



**Submission to the Political and Constitutional Reform
Committee of the House of Commons for its Consultation on
'A New Magna Carta?'**

**The Protection of the Human Rights of Non-Nationals under
a Reformed UK Constitution: Lessons from International and
Comparative Jurisprudence**

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PART I - EXECUTIVE SUMMARY

1. Oxford Pro Bono Publico (OPBP) is making this submission to the House of Commons Political and Constitutional Reform Committee in response to its 2014 report ‘A New Magna Carta?’¹ In that report, the Committee seeks views on the possibility of codifying the British Constitution, and on the potential contents of a codified Constitution. In the appendix to the report, ‘Mapping the Path towards Codifying – or not Codifying – the UK Constitution’, Professor Robert Blackburn lays out three illustrative ‘blueprints’ – a Constitutional Code, a Constitutional Consolidation Act, and a Written Constitution – to help inform the debate about constitutional codification.
2. This submission is made in response to a specific issue which is raised by the third ‘blueprint’ in the appendix to the report, the illustrative ‘Written Constitution.’ That issue is the protection of the human rights of non-nationals under a codified, or otherwise reformed, Constitution. The submission is not concerned with the broader question of whether some form of codification is desirable, or if so, what model of codification should be adopted.
3. The Written Constitution’s section on nationality and citizenship (s 6) includes the following provision:

Civil Rights of Non-Nationals

(12) An Act of Parliament -

- (a) shall determine the extent to which persons under the jurisdiction of the UK who do not hold British nationality are entitled to the civic rights, and are subject to the civic duties, attached to British nationality;...²

4. Section 36 of the illustrative Written Constitution contains a Bill of Rights. According to a footnote in the report, the rights protections in this section ‘build on those written for the European Convention on Human Rights...with some elements taken from the United Nations International Covenant on Civil and Political Rights.’³ Most of the rights in the Bill of Rights appear to apply both to nationals and non-nationals, and where the rights of nationals and non-nationals differ, this seems to be spelt out explicitly, as in s 36(14) on freedom from expulsion from the UK.
5. The relationship between s 6(12)(a) and the Bill of Rights in s 36 is not made clear. Nor is it clear which rights fall within the scope of s 6(12)(a): while the text of the section refers to ‘civic rights’, which could potentially be interpreted rather narrowly to apply to voting and political participation

¹ Political and Constitutional Reform Committee, ‘A New Magna Carta?’ (Second Report of Session 2014–2015, HC 463).

² *ibid*, 289.

³ *ibid*, 327.

rights and the right to enter and remain on the national territory, the heading refers to ‘civil rights’, which would seem to be a broader term – potentially including many or all of the rights included in the International Covenant on Civil and Political Rights.

6. In its current form, the Human Rights Act 1998, which incorporates the European Convention on Human Rights (ECHR) into domestic law, does not include a provision of the type contained in s 6(12)(a). It is true that a certain number of rights are subject to exceptions which limit the extent to which they apply to aliens,⁴ but most of the rights guaranteed under the ECHR apply more generally to all persons within the jurisdiction of the United Kingdom. The case law under the ECHR acknowledges that State parties to the Convention can draw distinctions between nationals and non-nationals in relation to these rights and that ‘the contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment’,⁵ but such distinctions are only permitted to the extent to which they are based on an ‘objective and reasonable justification’ – that is, the distinction must pursue a legitimate aim, and there must be a reasonable relationship of proportionality between the aim pursued and the means employed.⁶ Moreover, the European Court of Human Rights has observed that ‘very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention’.⁷ In contrast, s 6(12)(a) could be interpreted as allowing Parliament to enjoy a broad discretion in determining the extent to which non-nationals should enjoy ‘civic’ (or ‘civil’) rights.
7. This submission seeks to inform debate about the issues raised by s 6(12)(a) of the illustrative written Constitution – the human rights of non-nationals, and the extent to which they should be protected under any reform of the British Constitution. To do this, OPBP has undertaken research which aims to provide a brief overview of the extent to which non-nationals’ rights are protected under various international and regional instruments, under European Union law, and in the domestic systems of a number of other jurisdictions within the Commonwealth and the European Union, as well as in the United States and Brazil.
8. The international and regional treaty regimes selected for consideration are:

⁴ The right to liberty in Article 5 (Article 5(1)(f) contains an exception allowing arrest and detention to prevent unauthorised entry to the country or with a view to extradition or deportation), and the rights to freedom of expression in Article 10, to freedom of assembly and association in Article 11, and the prohibition on discrimination in the enjoyment of Convention rights under Article 14 (all of which are limited by Article 16, which states that ‘[n]othing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens’).

⁵ *Gaygusuz v Austria* (1996) 23 EHRR 364, para [42].

⁶ *ibid*; see also *Koua Poirrez v France* (2003) 40 EHRR 2.

⁷ *ibid*

- i) the ECHR and its protocols,
- ii) the core human rights treaties of the United Nations, in particular the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Covenant on the Elimination of All Forms of Racial Discrimination (ICERD), and
- iii) the American Convention on Human Rights.

9. In addition, the submission considers the protection of the rights of non-nationals under the Charter of Fundamental Rights of the European Union, and in comparable domestic jurisdictions.

The countries selected for consideration are:

- i) South Africa,
- ii) Canada,
- iii) Germany,
- iv) France,
- v) the United States of America,
- vi) Nigeria, and
- vii) Brazil.

10. The questions which the researchers were asked to answer were as follows:

In light of relevant international, regional and domestic legal instruments, please provide answers to the following questions in relation to your jurisdiction or treaty regime:

- A. Considering both the text of the instrument(s) and relevant case law, are rights guaranteed to non-nationals as well as nationals?
- B. Is there a difference between the human rights afforded to non-nationals and those of nationals? In relation to which rights do limitations regarding non-nationals apply? What is the scope of the limitations?
- C. Are the terms 'civic rights' and/or 'civil rights' used in the instrument(s), and if so, how are they defined, or how have they been construed? Are there any indications that 'civic rights' and/or 'civil rights' are guaranteed only to nationals?

11. Some of the researchers divided their reports into three sections corresponding to the three groups of questions listed above, while other reports are structured somewhat differently. However, all of the reports address the research questions and provide helpful insights as to the protection of the human rights of non-nationals under the instrument or in the jurisdiction being considered.

12. The next section is a summary of the findings of this research in relation to each of these questions, seeking to identify general trends across the different treaty regimes and jurisdictions. Part II consists of individual reports on the protection of non-national rights in each of the treaty regimes and jurisdictions which have been considered.

SUMMARY CONCLUSIONS

A. Considering both the text of the instrument(s) and relevant case law, are rights guaranteed to non-nationals as well as nationals?

13. In all the jurisdictions and treaty regimes considered, the human rights framework provided protection to the rights of non-nationals as well as nationals. This reflects the broader philosophical inspiration which underlies the idea of human rights – that they are rights which people enjoy simply by virtue of their humanity, which do not depend on citizenship or other forms of status. None of the instruments or jurisdictions accords an unbounded discretion to State legislative or executive bodies to determine the extent to which non-nationals should enjoy the human rights protected under the instrument or in the jurisdiction.

B. Is there a difference between the human rights afforded to non-nationals and those of nationals? In relation to which rights do limitations regarding non-nationals apply? What is the scope of the limitations?

14. In all the treaty regimes and jurisdictions considered, a limited number of specific rights are expressed as applying only to citizens. In the majority of case studies, however, the rights which apply only to citizens were confined to a certain number of categories, notably:

- Rights to political participation: voting rights, eligibility for public office, the right to form political parties and the right to access employment in the public service are commonly restricted to citizens. In some (but not all) jurisdictions, the restrictions on political rights may go somewhat further. Article 16 of the ECHR, for example, appears to allow restrictions on non-nationals' freedom of expression and right to assembly and association in the context of political activity. This provision has been the subject of subsequent criticism and in at least one case has been interpreted narrowly by the European Court of Human Rights.⁸ Similarly, the rights to assembly and association under Article 8 and 9 of the German Basic Law only apply to citizens, although restrictions on non-nationals in these spheres would be subject to more general tests of

⁸ *Piermont v France* (1995) 20 EHRR 301

constitutionality such as proportionality under the general protection of individual freedom in Article 2.

- The right to enter the State's territory, the right to non-expulsion and freedom of movement rights within the territory: non-nationals are generally not accorded a right to enter the State's territory, nor do they have a general right not to be expelled from the State's territory. The right to freedom of movement within the State's territory is generally limited to those legally present on the State's territory, which excludes non-nationals who do not have the State's permission for their continued presence.
- Under the Nigerian Constitution, the right to privacy (s 37), to own immoveable property (s 43), and to freedom from discrimination (s 42) appear to be accorded only to citizens.⁹ These provisions do not seem to be mirrored in the other jurisdictions studied.

15. In addition, economic, social and cultural rights, which are not included in human rights instruments in all jurisdictions, where present are sometimes not extended, or not fully guaranteed, to non-nationals. Article 2(3) of the ICESCR allows developing countries to determine the extent to which the rights it establishes are accorded to non-nationals. Although many of the economic and social rights in South Africa apply to non-nationals, this is not the case in relation to the freedom to undertake a trade, occupation, or profession (s 22 of the Constitution), or of the obligation of the State to foster equitable access to the land, which applies only in relation to nationals (s 25(5)). Similarly, the right to choose a profession or trade in the German Basic Law (Article 12(1)) does not apply to non-nationals, and the freedom to seek employment, to work, and to provide services recognised in Article 15(2) of the Charter of Fundamental Rights of the European Union only applies to citizens of the Union. It appears that some of the social and economic rights in the Brazilian Constitution are also guaranteed only to nationals.

16. Outside these categories, the rights provided for in the treaty regimes and jurisdictions studied in this submission are overwhelmingly 'non-differentiated' – that is, they do not differentiate between nationals and non-nationals. However, in most, if not all, the jurisdictions and treaty regimes, it appeared to be considered that distinctions between nationals and non-nationals can in some circumstances be made by the State in the application of these 'non-differentiated' rights. But such differential treatment is generally subject to an overarching principle of equality or

⁹ Although a broader prohibition on discrimination is contained in Article 2 of African Charter of Human and People's Rights, which guarantees to 'every individual...without distinction' the rights in the Charter, and the Charter has been incorporated into Nigerian domestic law.

non-discrimination which imposes objective limits on it; it will only be permissible if it satisfies some kind of rationality and proportionality test.

17. Importantly, it appears that none of the international instruments considered, nor any of the other jurisdictions selected for analysis, contain a provision which accords a blanket power to State legislative or executive bodies to determine the extent to which non-nationals should enjoy these ‘non-differentiated’ rights. Any change to the UK constitution which would accord Parliament such a power would constitute a significant departure from the international standard.

C. Are the terms ‘civic rights’ and/or ‘civil rights’ used in the instrument(s), and if so, how are they defined, or how have they been construed? Are there any indications that ‘civic rights’ and/or ‘civil rights’ are guaranteed only to nationals?’

18. The term ‘civic rights’ is not used in the instruments and jurisdictions considered in this submission to define a category of human rights which are not guaranteed to non-nationals. The use of the term ‘civic rights’ in s 6(12)(a) of the illustrative written Constitution to define those rights which are not fully accorded to non-nationals is concerning: since the term is not used in other instruments there could be uncertainty about its scope – which rights would fit within the category.

19. Nor is the term ‘civil rights’, which appears in the heading of s 6(12), used in the instruments to indicate a clearly defined subcategory of human rights. Article 6 of the ECHR uses the term ‘civil rights’ in a completely different context: it establishes a right to a fair and public hearing by an independent and impartial tribunal in the determination of a person’s ‘civil rights and obligations’ as well as of criminal charges. Here, the term ‘civil rights’ is clearly not being used to refer to a subcategory of the human rights guaranteed in the ECHR, but refers more generally to rights (such as those under private law) arising in the legal systems of parties to the Convention. The majority of the instruments do not use the term ‘civil rights’, and where the term is used it tends not to be defined.¹⁰ In none of the instruments or jurisdictions studied is the term used in a general provision to define those rights which are not guaranteed to non-nationals. The term ‘civil rights’ is used in the title of the ICCPR (and in Chapter II of the American Convention on Human Rights) to identify a broad category of rights that are considered as ‘civil and political’ (as opposed to the ‘economic, social and cultural’ rights of the kind contained in the ICESCR)– but it would be very disquieting if s 6(12)(a) meant that non-nationals were not entitled to any of the rights in the ICCPR except to the extent determined by Parliament, since this would include such basic rights as

¹⁰ For example, in the German Basic Law, the German language terms equivalent to ‘political rights’ and ‘civil and political rights’ (“*staatsbürgerlichen Rechte*”, “*bürgerlicher und staatsbürgerlicher Rechte*”) are used in Article 33(1) and (3) to guarantee equality of such rights. The first provision is a guarantee of political rights equally to every German citizen in every *Land* or state, the second is a guarantee that civil and political rights will be enjoyed independently of religious affiliation. However, neither the term ‘political rights’ nor ‘civil and political rights’ is defined.

the right to life, the right not to be tortured, enslaved or arbitrarily detained, the right to fair trial and freedom of thought, religion and expression.

20. In summary, neither of the terms - 'civic rights' or 'civil rights' - appears to be appropriate if the intention of s 6(12)(a) is to allow Parliament to determine the extent to which non-nationals shall enjoy those rights which, in the international and comparative practice considered in this submission, are guaranteed only to nationals – primarily, rights of political participation and of freedom of entry to the territory, freedom of movement and the right to non-expulsion. The terms are potentially over-inclusive, and could be interpreted as extending beyond these areas.

21. A provision of the kind contained in s 6(12)(a) is not necessary to ensure that the constitutional guarantees usually associated with citizenship are confined to nationals. This can be specified in the text of these particular rights – as is in fact the case in the Bill of Rights in s 36 of the illustrative Written Constitution, in which it is stated that the right to participate in public life and service applies to 'every adult citizen' (s 36(14)), that the right to liberty of movement applies to 'everyone lawfully within the United Kingdom' (s 36(15)), and that 'no British national shall be expelled from the United Kingdom or deprived of the right to enter the United Kingdom' (s 36(16)(a)). Nor would s 6(12)(a) be necessary to authorise Parliament to extend these particular rights to non-nationals, to the extent that it chose to do so, since Parliament would be able to do so in the exercise of its general legislative power. If it is to be interpreted in line with the approach in international instruments and in other jurisdictions, s 6(12)(a) performs no real function.

22. Considering the confusion which could be caused by such a provision, it is submitted that a provision of this kind should not be included in any codified or reformed UK Constitution.

PART II – INTERNATIONAL AND COMPARATIVE REPORTS

1. EUROPEAN CONVENTION ON HUMAN RIGHTS¹¹

A. Considering both the text of the instrument(s) and relevant case law, are rights guaranteed to non-nationals as well as nationals?

23. The European Convention on Human Rights (ECHR) applies equally to all persons within the legal order formed by the Convention, whatever their nationality. Thus, since the early years of the ECHR, it has been accepted that non-nationals – whether nationals of another State Party to the Convention or of non-party State, refugees or stateless persons – are able to rely before the Commission and the Court on the rights enshrined in the Convention. It is a prerequisite to membership of the Council of Europe that ‘every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by *all persons within its jurisdiction* of human rights and fundamental freedoms’ (emphasis added).¹² This position is reiterated in Article 1 of the ECHR, which provides that ‘[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms’ defined in the ECHR. Thus, non-nationals within the jurisdiction of a contracting party benefit from the rights and freedoms enumerated in the ECHR.

24. Further, Article 14 of the ECHR requires that each of the rights and freedoms guaranteed therein ‘be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.’ Although nationality, as opposed to ‘national origin’, is not explicitly listed as a prohibited ground of discrimination in Article 14, the Article has been authoritatively interpreted as including nationality.¹³ In the case of *Koua Poirreze v France*,¹⁴ the Court observed that:

According to the Court's case-law, a distinction is discriminatory, for the purposes of Article 14, if it “has no objective and reasonable justification”, that is if it does not pursue a “legitimate aim” or if there is not a “reasonable relationship of proportionality between the means employed and the aim sought to be realised”. Moreover the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see, inter alia, *Gaygusuz* [...] p. 1142, § 42; *Larkos v Cyprus* [GC], no. 29515/95, § 29, ECHR 1999-I; and *Thlimmenos v Greece* [GC], no. 34369/97, § 40, ECHR 2000-IV). However, very weighty reasons would have to be

¹¹ This report is indebted to H el ene Lambert, *The Position of Aliens in Relation to the European Convention on Human Rights* (3rd edition, Council of Europe Publishing 2006).

¹² Statute of the Council of Europe (adopted 5 May 1949, entered into force 3 August 1949) 87 UNTS 103 art 3

¹³ *Gaygusuz v Austria* (1996) 23 EHRR 364, para [42]; see also *A v Secretary of State for the Home Department*, [2004] UKHL 56, [49] (Lord Bingham of Cornhill)

¹⁴ (2003) 40 EHRR 2, para [46]

put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention (see *Gaygusuz*, cited above, p. 1142, § 42).

25. Similarly, in the House of Lords case of *A v Secretary of State for the Home Department*,¹⁵ applying the Human Rights Act (which incorporates the ECHR into UK domestic law), Lord Bingham of Cornhill observed that the rights of non-nationals were protected under the Convention, and that this was in harmony with pre-existing British case law:

The foreign nationality of the appellants does not preclude them from claiming the protection of their Convention rights. By article 1 of the Convention (which has not been expressly incorporated) the contracting states undertook to secure the listed Convention rights "to everyone within their jurisdiction"...The European Court has recognised the Convention rights of non-nationals: see, for a recent example, *Conka v Belgium* (2002) 34 EHRR 1298. This accords with domestic authority. In *Khawaja v Secretary of State for the Home Department* [1984] 1 AC 74:

"Habeas corpus protection is often expressed as limited to 'British subjects'. Is it really limited to British nationals? Suffice it to say that the case law has given an emphatic 'no' to the question. Every person within the jurisdiction enjoys the equal protection of our laws. There is no distinction between British nationals and others. He who is subject to English law is entitled to its protection. This principle has been in the law at least since Lord Mansfield freed 'the black' in *Sommersett's Case* (1772) 20 St. Tr. 1. There is nothing here to encourage in the case of aliens or non-patrials the implication of words excluding the judicial review our law normally accords to those whose liberty is infringed."

B. Is there a difference between the human rights afforded to non-nationals and those of nationals? In relation to which rights do limitations regarding non-nationals apply? What is the scope of the limitations?

26. The ECHR and its protocols contain several exceptions to this principle, resulting in the exclusion of some or all non-nationals from the enjoyment of certain human rights. This is the case, in particular of Article 5 (1)(f) and Article 16 of the ECHR, Article 1 of Protocol No 1,¹⁶ Articles 2 (1) and 4 of Protocol No 4,¹⁷ and Article 1 of Protocol No 7,¹⁸ which all contain direct limitations on the non-discrimination clause. In addition, Articles 8 to 11 ECHR have been found to limit indirectly the non-discrimination clause by allowing states to take restrictive measures necessary in a democratic society.

¹⁵ *A* (n 13), [48]

¹⁶ Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 20 March 1954, entered into force May 18, 1954) ETS No 9

¹⁷ Protocol No 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 16 September 1962, entered into force 2 May 1968) ETS No 46

¹⁸ Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 22 November 1984, entered into force 1 November 1988) ETS No 117

Article 5 (1)

27. Article 5(1) of the Convention reiterates the global principle of the right to liberty and security of the person, but elaborates upon that standard by providing that ‘no one shall be deprived of his liberty’ except in certain specified cases and only ‘in accordance with a procedure prescribed by law.’ The list of exceptions to the right to liberty in article 5(1) is exhaustive and only a narrow interpretation of those exceptions is consistent with the aim of article 5, namely to protect the individual from arbitrary detention.
28. Detention for the purpose of refusing unauthorised entry into the territory or for deporting or extraditing an alien is one of the specified exceptions where deprivation of liberty is permitted under the ECHR (Article 5(1)(f)). However, a number of cases show that States’ power to detain aliens in this context is still subject to limits. In *Amuur v France*,¹⁹ a case involving four sibling asylum-seekers from Somalia held in the international zone of Paris Orly airport for twenty days, the ECtHR stated that:
- Holding aliens in the international zone...should not be prolonged excessively, otherwise there would be a risk of it turning a mere restriction on liberty - inevitable with a view to organising the practical details of the alien’s repatriation or, where he has requested asylum, while his application for leave to enter the territory for that purpose is considered - into a deprivation of liberty.²⁰
29. In *Medvedev and Others v France*²¹ the applicants had been deprived of their liberty between the boarding of their ship and its arrival in Brest. The ECtHR found a violation of Article 5(1) ECHR, considering the detention to be unlawful as it lacked a legal basis of the requisite quality to satisfy the general principle of legal certainty. In *Abdolkehani and Karimnia v Turkey*²² the applicants had not been free to leave the police headquarters or the Foreigners’ Admission and Accommodation Centre. Further, they were only able to meet a lawyer if the latter could present to the authorities a notarised power of attorney. Access by the UNHCR to the applicants was subject to the authorisation of the ministry of the interior. In the ECHR’s view, the applicants’ placement in the aforementioned facilities amounted to a ‘deprivation of liberty’ given the restrictions imposed on them by the administrative authorities despite the nature of the classification under national law.²³
30. Moreover, national authorities cannot do away with effective control of lawfulness of detention by the domestic courts whenever they choose to assert that national security and terrorism are

¹⁹ *Amuur v France* (1996) 22 EHRR 533

²⁰ *ibid*, para [43]

²¹ (2010) 51 EHRR 39

²² App no 30471/08 (ECtHR, 22 September 2009)

²³ *Ibid*, para [127]

involved.²⁴ In *Al-Nashif v Bulgaria*,²⁵ the ECHR noted that there are means which can be employed which both accommodate legitimate national security concerns and yet accord the individual a substantial measure of procedural justice.

31. In *A v Secretary of State for Home Affairs*,²⁶ the House of Lords found that the detention on security grounds of foreign nationals, who could not be deported to their countries of nationality because of the risk of torture, did not fall under the exception permitting detention for deportation purposes in Article 5(1)(f) of the Convention.²⁷ The UK had derogated from Article 5(1) of the Convention under Article 15 on the basis of the existence of a public emergency, in order to allow continued detention in this situation. The House of Lords held 8 to 1 that this derogation was valid. However, a majority of the Law Lords went on to hold that the detention provisions were not proportionate to the public emergency (partially because they applied only to non-nationals, and not to nationals who could pose an equally great security threat and who were also irremovable from the UK). On the same basis, they also found that the differential treatment of non-nationals constituted a violation of the non-discrimination provision in Article 14 ECHR (from which the UK had not derogated) since there was no objective reason for the differential treatment.²⁸
32. Article 5(4) ECHR also guarantees procedural fairness rights for detained non-nationals. In a case heard at the Strasbourg Court, *A and Others v the United Kingdom*,²⁹ arising from the same facts as the case discussed above, the Court held that the ‘open’ evidence provided to certain of the detainees was insufficient to allow them effectively to challenge the allegations against them, constituting a violation of Article 5(4).

Article 6

33. The right to a fair and public hearing under Article 6 ECHR is to be secured to ‘everyone’. However, the obligation to furnish both nationals and non-nationals the rights guaranteed under Article 6 is contingent upon the proceedings in question being understood, or constructed, as involving the determination of the individual’s ‘civil rights and obligations’ or of ‘any criminal charge’ against him or her. Thus, only when the relevant proceedings are held to entail the determination of ‘civil rights and obligations’ or of a ‘criminal charge’ will the additional procedural protections set out under Article 6(2) and 6(3) apply.

²⁴ *Chahal v UK* (1997) 23 EHRR 413, para [131]

²⁵ (2003) 36 EHRR 37

²⁶ *A* (n 13)

²⁷ *ibid*, [8]-[9] (Lord Bingham of Cornhill); [97] (Lord Hoffmann); [103]-[105] (Lord Hope); [155] (Lord Scott); [163] (Lord Rodger); [222] (Baroness Hale)

²⁸ *ibid* [33]-[34] (Lord Bingham of Cornhill)

²⁹ (2009) 49 EHRR 29

34. Article 6(1) may apply in cases where an applicant is being returned to a third country where one may be subjected to treatment contrary to Article 6(1).³⁰ The extraterritorial effect of Article 6 was recognised in *Soering v the United Kingdom*,³¹ in which the Court stated that it ‘does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of fair trial in the requesting country. However, the facts of the present case do not disclose such a risk’.³² In *Drozd and Janousek v France and Spain*,³³ the Court stated that although states parties to the ECHR do not have to ensure that the guarantees of Article 6 will be respected in the receiving country, ‘the Contracting States are, however, obliged to refuse their co-operation if it emerges that the conviction is the result of a flagrant denial of justice’.

Article 8

35. Article 8 ECHR guarantees ‘everyone’, including non-nationals, a right to respect for one’s private and family life, home and communications.³⁴ The Commission and the Court applied Article 8 of the ECHR to aliens seeking entry into the territory of a contracting state to join family members lawfully residing there.³⁵ The Court has also held that Article 8 can limit on the State’s right to deport aliens where this would lead to an unjustified interference to the applicant’s right to family life in the country of residence.³⁶ Considering the sensitivity of the matter, the Court recognised that such limitations did not, however, ‘impose on a State a general obligation to respect the choice by married couples of the country of their matrimonial residence and to authorise family reunion in its territory’.³⁷

36. The limitations of the Article 8 rights of non-nationals in the context of deportation were considered in the case of *Bouchelkia v France*.³⁸ Mr Bouchelkia was born in Algeria in 1970, and immigrated to France with his mother at age two. In 1990, Mr Bouchelkia was ordered deported because of a violent rape conviction in 1987. Mr Bouchelkia requested that the European Court of Human Rights find a violation of Article 8 of the European Convention. The Court found no such violation concluding that the interference in Mr Bouchelkia’s family life ‘had aims which were entirely compatible with the Convention, namely “the prevention of disorder or crime”’. The Court

³⁰ Lambert (n 11) 80

³¹ (1989) 11 EHRR 439

³² *ibid*, para [113]

³³ (1992) 14 EHRR 745

³⁴ Lambert (n 11) 64–65

³⁵ *Abdulaziz, Cabales and Balkandali v. the United Kingdom* (1987) 7 EHRR 47; *Gül v Switzerland* (1996) 22 EHRR 93; *Ahmut v. the Netherlands* (1996) 24 EHRR 62; *Nsona v the Netherlands* (2001) 32 EHRR 9;

³⁶ *Berrehab v the Netherlands* (1988) 11 EHRR 322

³⁷ *Jeunesse v the Netherlands* [2014] ECHR 1036, para [107]

³⁸ (1996) 22 EHRR 228

concluded by saying that ‘it is for the Contracting States to maintain public order in particular by exercising the right as a matter of well-established international law and subject to their treaty obligation, to control the entry and residence of non-nationals. For that purpose they are entitled to order the expulsion of such persons convicted of criminal offences.’³⁹

Article 16

37. Article 16 of the ECHR provides an exception to the non-discriminatory clause expressed in Article 14, allowing the contracting parties to impose restrictions on the political activities of non-nationals in respect of Article 10 (‘Freedom of expression’), Article 11 (‘Freedom of assembly and association’) and Article 14 (‘Prohibition of discrimination’).⁴⁰ The *travaux préparatoires* suggest that Article 16 was included in the ECHR to reflect the view taken of customary international law at the time under which states were accorded the freedom to restrict the political activity of non-nationals.⁴¹ Lambert observes that in more recent years:

this provision has been criticised for conflicting with Article 1 of the ECHR (i.e., the enjoyment by everyone of the rights and freedoms guaranteed therein) and for applying to potentially wide provisions such as Article 14. The Parliamentary Assembly of the Council of Europe even called for its deletion in 1977.⁴²

38. The scope of Article 16 was discussed by the Court in *Piermont v France*.⁴³ The applicant was a German citizen and a member of the European Parliament (MEP). In French Polynesia she took part in demonstrations in favour of independence of France and against French nuclear testing. She was expelled with a prohibition on re-entering and claimed that the measure violated her freedom of expression under Article 10. The French government argued, *inter alia*, that this was permitted under Article 16. The Court disagreed, finding that the applicant’s ‘possession of the nationality of a member State of the European Union and, in addition to that, her status as a member of the European Parliament do not allow Article 16 of the Convention to be raised against her, especially as the people of the OTs take part in the European Parliament elections’.⁴⁴

Article 1 of Protocol no 1

39. In *Ilić v Croatia*⁴⁵ the Court found that the right to a peaceful enjoyment of possessions contained in Article 1 of Protocol No 1 to the ECHR does not encompass the right for an alien who owns

³⁹ *ibid*, para [48]

⁴⁰ Lambert (n 11) 25

⁴¹ Council of Europe, *Collected Edition of the “Travaux préparatoires” of the European Convention on Human Rights*, Vol III (Martinus Nijhoff 1976), 266

⁴² Lambert (n 11) 25

⁴³ (1995) 20 EHRR 301

⁴⁴ *ibid*, para [64]

⁴⁵ App No 42389/98 (ECtHR, 19 September 2000)

property in another country to reside permanently there in order to use his/her property. Lambert goes on to state:

Restrictions applicable to an alien's right of residence in a country are compatible with Article 1 of Protocol No 1 provided they are not absolute nor permanent. It remains uncertain whether or not Article 1 of Protocol No 1 guarantees a right of temporary entry into a foreign country (through the granting of a visa for example) to non-nationals who own property.⁴⁶

40. In *Beyeler v. Italy*,⁴⁷ the Court found the deprivation of the non-national applicant's property in a painting under Italian legislation to be unlawful because of 'the element of uncertainty in the statute and the considerable latitude it afforded the authorities'.⁴⁸ It further found that such interference could not be justified on the ground of national interest and that 'irrespective of the applicant's nationality, such enrichment was incompatible with the requirement of a "fair balance"'.⁴⁹

Article 2 (1) of Protocol No. 4

41. One more limitation is provided in Article 2 (1) of Protocol No 4 to the ECHR stating that: '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', subject to the limitations or restrictions applicable to 'everyone' provided in Article 2 (3) and (4). With the exception of Andorra, Greece, Spain, Switzerland, Turkey and the United Kingdom, all other states that are parties to the ECHR are also parties to Protocol No 4. Thus, aliens lawfully in a state may move freely within that state and may choose their place of residence, but aliens who are not lawfully in a state are not guaranteed this right.⁵⁰

Article 4 of Protocol No 4

42. A rule which applies explicitly to aliens is provided for in Article 4 of Protocol No 4: 'Collective expulsion of aliens is prohibited'. The Commission has defined collective expulsion as 'any measure of the competent authority compelling aliens as a group to leave the country'.⁵¹ However, 'the refusal of asylum in identical terms to a number of aliens from the same country does not amount to collective expulsion if each of them had his/her asylum application decided on its individual merits'.⁵² Aliens may only be expelled as a group following 'a reasonable and objective

⁴⁶ Lambert (n 11), 37–38

⁴⁷ (2001) 33 EHRR 52

⁴⁸ *ibid*, para [110]

⁴⁹ *ibid*, paragraphs [120]–[121]

⁵⁰ Lambert (n 11), 33–34

⁵¹ *Becker v. Denmark*, App No 7011/75, (EComHR, 2 October 1975), para [235]

⁵² Lambert (n 11), 34, citing *Alibaks and others v. the Netherlands*, App No 14209/88 (ECtHR, 16 December 1988)

examination of the particular cases of each individual alien of the group'.⁵³ More recently, the Court endorsed the Commission's definition of collective expulsion to mean 'any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group'.⁵⁴ In *Conka v Belgium*,⁵⁵ Article 4 of Protocol No 4 was found to have been breached because the expulsion procedure lacked 'sufficient guarantees demonstrating that the personal circumstances of each of those concerned had been genuinely and individually taken into account'.⁵⁶ Finally, 'the procedural guarantee under Article 4 of Protocol No 4 applies generally to all aliens, whether lawfully or unlawfully in the territory of a state, whether resident or non-resident in the territory of that state, and whether or not part of a collective group'.⁵⁷

Article 1 of Protocol No. 7

43. The last exception is contained in Article 1 of Protocol No. 7, which guarantees 'procedural safeguards relating to the expulsion of aliens'. Lambert summarises this provision as follows:

According to this provision, individual aliens 'lawfully resident' in a country may only be expelled pursuant to a decision reached by law, and they must be allowed to submit reasons against their expulsion, to have their case reviewed, and to be represented before the competent authority, except when such expulsion is necessary on grounds of public order or national security.⁵⁸

Most complaints under this provision have failed, on the grounds that the applicant was not lawfully resident in the country.⁵⁹

C. Are the terms 'civic rights' and/or 'civil rights' used in the instrument(s), and if so, how are they defined, or how have they been construed? Are there any indications that 'civic rights' and/or 'civil rights' are guaranteed only to nationals?

44. The terms 'civil rights' and/or 'civic rights' are not used in the ECHR to define a subset of human rights contained in the Convention which would not be fully guaranteed to non-nationals.

45. The term 'civil rights' is used in quite a different sense in Article 6 of the Convention, to define the circumstances in which the right to a fair hearing applies: 'In determination of his civil rights and obligations...everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.' In this context, 'civil rights' refers not to a

⁵³ *Becker* (n 48)

⁵⁴ *Andric v Sweden*, App No 45917/99 (ECtHR, 23 February 1999)

⁵⁵ (2002) 32 EHRR 54

⁵⁶ *ibid*, para [63]

⁵⁷ Lambert (n 11), 35

⁵⁸ *ibid*

⁵⁹ *ibid*

subcategory of human rights but to rights recognised in domestic legal systems in the context of private law disputes.

46. The Court has interpreted the concept of ‘civil rights’ in Article 6 narrowly in the immigration sphere. In *G R v the Netherlands*⁶⁰ the Court held that:

Article 6 is not applicable to proceedings concerning the legality of an alien’s residence, which pertain exclusively to public law; moreover, the fact that such proceedings incidentally have major repercussions on the private and family life or on the prospects of employment of the person concerned cannot suffice to bring those proceedings within the scope of civil rights protected by Article 6(1) of the Convention”.⁶¹

⁶⁰ App No 22571/07, (ECt HR, 10 January 2012)

⁶¹ *ibid*, para [48]

2. INTERNATIONAL LAW: ICCPR, ICESCR, ICERD

47. The focus of this section will be on the rights of non-nationals under the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Covenant on the Elimination of All Forms of Racial Discrimination (ICERD)). Non-nationals further subdivided into a diverse range of categories, including permanent residents, migrants, refugees, asylum-seekers, victims of trafficking, foreign students, temporary visitors and stateless people. These sub-categories often fall under the purview of more specific legal rules of international law and human rights law. For example, both the United Nations and International Labour Organisation have created instruments dealing specifically with migrant workers- the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 1990 is but one prominent example. Space precludes a detailed treatment of these more specific legal regimes.

A. Considering both the text of the instrument(s) and relevant case law, are rights guaranteed to non-nationals as well as nationals?

48. Across the core United Nations human rights treaties, the general rule is that all persons enjoy all rights by virtue of their humanity, free from distinctions based on nationality. This general rule is subject to limited exceptions outlined below in respect of particular treaties. This general principle was strongly re-iterated by the Office of the United Nations High Commissioner for Human Rights in a recent report: ‘All persons should, by virtue of their essential humanity, enjoy all human rights.’⁶²

B. Is there a difference between the human rights afforded to non-nationals and those of nationals? In relation to which rights do limitations regarding non-nationals apply? What is the scope of the limitations?

i) The International Covenant on Civil and Political Rights (ICCPR)

49. In the ICCPR, the general rule of equality is set out in Article 2(1) according to which each state party undertakes “to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, *without distinction of any kind*”.⁶³ The general principle of equality is also found in Article 26 which guarantees equality before the law. This principle has

⁶² Office of the UN High Commissioner for Human Rights, *The Rights of Non-Citizens* (2006) HR/PUB/06/11, 5

⁶³ Article 2(1), International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

been articulated more explicitly in the context of non-nationals by the Human Rights Committee, which in General Comment No.15 stated ‘the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.’⁶⁴

50. Limited exceptions to the general rule of equality exist with respect to two categories of rights.⁶⁵ The first category is political rights which are explicitly guaranteed to *citizens* under Article 25 (specifically guaranteeing the right to political participation including the right to vote and access to public service). The second category is freedom of movement rights under Article 12(1), which is textually limited to persons ‘lawfully within the territory of a State’.⁶⁶ This therefore excludes certain non-nationals such as undocumented migrants. However, Article 12(4) guarantees that ‘no one shall be arbitrarily deprived of the right to enter his own country’⁶⁷. The Human Rights Committee has interpreted the language of ‘no one’ broadly so as to confer rights upon stateless persons resident in a particular state and other non-nationals with a long term relationship with the state.⁶⁸ Furthermore, whilst confirming the Covenant does not recognise the rights of aliens ‘to enter or reside in the territory of a state party’⁶⁹ the Committee went on to nonetheless note that an alien may be protected in relation to entry or residence when considerations of non-discrimination, prohibition of inhumane treatment and respect of family life arise.⁷⁰ It is worth noting that non-nationals are also granted additional rights by virtue of their status, including the procedural protections of Article 13 in respect of decisions to expel or deport aliens – though this is only granted to aliens ‘lawfully in the territory of a state party’ (contrast this with Article 12 which applies to *everyone* lawfully within state territory).
51. Beyond the textual limitations on the type of rights accorded to non-nationals, the jurisprudence of the Human Rights Committee holds that the ICCPR does not preclude differential treatment of non-nationals. However, the Committee has interpreted Article 26 (guaranteeing equality before the law and equal protection of the law) to require objective and reasonable grounds for such

⁶⁴ UN Human Rights Committee, ‘General Comment 15, the position of aliens under the Covenant’ (1986) UN Doc HRI/GEN/1/Rev.1

⁶⁵ (n 62), 8

⁶⁶ Article 12(1), ICCPR

⁶⁷ Article 12(4), ICCPR

⁶⁸ (n 62), 18

⁶⁹ (n 64) para. 5

⁷⁰ Ibid.

differential treatment.⁷¹ In determining whether such grounds exist, it is necessary to judge each case on its own facts.⁷²

52. Under the ICCPR, we therefore see a strong principle of equal rights being conferred on persons regardless of nationality with some exceptions in the realm of political rights and free movement. Any further differential treatment must be based upon objective and reasonable grounds as applied to the individual case.

ii) International Covenant on Economic, Social and Cultural Rights ('ICESCR')

53. Again, the general rule is that rights apply equally to nationals and non-nationals. Article 2(2) requires that states guarantee rights 'without discrimination of any kind'.⁷³ The key exception here with regard to non-nationals is laid down in Article 2(3):

Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognised in the present Covenant to non-nationals.⁷⁴

54. This exception is obviously permissive rather than mandatory and the Office of the High Commissioner for Human Rights has argued it must be construed narrowly given it operates to limit rights.⁷⁵ Despite this, its scope is still unclear. First, it applies only to developing countries, although no criteria or definition is provided to define this term. One commentator notes that during the drafting process, it was either frequently stated or generally understood that 'developing countries' referred to states emerging from colonialism with weaker economies – however, uninformed by this history, the term may be taken to cover a much broader list of states, even including former colonial powers.⁷⁶ Second, the exception requires due regard to the state's national economy: again, it has been argued this covers factors such as the state's foreign exchange resources, purchasing power and provision of basic infrastructure.⁷⁷ Third, the exception only allows states to limit the economic rights of non-nationals, as distinct from social and cultural rights (although the concept of 'economic rights' is not separately defined in the ICESCR). Article 2(3) implies non-nationals should not be completely deprived of all economic rights (for it uses the

⁷¹ For example, *Broeks v The Netherlands* (Communication No 172/1984), *Sprenger v The Netherlands* (Communication No 395/1990), and *Kavanagh v Ireland* (Communication No 819/1998).

⁷² UN Human Rights Committee, Views on communication No. 965/2000 (*Karakurt v Austria*), 4 April 2002, A/57/40 (vo.II) annex IX, sect. II, para 8.4

⁷³ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 2(2)

⁷⁴ *ibid* art 2(3)

⁷⁵ (n 62), 12.

⁷⁶ E V O Dankwa, 'Working Paper on Article 2(3) of the International Covenant on Economic, Social and Cultural Rights' (1987) 9 Human Rights Quarterly 230, 236-237

⁷⁷ *ibid*, 242

language of “to what *extent...*”). In any case, this exception does not apply to the UK, as a developed country.

55. The rights in the ICESCR are therefore broadly guaranteed to non-nationals in equal measure, subject only to the narrow exception above for economic rights in developing countries.

iii) International Covenant on the Elimination of All Forms of Racial Discrimination (‘ICERD’)

56. ICERD appears to embody the greatest departure from the general rule of equality of rights between nationals and non-nationals. Article 1(1) defines the content and scope of racial discrimination in relation to a wide range of rights and freedoms found in Article 5. However, and crucially for our purposes, Article 1(2) goes on to state that ‘this Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens’.⁷⁸ Article 1(3) adds that ‘nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality’.⁷⁹ Together, these provisions indicate that states may make distinctions between nationals and non-nationals, so long as they treat all non-nationals similarly.⁸⁰

57. Clarification on the meaning of Article 1 has been given by the Committee on the Elimination of Racial Discrimination (‘CERD’).⁸¹ In General Recommendation No. 30, CERD stated that Article 1 should be read in light of the totality of human rights law and Article 1(2) should not “detract in any way from the rights and freedoms recognised and enunciated in other instruments”.⁸² Furthermore, they reiterated the general obligation to guarantee equality regardless of citizenship in the enjoyment of human rights, and that any differential treatment must pursue a legitimate aim (consistent with the objectives and purposes of ICERD) and be proportional to achievement of that aim.⁸³ This reasoning was applied in the communication of *DR v Australia*, in which CERD held the prioritisation of Australian nationals with regard to educational benefits pursued a

⁷⁸ Article 1(2), International Covenant on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969), 660 UNTS 195 (ICERD)

⁷⁹ Article 1(3), ICERD

⁸⁰ UN Economic and Social Council, Commission on Human Rights, Fifty-fifth session ‘The rights of non-citizens, Final report of the Special Rapporteur Mr David Weissbrodt’ (26 May 2003) E/CN.4/Sub.2/2003/23, 9

⁸¹ Theo Van Boven, ‘Racial and Religious Discrimination’ in Rüdiger Wolfrum (ed) (2010) MPEPIL <www.mpepil.com> accessed 16 December 2014, para [15]

⁸² (n 62), 9

⁸³ *ibid*, 10 (unless otherwise falling within the Art 1(4) provision for affirmative action)

legitimate aim and was not discriminatory because the New Zealand applicant was treated equally when compared with other non-nationals.⁸⁴

58. Viewed as a whole, what seems like a broad statutory exemption of non-nationals from the protection of ICERD (other than a right to equal treatment compared with other non-nationals) has been interpreted so as to be more limited, requiring differential treatment to be a proportionate means of achieving a legitimate aim. In any case, even if ICERD's protection did not apply to non-nationals, States would still be bound by their obligations to non-nationals arising out of other conventions to which they were parties, such as the ICCPR.

C. Are the terms 'civic rights' and/or 'civil rights' used in the instrument(s), and if so, how are they defined, or how have they been construed? Are there any indications that 'civic rights' and/or 'civil rights' are guaranteed only to nationals?

59. The name and operation of the ICCPR refers to 'civil and political rights,' suggesting that all the rights within that instrument fall within that category. However, as discussed in Section A, the rights in the ICCPR are not limited to citizens, with the exception of the narrowly 'political' rights in Article 25, such as the right to vote. Any attempts by a State to treat non-nationals differently in the enjoyment of rights protected by the ICCPR on the grounds of their status are subjected to scrutiny. Under the ICCPR, Article 26 requires objective and reasonable grounds to limit the equal protection of the law.

⁸⁴ Committee on the Elimination of Racial Discrimination, *D R v Australia*, Comm. 42/2008, U.N. Doc A/64/18 at 131 (CERD Aug. 14, 2009)

3. AMERICAN CONVENTION ON HUMAN RIGHTS

A. Considering both the text of the instrument(s) and relevant case law, are rights guaranteed to non-nationals as well as nationals?

60. Article 1 of the American Convention determines the scope of the parties' obligation to respect the rights recognized in the rest of the Convention. It reads as follows:

Article 1. Obligation to Respect Rights

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

For the purposes of this Convention, "person" means every human being.

61. The expression 'all persons' and the non-exhaustive enumeration of prohibited grounds of discrimination – expressly mentioning national origin – in Article 1(1) of the American Convention shows that the American Convention does not institute any restrictions on the group of persons that is entitled to the benefit of the rights under the American Convention. Article 1(2) of the American Convention, which stresses that by 'person' reference is made to 'every human being', explicitly confirms this.⁸⁵ In addition, the preamble of the American Convention provides that '[...] the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality [...]'.⁸⁶ Thus the criterion of being under a member state's jurisdiction is in general the only decisive one for an individual to enjoy the rights of the American Convention. This is confirmed by the case law of the Inter-American Court of Human Rights (IACHR).⁸⁷

62. Exceptionally, nationality is relevant for certain particular rights protected in the Convention: the prohibition on expulsion from the territory of the state of which a person is a national (Article 22(5)), the right to enter the state of which a person is a national (Article 22(5)), the prohibition on the expulsion of an alien that is lawfully in the territory of a state party without a decision reached

⁸⁵ Article 1 of the American Convention excludes legal persons from the protection of the American Convention. Despite the unambiguity of the text of the American Convention, the Inter-American Commission on Human Rights has admitted a case for processing in which a legal person is the victim. See *Radio Nanduti v Paraguay*, Resolution 14/87, Inter-American Commission on Human Rights OEA/SerL/V/II.71 Doc 9 rev.1 (28 March 1987). However, the Inter-American Court of Human Rights has made it clear in recent case law that when it comes to legal persons, the American Convention aims at protecting the human beings forming the legal person. See *Case of Cantos v Argentina*, Preliminary Objections Judgment, Inter-American Court of Human Rights Series C No 85 (7 September 2001), paras 26-29. Cecilia Medina and Peter Krupa (tr), *The American Convention on Human Rights, Crucial Rights and their Theory and Practice* (Intersentia, Cambridge, Antwerp, Portland 2014) 8.

⁸⁶ The preamble of the Protocol of San Salvador contains a similar clause.

⁸⁷ See eg *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, Advisory Opinion OC-21/14, Inter-American Court of Human Rights Series A No 21 (19 August 2014), para 61.

in accordance with law (Article 22(6)), the right to seek asylum in a foreign territory (Article 22(7)), the right to non-refoulement (Article 22(8)), the prohibition of the collective expulsion of aliens (Article 22(9)) and the right to participate in government (Article 23).

B. Is there a difference between the human rights afforded to non-nationals and those of nationals? In relation to which rights do limitations regarding non-nationals apply? What is the scope of the limitations?

63. Chapter II of the American Convention protects ‘civil and political rights’ (Articles 3 to 25 of the American Convention). Article 26 of the American Convention, entitled ‘Progressive Development’, does not mention individual economic, social and cultural rights, but refers to the ‘[...] rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires’. Today, they correspond to the standards on ‘Integral Development’ in the revised text of the Charter of the Organization of American States (OAS) and the changes that were introduced by the Protocols of Cartagena de Indias, Washington and Managua.⁸⁸
64. According to Article 1 of the American Convention, states parties must respect and ensure human rights in accordance with the principle of equality and non-discrimination. Apart from Article 1 of the American Convention, the principle of equality and non-discrimination is also established in Article 24 of the American Convention, entitled ‘Right to Equal Protection’, and Article 3 of the Protocol of San Salvador, entitled ‘Obligation of Non-Discrimination’. The IACHR examines cases in which the state allegedly discriminates in relation to respect for or guarantee of a conventional right under Article 1(1) of the American Convention and the substantial right in question, while it treats cases of alleged unequal protection by domestic law under Article 24 of the American Convention.⁸⁹
65. The states parties to the American Convention can restrict the rights contained in the American Convention. There are three limits on all restrictions of the rights contained in the American Convention, which can partly be found in Article 30 of the American Convention and partly be

⁸⁸ Medina and Krupa (n 85) 24. In *Case of Acevedo Buendía et al. (Discharged and Retired Employees of the Comptroller) v Peru*, Preliminary Objection, Merits, Reparations and Costs Judgement, Inter-American Court of Human Rights Series C No 198 (1 July 2009), the IACHR found that certain violations of Article 26 of the American Convention would lie within its competence. Moreover, it has also construed other rights in light of Article 26 of the American Convention. See G L Neuman, ‘American Convention on Human Rights (1969)’ (2010) MPEPIL <www.mpepil.com> accessed 16 December 2014, para 8. In addition, 15 (out of 23) states parties to the American Convention have ratified the Protocol of San Salvador, which authorizes individual petitions concerning trade union rights (Article 8(1)(a)) and the right to education (Article 13).

⁸⁹ See *Case of Fernández Ortega et al. v Mexico*, Preliminary Objection, Merits, Reparations, and Costs Judgment, Inter-American Court of Human Rights Series C No 215 (30 August 2010), para. 199; *Case of Rosendo-Cantú and other v Mexico*, Preliminary Objection, Merits, Reparations, and Costs Judgment, Inter-American Court of Human Rights Series C No 216 (31 August 2010), para 183.

deduced from the context of the American Convention.⁹⁰ Article 30 of the American Convention states as follows:

Article 30. Scope of Restrictions

The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.

66. Thus, restrictions of rights established in the American Convention must be contained in a formal law that is general in nature. In an Advisory Opinion, the IACHR held '[t]hat the word 'laws' in Article 30 of the Convention means a general legal norm tied to the general welfare, passed by democratically elected legislative bodies established by the Constitution, and formulated according to the procedures set forth by the constitutions of the States Parties for that purpose'.⁹¹ Moreover, Article 30 of the American Convention requires that the laws that place restrictions on the rights established in the American Convention must be enacted 'for reasons of general interest'. In this respect the IACHR found that:

[t]he requirement that the laws be enacted for reasons of general interest means they must have been adopted for the 'general welfare' (Art. 32(2)), a concept that must be interpreted as an integral element of public order (*ordre public*) in democratic states, the main purpose of which is 'the protection of the essential rights of man and the creation of circumstances that will permit him to achieve spiritual and material progress and attain happiness' (American Declaration of the Rights and Duties of Man (hereinafter American Declaration), First Introductory Clause).⁹²

67. Second, restriction of rights contained in the American Convention must be justified by one of the causes or interests set out in the American Convention. Causes or interests set out in the American Convention include *inter alia* national security, public safety or public order, the protection of public health or morals and the protection of the rights or freedoms of others.⁹³ The concrete meaning and scope of these causes and interests in the context of the American Convention has not yet been clearly established.⁹⁴

68. Third, restrictions of rights embodied in the American Convention must be 'necessary in a democratic society'. Although only Articles 15, 16 and 22 of the American Convention explicitly

⁹⁰ Medina and Krupa (n 85) 26-28.

⁹¹ *The Word "Laws" in Article 30 of the American Convention on Human Rights*, Advisory Opinion OC-6/86, Inter-American Court of Human Rights Series A No 6 (9 May 1986), para 27 and conclusion.

⁹² *ibid.*, para 29.

⁹³ See eg Article 15 of the American Convention.

⁹⁴) 28.

mention this requirement, its application as a limit on the restrictions of all rights of the American Convention can be deduced from the general context of the American Convention, in particular in light of its object and purpose, both established in the preamble and Article 29(c) of the American Convention, which lays down guidelines for the interpretation of the American Convention.⁹⁵ In this regard, drawing on the case law of the European Court of Human Rights, the IACHR in an Advisory Opinion held that

[...] the ‘necessity’ [and, hence, the legality of restrictions imposed under Article 13(2) on freedom of expression,] depend[s] upon a showing that the restrictions are required by a compelling governmental interest. Hence if there are various options to achieve this objective, that which least restricts the right protected must be selected. Given this standard, it is not enough to demonstrate, for example, that a law performs a useful or desirable purpose; to be compatible with the Convention, the restrictions must be justified by reference to governmental objectives which, because of their importance, clearly outweigh the social need for the full enjoyment of the right [Article 13 guarantees]. Implicit in this standard, furthermore, is the notion that the restriction, even if justified by compelling governmental interests, must be so framed as not to limit the right protected [by Article 13] more than is necessary. That is, the restriction must be proportionate and closely tailored to the accomplishment of the legitimate governmental objective necessitating it. (The Sunday Times Case, *supra*, para. 62, p. 38. See also Eur. Court H. R., Barthold judgment of 25 March 1985, Series A no. 90, para. 59, p. 26.)⁹⁶

69. With regard to the principle of equality and non-discrimination, in particular, the IACHR in its Advisory Opinion *Juridical Condition and Rights of the Undocumented Migrants*,⁹⁷ in which it examined the deprivation of the enjoyment and exercise of certain labor rights of migrant workers and its compatibility with the obligation of the American states to ensure the principle of equality and non-discrimination, made the following observations:⁹⁸

83. Non-discrimination, together with equality before the law and equal protection of the law, are elements of a general basic principle related to the protection of human rights. The element of equality is difficult to separate from non-discrimination. Indeed, when referring to equality before the law, the instruments cited above (*supra* para. 71) indicate that this principle must be guaranteed with no discrimination. This Court has indicated that “[r]ecognizing equality before the law, [...] prohibits all discriminatory treatment.”⁹⁹

(...)

⁹⁵ *ibid*

⁹⁶ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Art. 13 and 29 American Convention on Human Rights)*, Advisory Opinion OC-5/85, Inter-American Court of Human Rights Series A No 5 (13 November 1985), para 46.

⁹⁷ *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, Inter-American Court of Human Rights Series 1 No 18 (17 September 2003).

⁹⁸ Due to the relevance of this Advisory Opinion for the theme of the present report, the important considerations are quoted at length.

⁹⁹ Footnote 32 in the original judgment: Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica. Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, para. 54.

86. The principle of the equal and effective protection of the law and of non-discrimination is embodied in many international instruments.¹⁰⁰ The fact that the principle of equality and non-discrimination is regulated in so many international instruments is evidence that there is a universal obligation to respect and guarantee the human rights arising from that general basic principle.

(...)

88. The principle of equality and non-discrimination is fundamental for the safeguard of human rights in both international and domestic law. Consequently, States have the obligation to combat discriminatory practices and not to introduce discriminatory regulations into their laws.

89. Nevertheless, when examining the implications of the differentiated treatment that some norms may give to the persons they affect, it is important to refer to the words of this Court declaring that “not all differences in treatment are in themselves offensive to human dignity.”¹⁰¹ In the same way, the European Court of Human Rights, following “the principles which may be extracted from the legal practice of a large number of democratic States,” has held that a difference in treatment is only discriminatory when “it has no objective and reasonable justification.”¹⁰² Distinctions based on de facto inequalities may be established; such distinctions constitute an instrument for the protection of those who should be protected, considering their situation of greater or lesser weakness or helplessness.¹⁰³ For example, the fact that minors who are detained in a prison may not be imprisoned together with adults who are also detained is an inequality permitted by law. Another example of these inequalities is the limitation to the exercise of specific political rights owing to nationality or citizenship.

(...)

91. Likewise, the Inter-American Court has established that:

[n]o discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things. It follows that there would be no discrimination in differences in treatment of individuals by a state when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review. These aims may not be unjust or unreasonable, that is, they may not be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of humankind.¹⁰⁴

(...)

91. The Court now proceeds to consider whether this is a jus cogens principle.

(...)

100. In particular, when referring to the obligation to respect and ensure human rights, regardless of which of those rights are recognized by each State in domestic or international norms, the Court

¹⁰⁰ Omitted here: footnote 33 in the original judgment.

¹⁰¹ Footnote 35 in the original judgement: Legal Status and Human Rights of the Child, supra note 1, para. 46; and Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica., supra note 32, para. 56.

¹⁰² Footnote 36 in the original judgment: Cf. Eur. Court H.R., Case of Willis v. The United Kingdom, Judgement of 11 June 2002, para. 39; Eur. Court H.R., Case of Wessels-Bergervoet v. The Netherlands, Judgement of 4 June 2002, para. 46; Eur. Court H.R., Case of Petrovic v. Austria, Judgment of 27 March 1998, Reports 1998-II, para. 30; Eur. Court H.R., Case “relating to certain aspects of the laws on the use of languages in education in Belgium” v. Belgium, Judgment of 23 July 1968, Series A 1968, para. 10.

¹⁰³ Footnote 37 in the original judgement: Legal Status and Human Rights of the Child, supra note 1, para. 46.

¹⁰⁴ Footnote 39 in the original judgment: Legal Status and Human Rights of the Child, supra note 1, para. 47; and Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, supra note 32, para. 57.

considers it clear that all States, as members of the international community, must comply with these obligations without any discrimination; this is intrinsically related to the right to equal protection before the law, which, in turn, derives “directly from the oneness of the human family and is linked to the essential dignity of the individual.”¹⁰⁵ The principle of equality before the law and non-discrimination permeates every act of the powers of the State, in all their manifestations, related to respecting and ensuring human rights. Indeed, this principle may be considered peremptory under general international law, inasmuch as it applies to all States, whether or not they are party to a specific international treaty, and gives rise to effects with regard to third parties, including individuals. This implies that the State, both internationally and in its domestic legal system, and by means of the acts of any of its powers or of third parties who act under its tolerance, acquiescence or negligence, cannot behave in a way that is contrary to the principle of equality and non-discrimination, to the detriment of a determined group of persons.

101. Accordingly, this Court considers that the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws. Nowadays, no legal act that is in conflict with this fundamental principle is acceptable, and discriminatory treatment of any person, owing to gender, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, nationality, age, economic situation, property, civil status, birth or any other status is unacceptable. This principle (equality and non-discrimination) forms part of general international law. At the existing stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*.

70. Applying its considerations to migrants and undocumented migrants in the context of the right to work,¹⁰⁶ the IACHR stated:

112. Migrants are generally in a vulnerable situation as subjects of human rights; they are in an individual situation of absence or difference of power with regard to non-migrants (nationals or residents). This situation of vulnerability has an ideological dimension and occurs in a historical context that is distinct for each State and is maintained by *de jure* (inequalities between nationals and aliens in the laws) and *de facto* (structural inequalities) situations. This leads to the establishment of differences in their access to the public resources administered by the State.

(...)

118. We should mention that the regular situation of a person in a State is not a prerequisite for that State to respect and ensure the principle of equality and nondiscrimination, because, as mentioned above, this principle is of a fundamental nature and all States must guarantee it to their citizens and to all aliens who are in their territory. This does not mean that they cannot take any action against migrants who do not comply with national laws. However, it is important that, when taking the corresponding measures, States should respect human rights and ensure their exercise and enjoyment to all persons who are in their territory, without any discrimination owing to their regular or irregular residence, or their nationality, race, gender or any other reason.

119. Consequently, States may not discriminate or tolerate discriminatory situations that prejudice migrants. However, the State may grant a distinct treatment to documented migrants with respect to

¹⁰⁵ Footnote 45 in the original judgment: Legal Status and Human Rights of the Child, *supra* note 1, para. 45; Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, *supra* note 32, para. 55.

¹⁰⁶ The right to work is established *inter alia* in Articles 6 and 7 of the Protocol of San Salvador and also in the Charter of the OAS.

undocumented migrants, or between migrants and nationals, provided that this differential treatment is reasonable, objective, proportionate and does not harm human rights. For example, distinctions may be made between migrants and nationals regarding ownership of some political rights. States may also establish mechanisms to control the entry into and departure from their territory of undocumented migrants, which must always be applied with strict regard for the guarantees of due process and respect for human dignity. (...)

(...)

133. Labor rights necessarily arise from the circumstance of being a worker, understood in the broadest sense. A person who is to be engaged, is engaged or has been engaged in a remunerated activity, immediately becomes a worker and, consequently, acquires the rights inherent in that condition. The right to work, whether regulated at the national or international level, is a protective system for workers; that is, it regulates the rights and obligations of the employee and the employer, regardless of any other consideration of an economic and social nature. A person who enters a State and assumes an employment relationship, acquires his labor human rights in the State of employment, irrespective of his migratory status, because respect and guarantee of the enjoyment and exercise of those rights must be made without any discrimination.

134. In this way, the migratory status of a person can never be a justification for depriving him of the enjoyment and exercise of his human rights, including those related to employment. On assuming an employment relationship, the migrant acquires rights as a worker, which must be recognized and guaranteed, irrespective of his regular or irregular status in the State of employment. These rights are a consequence of the employment relationship.

(...)

136. However, if undocumented migrants are engaged, they immediately become possessors of the labor rights corresponding to workers and may not be discriminated against because of their irregular situation. This is very important, because one of the principal problems that occurs in the context of immigration is that migrant workers who lack permission to work are engaged in unfavourable conditions compared to other workers.

(...)

153. In summary, employment relationships between migrant workers and third party employers may give rise to the international responsibility of the State in different ways. First, States are obliged to ensure that, within their territory, all the labor rights stipulated in its laws – rights deriving from international instruments or domestic legislation – are recognized and applied. Likewise, States are internationally responsible when they tolerate actions and practices of third parties that prejudice migrant workers, either because they do not recognize the same rights to them as to national workers or because they recognize the same rights to them but with some type of discrimination.

(...)

160. The Court considers that undocumented migrant workers, who are in a situation of vulnerability and discrimination with regard to national workers, possess the same labor rights as those that correspond to other workers of the State of employment, and the latter must take all necessary measures to ensure that such rights are recognized and guaranteed in practice. Workers, as possessors of labor rights, must have the appropriate means of exercising them.

71. This practice has been confirmed by later decisions of the IACHR.¹⁰⁷ In the *Case of the Girls Yean and Bosico v Dominican Republic*,¹⁰⁸ the IACHR had to examine *inter alia* whether the Dominican practice of granting nationality violated the rights to nationality and to equal protection embodied in Articles 20 and 24 of the American Convention, in relation to Articles 19 and Article 1(1) thereof and decided affirmatively. In its considerations, the IACHR held that the preemptory legal principle of the equal and effective protection of the law and non-discrimination implies that, when they regulate the mechanisms for granting nationality, states must abstain from producing regulations, which are discriminatory or have discriminatory effects on certain groups of the population when exercising their rights.¹⁰⁹ Thereby, it stressed that the obligation to respect and ensure the principle of equality and non-discrimination applies irrespective of a person's migratory status in a state. "In other words, States have the obligation to ensure this fundamental principle to its citizens and to any foreigner who is on its territory, without any discrimination based on regular or irregular residence, nationality, race, gender or any other cause".¹¹⁰ Considering the right to nationality of the children of migrants in the Dominican Republic, the IACHR found that

- (a) The migratory status of a person cannot be a condition for the State to grant nationality, because migratory status can never constitute a justification for depriving a person of the right to nationality or the enjoyment and exercise of his rights;¹¹¹
- (b) The migratory status of a person is not transmitted to the children, and
- (c) The fact that a person has been born on the territory of a State is the only fact that needs to be proved for the acquisition of nationality, in the case of those persons who would not have the right to another nationality if they did not acquire that of the State where they were born.¹¹²

72. Similar considerations were also put forward by the IACHR in the recent Advisory Opinion *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*,¹¹³ in which the IACHR considered the state obligations with regard to children associated with their migratory

¹⁰⁷ See eg *Case of the Girls Yean and Bosico v Dominican Republic*, Preliminary Objections, Merits, Reparations and Costs Judgment, Inter-American Court of Human Rights Series C No 130 (8 September 2005); *Case of Vélez Loo v Panama*, Preliminary Objections, Merits, Reparations, and Costs Judgment, Inter-American Court of Human Rights Series C No 218 (23 November 2010); *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, Advisory Opinion OC-21/14, Inter-American Court of Human Rights Series A No 21 (19 August 2014).

¹⁰⁸ *Case of the Girls Yean and Bosico* (n 107)

¹⁰⁹ *ibid*, para 141.

¹¹⁰ *ibid*, para 155.

¹¹¹ Footnote 99 in the original judgement: Cf. Juridical Status and Rights of Undocumented Migrants, *supra* note 95, para. 134

¹¹² *Case of the Girls Yean and Bosico* (n 107) para 156.

¹¹³ *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, Advisory Opinion OC-21/14, Inter-American Court of Human Rights Series A No 21 (19 August 2014).

status,¹¹⁴ or that of their parents, which states must consider when they design, adopt, implement and apply their immigration policies. In general, it held that states must accord priority to a human rights-based approach that takes into account the rights of the child and the protection and comprehensive development of the child, which should have priority over any consideration of nationality or migratory status, in order to ensure the full exercise of their rights. More precisely, the IACHR found that states are obliged to identify non-national children who require international protection within their jurisdiction through a safe and confidential procedure in order to provide them the necessary attention. Further, in order to ensure access to justice under equal conditions, to guarantee effective due process, and to ensure the best of the children is a paramount consideration in all decisions adopted, the states must guarantee that the administrative or judicial proceedings in which the decisions are adopted on the rights of migrant children are adapted to their needs and accessible. In addition, the basic guarantees of due process must govern any administrative or judicial immigration proceedings that involve children.

73. Further, states may not resort to the deprivation of liberty of children as a precautionary measure for the protection of the objectives of immigration proceedings, nor may states base this measure on the failure to comply with the requirements to enter and to remain in a country, on the fact that the child is alone or separated from her family, or on the objective of ensuring family unity. Moreover, states must design and incorporate into the domestic law a set of non-custodial measures to be implemented during immigration proceedings prioritizing the rights of the child. The places for accommodating children should respect the principle of separation and the right to family unity. States must respect the specific guarantees that become operational in the context of a restriction to personal liberty that may constitute or lead to a measure that results in deprivation of liberty. Further, states must respect the principle of non-refoulement and shall base any decision on the return of a child to the country of origin or a safe third country on the requirements of her best interest. In addition, the state obligation to establish and follow fair and efficient asylum procedures must include some specific components ensuring the protection due to children. Finally, any administrative or judicial body taking a decision on the separation of family members, due to expulsion based on the status of immigration of one or both parents, must employ a weighting analysis considering the particular circumstances of the case, always prioritizing the best interest of the child. In a situation in which the child has a right to the nationality of the country from which one or both of her parents may be expelled, or the child complies with the legal conditions to reside there on a permanent basis, states may not expel one or both parents for

¹¹⁴ The rights of the child are established *inter alia* in Article 19 of the American Convention.

administrative immigration offenses, since the child's right to family life is sacrificed in an unreasonable or excessive manner.¹¹⁵

74. In sum, pursuant to the American Convention and the practice of the IACHR, the member states must respect and ensure rights to all persons subject to their jurisdiction without any discrimination in particular for the reason of national origin. Thereby, the principle of equality before the law, equal protection before the law and non-discrimination is considered as belonging to *jus cogens*. Accordingly, states may not discriminate or tolerate situations that are discriminatory thereby prejudicing non-nationals. More precisely, they have an obligation not to adopt discriminatory regulations in their law, to eliminate discriminatory regulations, to combat discriminatory practice and to adopt norms and other measures respecting all persons' effective equality before the law. However, a distinctive treatment of documented and non-documented non-nationals or of nationals and non-nationals may be justified provided it is reasonable, proportionate, objective, and does not harm human rights. This is notably the case with regard to the limitation to the exercise of specific political rights.
75. The political rights established in Articles 23 of the American Convention, entitled 'Right to Participate in Government', are afforded only to the citizens of the member states of the American Convention. According to Article 27(2) of the American Convention, entitled "Suspension of Guarantees", they cannot be suspended in emergency situations.¹¹⁶
76. The rights not mentioned in Article 27(2) of the American Convention can be suspended under the conditions set out in Article 27(1)(3) of the American Convention. One of the conditions is the prohibition on discrimination.¹¹⁷ More precisely, the measures of suspension taken by the states parties during an emergency cannot entail any "[...] discrimination on the ground of race, color,

¹¹⁵ See *Rights and Guarantees of Children in the Context of Migration and/ or in Need of International Protection*, Advisory Opinion OC 21/14, Inter-American Court of Human Rights Series A No 21 (19 August 2014), conclusions.

¹¹⁶ Article 27(2) of the American Convention further prohibits the suspension of the right to judicial personality (Article 3), the right to life (Article 4), the right to human treatment (Article 5), the freedom from slavery (Article 6) the freedom of ex post facto laws (Article 9), the freedom of conscience and religion (Article 12), the rights of the family (Article 17), the right to a name (Article 18), the rights of the child (Article 19), the right to nationality (Article 20) or of the judicial guarantees essential for the protection of such rights. According to the IACHR, the essential judicial guarantees which are not subject to derogation include *habeas corpus* (Article 7(6) of the American Convention), any other remedy effective before judges or competent tribunals (25(1) of the American Convention), and the judicial procedures, inherent to reprehensive democracy as a form of government (Article 29(c) of the American Convention), which should be exercised within the framework and the principles of due process of law as expressed in Article 8 of the American Convention. See *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and (8) American Convention on Human Rights)*, Advisory Opinion OC-9/87, Inter-American Court of Human Rights Series A No 9 (6 October 1987), para 41.

¹¹⁷ The other conditions are existence of grounds authorizing measures of suspension, proportionality of measures of suspension, compatibility of measures of suspension with the state party's obligations under international law. Moreover, the state party taking measures of suspension must immediately inform the other states parties to the American Convention, through the Secretary General of the Organization of American States.

sex, language, religion, or social origin”.¹¹⁸ Interestingly, the list of prohibited grounds of discrimination contained in Article 27(1) of the American Convention does not mention the grounds of political or other opinion, national or social origin, economic status or birth. Moreover, the list seems to be exhaustive since it does not contain a clause that would permit the inclusion of other, not mentioned grounds of discrimination such as the one contained in Article 1 of the American Convention.¹¹⁹ Insofar, it seems that measures of suspension taken by the states parties of the American Convention in accordance with Article 27 of the American Convention may potentially discriminate for reasons of nationality. However, there appears to be no case law of the IACHR on this point.¹²⁰

C. Are the terms ‘civic rights’ and/or ‘civil rights’ used in the instrument(s), and if so, how are they defined, or how have they been construed? Are there any indications that ‘civic rights’ and/or ‘civil rights’ are guaranteed only to nationals?

77. The expression “civil and political rights” is used twice in the American Convention. First, the preamble of the American Convention provides that

[r]eiterating that, in accordance with the Universal Declaration of Human Rights, the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights; [...]¹²¹

78. Second, chapter II of the American Convention is entitled “Civil and Political Rights”. It includes the right to judicial personality (Article 3), the right to life (Article 4), the right to humane treatment (Article 5), the freedom from slavery (Article 6), the right to personal liberty (Article 7), the right to a fair trial (Article 8), the freedom from ex post facto laws (Article 9), the right to compensation (Article 10), the right to privacy (Article 11), the freedom of conscience and religion (Article 12), the freedom of thought and expression (Article 13), the right of reply (Article 14), the right of assembly (Article 15), the freedom of association (Article 16), the rights of the family (Article 17), the right to a name (Article 18), the rights of the child (Article 19), the right to nationality (Article 20), the right to property (Article 21), the freedom of movement and residence (Article 22), the right to participate in government (Article 23), the right to equal protection (Article 24) and the right to judicial protection (Article 25).

79. The only right, which is explicitly limited to citizens, is the right to participate in government (Article 23 of the American Convention). According to Article 23(2) of the American Convention,

¹¹⁸ Article 27(1) of the American Convention.

¹¹⁹ Article 1 of the American Convention includes the clause “any other social condition”.

¹²⁰ Medina and Krupa (n 85) 35.

¹²¹ The preamble of the Protocol of San Salvador also mentions the expression of “civil and political rights”.

the law of states parties may regulate the exercise of the rights and opportunities established in Article 23(1) of the American Convention on the basis of *inter alia* nationality. In doing so, however, they must respect the principle of equality and non-discrimination. In this respect, there seems to be no case law available yet. In the *Case of Ivcher Bronstein v Peru*,¹²² in which the applicant, a naturalized Peruvian of Israeli origin, had been deprived of Peruvian nationality, which was a necessary condition to be capable of owning a television channel, in order to prevent his TV channel from criticizing President Alberto Fujimori's government, the IACHR reasoned on the basis of violation of freedom of expression but did not consider the violation of the applicant's political rights.¹²³

¹²² *Case of Ivcher Bronstein v Peru*, Merits, Reparations and Costs Judgment, Inter-American Court of Human Rights Series C No 74 (6 February 2001).

¹²³ Laurence Burgorgue-Larsen, Amaya Úbeda de Torres, Rosalind Greenstein (tr), *The Inter-American Court of Human Rights: Case Law and Commentary* (OUP, Oxford 2001) para 23.09. For a treatment of the principle of equality and non-discrimination in the context of the political rights of indigenous communities, see *Case of Yatama v Nicaragua*, Preliminary Objections, Merits, Reparations and Costs Judgment, Inter-American Court of Human Rights Series C No 127 (23 June 2005).

4. EUROPEAN UNION LAW

A. Considering both the text of the instrument(s) and relevant case law, are rights guaranteed to non-nationals as well as nationals?

80. The Charter of Fundamental Rights of the European Union¹²⁴ (“the Charter”) enshrines certain political, social, and economic rights into the law of the European Union (EU). It was drafted by the European Convention and solemnly proclaimed on 7 December 2000 by the European Parliament, the Council of the European Union and the European Commission. With the entry into force of the Treaty of Lisbon on 1 December 2009, article 6(1) of the Treaty of the EU (TEU)¹²⁵ conferred the legal status of the Treaties of the EU upon the Charter, thus making it fully legally binding upon the Member States and the EU institutions.
81. Before addressing the question of whether rights under the Charter are guaranteed to non-nationals as well as nationals, a preliminary clarification must be made. Bearing in mind the fact that the EU is not a (nation) state, the relevant groups of rights-holders are non-EU-citizens and EU-citizens respectively. According to article 20 of the Treaty on the Functioning of the EU (TFEU), every person holding the nationality of a Member State (MS) is automatically a citizen of the EU. Individuals who do not hold a MS citizenship (also called ‘third-country-nationals’) are referred to as non-EU-citizens in this report.
82. When examining whether the principles, rights, and freedoms of the Charter are guaranteed to non-EU-citizens as well as EU-citizens, a comprehensive list of the provisions of the Charter according to the subject to whom they apply can be helpful. The text of the Charter provides for five categories of rights-holders. The rights which accrue to the groups are as follows:¹²⁶

Rights accruing to ‘everyone’:

- Human dignity (article 1);
- The right to life, including the protection from the death penalty (article 2);
- Respect for physical and mental integrity (article 3);
- The prohibition on torture, inhuman or degrading treatment or punishment (article 4);
- The prohibition on slavery and servitude; compulsory labour and trafficking human beings (article 5);
- Liberty and security of person (article 6);
- Respect for private and family life (article 7);

¹²⁴ [2012] OJ C326/02

¹²⁵ Consolidated Version of the Treaty on the European Union, [2008] OJ C115/13

¹²⁶ The following enumeration resembles with some modifications the list in E. Guild, ‘The Variable Subject of the EU Constitution, Civil Liberties and Human Rights’, (2005) 6 European Journal of Migration and Law, p. 389-391.

- Protection of personal data (article 8);
- The right to marry and found a family (article 9);
- Freedom of thought, conscience and religion (article 10);
- Freedom of expression and information (article 11);
- Freedom of assembly and of association (article 12);
- The right to education (article 14);
- The right to work and chose an occupation (article 15);
- The right to property (article 17);
- The right to asylum (article 18)¹²⁷;
- Protection from removal, expulsion or extradition to a state where there is a serious risk of the application of the death penalty, torture or other inhuman or degrading treatment or punishment (article 19);
- Equality before the law (article 20);
- The right to non-discrimination on enumerated grounds (article 21);
- Respect of cultural, religious and linguistic diversity (article 22);
- Equality between men and women (article 23);
- The rights of the child (article 24);
- The rights of the elderly (article 25);
- The right of persons with disabilities (article 26);
- The right of collective bargaining and action (article 28);
- Access to placement services (article 29);
- Entitlement to social security benefits in accordance with Union and national law (article 34(2));
- Social and housing assistance (article 34(3));
- Access to preventive health care (article 35);
- Access to service of general economic interest (article 36);
- Environmental protection (article 37);
- Consumer protection (article 38);
- The right to good administration including a right to be heard; access to the file and a duty for the administration to give reasons; the right to damages for loss caused by the institutions; the right to use any of the Constitution languages (article 41)
- The right to an effective remedy, to a fair and public hearing within a reasonable time and to legal aid (article 47);
- The presumption of innocence (article 48);
- The right to protection against retrospective laws (article 49);
- Protection against double punishment for the same act (article 50);

Rights accruing to all workers:

- Right to information and consultation within the undertaking for workers or their representatives (article 27);
- Right of collective bargaining and action for workers and employers, or their respective organisations (article 28);
- Protection in the event of unjustified dismissal (article 30);
- The right to working conditions which respect health, safety and dignity (article 31(1));

¹²⁷ There is no specific reference to the Aznar Protocol to the EC Treaty which seeks to limit the right of asylum to third country nationals and to exclude citizens of the Union from the right to asylum.

- The right to limitation of maximum working hours, periods of rest and annual paid leave (article 31(2));

Rights accruing to non-EU citizens lawfully in the EU:

- Where authorised to work in the territories of the Member States, entitled to working conditions equivalent to those of citizens of the Union (article 15(3));
- Where moving legally within the EU the right to social security benefits and advantages in accordance with Community law national laws and practices (article 34(2));
- The possibility to be granted the right to move and reside anywhere in the Union (article 45(2));

Rights accruing to any person residing in the EU: (including EU-citizens, non-EU-citizens and legal persons)

- The right to access documents (article 42, 2nd alternative);
- The right to refer to the European Ombudsman (article 43, 2nd alternative);
- The right to petition the European Parliament (article 44, 2nd alternative);

Rights accruing to EU citizens:

- Right to be represented by political parties at the Union level (article 12(2));
- The freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State (article 15(2));
- The right to non-discrimination on the grounds of nationality of a MS (article 21);
- The right to vote and stand as a candidate in elections to the European Parliament (article 39(1));
- The right to vote and stand as a candidate in elections at municipal level (article 40);
- The right to access to documents (article 42, 1st alternative);
- The right to refer to the European Ombudsman (article 43, 1st alternative);
- The right to petition the European Parliament (article 44, 1st alternative);
- The right to move and reside anywhere in the Union (article 45(1));
- The right to protection by diplomatic or consular authorities in third countries (article 46).

83. It is apparent from this list that rights-holders under the Charter are not limited to EU-citizens. The general category of ‘everyone’ appears to be the equivalent of all persons within jurisdiction of the European Convention on Human Rights contained in article 1 (‘everyone within the jurisdiction of the signatory state’),¹²⁸ including non-nationals. This was confirmed in paragraph 55 of the ECJ judgement from 22 June 2010 on the joint cases of *Aziz Melki* and *Sélim Abdeli*¹²⁹ (C-188 and 189/09). The organs of the EU will include MS authorities when they are implementing EU law (article 51(1) of the Charter).

84. The Charter is complementary to the variety of instruments, which have been adopted under EU law, including the European Convention on Human Rights (ECHR), some provisions under the

¹²⁸ Guild (n 126), 389.

¹²⁹ Case C188 and 189/09 [2010] ECR I-5667

TEU and the TFEU, and some secondary EU legislation. The latter includes, most importantly, the Racial Equality Directive (Nr. 2000/43), the Directive on Long-term Resident Third-country-nationals (Nr. 2003/109), the Family Reunification Directive (Nr. 2003/86), the Students and Researchers Directives (Nr. 2004/114 and 2005/71) and the Returns Directive (Nr. 2008/115).¹³⁰

85. An example of the complementary function of the Charter is found in the case of the expulsion of a non-EU-citizen. The individual's right to respect for private and family life (enshrined in article 7 of the Charter) has been held by the European Court of Human Rights (ECtHR) in the context of the corresponding article 8 of the ECHR to found a right to protection against expulsion.¹³¹ The ECtHR has outlined certain criteria¹³² under which the expulsion of a non-EU-citizen will amount to a violation of her right to private and family life in article 8 ECHR. This jurisprudence is now applicable to EU law through the corresponding provisions under the Charter (article 7).

86. One can conclude that the vast majority of rights and freedoms contained in the Charter apply not only to EU-citizens but also to non-EU-citizens, so that '[t]he gulf between the rights of citizens of the Union and third-country nationals has diminished with the Charter's move towards the equalisation of rights for everyone in the EU'.¹³³

B. Is there a difference between the human rights afforded to non-nationals and those of nationals? In relation to which rights do limitations regarding non-nationals apply? What is the scope of the limitations?

87. As seen in the enumeration above, there are five categories of natural persons who are recognised as rights holders in the Constitution's charter, namely 'everyone', workers, non-EU-citizens lawfully in the EU, any persons residing in the EU, and EU-citizens. Thus there are rights, which are clearly and specifically limited to EU-citizens. These are found in Chapter V of the Charter and are listed above. However, even this chapter includes rights which are conferred upon non-EU-citizens as well, such as the right to good administration in article 41. Although it is found in the chapter of the citizen's rights, article 41 states that "every person has the right to have his or her affairs handed impartially, fairly and within a reasonable time by the institutions and bodies of the Union". Thus an asylum-seeker in a MS is entitled to rely on article 41 of the Charter to request that her claim be dealt with in an impartial and fair manner and within a reasonable period of time

¹³⁰ See E. Guild, 'The evolution of the concept of union citizenship after the Lisbon Treaty' in S Morano-Foadi/M Malena (eds.), *Integration for Third Country Nationals in the European Union: The Equality Challenge* (Edward Elgar Publishing, 2012) , 10.

¹³¹ *Üner v The Netherlands* (2007) 45 EHRR 14

¹³² *Ibid.*, para. 57.

¹³³ Guild (n 130), p. 11.

because the asylum application must be dealt with in accordance with EU secondary legislation (e.g. the Qualification Directive 2011/95 and the Procedures Directive 2005/85).

88. The rights which are limited to workers may depend on the interpretation which the ECJ has given to the term worker: a person who for a period of time provides services in return for remuneration in a relationship of subordination.¹³⁴ The two intermediate categories – those of non-EU-citizens lawfully in the EU and generally persons resident in the EU – have yet to be discussed in the jurisprudence of the ECJ and the municipal courts.¹³⁵

89. The fact that there only is a small (at least textual) gap between the rights enjoyed by EU-citizens and non-EU-citizens can be explained by the fact that the principle of equality and the values of human dignity, freedom, and solidarity are foundational for the EU legal system. This is represented in the Charter, placing the ‘individual’ and not the ‘EU citizen’ at its heart. Article 21(2) prohibits ‘any discrimination on grounds of nationality’ within the scope of application of the EU Treaties. Any limitation of the rights of non-EU-citizens compared to those of EU-citizens will thus be subject to scrutiny under the Charter. However, Article 21(2) also states that the principle of non-discrimination on the basis of nationality in the Charter is expressed to be without prejudice to specific provisions in the treaties. Non-EU-citizens often seem to be excluded from the principle of non-discrimination under other instruments of EU law, especially regarding the application of article 18 TFEU and the Equality Directives.¹³⁶ Notably, Article 3(2) of the Racial Equality Directive¹³⁷ prohibits ‘any direct or indirect discrimination based on racial or ethnic origin as regards the areas covered by this Directive’ but goes on to state that:

This directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

90. But it seems that the Charter is capable of giving give non-EU-citizens a wider protection from discrimination compared to other instruments of EU law, in combination with other instruments such as the 2003 Directive on the status of non-EU nationals who are long-term residents.¹³⁸ This Directive guarantees to non-nationals who have five years of continuous residence in an EU

¹³⁴ See for instance ECJ, 53/81 *Levin v Staatssecretaris Van Justitie* [1982] ECR 1035.

¹³⁵ Guild (n 126), 392

¹³⁶ S. Morano-Foadi and K de Vries, ‘The equality clauses in the EU directives on non-discrimination and migration/asylum’ in S. Morano-Foadi/M. Malena (eds) (n 128) 18.

¹³⁷ Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L180/22

¹³⁸ Council Directive (EC) 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents OJ L 16/44

country a range of rights, including increased protection from deportation and equal treatment in a range of economic and social spheres. The provisions for equal treatment are subject to exceptions: for example, Article 11(4) states that '[m]ember States may limit equal treatment in respect of social assistance and social protection to core benefits.' In the its *Kamberaj* judgement,¹³⁹ the ECJ referred to the Charter to interpret this limitation to the right to equal treatment narrowly: since Article 34 of the Charter recognizes the right to 'social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources', benefits fulfilling the purpose of this right were 'core benefits' in relation to which equal treatment of long-term resident non-nationals was required under the 2003 Directive.

91. Although differential treatment of non-nationals may be legal if it is necessary and proportionate, the bar for this test seems to be placed high. The interest of the nation state does not, of itself, justify a limitation. Thus seeking to secure the solidarity of citizens of the Member State among themselves may not be a justification for a citizenship limitation of the rights in the Charter. The objectives of general interest which will justify a limitation must be recognised by the Union itself.¹⁴⁰
92. However, regardless of the many rights under EU law and the Charter in particular, which are guaranteed to individuals regardless of their nationality, one cannot deny the clear textual distinction between EU-citizens and non-EU-citizens in Chapter V of the Charter, which provides for rights which are enjoyed only by the former group. Some authors even argue that the Charter is founded upon this distinction,¹⁴¹ which "could potentially produce the marginalisation of non-citizens in the EU and undermine the Charter's legitimacy as an instrument of fundamental rights".¹⁴² The protection of non-discrimination on the grounds of nationality under article 21(2) of the Charter is explicitly limited to the scope of the application of the Treaties. 'Hence, it seems that such an extension to [non-EU-citizens] would potentially lack both sufficient reasoning and a convincing source of inspiration'.¹⁴³
93. Moreover, one has to bear in mind that according to article 6(1) TEU '[t]he rights, freedoms and principles on the Charter shall be interpreted [...] with due regard to the explanations referred to in the Charter, that sets out the sources of those provisions'. Since the text of article 21(2) of the

¹³⁹ Case C-571/10 *Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano* [2012] ECR I-0000

¹⁴⁰ Guild (n 126), p. 392.

¹⁴¹ S McInerney, "The Charter of Fundamental Rights of the European Union and the Case of Race Discrimination", (2002) 27(4) *European Law Review* 484.

¹⁴² Morano-Foadi and De Vries (n 136) 27.

¹⁴³ *ibid*, 28.

Charter corresponds to article 18(1) TFEU,¹⁴⁴ it must be applied in compliance with its limited scope. This may speak in favour of excluding non-EU-nationals from the scope of the prohibition of discrimination on the grounds of nationality, as in the case of article 18 TFEU, outlined above. Article 52(2) of the Charter also serves as an impediment to the expansion of any rights, based on those found in the Treaties, beyond their original scope.¹⁴⁵

C. Are the terms ‘civic rights’ and/or ‘civil rights’ used in the instrument(s), and if so, how are they defined, or how have they been construed? Are there any indications that ‘civic rights’ and/or ‘civil rights’ are guaranteed only to nationals?

94. The Charter does not make use of the terms ‘civic rights’ and/or ‘civil rights’. The document includes many provisions related to civil rights, such as the guarantee for peoples' physical and mental integrity, life and safety; protection from discrimination on grounds such as race, gender, national origin, colour, sexual orientation, ethnicity, religion, or disability; and individual rights such as privacy, the freedoms of thought and conscience, speech and expression, religion, religion, assembly and movement. These are found throughout the Charter (see the list above) but are not labelled explicitly as civil and/or civic rights. The categorisation undertaken by the Charter allocates the rights in six different chapters, namely *dignity*, *freedoms*, *equality*, *solidarity*, *citizen rights*, and *justice* (the final Chapter VII is concerned with the general provisions such as the scope and the applicability of the Charter) and civil rights elements are found in all these categories. Maybe the most distinctive of these is the group related to citizens rights under Chapter VII, which deals mainly with political and participatory rights and is, as already seen, to a large extent limited to EU-citizens only. Outside of this sphere however, civil rights are not textually limited to EU-citizens but are rather accrued to “everyone” in line with the respect for fundamental rights as a key aspiration of the EU enshrined in the Charter: “A European area of freedom, security and justice must be an area where all people, including third-country nationals, benefit from the effective respect of the fundamental rights enshrined in the Charter of the Fundamental Rights of the European Union”.¹⁴⁶

95. Regarding the question is section C, one may also summarise that the Charter as a human rights instrument under EU law is textually eliminating the discrepancies in the protection of EU-citizens and non-EU-citizens, and, as demonstrated, the European courts show efforts towards a gapless

¹⁴⁴ Explanations relating to the Charter of Fundamental Rights, Official Journal C 303 of 14 December 2007.

¹⁴⁵ Morano-Foadi and de Vries, (n 136)

¹⁴⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions delivering an area of freedom, security, and justice for Europe's citizens, Action Plan Implementing the Stockholm Programme, COM (2010) 171.

protection of non-EU-citizens. When other instruments of EU law such as the primary treaties, or the secondary legislation come short in terms of protecting the civil rights of non-EU-citizens or find ways to exclude them from the scope of protection or the prohibition of discrimination in the grounds of nationality, the Charter has, on some occasions, including the *Kamberaj* case, filled the gaps. It can be said that the complementary nature of this instrument, together with the ECHR, tends towards inclusion of non-EU-citizens and demonstrates a move towards a universalist protection of individuals, rather than a focus on protecting EU citizens.

96. Nonetheless, the scope of application of the Charter is limited in accordance to Chapter VII to the organs of the EU and the Member States, only when implementing EU law. When these implement EU law has not yet been unambiguously settled by the courts. Another restriction is found in article 51(2), ensuring that the Charter “does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties”. And the provision in article 52(3) reminds that the Charter only sets a standard of minimum protection under the compliance duty towards the primary EU treaties. Some of the tensions, resulting from these provisions have been explored in section B. Keeping in mind that the full binding legal force of the Charter has been in existence only since 2009, it is no surprise that it is still one of the less developed instruments of EU human rights law. The case law of the European courts and mainly the ECJ will play a leading role in determining the scope of the practical protection of non-EU-citizens under the Charter in the future.

5. SOUTH AFRICA

A. Considering both the text of the instrument(s) and relevant case law, are rights guaranteed to non-nationals as well as nationals?

97. The Constitution of the Republic of South Africa guarantees rights to non-nationals as well as to nationals. Most of the rights protected under the Constitution are expressed to apply to ‘everyone’, while a small number of rights such as the right to vote are expressed to apply to ‘citizens’. Section 7(1) of the Constitution, which is the first provision in Chapter 2 (the Bill of Rights), explains that the Bill of Rights ‘enshrines the rights of *all people in our country* and affirms the democratic values of human dignity, equality and freedom’.¹⁴⁷ These factors suggest that, absent a clear indication to the contrary, the rights conferred upon ‘everyone’ are intended to apply to both nationals and non-nationals.

98. This interpretation is confirmed by the jurisprudence of the Constitutional Court of South Africa. In *Lawyers for Human Rights & Another v Minister of Home Affairs & Another* 2004 (4) SA 125 (CC), the Constitutional Court was called upon to decide whether the rights conferred by section 12 (right to freedom and security of the person) and section 35(2) (rights of detainees) applied to non-nationals, including those who were located at ports of entry into South Africa but had not yet been admitted into the country. Yacoob J, delivering the leading judgment, stated:

Once it is accepted, as it must be, that persons within our territorial boundaries have the protection of our courts, there is no reason why ‘everyone’ in sections 12(2) and 35(2) should not be given its ordinary meaning. When the Constitution intends to confine rights to citizens it says so. All people in this category are beneficiaries of section 12 and section 35(2).¹⁴⁸

The fact that the non-nationals concerned were ‘illegal foreigners’, in that they did not have permission to enter South Africa, did not prevent sections 12 and 35(2) from applying.¹⁴⁹

99. Similarly, in *Kbosa v Minister for Social Development* 2004 (6) SA 595 (CC), the Constitutional Court confirmed that section 27(1)(c) (right to social security) is not confined to citizens. The case concerned the eligibility of permanent residents for certain social security benefits that were, under the relevant legislation, extended only to ‘citizens’. The applicants, who were permanent residents, challenged the legislation on the footing that it was inconsistent with section 27(1)(c). The leading judgment was delivered by Mokgoro J. Her Honour compared the rights under sections 26 and 27,

¹⁴⁷ Emphasis added.

¹⁴⁸ [27].

¹⁴⁹ [41]; see also Mandala J at [57] (‘The Constitution applies to the exercise of all public power within the Republic’).

which are conferred upon ‘everyone’, to the State’s obligations under s 25(5) (access to land) which are expressly confined to citizens.¹⁵⁰ Her Honour reasoned:

Given that the Constitution expressly provides that the Bill of Rights enshrines the rights of ‘all people in our country’, and in the absence of any indication that the section 27(1) right is to be restricted to citizens as in other provisions in the Bill of Rights, the word ‘everyone’ in this section cannot be construed as referring only to ‘citizens’.¹⁵¹

Mokgoro J drew a distinction between those non-nationals who were permanent residents and those present in South Africa only on a temporary basis; while the latter could reasonably be excluded from entitlement to social security benefits, the former could not.¹⁵² The denial of social security benefits to permanent residents constituted unfair discrimination in breach of section 9, and a violation of the right to social security protected by section 27(1)(c).¹⁵³

100. There have been several other cases where the Constitutional Court has applied the protections of the Bill of Rights to non-nationals. *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) concerned a requirement under immigration law that applicants for immigration permits be living outside South Africa at the time their permits were granted. An exception to this rule was available for spouses of South African citizens who were in possession of valid temporary residence permits, such permits being granted at the discretion of immigration authorities. The Court held that the impugned legislation violated section 10 of the Constitution, which confirms that ‘[e]veryone has inherent dignity’ and protects the right to have that dignity respected and promoted. The Court held that the broad discretionary power to refuse temporary residence permits to spouses significantly impaired the ability of spouses to honour their marital obligation of co-habitation.¹⁵⁴ O’Regan J, delivering the leading judgment, held that there was an ‘unjustifiable infringement of the constitutional right of dignity of applicant spouses who are married to people lawfully and permanently resident in South Africa’.¹⁵⁵

101. *Dawood v Minister of Home Affairs* was followed in the later case of *Booyesen v Minister of Home Affairs* 2001 (4) SA 485. That case concerned a challenge to certain provisions of immigration law concerning the granting of work permits to non-nationals. The provisions required non-nationals to apply for work permits from outside South Africa and not to enter the country until such a permit had been granted. They also confined work permits applicants whose occupational skills

¹⁵⁰ [46].

¹⁵¹ [47] (footnotes omitted).

¹⁵² [59].

¹⁵³ [80]-[82].

¹⁵⁴ [39].

¹⁵⁵ [58].

were scarce in South Africa. No exception was made for the spouses of South African citizens or of permanent residents. Sachs J, delivering the judgment of the Court, held that the impugned provisions limited the right to human dignity of both South Africans and their non-national spouses.¹⁵⁶

102. Another case in which a non-national was found to be a rights-bearer under the Bill of Rights is *Mohamed v President of the Republic of South Africa (Society for the Abolition of the Death Penalty in South Africa)* 2001 (3) SA 893 (CC). That case concerned the removal to the United States of a Tanzanian national suspected of involvement in the 1998 bombing of the US embassy in Dar es Salaam. The Court held that the South African authorities should have obtained an undertaking from the US government that the death penalty, which is prohibited under the South African Constitution,¹⁵⁷ would not be sought against the non-national. The Court held that there had been a breach of the non-national's rights under section 10 (human dignity), section 11 (right to life) and section 12(1)(d) of the Constitution (prohibition on torture).¹⁵⁸

103. The Constitutional Court has also identified non-citizenship as a protected ground giving rise to a prima facie claim of discrimination under section 9 (equality before the law and the prohibition on unfair discrimination). In *Larbi-Odam v Member of the Executive Council for Education (North West Province)* 1998 (1) SA 745, Mokgoro J, delivering the judgment of the Court, held that non-citizenship was analogous to the other grounds in section 9 on the basis of which discrimination was prohibited (such as race, gender and ethnic or social origin). She observed that non-citizens were typically lacking in political power and that non-citizenship was an attribute that was difficult to change.¹⁵⁹ Her Honour went on to hold that a law that rendered non-citizens ineligible for permanent teaching posts was unconstitutional.¹⁶⁰

104. Apart from the express limitation of certain constitutional rights to citizens (discussed further in section B, below), the main limitation on the application of the Bill of Rights to non-nationals may be on the basis of territoriality. In *Kaunda v President of the Republic of South Africa* 2005 (1) SACR 111 (CC), the Court was required to decide whether the government had a legal duty to provide diplomatic protection to South African nationals arrested and imprisoned in a foreign country. In

¹⁵⁶ [10].

¹⁵⁷ See *S v Makwanyane* 1995 (3) SA 391 (CC).

¹⁵⁸ [48]-[49].

¹⁵⁹ [19].

¹⁶⁰ [25], [45]-[46].

the course of his reasoning, Chaskalson CJ, for the majority, touched upon the question of non-nationals outside South African territory:

Foreigners are entitled to require the South African state to respect, protect and promote their rights to life and dignity and not to be treated or punished in a cruel, inhuman or degrading way while they are in South Africa. Clearly, they lose the benefit of that protection when they move beyond our borders.¹⁶¹

Of section 7(1), Chaskalson CJ said: ‘The bearers of the rights are people in South Africa. Nothing suggests that it is to have general application, beyond our borders.’¹⁶² O’Regan J, in dissent, was more circumspect: ‘It is not necessary to consider in this case whether the provisions of the Bill of Rights bind the government in its relationships outside of South Africa with people who have no connection with South Africa.’¹⁶³ On either reading, the general applicability of the Bill of Rights does not turn upon citizenship itself.

B. Is there a difference between the human rights afforded to non-nationals and those of nationals? In relation to which rights do limitations regarding non-nationals apply? What is the scope of the limitations?

105. As mentioned above, a relatively small number of rights in the South African Bill of Rights are expressed to apply only to ‘citizens’. These are: section 19 (political rights); section 20 (right not to be deprived of citizenship); sub-sections 21(3) (right to enter and reside anywhere in South Africa) and 21(4) (right to a passport); section 22 (freedom of trade, occupation and profession); and section 25(5) (obligation on the State to foster equitable access to land). In addition, sub-section 37(8) draws a distinction between citizens and non-citizens in terms of the procedural protections available to persons detained in consequence of an international armed conflict. Protections for citizen detainees are sourced in sub-sections 37(6) and (7), whereas non-citizen detainees are protected under international humanitarian law.

106. A closer examination of those rights that are confined to citizens reveals that many (although not all) are rights which, of their nature, are intimately connected with citizenship. Section 19 confers upon citizens the following political rights: the right to form, participate in and campaign for a political party; the right to free, fair and regular elections; the right to vote, in secret; and the right to stand for and hold political office. The conferral of such rights upon citizens alone is common

¹⁶¹ [36].

¹⁶² [37].

¹⁶³ [228] (Mokgoro J concurring).

in international and domestic human rights instruments. For example, the International Covenant on Civil and Political Rights confines the political rights in article 25 to citizens.¹⁶⁴

107. Section 20 of the Constitution provides: ‘No citizen shall be deprived of citizenship.’ This protection, of its nature, can only apply to citizens.
108. Section 21 contains two categories of rights: those which apply to ‘everyone’, and those confined to citizens. Sub-sections (1) and (2) confer without distinction the right to freedom of movement and the right to leave South Africa, respectively. Sub-sections (3) and (4) are confined to citizens. They concern the right to enter, remain in and reside anywhere in the country (sub-section (3)) and the right to hold a passport (sub-section (4)). Again, this distinction is not unusual; the right to enter a country, and the right to travel under that country’s passport, are among the hallmarks of citizenship.
109. The restriction of section 22 to non-citizens is less axiomatic. Section 22 provides: ‘Every citizen has the right to choose their trade, occupation or profession freely.’ The predecessor to section 22 in South Africa’s Interim Constitution did not confine this right to citizens.¹⁶⁵ During the process of certifying the text that was to become the final Constitution, an objection was made to the fact that section 22 did not apply to non-citizens. The Constitutional Court rejected this objection. It observed that the right to occupational choice appeared in few international human rights instruments, and that there was at any rate nothing in such instruments to suggest that the State could not restrict such a right to citizens. The Court pointed, in particular, to article 2(3) of the International Covenant on Economic Social and Cultural Rights, which permitted developing countries to determine, with due regard to human rights and their national economies, the extent to which they would guarantee to non-nationals the economic rights under the Covenant.¹⁶⁶ The Court also cited other domestic jurisdictions that did not protect freedom of occupational choice at all, or that protected it only in respect of citizens.¹⁶⁷
110. Section 25(5) obliges the State to take reasonable measures ‘to foster conditions which enable citizens to gain access to land on an equitable basis’. This provision was inserted into the

¹⁶⁴ Those rights include the right to take part in the conduct of public affairs, the right to vote and be elected at genuine periodic elections (which are to be by universal and equal suffrage and held by secret ballot), and the right to have access to public service.

¹⁶⁵ Section 26 of the Constitution of the Republic of South Africa Act 200 of 1993 provided, in relevant part: ‘every person shall have the right of freely to engage in economic activity and to pursue a livelihood anywhere in the national territory’.

¹⁶⁶ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 1997 (2) SA 97 (CC) [17]-[19].*

¹⁶⁷ [21].

Constitution in order to effect land redistribution. Its object was to redress the profound inequalities engendered by the land reservation and segregation that had been central tenets of government policy under apartheid.¹⁶⁸ With this specific purpose in mind, it is unsurprising that the benefits of section 25(5) are confined to South African citizens.

111. Separate from the Bill of Rights is section 3 of the Constitution. Section 3(1) provides for a ‘common South African citizenship’. Section 3(2)(a) confirms that all citizens are equally entitled to the rights, privileges and benefits of citizenship, and section 3(2)(b) that all citizens are equally subject to the duties and responsibilities of citizenship. Section 3 sits outside the Bill of Rights and does not purport to effect a limitation on the rights set out therein. Its guarantee of equal treatment is to be understood against the background of apartheid-era policies that denied to particular segments of the South African population rights that were accorded to other citizens.¹⁶⁹ Section 3 is properly conceived of as a source of rights, and a supplement to those rights in the Bill of Rights conferred exclusively on citizens, rather than as a constraint upon those rights that extend to ‘everyone’. In *Kaunda v President of the Republic of South Africa*, Chaskalson CJ referred to the entitlement to request diplomatic protection as ‘part of the constitutional guarantee given by section 3’.¹⁷⁰ Ngcobo J, concurring, viewed section 3(2)(a) as conferring upon a citizen the ‘right to require the government to provide him or her with the rights, privileges and benefits of citizenship’.¹⁷¹

112. The remaining provisions of the Constitution that refer to ‘citizens’ are sections 47, 106 and 158. These provide that only citizens are eligible to be elected to the National Assembly, provincial legislatures, and municipal councils, respectively. These restrictions are in a similar vein to those contained in section 19, concerning political rights.

C. Are the terms ‘civic rights’ and/or ‘civil rights’ used in the instrument(s), and if so, how are they defined, or how have they been construed? Are there any indications that ‘civic rights’ and/or ‘civil rights’ are guaranteed only to nationals?

113. The South African Constitution does not use the terms ‘civic rights’ or ‘civil rights’. The term in the Constitution most closely associated with ‘civil rights’ is ‘political rights’; as discussed above, political rights are protected under section 19 and are expressly confined to nationals.

¹⁶⁸ See Juanita Pienaar and Jason Brickhill, ‘Land’ in Stuart Woolman and others, *Constitutional Law of South Africa* (2nd ed, Juta & Co, 2004) ch 48.

¹⁶⁹ See Jonathan Klaaren, ‘Citizenship’ in Stuart Woolman and others, *Constitutional Law of South Africa* (2nd ed, Juta & Co, 2004) ch 60.

¹⁷⁰ [67].

¹⁷¹ [178].

6. CANADA

114. The majority of human rights afforded to non-nationals in Canada, subject to judicial interpretation, are the same as those given to nationals in both federal and provincial instruments.

115. The *Immigration and Refugee Protection Act*¹⁷² (“*IRPA*”) is the primary federal legislation which defines the types of non-nationals in Canada, and the processes by which one can immigrate into Canada. Notably, the *IRPA* defines a ‘foreign national’ as someone who is not a Canadian citizen or a permanent resident of Canada, while a permanent resident is defined as someone who has acquired permanent resident status and not lost that status under the Act. The *IRPA* also specifies the characteristics needed for a person to qualify as a refugee under the United Nations Convention Relating to the Status of Refugees.¹⁷³

116. The main reference to rights of individuals subject to the *IRPA* is stated in subsection 3(d), which provides:

This Act is to be construed and applied in a manner that ensures the decisions taken under this Act are consistent with the Canadian Charter of Rights and Freedoms, including its principles of equality and freedom from discrimination and of the equality of English and French as the official languages of Canada.¹⁷⁴

117. The primary source of rights for nationals and non-nationals in Canada is the *Canadian Charter of Rights and Freedoms* (the “*Charter*”).¹⁷⁵ The *Charter* is part of Canada’s entrenched Constitution and specifies fundamental rights and freedoms for nationals and non-nationals alike. The *Charter* applies in two main ways. First, individuals may seek redress for violations of *Charter* rights against government actors or institutions. Secondly, all provincial and federal laws must be consistent with Canada’s Constitution, which includes the *Charter*.

¹⁷² *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

¹⁷³ *ibid* at s. 96:” A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion: (a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or (b) (b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country”.

¹⁷⁴ *ibid*, s. 3(d).

¹⁷⁵ *Canadian Charter of Rights and Freedoms*, The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Charter*].

Rights restricted to nationals

118. Two fundamental rights in Canada that are restricted to Canadian citizens are the right to vote¹⁷⁶ and mobility rights. With respect to the latter set of rights, subsection 6(1) of the *Charter* provides that Canadian citizens have the right to enter, remain in, and leave Canada.¹⁷⁷ Subsection 6(2) provides that Canadian citizens and permanent residents of Canada have the right to move and take up residence in any Canadian province, and to pursue the gaining of a livelihood in any province of Canada.¹⁷⁸

Rights applying to nationals

119. The remainder of fundamental rights contained in the *Charter* apply to all individuals in Canada, including: the right to freedom of conscience and religion;¹⁷⁹ the right to life, liberty and security of the person;¹⁸⁰ the right to be secure against unreasonable search or seizure;¹⁸¹ the right not to be arbitrarily detained or imprisoned;¹⁸² the right to counsel upon arrest or detention;¹⁸³ the right to be presumed innocent until proven guilty in law by an independent and impartial tribunal;¹⁸⁴ the right not to be subjected to cruel and unusual punishment;¹⁸⁵ and the right to the equal protection and equal benefit of the law without discrimination.¹⁸⁶ Additionally, non-nationals whose Charter rights have been infringed by the state may apply to a court to obtain a remedy that the court considers ‘appropriate and just’ for the situation.¹⁸⁷

Limitations on Charter rights

120. A party who alleges a *Charter* violation must prove on a balance of probabilities that his or her rights have been violated on a balance of probabilities. Once this has been proven, the burden shifts to the government to justify the infringement under section 1 of the *Charter*. This section provides: “The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in

¹⁷⁶ *ibid*, s. 3: “Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.”

¹⁷⁷ *ibid*, s 6(1).

¹⁷⁸ *ibid*, s 6(2).

¹⁷⁹ *Charter* (n 175) “Everyone has the following fundamental freedoms: freedom of conscience and religion”.

¹⁸⁰ *ibid*, s 7: “Everyone has the right to life, liberty and security of the person and the right not to be deprived of except in accordance with the principles of fundamental justice”.

¹⁸¹ *ibid*, s. 8: “Everyone has the right to be secure against unreasonable search or seizure”.

¹⁸² *ibid*, s 9: “Everyone has the right not to be arbitrarily detained or imprisoned”.

¹⁸³ *ibid*, s 10(b): “Everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right”.

¹⁸⁴ *ibid*, s 11(d): “Everyone has the right on arrest or detention to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal”.

¹⁸⁵ *ibid*, s 12: “Everyone has the right not to be subjected to any cruel and unusual treatment or punishment”.

¹⁸⁶ *ibid*, s 15(1): “Everyone individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental and physical disability”.

¹⁸⁷ *ibid*, s 24(1): “Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances”.

it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”¹⁸⁸.

121. In *R. v. Oakes*¹⁸⁹ the Supreme Court of Canada developed the following test for a party seeking to justify an infringement of a *Charter* right. A court must be satisfied of the following:¹⁹⁰

1. Are the measures limiting a *Charter* right sufficiently important to warrant overriding a constitutionally protected right or freedom?
2. Are the means used by the party infringing the *Charter* right reasonable and demonstrably justified? To answer this question, a party must demonstrate:
 - a. The measures chosen are fair and not arbitrary, in that they are designed to achieve the objective in question and rationally connected to that objective;
 - b. The means chosen by the party ought to impair the right or freedom in question as little as possible; and
 - c. There must be proportionality between the effects of the limiting measure and the objective – the more severe the deleterious effects of a measure, the more important the objective must be.

Seminal decisions on rights of non-nationals

122. Two Supreme Court of Canada decisions affirmed the rights of non-nationals to human rights protections under the *Charter*. First, in *Singh v. Minister of Employment and Immigration*¹⁹¹ the appellants were denied refugee status and argued their section 7 *Charter* rights were violated since they did not have the right to challenge this ruling with an oral hearing. A majority of the Court remitted the matter back to Canada’s Immigration Appeal Board for reconsideration.

123. Madam Justice Wilson, for three justices, held that the language of section 7 is broad enough to cover non-nationals. She stated:

Counsel for the appellants contrasts the use of the word "Everyone" in s 7 with language used in other sections, for example, "Every citizen of Canada" in s 3, "Every citizen of Canada and every person who has the status of a permanent resident of Canada" in s 6(2) and "Citizens of Canada" in s 23. He concludes that "Everyone" in s 7 is intended to encompass a broader class of persons than citizens and permanent residents. Counsel for the Minister concedes that "everyone" is sufficiently broad to include the appellants in its compass and I am prepared to accept that the term includes every human being who is physically present in Canada and by virtue of such presence amenable to Canadian law.

¹⁸⁸ *ibid*, s 1

¹⁸⁹ *R. v. Oakes*, [1986] 1 SCR 103 [*Oakes*].

¹⁹⁰ *ibid* See also *R. v. Edwards Brooks & Art*, [1986] 2 SCR 713.

¹⁹¹ *Singh v. Minister of Employment and Immigration*, [1985] 1 SCR 177

While Justice Wilson's judgment was only for three of the six majority judges, her judgment has withstood the test of time. The ambit of recent debate (discussed below) has not been whether section 7 of the *Charter* applies to non-nationals, but rather what principles apply to section 7 *Charter* cases involving non-nationals.

124. Secondly, in *Andrews v. Law Society of British Columbia*¹⁹², the appellant was denied admission into the bar in the Canadian province of British Columbia since he failed to meet the requirement of being a Canadian citizen. A majority of the Court held the citizenship requirement violated the appellant's rights under section 15(1) of the *Charter*, and that the limitation was not justifiable under section 1 of the *Charter*. With respect to section 1, Justice Wilson, for the majority, stated:¹⁹³

To my mind, even if lawyers do perform a governmental function, I do not think the requirement that they be citizens provides any guarantee that they will honourably and conscientiously carry out their public duties. They will carry them out, I believe, because they are good lawyers and not because they are Canadian citizens.

It is worth noting that section 15(1) lists 'national origin' as a prohibited ground of discrimination.

125. A large number of human rights decisions have involved the section 7 rights of non-nationals facing deportation to their country of origin. In *Suresh v Canada (Minister of Citizenship and Immigration)*¹⁹⁴, the appellant faced deportation based on his past involvement with the Liberation Tigers of Tamil Eelam. He argued that he would be subjected to torture if sent back to Sri Lanka. Applying section 7 of the *Charter*, a unanimous Court held that an individual should not be deported if he or she faces a substantial risk of torture. Additionally, the Court held that an individual facing risk of deportation to torture must be informed of the case he or she has to meet, be provided with an opportunity to make submissions on why his or her continued presence in Canada will not be detrimental to the country, and must receive written reasons explaining why he or she has or has not been deported. Significantly, though, the Court did not rule out the possibility of an individual facing deportation even if faced with the possibility of torture. The appellant was given a re-hearing.

126. In *Charkaoui v. Canada (Citizenship and Immigration)*¹⁹⁵, the appellant challenged his detention under Canada's then security certificate procedures, which allowed foreign nationals accused of partaking in terrorist activities to be detained up to 120 days without review. Canada's then security certificate procedures, which allowed foreign nationals accused of partaking in terrorist activities to

¹⁹² *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143.

¹⁹³ *ibid*, 157.

¹⁹⁴ *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC1, [2002] SCR 3.

¹⁹⁵ *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350.

be detained up to 120 days without review. The Court held the scheme violated the appellant's section 7 *Charter* rights, and could not be saved under section 1 of the *Charter*, as subjects of security certificates were not provided with sufficient information of the case against them. The Court also held that the scheme violated the appellants' right not to be subject to arbitrary detention under section 9 of the *Charter*. Notably, though, the Court concluded foreign nationals could be subject to extended periods of detention so long as regular review procedures were in place. It did not mandate that detention be reviewed every 48 hours, as is the case for permanent residents who are detained under a security certificate.

Summary of *Charter* rights for non-nationals

127. The primary source of rights for non-nationals in Canada is in the *Charter*, which affords the majority of rights provided to non-nationals as it does for Canadian citizens and permanent residents. However, as evidenced by the decision in *Charakaoui*, these rights may be interpreted differently for non-nationals depending on the context in which they arise.

7. GERMANY

A. Considering both the text of the instrument(s) and relevant case law, are rights guaranteed to non-nationals as well as nationals?

128. Human rights are guaranteed to non-nationals as well as nationals, except for those which are expressly conferred only on nationals.¹⁹⁶ This is reflected in the wording of the German Basic Law¹⁹⁷ or *Grundgesetz* (“GG”), which defines many rights as applying to “everyone”¹⁹⁸ or “all persons”,¹⁹⁹ or indicates a similarly broad scope by using an impersonal, indirect formulation.²⁰⁰

B. Is there a difference between the human rights afforded to non-nationals and those of nationals? In relation to which rights do limitations regarding non-nationals apply? What is the scope of the limitations?

129. The GG differentiates between human rights afforded to Germans (“*Deutschenrechte*”) and human rights afforded to Germans and non-nationals alike (“*Jedermannrechte*”). “Germans” are defined in Art. 116 para. 1 GG mainly as all German citizens.²⁰¹ This differentiation is firstly analysed in relation to natural persons. The treatment of foreign juridical persons raises further problems in the German human rights system. A third category is constituted by non-national EU-citizens, in interrelation with the EU-non-discrimination principle.

List of human rights afforded only to nationals

- Freedom not to render armed military service against one’s conscience, Art. 4 para. 3 GG
- Freedom of assembly, Art. 8 para. 1 GG
- Freedom of association, Art. 9 para. 1 GG
- Freedom of movement, Art. 11 para. 1 GG
- Freedom to choose a profession, a workplace and place of training, Art. 12 para. 1 GG
- Freedom not to be deprived of German citizenship, Art. 16 para. 1 GG
- Freedom not to be extradited, Art. 16 para. 2 GG
- Right to resistance, Art. 20 para. 4 GG
- Equality of political rights and duties, Art. 33 para. 1 GG
- Freedom to be equally eligible for any public office based on suitability, qualifications and professional achievements, Art. 33 para. 2 GG

¹⁹⁶ Hans D Jarass, in Bodo Pieroth and Hans D Jarass (eds), *Grundgesetz für die Bundesrepublik Deutschland: Kommentar* (13th edn, CH Beck 2014), Art. 19 para. 11.

¹⁹⁷ Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany), 23.5.1949 (BGBl. I S. 1).

¹⁹⁸ Freedom of speech Art. 5 para. 1 s. 1 GG.

¹⁹⁹ Equality before the law Art. 3 para. 1 GG.

²⁰⁰ I.e. the freedom of religion in Art. 4 para. 1 GG. Cf Horst Dreier, in Horst Dreier (ed), *Grundgesetz: Kommentar*, vol I (3rd edn, Mohr Siebeck 2013), Vorbemerkungen vor Artikel 1 GG para. 72.

²⁰¹ Of less contemporary relevance is the inclusion of people who were admitted to the territory of the German Reich within the boundaries of 31 December 1937 as a refugee or expellee of German ethnic origin or as the spouse or descendant of such a person, as well as of former German citizens who were deprived of their citizenship on political, racial or religious grounds between 30 January 1933 and 8 May 1945 and their descendants, Art. 116 para. 1 and 2 GG.

- Full suffrage to the *Bundestag* (Germany’s main legislative body with directly elected representatives), Art. 38 para. 1 s. 1 and 2 GG.²⁰²

Normative scope of limitation

130. *Deutschenrechte* are not afforded to non-nationals. They are excluded from the scope *ratione personae* of the respective rights. It follows that non-nationals neither hold those rights, nor can they exercise them or claim a violation.
131. However, this does not mean that foreign natural persons do not enjoy any human rights protection in these cases. The German human rights system provides for specific human rights which relate to certain thematic areas of protection as *leges speciales* (i.e. the above listed *Deutschenrechte*, or the freedom of speech Art. 5 para. 1 s. 1 alt. 1 GG). In addition, it provides for a subsidiary general freedom of action under Art. 2 para. 1 GG as *lex generalis*, which is applicable to nationals and non-nationals alike. It follows that Art. 2 para. 1 GG affords protection to non-nationals for all possible conduct, including areas that are covered for nationals by the more specific *Deutschenrechte*. As the scope *ratione personae* of these specific rights does not include non-nationals, these rights cannot block the application of Art. 2 para. 1 GG under the *lex specialis*-rule, as there is no concurrence of laws.²⁰³
132. Protection of non-nationals under Art. 2 para. 1 GG means that every state measure taken against a non-national natural person must conform to objective formal and material constitutional law, such as the proportionality principle, the requirement of a formally enacted statute to restrict human rights, and protection for reliance on existing law. Likewise, it procedurally entitles non-nationals to claim human right violations by filing individual complaints (“*Verfassungsbeschwerde*”)

²⁰² Cf. list in BVerfGE 37, 217 (241) and Horst Dreier, in Horst Dreier (ed), *Grundgesetz: Kommentar*, vol I (3rd edn, Mohr Siebeck 2013), Vorbemerkungen vor Artikel 1 GG para. 73.

²⁰³ BVerfGE 35, 382 (399); 78, 179 (196 f.). See Klaus Stern and Michael Sachs, *Das Staatsrecht der Bundesrepublik Deutschland*, vol III/1 (CH Beck 1988), 1040 f.; Udo di Fabio, in Theodor Maunz and Günter Dürig (eds), *Grundgesetz: Kommentar* (CH Beck 2001), Art. 2 Abs. 1 para. 32; Jörg Gundel, ‘§ 198 Der Grundrechtliche Status der Ausländer’ in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol IX (3rd edn, CF Müller 2011), para. 5; Friedhelm Hufen, *Staatsrecht II: Grundrechte* (4th edn, CH Beck 2014), § 14 para. 15; Hans D Jarass, in Bodo Pieroth and Hans D Jarass (eds), *Grundgesetz für die Bundesrepublik Deutschland: Kommentar* (13th edn, CH Beck 2014), Art. 2 para. 7; Bodo Pieroth and others, *Grundrechte: Staatsrecht II* (30th edn, CF Müller 2014), para. 128. Some scholars rely on different arguments and put forward that *Deutschenrechte* should be interpreted as also covering non-nationals when the alleged core of such rights relating to human dignity is touched. However, this approach generally seems to reach the same results. See i.e. Jörg Gundel, ‘§ 198 Der Grundrechtliche Status der Ausländer’ in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol IX (3rd edn, CF Müller 2011), para. 6 and fn. 27; Horst Dreier, in Horst Dreier (ed), *Grundgesetz: Kommentar*, vol I (3rd edn, Mohr Siebeck 2013), Vorbemerkungen vor Artikel 1 GG para. 74, Art. 2 I para. 45 f. This theory was explicitly rejected by the *Bundesverfassungsgericht*, BVerfGE 78, 179 (196) – Occasionally, the extension of general human rights protection to non-nationals under Art. 2 para. 1 GG is contested. This position must rather be considered to be a small minority view, i.e.: Hartmut Maurer, *Staatsrecht: Grundlagen, Verfassungsorgane, Staatsfunktionen* (6th edn, CH Beck 2010), § 9 para. 30; see the comment by Jörg Gundel, ‘§ 198 Der Grundrechtliche Status der Ausländer’ in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol IX (3rd edn, CF Müller 2011), para. 5 and fn. 24.

before the *Bundesverfassungsgericht* (Federal Constitutional Court of Germany).²⁰⁴ However, as a more general human right, Art. 2 para 1 GG may allow for greater limitations than the more specific *Deutschenrechte*.²⁰⁵ *Deutschenrechte* often specify certain conditions that statutes must fulfil to be justified in limiting the respective human right, which do not apply to Art. 2 para 1 GG.²⁰⁶ For instance, the freedom of assembly in an enclosed area (Art. 8 para. 1 GG) may only be limited by laws that pursue other constitutional values.²⁰⁷ Such specific constraints do not apply to Art. 2 para. 1 GG, potentially giving the legislature greater leeway to restrict the participation of non-nationals in such assemblies.²⁰⁸ On the other hand, the degree of protection provided under Art. 2 para. 1 GG need not necessarily be lower than the protection under the more specific rights accorded to nationals. Furthermore, the German human rights system does not require the legislator to treat nationals and non-nationals differently in federal and state law.²⁰⁹

Reasons for differentiating between nationals and non-nationals

133. Firstly, it must be highlighted that the *Parlamentarischer Rat*, which was the council responsible for drafting the GG from 1 September 1948 to 8 May 1949,²¹⁰ intended to extend the applicability of human rights to non-nationals in comparison to its predecessor, the Weimar Constitution, in which the majority of human rights were granted only to Germans according to its wording.²¹¹ Two different motivations can be identified for providing certain human rights only to nationals.
134. With respect to rights which refer to the direct participation in the political process of Germany (Art. 20, 33, 38 GG), the *Parlamentarischer Rat* restricted these rights to German citizenship as expression of membership in the state community of the Federal Republic of Germany.²¹² They are directly related to democratic participation and thus only available to nationals.²¹³

²⁰⁴ BVerfGE 35, 382 (399); Markus Heintzen, ‘§ 50 Ausländer als Grundrechtsträger’ in Detlef Merten and Hans-Jürgen Papier (eds), *Handbuch der Grundrechte in Deutschland und Europa*, vol II (CF Müller 2006), para. 49; Bodo Pieroth and others, *Grundrechte: Staatsrecht II* (30th edn, CF Müller 2014), para. 129.

²⁰⁵ BVerfGE 78, 179 (196 f.); Markus Heintzen, ‘§ 50 Ausländer als Grundrechtsträger’ in Detlef Merten and Hans-Jürgen Papier (eds), *Handbuch der Grundrechte in Deutschland und Europa*, vol II (CF Müller 2006), para. 47 f.; Horst Dreier, in Horst Dreier (ed), *Grundgesetz: Kommentar*, vol I (3rd edn, Mohr Siebeck 2013), Vorbemerkungen vor Artikel 1 GG para. 74; Art. 2 I para. 46.

²⁰⁶ BVerfGE 35, 382 (399); Peter M Huber, ‘§ 49 Natürliche Personen als Grundrechtsträger’ in Detlef Merten and Hans-Jürgen Papier (eds), *Handbuch der Grundrechte in Deutschland und Europa*, vol II (CF Müller 2006), para. 43; Jörg Gundel, ‘§ 198 Der Grundrechtliche Status der Ausländer’ in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol IX (3rd edn, CF Müller 2011), para. 6.

²⁰⁷ See i.e. Hans D Jarass, in Bodo Pieroth and Hans D Jarass (eds), *Grundgesetz für die Bundesrepublik Deutschland: Kommentar* (13th edn, CH Beck 2014), Art. 8 para. 20.

²⁰⁸ Cf. BVerfGE 78, 179 (196 f.).

²⁰⁹ Udo di Fabio, in Theodor Maunz and Günter Dürig (eds), *Grundgesetz: Kommentar* (CH Beck 2001), Art. 2 Abs. 1 para. 33.

²¹⁰ Comprised by representatives of the state parliaments (“Landestage”). See Hans D Jarass, in Bodo Pieroth and Hans D Jarass (eds), *Grundgesetz für die Bundesrepublik Deutschland: Kommentar* (13th edn, CH Beck 2014), Einleitung para. 2.

²¹¹ However, whether these rights were nevertheless applicable to non-nationals was controversial in the *Weimarer Republik*, cf. Klaus Stern and Michael Sachs, *Das Staatsrecht der Bundesrepublik Deutschland*, vol III/1 (CH Beck 1988), 1020 f.

²¹² *ibid.*, 1028 f. with reference to the description of citizenship in BVerfGE 37, 217 (241).

²¹³ Peter M Huber, ‘§ 49 Natürliche Personen als Grundrechtsträger’ in Detlef Merten and Hans-Jürgen Papier (eds), *Handbuch der Grundrechte in Deutschland und Europa*, vol II (CF Müller 2006), para. 41.

135. The *Bundesverfassungsgericht* (Federal Constitutional Court) has found that affording the right to vote (Art. 38 para. 1 s. 1 GG) to non-nationals in federal and state elections was unconstitutional, because the right to vote was rooted in the democratic principle that all power is derived from the people, which is comprised only of German citizens pursuant to Art. 20 para. 2, 116 GG (and, with respect to the state level, Art. 28 para. 1 s. 1 and 2 GG).²¹⁴ However, in county and municipal elections, which constitute executive bodies, EU citizens may participate in voting according to Art. 28 para. 1 s. 3 GG.
136. With respect to rights not referring directly to participation in the political process of Germany (in particular Art. 8, 9, 11 and 12 GG), the *Parlamentarischer Rat* was concerned with domination by foreign influences and possible dangers in providing nationals with the essential requirements for their living. The socio-economic situation after the Second World War was considered to be highly strained, as a large number of people now had to be able to make their living on a smaller state territory. After the social and economic situation changed and improved, the decision to restrict these rights to nationals was considered to be predetermined by the GG and was thus not questioned.²¹⁵ It must also be appreciated in this context that, in 1949, the GG was considered to be of a provisional nature until a constitution was legitimised by the whole German population.²¹⁶
137. In addition to these historical reasons, a number of teleological arguments are presented in literature today. Restricting the freedom to choose a profession or trade under Art. 12 para. 1 GG to nationals enabled the state to regulate access to the German labour market on the basis of international reciprocity.²¹⁷ By limiting the freedom of assembly (Art. 9 para. 1 GG) and association (Art. 8 para. 1 GG), the state may prevent external political conflicts, especially extremism, to be brought into Germany.²¹⁸ The freedom of movement was historically restrained to nationals in order to provide a practical element of national identity, to support the creation of the German nation, against the background of a highly fragmented political and territorial landscape in the 18th

²¹⁴ BVerfGE 83, 37 (50 ff.); 83, 60 (70 ff.); Horst Dreier, in Horst Dreier (ed), *Grundgesetz: Kommentar*, vol I (3rd edn, Mohr Siebeck 2013), Vorbemerkungen vor Artikel 1 GG para. 73; Bodo Pieroth and others, *Grundrechte: Staatsrecht II* (30th edn, CF Müller 2014), para. 122. About the nature of municipalities see i.e. Bodo Pieroth, in Bodo Pieroth and Hans D Jarass (eds), *Grundgesetz für die Bundesrepublik Deutschland: Kommentar* (13th edn, CH Beck 2014), Art. 28 para. 10.

²¹⁵ Klaus Stern and Michael Sachs, *Das Staatsrecht der Bundesrepublik Deutschland*, vol III/1 (CH Beck 1988), 1022 f. with reference to Hermann v. Mangoldt, *Das Bonner Grundgesetz* (Franz Vahlen 1953), 39; Markus Heintzen, '§ 50 Ausländer als Grundrechtsträger' in Detlef Merten and Hans-Jürgen Papier (eds), *Handbuch der Grundrechte in Deutschland und Europa*, vol II (CF Müller 2006), para. 41; Horst Dreier, in Horst Dreier (ed), *Grundgesetz: Kommentar*, vol I (3rd edn, Mohr Siebeck 2013), Vorbemerkungen vor Artikel 1 GG para. 71.

²¹⁶ Hans D Jarass, in Bodo Pieroth and Hans D Jarass (eds), *Grundgesetz für die Bundesrepublik Deutschland: Kommentar* (13th edn, CH Beck 2014), Einleitung para. 1.

²¹⁷ Markus Heintzen, '§ 50 Ausländer als Grundrechtsträger' in Detlef Merten and Hans-Jürgen Papier (eds), *Handbuch der Grundrechte in Deutschland und Europa*, vol II (CF Müller 2006), para. 41.

²¹⁸ *ibid.*, para. 42.

and in the first half of the nineteenth century.²¹⁹ It is also argued that, today, it allows for restricting and regulating the entry of non-nationals into Germany more easily, thereby providing the basis for laws concerning aliens.²²⁰

Differences of protection in practice in federal and state law

138. Notwithstanding the differentiation on the constitutional level, the legislator is free to provide more protection to non-nationals in federal and state legislation, and has done so in many areas. For instance, non-nationals have the same right as nationals to engage in commerce (§ 1 *Gewerbeordnung*), to organise and to participate in public assemblies (§ 1 *Versammlungsgesetz*)²²¹ and to found an association (“*Verein*”, § 1 *Vereinsgesetz*).²²²

Human rights protection for foreign juridical persons

139. Human rights protection for foreign juridical persons must be considered separately from protection for natural persons. Pursuant to Art. 19 para. 3 GG, human rights are applicable to *domestic* juridical persons to the extent that the nature of such rights permits. Conversely, it follows that foreign juridical persons do not enjoy human rights protection, not even under Art. 2 para. 1 GG.²²³ An analogy in favour of foreign juridical persons must be rejected due to the clear wording of Art. 19 para. 3 GG and the drafting history, as the *Parlamentarischer Rat* explicitly refused to extend human rights protection to foreign juridical persons.²²⁴ Whether a juridical person is foreign or domestic is assessed on the basis of its effective seat.²²⁵

140. The main object and purpose of this restriction to domestic juridical persons is to provide the German government with more flexibility in international trade relations, especially with regard to reciprocal commitments. Otherwise, there would be no incentives for other states to improve the rights of German juridical persons in their legal systems.²²⁶ However, one exception is made from this general principle. All juridical persons enjoy the procedural human rights as part of the

²¹⁹ Peter M Huber, ‘§ 49 Natürliche Personen als Grundrechtsträger’ in Detlef Merten and Hans-Jürgen Papier (eds), *Handbuch der Grundrechte in Deutschland und Europa*, vol II (CF Müller 2006), para. 38.

²²⁰ *ibid*, para. 39; Ferdinand Wollenschläger, in Horst Dreier (ed), *Grundgesetz: Kommentar*, vol I (3rd edn, Mohr Siebeck 2013), Art. 11 para 30, 40.

²²¹ Remains in force as federal law until superseded by Land (state) law pursuant to Art. 125a para. 1 GG.

²²² Horst Dreier, in Horst Dreier (ed), *Grundgesetz: Kommentar*, vol I (3rd edn, Mohr Siebeck 2013), Vorbemerkungen vor Artikel 1 GG fn. 324.

²²³ BVerfGE 21, 207 (208 f.); 23, 229 (236); Horst Dreier, in Horst Dreier (ed), *Grundgesetz: Kommentar*, vol I (3rd edn, Mohr Siebeck 2013), Art. 19 III para. 86.

²²⁴ BVerfGE 129, 78 (96); Horst Dreier, in Horst Dreier (ed), *Grundgesetz: Kommentar*, vol I (3rd edn, Mohr Siebeck 2013), Art. 19 III para. 86.

²²⁵ Josef Isensee, ‘§ 199 Anwendung der Grundrechte auf juristische Personen’ in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol IX (3rd edn, CF Müller 2011), para. 66; Horst Dreier, in Horst Dreier (ed), *Grundgesetz: Kommentar*, vol I (3rd edn, Mohr Siebeck 2013), Art. 19 III para. 79.

²²⁶ *ibid*, para. 86.

constitutional principle of the rule of law (Art. 20 para. 3 GG), which enshrines *inter alia* everyone's right to judicial review and fair trial to everyone.²²⁷ These are:

- The right to petition, Art. 17 GG
- The right to judicial remedies, Art. 19 para. 4 GG
- The ban on extraordinary courts Art. 101 GG
- The right to be heard in the courts in accordance with law Art. 103 para. 1 GG.

EU citizens

141. The status of EU citizens (natural persons) in German human rights protection is influenced by European law. Art. 18 TFEU establishes the principle of non-discrimination on the basis of citizenship where EU-law is applicable. The basic freedoms under Art. 28 ff. TFEU prescribe similar obligations as *leges speciales*.

142. The majority view in German human rights literature considers EU-citizens to be excluded from the scope of the “Deutschenrechte” due to the clear wording of the provisions. However, Art. 2 para. 1 GG should be interpreted as providing to EU-citizens the same degree of human rights protection as the respective “Deutschenrecht” would grant for nationals in order to comply with the EU-non-discrimination principle. It followed that EU-citizens enjoy a similar level of human rights protection as nationals.²²⁸ Other scholars argue that “Deutschenrechte” directly apply also to EU-citizens, as this was the only way to ensure the same level of practical human rights protection. They refer to the principle of supremacy of EU-law.²²⁹ The *Bundesverfassungsgericht* has not adjudicated on this question so far. Its findings on human rights protection of *juridical* persons with a seat in the EU rather seem to be in line with the second approach (see below).²³⁰

143. Some reject that EU law requires human rights protection to be generally equalised between nationals and EU citizens, and point to solutions in federal and state legislation.²³¹ However, this theory must rather be considered to be a minority view in German human rights literature.²³²

²²⁷ BVerfGE 12, 6 (8), 18, 441 (447), 64, 1 (11); Josef Isensee, ‘§ 199 Anwendung der Grundrechte auf juristische Personen’ in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol IX (3rd edn, CF Müller 2011), para. 70.

²²⁸ Horst Dreier, in Horst Dreier (ed), *Grundgesetz: Kommentar*, vol I (3rd edn, Mohr Siebeck 2013), Vorbemerkungen vor Artikel 1 GG para. 116; Art. 2 I para. 17.

²²⁹ See i.e. Hans D Jarass, in Bodo Pieroth and Hans D Jarass (eds), *Grundgesetz für die Bundesrepublik Deutschland: Kommentar* (13th edn, CH Beck 2014), Art. 19 para. 12.

²³⁰ Ferdinand Wollenschläger, in Horst Dreier (ed), *Grundgesetz: Kommentar*, vol I (3rd edn, Mohr Siebeck 2013), Art. 11 para. 40, fn. 155.

²³¹ See i.e. Udo di Fabio, in Theodor Maunz and Günter Dürig (eds), *Grundgesetz: Kommentar* (CH Beck 2001), Art. 2 Abs. 1 para. 35.

²³² Cf. with further references Horst Dreier, in Horst Dreier (ed), *Grundgesetz: Kommentar*, vol I (3rd edn, Mohr Siebeck 2013), Vorbemerkungen vor Art. 1 GG para. 116, Art. 2 I para. 17.

144. Foreign juridical persons with a seat in the EU enjoy the same human rights protection as juridical persons with a seat in Germany. The *Bundesverfassungsgericht* has confirmed this principle in a decision from 2011. It found that the basic freedoms under Art. 28 ff. TFEU and the general principle of non-discrimination under Art. 18 TFEU “extends” the application of Art. 19 para. 3 GG (which does only apply to domestic juridical persons according to its wording, see above). This followed from the principle of supremacy of EU-law which forms part of the TEU and TFEU treaty obligations that Germany agreed to.²³³

C. Are the terms ‘civic rights’ and/or ‘civil rights’ used in the instrument(s), and if so, how are they defined, or how have they been construed? Are there any indications that ‘civic rights’ and/or ‘civil rights’ are guaranteed only to nationals?

145. The notion of “civil rights” is expressly used in the German constitution only in Art. 33 para 1 and 3 GG (“*staatsbürgerlichen Rechte und Pflichten*”, “*bürgerlicher und staatsbürgerlicher Rechte*“) and in Art. 140 GG which incorporates, *inter alia*, Art. 136 para 1 of the Weimar Constitution (“*bürgerlichen und staatsbürgerlichen Rechte und Pflichten*“).¹ The German terms are equivalent to ‘political rights’ and ‘civil and political rights’. The first term is used in Article 33 para 1 in a guarantee of such rights equally to each German citizen in every *Land* or state, the second in Article 33 para 3 in a guarantee that such rights will be accorded independently of religious affiliation.

146. These terms are not defined; there is thus no definition of “civic/civil rights” in the GG. The concept of “civil rights” and its definition are of theoretical interest rather than of practical importance.

147. Some scholars argue that “civil rights” can be equated with *Deutschenrechte*.²³⁴ From this point of view, the German constitution distinguishes between human rights/*Jedermannrechte* on the one side and civil rights/*Deutschenrechte* on the other side.

148. Others define the concept of “civic/civil rights” as the group of human rights referring to direct participation in Germany’s political state decisions and related processes, including the access to

²³³ BVerfGE 129, 78 (94 ff., 99 f.). Agreeing and providing an overview on alternative approaches in literature: Horst Dreier, in Horst Dreier (ed), *Grundgesetz: Kommentar*, vol I (3rd edn, Mohr Siebeck 2013), Art. 19 III para. 84 f. – Extension to juridical persons with a seat in the EU rejected i.e. by Josef Isensee, ‘§ 199 Anwendung der Grundrechte auf juristische Personen’ in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol IX (3rd edn, CF Müller 2011), para. 71.

²³⁴ Konrad Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (20th edn, CF Müller 1995), para. 284; Udo di Fabio, in Theodor Maunz and Günter Dürig (eds), *Grundgesetz: Kommentar* (CH Beck 2001), Art. 2 Abs. 1 para. 28; Peter M Huber, ‘§ 49 Natürliche Personen als Grundrechtsträger’ in Detlef Merten and Hans-Jürgen Papier (eds), *Handbuch der Grundrechte in Deutschland und Europa*, vol II (CF Müller 2006), para. 27; Peter Badura, *Staatsrecht* (5th edn, CH Beck 2012), C para. 12; Friedhelm Hufen, *Staatsrecht II: Grundrechte* (4th edn, CH Beck 2014), § 1 para. 6, § 6 para. 34. Further references and explanations by Klaus Stern and Michael Sachs, *Das Staatsrecht der Bundesrepublik Deutschland*, vol III/1 (CH Beck 1988), 1016, who criticise this concept.

public or administrative office. They base in membership in the political society of the state.²³⁵ It is argued that the term “civic/civil rights” has its origins in the French 1789 *Déclaration des Droits de l’Homme et du Citoyen*, which referred to different types of rights granted to the *same* person. Therefore, the same terminology could not be appropriate to describe groups of rights that are afforded to *different* groups of people.²³⁶ This theory may identify the following human rights as ‘civil rights’:

- Freedom not to render armed military service against one’s conscience, Art. 4 para. 3 GG, considering that it enshrines a right with respect to the obligation of citizens to provide military service if demanded, Art. 12a para. 1 GG.
- Full suffrage to the *Bundestag*, Art. 38 para. 1 s. 1 and para. 2 GG.
- Equality of political rights and duties, Art. 33 para. 1 GG
- Freedom to be equally eligible for any public office based on suitability, qualifications and professional achievements, Art. 33 para. 2 GG
- Equal treatment in enjoyment of civil and political rights without discrimination on the basis of religion and philosophical believes, Art. 33 para. 3 GG.²³⁷

²³⁵ I.e. Markus Heintzen, ‘§ 50 Ausländer als Grundrechtsträger’ in Detlef Merten and Hans-Jürgen Papier (eds), *Handbuch der Grundrechte in Deutschland und Europa*, vol II (CF Müller 2006), para. 28.

²³⁶ Klaus Stern and Michael Sachs, *Das Staatsrecht der Bundesrepublik Deutschland*, vol III/1 (CH Beck 1988), 1016 f., 1027 f.; Josef Isensee, ‘§ 190 Grundrechtsvoraussetzungen und Verfassungserwartungen an die Grundrechtsausübung’ in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol IX (3rd edn, CF Müller 2011), para. 29; Horst Dreier, in Horst Dreier (ed), *Grundgesetz: Kommentar*, vol I (3rd edn, Mohr Siebeck 2013), Vorbemerkungen vor Artikel 1 GG para. 73, 80.

²³⁷ Cf. Horst Dreier, in Horst Dreier (ed), *Grundgesetz: Kommentar*, vol I (3rd edn, Mohr Siebeck 2013), Vorbemerkungen vor Artikel 1 GG, para. 80.

8. FRANCE

A. Considering both the text of the instrument(s) and relevant case law, are rights guaranteed to non-nationals as well as nationals?

149. The instrument considered here is the French Constitution – defined broadly. The French Constitution of 1958 itself contains no fundamental rights catalogue. However, its preamble refers to the 1789 Declaration of the Rights of Man and of the Citizen, the preamble of the French Constitution from 1946 and the 2004 environmental charter.²³⁸ All of these instruments are considered to have a constitutional status by virtue of the constitution referring to them. Together with the text of the Constitution itself they form the ‘*bloc de constitutionalité*’.

150. Many provisions of the *bloc de constitutionalité* use the notion ‘citoyen’ – ‘citizen’. French constitutional law scholar Leben notes that in French constitutional law ‘all nationals are citizens and only citizens are nationals.’²³⁹ While neither ‘nationality’ nor ‘citizenship’ are defined by the French Constitution, it does refer to the terms ‘citizen’ and ‘national’.

151. Article 1 of the 1958 Constitution declares that France is an indivisible, secular, democratic and social republic, which respects ‘equality before the law of all citizens without distinction regarding origin, race or religion.’²⁴⁰ This however leaves open the question of whether also foreigners are subject to these rights.

152. Article 3 of the Constitution provides that national sovereignty belongs to ‘the people’ and is exercised by its representatives and referenda. It further defines the electorate as those of French nationals above 18 years of age. As Leben notes, the notions of nationality and citizenship overlap in this regard: French nationals are French citizens and French citizens are French nationals.²⁴¹ The French *Conseil constitutionnel* was faced with this issue in its decision on the constitutionality of the Maastricht Treaty.²⁴² It found voting rights for foreign residents in local elections to conflict with Article 3 of the Constitution according to which national sovereignty belongs to the *peuple* – the people, a notion understood to designate only those of French nationality. Allowing foreign

²³⁸ ‘*Le peuple français proclame solennellement son attachement aux Droits de l’Homme et aux principes de la souveraineté nationale tels qu’ils ont été définis par la Déclaration de 1789, confirmée et complétée par le préambule de la Constitution de 1946, ainsi qu’aux droits et devoirs définis dans la Charte de l’environnement de 2004.*’

²³⁹ Charles Leben, ‘Nationalité et citoyenneté en droit constitutionnel’ 11 *Controverses* 151, 152.

²⁴⁰ Article 1 of the 1958 French Constitution.

²⁴¹ *Ibid.*, 154.

²⁴² Décision n. 92-308 DC du 09 avril 1992. For a comment, see Olivier Beaud, ‘Le Droit de Vote des Etrangers: L’Apport de la Jurisprudence Constitutionnelle Allemande à une Théorie du Droit de Suffrage’ (1992) *Revue Française de Droit Administratif* 409.

citizens to vote in local elections would violate this principle as mayors contribute to the election of members of the upper House, the *Sénat* (Senate). The council found that as a legislative chamber at national level, the Senate contributes to the exercise of national sovereignty and can hence only be elected by French nationals. This conflict was later remedied by the introduction of Article 88(3) into the French constitution that specified that while European citizens can vote and stand for election in local elections, they cannot be mayors nor participate in the election of senators²⁴³, a limitation on the electoral rights of EU citizens that is lawful under EU law.²⁴⁴

153. Other provisions of the constitution confer rights without referring to either ‘nationals’ or ‘citizens’. Article 66 of the Constitution for instance provides that ‘no one can be detained arbitrarily’²⁴⁵ and Article 66(1) provides that ‘no one can be subject to the death sentence.’²⁴⁶ As for the 1789 Declaration of the Rights of Man and the Citizen, while most of the provisions thereof refer to ‘men’ or ‘man’²⁴⁷, others refer to ‘citizens’. Article 14 for instance provides that all the ‘*citizens* have a right to decide, either personally or by their representatives, as to the necessity of the public contribution; to grant this freely; to know to what uses it is put; and to fix the proportion, the mode of assessment and of collection and the duration of the taxes.’ Also Articles 6, 7, 10 and 12 refer to the ‘citizens’ rather than ‘men’. The preamble to the 1946 Constitution employs yet again a different terminology in referring to the ‘inalienable and sacred’ rights that ‘each human being’ possesses.²⁴⁸

154. The wording of these different texts, written at different times and in different context, is therefore somewhat confusing. It seems difficult to find literature on the differences between the various terminologies and the scope of application of the various provisions. In a French constitutional law book, Favoreu et al clarify the matter, unfortunately without providing footnotes referring to primary sources. Favoreu et al note that it is often stated that ‘the citizens’ are the subjects of the fundamental rights protected under French law. Yet in their view this is wrong, this assumption is wrong not only because legal entities can benefit from some of these fundamental rights but also because foreigners can benefit from most of these rights.²⁴⁹

²⁴³ See Article 88(3) of the French Constitution and Loi constitutionnelle n° 92-554 du 25 juin 1992 ajoutant à la Constitution un titre : "Des Communautés européennes et de l'Union européenne" (1)

²⁴⁴ See Article 5 of Directive 94/80 [1994] OJ L368/38.

²⁴⁵ ‘*Nul ne peut être arbitrairement détenu.*’

²⁴⁶ ‘*Nul ne peut être condamné à la peine de mort.*’

²⁴⁷ Article 1 for instance provides that ‘Men are born and remain free and equal in rights’.

²⁴⁸ Article 1 of the 1948 Preamble.

²⁴⁹ Louis Favoreu et al, *Droit Constitutionnel*, vol 12e édition (Daloz 2009) 893.

155. These authors explain that the application of fundamental rights to individuals varies depending on whether they regularly or irregularly reside in France. As regards those lawfully being on French territory, they benefit from the *'droits-libertés'* (this includes the right to safety, liberty, the inviolability of the home, the respect of private life, and the right to marry). Foreigners that lawfully reside on French soil also benefit from the *'droits de créance'* (rights requiring positive state action such as the right to social protection, and the right to housing²⁵⁰). The *'droits de participation'* on the other hand, which are intimately linked to citizenship, do not apply to foreigners. For those foreigners in an irregular situation, only certain *'droits-libertés'* apply (and only as long as there is no danger to public order). The exception is the right to education, which applies to any child on French soil of less than 16 years of age.²⁵¹ The right to unconditionally remain on French soil is limited solely to French citizens.²⁵²

156. The case law of the French jurisdictions supports some of these claims. The French Council of State recognised that 'it results from the general principles of law [...] that those foreigners legally residing in France have the same right to lead a normal family life as nationals.'²⁵³ This was confirmed by the Constitutional Council in 1993, which provided a non-exhaustive list of rights that are recognised to foreigners. It stated:

if the legislature can establish specific dispositions with regard to foreigners, it must respect their fundamental rights and liberties of constitutional value, which are recognised to all those residing within the French territory. This includes personal liberty and safety [...] the liberty to marry, the right to a normal family life. Further, foreigners enjoy the right to social protection as long as they lawfully and stably reside on French territory. They must further be able to benefit from remedies with safeguard these rights.²⁵⁴

157. French law however discriminates against non-nationals when it comes to accessing civil service employment. It should however be noted that nationals from other EU Member States, as well as from Norway, Iceland, Lichtenstein, Andorra, Monaco and Switzerland can access some civil service jobs that other foreigners cannot. As in other EU Member States, those jobs said to relate to the State's exercise of national sovereignty (such as for instance relating to diplomatic relations and matters of national defence), are solely available to French nationals.²⁵⁵

²⁵⁰ See Article 1 of Law N. 2007-290 of 5 March 2007.

²⁵¹ Favoreu et al 894.

²⁵² See ordonnance no. 45-2658 of 2 November 1945.

²⁵³ CE, Ass. 8 déc. 1978 (Gisti).

²⁵⁴ Conseil constitutionnel, decision du 13 aout 1993 relative à la maîtrise de l'immigration.

²⁵⁵ Edward Arkwright and Manuele Delamarre, 'Le citoyen dans la cite: Quels sont les droits des étrangers?' (*Vie publique*, 9 October 2013), www.vie-publique.fr/decouverte-institutions/citoyen/citoyennete/citoyen-france/quels-sont-droits-etrangers.html (accessed 29 December 2014)

158. Foreigners are also barred from exercising a number of professions, including being a doctor, a dentist, a midwife or a pharmacist, unless the individual possesses French, Andorran, EU, Moroccan or Tunisian nationality or that of an EFTA country. Exceptions are also possible for those nationals with the country of which a special agreement has been concluded.²⁵⁶

B. Is there a difference between the human rights afforded to non-nationals and those of nationals? In relation to which rights do limitations regarding non-nationals apply? What is the scope of the limitations?

See above.

C. Are the terms ‘civic rights’ and/or ‘civil rights’ used in the instrument(s), and if so, how are they defined, or how have they been construed? Are there any indications that ‘civic rights’ and/or ‘civil rights’ are guaranteed only to nationals?

159. These terms are not used in any rights instrument. However, the term ‘civil rights, civic rights and family rights’ (*droits civiques, civils et de famille*) is used in the French Penal Code (article 131-26) to refer to certain rights which can temporarily be taken away from individuals if they are convicted of a crime. This category includes the right to vote, to be eligible for public office, to practice law, or to exercise the legal guardianship function of a ‘tuteur’ or ‘curateur’.

²⁵⁶ *ibid*

9. UNITED STATES

A. Considering both the text of the instrument(s) and relevant case law, are rights guaranteed to non-nationals as well as nationals?

160. The starting point for any analysis of this issue is the United States Constitution. The Constitution of the United States does distinguish in some respects between the rights of citizens and non-citizens: the right not to be discriminatorily denied the vote and the right to run for federal, elective office are both expressly restricted to citizens. Other rights within the Constitution are written *without* such a limitation.

161. Below are some extracts from the Constitution (emphasis added):

Article. I.

Section. 2.

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Section. 3.

The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote ...

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall choose their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honour, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Article. II.

Section. 1.

The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows ...

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States ...

14th Amendment

Section 2

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

15th Amendment

Section 1

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, colour, or previous condition of servitude—

16th Amendment

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

These voting rights were also said not to be denied to citizens of the US on the basis of reason to pay any poll tax or other tax (24th Amendment, Section 1), or age (after they had reached the 18 year old threshold – 26th Amendment, Section 1)

162. All other rights of the US Constitution are written *without* such a limitation. For instance, the Fifth Amendment due process rights are framed in terms of all individuals and persons: ‘no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand jury ... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb ...’. While some amendments such as the First Amendment, which concerns the protections of political and religious freedoms and the Fourth Amendment which deals with the protection of privacy and liberty are both framed in terms of applying to ‘the people’, (eg. in Fourth Amendment, ‘the right of the people to be secure in their persons...’), the case law of the Supreme Court has interpreted these rights as applying to non-nationals (at least those on US territory), as well as to nationals.
163. In fact, it appears that the general approach of the US Supreme Court case law is *not* to distinguish between rights of nationals and non-nationals (save where the Constitution specifies that the right in question is guaranteed only to citizens). A good example of the general court’s approach which is highlighted in academic literature and which exemplifies the broad approach is looking at litigation in relation to the First and Fifth Amendment. In *Kwong Hai Chew v Colding*,²⁵⁷ the petitioner was a seaman and left the US aboard a ship (he was admitted to permanent residence after his marriage to a citizen but was an alien); upon his return, he was denied entry as an entrant whose admission could be denied in the public interest (and the respondent argued that the order was based on confidential information, the disclosure of which would be prejudicial to the public interest); the petitioner was denied a hearing and an opportunity to speak on his own behalf (and had not been informed of the charges against him).
164. The Court held that the petitioner (as a legal resident alien) was protected by the Fifth Amendment and could not be detained without being informed of the charges against him (and without a hearing which satisfied due process requirements). The Court stated that the First and Fifth Amendment do not “acknowledge[] any distinction between citizens and resident aliens” (thus this distinction was found not to apply when construing the immigration regulation permitting exclusion of aliens – here a permanent resident - based on secret evidence because of the substantial constitutional concerns that such an application would present).

²⁵⁷ [1953] 344 US 590

165. Another example of the application of constitutional rights to non-nationals is the case of *Zadvydas v Davis*,²⁵⁸ which concerned a resident alien in the US who was ordered to be deported in 1994 on the basis of his criminal record. Under Federal law, a person is to be detained for up to 90 days pending their deportation; if the 90 days passes without deportation, the Attorney General could detain the person indefinitely until they could be deported. There was difficulty in finding a country which would accept the individual in question, and the applicant remained in detention. He then filed a petition for a writ of *habeas corpus*. The Supreme Court found that the indefinite detention of immigrants under order of deportation, where the United States cannot find a country willing to accept them, was illegal. The Court held that “the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary or permanent”. Therefore when non-citizens are tried for crimes, they are entitled to all of the rights that attach to the criminal process.

166. Therefore, the Supreme Court’s case law, as summarised broadly by Cole, “has generally applied the same due process analysis to preventive detention of foreigners in immigration proceedings and of citizens in criminal and civil commitment settings, treating the cases interchangeably”²⁵⁹. Despite this general approach of recognizing that non-nationals enjoy constitutional rights, there have been cases in which the Court has held these rights to be more limited in the case of foreign nationals. In *Demore v Kim*,²⁶⁰ the Court upheld a statute mandating preventive detention during deportation proceedings of foreign nationals charged with certain criminal offences. Under the legislation, persons who posed no risk of flight and no danger to the community must be detained. In upholding the legislation, the Court referred to statistics showing that significant percentages of ‘criminal aliens’ committed further crimes upon release and/or failed to appear for their deportation hearings and reasoned on this basis that Congress could make a rational judgment that no such persons should be released on bond while in deportation proceedings. The majority in the case said that “Congress regularly makes rules that would be unacceptable if applied to citizens”. However, the judgment has been subject to criticism: Cole observes that ‘the liberty interests of the detainee and the government’s interests in preventing flight or danger to the community are no different for noncitizens in immigration proceedings than for citizens in criminal proceedings. *Demore* thus asserts but does not justify, differential treatment of foreign nationals’ due process rights.’

²⁵⁸ [2001] 533 US 678

²⁵⁹ David Cole, ‘*Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*’ (2003) 25 T Jefferson L Rev 367

²⁶⁰ [2003] 538 US 510

167. More recent case law may show a more expansive interpretation of the liberty rights of non-nationals, including those detained outside the US's borders. In *Boumediene v Bush*²⁶¹ the Supreme Court ruled against the US government in cases brought by foreign nationals challenging their detention at the Guantanamo Bay. The Court held that the Military Commissions Act of 2006 violated the US constitutional right of the detainees in question to meaningful habeas corpus review by federal civilian judges. As background to the decision, it should be noted that in *Rasul v Bush*²⁶², the Supreme Court held that US courts have jurisdiction under a federal habeas statute to hear the detainees' lawsuits. At 481, the Court said "considering that the [habeas] statute draws no distinction between Americans and aliens held in federal custody ... [the Court found] little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship". The Military Commissions Act 2006 (MCA) did not purport to suspend habeas corpus but rather removed it permanently and without regard to any 'rebellion or invasion' or 'public safety' which is the criterion in the US Constitution to allow for suspension of the right.
168. The US government argued in front of the Supreme Court that the MCA's withdrawal was constitutional because: (1) noncitizens held as enemy combatants outside the sovereign territory of the US lack individual rights under the Constitution including the right to habeas corpus, and (2) even if the detainees had a constitutional entitlement to habeas, Supreme Court case law allowing the government to substitute an 'adequate' alternative procedure was satisfied by the MCA process of fact-finding and review. The detainees asserted that the common law habeas writ circa 1789 was available to aliens outside of the formal borders of the country (anywhere the government exercised *de facto* sovereignty and control, jailers could be forced by the writ to justify the legality of detentions).
169. The Court found that the evidence as to 1789 was inconclusive historically but they found, when they came to their decision, that the framers of the Constitution were motivated by an 'inherent distrust of governmental power' (at 15) and thus that the Suspension Clause was written to protect the separation of powers by 'ensuring that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the delicate balance of governance that is itself the surest safeguard of liberty'. Thus, the writ of habeas corpus could also be invoked by non-citizens.

²⁶¹ [2008] 553 US 723

²⁶² [2004] 542 US 466

170. David Cole notes that defenders of exceptional government power over noncitizens offer several arguments for not extending the same rights to foreigners that we extend to citizens. Firstly, foreign nationals have taken no oath of loyalty to this country and presumably maintain their principal fidelity is to another country. Secondly, while citizens have a right to permanent residence in the United States, foreign nationals have no constitutional right to reside there. Thirdly, foreign nationals come and live among this country as guests, on whatever conditions the State sets; and if the State were to extend to foreign nationals the same rights that citizens enjoy, it would devalue citizenship itself. Finally, the most common argument for reduced constitutional protection for noncitizens invokes the political branches' 'plenary power' over immigration; doctrine counsels considerable judicial deference in reviewing the substantive terms Congress sets for admission to the United States.

171. In response, Cole states that:

'none of these arguments warrants affording diminished constitutional protection to non-nationals residing among us. Loyalty is a red herring. Most citizens became citizens by the accident of birth, not by passing any test of commitment. Non-nationals choose to come here, while most citizens were simply born here and did not leave'²⁶³

In any case, the plenary power and 'guests' arguments are incompatible with Supreme Court case law, which as indicated above has insisted that the First and Fifth Amendments acknowledge no distinctions between citizens and noncitizens residing here (*Chew*²⁶⁴ at 596). Cole concludes that:

[t]here is little reasoned support for the widely held notion that noncitizens are entitled to substantially less constitutional protection than citizens. While not identically situated in all respects, foreign nationals should enjoy the same constitutional protections for fundamental rights and liberties as United States citizens. The areas of permissible differentiation - admission, expulsion, voting, and running for federal elective office - are much narrower than the areas of presumptive equality - due process, freedom of expression, association, and religion, privacy, and the rights of the criminally accused ... In the end, the true test of justice in a democratic society is not how it treats those with political power, but how it treats those who have no voice in the democratic process. How we treat foreign nationals, the paradigmatic other in this time of crisis [after 9/11], ultimately tests our own humanity'²⁶⁵

172. As a further argument in favour of according non-nationals fundamental rights, Cole argues that the very fact that the right to vote is *not* accorded to non-nationals makes the protection of their other rights all the more important:

Foreign nationals residing here must obey our laws and pay taxes; they are even subject to the draft. Yet because they lack the franchise, they are without a meaningful voice in the political bargains that govern their everyday lives. Members of Congress have little reason to concern themselves with the rights and

²⁶³ David Cole (n 259) 384

²⁶⁴ (n 257)

²⁶⁵ *ibid*, 388

interests of people who cannot vote ... Foreign nationals do enjoy some indirect representation, as co-ethnic groups and business interests may sometimes assert their rights ... But such indirect representation is no substitute for the vote²⁶⁶.

B. Is there a difference between the human rights afforded to non-nationals and those of nationals? In relation to which rights do limitations regarding non-nationals apply? What is the scope of the limitations?

173. Many of the particular differences between the different rights afforded to nationals and non-nationals has already been highlighted above. The principal limitations within the Constitution itself are in relation to the ability to run for federal office and voting rights.
174. The right to equal protection of the laws, although it applies to non-nationals, does not guarantee them exactly identical treatment to that accorded to citizens. The Supreme Court in *Yick Wo v Hopkins*²⁶⁷ held that non-citizens are entitled to equal protection of the laws. The same principle applies even to undocumented persons illegally in the US: in *Plyler v Doe*²⁶⁸, the Court ruled that Texas could not deny public education to the children of ‘illegal aliens’. The general rule seems to be that where foreign nationals and citizens are similarly situated, they must be treated equally. However, different treatment of non-nationals will be permitted in two main situations: (1) exercising its power over immigration, the federal government may treat foreign nationals differently from citizens. The Supreme Court has acknowledged in *Mathews v Diaz*²⁶⁹ (at 90) that “in the exercise of its broad power over naturalisation and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens”; (2) the Court permits states to bar foreign nationals from public employment connected to the administration of public policy, including such positions as police officers (*Foley v Connelie*²⁷⁰, – permitting states to require citizenship in hiring state troopers), schoolteachers (*Ambach v Norwick*²⁷¹ – permitting states to require citizenship in hiring public school teachers) and even deputy probation officers (*Cabell v Chavez-Salido*,²⁷² – permitting states to require citizenship in hiring of deputy probation officers).
175. In these two areas, the Court has not (according to Cole) declared that equal protection is inapplicable, but only that noncitizens are differently situated from citizens in these areas with

²⁶⁶ *ibid.* 374, 375 & 376

²⁶⁷ [1886] 118 US 356

²⁶⁸ [1982] 457 US 202

²⁶⁹ [1976] 426 US 67

²⁷⁰ [1978] 435 US 291

²⁷¹ [1979] 441 US 68

²⁷² [1982] 454 US 432

respect to the immigration power because noncitizens are uniquely subject to that power and with respect to self-government, because they are not necessarily part of the polity. For instance in *Cabell*²⁷³ at 438 the Court noted that citizenship is “not a relevant ground for [state] distribution of economic benefits ... [but] it is for determining membership in the political community”.

176. Cole summarises the position of US constitutional law in the following paragraph:

In short, contrary to widely held assumptions, the Constitution extends fundamental protections of due process, political freedoms, and equal protection to all persons subject to our laws, without regard to citizenship. These rights inhere in the dignity of the human being, and are especially necessary for people, like non-nationals, who have no voice in the political process. The rights to political participation, entry, and abode, by contrast, are rights that may be limited to the citizenry; they are inextricable from a polity's ability to define itself, and they are virtually universally recognized as legitimately limited to the citizenry. By contrast, there are no good reasons specific to the rights of speech, association, or due process that warrant diminished protection for non-nationals. While relevant differences between noncitizens and citizens do justify some differences in treatment, beyond those limited differences, noncitizens are presumptively entitled to equal protection of the laws.²⁷⁴

177. Another important and interesting point noted by Cole which acts as a qualification to the notion that noncitizens are entitled to the same constitutional protection for their basic human rights as citizens is with regards to foreign nationals outside the US border. Supreme Court has historically treated foreign nationals outside the US border very differently from those within US jurisdiction. In *Zadydas*²⁷⁵ (at 693) the Court said:

it is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders. But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States.

178. The case of *United States ex. rel Knauff v Shaughnessy*²⁷⁶, involved a challenge to the procedures used to decide an initial entrant’s request for admission; the Court reasoned that noncitizens seeking initial entry have no right to enter, and therefore may not object on due process grounds to the procedures used to determine whether they may enter. Cole says that “that result, however, does not compel the much more sweeping conclusion that foreign nations outside our borders have no constitutional rights whatsoever”²⁷⁷. It may simply mean according to Cole²⁷⁸ that where a statute does not create an entitlement, no ‘liberty’ or ‘property’ interest is implicated by the denial of the

²⁷³ *ibid.*

²⁷⁴ Cole (n 259) 381

²⁷⁵ [2001] 533 US 678

²⁷⁶ [1950] 338 US 537

²⁷⁷ Cole (n 259) 382

²⁷⁸ *ibid.*

gratuitous benefit it offers, and therefore due process does not attach (a proposition equally applicable to citizens).

C. Are the terms ‘civic rights’ and/or ‘civil rights’ used in the instrument(s), and if so, how are they defined, or how have they been construed? Are there any indications that ‘civic rights’ and/or ‘civil rights’ are guaranteed only to nationals?

179. In the US Constitution, there is no specific mention of the terms *civil rights* or *civic rights* as a separate category of constitutional rights.

10. NIGERIA

180. This contribution provides an overview of the human rights regime of citizens and non-nationals in Nigeria, a common law jurisdiction. The paper sketches the legal position on the rights held in common between citizens and non-citizens and outlines the differences that exist between rights guaranteed to both categories of persons. Finally, it provides a synopsis of the legal position of non-citizens concerning civic rights of political participation.

Preliminary issues

181. Nigeria is a federal republic and possesses a supreme entrenched constitution that forms the basis of the legal system. Furthermore, the 1999 Constitution of the Federal Republic of Nigeria (as amended)²⁷⁹ contains a Bill of Rights that generally protects justiciable fundamental human rights of a civil and political nature.²⁸⁰ Human rights are also guaranteed under applicable international treaties and instruments such as the African Charter of Human and Peoples' Rights which has been incorporated as part of municipal law.²⁸¹ Economic, social, and cultural rights are generally non-justiciable,²⁸² although they may be claimed under international law. The independence of the judiciary is constitutionally guaranteed²⁸³ and the courts are vested with jurisdiction over human rights cases²⁸⁴ as well as express powers of *ex ante* and *ex post* judicial review.²⁸⁵ The Constitution creates a Supreme Court which operates as the apex judicial institution, and vests federal legislative powers in a bicameral legislature known as the National Assembly.

Overview of the Legal Framework on Citizenship

182. The Nigerian law incorporates aspects of *jus soli* and *jus sanguinis* concepts such that the status of citizenship is derived from birth or through descent.²⁸⁶ Citizens enjoy full legal capacity; can claim

²⁷⁹ Hereafter referred to as the 1999 Constitution. On the legal rule of constitutional supremacy see the 1999 Constitution, s 1.

²⁸⁰ Most of the rights are formulated in terms of a general grant and contain internal qualifications. The Bill of Rights also contains a general restriction and derogation clause that upholds the limitation of human rights on grounds that are "reasonably justifiable in a democratic society" such as public security and public health inter alia.

²⁸¹ Adopted on 27 June 1981, OAU Doc. CAB/LEG/67/3 Rev.5, 1520 U.N.T.S. 217 (entered into force on 21 Oct. 1986). Hereafter referred to as the African Charter. This instrument was transformed into municipal law as is constitutionally required vide the African Charter (Ratification and Enforcement Act) 1983 CAP 10 Laws of the Federation of Nigeria. Notably, Nigeria ratified the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) on 29 July 1993.

²⁸² 1999 Constitution, Chapter II; s 6(6)(c); see also Oyelowo Oyewo, *Constitutional Law in Nigeria* (Kluwer 2013) 121

²⁸³ Ibid ss. 6, 232, 231, & 292

²⁸⁴ Ibid s 46 (1); see also J Akande, "A Decade of Human Rights in Nigeria" in M.Ayo Ajomo (ed), *New Dimensions in Nigerian Law* (NIALS Law Series No.3 1989) 108-9

²⁸⁵ Ibid s 4(8); *Chief Arthur Nwankwo v The State* [1985] 6 NCLR 228

²⁸⁶ See B.O. Nwabueze, *Constitutional Law of the Nigerian Republic* (Butterworths 1964) 330-333; Bronwen Manby, *Citizenship Law in Africa: A Comparative Study* (African Minds 2012) 32

legal rights and privileges; enjoy the protection of the State within and outside the territory;²⁸⁷ and owe prescribed constitutional duties to the State.²⁸⁸ The following persons qualify as citizens under the Nigerian constitutional framework:

a. Citizens by Birth

183. Falling under this category are persons who were born in Nigeria before the date of independence on October 1st 1960 and either of whose parents or grandparents belonged to a indigenous Nigerian community.²⁸⁹ A person also qualifies as a citizen by birth if he was born in Nigeria after the date of independence to parents or grandparents who are themselves citizens of Nigeria.²⁹⁰ Furthermore, a person born outside Nigeria may qualify as a citizen provided that either of his parents is a Nigerian citizen.²⁹¹

b. Citizens by Registration

184. The President possesses discretionary powers under the Constitution to grant an application to be registered as a citizen of Nigeria. An application may be made by a woman who is or has been married to a Nigerian citizen, or by a person of full age and capacity who, although born outside Nigeria, is a child or grandchild of a citizen.²⁹²

c. Citizens by Naturalisation

185. The President also has the discretion to grant an application for a certificate of naturalisation to any person who satisfies certain conditions prescribed in the Constitution such as, inter alia, assimilation into the national culture, good character, and long residence in the country.²⁹³ In this regard, successful applicants then become naturalised citizens.

Who is a Non-Citizen?

186. Persons who do not fall under either of the above categories are not recognised as citizens by Nigerian law. Non-citizens generally possess “full contractual, testamentary, and procedural capacity”,²⁹⁴ enjoy the protection of the State within the territory, and may institute suits and be

²⁸⁷ Nwabueze (n 286) 335-336; *Olawoyin v Attorney-General Northern Region* (1961) 1 All NLR 209; *Akaniwon v Nsirim* (1997) 9 NWLR (Pt 520) 255 (CA)

²⁸⁸ 1999 Constitution, s 24

²⁸⁹ *ibid*, s 25(1) (a)

²⁹⁰ *ibid* s 25(1) (b)

²⁹¹ *ibid* s 25 (1) (c)

²⁹² *ibid* s 26

²⁹³ *ibid* s 27 (1) – (2)

²⁹⁴ A V J Nylander, *The Nationality and Citizenship Laws of Nigeria* (University of Lagos/Evans Brothers 1973) 103

sued in local courts.²⁹⁵ Notwithstanding, they are subject to the laws of the land, and cannot exercise the full rights and privileges of citizens. Diplomats, as a special category of aliens, are entitled to special immunities and privileges.

Are Rights Guaranteed To Non-Nationals As Well As Nationals?

187. Nigerian law recognises the human rights of both citizens and non-citizens in the constitutional Bill of Rights and relevant international instruments. Notably, human rights are protected against alteration by constitutional entrenchment.²⁹⁶ For the purposes of this discussion, the most relevant international instrument is the African Charter on Human and Peoples Rights since it has been transformed into Nigerian municipal law by a local enacting statute. In order to enjoy the force of law within Nigeria, the Constitution requires that international instruments be enacted into law by the National Assembly.²⁹⁷ Accordingly, non-citizens can generally invoke the human rights guaranteed under the Constitution and applicable international instruments.

188. The following “fundamental rights” are guaranteed to both citizens and non-citizens in the 1999 Constitution:

- a. The right to life²⁹⁸
- b. The right to human dignity²⁹⁹
- c. The right to personal liberty³⁰⁰
- d. The right to fair hearing and due process³⁰¹
- e. The right to freedom of expression³⁰²
- f. The right to freedom of thought, conscience, and religion.³⁰³
- g. The right to peaceful assembly and association.³⁰⁴

189. However, certain rights are reserved for Nigerian citizens under the constitutional framework. These rights are:

- a. The right to privacy³⁰⁵

²⁹⁵ *ibid*

²⁹⁶ 1999 Constitution, s 9(3)

²⁹⁷ *ibid*, s 12(1)

²⁹⁸ *ibid* s 33

²⁹⁹ *ibid* s 34

³⁰⁰ *ibid* s 35

³⁰¹ *ibid* s 36

³⁰² *ibid* s 39

³⁰³ *ibid* s 38

³⁰⁴ *ibid* s 40

³⁰⁵ *ibid* s 37

- b. The right to freedom of movement and residence³⁰⁶
- c. The right to acquire and own immovable property anywhere in Nigerian territory.³⁰⁷
- d. The right to freedom from discrimination³⁰⁸
- e. Civic rights of political participation

190. The distinction between fundamental rights guaranteed to all persons and those which may only be claimed by citizens is particularly highlighted by the phraseology employed in the applicable constitutional provisions. Thus, certain rights are expressly guaranteed to *'every person'* and *'every individual'* while some provisions expressly recognise *'citizens'* as right-holders. It appears that the importance of the distinction has been affirmed in various judicial decisions.³⁰⁹ The rights guaranteed to both citizens and non-citizens will now be discussed in seriatim.

a) *Right to life*

191. Section 33 of the 1999 Constitution provides, inter alia, as follows:

s 33(1) Every person has the right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria...

192. Thus, the Constitution guarantees to all persons a qualified right to life. This right may lawfully be limited by the use of force as is reasonably necessary in legally permitted circumstances such as in situations of self-defence or defence of property. The right may also be lawfully curtailed by the use of such force as is reasonably necessary to ensure a lawful arrest, prevent the escape of a lawfully detained person, or suppress a riot, insurrection, or mutiny.³¹⁰ It bears mentioning that the same limitations to this right apply to all right-holders - citizens and non-citizens alike - under the constitutional framework

b) *Right to human dignity*

193. Section 34 of the 1999 Constitution provides, inter alia, as follows:

s 34(1) Every individual is entitled to respect for the dignity of his person, and accordingly –

³⁰⁶ *ibid* s 41

³⁰⁷ 1999 Constitution, s 43

³⁰⁸ *Ibid* s 42; D O Aihe, *Cases and Materials on Constitutional Law in Nigeria* (OUP 1979) 141

³⁰⁹ *Director, SSS v Aghakoba* (1999) 3 NWLR (Pt. 595) 314 (SC): recognizing the right of a citizen to freedom of movement; *Uzoukwu v Ezeonu II* (1991) 6 NWLR (Pt. 200) 708 (CA): affirming the right of every person to human dignity.

³¹⁰ 1999 Constitution, s 33(2)(a)-(c); 45(2); see also African Charter, article 4

- (a) No person shall be subjected to torture or to inhuman or degrading treatment;
- (b) No person shall be held in slavery or servitude; and
- (c) No person shall be required to perform forced or compulsory labour.

194. However, this right is qualified in certain respects. Thus, labour required in consequence of a court order or sentence does not amount to forced labour within the meaning of the provision.³¹¹ Furthermore, labour required of citizens and non-citizens alike in the event of an emergency or calamity that threatens the life of the community is excluded from the definition of forced labour. By the same token, persons may be lawfully required to perform labour or service as part of normal civic obligations for the wellbeing of the community.³¹² It is noteworthy that the right to human dignity is not limited by the general restriction and derogation clause that applies to other rights in the Constitution.³¹³

c) Right to personal liberty

195. The applicable constitutional provision is as follows:

s 35 Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law...³¹⁴

196. In the event that he is arrested or detained, a non-citizen is entitled to be informed within twenty-four (24) hours of the facts and grounds on which he is being held.³¹⁵ However, where his arrest or detention is unlawfully, the non-citizen is equally entitled to compensation and public apology from the appropriate authority. The right of pre-trial silence is guaranteed to citizens and non-citizens alike.³¹⁶

197. Clearly, this right is not absolutely guaranteed to either citizens or aliens. Thus, personal liberty may be curtailed by imprisonment consequent upon a criminal conviction, or in order to enforce compliance with a court order or legal obligation.³¹⁷ The right may be lawfully limited in order to ensure the appearance of any person before a court in execution of a court order, or to such extent as is reasonably necessary to prevent the commission of a crime.³¹⁸ Unlike citizens, however, aliens may be lawfully expelled or prevented from entering Nigerian territory.³¹⁹ In order to protect the community, the personal liberty of individuals suffering from contagious ailments may also be

³¹¹ *ibid*, s 34(2)(a)

³¹² *ibid* s 34(2)(d)-(e)

³¹³ *ibid* s 45(1); see also the African Charter, article 4

³¹⁴ 1999 Constitution, s 35; see also Article 6 of the African Charter; *Ubani v Director, SSS* (1999) 11 NWLR (Pt. 625) 129 (CA)

³¹⁵ 1999 Constitution s 35(3)

³¹⁶ *ibid* s 35(2), (4), (5) & (6)

³¹⁷ 1999 Constitution s 35(1)(a)-(b)

³¹⁸ *ibid* s 35(1)(c)

³¹⁹ *ibid* s 35(1)(f)

lawfully restricted; and measures taken to ensure the welfare and education of minors are not unlawful even when they limit the right.³²⁰ Finally, laws may place reasonably justifiable restrictions on the exercise of personal liberty during periods of emergency.³²¹

d) *Right to a fair hearing*

198. Section 36 of the Constitution provides thus:

s 36(1) In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.

199. Several judicial decisions have interpreted this constitutional right as one that incorporates both the principle of fair hearing and the rule against bias.³²² Also, the words ‘civil rights and obligations’ have been judicially construed as referring to the panoply of constitutional and legal rights.³²³ The constitutional presumption of innocence until guilt is proved is extended to all categories of persons,³²⁴ and a non-citizen charged with a criminal offence is entitled to be informed promptly of the nature of the alleged offence in the language that he understands.³²⁵ Also, non-citizens have the right to public trial within a reasonable time,³²⁶ and are entitled to adequate time and facilities to prepare their defence.³²⁷ Furthermore, a non-citizen who cannot understand the language at his trial has the right to the assistance of an interpreter without any cost to himself.³²⁸ Although he is entitled to legal representation by counsel of his choice,³²⁹ a non-citizen has no right to free legal aid.³³⁰ Other rights guaranteed to all persons include the privilege against self-incrimination,³³¹ protection against double jeopardy³³² and retrospective criminal laws³³³ and the right of an accused person to the record of proceedings at his criminal trial.³³⁴

³²⁰ *ibid* s 35(1)(e); s 35(1)(d)

³²¹ *ibid* s 45(2)

³²² *Donatus Ndu v The State* (1990) 7 NWLR (Pt. 164) 550 at 578 (SC); *Kotoye v Central Bank of Nigeria* (2000) 16 WRN 71 at 103-104; *Legal Practitioners' Disciplinary Committee v Fawehinmi* (1985) 7 SC 178 (SC)

³²³ *Ransome Kuti v Attorney-General of the Federation* (1985) 2 NWLR 211 (SC)

³²⁴ 1999 Constitution, s 36 (5); see also African Charter, article 7

³²⁵ *Ibid* s 36(6)(a)

³²⁶ *Ibid* s 36(4)

³²⁷ *Ibid* s 36(6)(b)

³²⁸ *Ibid* s 36 (6)(e)

³²⁹ *Ibid* s 36(6)(c)

³³⁰ *Ibid* s 46(4)(b)

³³¹ *Ibid* s 36(11)

³³² *Ibid* s 36(9)

³³³ *Ibid* s 36(8); see also s 36(10)

³³⁴ *Ibid* s 36(7); see also the African Charter, article 7: guaranteeing fair hearing and procedural rights.

e) *Right to freedom of conscience, thought and religion*

200. This right is enshrined in section 38 of the Constitution.³³⁵

s 38(1) Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or private) to manifest and propagate his religion or belief in worship, teaching, practice, and observance.

201. Thus, non-citizens enjoy the right to freedom of religion under the Nigerian Constitution. This right encompasses freedom of thought, conscience and religion, and freedom to change one's religion and belief. Non-citizens also have the right to manifest and propagate their religion or belief through acts of worship, teaching, practice, and observance. The freedom to manifest and propagate one's religion or belief may be exercised publicly or privately, alone, or in community with other people.³³⁶ Presumably, atheistic beliefs are also protected under the constitutional guarantee. Non-citizens who are parents or guardians have the right to approve the religious instruction given to their children or wards in an educational institution. In addition, every person has the right not to be compelled to receive religious instruction or to participate in religious ceremonies or practices that are different from his own.³³⁷

202. Notably, non-citizens who are members of a religious denomination or community, have the freedom to provide religious instructions for pupils of their community or denomination in educational institutions wholly maintained by them.³³⁸

203. Without prejudice to the foregoing, the right to freedom of religion under the Constitution is not absolutely guaranteed. The right may be limited on such grounds as are "reasonably justifiable in a democratic society" e.g. public order or safety. More so, the right does not include the freedom to form, participate, or acquire membership of a secret society. A secret society is defined as, *inter alia*, an association that uses secret signs, oaths, or symbols, and which is formed to promote a cause that aids, or fosters the interests of its members without due regard to merit, fair play or justice to the detriment of the legitimate interest of non-members.³³⁹

f) *Right to freedom of expression*

204. Section 39(1) of the Constitution provides thus:

³³⁵ See also the African Charter, article 8

³³⁶ 1999 Constitution, s 38 (1)

³³⁷ *ibid* s. 38(2)

³³⁸ *ibid* s. 38(3)

³³⁹ *ibid* ss. 45 & 318(1)

s 39(1) Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.

Freedom of expression includes the right of every person to establish and operate any medium in order to disseminate information, ideas, and opinions.³⁴⁰ However, the Constitution does not vest the right in any person (other than federal and state governments or duly authorised persons) to own, operate, or establish a television or wireless broadcasting station as the qualification for any of the aforementioned activities is regulated by law.³⁴¹ .

205. This right may be limited by laws that are “reasonably justifiable in a democratic society” in order, inter alia, to protect privileged information and maintain the authority and independence of judicial institutions.³⁴²

g) Right to assembly and association

206. This right is enshrined in section 40 of the Constitution:

s 40(1) Every person shall be entitled to assemble freely and associate with other persons, and in particular he may form or belong to any political party, trade union or any other association for the protection of his interests...

207. Citizens and aliens alike may claim this right.³⁴³ Thus, the freedom of non-citizens to assemble and associate peacefully with others is constitutionally guaranteed as are their rights to establish or join trade unions, professional organisations, and other bodies for the protection of their legitimate interests.

208. It does not appear, however, that aliens can independently establish and operate political parties since they lack voting franchise and are constitutionally excluded from running for certain public offices. More so, the Constitution confers no absolute right on an association to be recognised as a political party.³⁴⁴ Presumably, non-citizens in political parties may still exercise limited rights (e.g. membership and lobbying) that fall short of voting in general elections and running for public office.

³⁴⁰ Ibid s 39(2); see also the African Charter, article 19

³⁴¹ *ibid*

³⁴² Ibid s 39(3)(a)

³⁴³ See also the African Charter, articles 10 & 11

³⁴⁴ 1999 Constitution, s 40

Rights which are limited to nationals

209. As noted earlier, the 1999 Constitution reserves some specific rights for Nigerian citizens. These include: the rights to privacy, equality, freedom of movement, and acquisition and ownership of immovable property anywhere in Nigeria.³⁴⁵

a) *Right to privacy*

210. The applicable constitutional provision is as follows:

s 37 The privacy of citizens, their homes, correspondence, telephone conversations, and telegraphic communications is hereby guaranteed and protected.³⁴⁶

211. Remarkably, this is one of the few fundamental rights specifically reserved for Nigerian citizens. While this was not always the case in Nigeria's constitutional history,³⁴⁷ subsequent Bills of Rights since 1979 employed a phraseology that expressly recognised citizens as holders of this right. Like some other rights in the constitutional framework, the right to privacy may be restricted by laws that are reasonably justifiable in a democratic society.³⁴⁸

212. While there appears to be a dearth of judicial decisions on the extension of this right to non-citizens, some commentators suggest that aliens who are lawfully within Nigerian territory enjoy legal protection of their privacy under relevant international instruments.³⁴⁹ In order to successfully claim this right, however, non-citizens may only invoke such human rights treaties that have been transformed into Nigerian law by an Act of the National Assembly.³⁵⁰ It is noteworthy that, by virtue of the 1999 Constitution, treaties enjoy the force of law within Nigeria only to the extent to which they are enacted into law by the National Assembly.³⁵¹ Furthermore, treaties do not override the provisions of the 1999 Constitution even when transformed into municipal law.³⁵² Significantly, the African Charter, which enjoys legal force in the Nigerian municipal sphere, offers no direct guarantee of a privacy right.

213. In this regard, it appears safe to conclude that the legal protection of privacy rights of non-citizens is relatively weak. This does not mean, however, that non-citizens are precluded from

³⁴⁵ O. Oyewo (n 281) 119

³⁴⁶ 1999 Constitution, s 37

³⁴⁷ See the 1963 Republican Constitution, s. 23(1): "Every *person* shall be entitled to respect for his private and family life, his home and his correspondence." (Emphasis added). Cf. ss. 34 and 37 of the 1979 and 1999 Constitutions respectively.

³⁴⁸ 1999 Constitution, s 45(1)

³⁴⁹ See K.M Mowoe, *Constitutional Law in Nigeria* (Malthouse, 2008) 407

³⁵⁰ 1999 Constitution, s 12(1)

³⁵¹ *ibid*

³⁵² *Abacha v Favehinmi* (2001) 51 WRN 1 (SC)

claiming alternative legal safeguards under various statutory frameworks. For instance, aspects of the right to privacy are protected by laws which prohibit arbitrary searches conducted on the physical person of a non-citizen, or entry and search of his home in the absence of reasonable suspicion of the commission of a crime.³⁵³ Aliens may also rely on protection of the rights to integrity, and family life under the African Charter.³⁵⁴ Furthermore, communications between a non-citizen and his attorney in the context of a lawyer-client relationship are privileged, as are communication between spouses.³⁵⁵

b) Right to freedom of movement

214. Subject to limitations that are “reasonably justifiable in a democratic society”, the 1999 Constitution protects the right of Nigerian citizens to freedom of movement. This right encompasses the following component liberties:

- a. Right of free movement throughout Nigerian territory
- b. Right of residence in any part of the territory
- c. Freedom from expulsion from Nigeria
- d. Right of entrance
- e. Right not to be refused exit

215. The relevant constitutional provision is as follows:

s 41(1) Every citizen of Nigeria is entitled to move freely throughout Nigeria and to reside in any part thereof, and no citizen of Nigeria shall be expelled from Nigeria or refused entry thereto or exit there from...³⁵⁶

216. In practice, however, aliens who are lawfully within Nigerian territory generally exercise the right of free movement.³⁵⁷ Notably, under regional international law, “community citizens” from countries that constitute the Economic Community of West African States (ECOWAS) are generally entitled to move freely, reside, and establish economic activities in Nigeria.³⁵⁸ Furthermore, aliens facing persecution in their countries possess the rights to seek and obtain asylum in Nigeria under regional international law.³⁵⁹

217. The scope of the freedom of movement of non-citizens is limited by statutory provisions that

³⁵³ Ibid s 35; Police Act CAP 359 LFN 1990 s 26(1); Criminal Procedure Act CAP C41 LFN 2004, ss. 6(6) & 107

³⁵⁴ African Charter, articles 4 & 18

³⁵⁵ Evidence Act No. 18 2011, ss. 192 & 182

³⁵⁶ 1999 Constitution, s 41(1); see also African Charter, article 12

³⁵⁷ Mowoe (n 349) 493

³⁵⁸ See The Treaty of the Economic Community of West African States 1975, article 27; see also the Protocol to the ECOWAS Treaty Relating to Free Movement of Persons, Residence, and Establishment 1979, article 2(1)

³⁵⁹ African Charter, article 12

permit the extradition of aliens, deportation of prohibited immigrants, and refusal of entrance to same.³⁶⁰ Other lawful grounds on which this right may be limited include defence, public safety, public order, public morality, public health, and the protection of the rights and freedoms of others.³⁶¹

c) *Right to acquire and own immovable property*

218. While non-citizens have the same rights concerning moveable property as citizens,³⁶² only the latter category of persons can acquire and own immovable property anywhere in Nigeria as of right.³⁶³ Notwithstanding, every person who owns or holds an interest in moveable or immovable property is entitled to constitutional protection from compulsory acquisition and expropriation. Along with citizens, an alien may also invoke the right to prompt payment of compensation in case of a compulsory acquisition or expropriation of his property. Without prejudice to the foregoing, enemy property, inter alia, is excluded from the protection of this right.³⁶⁴ The relevant constitutional provisions are as follows:

s 43 Subject to the provisions of this Constitution, every citizen of Nigeria shall have the right to acquire and own immovable property anywhere in Nigeria.³⁶⁵

s 44(1) No moveable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law that, among other things –

- (a) requires the prompt payment of compensation there for; and
- (b) gives to any person claiming such compensation a right of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria.³⁶⁶ ...

d) *Equality rights - Freedom from discrimination*

219. Under the constitutional framework, the right to freedom from discrimination is guaranteed to Nigerian citizens alone. The relevant constitutional provision is as follows:

s 42(1) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion, or political opinion, shall not, by reason only that he is such a person –

(a) be subjected either expressly by, or in the practical application of any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of

³⁶⁰ Immigration Act CAP 11 LFN 2004, s 7, 18

³⁶¹ 1999 Constitution, s 45

³⁶² A J V Nylander (n 294) 105

³⁶³ 1999 Constitution, s 43

³⁶⁴ *ibid* s 44(g)

³⁶⁵ *ibid* s 43

³⁶⁶ *ibid*, s 44(1)(a) & (b)

Nigeria of other communities, ethnic groups, places of origin, sex, religions, or political opinions are not made subject; or

(b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions, or political opinions.³⁶⁷

(2) No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.³⁶⁸ ...

220. The foregoing provisions seek to protect Nigerian citizens from discrimination on any of the prescribed grounds through legislative, executive, or administrative action. Although non-citizens are not the intended beneficiaries of this constitutional protection, it does not follow that they are altogether without legal protection. Thus aliens may invoke legal guarantees against discrimination under applicable international instruments. In this regard, the African Charter, which is part of Nigerian law, offers a more elaborate protection to 'every individual' by prohibiting discrimination on grounds of 'race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth, or other status.'³⁶⁹

e) Rights of political participation

221. As a constitutional matter, distinctions are drawn between citizens and aliens in the enjoyment of certain civic rights. Thus, non-citizens are ineligible for the office of President and Vice-President.³⁷⁰ By the same token, only Nigerian citizens are eligible for election to the National Assembly³⁷¹ and an alien may not be appointed as a Minister of the Federation.³⁷² Non-citizens are also subject to the same legal disabilities at the state level as only Nigerian citizens are qualified to be elected as state legislators³⁷³ or Governors and Deputy Governors respectively.³⁷⁴ Furthermore, non-citizens do not enjoy the franchise as they are not eligible to be registered as voters.³⁷⁵

Conclusion

222. This paper has provided an outline of the legal position in Nigeria concerning the rights of non-nationals. It has been demonstrated that while most human rights are guaranteed to both categories of persons, certain constitutional rights are specifically reserved for citizens. In such cases,

³⁶⁷ Ibid, s 42(1)

³⁶⁸ Ibid, s 42(2)

³⁶⁹ African Charter, article 2

³⁷⁰ Ibid, s 137 (1) (a)

³⁷¹ Ibid s 65(1)(a)-(b)

³⁷² Ibid s 147(5)

³⁷³ Ibid s 106;

³⁷⁴ Ibid 182(1); 182(7)

³⁷⁵ Electoral Act No. 64 2010 (as amended), s 12; B O Nwabueze (n 286) 336

however, non-nationals are still entitled to claim protection under international instruments and other statutory frameworks. Aliens do not enjoy substantial civic rights of political participation.

11. BRAZIL

223. The legislation mentioned in this report comprises the Constitution of the Federative Republic of Brazil of 1988,³⁷⁶ and the Foreigner Law,³⁷⁷ although other relevant statutes are referred as well. The report also addresses the case law of the Supreme Federal Court (*Supremo Tribunal Federal* – *STF*, which is the Brazilian Constitutional Court).

224. The Foreigner Law defines the legal situation of non-Brazilians in the country. Its provisions deal with several aspects related to immigration procedures, including visas, asylum status, rights and duties of immigrants, and naturalization, as well as extradition, deportation and expulsion regulations. This law was enacted during the military dictatorship regime and its main purpose is to protect national security. However, there is a bill pending in Congress aiming to expand the protections granted to non-nationals in the country.

A. Considering both the text of the instrument(s) and relevant case law, are rights guaranteed to non-nationals as well as nationals?

225. According to the Constitution, one of the fundamental principles of the Federative Republic of Brazil is human dignity,³⁷⁸ and its international relations are governed by the principles of prevalence of human rights,³⁷⁹ repudiation of terrorism and racism,³⁸⁰ and the granting of political asylum.³⁸¹

226. The bill of rights of the Brazilian Constitution comprises four categories of fundamental rights: fundamental freedoms; social, economic and cultural rights; nationality rights; and political rights. Brazilians are entitled to these rights, in full (except for political rights, since suffrage is only granted to Brazilians once they have reached the voting age and the right to run for office is dependent on Brazilian nationality and certain additional requirements).

³⁷⁶ Constitution of the Federative Republic of Brazil 1988.

³⁷⁷ Law 6815 (Foreigner Law) 1980.

³⁷⁸ Constitution of the Federative Republic of Brazil, Art. 1(III).

³⁷⁹ *Ibid*, Art 4 (II).

³⁸⁰ *Ibid*, Art 4 (VIII).

³⁸¹ *Ibid*, Art 4 (X).

Fundamental Freedoms

227. Brazilians and foreigners residing in the Country are entitled to the rights to life, liberty, equality, security and property (which are called ‘Individual and Collective Rights and Duties’).³⁸² There is a detailed list of freedoms aimed to ensure the protection of these fundamental rights, which includes, *inter alia*, protection against torture and degrading treatment, freedom of expression, freedom of conscience and belief, freedom of religious manifestation, protection of conscientious objection, freedom of association, right to inheritance, consumer protection, personal privacy, honor and reputation, secrecy of correspondence, due process and, prisoner’s rights.³⁸³ This bill of rights also includes some remedies, such as *habeas corpus* and *habeas data*.³⁸⁴

228. The Constitution does not expressly accord these fundamental freedoms to foreign visitors (those holding temporary visas, for example as tourists or for business or academic purposes). However, in accordance with the case law of the Supreme Federal Court, visiting foreigners are entitled to the fundamental freedoms that are necessary for the protection of their dignity.³⁸⁵ Brazil is also a party to international treaties that protect the human rights of all, including non-residing foreigners.³⁸⁶ In addition, non-residents are protected against discrimination, since the Anti-Discrimination Law provides that discrimination due to national origin is a crime and shall be punished by penalties including imprisonment and fines.³⁸⁷

Social, Economic and Cultural Rights

229. In the Brazilian Constitution, education, health, nutrition, labor, housing, leisure, security, social security, protection of motherhood and childhood and assistance to the destitute, are fundamental rights.³⁸⁸ Nonetheless, in its bill of rights (Title II), the Constitution does not expressly provide that non-nationals are entitled social, economic and cultural rights.

230. In its provisions on the social order (Title VIII), the Constitution provides that health is the right of all and the duty of the National Government and shall be guaranteed by social and economic policies,³⁸⁹ therefore, non-nationals seems to be entitled to public health services. It also provides

³⁸² Ibid, Art 5 (heading).

³⁸³ Cf. Ibid, Art 5 (I to LXXVIII). See also *HC 74051 - STF*.

³⁸⁴ According to Art 5(LXXII), *habeas data* aims “to assure knowledge of personal information about the petitioner contained in records or data banks of government agencies or entities of a public character” and, “to correct data whenever the petitioner prefers not to do so through confidential judicial or administrative proceedings”.

³⁸⁵ See *HC 97147 - STF*; *HC 94016 - STF*; *RE 215267 - STF*; *HC 72391 QO - STF*; *HC 102041 - STF*; *RE 346180 AgR - STF*.

³⁸⁶ For example, Brazil is a State Party of the International Covenant on Civil and Political Rights and has fully incorporated this treaty in the domestic legal system by the Decree n 592, 1992.

³⁸⁷ Law 7716 (Anti-Discrimination Law) 1989, Art 1.

³⁸⁸ *Constitution of the Federative Republic of Brazil*, Art 6.

³⁸⁹ Ibid, Art 196.

that social security depends on contribution, and for this reason, if a foreigner works legally in Brazil and contributes to the social security system, he or she is entitled to social security benefits, which include coverage in the event of illness, disability, death and advanced age; maternity benefits; protection for the involuntarily unemployed; family allowance for dependents of insured persons with low incomes; and pensions for spouses and dependents on the death of an insured man or woman.³⁹⁰ In addition, the Federative Republic of Brazil has ratified the International Covenant on Economic, Social and Cultural Rights.³⁹¹

231. In the case law of the Supreme Federal Court, discrimination because of nationality is forbidden in labor and employment relations, especially in terms of salary.³⁹²

Nationality Rights

232. The Constitution provides that Brazilian Nationality is acquired by birth or naturalization. Native Brazilians are those born in the Federative Republic of Brazil, even though of foreign parents, provided that they are not in the service of their country; those born abroad of a Brazilian father or mother, so long as either is in the service of Brazil; and, those born abroad of a Brazilian father or mother, so long as they are registered at a proper Brazilian governmental office, or come to reside in Brazil and opt for Brazilian nationality at any time after reaching the age of majority.³⁹³ Naturalized Brazilians are those who, as set forth by law, acquire Brazilian nationality. When foreigners reside permanently for more than fifteen years in Brazil without any criminal conviction, they have a definite right to naturalization, should they wish to apply for it.³⁹⁴

233. Rights inherent to Brazilians shall be attributed to Portuguese permanently resident in the country if Brazilians are afforded reciprocal treatment, except in cases provided for in the Constitution.³⁹⁵ This special condition is called *quasi-nationality*.³⁹⁶ Finally, the law may not establish any distinction between native-born and naturalized Brazilians, except in cases provided for in the Constitution.³⁹⁷

³⁹⁰ Ibid, Art 201.

³⁹¹ The treaty has been fully incorporated in the domestic legal order by the Decree n. 591, 1992.

³⁹² See Ibid Art. 37 (XXX); RE 161243 - STF.

³⁹³ Constitution of the Federative Republic of Brazil, Art 12 (I).

³⁹⁴ According to the Supreme Federal Court case law (RE 264848 - STF), the recognition by the State authorities of the naturalization has only a declaratory nature. The date of naturalization is retroactive to the date of the requirement.

³⁹⁵ Constitution of the Federative Republic of Brazil, Art. 12 Para 1.

³⁹⁶ Cf. Ext 890 - STF.

³⁹⁷ Constitution of the Federative Republic of Brazil, Art. 12 Para 2.

B. Is there a difference between the human rights afforded to non-nationals and those of nationals? In relation to which rights do limitations regarding non-nationals apply? What is the scope of the limitations?

Exclusive rights

234. Currently, foreigners are not entitled to political rights. They are not eligible to for election to public office³⁹⁸ and may not register to vote.³⁹⁹ However, there is a proposed constitutional amendment to extend the political rights to foreigners residing permanently in the country in order to allow them to vote and to be eligible in municipal elections (*Proposta de Emenda Constitucional - PEC n. 25, 2012*).
235. The following public offices are restricted to native-born Brazilians: President and Vice-President of the Republic, President of the Chamber of Deputies, President of the Federal Senate, Minister of the Supreme Federal Tribunal, the diplomatic career, officers of the Armed Forces and, the Minister of Defense.⁴⁰⁰
236. Ownership of companies of journalism and broadcasting of sounds and images with sounds (for example, TV and radio networks and stations, newspapers and news magazines) is restricted to native-born Brazilians or those naturalized for more than ten years, or to legal entities organized under Brazilian law and having their headquarters in the Country. In addition, editorial responsibility and the activities of selecting and directing programming are restricted to native-born Brazilians or those naturalized for more than ten years.⁴⁰¹
237. The Constitution provides that public offices, jobs and positions are accessible to ‘all Brazilians...as well as to foreigners, under the terms of the law.’⁴⁰² However, as a general law regulating foreigners’ entitlement to public employment has not yet been enacted, and thus non-nationals are not allowed to occupy a public office, job or position,⁴⁰³ except for visiting professors, who are allowed to work in public educational and research institutions.⁴⁰⁴

³⁹⁸ Ibid, Art 14 Para. 3.

³⁹⁹ Ibid, Art 14 Para. 2.

⁴⁰⁰ Ibid, Art 12 Para 3.

⁴⁰¹ Ibid, Art 222.

⁴⁰² Ibid, Art 37 (I).

⁴⁰³ See RE 346180 AgR - STF; AI 590663 AgR - STF; RE 544655 AgR - STF.

⁴⁰⁴ *Constitution of the Federative Republic of Brazil*, Art 207 Para 1 and 2.

Inheriting foreigners' properties

238. The Constitution provides that inheritance of foreigners' assets located in Brazil shall be governed by domestic law, for the benefit of the national spouse or children, whenever the personal law of the deceased is not more favorable to them.⁴⁰⁵

Social, Economic and Cultural Rights

239. The Federative Republic of Brazil has ratified the International Covenant on Economic, Social and Cultural Rights,⁴⁰⁶ which states that 'Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals'.⁴⁰⁷ Brazil has also ratified the International Labor Organization Convention on Social Security,⁴⁰⁸ which states that

Article 68. 1. Non-national residents shall have the same rights as national residents: Provided that special rules concerning non-nationals and nationals born outside the territory of the Member may be prescribed in respect of benefits or portions of benefits which are payable wholly or mainly out of public funds and in respect of transitional schemes. 2. Under contributory social security schemes which protect employees, the persons protected who are nationals of another Member which has accepted the obligations of the relevant Part of the Convention shall have, under that Part, the same rights as nationals of the Member concerned: Provided that the application of this paragraph may be made subject to the existence of a bilateral or multilateral agreement providing for reciprocity.⁴⁰⁹

240. Concerning social assistance, according to the social assistance legislation, only Brazilians residents in the Country are entitled to old age and invalidity assistance benefits.⁴¹⁰ However, there is a case pending in the Supreme Federal Court that challenges the constitutionality of this legal rule,⁴¹¹ aiming to expand these benefits to non-nationals.

Adoption rights

241. Although the Constitution allows non-nationals to adopt children in Brazil,⁴¹² Brazilians have priority in the adoption process.⁴¹³

⁴⁰⁵ Ibid, Art. 5 (XXXI).

⁴⁰⁶ The treaty has been fully incorporated in the domestic legal order by the Decree n 591, 1992.

⁴⁰⁷ Resolution 2200A (XXI) of the UN General Assembly - International Covenant on Economic, Social and Cultural Rights 1966.

⁴⁰⁸ See Legislative Decree 269 2008.

⁴⁰⁹ ILO Social Security (Minimum Standards) Convention - n 102 1955, Art 68.

⁴¹⁰ Law 8742 1993; Decree 6214 2007, Art 7.

⁴¹¹ Cf. RE 587970 - STF.

⁴¹² *Constitution of the Federative Republic of Brazil*, Art 227 Para 5.

⁴¹³ Law 8069 (Children and Adolescent Statute) 1990.

Loss of nationality

242. Brazilians may lost their nationality and, therefore, becoming foreigners, in the following cases: those whose naturalization has been cancelled by judicial decision because of activity harmful to the national interest; and acquires another nationality, except in the cases of recognition of original nationality by foreign law and of a foreign law imposing naturalization upon a Brazilian residing in a foreign country as a condition for remaining in its territory or for exercise of civil rights.⁴¹⁴

Restrictions on Freedom of Movement

243. *Entrance in the Country*: Brazilians are allowed to enter and leave the country at any time and without having to ask permission, in times of peace and if they are not being criminally prosecuted.⁴¹⁵ Non-nationals are not entitled to the right to enter in the Country; they are subject to visa regulations.

244. *Extradition*: Native Brazilians may not be extradited. Naturalized Brazilians may be extradited for a crime committed prior to naturalization, or for their proven involvement in unlawful traffic in narcotics and similar drugs.⁴¹⁶ Non-nationals may be extradited, but not for a political or ideological offense.⁴¹⁷ The Supreme Court has ruled that extradition is not barred by the constitutional principle of equality between nationals and non-nationals,⁴¹⁸ nor the fact that the non-national to be extradited is married to a Brazilian spouse or has a family in Brazil.⁴¹⁹

245. *Expulsion*: Brazilians may not be expelled or banished from the national territory. Non-nationals may be expelled from the country if they act against national security, political or social order, tranquility or public morality, or the welfare of the population, or if their presence is harmful to national interests.⁴²⁰

246. *Deportation*: Brazilians may not be deported from Brazil. Non-nationals may be deported in cases of illegal entry or overstay.⁴²¹

⁴¹⁴ *Constitution of the Federative Republic of Brazil*, Art 12 Para 4.

⁴¹⁵ *Ibid*, Art 5 (XV).

⁴¹⁶ *Ibid*, Art 5 (LI). See also *Law 6815 (Foreigner Law)*, Art. 76-94.

⁴¹⁷ *Constitution of the Federative Republic of Brazil*, Art 5 (LII).

⁴¹⁸ See *Ext 1028 - STF*.

⁴¹⁹ See *Súmula 421 - STF*; *Ext 1223 - STF*.

⁴²⁰ *Law 6815 (Foreigner Law)*, Art 65-75.

⁴²¹ *Ibid*, Art 57-64.

Other restrictions on the rights of non-nationals in the Foreigner Law

247. The Foreigner Law provides that non-nationals are not allowed to⁴²²: be the owner, operator or captain of a national ship, including in the river and lake navigation services (except for fishing boats);

- be the owner of journalistic and broadcasting companies, or be partner or shareholder of a company that owns these companies;
- be intellectual or administrative supervisor of the companies mentioned in the previous item;
- obtain a license or authorization for research, prospecting, exploration and exploitation of mineral deposits, mines and other mineral resources and hydroelectric power;
- be the owner or operator of Brazilian aircraft, except as provided in the specific legislation;
- be shipbroker or broker of public funds, auctioneer and customs broker;
- participate in the management or be representative of unions or professional associations, as well as verifying agency of the exercise of regulated professions;
- be a harbour pilot;
- own, operate, or maintain, even as an amateur, radio or telegraphy devices, and similar, unless reciprocal treatment;
- provide religious assistance to the armed forces and its auxiliaries, or to establishments for collective confinement.

248. Concerning political activities, non-nationals (except for Portuguese under the Statute of Equality) are not allowed to: organize, create or maintain any political society or entity; make political propaganda; and, organize parades, marches, rallies and meetings with political purposes.⁴²³

C. Are the terms ‘civic rights’ and/or ‘civil rights’ used in the instrument(s), and if so, how are they defined, or how have they been construed? Are there any indications that ‘civic rights’ and/or ‘civil rights’ are guaranteed only to nationals?

249. No. There are no references to ‘civil’ or ‘civic rights’ in the Constitution. ‘Civil rights’ and ‘fundamental liberties’ (expressions used in international human rights documents) are called ‘individual and collective rights’ in the Constitution and they are granted to nationals and non-nationals, as indicated in the answer to research question A provided above. However, political rights are granted only to Brazilians. In the Constitution, a citizen is a Brazilian who can exercise the right to vote.

⁴²² Ibid, Art 106.

⁴²³ Ibid, Art 107.