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Summary
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24 May 2007

Ahmadou Sadio Diallo
(Republic of Guinea v. Democratic Republic of the Congo)

Preliminary Objections

Summary of the Judgment of 24 May 2007

History of proceedings and submissions of the Parties (paras. 1-12)

The Court begins by recapitulating the various stages of the proceedings (this history may be found in Press Release No. 2006/36 of 9 November 2006). It also recalls the final submissions presented by the Parties at the oral proceedings (see Press Release No. 2006/41 of 1 December 2006).

Background to the case (paras. 13-25)

The Court indicates that, in their written pleadings, the Parties are in agreement as to the following facts. Mr. Ahmadou Sadio Diallo, a Guinean citizen, settled in the DRC (called "Congo" between 1960 and 1971 and "Zaire" between 1971 and 1997) in 1964. There, in 1974, he founded an import-export company, Africom-Zaire, a société privée à responsabilité limitée (private limited liability company, hereinafter "SPRL") incorporated under Zairean law and entered in the Trade Register of the city of Kinshasa, and he became its gérant (manager). In 1979 Mr. Diallo expanded his activities, taking part, as gérant of Africom-Zaire and with backing from two private partners, in the founding of another Zairean SPRL, specializing in the containerized transport of goods. The capital in the new company, Africontainers-Zaire, was held as follows: 40 per cent by Mr. Zala, a Zairean national; 30 per cent by Ms Dewast, a French national; and 30 per cent by Africom-Zaire. It too was entered in the Trade Register of the city of Kinshasa. In 1980 Africom-Zaire's two partners in Africontainers-Zaire withdrew. The parts sociales in Africontainers-Zaire were then held as follows: 60 per cent by Africom-Zaire and 40 per cent by Mr. Diallo. At the same time Mr. Diallo became the gérant of Africontainers-Zaire. Towards the end of the 1980s, Africom-Zaire's and Africontainers-Zaire's relationships with their business partners started to deteriorate. The two companies, acting through their gérant, Mr. Diallo, then initiated various steps, including judicial ones, in an attempt to recover alleged debts. The various disputes between Africom-Zaire or Africontainers-Zaire, on the one hand, and their business partners, on the other, continued throughout the 1990s and for the most part remain unresolved today. Thus, Africom-Zaire claims payment from the DRC of a debt (acknowledged by the DRC) resulting from default in payment for deliveries of listing paper to the Zairean State between 1983 and 1986. Africom-Zaire is involved in another dispute, concerning arrears or overpayments of rent, with Plantation Lever au Zaire ("PLZ"). Africontainers-Zaire is in dispute with the companies Zaire

Fina, Zaire Shell and Zaire Mobil Oil, as well as with the Office National des Transports ("ONATRA") and Générale des Carrières et des Mines ("Gécamines"). For the most part these differences concern alleged violations of contractual exclusivity clauses and the lay-up, improper use or destruction or loss of containers.

The Court considers the following facts also to be established. On 31 October 1995, the Prime Minister of Zaire issued an expulsion Order against Mr. Diallo. The Order gave the following reason for the expulsion: Mr. Diallo's "presence and conduct have breached public order in Zaire, especially in the economic, financial and monetary areas, and continue to do so". On 31 January 1996, Mr. Diallo, already under arrest, was deported from Zaire and returned to Guinea by air. The removal from Zaire was formalized and served on Mr. Diallo in the shape of a notice of refusal of entry (refoulement) on account of "illegal residence" (séjour irrégulier) that had been drawn up at the Kinshasa airport on the same day.

However, throughout the proceedings Guinea and the DRC continued to differ on a number of other facts, inter alia the specific circumstances of Mr. Diallo's arrest, detention and expulsion and the reasons therefor. Guinea maintained that Mr. Diallo's arrest, detention and expulsion were the culmination of a DRC policy to prevent him from recovering the debts owed to his companies. The DRC rejected that allegation and argued that his expulsion was justified by the fact that his presence and conduct breached public order in Zaire.

Violations of rights invoked by Guinea for which it seeks to exercise diplomatic protection (paras. 26-31)

The Court notes that Guinea, as well as claiming the payment of debts due to Mr. Diallo and his companies, seeks to exercise its diplomatic protection on behalf of Mr. Diallo for the violation, alleged to have occurred at the time of his arrest, detention and expulsion, or to have derived therefrom, of three categories of rights: his individual personal rights, his direct rights as associé in Africom-Zaire and Africontainers-Zaire and the rights of those companies, by "substitution".

Jurisdiction of the Court (para. 32)

To establish the jurisdiction of the Court, Guinea relies on the declarations made by the Parties under Article 36, paragraph 2, of the Statute. The DRC acknowledges that the declarations are sufficient to found the jurisdiction of the Court in the present case. The DRC nevertheless challenges the admissibility of Guinea's Application and raises two preliminary objections in doing so. First of all, according to the DRC, Guinea lacks standing to act in the current proceedings since the rights which it seeks to protect belong to Africom-Zaire and Africontainers-Zaire, Congolese companies, not to Mr. Diallo. Guinea, it is argued, is further precluded from exercising its diplomatic protection on the ground that neither Mr. Diallo nor the companies have exhausted the remedies available in the Congolese legal system to obtain reparation for the injuries claimed by Guinea before the Court.

Admissibility of the Application in so far as it concerns the protection of Mr. Diallo's rights as an individual (paras. 33-48)

The Court recalls that, according to the DRC, Guinea's claims in respect of Mr. Diallo's rights as an individual are inadmissible because he "[has not] exhausted the available and effective local remedies existing in Zaire, and subsequently in the Democratic Republic of the Congo". The Court notes, however, that in the course of the present proceedings the DRC elaborated on only a single aspect of that objection: that concerning his expulsion from Congolese territory. It indicates that on this subject the DRC maintained that its domestic legal system provided for available, effective remedies which Mr. Diallo should have exhausted, and that his expulsion from the territory was lawful. The DRC acknowledges that the notice signed by the immigration officer "inadvertently" refers to "refusal of entry" (refoulement) instead of "expulsion". It does not

challenge Guinea's assertion that Congolese law provides that refusals of entry are not appealable. The DRC nevertheless maintains that "despite this error, it is indisputable . . . that this was indeed an expulsion and not a refusal of entry". According to the DRC, calling the action a refusal of entry was therefore not intended to deprive Mr. Diallo of a remedy.

Guinea responds, with respect to Mr. Diallo's expulsion from the Congolese territory, that there were no effective remedies first in Zaire, nor later in the DRC, against this measure. It recalls that the expulsion Order against Mr. Diallo was carried out by way of an action denominated "refusal of entry", which precluded any possibility of redress. Guinea adds, moreover, that "[a]dministrative or other remedies which are neither judicial nor quasi-judicial and are discretionary in nature are not . . . taken into account by the local remedies rule". Guinea further contends that, even though some remedies may in theory have been available to Mr. Diallo in the Congolese legal system, they would in any event have offered him no reasonable possibility of protection at the time as the objective in expelling Mr. Diallo was precisely to prevent him from pursuing legal proceedings.

The Court recalls that under customary international law, diplomatic protection "consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility" (Article 1 of the draft Articles on Diplomatic Protection adopted by the International Law Commission (ILC) at its Fifty-eighth Session (2006)). In the present case, it falls to the Court to ascertain whether the Applicant has met the requirements for the exercise of diplomatic protection, that is to say whether Mr. Diallo is a national of Guinea and whether he has exhausted the local remedies available in the DRC.

On the first point, the Court observes that it is not disputed by the DRC that Mr. Diallo's sole nationality is that of Guinea and that he has continuously held that nationality from the date of the alleged injury to the date the proceedings were initiated.

On the second point, the Court notes, as it stated in the Interhandel (Switzerland v. United States of America) case, that "[t]he rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law" which "has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law."

The Court observes that the Parties do not question the local remedies rule; they do however differ as to whether the Congolese legal system actually offered local remedies which Mr. Diallo should have exhausted before his cause could be espoused by Guinea before the Court. More specifically, the Court indicates that, in matters of diplomatic protection, it is incumbent on the applicant to prove that local remedies were indeed exhausted or to establish that exceptional circumstances relieved the allegedly injured person whom the applicant seeks to protect of the obligation to exhaust available local remedies. It is for the respondent to convince the Court that there were effective remedies in its domestic legal system that were not exhausted.

In view of the arguments made by the Parties, the Court addresses the question of local remedies solely in respect of Mr. Diallo's expulsion. It notes that the expulsion was characterized as a "refusal of entry" when it was carried out, as both Parties have acknowledged and as is confirmed by the notice drawn up on 31 January 1996 by the national immigration service of Zaire. It is apparent that refusals of entry are not appealable under Congolese law. Article 13 of Legislative Order No. 83-033 of 12 September 1983, concerning immigration control, expressly states that the "measure [refusing entry] shall not be subject to appeal". The Court considers that the DRC cannot now rely on an error allegedly made by its administrative agencies at the time Mr. Diallo was "refused entry" to claim that he should have treated the measure as an expulsion.

Mr. Diallo, as the subject of the refusal of entry, was justified in relying on the consequences of the legal characterization thus given by the Zairean authorities, including for purposes of the local remedies rule.

The Court further observes that, even if this was a case of expulsion and not refusal of entry, the DRC has also failed to show that means of redress against expulsion decisions are available under its domestic law. The DRC did, it is true, cite the possibility of requesting reconsideration by the competent administrative authority. The Court nevertheless recalls that, while the local remedies that must be exhausted include all remedies of a legal nature, judicial redress as well as redress before administrative bodies, administrative remedies can only be taken into consideration for purposes of the local remedies rule if they are aimed at vindicating a right and not at obtaining a favour, unless they constitute an essential prerequisite for the admissibility of subsequent contentious proceedings. Thus, the possibility open to Mr. Diallo of submitting a request for reconsideration of the expulsion decision to the administrative authority having taken it — that is to say the Prime Minister — in the hope that he would retract his decision as a matter of grace cannot be deemed a local remedy to be exhausted.

Having established that the DRC has not proved the existence in its domestic legal system of available and effective remedies allowing Mr. Diallo to challenge his expulsion, the Court concludes that the DRC's objection to admissibility based on the failure to exhaust local remedies cannot be upheld in respect of that expulsion.

Admissibility of the Application in so far as it concerns protection of Mr. Diallo's direct rights as "associé" in Africom-Zaire and Africontainers-Zaire (paras. 49-75)

The Court indicates that the DRC raises two objections to admissibility regarding this aspect of the Application: the DRC contests Guinea's standing, and it suggests that Mr. Diallo has not exhausted the local remedies that were available to him in the DRC to assert his rights. The Court deals with these objections in turn.

— Guinea's standing (paras. 50-67)

The DRC accepts that under international law the State of nationality has the right to exercise its diplomatic protection in favour of associés or shareholders when there is an injury to their direct rights as such. It nonetheless contends that "international law allows for [this] protection . . . only under very limited conditions which are not fulfilled in the present case". The DRC maintains first of all that Guinea is not seeking, in this case, to protect the direct rights of Mr. Diallo as associé, but that it identifies a violation of the rights of Africom-Zaire and Africontainers-Zaire with a violation of the rights of Mr. Diallo. The DRC further asserts that action to protect the direct rights of shareholders as such applies to only very limited cases and, relying on the Judgment of the Court in the Barcelona Traction case, contends that the only acts capable of violating those rights would consequently be "acts of interference in relations between the company and its shareholders". For the DRC, therefore, the arrest, detention and expulsion of Mr. Diallo could not constitute acts of interference on its part in relations between the associé Mr. Diallo and the companies Africom-Zaire and Africontainers-Zaire. As a result, they could not injure Mr. Diallo's direct rights. The DRC thus indicates that Mr. Diallo could very well have exercised his rights from foreign territory and that he could have delegated his tasks to local administrators.

Guinea also refers to the Judgment in the Barcelona Traction case, in which the Court, having ruled that "an act directed against and infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected", added that "[t]he situation is different if the act complained of is aimed at the direct rights of the shareholder as such". Guinea further claims that this position of the Court was taken up in Article 12 of the ILC's draft Articles on Diplomatic Protection. Guinea points out that, in SPRLs, the parts sociales "are

not freely transferable", which "considerably accentuates the intuitu personae character of these companies" and emphasizes that this character is seen as even more marked in the case of Africom-Zaire and Africontainers-Zaire, since Mr. Diallo was their "sole manager (gérant) and sole associé (directly or indirectly)". According to Guinea, "in fact and in law it was virtually impossible to distinguish Mr. Diallo from his companies" and the arrest, detention and expulsion of Mr. Diallo not only had the effect "of preventing him from continuing to administer, manage and control any of the operations" of his companies, but were specifically motivated by the intent to prevent him from exercising these rights, from pursuing the legal proceedings brought on behalf of the companies, and thereby from recovering their debts. Finally, Guinea maintains that, contrary to what is claimed by the DRC, Mr. Diallo could not validly exercise his direct rights as shareholder from his country of origin.

Noting that the Parties have referred to the Barcelona Traction case, the Court recalls that this involved a public limited company whose capital was represented by shares, while the present case concerns SPRLs whose capital is composed of parts sociales. In order to establish the precise legal nature of Africom-Zaire and Africontainers-Zaire, the Court must refer to the domestic law of the DRC. It indicates that Congolese law accords an SPRL independent legal personality distinct from that of its associés, particularly in that the property of the associés is completely separate from that of the company, and in that the associés are responsible for the debts of the company only to the extent of the resources they have subscribed. Consequently, the company's debts receivable from and owing to third parties relate to its respective rights and obligations.

The Court recalls that the exercise by a State of diplomatic protection on behalf of a natural or legal person, who is associé or shareholder, having its nationality, seeks to engage the responsibility of another State for an injury caused to that person by an internationally wrongful act committed by that State. What amounts to the internationally wrongful act, in the case of associés or shareholders, is the violation by the respondent State of their direct rights in relation to a legal person, direct rights that are defined by the domestic law of that State. On this basis, diplomatic protection of the direct rights of associés of an SPRL or shareholders of a public limited company is not to be regarded as an exception to the general legal régime of diplomatic protection for natural or legal persons, as derived from customary international law.

Having considered the arguments advanced by the Parties, the Court finds that Guinea does indeed have standing in this case in so far as its action involves a person of its nationality, Mr. Diallo, and is directed against the allegedly unlawful acts of the DRC which are said to have infringed his rights, particularly his direct rights as associé of the two companies Africom-Zaire and Africontainers-Zaire. The Court notes that Mr. Diallo, who was associé in both companies, also held the position of gérant in each of them. An associé of an SPRL holds parts sociales in its capital, while the gérant is an organ of the company acting on its behalf.

In view of the foregoing, the Court concludes that the objection of inadmissibility raised by the DRC due to Guinea's lack of standing to protect Mr. Diallo cannot be upheld in so far as it concerns his direct rights as associé of Africom-Zaire and Africontainers-Zaire.

— Non-exhaustion of local remedies (paras. 68-75)

The DRC further claims that Guinea cannot exercise its diplomatic protection for the violation of Mr. Diallo's direct rights as associé of Africom-Zaire and Africontainers-Zaire in so far as he has not attempted to exhaust the local remedies available in Congolese law for the alleged breach of those specific rights. It submits in this respect that "Mr. Diallo's absence from Congolese territory was not an obstacle [in Congolese law] to the proceedings already initiated when Mr. Diallo was still in the Congo" or for him to bring other proceedings, and that Mr. Diallo could also have appointed representatives to that end. The DRC also asserts that the existing remedies available in the Congolese legal system are effective.

For its part, Guinea alleges that "the Congolese State deliberately chose to deny access to its territory to Mr. Diallo because of the legal proceedings that he had initiated on behalf of his companies". It maintains that "[i]n these circumstances, to accuse Mr. Diallo of not having exhausted the remedies would not only be manifestly 'unreasonable' and 'unfair', but also an abuse of the rule regarding the exhaustion of local remedies". According to Guinea, the circumstances of Mr. Diallo's expulsion moreover precluded him from pursuing local remedies on his own behalf or on that of his companies. Guinea further emphasizes that the existing remedies in the Congolese legal system are ineffective in view, inter alia, of excessive delays, "unlawful administrative practices" and the fact that "at the time of the events, the enforcement of legal decisions depended solely on the government's goodwill".

The Court notes that the alleged violation of Mr. Diallo's direct rights as associé was dealt with by Guinea as a direct consequence of his expulsion. The Court has already found that the DRC has not proved that there were effective remedies, under Congolese law, against the expulsion Order. The Court further observes that at no time has the DRC argued that remedies distinct from those in respect of Mr. Diallo's expulsion existed in the Congolese legal system against the alleged violations of his direct rights as associé and that he should have exhausted them. According to the Court, the Parties indeed devoted some discussion to the question of the effectiveness of local remedies in the DRC but have confined themselves in it to examining remedies open to Africom-Zaire and Africontainers-Zaire, without considering any which may have been open to Mr. Diallo as associé in the companies. Inasmuch as it has not been argued that there were remedies that Mr. Diallo should have exhausted in respect of his direct rights as associé, the question of the effectiveness of those remedies does not in any case arise.

The Court thus concludes that the objection as to inadmissibility raised by the DRC on the ground of the failure to exhaust the local remedies against the alleged violations of Mr. Diallo's direct rights as associé of the two companies Africom-Zaire and Africontainers-Zaire cannot be upheld.

Admissibility of the Application in so far as it concerns the exercise of diplomatic protection with respect to Mr. Diallo "by substitution for" Africom-Zaire and Africontainers-Zaire (paras. 76-95)

The Court notes that here too the DRC raises two objections to the admissibility of Guinea's Application, derived respectively from Guinea's lack of standing and the failure to exhaust local remedies. The Court again addresses these issues in turn.

— Guinea's standing (paras. 77-94)

The DRC contends that Guinea cannot invoke "'considerations of equity' in order to justify 'the right to exercise its diplomatic protection [in favour of Mr. Diallo and by substitution for Africom-Zaire and Africontainers-Zaire] independently of the violation of the direct rights [of Mr. Diallo]'" on the ground that the State whose responsibility is at issue is also the State of nationality of the companies concerned. Diplomatic protection "by substitution" is said by the DRC to go "far beyond what positive international law provides" and neither the Court's jurisprudence nor State practice recognizes such a possibility. The DRC even goes as far as to assert that Guinea is in reality asking the Court to authorize it to exercise its diplomatic protection in a manner contrary to international law. In this connection, it indicates that the Court should dismiss any possibility of resorting to equity contra legem. The DRC also points out that Guinea has not demonstrated that protection of the shareholder "in substitution" for the company which possesses the nationality of the respondent State would be justified in the present case. According to the DRC, such protection by substitution would in fact lead to a discriminatory régime of protection, resulting as it would in the unequal treatment of the shareholders. Lastly, the DRC

maintains that application of protection "by substitution" to the case of Mr. Diallo would prove "fundamentally inequitable", in view of his personality and conduct, which are "far from irreproachable".

For its part, Guinea observes that it is not asking the Court to resort to equity contra legem, but it contends that, in the Barcelona Traction case, the Court referred, in a dictum, to the possibility of an exception, founded on reasons of equity, to the general rule of the protection of a company by its national State, "when the State whose responsibility is invoked is the national State of the company". Guinea contends that the existence of the rule of protection by substitution and its customary nature are confirmed by numerous arbitral awards. Further, according to Guinea, "[s]ubsequent practice [following Barcelona Traction], conventional or jurisprudential . . . has dispelled any uncertainty . . . on the positive nature of the 'exception'". Finally Guinea claims that the application of protection by substitution is particularly appropriate in this case, as Africom-Zaire and Africontainers-Zaire are SPRLs, which have a marked intuitu personae character and which, moreover, are statutorily controlled and managed by one and the same person. Further, it especially points out that Mr. Diallo was bound, under Zairean legislation, to incorporate the companies in Zaire.

The Court recalls that, as regards diplomatic protection, the principle as emphasized in the Barcelona Traction case, is that: "Not a mere interest affected, but solely a right infringed involves responsibility, so that an act directed against and infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected." (I.C.J. Reports 1970, p. 36, para. 46.) Since its dictum in the aforementioned case, the Court notes that it has not had occasion to rule on whether, in international law, there is indeed an exception to the general rule "that the right of diplomatic protection of a company belongs to its national State", which allows for protection of the shareholders by their own national State "by substitution", and on the reach of any such exception. It observes that in the case concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy), the Chamber of the Court allowed a claim by the United States of America on behalf of two United States corporations (who held 100 per cent of the shares in an Italian company), in relation to alleged acts by the Italian authorities injuring the rights of the latter company. However, the Court recalls that in doing so, the Chamber based itself not on customary international law but on a Treaty of Friendship, Commerce and Navigation between the two countries directly granting to their nationals, corporations and associations certain rights in relation to their participation in corporations and associations having the nationality of the other State.

The Court examines whether the exception invoked by Guinea is part of customary international law. It notes in this respect that the role of diplomatic protection has somewhat faded, as in practice recourse is only made to it in rare cases where treaty régimes do not exist or have proved inoperative. According to the Court, the theory of protection by substitution seeks to offer protection to the foreign shareholders of a company who could not rely on the benefit of an international treaty and to whom no other remedy is available, the allegedly unlawful acts having been committed against the company by the State of its nationality. Protection by "substitution" would therefore appear to constitute the very last resort for the protection of foreign investments. Having examined State practice and decisions of international courts and tribunals, it is of the opinion that these do not reveal — at least at the present time — an exception in customary international law allowing for protection by substitution, such as is relied on by Guinea. The Court adds that the fact invoked by Guinea that various international agreements have established special legal régimes governing investment protection, or that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary.

The Court then turns to the question of whether customary international law contains a more limited rule of protection by substitution, such as that set out by the ILC in its draft Articles on Diplomatic Protection, which would apply only where a company's incorporation in the State having committed the alleged violation of international law "was required by it as a precondition for doing business there" (Article 11, paragraph (b)). However, this very special case does not seem to correspond to the one the Court is dealing with here. The Court observes that it appears natural that Africom-Zaire and Africontainers-Zaire were created in Zaire and entered in the Trade Register of the city of Kinshasa by Mr. Diallo, who had settled in the country in 1964. Furthermore, and above all it has not satisfactorily been established before the Court that their incorporation in that country, as legal entities of Congolese nationality, would have been required of their founders to enable the founders to operate in the economic sectors concerned. The Court thus concludes that the two companies were not incorporated in such a way that they would fall within the scope of protection by substitution in the sense of Article 11, paragraph (b), of the ILC draft Articles on Diplomatic Protection. Therefore, the question of whether or not this paragraph of Article 11 reflects customary international law does not arise in this case.

The Court cannot accept Guinea's claim to exercise diplomatic protection by substitution. It is therefore the normal rule of the nationality of the claims which governs the question of the diplomatic protection of Africom-Zaire and Africontainers-Zaire. The companies in question have Congolese nationality.

The objection as to inadmissibility raised by the DRC owing to Guinea's lack of standing to offer Mr. Diallo diplomatic protection as regards the alleged unlawful acts of the DRC against the rights of the two companies Africom-Zaire and Africontainers-Zaire is consequently well founded and must be upheld.

— Non-exhaustion of local remedies (para. 95)

Having concluded that Guinea is without standing to offer Mr. Diallo diplomatic protection as regards the alleged unlawful acts of the DRC against the rights of the companies Africom-Zaire and Africontainers-Zaire, the Court need not further consider the DRC's objection based on the non-exhaustion of local remedies.

Findings (para. 96)

In view of all the foregoing, the Court concludes that Guinea's Application is admissible in so far as it concerns protection of Mr. Diallo's rights as an individual and his direct rights as associé in Africom-Zaire and Africontainers-Zaire.

Further proceedings (para. 97)

The Court indicates that, in accordance with Article 79, paragraph 7, of the Rules of Court as adopted on 14 April 1978, time-limits for the further proceedings shall subsequently be fixed by Order of the Court.

Operative paragraph (para. 98)

"For these reasons,

THE COURT,

(1) As regards the preliminary objection to admissibility raised by the Democratic Republic of the Congo for lack of standing by the Republic of Guinea to exercise diplomatic protection in the present case:

(a) unanimously,

Rejects the objection in so far as it concerns protection of Mr. Diallo's direct rights as associé in Africom-Zaire and Africontainers-Zaire;

(b) by fourteen votes to one,

Upholds the objection in so far as it concerns protection of Mr. Diallo in respect of alleged violations of rights of Africom-Zaire and Africontainers-Zaire;

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Bennouna, Skotnikov; Judge ad hoc Mampuya;

AGAINST: Judge ad hoc Mahiou;

(2) As regards the preliminary objection to admissibility raised by the Democratic Republic of the Congo on account of non-exhaustion by Mr. Diallo of local remedies:

(a) unanimously,

Rejects the objection in so far as it concerns protection of Mr. Diallo's rights as an individual;

(b) by fourteen votes to one,

Rejects the objection in so far as it concerns protection of Mr. Diallo's direct rights as associé in Africom-Zaire and Africontainers-Zaire;

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Bennouna, Skotnikov; Judge ad hoc Mahiou;

AGAINST: Judge ad hoc Mampuya;

(3) In consequence,

(a) unanimously,

Declares the Application of the Republic of Guinea to be admissible in so far as it concerns protection of Mr. Diallo's rights as an individual;

(b) by fourteen votes to one,

Declares the Application of the Republic of Guinea to be admissible in so far as it concerns protection of Mr. Diallo's direct rights as associé in Africom-Zaire and Africontainers-Zaire;

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Bennouna, Skotnikov; Judge ad hoc Mahiou;

AGAINST: Judge ad hoc Mampuya;

(c) by fourteen votes to one,

Declares the Application of the Republic of Guinea to be inadmissible in so far as it concerns protection of Mr. Diallo in respect of alleged violations of rights of Africom-Zaire and Africontainers-Zaire.

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Bennouna, Skotnikov; Judge ad hoc Mampuya;

AGAINST: Judge ad hoc Mahiou.

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Judge ad hoc MAHIOU appends a declaration to the Judgment of the Court; Judge ad hoc MAMPUYA appends a separate opinion to the Judgment of the Court.

Declaration of Judge ad hoc Mahiou

After declaring Guinea's Application admissible in so far as it concerns protection of, on the one hand, Mr. Diallo's rights as an individual and, on the other hand, his direct rights as associé in the companies Africom-Zaire and Africontainers-Zaire, the Court declares inadmissible the Application seeking to protect Mr. Diallo in respect of the alleged violations of rights of these companies. In rejecting this latter Application, the Court relies on the approach set out by the International Law Commission (ILC) in its draft Articles on Diplomatic Protection, which it takes up in paragraphs 88 and 91 of the Judgment. However, after explaining and apparently accepting this approach to diplomatic protection, the Court takes the view that it does not apply in the present case. After noting that the first condition has been satisfied — since the two companies in question do indeed have the nationality of the Congolese State, which has committed the wrongful acts — it considers that the second condition has not been met, because this nationality results from a free choice of their owner and not from a requirement of local law that would enable diplomatic protection to be invoked.

The choice of Congolese nationality was certainly made by Mr. Diallo, but it seems questionable to conclude that this was a free choice, as the Court does in paragraph 92 of the Judgment. Freedom of choice is more appearance than reality when one examines Congolese law, which requires both the registered office and administrative headquarters to be in the DRC if the main operating centre is located in that country, failing which the two companies would automatically be struck off the Trade Register, thereby preventing them from existing or carrying on activities in the DRC. Consequently, because of this legal and factual situation, this case falls within the scope of Article 11, paragraph (b), of the ILC draft as one in which it would be legitimate for the right to diplomatic protection from the State of the shareholders' nationality to be exercised if prejudicial measures are taken by the State against a company having its nationality.

Furthermore, it should be noted that one of the two companies, Africom-Zaire, is said to have disappeared as a result of action taken by the Congolese authorities. If that should prove to be the case, a new situation would result in which there would no longer be any possibility for that company to assert its rights directly, and that could deprive its sole shareholder, Mr. Diallo, of any means of redress if he were refused the benefit of diplomatic protection. I therefore believe that the Court should have taken further account of this situation in order to safeguard the rights and interests of the sole shareholder in this company.

Separate opinion of Judge ad hoc Mampuya

In this case between Guinea and the Democratic Republic of the Congo, while generally subscribing to the Court's findings on the admissibility of Guinea's Application, I would express reservations about certain aspects of the approach taken in the Judgment and about some issues associated with the admissibility of the Application as regards the protection of the direct rights of a Guinean national as associé in the two Congolese companies.

I endorse the main operative part of the Judgment declaring Guinea's Application admissible in so far as it concerns the direct rights of its national as an individual and inadmissible in so far as it also concerned the rights of non-Guinean companies.

However, it seemed to me in fact that whereas a study of the Court's case law points to the need for the nature of its claim to be stated "within the degree of precision and clearness requisite for the administration of justice", Guinea's Application was not worded clearly enough to define its

object, the circumstances of its filing explaining why Guinea has, from start to finish in the procedure, wavered between, on the one hand, protection of the two companies controlled by its national Mr. Diallo but which are of Congolese nationality, whose financial claims emerge clearly as the real object of the Application, and, on the other hand, protection of Mr. Diallo's direct rights as an individual and associé. I believe that, on grounds of obscuri libelli, if not lack of standing, the admissibility of Guinea's Application is at least problematic. Moreover, by upholding the direct rights of Mr. Diallo as an object of the Application, opting for this artificial dispute instead of the real one, the Court is admitting quite new private claims, not hitherto known to the Congolese authorities and not constituting in themselves a dispute arising directly from relations between Guinea and the Democratic Republic of the Congo, without verifying, contrary to all its previous case law, whether Mr. Diallo's private dispute had given rise to an international dispute between the two States which could be submitted to the Court, the latter only entertaining international disputes and not mere acts, even if they may be internationally wrongful. Lastly, while Guinea's right to act in respect of the direct rights of its national as associé cannot be contested, I did not support the finding that, since the DRC had not shown remedies against the expulsion order to exist, there would also be none against the alleged infringement of these direct rights as associé, which is regarded as a direct consequence of that expulsion. That is why, having accepted Guinea's standing, in particular to act in respect of alleged violations of human rights, I did not join the majority in favour of the operative provision which rejects, on the grounds set out here, the DRC's preliminary objection that domestic remedies concerning the direct rights as associé had not been exhausted.
