on the discussions concerning Article 12.4 by the negotiating States, there is no reason to think that they considered all other uses of the word in the rest of the ICCPR nor that they consciously intended that the word have the exact same meaning in each case. In the General Assembly's four-day negotiation leading to the adoption of the language of Article 12, there were only three comments regarding the fact that the word "arbitrarily" is used elsewhere in the ICCPR, and those comments were generally unremarkable and generated no further discussion. ICCPR Preparatory Works SR.958, *supra* note 46, at 246–48 (Summary Statement of the Philippines); *id.* ¶ 25 (Summary Statement of Panama); *id.* ¶ 31 (Summary Statement of Ireland). In fact, Ireland's comment suggests that the interpretation of "arbitrary" in Article 12.4 might be different from the interpretations of "arbitrary" in Articles 6 and 9 since "the meaning of the wording [in Articles 6 and 9] . . . was amplified and defined in several paragraphs." *Id.* The Human Rights Committee, however, has interpreted the word "arbitrarily" in each of these provisions to mean that mere lawfulness (under municipal law) does not, in and of itself, constitute nonarbitrary action. *See infra* note 159.

<sup>132</sup> *See supra* Section I.A.3.

imposes.<sup>133</sup> Furthermore, if the State's goals can be accomplished without banishment (e.g., by sanctioning criminal behavior through imprisonment), then the deprivation of the right to remain would be deemed arbitrary since it would not be necessary. Indeed, it is hard to imagine a situation in which banishment would not be arbitrary.<sup>134</sup>

Given this interpretation, mere procedural due process is not enough to make any banishment nonarbitrary, and banishment done merely in accordance with municipal law may still be arbitrary. There is a difference between being lawful, on the one hand, and being reasonable, necessary, proportionate, and justifiable—i.e., not arbitrary—on the other. States parties have an interest in enforcing their municipal laws, including their immigration laws, but they are prohibited from enforcing laws that violate the ICCPR.<sup>135</sup>

#### 4. *Preparatory Works*

An examination of the preparatory works leading to the adoption of the ICCPR reveals quite a bit about what the negotiating States meant by “arbitrarily” in Article 12.4 and confirms the broad interpretation described above.

The text of what would become Article 12 was negotiated over the course of more than a decade, culminating in the adoption of the final text in 1959. During the drafting process, whenever a negotiating State proposed allowing States to restrict the right of entry for reasons of national security, public order, public health, and the like, these proposals were rejected by the other negotiating States. For example, during the drafting conferences of the Commission on Human Rights in 1949, both Lebanon and France proposed language that would permit States to deprive someone of the right to enter

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<sup>133</sup> For discussions of the need for proportionality in the context of immigration enforcement, see generally Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 U.C. IRVINE L. REV. 415 (2012); Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683 (2009).

<sup>134</sup> Some have argued that allowing undocumented noncitizens to remain in a country imposes undue costs on society, e.g., administrative costs, medical costs, costs associated with increased job competition. See, e.g., Christopher Rugaber, *Trump's Harsh Message to Immigrants Could Drag on Economy*, ASSOC. PRESS (Sept. 6, 2017) <https://www.apnews.com/70d54a71362e4d90ad1959c8d33266ac> (making this argument with regard to DACA recipients in the United States). Some may argue that the desire to rid the country of such costs justifies their deportation. However, the societal costs imposed by the average undocumented person would not seem to be considerably more than those imposed by the average citizen, and any argument that asserts that a desire to rid a country of these costs renders deportation of undocumented noncitizens nonarbitrary (as that term is used in ICCPR Article 12.4) would necessarily lead to the absurd conclusion that a State could also banish any citizen unless they proved themselves to be a net asset to the country.

<sup>135</sup> See sources cited *supra* note 32 (discussing the relationship between international law and state sovereignty).

their country for “reasons of security or in the general interest.”<sup>136</sup> Several negotiating States declared those reasons to be too permissive. Some negotiating States argued that the right to enter one’s own country was a “fundamental” human right.<sup>137</sup> Consequently, the negotiating States decided to isolate the articulation of the right to enter one’s country from the articulation of the other movement rights and placed only the most limited restrictions on the exercise of the right to enter.<sup>138</sup>

A similar discussion with similar results occurred at the General Assembly in the days before it adopted the final text. Most of those discussions focused on a series of three draft proposals made jointly by Argentina, Belgium, Iran, Italy, and the Philippines, the so-called “Five-Power” Amendments.<sup>139</sup> The Original Five-Power Amendment proposed that the right to enter one’s country could be restricted on the basis of “law” that was “necessary to protect national security, [public safety,] health or morals or the rights and freedoms of others. . . .”<sup>140</sup> The First Revised Five-Power Amendment proposed a similar set of exceptions.<sup>141</sup> These proposals were met with widespread objection because most States believed that the right to enter one’s country should not be subject to such permissive exceptions.<sup>142</sup> and very

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<sup>136</sup> U.N., Econ. & Soc. Council, Comm’n on Hum. Rts., Draft Int’l Covenant on Hum. Rts., Lebanon: Amends. to Art. 11, U.N. Doc. E/CN.4/215/Rev.1 (May 26, 1949); U.N., Econ. & Soc. Council, Comm’n on Hum. Rts., Draft Int’l Covenant on Hum. Rts., France: Amend. to the Lebanese Proposal, U.N. Doc. E/CN.4/275 (May 31, 1949).

<sup>137</sup> U.N., Econ. & Soc. Council, Comm’n on Hum. Rts., Fifth Sess., 106th mtg. at 5–9, U.N. Doc. E/CN.4/SR.106 (May 31, 1949).

<sup>138</sup> *Id.* at 5–9, 10–11.

<sup>139</sup> Draft Int’l Covenants on Hum. Rts., Argentina, Belgium, Iran, Italy, and the Philippines: Amends. to Art. 12 of the Draft Covenant on Civ. and Pol. Rts., U.N. Doc. A/C.3/L.812 (Nov. 12, 1959) [hereinafter Original Five-Power Amendment]; Draft Int’l Covenants on Hum. Rts., Argentina, Belgium, Iran, Italy, and the Philippines: Revised Amends. to Art. 12 of the Draft Covenant on Civ. and Pol. Rts., U.N. Doc. A/C.3/L.812/Rev.1 (Nov. 13, 1959) [hereinafter First Revised Five-Power Amendment]; Draft Int’l Covenants on Hum. Rts., Argentina, Belgium, Iran, Italy, and the Philippines: Revised Amends. to Art. 12 of the Draft Covenant on Civ. and Pol. Rts., U.N. Doc. A/C.3/L.812/Rev.2 (Nov. 16, 1959) [hereinafter Second Revised Five-Power Amendment].

<sup>140</sup> Original Five-Power Amendment, *supra* note 139, art. 12.3.

<sup>141</sup> See First Revised Five-Power Amendment, *supra* note 139.

<sup>142</sup> See, e.g., ICCPR Preparatory Works SR.956, *supra* note 47, ¶ 23 (Summary Statement of the United Kingdom); ICCPR Preparatory Works, SR.957, *supra* note 41 (Summary Statement of Ireland), ¶¶ 3, 38; *id.* ¶ 12 (Summary Statement of India); *id.* ¶ 14 (Summary Statement of Lebanon); *id.* ¶ 16 (Summary Statement of Afghanistan); *id.* ¶ 19 (Summary Statement of the United Kingdom); *id.* ¶ 24 (Summary Statement of Saudi Arabia); *id.* ¶ 32 (Summary Statement of Morocco).

few States voiced support for those exceptions,<sup>143</sup> As a result, these proposals were roundly rejected.<sup>144</sup>

Nevertheless, some States wanted to permit “exiling” people, and the discussions that directly led to the decision to insert the word “arbitrarily” occurred in this context.<sup>145</sup> Some States thought it was appropriate to allow “lawful exile,”<sup>146</sup> while others considered exile to be an antiquated practice and never appropriate regardless of the circumstances.<sup>147</sup> Many of the States that objected to permitting “lawful exile” also objected to any exceptions at all to the right to enter one’s own country.<sup>148</sup>

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<sup>143</sup> Even the members of the Five-Power group of States did not actively support these exceptions. Their proposals were attempts to capture and synthesize the apparent will of the General Assembly based on views most recently expressed by the negotiating States. As that will became clearer, the Five-Power amendments evolved in response.

<sup>144</sup> This rejection prompted the Five-Power group of States to revise their proposal, and the next morning they suggested a new text of Article 12, one which not only removed the authority of States to limit the right of entry based on national security concerns, public order concerns, and the like, but which was adopted later that day as the final text of Article 12. Second Revised Five-Power Amendment, *supra* note 139; ICCPR Preparatory Works SR.958, *supra* note 46, at Agenda Items, ¶ 2; U.N. GAOR, 14th Sess., 959th mtg. at 251, ¶ 27, U.N. Doc. A/C.3/SR.959 (Nov. 17, 1959) [hereinafter ICCPR Preparatory Works SR.959] (announcing the result of the vote adopting the Second Revised Five-Power Amendment). The Second Revised Five-Power Amendment proposed the use of the word “arbitrarily” in Article 12.4, and much of the debate about Article 12.4 for the rest of the day concerned the use of that word and possible alternatives.

<sup>145</sup> See *supra* note 40 (providing the proposed draft that the Commission on Human Rights presented to the General Assembly for its consideration prior to the General Assembly’s discussion and adoption of the final version of Article 12.) Note that that draft provided that “[n]o one shall be subjected to arbitrary exile” and that otherwise “anyone shall be free to enter his own country.” Draft Int’l Covenants on Hum. Rts., U.N. Doc. A/4299, ¶ 3 (Dec. 3, 1959).

<sup>146</sup> E.g., ICCPR Preparatory Works SR.957, *supra* note 41, ¶ 4 (Summary Statement of Portugal); *id.* ¶ 12 (Summary Statement of India); *id.* ¶ 26 (Summary Statement of Italy); *id.* ¶ 34 (Summary Statement of the United Kingdom); *id.* ¶ 38 (Summary Statement of Ireland); ICCPR Preparatory Works, SR.958, *supra* note 46, ¶ 4 (Summary Statement of Ireland), *id.* ¶ 21 (Summary Statement of Italy); ICCPR Preparatory Works SR.959, *supra* note 144, ¶ 32 (Summary Statement of the United States).

<sup>147</sup> See, e.g., ICCPR Preparatory Works SR.956, *supra* note 47, ¶ 31 (Summary Statement of El Salvador); ICCPR Preparatory Works SR.957, *supra* note 41, ¶ 7 (Summary Statement of Yugoslavia); *id.* ¶ 8 (Summary Statement of Greece); ICCPR Preparatory Works SR.958, *supra* note 46, ¶ 2 (Summary Statement of Argentina); *id.* ¶ 10 (Summary Statement of Philippines). At least ten additional States spoke out against the inclusion of any language that permitted “lawful exile” or nonarbitrary deprivation of one’s right to enter his or her own country. Those countries were Spain, El Salvador, Panama, Ethiopia, Cuba, Honduras, Afghanistan, Ecuador, Guatemala, and Colombia. *Id.* ¶¶ 16, 18, 25; ICCPR Preparatory Works SR.959, *supra* note 144, ¶¶ 28–30, 33–34, 36–37. See also ICCPR Preparatory Works SR.956, *supra* note 47, ¶ 15 (Summary Statement of the Philippines stating, “Exile was no longer a commonly imposed punishment, perhaps because it laid upon other countries the duty of taking in the exile persons”). Two negotiating States, the United Kingdom and Ecuador, expressed the view that being “exiled” was something that could only happen to citizens. ICCPR Preparatory Works SR.957, *supra* note 41, ¶¶ 34, 35 (“A citizen was exiled; a foreigner was expelled.”). This observation lends some support to the argument that the negotiating States were assuming that the Article 12.4 right to enter was a right held only by citizens.

<sup>148</sup> See sources cited *supra* notes 142–144.

The decision to insert the word “arbitrarily” in the final text of Article 12.4 was largely a compromise between these two groups.<sup>149</sup> The negotiating States understood and acknowledged that a rule prohibiting “arbitrary” deprivation of a right was quite ambiguous with regard to what kind of deprivation would be permitted,<sup>150</sup> but it was clearly intended by the negotiating States to overwhelmingly restrict banishment.<sup>151</sup> The vote to approve inserting the word “arbitrarily” was 29 to 20 with 20 abstentions.<sup>152</sup> From the tone of the debate and State comments made after the vote, we know that many of the countries that abstained were against inserting “arbitrarily” or any exception at all into Article 12.4 but were abstaining out of respect for those countries that wanted some kind of exception.<sup>153</sup>

In sum, during the entire drafting process, the articulation of the right to enter one’s own country in Article 12 was almost always deliberately isolated from the other Article 12 movement rights (e.g., the right of internal movement, the right to leave)<sup>154</sup> in order to make the entry right more absolute. The negotiating States did not want the right to enter one’s own country to be restricted even when such restrictions might be “necessary to protect national security, the general interest, public order (*ordre public*), public health or morals, or the rights and freedoms of others.” This strongly suggests that the deprivation of the right to enter one’s own country could be arbitrary *even if* the State were to deem such deprivation “necessary” to protect such concerns.<sup>155</sup> Therefore, “arbitrarily” must have a particularly broad meaning, one that captures nearly all State actions that prevent a person from entering

<sup>149</sup> See ICCPR Preparatory Works SR.958, *supra* note 46, ¶ 21 (Summary Statement of Italy) (articulating the compromise of the use of the word “arbitrarily”); *id.* ¶ 29 (Summary Statement of Argentina) (articulating the same).

<sup>150</sup> See, e.g., ICCPR Preparatory Works SR.957, *supra* note 41, ¶ 7 (Summary Statement of Yugoslavia); ICCPR Preparatory Works SR.958, *supra* note 46, ¶ 21 (Summary Statement of Italy).

<sup>151</sup> There was no attempt to define the word “arbitrarily,” and no State articulated its own understanding of what “arbitrarily” meant in the context of Article 12.4. U.N. GAOR, 14th Sess., 954–59th mtgs., U.N. Docs. A/C.3/SR.954–A/C.3/SR.959 (1959). During the debates that led to the decision to insert the word “arbitrarily” in Article 12.4, there was no explicit discussion about whether noncitizens could be arbitrarily, lawfully, or otherwise exiled or expelled. This omission is understandable considering ICCPR Article 13 addresses the deportation processes applicable to aliens.

<sup>152</sup> ICCPR Preparatory Works SR.959, *supra* note 144, ¶ 27.

<sup>153</sup> See, e.g., *id.* ¶ 29 (Summary Statement of Cuba) (voicing its objection to any restrictions on the right to enter one’s own country but identifying itself as a State that abstained); *id.* ¶ 30 (Summary Statement of Honduras) (same); *id.* ¶ 37 (Summary Statement of Colombia) (same).

<sup>154</sup> ICCPR, *supra* note 1, art. 12.

<sup>155</sup> The use of the word “necessary” in Article 12.3 and its omission in Article 12.4’s right of entry raise problematic interpretation issues. If an action is “necessary,” how can it also be “arbitrary”? It is fairly clear that the negotiating States were worried that States parties might abuse the discretion that Article 12.3 grants. They feared States parties might apply Article 12.3 exceptions too liberally and might restrict the right of entry in ways that are not “necessary” at all. Otherwise, an analysis and interpretation of the word “necessary” in Article 12.3 is beyond the scope of this Article.

their own country. Certainly, concerns like national security may be considered when determining whether or not a deprivation is arbitrary, but such concerns are not necessarily sufficient to justify such deprivation. Admittedly, this still leaves us to wonder what would constitute a nonarbitrary deprivation of the right to enter one's own country, but such situations must be exceedingly rare.

*B. Jurisprudence of the Human Rights Committee*

Reflecting the conclusions suggested by the customary rules of treaty interpretation, including an analysis of the preparatory works, the Human Rights Committee has repeatedly asserted, in interpreting and applying the word "arbitrarily" in Article 12.4, that there are "few, *if any*, circumstances in which deprivation of the right to enter one's own country could be reasonable."<sup>156</sup> In the jurisprudence of the Committee, reasonableness is one of the hallmarks of non-arbitrariness. In its general comments and recent cases addressing Article 12.4, the Committee has reiterated that any denial of entry to one's country must be "reasonable in the particular circumstances."<sup>157</sup> Of course, this raises the question of what is "reasonable."

In *Budlakoti*, the Human Rights Committee listed other hallmarks of arbitrariness. It stated, "The notion of 'arbitrariness' includes elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality."<sup>158</sup> Those are quite a few elements, but the following conclusions can be made about the Human Rights Committee's interpretation on arbitrariness as used in Article 12.4. First, a decision to deny someone the right to enter their own country (or to banish someone) is one that must be made only after balancing all the interests of, and costs and benefits to, both the State and the individual in question. Second, to be nonarbitrary, denial of entry (or banishment) must be necessary; that is, there must not be any lesser means to adequately accomplish the State party's fundamental goal, a means that would ensure the State's interests are adequately met without imposing upon someone the extraordinary harsh consequences of banishment from their own country.<sup>159</sup>

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<sup>156</sup> See, e.g., CCPR General Comment No. 27, *supra* note 3, ¶ 21; CCPR *Budlakoti*, *supra* note 58, ¶ 9.4; CCPR *Nystrom*, *supra* note 59, ¶ 7.6; CCPR *Warsame*, *supra* note 59, ¶ 8.6.

<sup>157</sup> CCPR General Comment 27, *supra* note 3, ¶ 21; CCPR *Nystrom*, *supra* note 59, ¶ 7.6; CCPR *Warsame*, *supra* note 59, ¶ 8.6.

<sup>158</sup> CCPR *Budlakoti*, *supra* note 58, ¶ 9.4.

<sup>159</sup> The ICCPR prohibits States parties from engaging in three other "arbitrary" behaviors. Article 6.1 of the ICCPR provides, "No one shall be arbitrarily deprived of life." ICCPR, *supra* note 1. Article 9.1

Examining how the Human Rights Committee has applied this analytical framework in the context of attempts to deport criminal noncitizens and how the Committee's jurisprudence suggests it would apply the framework in the context of a noncitizen's illegal entry or unlawful presence demonstrates just how rare the Committee believes nonarbitrary banishments to be.

### 1. *Criminal Activity*

In its three most recent Article 12.4 cases, *Budlakoti*, *Nystrom*, and *Warsame*, the Human Rights Committee concluded that expulsion would amount to an arbitrary deprivation of the right to enter one's country even though each person facing deportation had engaged in extensive criminal activity.<sup>160</sup> Mr. Budlakoti, who was born in Canada and lived there all his life, had, before turning twenty-two, been convicted of breaking and entering, trafficking a firearm, possession of an illegal weapon, and trafficking in cocaine, among other charges.<sup>161</sup> He had been sentenced to an aggregate of

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provides, "No one shall be subjected to arbitrary arrest or detention." *Id.* Article 17.1 provides, "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation." *Id.* In each case, the Human Rights Committee has interpreted "arbitrary" in a similar fashion as it interprets "arbitrary" in the context of Article 12.4, that is to say, as a restriction narrower than would be required by an obligation to merely act lawfully or with articulable reason. *See, e.g.*, Hum. Rts. Comm., General Comment 36 on Article 6: Right to Life, U.N. Doc. CCPR/C/GC/36, ¶ 12 (Oct. 30, 2018) ("A deprivation of life may, nevertheless, be authorized by domestic law and still be arbitrary. The notion of "arbitrariness" is not to be fully equated with "against the law," but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law as well as elements of reasonableness, necessity, and proportionality."); Hum. Rts. Comm., General Comment 8 on Article 9: Right to Liberty and Security of Persons, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1, ¶ 4 (1994) (requiring that preventative detention must be both "based on grounds and procedures established by law" and "not be arbitrary"); Hum. Rts. Comm., General Comment 16 on Article 17 (Right to Privacy): The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1, ¶ 4 (1994) (originally from 23rd Sess., Apr. 8, 1988) (interpreting "arbitrary interference" in the context of Article 17 in such a way that even interference done pursuant to municipal law may be arbitrary. In order to refrain from an arbitrary decision, a State's decision must be "in accordance with the provisions, aims and objectives" of the ICCPR and "reasonable in the particular circumstances"); CCPR *A.B.*, *supra* note 122, at ¶ 8.7 ("[T]he notion of arbitrariness [in the context of Article 17] includes elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality. The Committee also recalls that the relevant criteria for assessing whether or not the specific interference with family life can be objectively justified must be considered in the light, on the one hand, of the significance of the State party's reasons for the removal of the person concerned and, on the other hand, of the degree of hardship the family and its members would encounter as a consequence of such removal."); CCPR *Budlakoti*, *supra* note 58, ¶ 9.4 (reiterating the same).

<sup>160</sup> CCPR *Budlakoti*, *supra* note 58, ¶ 9.4; CCPR *Nystrom*, *supra* note 59, ¶ 7.6; CCPR *Warsame*, *supra* note 59, ¶ 8.6.

<sup>161</sup> CCPR *Budlakoti*, *supra* note 58, ¶¶ 2.5, 4.5, 4.16.



four years in jail.<sup>162</sup> Mr. Nystrom, a Swedish citizen who lived in Australia since he was an infant, had been convicted of a large number of crimes since he was ten years old, including aggravated rape (of a child of ten when Mr. Nystrom was sixteen), arson, armed robbery, burglary, theft, and drug possession.<sup>163</sup> He had been sentenced to an aggregate of more than twenty years in prison.<sup>164</sup> Mr. Warsame, a Somali man who lived in Canada since he was four years old, began his life of crime at age fifteen.<sup>165</sup> Among his convictions were assault of a 60-year-old woman, multiple incidents of theft and robbery (occasionally with violence, including stabbing a store clerk with a screwdriver during one robbery), possession of crack cocaine, and assaulting a fellow inmate.<sup>166</sup> He had been sentenced to an aggregate of at least three years in jail.<sup>167</sup> In each case, the Human Rights Committee concluded that, despite their extensive criminality, expulsion would amount to an arbitrary deprivation of the right to enter one's own country, and thus each State party was prohibited under the terms of Article 12.4 from deporting these men.<sup>168</sup>

In reaching these conclusions, the Human Rights Committee balanced the interests of the State against the harshness of banishment. In none of these cases did the Committee provide a particularly extensive explanation of why it concluded that banishment would be arbitrary. However, in each case, before stating its conclusion, the Committee reiterated its assertion that “there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable.”<sup>169</sup> Where it did explain its conclusions

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<sup>162</sup> *Id.* ¶¶ 2.1–2.7. *See also supra* notes 90–104 and accompanying text (concluding that Canada was Mr. Budlakoti's own country).

<sup>163</sup> CCPR *Nystrom*, *supra* note 59, ¶¶ 2.3, 2.5, 3.10, 4.6.

<sup>164</sup> *Id.* ¶¶ 1.1–2.8. *See also supra* notes 68–78 and accompanying text (concluding that Australia was Mr. Nystrom's own country).

<sup>165</sup> CCPR *Warsame*, *supra* note 59, ¶¶ 2.2., 8.10.

<sup>166</sup> *Id.* ¶¶ 2.3, 4.2, 4.3, 5.10, 8.9.

<sup>167</sup> *Id.* ¶¶ 2.3, 2.4, 4.3, 5.4, 5.10. *See also supra* notes 79–89 and accompanying text (concluding that Canada was Mr. Warsame's own country).

<sup>168</sup> Despite the Human Rights Committee's conclusions, Australia deported Mr. Nystrom and Canada deported Mr. Warsame. Remedy Australia, Follow-up Report on Violations by Australia of ICERD, ICCPR & CAT in Individual Communications (1994–2014), at 32–34 (2014) (describing Nystrom's deportation) [https://remedy.org.au/reports/2014\\_Follow-Up\\_Report\\_to\\_treaty\\_bodies.pdf](https://remedy.org.au/reports/2014_Follow-Up_Report_to_treaty_bodies.pdf). Canada deported Mr. Warsame and put him on a set of flights to Somalia, but after disembarking in transit in Amsterdam, he requested asylum from the Netherlands, claiming he would be subject to persecution in Somalia. In a Kafkaesque turn of events, however, the Dutch refused to grant him asylum since they deemed him to be Canadian (not Somali) and not subject to asylum-qualifying persecution in Canada. Andrew Stobo Sniderman, *Jama Warsame is a Citizen of Nowhere*, *Maclean's* (Dec. 10, 2013), <https://www.macleans.ca/news/canada/jame-warsame-is-a-citizen-of-nowhere/>.

<sup>169</sup> CCPR *Nystrom*, *supra* note 59, ¶ 7.6; CCPR *Warsame*, *supra* note 59, ¶ 8.6; CCPR *Budlakoti*, *supra* note 58, ¶ 9.4; *see also* CCPR *Stewart*, *supra* note 3, at 20, ¶ 8 (dissenting opinion of Elizabeth Evatt and Cecilia Medina Quiroga, co-signed by Francisco José Aguilar Urbina) (declaring—after concluding, unlike

more particularly, the Committee emphasized whether or not the crimes were of a violent nature;<sup>170</sup> the extent to which the crimes were motivated by or resulted from drug or alcohol addiction and, if so, the length of time of sobriety;<sup>171</sup> and the length of time between the crimes, on the one hand, and the deportation orders, on the other.<sup>172</sup> Nevertheless, it is evident that even the commission of violent crimes did not, in and of itself, justify banishment. Both Mr. Warsame and Mr. Nystrom had committed quite violent crimes, including rape, arson, and assault,<sup>173</sup> yet the Human Rights Committee concluded that deporting them would be arbitrary.

Indeed, States do not exile their own citizens who behave in a similar fashion.<sup>174</sup> States investigate, arrest, prosecute, punish, and attempt to rehabilitate citizens.<sup>175</sup> As undesirable as one's crimes may be, one's identity as a noncitizen does not make the State's criminal justice system any less able to address the criminal activity in the same way.<sup>176</sup> Further still, banishing such a person imposes that person's criminal propensity on another country and on another group of people. In fact, such a deportation not only shifts

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the majority in *Stewart*, that Canada was Mr. Stewart's "own country" and consequently reaching the issue of arbitrariness—that "deportation could be considered arbitrary if the grounds relied on to deprive him of his right to enter and remain in the country were, in the circumstance, unreasonable, when weighed against the circumstances which make that country his 'own country'"); *id.* at 23 (dissenting opinion of Prafullachandra Bhagwati) ("Where an action taken by the State party against a person is excessive or disproportionate to the harm sought to be prevented, it would be unreasonable and arbitrary.").

<sup>170</sup> CCPR *Budlakoti*, *supra* note 58, ¶ 9.4.

<sup>171</sup> *Id.*; CCPR *Nystrom*, *supra* note 59, ¶ 7.6; *see also* CCPR *Stewart*, *supra* note 3, at 23 (dissenting opinion of Prafullachandra Bhagwati) (noting that Mr. Nystrom "has succeeded in controlling his alcohol abuse").

<sup>172</sup> CCPR *Nystrom*, *supra* note 59, ¶ 7.6; CCPR *Budlakoti*, *supra* note 58, ¶ 9.4.

<sup>173</sup> *Supra* notes 163–167 and accompanying text.

<sup>174</sup> The author knows of no State in the twenty-first century that practices extraterritorial *je jure* exile of its undesirable citizens. Regrettably, *de facto* exile is quite common, often taking the form of flight from persecution or civil unrest.

<sup>175</sup> Allowing States to banish people based on a history of criminal convictions would give States great latitude to banish people, since States can decide for themselves what to criminalize and could criminalize (and have criminalized) relatively innocuous things. Banishment premised on such criminal activity seems neither necessary to achieve any legitimate State goal nor a proportionate response to any such threat of continued criminal behavior. Furthermore, the worse the crime, the less justified it would be to impose such criminality on another country.

<sup>176</sup> Several dissenting Committee members in the now-discredited *Stewart* opinion suggested that a State's criminal justice system should always be expected to address any criminal recidivism. *See* CCPR *Stewart*, *supra* note 3, at 20, ¶ 9 (dissenting opinion of Elizabeth Evatt and Cecilia Medina Quiroga, co-signed by Francisco José Aguilar Urbin) ("It must be doubted whether the commission of criminal offences alone could justify the expulsion of a person from his own country..."); *id.* at 23 (dissenting opinion of Prafullachandra Bhagwati) (suggesting that the State's goal "to protect society from... criminal propensity" can be "achieved by taking lesser action than expulsion or deportation," and asserting that if Mr. Stewart were to commit any more offenses, "he can be adequately punished and imprisoned for it... This is the kind of action which would be taken against a national in order to protect the society, and *qua* national, it would be regarded as adequate. I do not see why it should not be regarded as adequate *qua* a person who is not a national...").

some threat of criminality from one group of people to another, but it may very well shift that threat from a group of people who make up the society in which the noncitizen became a criminal to a group who make up a society that played little or no role in that development.<sup>177</sup>

## 2. *Unlawful Entry and Unlawful Presence*

In each of the Human Rights Committee Article 12.4 decisions discussed above, the noncitizen subject to potential deportation entered the country lawfully (or was born in the country to parents who entered lawfully) and faced visa revocation only upon the State's decision to deport. Each noncitizen had been convicted of crimes, and, in some instances, multiple serious crimes. The State's interest in each of these matters was to eliminate from its territory the criminal threat posed by the noncitizen. But what if the deportee had not been convicted of a crime? Can a person be deported from their own country simply because their entry or presence is unlawful under municipal immigration law? Can the deportation of a person be nonarbitrary simply because that person is present in a country unlawfully?

The Human Rights Committee has not yet addressed the question of whether a State's decision to deport a noncitizen from their own country can be nonarbitrary if the only reason the State wants to deport the noncitizen is that the noncitizen unlawfully entered the territory of the State and/or resides in the territory of the State in violation of its municipal immigration laws.<sup>178</sup> Although the Committee has not answered this question in the context of an

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<sup>177</sup> See ICCPR Preparatory Works SR.956, *supra* note 47, ¶ 15 (Summary Statement of the Philippines) (suggesting that exile was no longer a commonly imposed punishment “because it laid upon other countries the duty of taking in the exiled persons”). However, in many cases, a banished person quickly deteriorates mentally and physically after he is deported to a country with which he has no substantial connection, whose language he cannot speak, whose culture is unfamiliar, and in which he has few if any familial or social resources. As a result, he may become less capable of engaging in successful criminality. But this possible “bright side” of banishment—the mental and physical deterioration of someone who has likely already served his criminal sentences—hardly seems just. In other cases, a lack of resources in a new country may make a banished person more desperate for self-preservation and more inclined to commit crimes. *See also, supra* notes 68–78, 163–164 and accompanying text (discussing *Nystrom v. Australia*); REMEDY AUSTRALIA, *supra* note 168, at 33 (reporting that despite the Human Rights Committee's conclusion in *Nystrom v. Australia*, Australia deported Mr. Nystrom to Sweden where he resumed drinking and has “variously been homeless, in homeless shelters, in prison and in psychiatric care”); Chris Gelardi, *The Tragic Story of Jimmy Aldaoud, Deported from the Streets of Detroit to His Death in Iraq*, THE INTERCEPT (Aug. 8, 2019), <https://theintercept.com/2019/08/08/ice-deportation-iraq-jimmy-aldaoud/> (describing the deportation of a noncitizen American to Iraq and his death two months later).

<sup>178</sup> The term “criminality” as used in this Article does not include any “criminality” resulting only from unlawful entry into or unlawful presence in the territory of a State. *See* G.A. Res. 71/1, ¶ 33, New York Declaration for Refugees and Migrants (Sept. 19, 2016) (declaring that the States of the United Nations will “consider reviewing policies that criminalize cross-border movements”).

Article 12.4 claim, it has addressed the issue in the context of claims under ICCPR Articles 17 and 23, which address the protection of the family. The Committee's analysis there strongly suggests that the Committee would insist that any such deportation would be arbitrary and thus violate Article 12.4.

In *Winata and Li v. Australia*,<sup>179</sup> the Human Rights Committee considered a claim by two Indonesian citizens, a man and a woman, who were facing deportation from Australia.<sup>180</sup> Both had lawfully entered Australia on short-term visas but had long overstayed their visas.<sup>181</sup> They met in Australia, entered into a “de facto relationship akin to marriage,” and had a son they named Barry.<sup>182</sup> Barry appears to have been born while each of his parents was unlawfully residing in Australia.<sup>183</sup> When Barry turned ten, he became an Australian citizen.<sup>184</sup> A day later, his parents applied for asylum based on a claim that they would face persecution in Indonesia on account of their Chinese ethnicity and Christian religion.<sup>185</sup> Australia denied their applications and eventually issued removal orders.<sup>186</sup> Neither the mother nor the father (nor Barry) had engaged in any criminal conduct.<sup>187</sup> Australia justified its deportation orders – i.e., claimed deportation would not be arbitrary – on the fact that Barry's parents had been residing in Australia in violation of Australia's municipal immigration laws.<sup>188</sup>

Mr. Winata and Ms. Li appealed to the Human Rights Committee and argued that if they were deported either Barry would have to live in Australia without his parents or Barry, an Australian citizen, would be forced to move to Indonesia, a country to which he had never been and whose language and culture he did not know.<sup>189</sup> They argued that their deportation would violate Article 17 of the ICCPR in either case.<sup>190</sup> Article 17 provides, in part, that “[n]o one shall be subjected to arbitrary or unlawful interference with his

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<sup>179</sup> Hum. Rts. Comm., Adoption of Views on Communication No. 930/2000, *Winata v. Australia*, U.N. Doc. CCPR/C/72/D/930/2000 (July 26, 2001) [hereinafter *CCPR Winata*].

<sup>180</sup> Indonesia may have formally withdrawn their citizenship, but Australia assumed that Indonesia would readily re-recognize their Indonesian citizenship if they moved back to Indonesia and applied for it. *Id.* ¶ 2.4.

<sup>181</sup> *Id.* ¶ 2.1.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* ¶¶ 2.1–2.2.

<sup>184</sup> *Id.* ¶ 2.2.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* ¶¶ 2.2–2.6, 4.11.

<sup>187</sup> This assertion is based on the fact that there is no mention in the Human Rights Committee communication of any (non-immigration-related) criminal activity. *Id.*

<sup>188</sup> *Id.* ¶ 4.11.

<sup>189</sup> *Id.* ¶ 3.4.

<sup>190</sup> *Id.* ¶¶ 1, 3.1–3.6.

privacy, family, [or] home . . .”<sup>191</sup> Relevant to our analysis, the Human Rights Committee interpreted “arbitrarily” as it is used in the context of Article 17 the same way it interprets “arbitrarily” as it is used in the context of Article 12.4.<sup>192</sup> After concluding that such deportations would constitute “interference” with the family, the Committee stated:

[T]here is significant scope for States parties to enforce their immigration policy and to require departure of unlawfully present persons. That discretion is, however, not unlimited and may come to be exercised arbitrarily in certain circumstances. In the present case, both [parents] have been in Australia for over fourteen years. [Their] son has grown in Australia from his birth [thirteen] years ago, attending Australian schools as an ordinary child would and developing the social relationships inherent in that. In view of this duration of time, it is incumbent on the State party to demonstrate *additional factors* justifying the removal of both parents *that go beyond a simple enforcement of its immigration law* in order to avoid a characterization of arbitrariness. In the particular circumstances, therefore, the Committee considers that the removal by the State party of the [parents] would constitute, if implemented, arbitrary interference with the family. . .<sup>193</sup>

If the Human Rights Committee were to apply its interpretation of “arbitrarily” under Article 17 to Article 12.4, a State party would be prohibited from deporting someone from their own country for the mere reason that that

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<sup>191</sup> Relatedly, Mr. Winata and Ms. Li also argued that their deportation would violate (i) Article 23.1 of the ICCPR, which reads, “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State;” and (ii) Article 24.1 of the ICCPR, which reads, “Every child shall have . . . the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.” ICCPR, *supra* note 1, arts. 23.1, 24.1.

<sup>192</sup> See *supra* note 159 and accompanying text.

<sup>193</sup> CCPR *Winata*, *supra* note 179, ¶ 7.3. Four Human Rights Committee members issued a joint dissenting opinion protesting this interpretation. *Id.* at 15, ¶¶ 4, 5 (dissenting opinion of Prafullachandra Natwarlal Bhagwati, Tawfik Khalil, David Kretzmer and Max Yalden) (first asserting, after rejecting that there was any “family interference” at all under the terms of Article 17.1, that a mere desire to enforce State immigration laws is alone an appropriate, nonarbitrary justification for interfering with a family at least in the circumstances where family unity can be maintained by having the child move to Indonesia with his Indonesian parents; and second, noting that the implication of the majority’s holding is that undocumented immigrants can create a right to stay in their host countries by having and raising children there). Australia rejected the Human Rights Committee’s views but did not deport Mr. Winata and Ms. Li. See REMEDY AUSTRALIA, *supra* note 168, at 44.

person's entry into or presence in the territory of that country violated the State's municipal immigration laws.<sup>194</sup>

Three years later, the Human Rights Committee had the opportunity to apply the *Winata* rule in a case involving a Fijian citizen facing deportation from New Zealand. *Sahid v. New Zealand*<sup>195</sup> concerned a 57-year-old Fijian man, Mohammad Sahid, who had been living in New Zealand for fifteen years in violation of its municipal immigration law.<sup>196</sup> He had arrived lawfully on a temporary visa that had long since expired.<sup>197</sup> He had no criminal record and appeared to be a law-abiding, family man.<sup>198</sup> His daughter, a lawful resident, and her four-year-old son, a citizen, also lived in New Zealand.<sup>199</sup> The three appeared to be very close.<sup>200</sup> Mr. Sahid claimed that his daughter suffered from physical and emotional disabilities and that he was the primary caregiver for the entire family.<sup>201</sup> The only justification New Zealand gave for deporting Mr. Sahid was to enforce its immigration law.<sup>202</sup> Like Mr. Winata and Ms. Li above, Mr. Sahid argued, in part, that his deportation would violate New Zealand's ICCPR obligation to protect families.<sup>203</sup>

Curiously, however, unlike Mr. Winata and Ms. Li, Mr. Sahid did not make an Article 17 claim.<sup>204</sup> Instead, he alleged that New Zealand was violating Article 23.1, which states, "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."<sup>205</sup> Nevertheless, New Zealand defended itself against a hypothetical Article 17 claim,<sup>206</sup> and the Human Rights Committee, without referring to Article 17, cited to *Winata* in deciding that New Zealand did not violate its obligations under Article 23 (or any other ICCPR obligation):

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<sup>194</sup> See also sources cited *supra* note 159 (describing how the Human Rights Committee has interpreted the word "arbitrarily" in other provisions of the ICCPR).

<sup>195</sup> Hum. Rts. Comm., Adoption of Views on Communication No. 893/1999, *Sahid v. New Zealand*, U.N. Doc. CCPR/C/77/D/893/1999 (Apr. 11, 2003) [hereinafter CCPR *Sahid*].

<sup>196</sup> *Id.* ¶¶ 1, 2.1.

<sup>197</sup> *Id.* ¶ 2.1. Mr. Sahid never hid from New Zealand's immigration authorities. After his New Zealand visa expired, he repeatedly applied for further visas, was rejected each time, and appealed each decision, always without success. This process of applying and appealing lasted many years until he finally ran out of domestic options and was deported. *Id.* ¶¶ 2.1–2.3.

<sup>198</sup> *Id.* ¶¶ 3.1–3.3, 5.2–5.3. The assertion that he had no criminal record is based on the fact that there is no mention in the Human Rights Committee communication of any (non-immigration-related) criminal activity.

<sup>199</sup> *Id.* ¶¶ 1, 2.1, 4.25.

<sup>200</sup> *Id.* ¶¶ 3.1–3.3, 5.2–5.3.

<sup>201</sup> *Id.* ¶¶ 3.2–3.3.

<sup>202</sup> *Id.* ¶¶ 4.17, 4.22, 6.3, 6.6.

<sup>203</sup> *Id.* ¶¶ 1, 3.1.

<sup>204</sup> *Id.* ¶¶ 1, 3.1, 4.13.

<sup>205</sup> Typically in complaints about family rights, communication authors allege violations of both Article 17 and Article 23.1, and the Human Rights Committee analyzes them together.

<sup>206</sup> CCPR *Sahid*, *supra* note 195, ¶¶ 4.13–4.22.

[I]n extraordinary circumstances, a State party must demonstrate factors justifying the removal of persons within its jurisdiction that go beyond a simple enforcement of its immigration law in order to avoid a characterization of arbitrariness. In *Winata*, the extraordinary circumstance was the State party's intention to remove the parents of a minor, born in the State party, who had become a naturalized citizen after the required [ten] years residence in that country. In the present case, [Mr. Sahid's] removal has left his grandson with his mother and her husband in New Zealand. As a result, in the absence of exceptional factors, such as those noted in *Winata*, the Committee finds that the State party's removal of [Mr. Sahid] was not contrary to his right under article 23, paragraph 1, of the Covenant.<sup>207</sup>

The significance of this statement for the interpretation of Article 17 is debatable. The Human Rights Committee was not asked to adjudge a claim based on Article 17. Consequently, the Committee did not make any formal conclusions as to whether there was "interference with the family" or, if so, whether any such interference was "arbitrary." Nor is it clear what the Committee meant by the phrase "extraordinary circumstances." As stated in *Sahid*, it is only in "extraordinary circumstances" that a State party must "demonstrate factors justifying the removal of persons within its jurisdiction that go beyond a simple enforcement of its immigration law in order to avoid a characterization of arbitrariness."<sup>208</sup> One wonders what is "extraordinary" about a family unit that contains an immigrant mother, an immigrant father, and a 13-year-old child citizen born and raised in his parents' host country as in *Winata*. Perhaps it was "extraordinary" only in that the family unit had lived in Australia for over a decade and the child was a citizen, whereas in most deportation cases, the noncitizen being deported does not have such a resonate family (or "own country") claim to remaining. It is clear, however, that the Human Rights Committee was not particularly inclined to maintain the cohesion of a family unit that included Mr. Sahid. His continued presence

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<sup>207</sup> *Id.* ¶ 8.2.

<sup>208</sup> *Id.* ¶ 8.2. The use of the phrase "extraordinary circumstances" may have been adopted from the *Winata* dissent's reference to "exceptional cases" three years earlier. CCPR *Winata*, *supra* note 179, at 15, ¶ 4 (dissenting opinion of Prafullachandra Natwarlal Bhagwati, Tawfik Khalil, David Kretzmer and Max Yalden) ("There may indeed be exceptional cases in which the interference with the family is so strong that requiring a family member who is unlawfully in its territory to leave would be disproportionate to the interest of the State party in maintaining respect for its immigration laws. In such cases it may be possible to characterize a decision requiring the family member to leave as arbitrary.").

close to the other members of that family was not particularly important to the Committee. His daughter was a married, full-grown adult, and his young grandson had parents with whom he lived.<sup>209</sup> The need to include Mr. Sahid in that family did not outweigh New Zealand's interest in enforcing its immigration laws—at least under the terms of ICCPR Article 23, an article that only requires the State to provide some undefined level of “protection” for families.

Neither Mr. Winata, Ms. Li, nor Mr. Sahid entered their host countries in violation of the domestic immigration laws. Mr. Winata and Ms. Li overstayed their visas and resided in Australia unlawfully for many years. Mr. Sahid overstayed his New Zealand visa and then remained in the country for a decade while under a deportation order. What if, instead, someone both entered and resided in violation of the State's immigration laws? The Human Rights Committee has not yet considered such a fact pattern. However, it has stated repeatedly that applying municipal immigration law does not, in itself, necessarily make a State's decision to prohibit a person from entering their own country (or a decision to expel someone from their own country) reasonable or nonarbitrary.<sup>210</sup> The municipal law itself must comply with the obligations of Article 12.4. Combined with the *Winata* assertion that “it is incumbent on the State party to demonstrate *additional factors ... that go beyond a simple enforcement of its immigration law* in order to avoid a characterization of arbitrariness”<sup>211</sup> when the State interferes with one's privacy, family, or home, Human Rights Committee jurisprudence seems to dictate that even a noncitizen who entered a country unlawfully and resides there unlawfully cannot be removed if the host country has become his or her own country unless the State can justify the removal beyond a mere desire to enforce its municipal immigration laws. And, even then, the justification would have to be significant enough to be deemed nonarbitrary. Recall that in *Budlakoti*, *Nystrom*, and *Warsame*, the Human Rights Committee deemed it arbitrary to deport noncitizens with long histories of criminality, including violent criminality. Consequently, one wonders what could justify removing anyone from his or her own country.

Such a conclusion by the Human Rights Committee would be correct. After all, it is begging the question to argue that the justification for banishing

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<sup>209</sup> CCPR *Winata*, *supra* note 179, ¶ 7.3 (emphasis added).

<sup>210</sup> *E.g.*, CCPR General Comment 27, *supra* note 3, ¶ 21 (asserting that the prohibition of arbitrary denial “guarantees that *even interference provided for by law* should be in accordance with the provision, aims and objectives of the Covenant and should be, in any event reasonable in the particular circumstances”) (emphasis added); CCPR *Budlakoti*, *supra* note 58, ¶ 9.4 (reiterating the same); CCPR *Nystrom*, *supra* note 59, ¶ 7.6 (reiterating the same); CCPR *Warsame*, *supra* note 59, ¶ 8.6 (reiterating the same).

<sup>211</sup> CCPR *Winata*, *supra* note 179, ¶ 7.3.



someone from their own country is that they have not been given permission to remain in the country. Denial of permission itself hardly qualifies as a reason for denial of permission.<sup>212</sup> That reasoning is circular. The real question is whether withholding (or revoking) permission is allowed under the ICCPR. Other explanations are necessary to justify the banishment, to make it nonarbitrary. In other words, banishing someone from their own country based solely on a desire to enforce municipal law, without more, is unjustified and unreasonable. It is, in a word, arbitrary. Quite simply, the ICCPR limits a country's ability to enact or enforce certain immigration laws.<sup>213</sup>

One might argue that banishment under these circumstances generally fosters respect for law and governance by the rule of law, but the ICCPR is also law,<sup>214</sup> and respect for it requires that no one be banished without extremely good reason. And, indeed, it is difficult to imagine what could constitute good reason for banishing anyone from their own country.

### III. THE RELATIONSHIP BETWEEN "OWN COUNTRY" AND "ARBITRARILY"

At this point, some might wonder if there is an interpretive relationship between the terms "own country," on the one hand, and "arbitrarily," on the other. Might it be the case that the interpretation of one depends on the interpretation of the other? For example, some might argue that a country can be someone's own to a large or a small extent, and if a country is someone's own to a small extent, then it is more likely that any expulsion would be nonarbitrary. Or, conversely, if a country is someone's own to a large extent, then it is more likely that any expulsion would be arbitrary. However, customary rules of treaty interpretation do not seem to support such an interpretation.

As observed above, the text and context of "own country" strongly suggests that a country is or is not one's own. This is a binary determination. And there is no textual or contextual support for the argument that what would constitute an "arbitrary" expulsion depends on the strength of the relationship one has with their own country. Indeed, it may be assumed that for a country to be "one's own," the strength of the relationship is great, at least great

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<sup>212</sup> Such argumentation recalls the parent who insists to their child that the child is not allowed to do something "because I say you can't." Even children aren't fooled by the tautology.

<sup>213</sup> See also ICCPR, *supra* note 1, art. 13 (providing due process rights to aliens facing deportation proceedings).

<sup>214</sup> See *supra* note 32 (discussing the relationship between international law and state sovereignty).

enough that there is no room to treat those with less strong relationships worse than those with stronger relationships.

Further, none of the States that negotiated and adopted the language of Article 12.4 ever suggested that someone who had stronger connections to their own country had greater rights to remain than someone who had relatively weaker connections to their own country.<sup>215</sup> The discussions that led to their decision to insert the word “arbitrarily” into the text of Article 12.4 did not include any suggestion that the strength of one’s relationship to their own country affected the determination of whether any expulsion was arbitrary. Granted, as noted above, there were a handful of States that advocated (unsuccessfully) that Article 12.4 rights should be limited to citizens, but even their positions were not expressly couched in terms of the *strength* of the relationship between citizens and their countries of citizenship.<sup>216</sup>

Additionally, the Human Rights Committee’s interpretation and application of Article 12.4, as presented above, jibe with the conclusion that the analysis of “own country” and “arbitrarily” are two independent analyses. The Committee has always determined whether a country is a person’s own country, answering either in the affirmative or the negative. If the answer is affirmative, the Committee has then analyzed whether an expulsion of that person would be arbitrary, without reconsidering the strength of that person’s connection to the country. Based on the customary rules of treaty interpretation, the Human Rights Committee’s analytical process is correct.

It is certainly true that if someone has limited, weak, or superficial connections to a country, that country is less likely to be their “own country.” But as soon as a country crosses the threshold to become one’s own, that person almost always, if not always, has the right to remain there.<sup>217</sup>

## CONCLUSION

Article 12.4 of the ICCPR states that “[n]o one shall be arbitrarily deprived of the right to enter his own country.” This article demonstrates that Article 12.4 is broad enough that it prohibits States parties from deporting noncitizens of a country if the noncitizens have developed extensive enough personal attachments to the country. Such attachments might include familial, cultural, social, linguistic, educational, and professional attachments. These

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<sup>215</sup> See *supra* Sections I.A.4, II.A.4

<sup>216</sup> See *supra* text accompanying notes 40–41.

<sup>217</sup> See *supra* text accompanying note 134 (suggesting that it is hard to imagine a situation in which banishment would not be arbitrary).

“noncitizen compatriots” have the right to remain and live in the country. Article 12.4 provides one exception. A State party can deport such a person if the deportation is “nonarbitrary.” However, this article also demonstrates that the word “arbitrary,” as it is used in Article 12.4, is so broad that cases of nonarbitrary deportation of people from their own countries are extremely rare. Indeed, Article 12.4 prohibits States parties from deporting noncitizen compatriots even if they entered the country in violation of municipal immigration laws or continue to reside in the country in violation of those laws. Article 12.4 even prohibits States parties from deporting these noncitizens based on their criminal activity. Quite simply, people cannot be banished from their home countries.

Just how deep and broad a noncitizen’s ties to a country must be in order for that country to be their “own country” is debatable.<sup>218</sup> Nevertheless, there is no doubt that the ICCPR bestows a very valuable right to noncitizens, particularly lawful permanent residents, long-term refugees, Dreamers and other long-term undocumented residents, and people born in countries without birthright citizenship. The ICCPR deems them to be home.

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<sup>218</sup> Some may consider that if a noncitizen has extensive enough ties with another country (perhaps their country of citizenship, but not necessarily), they may not be as likely to be able to claim their host state as their “own country.” But there is nothing in the text of Article 12.4 limiting persons to one “own country,” nor were there any such indications that the States who adopted the ICCPR considered this to be true. *See also supra* note 119 and accompanying text (discussing the possibility of having multiple own countries).