

**A COMPARATIVE ANALYSIS ON THE TREATMENT OF ALIENS
UNDER INTERNATIONAL LAW AND NATIONAL LAW**

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SCHEDULE A

I the undersigned, hereby declare that the work contained in this dissertation for the purpose of obtaining my degree of LLB is my own original work and that I have not used any other sources than those listed in the bibliography and quoted in the references.

Signature:

Date.....

Supervisor's certificate

I, AL Zender hereby certify that the research and writing of this dissertation was carried out under my supervision.

Supervisor's signature.....

Date.....

DEDICATION

To Aune T. Hamunyela.

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First and foremost I would like to thank God for the protection and guidance he afforded me throughout the year. I would like to thank my parents for being supportive during the period of writing this paper. I love u mum and dad.

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ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
AU	African Union
CERD Discrimination	International Convention on the Elimination of all Forms of Racial
DHRINCL	Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they Live
HC	High Court of Namibia
ECHR	European Convention on Human Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ILC	International Law Commission
NLJ	Namibian Law Journal
PCIJ	Permanent Court of International Justice
SA	South Africa
SAYIL	South African Yearbook of International Law
SC	Supreme Court of Namibia
UN	United Nations
UDHR	Universal Declaration of Human Rights

ABSTRACT

By customary international law no state can claim the right for its nationals to enter into, and reside on, the territory of a foreign state. It is noted that the reception of aliens is a matter of discretion, and every state is, by reason of its territorial supremacy, competent to exclude aliens from the whole, or any part, of its territory. While the state in which an alien is present may to a considerable degree treat aliens as it chooses, it must nevertheless not treat them in such a way as to involve the state in breach of international obligations to the state of which the alien is a national. Since an alien is subject to the territorial supremacy of the local state, it may apply its laws to aliens in its territory, and they must comply with and respect those laws. The local state has a broad measure of discretion in its treatment of aliens subject to its treaty obligations, which are now extensive.

Namibia has a supreme Constitution with a justiciable bill of rights. Although some of the rights are reserved for Namibian citizens, in terms our Constitution majority of the rights protect all individuals in Namibia, whether citizens or not. The question to be answered is whether the fundamental rights of this group (aliens) or that individual are in danger of violation. As far as the treatment of aliens in Namibia is concern, it is noted that the aliens present in Namibia are often victims of arbitrary and intolerant treatment from the state authorities, such as immigration officials and other executive authority. It is also worth to note that aliens may be prohibited from entering certain professions or from owning certain types of property. Namibia is a state party to major international human rights instruments, in this sense, Namibia has legal obligations to protect the aliens present in its territory, this legal obligation arises as being a state party to international human rights instruments, more specifically to ICCPR, CERD, and ACHPR. These instruments oblige Namibia to ensure the safety of everyone in its territory. In addition, Namibia has also legal obligation to protect aliens as provided under its Constitution which includes aliens in the enjoyment of the rights enshrined therewith by referring to terms "all persons". Namibian Constitution grants every person the right to have justiciable disputes settled by a court of law or another independent and impartial forum. This paper will discuss the protection of the rights of aliens in Namibian law and international law. In conclusion, it can be said that the rules defined by the Namibian Constitution and other relevant law relating to the treatment of aliens are in line with international law. Therefore it is up to the government to abide by the rules and to treat aliens in accordance with national law and contemporary international law.

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CHAPTER ONE INTRODUCTION

1.1. Background

The influx of foreign nationals and undocumented aliens into Namibia in recent years has focused renewed public attention on the existing laws relating to the admission, expulsion, and rights of aliens and refugees in general.¹ At the same time, attention has to be paid to the rights accorded to these persons under international law and Namibian municipal laws considering the fact that the worldwide refugees crisis and undocumented aliens are among the most serious human rights problems facing the international community today. The fundamental rights of aliens are particularly threatened in most countries because they are automatically considered to be suspects in foreign states.²

There is no state in practice want to exclude itself from intercourse with rest of the international community. Foreigners such as tourists are readily admitted in foreign territories because they bring in foreign exchange.³ Foreigners or aliens always fear of being prosecuted for reasons of race, religion, nationality, membership of a particular group or political opinion, as result of being outside the country of his nationality.⁴ The question is whether fundamental rights of these people are well protected under international law and Namibian law. It is worth noting that mistreatment of aliens in a foreign state implicate state responsibility for injury to aliens under international law. In a field of international law, an injury to a foreigner can give rise to the duty of states to make reparation to the injured individual. In *Phosphates in Morocco*,⁵ the Permanent Court of International Justice (PCJI) affirmed that when a state commits an internationally wrongful act against another state international responsibility is established immediately as between the two states. The PCJI also referred to the principle of reparation for injuries suffered by aliens in a foreign state. In *Rainbow Warrior* case,⁶ the Arbitral Tribunal stressed that any violation by a state of any obligation, of whatever origin, gives rise to state responsibility. Where an alien is injured in a

¹The Immigration Control Act 7 of 1993 and the Refugees (Recognition and Control) Act 2 of 1999 regulate the entry of foreigners into Namibia and refugees respectively.

² Prevost, M.D.1996.'Protecting the rights of aliens in South Africa: International and constitutional issues'. *South African Yearbook of International Law*, Volume 21:131.

³ Umozurike, U. O.1999.*Introduction to International Law*. 2nd edition. Lagos: Spectrum Law Publishing, p.132.

⁴ Prevost (1996:130).

⁵ *Phosphates in Morocco, Preliminary Objections* 1938, P.C.I.J., Series A/B, No.74.at 10

⁶ *Rainbow Warrior (New Zealand/France)* 1990, R.I.A.A., vol.XX, at 217

foreign state, he or she may require protection from the state of nationality which can be exercised by means of diplomatic protection.

The question whether a person is to be classified as an alien or not is one that is determined by state's municipal law. It is also worth to note that such determination must be consistent with public international law and it must be recognised by the legal order of other states.⁷ In order to define the term "alien", internal legal orders must comply with the restrictive directives of international law.⁸ In terms of these rules stateless persons are also to be considered as aliens. However, their status is not governed by the main body of rules relating to persons who possess a foreign state's nationality except when these rules are extended to them by convention.⁹ In the Namibian context, the term alien is defined in terms of section 1 of the Namibian Citizenship Act 14 of 1990, which stipulates that an alien means a person who is not a Namibian citizen.

Prior to the emergence of human rights law, limited protection existed for aliens under international law, reflecting their generally low status in society. However, it has long been recognised that the state of nationality is entitled to demand that the host country treat its nationals in a manner compatible with the minimum standard set down in customary international law.¹⁰ This right of the country of origin stems from its retention of personal supremacy over expatriate nationals, even though the host state possesses territorial supremacy.¹¹

The emergence of human rights law over the last fifty years has had a remarkable impact on the position of aliens, including refugees, in international law. In general, human rights law does not distinguish between aliens and citizens. This means aliens and citizens must be accorded equal treatment by the host state.

In ancient times, aliens were not only commonly denied legal capacity and rights, they were even considered outcasts and enemies, aliens could have no membership in communities

⁷Arnold, R.1992. "Aliens".In Bernhardt, R (Ed) *Encyclopedia of Public International Law*. Volume 1(A-D), Amsterdam: Elsevier Science publishers,p. 102.

⁸Marindze, A.C. 2010.LLM dissertation. *Diplomatic Protection and Xenophobic Violence in South Africa: The case for reparation to Mozambican victims*.Makerere University.An Alien is an individual who, according to the laws of a given state, is not considered its national. This paper makes no distinction between an alien and a foreigner. To this point, it refers to a foreigner as an alien or a natural person who is not a national of a certain State.

⁹Arnold (1992:103).

¹⁰Wallace, R. M.,M.2005.*International law*.5th ed.London: Sweet & Maxwell, p.193.

¹¹Mandal, R.2003.*Legal and Protection Policy Research Series: Political Rights of Refugees*. Available at <<http://www.unhcr.org/refworld/pdfid/3ef820794.pdf>>; last accessed on 20 July 2011.

other than their own.¹² As a guest the alien, by his host's authority, could nevertheless be granted legal capacity, a number of special rights, far-reaching protection, and judicial assistance.¹³ Infringement of an obligation imposed on states under international law gives rise to their responsibility, particularly due to the injury of foreigners are linked to so-called modern international human rights violations.¹⁴ Under international law state and a foreigner create correlative duties and rights since it is expected that the state protects the rights of the foreigner under treaties or conventions and the latter respects *inter alia*, the laws and policies of the former.

The principle of state responsibility for injury to aliens has been developing on the basis of cases concerning the unlawful treatment of aliens and the modern law of state responsibility revolves around these aspects. Early commentators had practical reasons to focus on this category of state responsibility.¹⁵ Many nationals of one state who have travelled, or worked in another state have endured abuse and discrimination throughout history. International law has developed to the point that it will be a wrongful act if a state injured an alien.¹⁶ A state is therefore under an international obligation not to ill-treat any foreign nationals present in its territory and any violation of this obligation will incur international responsibility.¹⁷ A state has to observe the obligations imposed by the international legal systems.¹⁸ The treatment of aliens is a complex issue under international law. The issue of when a state incurs liability arising from its treatment of an alien in its territory has developed not only in parallel with the law on state responsibility, but has also led to efforts to codify this branch of customary international law. This paper will discuss in detail to find out whether foreigners have legal protection arising at the international level, regional and at national level in particular Namibian municipal law.

Under international law an individual has no right of entry into a state of which she is not a national. If she is admitted, she may be expelled, but ill-treatment is not permitted in the

¹²Arnold (1992:102).

¹³Ibid 104.

¹⁴Slomanson, W. R.2003. *Fundamental perspectives on international law*.California: Thomson West, p.97.

¹⁵ International custom worked in favour of developing a minimum standard for the treatment of aliens, once admitted to a state. This conception took root in customary international law during the 19th century, with treaties stipulating a number of rights reflecting a minimum standard dating back to an earlier period.

¹⁶Wallace (2005:197).

¹⁷Dugard, J.2005.*International Law a South African perspective*.3rd edition. Lansdowne: Juta & Co Ltd, p.296.

¹⁸Dixon, M.2005.*Textbook on International law*.5th edition. Oxford: Oxford University Press, p.345.

process of expulsion.¹⁹ International law provides that the state may impose restrictions upon the rights of the aliens thus they may be prohibited from joining the civil service or entering certain professions, or from owning certain types of property.²⁰ However, restrictions imposed upon the rights of aliens by domestic laws must be in compliance with the general principles of public international law. Aliens are not only offered protection under international law, the rights of aliens are also protected under the state's domestic laws. Domestic laws also play a major role in the protection of the aliens' rights. International law provides rules governing the treatment and protection of aliens, however much is left to be regulated by domestic laws.

With regard to the treatment of aliens under national law, a reference will be made to Namibian municipal laws, thus the scope of this paper is limited to international law and Namibian municipal laws so far as the issue of treatment of aliens is concern. On 21 March 1990, Namibia became a constitutional state boasting a supreme Constitution with a justiciable bill of rights as entrenched in chapter 3 of the Namibian Constitution. It is worth noting that although some rights are reserved for Namibian citizens, majority of rights provided under the Namibian Constitution protect all individuals in Namibia, whether citizens or not. Namibia is a state party to major international human rights instruments which oblige state parties to ensure protection of the aforesaid human rights, for example, the International Covenant on Civil and Political Rights (ICCPR),²¹ the Convention relating to the Status of Refugees of 1951,²² as well as the Protocol relating to the status of Refugees of 1967 and the Organisation of African Unity governing the Specific Aspects of Refugees in Africa of 1969,²³ International Convention on the Elimination of all Forms of Racial Discrimination (CERD),²⁴ and African Charter on Human and Peoples Rights (ACHPR).²⁵ In addition, the Namibian Constitution obliges the government to ensure protection of the stated rights to, all people under its Bill of Rights.²⁶ Despite Namibia being a state party to major international human rights instruments, some foreigners are still being mistreated and their rights are being infringed at the hands of state authorities in Namibia. It should be noted

¹⁹ Dugard (2005:297).

²⁰ Prevost (1996:131).

²¹ Namibia ratified ICCPR on 24 September 1994. See 2010 Namlex Index.

²² Namibia acceded to this Convention on 17 February 1995.

²³ Namibia signed on 11 November 2009.

²⁴ Namibia is a state party to CERD.

²⁵ Namibia is a state party to ACHPR.

²⁶ Chapter 3 of the Namibian Constitution provides for the Fundamental Human Rights and Freedoms, executive, legislature and judiciary must respect the rights provided therein.

that when a state becomes party to a treaty, it must observe its content. The international human rights treaties oblige state parties to ensure protection of human rights contained therewith irrespective of the nationality of the individual. Therefore, they oblige state parties to guarantee safety of all human beings within their jurisdictions and failure to do so entails legal obligations to make reparation.

1.2. Problem statement

The influx of foreign nationals entering Namibia has risen from 120 000 per year in 1991 to 645 000 in 1998.²⁷ The large influx of foreigners and illegal immigrants into Namibia in recent years has focused renewed public attention on the existing laws relating to the admission, expulsion, and rights of aliens and refugees in general. At the same time, attention has to be paid to the rights accorded to these persons under international law and Namibian municipal laws considering the fact that the worldwide refugees crisis and undocumented aliens are among the most serious human rights problems facing the international community today.²⁸ During the past financial year 1 418 illegal immigrants had to leave Namibia, while about the same number of people obtained Namibian citizenship in that period.²⁹ Introducing the N\$174, 2 million budget vote for the Ministry of Home Affairs and Immigration, Minister Rosalia Nghidinwa said the illegal immigrants were either deported or instructed to leave Namibia. Illegal immigrants were deported because they did not enter the country legally.³⁰

The fundamental rights of aliens are particularly threatened in most countries including Namibia as aliens are automatically considered suspects persons or prohibited illegal immigrants. Aliens are often victims of intolerant and arbitrary treatment, not only from the authorities such as immigration officials, but also from the citizens of that state.³¹ Illegal immigrants in most cases are detained and issued with deportation order not in accordance

²⁷ Nghidinwa, R. "2010.2011-2012 Budget Motivational Speech by the Ministry of Home Affairs & Immigration". Unpublished paper presented on Parliament, Windhoek, April 2010.

²⁸ Robert, K. G. & M.M. Scott. 1983. International Legal Standards Relating to the Rights of Aliens and Refugees and United States Immigration Law. *Human Rights Quarterly*. 302, Available at <http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/hurq5&div=30&id=&page>;last> accessed on 8 June 2011.

²⁹ 2010. "Namibia deports foreigners as the country grows popularity" Exposenewspaper. Available at <www.exposenewspaper.com/FullStory.aspx?d=237>; last accessed on 20 July 2011.

³⁰ Nghidinwa (2010:4).

³¹ Prevost (1996:130).

with immigration laws of Namibia. We have some cases in Namibia brought before our courts where foreigners were ordered to leave Namibia and they were treated arbitrary in the process of deportation.³² Aliens are often targets of discrimination.³³ Their properties may be expropriated by the host state without compensation which is contrary to the general principles of international law. This research sought to find out whether aliens who are lawfully or unlawfully within the territory of Namibia are treated in accordance with contemporary international law and notes the origin of the present obligation of states to respect, on non-discriminatory basis, the basic human rights of all persons present in their territory.

The research also sought to find out whether our domestic laws offer adequate protection to aliens when it comes to admission of aliens into Namibia and expulsion or removal of immigrants or aliens from Namibia. This study identifies key provisions in key international instruments which affects the rights of aliens and refugees, and analyses the meaning and their legal significance in the protection of the rights of aliens.

The purpose of this paper is to examine the basic international law standards relating to the treatment of aliens and refugees, and to assess the compatibility of the existing Namibian municipal laws with those standards. The topics covered in this paper are not exhaustive and the author acknowledges that due to paucity of space, word limit and time, the vast area cannot be covered in this paper.

This paper attempts to answer the following questions:

- a) When does a state incur state liability or responsibility for the treatment of aliens?
- b) Is there is an international minimum standard for treatment of aliens?
- c) Does the national treatment doctrine contradict the international minimum standard and does this contradiction cause an ambiguity about the law on state responsibility for injury to aliens?
- d) What constitutes mistreatment or unlawful treatment of aliens under international law and Namibian law?
- e) Whether the rights of aliens are protected under Namibian laws?

³² See Sikundas case, the court declared that the deportation order of Sikunda was unlawful and arbitrary.

³³ Kaczorowska, A.2002.*Public International Law*. London: Old Bailey Press, p.180.

The main topics to be addressed in this paper include:

- Treatment of aliens under international law and Namibian law
- Admission and expulsion of aliens
- Standard of treatment relating to the treatment of aliens
- Expropriation of foreign owned property
- Exhaustion of local remedies as a requirement for diplomatic protection

1.3. Research Methodology

The research focused on already collected and recorded information or data emanating from secondary sources in the literature, reports, journals, books, unpublished works and internet. This research was based on qualitative desktop research. In order to tackle the research problem, the author has analysed the principles of international law which governs the treatment of aliens, this includes admission and expulsion of aliens, and analysis of the treaties which make provisions for minimum standards for the treatment of aliens. This includes the analysis of the International Covenant on Civil and Political Rights (ICCPR) which governs the admission and expulsion of aliens. It is worth noting that Namibia is a state party to this Covenant. The Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live which was adopted in 1985 by the General Assembly (DHRINCL), this declaration recognises that the human rights expounded in the Universal Declaration of Human Rights (UDHR) and other international instruments.³⁴ This paper also focuses on the decisions of the international tribunals and domestic courts on the treatment of aliens.

The author analysed and compared international and Namibian municipal laws regarding to the protection of the rights of aliens. The author also examined the provisions of the Namibian Constitution which imposes restrictions on aliens in terms of acquiring citizenship and Chapter 3 (Bill of Rights) which provide for the fundamental human rights and freedoms. Thereafter a discussion of the legislation applicable in Namibia which regulates the admissions and expulsion of aliens in Namibia, more specific the Immigration Control Act³⁵ which regulates the entry of persons in Namibia and their residence inside the country and

³⁴ Dugard (2001:220).

³⁵ Act No. 7 of 1993.

their removal from Namibia, The Namibian Refugees (Recognition and Control) Act³⁶ which recognise and control refugees in Namibia, the Namibian Citizenship Act³⁷ provides for the conditions under which an alien may be granted Namibian citizenship. Furthermore international conventions and treaties ratified by Namibia which provides for the protection of the rights of aliens are examined in detail in this paper.

Aliens are often targets of discrimination.³⁸ Their properties may be expropriated by the host state without compensation which is contrary to the general principles of international law. Expropriation of foreign property without compensation is considered to be an injury to an alien under international law; a state will incur responsibility for injury to the property of an alien as well as to her person. The paper analysed the Resolution on Permanent Sovereignty over Natural Resources 1803 (XVII) of 1963 which recognises the sovereignty right to expropriate property and Article 16 of the Namibian Constitution which provides for property rights in Namibia as well as the Agricultural Commercial Land Reform Act,³⁹ which provides for acquisition of commercial land, expropriation of land and restriction on acquisition of agricultural land by foreign nationals.

1.4. Literature review

The review of existing literature on the treatment of aliens under international law and Namibian law was conducted to give insights on the subject matter of this research. The author would like to acknowledge that there are many existing literature which laid the groundwork on the issue of treatment of aliens under international law. There is not so much literature available on the protection of the rights of aliens under Namibian law.

This review of texts will show how international law and our domestic laws protect the rights of aliens and restrictions placed upon the rights of aliens present in the territory of a foreign state. Apart from the legislation, the Namibian Constitution, and case law there is not so much literature information available on the protection of the rights of the aliens under Namibian law, thus this paper will focus on existing literature on the treatment of aliens, this

³⁶ Act No. 2 of 1999.

³⁷ Act No. 14 of 1990.

³⁸ Kaczorowska (2002:180).

³⁹ Agricultural (Commercial) Land Reform Act, Act No. 6 of 1995.

includes the issue of admission and expulsion of aliens and expropriation of foreign property, legislation applicable, judicial precedents and conventions or treaties applicable, and ratified by Namibia.

Scholars of public international law have stressed that if a state violates a rule of customary international law or ignores an obligation of a treaty it has concluded, it commits a breach of international law and thereby a so-called international wrongful act.⁴⁰ The area of state responsibility has become the most ambitious and most difficult topic of the codification work of the International Law Commission (ILC).⁴¹ The work of the Commission on state responsibility for internationally wrongful acts is much more important. Central aspects of the modern law of state responsibility have historically developed on the basis of cases concerned the unlawful treatment of aliens and the so-called international minimum standard. This field is also the key to the understanding of the content of many of the ILC draft articles. In terms of the draft ILC it is noted that failure to comply with the minimum international standard engages the international responsibility of the defendant state, and the state of nationality of the injured alien may exercise its right of diplomatic protection, that is, may make a claim, through diplomatic channels, against the other state, in order to obtain compensation or some other form of redress.⁴²

Academics and the ILCs Draft Articles on diplomatic protection with commentaries (2006) and ILCs Draft Articles on State responsibility for the internationally wrongful acts (2001) (which later cited as Draft Articles on State responsibility) explore diplomatic protection, its requirements, the treatment of foreigners with respect to states and the consequences arising for states internationally wrongful acts.⁴³

Dugard postulates that an individual has no right of entry to a state of which she is not a national, however if she admitted, she may be expelled, but mistreatment is not permitted in the process of expulsion.⁴⁴ Admission and expulsion is within the discretion of the state, however there are limitations placed under international law on this discretion.⁴⁵ The power of expulsion must be exercised in a good faith and not for an ulterior motive, as it will

⁴⁰ Malanczuk, P.1997.*Akehurst's Modern Introduction to International Law*.7th edition. London: Routledge publisher, p.330.

⁴¹ Ibid.

⁴² Chapter 14 of the International Law Commission Draft Articles on the law of state responsibility.

⁴³ Dugard (2005:269).

⁴⁴ Ibid 278.

⁴⁵ Ibid 279. It is the sovereign prerogative of states to regulate the presence of foreigners on their territory. However, this power is not unlimited and international human rights law places some restrictions on when and how to exercise this power.

constitute mistreatment of an alien in cases where ulterior motive is present and such State will incur responsibility for the harm caused.⁴⁶ The effect of this principle is that Namibia as a sovereign state, it is the sovereign prerogative of the state to regulate the presence of foreigners present in our territory. Namibia became a state party to major international human rights instruments includes among others those instruments which makes provisions for the protection of the rights of aliens and the Namibian Parliament passed legislation to give effect to those instruments.⁴⁷

The issue of whether or not international customary law contains the obligations of the states to admit foreign nationals and stateless persons into their territories has long been a matter of controversy. Different opinions in this respect were already presented by the classical scholars of international law including Ian Brownlie in his book titled *Principles of public international law* maintained that the admission of aliens is a matter of free and unlimited discretion of government, the effect of this is that the Namibian government have enacted various legislation which regulates or control the admission and expulsion of foreign nationals in Namibia. The law set out conditions for the admission and expulsion of aliens, the law also provides for the protection of the rights of the aliens by prohibiting the arbitrary abuse of power by the state authorities when exercising the powers conferred upon them.⁴⁸

In respect of the standard of treatment of aliens under international law has been a matter of controversy. The issue of whether a state will incur liability for the treatment of aliens when it treats an alien differently from its own nationals? The scholars of international law have asserted that it depends on the standard which has been adopted by the state.⁴⁹ Martin Dixon in his book titled *Textbook on International law*,⁵⁰ has indicated that some scholars advocated for the national standard treatment while others have supported the international minimum standard for the treatment of aliens. The question to be addressed is whether there is an international minimum standard for treatment of aliens and which standard of treatment should be adopted in Namibia.

⁴⁶It is worth noting that a breach of an international obligation may arise directly through actions or omissions of state officials or indirectly if the state fails „... to take all reasonable and adequate measures to prevent private wrongs, including the duty to arrest and bring an offender to justice.

⁴⁷The Immigration Control Act, the Namibian Citizenship Act the Refugees Recognition Control Act, and the Agricultural Commercial Land Reform Act, to mention but few.

⁴⁸ Brownlie, I.2003.*Principles of Public International Law*. 6th edition. Oxford: Oxford Press University, p.430.

⁴⁹ Starke, J.G.1989.*Introduction to International Law*.10th edition. London: Butterworths, p.294.

⁵⁰ Dixon (2005: 243).

According to Prevost in his article has indicated that the aliens are often the targets of discrimination.⁵¹ They may be prohibited from joining the civil service or entering certain professions, the states have the right to impose these kinds of restrictions on the rights of the aliens.⁵² Aliens may be prohibited from owning certain types of property in the territory of a foreign state, however where the alien is permitted is to own property, if a state confiscates the property of an alien without compensation, it is liable for the violation of the international minimum standard.⁵³ The right to own property is recognised in terms of Article 16 of the Namibian Constitution, it vest the power to expropriate in the state with a payment of just compensation.

⁵¹ Prevost (1996:131).

⁵² Ibid.

⁵³ Dugard (2005:225).

CHAPTER TWO TREATMENT OF ALIENS UNDER INTERNATIONAL LAW AND NAMIBIAN LAW

2.2. State responsibility for injury to aliens

A state may incur responsibility directly or indirectly.⁵⁴ It does so directly when its agents violates the territorial sovereignty of another state, damage its property, injure its diplomats.⁵⁵ Indirect state responsibility occurs when a state injures the person or property of a foreign national within its territory. Scholars on the law of state responsibility have maintained the view that a state will incur responsibility because of its failure to treat the foreign national according to the minimum standard of justice required for the treatment of aliens,⁵⁶ for instance, by detaining him for an unreasonable period without trial, or by confiscating his property without compensation or mistreat an alien in the process of admission into or expulsion from its territory. It is noted that the basis for responsibility in this case is that the defendant state has injured the plaintiff state by injuring its national.⁵⁷

The principle of state responsibility has been developing on the basis of cases concerning the unlawful treatment of aliens (or foreign nationals, corporations etc.) and the modern law of state responsibility revolves around these aspects. Early analysts had practical reasons to focus on this category of state responsibility. Many nationals of one state who have travelled, or worked in another state, are often the victims of intolerant and arbitrary treatment, not only from the authorities in most cases the immigration officials but also from the citizens of that state. They have suffered abuse and discrimination throughout history.⁵⁸

This branch of state responsibility is equated to the law of delict under the municipal law. The law of delict governs civil wrongs by individuals for unreasonable conduct that harms other individuals. For instance, if someone takes the property of another without justification, he is liable to compensate the other for such an infraction.⁵⁹ These views were adopted by many writers and jurists when considering wrongful act of a state for injuries to aliens. Under

⁵⁴ Dugard (2001:208).

⁵⁵ Ibid 209.

⁵⁶ Ibid 210.

⁵⁷ It is worth noting that if an individual allegedly sustains injury while in another State, redress may only be sought through the individual's State of nationality. Individual cannot prevent a State from exercising its rights of diplomatic protection if it feels its right to have its nationals treated properly has been violated. Thus it's a State discretion whether to take up a claim or not.

⁵⁸ Prevost (1996:131).

⁵⁹ Dugard (2001:206).

the general principles of international law a state is therefore under an international obligation not to ill-treat any foreign nationals present in its territory and any violation of this obligation will incur state responsibility. This is one of the commonest forms of state responsibility that arises in international law today.

Kaczorowska stated that an injury to a citizen is an injury to the state.⁶⁰ This relationship between the individual and his state gives rise to two principles:

- a) The state is responsible for acts of its citizens of which its agents know or ought to know and which cause harm to the legal interests of another state.
- b) The state has a legal interest in its citizens and in protecting this interest the state may call to account those harming its citizens.

In the case of *Mavrommattis Palestine Concessions (Jurisdiction): Greece v United Kingdom* the Court held:⁶¹

“ it is an elementary principle of international law that a state is entitled to protect its subjects, when injured by acts contrary to international law committed by another state, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf , a state is in reality asserting its own right – its right to ensure ,in the person of its subjects, respect for rules of international law.”

The general principle of the law of state responsibility for injury to aliens is a matter of existence of correlative rights and duties. The state has a right to expect that the alien will follow its local laws and the state has an obligation to protect the life and property of this alien under the various treaties and conventions of international law. Thus, failure to observe any of these rights and duties entails and gives rise to international responsibility where both the parties are entitled to remedies which may be utilized through the various channels available in international law beginning with exhaustion of local remedies.⁶² The injured state may make a claim through diplomatic channels against the offending state or, failing

⁶⁰ Kaczorowska (2002:180).

⁶¹ 1924 PCIJ Rep Ser A No 2, 12.

⁶² Brownlie (1990:433).

satisfaction, may present a claim on the international plane.⁶³ The defendant state's duties are owed not to the injured alien, but to the alien's national state. Thus, a claimant state may refrain from making a claim, the claimant state may abandon its claim, and the claimant state is under no obligation to pay any compensation obtained to its injured national.

It is worth noting that the defendant state's duties are owed not to the injured alien, but to the alien's national state.⁶⁴ The theory is that the claimant state itself suffers a loss when one of its nationals is injured. The claimant state has complete liberty to refrain from making a claim or to abandon a claim; it may agree to settle the claim at a fraction of its true value; and it is under no duty to pay the compensation obtained to its national.⁶⁵ In these respects, the injured individual is at the mercy of his or her national state. This aspect of diplomatic protection was clearly stated by the International Court of Justice in the *Barcelona Traction* case the court held "that within the limits prescribed by international law, a state may exercise diplomatic protection by whatever means and to whatever extent it think fit, for it is its own right that the state is asserting. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress. The state must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case. Since the claim of the state is not identical with that of the individual or corporate person whose cause is espoused, the state enjoys complete freedom of action".⁶⁶

Dugard postulates that the basis for responsibility is that the defendant state has injured the plaintiff state by injuring its national.⁶⁷ According to the Permanent Court of International Justice, in taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on his behalf, a state is in reality asserting its own, the right to ensure in the person of its nationals respect for the rules of international law.

⁶³ Kaczorowska (2002:180). It was noted that an injury to a citizen is an injury to the state. Thus failure to protect or to treat a foreign national in accordance with the international minimum standard of the treatment of aliens such state may incur international state responsibility and this may lead to the injured state to exercise its right of diplomatic protection.

⁶⁴ Malanczuk (1997:333).

⁶⁵ Malanczuk (1997:334).

⁶⁶ *Barcelona Traction, Light and Power Company, Limited, Second Phase*, I.C.J. Reports 1970.p.3.

⁶⁷ Dugard (2001:208).

Under international law, for a plaintiff state to succeed in a claim against the defendant state is required to prove that:

- a) The injured person was its national
- b) All local remedies have been exhausted ;and
- c) The conduct of the defendant state violates the rules of international law relating to the treatment of aliens.⁶⁸

It is noted that a state may provide diplomatic protection to its nationals alone. The PCIJ observed in the case of *Panevezys-Saldutiskis Railways*,⁶⁹ it is the bond of nationality between the state and the individual which alone confers upon the state the right to diplomatic protection.⁷⁰

It is noted that nationality indicates that there is legal connection between the individual and the state for external purposes.⁷¹ A Namibian national travel on a Namibian passport and is entitled to protection by the Namibian government if injured in another country. The Namibian Citizenship Act of 1990 prescribes rules relating to the acquisition of Namibian nationality and determines who Namibian nationals are. Section 2(a) of the Act provides for the acquisition of Namibian citizenship, that a person may acquire Namibian citizenship by birth, descent, marriage, registration or naturalisation as contemplated in Article 4(1), (2), (3), (4) or (5) of the Namibian Constitution, respectively.

The state has a right to expect that the alien will follow its local laws and the state has an obligation to protect the life and property of this alien under the various treaties and conventions. If a state fails to observe any of these rights and duties entails and gives rise to international responsibility where both the parties are entitled to remedies which may be utilized through the various channels available in international law beginning with exhaustion of local remedies.⁷² Namibia is a state party to various major international human rights instruments including those conventions and treaties which oblige state parties to ensure protection of the aforesaid human rights. When a state becomes party to a treaty, it must

⁶⁸ Ibid.

⁶⁹ *Panevezys –Saldutiskis Railways Case* PCIJ Reports, Series A/B, No 76 (1939) 4 at 16.

⁷⁰ Dugard (2001:209).

⁷¹ Ibid.

⁷² Umozurike, U, O.1999.*Introduction to International Law*. Benin City: Spectrum Law Publishing, p.132.

observe its content.⁷³ The international human rights treaties oblige state parties to ensure protection of human rights contained therein irrespective of the nationality of the individual. In other words, they oblige state parties to guarantee safety of all human beings within their jurisdictions. Article 144 of the Namibian Constitution provides that public international law and international agreements ratified by Namibia shall be binding upon Namibia and that they shall form part of the laws of Namibia. Thus Namibia is under the obligation to ensure protection of human rights contained in those international human rights instruments become a reality to all individuals in Namibia irrespective of the nationality of the individual.

Chapter 3 of the Namibian Constitution provides for fundamental human rights and freedoms and some of the rights and freedoms are extended to the aliens present in the Namibian territory. Article 25 of the Namibian Constitution provides that where the rights or freedoms of an individual are being threatened or infringed, he or she has the right to approach the competent court to enforce his or her rights and for remedy. For an alien to be deemed that he or she has exhausted local remedy, Article 25 will come into play, whether the alien has approached the court to enforce his rights or freedoms.

Namibia has enacted legislation which regulates the admission into and expulsion of aliens from Namibia and these laws should be applied with reference to various international instruments and agreements ratified by Namibia and general principles of international law relating to the treatment of aliens and refugees. It is noted that even though laws are put in place, state authorities in Namibia fail to comply with them, therefore rendering their actions unlawful and the state will incur international responsibility. Attention should be renewed on the number of decisions handed down by our courts relating to cases of arbitrarily and intolerant treatment of aliens by the authorities. It is not always the government authorities more specifically immigration officials abide by the rules and treat aliens in accordance with national law, a good example of this, is the *Sikunda v Government of the Republic of Namibia* case, in this case the applicant brought an urgent application for the release of his father from custody and for the decision taken by the Minister declaring Sikunda *persona non grata* to be set aside, the applicant's father has been detained in terms of section 49 of the Immigration

⁷³ See Vienna Convention on the Law of Treaties (1969), Article 11-17.

Control Act.⁷⁴ It had been alleged that he was a Unita collaborator. The Minister of Home Affairs had done certain investigations and then recommended to the Security Commission that Sikunda to be declared *persona non grata*. The court held that the right to be heard in Namibia was not only a common law principle of natural justice but a fundamental right which should be observed at all times when the civil rights and responsibilities of an individual were being determined; section 49 is of no exception to the rule. It was held further that the deportee must be afforded an opportunity to make a representation prior to his or her removal from Namibia, and this is in accordance with the principles of administrative justice. The court ruled that the decision taken was arbitrary and unlawful.

No state under international law obliged to admit aliens but if it does, may designate conditions for doing so.⁷⁵ No state excludes itself from intercourse with the rest of the international community. Tourists are readily admitted as they bring in foreign exchange but immigrants, workers and students are more restricted. A citizen travelling abroad requires the passport of his national state and the visa of his intended place of sojourn unless this has been waived by treaty or practice.⁷⁶ Last year the Ministry of Home Affairs and Immigration issued 6 138 employment permits, 59 368 work/business, study and holiday visas, and 45 permanent residence permits. About 3 205 people were granted temporary residence permits and 9 458 student permits were issued.⁷⁷ The next section identifies and discusses provisions in key international instruments and Namibia domestic laws which affects the rights of aliens and refugees, and analyses the meaning and their legal significance of the right of admission and expulsion of aliens and the protection of such rights.

2.3. Admission and Expulsion of aliens

The question of whether a state is under a legal obligation to grant foreigners entry into its territory has long been a matter of controversy. A state is not required to admit foreign nationals. Immigration control is a matter of national law.⁷⁸ Such obligation may be based

⁷⁴ *Sikunda v Government of the Republic of Namibia*⁷⁴ 2001 NR 181

⁷⁵ To give effect to that principle, the Namibia Parliament passed legislation the Immigration Act, Act No 7 of 1993, to regulate and control the entry of persons into, and their residence in, Namibia; to provide for the removal from Namibia of certain immigrants and to provide for incidental matters.

⁷⁶ Umozurike (1999:132).

⁷⁷ 2010 Motivational speech by the Minister of Home Affairs and Immigration, Rosalia Nghidinwa

⁷⁸ Wallace (2005:198).

either on customary international law or it could be based on international treaties.⁷⁹ Some writers argued that by customary international law no state can claim the right for its nationals to enter into, and reside on, the territory of a foreign state. The reception of aliens is a matter of discretion, and every state is, by reason of its territorial supremacy, competent to exclude aliens from the whole, or any part, of its territory.⁸⁰ It is noted that states may by treaty confer on each other's nationals a right to enter their territories, especially in treaties of commerce and friendship, which often entitle the foreign nationals concerned not to enter the state but to establish themselves in business there.⁸¹

Numerous scholars of international law have maintained that it is the sovereign prerogative of states to regulate the presence of foreigners in their territory.⁸² This power is not unlimited and international human rights law places some restrictions on when and how to exercise this power. Recently the tendency has been to allow states a general competence to require aliens to leave, but to engage them in international responsibility with respect to the manner of the expulsion of aliens. An alien may be expelled in peace time in the interest of state security or public welfare but mistreatment is not permitted in the process of expulsion.⁸³ International law forbids collective expulsion of aliens that have been properly admitted.

The right of states to expel alien is generally recognised in international law. It matters whether the alien is only on a temporary visit, or has settled down for professional business or other purposes on its territory, having established his domicile there.⁸⁴ It is worth noting that a state has a broad discretion in exercising its right to expel aliens from its territory, however its discretion is not absolute. By customary international law it not abuse its right by acting arbitrary in taking its decision to expel an alien, and it must act reasonably in the manner in which it effects an expulsion.⁸⁵

In *Attorney-General for Canada v Cain* the court held that: "one of the rights possessed by the supreme power in every state is the right to refuse to permit an alien to enter that state, to

⁷⁹ Karl, D.1992. "Aliens and admission". In Bernhardt, R.(ed) *Encyclopedia of Public International Law*, Volume One (A-D).Amsterdam: Elsevier Science Publisher, p.107.

⁸⁰ Robert, J & W, Arthur.1996. *Oppenheim's International Law*,9th ed.Vol.1.London: Longman Limited,p.897-898.

⁸¹ Ibid.

⁸² Goldman, R, K& Scott .M. M. International Legal Standards Relating to the Rights of Aliens and Refugees and United States Immigration Law, 5 *Human Rights Quarterly*. 302 (1983); Available at <<http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/hurq5&div=30&id=&page>>;last accessed on 08 June 2011.

⁸³ Dugard (2005:296).

⁸⁴ Robert & Arthur (1996:940-941).

⁸⁵ Ibid.

annex what conditions it pleases to the permission to enter it, and to expel or deport from a state, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order and good government, or to its social or material interests.”⁸⁶

In terms of the general principles of international law relating to the right to expel aliens, a state has discretion to expel aliens but when it is exercising this power it must act in good faith.⁸⁷ However certain conditions do exist which limit this discretion, one of the conditions is that expulsion may constitute the crime of genocide or may infringe the rule of non-discrimination under customary law, and there may be no right of expulsion where persons by long residence have acquired effective nationality of the foreign host state.⁸⁸

Writers on the treatment of aliens have asserted that customary international law provides no detailed rules regarding expulsion, and everything accordingly depends upon the merits of the individual case.⁸⁹ A state’s right to expel aliens may also be directly or indirectly limited by treaties. For instance Article 3 of the European Convention of 1955 provides that nationals of a contracting party lawfully residing in another party’s territory may be expelled only if they endanger national security or offend against *ordre public* or morality; and except where imperative considerations of national security otherwise require, such a national who has been lawfully residing there for more than two years cannot be expelled without first being allowed to submit reasons against his expulsion and to appeal to a competent authority. Article 13 of the International Covenant on Civil and Political Rights 1966,⁹⁰ provides that an alien lawfully in a state’s territory may be expelled only in pursuance of a decision reached in accordance with law and, except where compelling reasons of national security otherwise require, must be allowed to submit reasons against his expulsion and to have his case reviewed by a competent authority.⁹¹ In the *Baffolo* case the arbitrator said: ‘ The country exercising the power of expulsion must, when occasion demands, state the reason of such

⁸⁶1906 AC 542 the issue of admission and expulsion of aliens are matters essentially within the domestic jurisdiction of states.

⁸⁷The right of a State to regulate the admission and removal of aliens within its territory has been asserted by our courts, in *S v Nyimbili*; *S v Mutende* 1969 (2) SA 242(N); *S v Mweetwa* 1972 (1) SA 40 (C) at 43-4, the courts reaffirms the obligation of the authorities to execute deportations in a humanitarian manner.

⁸⁸ Kaczorowska, A.2002. *Public International Law*, London: Old Bailey Press, p.182.

⁸⁹ Robert & Arthur (1996:898).

⁸⁹ Ibid 941.

⁹⁰Namibia is a state party to this covenant, any violation of obligations assumed under this treaty will give rise to international state responsibility.

⁹¹ In Namibia, the expulsion of aliens is regulated by the Immigration Control Act, which provides that a person may not be expelled without the directives of the Immigration Tribunal and in accordance with the law. In terms of Article 18 of the Namibian Constitution it provides for administrative justice, and any person who is aggrieved by the decision of administrative body or official shall have the right to seek redress before a competent Court or Tribunal.

expulsion before an international tribunal, and an ineffective reason or none being advanced, accept the consequences’’.⁹²

As noted earlier in this paper is that admission of alien is a matter of free discretion of states. There are few cases in which the non-admission of an alien has been seen as an internationally wrongful act, even in cases of an arbitrary decision, only the commission of an unfriendly act has been assumed. Numerous scholars of international law have stressed that the non-admission of an alien cannot be seen as an international offence, merely because factually discrimination has occurred. Customary international law does not recognise any rule requiring equal protection of all aliens in every respect.⁹³ In some cases, it could be argued that the non-admission violates generally recognised human rights, but it may be that those cases are only ones which raise the question of international state responsibility. In addition, even recognition of such exceptional duty, on the other hand, would not automatically mean that a state in a general sense would be obliged to grant asylum, in the sphere of human rights a duty to admit a foreigner only exists if his life is clearly and directly threatened.

It is worth noting that a particular duty to admit aliens may, however, result from international treaties. Treaties protecting generally recognised human rights often contain the right of nationals to move freely inside their own State, the right not to be arbitrary expelled from the territory of a foreign State and also the right to return to their own state. Article 12(5) African Charter on Human and People’s Rights (ACHPR) provides that: ‘‘mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.’’ Article 13 of the Universal Declaration of Human Rights 1948; Article 13 of the ICCPR stipulates that a person facing expulsion is entitled to submit reasons against her expulsion and to have her case reviewed by a competent authority ‘expect where compelling reasons of national security otherwise require.’ In wartime, a belligerent is entitled to expel enemy aliens from its territory. The General Assembly has adopted a Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live. This Declaration contains a provision which is similar to Article 13 of the Covenant.⁹⁴ Article 7 of the Declaration on the Human

⁹² Robert et al (1996:944).

⁹³ Karl, D.1992. ‘‘Aliens and admission’’.In Bernhardt, R.*Encyclopedia of Public International Law*, Volume One (A-D).Amsterdam: Elsevier Science Publisher, p.108.

⁹⁴ See GA Res. 40/144 of 13 December 1985.

Rights of Individuals Who Are Not Nationals of the Country in Which They Live provides that “An alien lawfully in the territory of a state may be expelled there from only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons why he or she should not be expelled and to have the case reviewed by, and be represented for the purpose before, the competent authority or a person or persons specially designated by the competent authority. Individual or collective expulsion of such aliens on grounds of race, colour, religion, culture, descent or national or ethnic origin is prohibited.”

Namibia is a state party to the African Charter on Human and People’s Rights (ACHPR) and International Covenant on Civil and Political Rights (ICCPR), Convention relating to the Status of Refugees of 1951 as well as the Protocol relating to the status of Refugees of 1967 and the Organisation of African Unity Convention Governing the Specific Aspects of Refugees in Africa of 1969. The 1948 Universal Declaration of Human Rights is part of our law.⁹⁵ Thus, there is an obligation placed upon Namibia by international conventions or treaties, and general principles of public international law relating to the treatment of aliens, and Namibia has to ensure that rights provided therein are guaranteed and become a reality.

As mentioned earlier in this paper is that, it is the sovereign prerogative of states to regulate the presence of foreigners in their territory.⁹⁶ This power is not unlimited and international human rights law places some restrictions on when and how to exercise this power. States lay down in their municipal laws conditions under which an alien may enter their territory. An unlawful entry can result in the expulsion of the foreigner on the ground that the entry was not justified. The question whether the foreigner can claim judicial protection before national courts to contest the non-admission or expulsion can only be answered by application of the rules of the national legal system concerned.

⁹⁵ Namibia has signed the 1948 Universal Declaration of Human Rights, thus it is part of our law by virtue of Article 144 of the Namibian Constitution.

⁹⁶ Goldman, R, K& Scott M, M. International Legal Standards Relating to the Rights of Aliens and Refugees and United States Immigration Law, 5 *Human Rights Quarterly*. 302 (1983); Available at: <<http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/hurq5&div=30&id=&page>>; last accessed on 08 June 2011.

2.3.1. Admission and expulsion of aliens, and refugees in terms of the Immigration Control Act of 1993 and Namibian Refugees (Recognition and Control) Act of 1999

In terms of our domestic laws, admission of aliens is regulated by the Immigration Control Act of 1993.⁹⁷ The purpose of this Act is to regulate and control the entry of persons into, and their residence in, Namibia; to provide for the removal from Namibia of certain immigrants and to provide for incidental matters.

Section 24 of the Immigration Control Act of 1993 deals with the limitation of entry into, and residence in, Namibia, sections 24 -38 are in particular relevant. Section 24 of the Act provides that:

Subject to the provisions of section 35, no person shall-

(a) enter or reside in Namibia with a view to permanent residence therein, unless such person is in possession of a permanent residence permit issued to him or her in terms of section 26; or

(b) enter or reside in Namibia with a view to temporary residence therein, unless-

(i) in the case of any person who intends to enter or reside in Namibia for the purpose of employment or conducting a business or carrying on a profession or occupation in Namibia, such person is in possession of an employment permit issued to him or her in terms of section 27; or

(ii) in the case of any person who intends to enter or reside in Namibia for the purpose of attending or undergoing any training, instruction or education at any training or educational institution in Namibia, such person is in possession of a student's permit issued to him or her in terms of section 28; or

(iii) in the case of any person who intends to enter or reside for any other purpose, such person is in possession of a visitor's entry permit issued to him or her in terms of section 29.

Part VI of the Act prohibits the entry of certain categories of people into Namibia.

Included in these categories are:

⁹⁷ Immigration Control Act, Act No. 7 of 1993.

(i) Persons who have been removed from Namibia on the recommendation of the Security Commission, and whose activities endanger or are calculated to endanger the security of the State; and

(ii) Persons who the Minister regards as being undesirable inhabitants of or visitors to Namibia, based upon information received from any government through official or diplomatic channels. If any such prohibited immigrants are found in Namibia they may forthwith be arrested without a warrant and detained for a period of 14 days, pending investigation by an immigration officer. The Minister may extend this period but not for longer than 14 days at a time. The detention must comply with article 11(5) of the Constitution, in that: “No persons who have been arrested and held in custody as illegal immigrants shall be denied the right to consult confidentially legal practitioners of their choice, and there shall be no interference with this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security or for public safety.”

As discussed earlier in this paper is that no state is in international law obliged to admit aliens but if it does, may designate conditions for doing so. The Immigration Control Act of 1993 provides for conditions an alien may be permitted to enter the Namibian territory. It is worth noting that in practice, no state excludes itself from intercourse with the rest of the international community. Tourists are readily admitted as they bring in foreign exchange but immigrants, workers and students are more restricted.⁹⁸ In the Namibian context the tourists are readily admitted, because in terms of the Act the requirements for the application for visitor’s entry permits can be easily complied with unlike applying for the other permits, the issuing of other permits such as permanent residence permit, employment permits and student permits are more restricted. For instance, for an alien to be admitted and be issued with employment permit, he or she must have the scarce skills required in our job market.

During the past financial year, 2009-2010, Ministry of Home Affairs and Immigration has issued the following permits;⁹⁹

Employment Permits = 6 138

⁹⁸ Umozurike (1999:132).

⁹⁹Statistical data from the 2010-2011 Motivation Budget Speech by the Minister of Home Affairs and Immigration.

Student Permits=	9 458
Temporary Residence Permits=	3 205
Permanent Residence Permits=	45
Visas (work/business, study/holiday) =	59 368
Total=	88 014

With regards to expulsion or deportation of aliens from the territory of a state, expulsion refers to the order of a state government advising an individual in general, a foreign national or a stateless person to leave the territory of that state within a fixed and usually short period of time.¹⁰⁰ In other words expulsion means the prohibition to remain inside the territory of the ordering state and deportation is the factual execution of the expulsion order.

It is worth noting that it is immaterial whether the individual concerned is passing through the territory, or is staying only temporarily, or has established residence there. These differences may be of importance, however, regarding the lawfulness of the expulsion in concrete case since provisions of municipal law or treaties could influence the decision. Numerous scholars of international law have supported the view that expulsion regularly concerns individuals whose entry and in a given case residence, has initially permitted. Therefore where an alien has entered the territory illegal without realisation of this fact by the national authorities, such alien may be expelled or deported.

The right to expel may be restricted by international treaties protecting human rights. Naturally enough most countries have municipal law with provisions listing the grounds for expulsion of aliens, and since it is unlikely that these will endow the executive with absolute discretion in the matter, aliens are in practice substantially protected against arbitrary expulsion.¹⁰¹

Whether an alien is expelled lawfully from a foreign territory is a matter within the discretionary power of the expelling government.¹⁰² This discretionary power is subject to limits in extreme cases, the limits of the discretion may be found in governmental actions considered as abuse of rights.

¹⁰⁰ Karl (1992:108).

¹⁰¹ O'Connell, D. P.1971.*International Law for Students*. London: Stevens & Sons, p.292.

¹⁰² Prevost (1996:130).

In terms of Namibian law, there are restrictions imposed by the law to limit the arbitrariness or abuse of discretionary power by the immigration authorities in the process of expulsion of aliens from Namibia. Namibian immigration laws provides for substantive protection against return to face grave violations of human rights, procedural safeguards during deportation procedures, and protection with regard to the methods of expulsions. In addition to the general protection afforded to all foreigners, certain categories of foreigners, such as refugees are afforded additional protection against expulsions and/or benefit from additional procedural guarantees.

Namibia became a state party to the African Charter on Human and People's Rights (ACHPR) and International Covenant on Civil and Political Rights (ICCPR), Convention relating to the Status of Refugees of 1951 as well as the Protocol relating to the status of Refugees of 1967 and the Organisation of African Unity Convention Governing the Specific Aspects of Refugees in Africa of 1969. The 1948 Universal Declaration of Human Rights is part of our law.¹⁰³ Refugees have a special status in respect of the admission and expulsion of aliens. The refugees have a special status in respect of the admission and expulsion of aliens. The principle of *non-refoulement* applies.¹⁰⁴ It is worth to note that the principle of *non-refoulement* is now part of customary international law which provides that a refugee may not be returned to a state in which he or she is likely to face prosecution.

The principal statute governing the admission and expulsion of refugees is the Namibian Refugees (Recognition and Control) Act of 1999. The principal statute governing the admission and expulsion of aliens is the Immigration Control Act of 1993. The Immigration Control Act provides that no person may be expelled from Namibia unless such expulsion or removal from Namibia has been authorised by an immigration tribunal.

Section 43(1) of the Immigration Control Act 7 of 1993, provides:

“ For the purposes of the provisions of Article 11(4) of the Namibian Constitution , the Minister shall establish so many tribunals to be known as immigration tribunals as the

¹⁰³Namibia has signed the 1948 Universal Declaration of Human Rights, thus it is part of our law by virtue of Article 144 of the Namibian Constitution.

¹⁰⁴ Dugard (2005:218).

Minister may deem desirable for the hearing and determination of applications for authorisation for the removal of persons from Namibia in terms of this Act or any other law.’’

Article 11(4) of the Namibian Constitution in the relevant part provides that an illegal immigrant in Namibia ‘’ shall not be deported from Namibia unless deportation is authorised by a Tribunal empowered by law to give such authority’’. The tribunal will take into account all relevant facts, including the likelihood of the person to be deported being tortured in the country to which he or she may be expelled.

With regard to the protection of the rights of refugees in the process of admission and expulsion, parliament passed legislation in the form of Namibian Refugee (Recognition and Control) Act of 1999 to give effect to the Convention relating to the Status of Refugees of 1951 as well as the Protocol relating to the status of Refugees of 1967 and the Organisation of African Unity Convention Governing the Specific Aspects of Refugees in Africa of 1969. This Act makes it easier for persons seeking asylum to assert their rights.

Namibian Refugees (Recognition and Control) Act of 1999,¹⁰⁵ provides for the granting of asylum or refugee status and the Government established a system for providing protection to refugees. This statute in accordance with the above conventions provides for the protection of refugees against expulsion or return to countries where their lives or freedom would be threatened. The Namibia Refugees (Recognition and Control) Act provides for the rights of refugees. The Act stipulates that refugees who apply for refugee status in Namibia and every member of their family have the rights to remain in Namibia pending the grant of refugee status. Once refugee status is accorded, the refugee may remain in Namibia as a recognized refugee.

The Act also establishes a Refugee Committee under section 7. Powers, duties and functions of the Committee are presented in section 10. According to Section 4, it prohibits the granting of refugee status to persons:

‘’ Who belong to a category of persons declared by the Minister not to be entitled to refugee status; or who, before their admission to Namibia as refugees, have committed a crime against peace or a war crime or a crime against humanity; or a serious non political crime; or

¹⁰⁵ Act No.2 of 1999.

acts contrary to the purposes and principles of the United Nations or the Organisation of African Unity’’. Section 23 provides for the conditions for the withdrawal of refugee status. Under section 24 the Minister of Home Affairs may, if he/she is reasonably of the opinion that it is in the interest of the sovereignty and integrity of Namibia, national security, public order, decency or morality, request the Commissioner to order the detention or the expulsion of any recognised refugee or protected person.

The author has discussed the key provisions of the key international instruments which affect the rights of aliens and refugees, it is clear that our domestic laws are compatible with the international instruments ratified by Namibia which relates to the protection of aliens. Our domestic laws made provisions for the grounds for admission and expulsion of aliens and refugees into and from Namibia; aliens are therefore protected against arbitrary expulsion and arbitrary treatment in the process of admission.

The right of a state to regulate the admission and removal of aliens within its territory has been asserted by our courts. It is noted from numerous judgments that if an alien is admitted, she may be expelled but mistreatment is not permitted in the process of expulsion.¹⁰⁶ Expulsion has to be done in humanitarian manner. Whether the authorities observes the domestic laws in the process of admission and expulsion or whether their actions are justifiable in terms of the law, to answer these questions ,one must consider the attitude of the courts towards aliens and then the relevant law.

A good example of the state’s duty not to arbitrary and unfairly treat aliens in its territory which is against the Namibian Constitution and other relevant law can be found in the case of *Tao Hua Zhu v The Minister of Home Affairs and Immigration*¹⁰⁷ Tau was informed that his application for the renewal of an employment permit had not been successful, giving him 21 days to leave Namibia, there was no proof that an directed Toa’s deportation.

The court held that applications to the immigration tribunal are governed by section 44 of the Act. Section 44(1) provides as follows:

"When any prohibited immigrant who enters or has entered or is found in Namibia is to be removed from Namibia, application for authorization for such removal shall be made to a tribunal having jurisdiction under section 43."

¹⁰⁶ Dugard (2005:217).

¹⁰⁷ CASE NO.: (P) A 336/2004.

The Court held further that any attempt by the authorities to remove the applicant from Namibia without exhausting the provisions of the Act will be illegal and will attract not only censure but stern action from this Court.

Another important case on the treatment of aliens, is the case of *Correia v Commanding Officer, Windhoek Prison, and Another*,¹⁰⁸ the appellant had entered Namibia on 22 February 1996 without any valid documents in contravention of section 12 of the Immigration Control Act 7 of 1993. He complied with a notice in terms of section 42(4)(b)(i) of the Act ordering him to leave Namibia within 48 hours. Appellant complied with the order but re-entering Namibia thereafter. The appellant had then been given a visitor's entry permit, valid until 30 June 1996, but had revealed the fact that on 22 February he had been served with a notice to leave Namibia. On 12 June 1996, after failing to show his passport and report to the immigration offices, the appellant was arrested and detained. The court held that ,in order to answer the question put to counsel ,it was necessary to decide whether or not the appellant was a prohibited immigrant in terms of any provisions referred to by counsel, but that the answer was provided in section 36 read with section 41 and section 24. Court held further that section 41 provided that no prohibited immigrant would be exempted from the provisions of the Act or be permitted to remain in Namibia on the grounds only that he had not been informed that he could not enter or remain in Namibia.

The *Sikunda* judgement is of particular significance, since rules of natural justice were considered in detail. In *Sikunda v Government of the Republic of Namibia*,¹⁰⁹ in this case the applicant brought an urgent application for the release of his father from custody and for the decision taken by the Minister declaring Sikunda *persona non grata* to be set aside, the applicant's father has been detained in terms of section 49 of the Immigration Control Act 7 of 1993.It had been alleged that he was a Unita collaborator. The Minister of Home Affairs had done certain investigations and then recommended to the Security Commission that Sikunda to be declared *persona non grata*. The court held that the right to be heard in Namibia was not only a common law principle of natural justice but a fundamental right which should be observed at all times when the civil rights and responsibilities of an individual were being determined; section 49 is of no exception to the rule. It was held

¹⁰⁸ 1999 NR 48.

¹⁰⁹ 2001 NR 181.

further that the deportee must be afforded an opportunity to make a representation prior to his or her removal from Namibia, and this is in accordance with the principles of administrative justice. The court ruled that the decision taken was arbitrary and unlawful.

The court further held that declaring a person *persona non grata* has to be done in accordance with section 49 (1) of the Immigration Control Act. This section is not applicable to Namibian citizens' domicile in Namibia at time of decision. Therefore the minister was not entitled to make such decision. Declaring a person *persona non grata* in terms of section 49(1) of the Act, the Security Commission in this case recommending Sikunda to be declared *persona non grata* must consist of of four members. In terms of Article 114 of the Namibian Constitution providing that Commission should comprise six members, the court held that the Commission was not properly constituted, thus the decision of the Commission was null and void.

Our courts reaffirm the right of a state to regulate the admission and removal of aliens within its territory. However our courts maintained that if an alien is admitted, she may be expelled but mistreatment is not permitted in the process of expulsion, that admission and expulsion of aliens has to be done in accordance with the immigration laws which incorporate international human rights instruments. The courts also reaffirmed that the principle of administrative justice or natural justice must be observed by the decision makers in the process of expulsion or admission of aliens. The court reaffirmed the principle of natural justice incorporated in Article 18 of the Namibian Constitution, it held that administrative officials and bodies shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant law, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal. The principle of natural justice includes the right to be heard and give reasons for the decision made. This is in line with the general principles of international law governing the admission and expulsion of aliens. International law provides that aliens should be give reasons for his or her expulsion from the territory of a foreign state, in order to determine whether the state has acted arbitrary and breached its international obligation not to mistreat aliens present in its territory.

2.4. The standard of treatment relating to the treatment of aliens

Whether or not a state is internationally responsible for the way it treats foreigners depends on the standard of treatment which international law obliges that state to adopt. It is only when the state falls below this standard that it becomes internationally responsible. Unfortunately, there is considerable debate over the right standard of treatment which international law requires.¹¹⁰ Generally speaking the two opposing views are that of a “national treatment” standard and an “international minimum standard”.

International law does require a state to admit foreign nationals into their territory. Immigration control is a matter of national law.¹¹¹ Once the foreigner or alien is admitted, if a state should then fail to treat them in a particular way the host state will be in breach of an international obligation. This was endorsed by the United Nations General Assembly (UN) in 1985, in the Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live,¹¹² which articulates the fundamental human rights to be observed by the host state.¹¹³ It worth to note that aliens under international law are assured of certain rights ,such as the right to equality within the judicial process and protection from torture ,cruel or inhuman treatment they are required to observed the laws of the host state and to respect the host state’s customs and traditions.¹¹⁴ The issue to be addressed is by what standard is the treatment to be afforded to aliens present in the host state? As noted above there are two opposing views, one representing that of developing states and the other representing that of developed states.

Under international law, aliens must be treated decently and in accordance with civilised standards of behaviour. Some (mainly third world countries) countries support the national standard for the treatment of aliens.¹¹⁵ Some writers of international law have argued that aliens should be treated in the same way as the ordinary citizens of a country. Most (first world) countries, however, support the international standard for the treatments of aliens. The national treatment standard, primarily receives support from developing countries and the international minimum standard is supported by developed nations.

¹¹⁰ Umozurike (1999:132).

¹¹¹ Wallace (2005:198).

¹¹² See GA Res.144 (XL), G.A.O.R.,49th Session.

¹¹³ Wallace (2005:198).

¹¹⁴ Ibid 199.

¹¹⁵ Prevost (1996:136).

2.4.1. The national treatment standard

In the light of the national treatment standard foreigners „are entitled to the same treatment granted to nationals and nothing else. However, this type of treatment is seen as unfavourable to foreign nationals since the state can submit a foreigner to unacceptable situations and justify its conduct on its national laws which is forbidden under international law. In this sense, the national treatment standard may not take into account fundamental human rights entitled to foreigners and it can serve as a justification of states to escape international responsibility. Some writers have asserted that if national treatment standard applied consistently, this would be advantageous to non-nationals. However, international law does not regulate a state's treatment of non-nationals in all activities,¹¹⁶ for example non-nationals in Namibia may not vote nor may they be admitted to public office. Some of these rights are reserved for Namibian citizens or nationals, this includes the rights, privileges and benefits of citizenship, voting rights and the right to enter, remain and leave the Republic of Namibia as found in the Namibian Constitution.

Scholars of international law on the treatment of aliens have argued that that national treatment standard may be disadvantageous in some cases.¹¹⁷ This is because a state could subject a non-national to inhuman treatment and justify such treatment on the grounds that nationals could be treated similarly. It is noted from the case of *Roberts Claim*,¹¹⁸ where international tribunals have denied that a state can exonerate itself by pleading that nationals are treated in the same way in the event that the treatment of non-nationals falls short of the international minimum standard.¹¹⁹

¹¹⁶Wallace (2005:199).

¹¹⁷ Wallace (2005:199)

¹¹⁸*Roberts Claim* (1926) 4 R.I.A.A.77.

¹¹⁹ Wallace (2005:199).

2.4.2. International minimum standard

The international minimum standard treatment requires states to treat foreigners by observing the international minimum standards in so far as the application of national laws or polices have to comply with the standards of civilization in terms of international rules.¹²⁰ In present days there is an acceptance that the treatment of foreigners with regard to their personal rights should be based on the international minimum standard in which its content is in the international human rights instruments and customary international law.

It should be noted that the exact scope of this standard is not always clear but it can be accepted that the rights and guarantees accorded aliens should not be less than those recognised and defined in contemporary international instruments. Prevost refers to the United Nations General Assembly Declaration on the Human Rights of Individuals who are not Nationals in the Country in which they Live,¹²¹ which recognises that the human rights expounded in the Universal Declaration of Human Rights and other international instruments, should also accrue to individuals who are not nationals of the country in which they reside. These rights include non-discrimination on the ground of race, the prohibition of torture and of inhuman or degrading treatment or punishment, and the rights to fair trial.¹²² It is worth to note that to violate the international minimum standard, a state's treatment of foreign nationals must fall so short of established civilised behaviour that every reasonable and impartial man would readily recognise its insufficiency.¹²³

A state may incur international responsibility if a non-national is physically ill-treated, or if his or her property is damaged. Furthermore a state may also incur international responsibility if a non-national suffers maladministration of justice, for example where an alien is denied assistance of legal counsel or denied adequate protection.

Arbitral tribunals have, more than often than not, put the practice of states to the test of international standards. In *Neer's Claim*,¹²⁴ the commission stated that "the property of governmental acts should be put to the test of international standards. The treatment of an

¹²⁰ Dugard (2005:286).

¹²¹ Res 144 XL.

¹²² Prevost (1996:134).

¹²³ *Neer Claim* 1926 4 R.I.A.A.60.

¹²⁴ *Neer Claim US v Mexico* 1926 IV RIAA, 60.

alien in order to constitute international delinquency should amount to an outrage, to bad faith, to wilful neglect of duty, or to insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognise its insufficiency.’’

The emphasis has at one time been on assimilation of aliens, and nationals, when national treatment would be advantageous to aliens, and at another on creating for aliens special privileges, when it would be disadvantageous. Whether the alien enjoys a privilege or a disadvantageous position is a matter for municipal law alone to determine provided the position is compatible with the rules of International law.¹²⁵ The exponents of the equality of treatment thesis contend that aliens must be accorded the same treatment with respect to constitutional rights and guarantees as nationals.¹²⁶ It happens that most countries with constitutional guarantees do not discriminate between aliens and nationals, so that we say that in practice this relativity is established. The question that arises, however, is whether the equality of treatment emanates from municipal law exclusively, that is, from the constitution itself, or from international law to which the constitution conforms.

Some scholars of international law argued that once an alien is admitted, an alien becomes entitled to rights that make normal life. Namibia is a constitutional state boasting a supreme Constitution with a justiciable bill of rights. Although some rights are reserved for Namibian citizens¹²⁷, the majority of rights protect all individuals in Namibia, whether citizens or not. An alien is however, not entitled to complete equality in every respect with nationals. He or she may be barred from active politics. He or she may be denied the right to vote, own land, and to practice certain trades and professions.¹²⁸ It should be noted that international conventions and treaties have become increasingly important as guidelines for our courts in human rights issues. When Namibian courts are called upon to interpret the bill of rights embodied in the constitution, it must have regard to public international law where applicable. In terms of Article 144 of the Namibian Constitution provides that the general rules of public international law and international agreements binding upon Namibia under

¹²⁵ O’Connell (1971:283).

¹²⁶ O’Leary, S.1997.The principle of equal treatment on grounds on nationality in Article 6 EC a lucrative source of rights for member state nationals. In Dashwood & O’Leary,S.*The principle of Equal Treatment in E.C.Law*,London: Sweet & Maxwell,p.105.

¹²⁷Rights reserved for Namibian citizens are in Article 4 (the rights, privileges and benefits of citizenship,) Article 17 provides for political activity and this includes voting rights, Article 21 guarantees the right to enter, remain in and leave the country and the political rights contained in Article 17 of the Namibian Constitution.

¹²⁸ Umozurike (1999:132).

this Constitution shall form part of law of Namibia. Thus, under such circumstances, the court must refer to that to that body of public international law relating to the protection of human rights known as international human rights law.¹²⁹ This includes but not restricted, the so-called 'International Bill of Rights' (the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the African Charter on Human and People's Rights (ACHPR), Convention relating to the Status of Refugees of 1951 as well as the Protocol relating to the status of Refugees of 1967 and the Organisation of African Unity Convention Governing the Specific Aspects of Refugees in Africa of 1969. Namibia is state party to the above mentioned international agreements, and when a state becomes party to a treaty, it must observe its content.¹³⁰

In a South African case of *Nyamakazi v President of Bophuthatswana*,¹³¹ the court held international standard relating the treatment of aliens postulates that if a state admits an alien into its territory, it must conform in its treatment of him to the internationally determined standard. This means that the state should accord treatment to the alien which measures up to the ordinary standards of civilisation. The international standard of treatment of aliens applies in respect of fundamental human rights such as the right to life and integrity of persons but not to political rights, in respect of which an alien can only expect equality of treatment or even less than equality with that accorded to the state's own nationals. There is also a rule of international law which provides that a state may impose restrictions upon the exercise of certain rights by aliens admitted into its territory.¹³² A state may thus, impose restrictions upon the participation by aliens in political or public life, ownership of property by aliens or upon their taking employment. It should be noted that, even though under international law, aliens are not entitled to complete equality in every respect with nationals, restrictions imposed on aliens will be lawfully if those restrictions are not short of international minimum standards relating to the treatment of aliens.

¹²⁹ Prevost (1996:134).

¹³⁰ See Vienna Convention on the Law of Treaties (1969), Article 11-17.

¹³¹ 1992 (4) SA (B) at 579C-E. See Dugard (2005:219).

¹³² Ibid.

CHAPTER THREE EXPROPRIATION OF FOREIGN PROPERTY

The term nationalisation is preferred to expropriation which is also used to denote the taking over of foreign private property. It is generally recognised that, in the exercise of the right of *imminent domain*, a state can nationalise foreign-owned private property.¹³³ International law does not prohibit all interference with alien property by the state of the *situs* of such property, such *situs* being determined by the effective power to enforce measures against such property rather than by the fictions established in the conflict of law rules concerning the localisation of intangible rights.¹³⁴ However, the home state of the alien concern may consider this foreign investment of its national to be part of its national assets. This state will be able to resort to diplomatic protection and thereby assert a right of its own which its national cannot waive, even if the host state had made him sign a *Calvo Clause* by which he allegedly waives any diplomatic protection by his home state and submits to the exclusive jurisdiction of the host state.¹³⁵

Under international law a state will incur international responsibility for injury to the property of an alien as well as to her person. If a state arbitrarily confiscates the property of an alien without paying compensation, it is liable for violation of international minimum standard which provides for the payment of compensation in the event of expropriation of property.¹³⁶ The right to expropriate property is recognised under international law sovereignty right of the state. The Charter of Economic Rights and Duties of States (UN GA Res.3281 (XXIX) of Dec 12, 1974) claims that each state to “nationalise, expropriate or transfer ownership of foreign property, in when case appropriate compensation should be paid by the state adopting such measures, taking into account its relevant laws and regulation and all circumstances that the state considers pertinent. In any case where the questions of compensation giving rise to a controversy, it shall be settled under the domestic law of the nationalising state and by its tribunals, unless otherwise agreed”.¹³⁷ This UN Declaration gives each state the right to

¹³³ Umozurike (1993:137).

¹³⁴ Hovenveldern, I, S.1992. Aliens and Property, In Bernhardt, R. *Encyclopedia of Public International Law*, Volume One (A-D). Amsterdam: Elsevier Science Publishers, p.116.

¹³⁵ Hovenveldern (1992:116).

¹³⁶ Dugard (2005:220).

¹³⁷ Article 2(2)(c) of the Charter of Economic Rights and Duties of States (UN GA Res.3281 (XXIX) of Dec 12, 1974).

determine the amount of possible compensation and mode of payment. It therefore reaffirms a state's inalienable right to expropriate property and is silent on the duty to compensation.¹³⁸

The right to expropriate property is not absolute and international law seeks to place limitations on governments' discretionary powers in this regard. The General Assembly Resolution 1803 on Permanent Sovereignty over Natural Resources,¹³⁹ recognises the right of people and nations to permanent sovereignty over their natural wealth and resources. Paragraph 4 of the Resolution, which is regarded as reinforcing customary international law, provides: "Nationalisation, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognised as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation in accordance with the rules in force in the state taking such measures in the exercise of its sovereignty and in accordance with international law."

For expropriation to be lawful, it should be for public purposes, should not be discriminatory and should be accompanied by compensation assessed in accordance with the rules in force in the appropriate state and international law.¹⁴⁰ It should be noted that a state must not, through its officials or courts, injure an alien through injury to his property, an alien must also allowed access to courts in order to protect his property, and have equality before the law in doing so, a state's has a duty to protect aliens applies as much as their property as to their persons.¹⁴¹ A state's obligation to observe in its treatment of aliens certain minimum international standards applies also in respect of their property. It is worth to note that the rule is clearly established that a state is bound to respect the property of aliens, and that for their part aliens have the right to peaceful use and enjoyment of their property. This rule is however, qualified to an extent which is not wholly clear.¹⁴²

3.1. Compensation

Under international law, the payment of compensation is also a prerequisite for lawful expropriation of private property by a sovereign state. The right to expropriate is within the

¹³⁸ Umozurike (1999:142).

¹³⁹ 1962 G.A.O.R.,17th Session.

¹⁴⁰ Wallace (2005:203).

¹⁴¹ Robert & Arthur (1996:912).

¹⁴² Ibid.

competence of a sovereign state, but the compensation requirement imposes a legal condition on this competence.¹⁴³ The quantum of compensation due for the taking of the alien property has long been disputed between home states and host states. Authors have asserted that home states insist that investments by their nationalising be taken only “prompt, adequate and effective” compensation. This minimum standard is said to be owed to aliens no matter how the host state treats investments of its own nationals. In the case of *Anglo-Iranian Oil Co.* the court held that this formula that requires that compensation must be “prompt, adequate and effective” it means that the nationalising state should make payment in a currency that can be readily used that it should reflect the full value of the expropriated property, perhaps incorporating an element for future lost profits, and that it must be handed over within a reasonable time after the expropriation, failing which interest should be paid.¹⁴⁴

The host states claim to have a sovereign right to right to determine the amount of compensation owed according to their own preferences and that in any case the treatment accorded to a foreign property cannot be better than that accorded to that of that of their own nationals.¹⁴⁵

3.2. Public purpose

Expropriation for public purpose is the first requirement for lawful expropriation under international law. While the compensation requirement makes an expropriation that is non-discriminatory and for a public purpose conditionally legal, an expropriation that is discriminatory or not for a public purpose is illegal in itself, whether or not compensation is paid.¹⁴⁶ The requirements that expropriation should be for a public purpose for it to be lawful under international law was identified in *Certain German Interests in Polish Upper Silesia* case¹⁴⁷ and in *Amoco International Financial Corp. v Iran* the concept of a public purpose whereby expropriation is lawful remains undefined and consequently states enjoy considerable discretion in its application. In the *Liamco case*,¹⁴⁸ the arbitrator dismissed the

¹⁴³ Christina T.2004. *Legal analysis of farmland expropriation in Namibia*, Available at http://www.nid.org.na/pub_docs/no01_04.pdf;last accessed on 05 October 2011.

¹⁴⁴ *Anglo-Iranian Oil Co. Case* 1952,ICJ Report 93, 100.

¹⁴⁵ Hovenveldern (1992:117).

¹⁴⁶ Zongwe, D, P.2010. “The contribution of Campbell v Zimbabwe to the foreign investment law on expropriations” *NLJ*, Volume 1, 2010, p.37.

¹⁴⁷ P.C.I.J.Rep., ser.A, No.7 1929, p.22.

¹⁴⁸ 20. I.L.M.1.1974.

independent public purpose requirement on the grounds it is the general opinion in international law that the public utility principle is not necessary requisite for the legality of expropriation. In practice, public purpose has not been predominant in international claims, and where it has featured it has been of secondary importance.¹⁴⁹ Public purpose is a broad concept which is not readily susceptible to objective examination.

The author has noted that the small number of cases on the substance of *public purpose* may be imputable to the fact that an expropriating state can effortlessly couch any taking in terms of some ‘public purpose’.¹⁵⁰ In *Campbell*, the Government of Zimbabwe had formulated the taking of white- owned commercial farms in terms of “land resettlement purposes”¹⁵¹, which is without a doubt a legitimate government purpose.

3.3. Expropriation of land owned by foreigners in Namibia

Article 16(1) of the Namibian Constitution guarantees all persons the right to acquire, own and dispose of all forms of property in any part of Namibia. Article 16 (2) of the Namibian Constitution made provisions for expropriation of property. It provides for the state, or a competent body authorised by law, to expropriate property in the public interest, subject to payment of just compensation and in accordance with requirements and procedures to be determined by an Act of Parliament. The term public interest is not defined in the Namibian Constitution. The Agricultural (Commercial) Land Reform Act,¹⁵² was promulgated to provide for an expropriation policy as determined by Article 16 of the Namibia Constitution, allows in Article 14 (2) (a-d) for the compulsory acquisition of agricultural land classified as under-utilised, excessive or acquired by a foreign national, or of land where the application of the willing-seller, willing-buyer principal has failed.

The Agricultural Land Reform Act prohibits foreign nationals to enter into any agreement regarding the right to occupy or possess agricultural land or a portion thereof in Namibia, without the written permission and consent of the Minister. To date no further restrictions are

¹⁴⁹ Wallace (2005:204).

¹⁵⁰ Zongwe (2010:37-38).

¹⁵¹ *Mike Campbell (Pvt) Ltd & Others v The Republic of Zimbabwe*, SADC (T) Case No. 2/2007 (hereinafter *Campbell*).

¹⁵²The Agricultural (Commercial) Land Reform Act 6 of 1995

being placed on the acquisition of landownership by foreigners.¹⁵³ As long as a foreigner did not enter Namibia illegally, and his/her permit does not prohibit the acquisition of immovable property, he/she may certainly buy, own and sell real estate in Namibia.

The protection of the rights of foreigners whose land is earmarked for expropriation is properly a matter of international law. In this case the international standard must apply: expropriation must not be directed against the nationals of only one state, but should rather be directed against all persons in possession of property, the expropriation of which is deemed to be in the public interest. According to the Permanent Court of International Justice, “the form of discrimination which is forbidden is therefore discrimination based upon nationality and involving differential treatment by reason of their nationality as between persons belonging to different national groups.”¹⁵⁴

3.4. Application of international and comparative criteria to Namibian law

In our law the term “public interest” in Article 16 (2) of the Namibian Constitution has been defined to include expropriations for land reform and resettlement programmes. The Agricultural (Commercial) Land Reform Act defines the expropriation policy. “Public interest” is defined to include the possibility of title being transferred to other private individuals, as this outcome would occur in the context of restitution or redistribution. The government can therefore generally exercise the power of expropriation for its resettlement and agrarian reform schemes.

In terms of the Namibian Constitution, expropriation will be lawful, provided that the conditions of public interest and just compensation are met. The Agricultural (Commercial) Land Reform Act is, however, the legal foundation for expropriation and its stipulations must therefore be adhered to. Furthermore the introduction of a new land reform policy, as announced by the government, lies within its discretion, as long as the policy is in line with the principle of public interest, is generally applicable as required by Article 22 (a) of the Namibian Constitution and is neither arbitrary nor discriminatory.

¹⁵³ *Investing in Namibia*. Available at http://www.namibia-realestate.com/index.php?option=com_content&view=article&id=21:investing-in-namibia&catid=1:info&Itemid=6; last accessed on 04 October 2011.

¹⁵⁴ Christina (2004:10).

As mentioned earlier in this paper is that under international law, the payment of compensation is also a prerequisite for lawful expropriation of private property by a sovereign state. The right to expropriate is within the competence of a sovereign state, but the compensation requirement imposes a legal condition on this competence. Article 16 (2) of the Namibian Constitution provides that expropriation of property must be in the public interest and must be subject to the payment of “just compensation”. Article 25 of the Agricultural (Commercial) Land Reform Act made provisions for compensation for expropriation. Although the Agricultural (Commercial) Land Reform Act does not specify the amount of compensation to be paid for land that is expropriated, it is worth noting that the Act established relevant criteria for the assessment of the amount of compensation.¹⁵⁵

The law on expropriation of property under international law requires that compensation must be “prompt, adequate and effective” it means that the nationalising state should make payment in a currency that can be readily used that it should reflect the full value of the expropriated property, perhaps incorporating an element for future lost profits, and that it must be handed over within a reasonable time after the expropriation, failing which interest should be paid. Article 16(2) of the Namibian Constitution provides for the state, or a competent body authorised by law, to expropriate property in the public interest, subject to payment of just compensation and in accordance with requirements and procedures to be determined by an Act of Parliament. Article 16 of the Namibian Constitution does not provide for the quantum of compensation due for the taking of the property. Article 25 (5) (a) of the Agricultural Commercial Land Reform Act stipulates that the enhancement of the value of the property as consequence of the use thereof must be taken into consideration, while according to Article 25 (5) (b), improvements made after the date on which the expropriation notice is served shall not be taken into account. In the case of agricultural land, however, the amount of compensation should, according to Article 25 (1) (a) (i) and (ii), not exceed the aggregate of the amount which the land would have realised if sold on the date of notice on the open market on a willing-seller, willing-buyer basis on the one hand, and the amount that would be required to fully compensate for the actual financial loss caused by the expropriation, on the other.

¹⁵⁵ Ibid 9.

A landmark case on the expropriation of property or foreign owned property is the case of *Kessl v Ministry of Lands Resettlement and Others and Two Similar cases*¹⁵⁶ dealt with expropriation of property in Namibia. In this case, the farm of a foreign national, German national was earmarked for expropriation. The court was called to decide on what constitutes lawful expropriation in terms of Article 16 (2) of the Namibian Constitution and Agricultural Commercial Land Reform Act. In this case the court held that Article 16 (2) of the Namibian Constitution gives the government the right to expropriate land. However, this right not excluding fair procedure as required by Article 18 of the Namibian Constitution, which provides for *audi alteram partem* principle and failure to apply audi principle, might lead to declaration that expropriation invalid. The court laid down guidelines for procedure in expropriation.

The Agricultural (Commercial) Land Reform Act of 1995 regulates purchase and redistribution of privately owned farms on the basis of purchase of willing buyer/willing seller. Section 14 of the Act provides for the purchase of land by the government and provides the appropriate notice to be given. This is not part of the expropriation process, but in the event of expropriation of property, a section 14 notice is a prerequisite. Section 20 of the Act deals with the expropriation of property and giving of the required notice. The court held that Article 18 of the Constitution cannot be disregarded during the process of expropriation of property in terms of Article 16(2), even if it is in the public interest to expropriate such property. Although expropriation usually takes place as part of the state's eminent domain, the requirements of both Article 16 (2) and 18 must still be adhered to. The application of the principle of *audi alteram partem* is prerequisite before a minister takes a decision, in terms of the Act, to expropriate. Failure to do so may lead to a declaration that the action of the minister invalid. In *Cultura 2000 and Another v The Government of the Republic of Namibia and Others*,¹⁵⁷ the Namibian High Court confirmed that a guarantee in Article 16 (1) applies to all persons, including both natural and juristic persons, such as companies and also that the guarantee refers to both tangible and intangible property.

It should be noted that as far as expropriation is concerned in Namibia, the expropriation policy regarding land acquired by foreigners in Namibia is, however, not directed against the nationals of only one state, but against foreigners in general, so that Namibian nationals enjoy

¹⁵⁶ 2008 (1) NR 167.

¹⁵⁷ 1992 NR 110 (HC)

an advantage over foreigners with respect to land ownership and acquisition. Colonisation and unlawful land acquisition by foreigners many years ago, necessitates the disadvantaging of foreigners regarding the sensitive issue of land redistribution in order to redress the wrongs of the past and actively advantage the formerly disadvantaged. The inclusion of foreigners in the group of people whose land might be legally expropriated is not discriminatory in terms of international law, provided that just compensation is paid in accordance with international rules.

CHAPTER FOUR CONCLUSIONS AND RECOMMENDATIONS

Since a state need not receive aliens at all, it can receive them only under certain conditions. Most states distinguish between aliens intending to settle in the country, and such as intend only to travel in the country, the former are often subject to stringent controls before being allowed to settle in the country, or to take up employment in it, while aliens who are merely travelling are normally allowed to do so subject only to visa regulations.¹⁵⁸ If an alien is admitted, he or she may be expelled, but mistreatment is not permitted in the process of expulsion. States can exercise diplomatic protection in direct injury or in indirect injury; in direct injury, they need not meet all the requirements of diplomatic protection, for instance, exhaustion domestic remedies.¹⁵⁹ As a general rule, in indirect injury states are required to meet all the requirements, namely nationality of the individual in relation to the intervening state, exhaustion of local remedies in the defendant state by the individual and existence of an internationally wrongful conduct committed by the defendant state considered as such under international law.

The state in whose territory an alien resides must afford his person and property at least that level of protection which is sufficient to meet those minimum international standards prescribed by international law, and must grant him at least equality before the law with its own nationals as far as safety of person and property is concerned.¹⁶⁰ An alien must in particular not be wronged in person or property by the officials or courts of a state.

States share different points of views as concerns to the treatment of foreigners. Some of them defend the national treatment standard and the others are for the international minimum standard. The former type of treatment requires that both foreigners and nationals receive the same treatment. Stated differently, laws, polices of a state apply in the same circumstances to foreigners and non-foreigners under its jurisdictions regardless of being advantageous or not.¹⁶¹ The latter position implies that states in their territories have to comply with standards of civilised treatment in relation to foreigners by observing customary international law, international human rights treaties or their commitment in the international sphere. Additionally, in case of mistreatment of a foreigner in a manner that contradicts with those standards the state of nationality of the individual may intervene on his or her behalf.

¹⁵⁸ Robert & Arthur (1996:898).

¹⁵⁹ Durgard (2005:218).

¹⁶⁰ Robert & Arthur (1996:910-911).

¹⁶¹Wallace (2005:198-199)

It is categorically clear that the presence of foreigners in Namibia is useful. Looking at the tourism industry, foreigners bring in foreign exchange. In this sense, Namibia's legal obligations to protect the aforesaid people arise as being a state party to international human rights treaties, specifically to ICCPR, ICESCR, CERD, the Convention relating to the Status of Refugees of 1951 as well as the Protocol relating to the status of Refugees of 1967 and the Organisation of African Unity Convention Governing the Specific Aspects of Refugees in Africa of 1969, and ACHPR. In brief, these instruments oblige Namibia to ensure safety of everyone in its territory.

On the other hand, its legal obligations to protect foreigners as provided in terms of its 1990 Constitution which includes foreigners in the enjoyment of rights enshrined therewith by referring to terms *inter alia*, „everyone and „all people. However, some of the rights and freedoms are reserved for Namibian citizens only. The international standard of treatment of aliens applies in respect of fundamental human rights such as the right to life and integrity of persons but not to political rights, in respect of which an alien can only expect equality of treatment or even less than equality with that accorded to the state's own nationals.

In terms of our law, international conventions and agreements have become increasingly important as guidelines for our courts in human rights issues. When a Namibian court is called upon to interpret the bill of rights entrenched in the Namibian Constitution, it must have regard to public international law where applicable because general principles of public international law are part of our law in terms of Article 144. Under such circumstances, the court must refer to that body of public international human rights law.

The Namibian Constitution is founded upon on the principle of equality, non-discrimination and the respect for human rights for all, it has a justiciable bill of rights. Although some rights are reserved for Namibians only, the majority of the rights protect all individuals in Namibia, whether citizens or not. In our law all persons including aliens have to be treated in accordance with national laws and general principles of public international law, and any law which contradicts the spirit and purpose of the Namibian Constitution will be declared invalid. Thus, it is worth to note that our laws are to a certain extent not in conflict with the general principles of public international law in relation to the treatment of aliens. The protection of non-nationals is a guaranteed right in our law. In conclusion, it can be said that the rules defined by the Namibian Constitution and other relevant law relating to the

treatment of aliens are in line with international law. Therefore it is up to the government to abide by the rules and to treat aliens in accordance with national law and contemporary international law.

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