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RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE
AHMADOU SADIO DIALLO

(RÉPUBLIQUE DE GUINÉE c. RÉPUBLIQUE DÉMOCRATIQUE
DU CONGO)

EXCEPTIONS PRÉLIMINAIRES

ARRÊT DU 24 MAI 2007

2007

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

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PRELIMINARY OBJECTIONS

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CASE CONCERNING AHMADOU SADIO DIALLO

(REPUBLIC OF GUINEA *v.* DEMOCRATIC REPUBLIC OF THE CONGO)

PRELIMINARY OBJECTIONS

Facts underlying the case — Disputes between Africom-Zaire and Africontainers-Zaire, two sociétés privées à responsabilité limitée *(SPRLs) incorporated under Zairean law, on the one hand, and the Zairean State and other business partners on the other — Arrest, detention and expulsion of Mr. Diallo, a Guinean citizen,* associé *and* gérant *of the companies, on the ground that his presence and conduct breached public order in Zaire — Disagreement between the Parties on the circumstances of Mr. Diallo's arrest, detention and expulsion.*

* *

Object of the Application — Diplomatic protection on behalf of Mr. Diallo for the violation of three categories of rights — Mr. Diallo's individual personal rights — Mr. Diallo's direct rights as associé *in Africom-Zaire and Africontainers-Zaire — Rights of the companies.*

* *

Basis of the Court's jurisdiction — Declarations made by the Parties under Article 36, paragraph 2, of the Statute.

* *

Preliminary objections raised by the DRC to the admissibility of the Application — Guinea's standing — Non-exhaustion of local remedies — Examination by the Court in respect of each of the three different categories of rights alleged by Guinea to have been violated.

*

Mr. Diallo's individual personal rights.

DRC's contention that Guinea's Application is inadmissible on the ground that local remedies have not been exhausted — Scope ratione materiae *of diplomatic protection — Conditions of exercise — Mr. Diallo's Guinean nationality — Burden of proof as regards local remedies — Guinea required to prove exhaustion by Mr. Diallo of local remedies available in the DRC or the existence of exceptional circumstances justifying the failure to exhaust them — DRC required to prove existence and non-exhaustion of available and effective local remedies — Examination by the Court confined to the question of local remedies in respect of Mr. Diallo's expulsion — Expulsion characterized as "refusal of entry"* ("refoulement") *when carried out — Refusals of entry not appealable under Congolese law — DRC cannot rely on error in designation — Request for reconsideration by the administrative authority having taken the decision not a local remedy to be exhausted — Objection based on failure to exhaust local remedies rejected.*

*

Protection of Mr. Diallo's direct rights as associé *in Africom-Zaire and Africontainers-Zaire.*

DRC's contention that Guinea's Application is inadmissible for lack of standing, Mr. Diallo's expulsion not having injured his direct rights as associé *— Guinea's contention that the effect of and motive for Mr. Diallo's expulsion was to prevent him from exercising his direct rights as* associé *in Africom-Zaire and Africontainers-Zaire and his rights as their* gérant *— Legal nature of the companies governed by Congolese law — Independent legal personality of SPRLs distinct from that of their* associés *— National State of* associés *entitled to exercise diplomatic protection in respect of infringements of their direct rights — Definition of rights appertaining to the status of* associé *and to the position of* gérant *of an SPRL under Congolese law and assessment of the effects on these rights of the actions taken against Mr. Diallo, being substantive matters — Objection based on Guinea's lack of standing rejected.*

DRC's contention that Guinea's Application is inadmissible for failure to exhaust local remedies — Alleged violations of Mr. Diallo's direct rights as associé *described by Guinea as a direct consequence of his expulsion — Court having found that the DRC has not proved the existence under Congolese law of effective remedies against Mr. Diallo's expulsion — DRC not having shown the existence of distinct remedies against the alleged violations of Mr. Diallo's direct rights as* associé *— Objection as to inadmissibility based on failure to exhaust local remedies rejected.*

*

Diplomatic protection with respect to Mr. Diallo "by substitution" for Africom-Zaire and Africontainers-Zaire.

DRC's contention that Guinea's Application is inadmissible for lack of standing — Guinea's argument that customary international law of diplomatic protection by a company by its State of nationality is subject to an exception allowing for diplomatic protection of shareholders by their national State "by

substitution" for the company when the State whose responsibility is at issue is the national State of the company — Exception not, at present, established in customary international law — Question whether customary international law contains a more limited rule of protection "by substitution", such as that proposed by the International Law Commission (ILC) in Article 11 (b) *of its draft Articles on Diplomatic Protection — Does not arise for decision on present facts — Diplomatic protection of Africom-Zaire and Africontainers-Zaire governed by the normal rule of the nationality of the claims — Congolese nationality of the companies — Objection based on Guinea's lack of standing upheld.*

DRC's objection based on failure to exhaust local remedies without object.

* *

Application 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.*

JUDGMENT

Present: *President* Higgins; *Vice-President* Al-Khasawneh; *Judges* Ranjeva, Shi, Koroma, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Bennouna, Skotnikov; *Judges* ad hoc Mahiou, Mampuya; *Registrar* Couvreur.

In the case concerning Ahmadou Sadio Diallo,

between

the Republic of Guinea,

represented by

Mr. Mohamed Camara, Chargé d'affaires a.i. at the Embassy of the Republic of Guinea, Brussels,

as Agent;

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre, Member and former Chairman of the International Law Commission of the United Nations,

as Deputy Agent, Counsel and Advocate;

Mr. Mathias Forteau, Professor at the University of Lille 2,
Mr. Jean-Marc Thouvenin, Professor at the University of Paris X-Nanterre, member of the Paris Bar, Cabinet Sygna Partners,
Mr. Samuel Wordsworth, member of the English Bar, Essex Court Chambers,

as Counsel and Advocates;

Mr. Daniel Müller, Researcher at the Centre de droit international de Nanterre (CEDIN), University of Paris X-Nanterre,
Mr. Luke Vidal, member of the Paris Bar, Cabinet Sygna Partners,

as Advisers,

and

the Democratic Republic of the Congo,

represented by

H.E. Mr. Pierre Ilunga M'Bundu wa Biloba, Minister of Justice and Keeper of the Seals, Democratic Republic of the Congo,

as Head of Delegation;

H.E. Mr. Jacques Masangu-a-Mwanza, Ambassador Extraordinary and Plenipotentiary of the Democratic Republic of the Congo to the Kingdom of the Netherlands,

as Agent;

Maître Tshibangu Kalala, Deputy, Congolese Parliament, member of the Kinshasa and Brussels Bars, Cabinet Tshibangu et Associés,

as Co-Agent, Counsel and Advocate;

Mr. André Mazyambo Makengo Kisala, Professor of International Law, University of Kinshasa,

as Counsel and Advocate;

Mr. Yenyi Olungu, Principal Advocate-General of the Republic, Directeur de cabinet of the Minister of Justice and Keeper of the Seals,
Mr. Victor Musompo Kasongo, Private Secretary to the Minister of Justice and Keeper of the Seals,
Mr. Nsingi-zi-Mayemba, Minister-Counsellor, Embassy of the Democratic Republic of the Congo in the Netherlands,
Mr. Bamana Kalonji Jerry, Second Counsellor, Embassy of the Democratic Republic of the Congo in the Netherlands,
Maître Kikangala Ngoie, member of the Brussels Bar,

as Advisers;

Maître Kadima Mukadi, member of the Kinshasa Bar, Cabinet Tshibangu et Associés,
Maître Lufulwabo Tshimpangila, member of the Brussels Bar,
Maître Tshibwabwa Mbuyi, member of the Brussels Bar,

as Research Assistants;

Ms Ngoya Tshibangu,

as Assistant,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 28 December 1998, the Government of the Republic of Guinea (hereinafter "Guinea") filed in the Registry of the Court an Application instituting

proceedings against the Democratic Republic of the Congo (hereinafter the "DRC") in respect of a dispute concerning "serious violations of international law" allegedly committed "upon the person of a Guinean national". The Application consisted of two parts, each signed by Guinea's Minister for Foreign Affairs. The first part, entitled "Application" (hereinafter the "Application (Part One)"), contained a succinct statement of the subject of the dispute, the basis of the Court's jurisdiction and the legal grounds relied on. The second part, entitled "Memorial of the Republic of Guinea" (hereinafter the "Application (Part Two)"), set out the facts underlying the dispute, expanded on the legal grounds put forward by Guinea and stated Guinea's claims. In the Application (Part One) Guinea maintained:

> "Mr. Ahmadou Sadio Diallo, a businessman of Guinean nationality, was unjustly imprisoned by the authorities of the Democratic Republic of the Congo, after being resident in that State for thirty-two (32) years, despoiled of his sizable investments, businesses, movable and immovable property and bank accounts, and then expelled."

Guinea added:

> "[t]his expulsion came at a time when Mr. Ahmadou Sadio Diallo was pursuing recovery of substantial debts owed to his businesses by the State and by oil companies established in its territory and of which the State is a shareholder".

Mr. Diallo's arrest, detention and expulsion are alleged to constitute, *inter alia*, violations of

> "the principle that aliens should be treated in accordance with 'a minimum standard of civilization', [of] the obligation to respect the freedom and property of aliens, [and of] the right of aliens accused of an offence to a fair trial on adversarial principles by an impartial court".

To found the jurisdiction of the Court, Guinea invoked in the Application (Part One) the declarations whereby the two States have recognized the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute of the Court.

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was immediately communicated to the Government of the DRC by the Registrar; and, in accordance with paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

3. By an Order of 25 November 1999, the Court fixed 11 September 2000 as the time-limit for the filing of a Memorial by Guinea and 11 September 2001 as the time-limit for the filing of a Counter-Memorial by the DRC. By an Order of 8 September 2000, the President of the Court, at Guinea's request, extended the time-limit for the filing of the Memorial to 23 March 2001; in the same Order the time-limit for the filing of the Counter-Memorial was extended to 4 October 2002. Guinea duly filed its Memorial within the time-limit as thus extended.

4. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each of them availed itself of its right under Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case. Guinea chose Mr. Mohammed Bedjaoui and the DRC Mr. Auguste Mampuya Kanunk'a-Tshiabo. Following Mr. Bedjaoui's resignation on 10 September 2002, Guinea chose Mr. Ahmed Mahiou.

5. On 3 October 2002, within the time-limit set in Article 79, paragraph 1, of the Rules of Court as adopted on 14 April 1978, the DRC raised preliminary objections in respect of the admissibility of Guinea's Application. In accordance with Article 79, paragraph 3, of the Rules of Court, the proceedings on the merits were then suspended. By an Order of 7 November 2002, the Court, taking account of the particular circumstances of the case and of the agreement of the Parties, fixed 7 July 2003 as the time-limit for the presentation by Guinea of a written statement of its observations and submissions on the preliminary objections raised by the DRC. Guinea filed such a statement within the time-limit fixed and the case thus became ready for hearing on the preliminary objections.

6. Pursuant to Article 53, paragraph 2, of the Rules of Court, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made accessible to the public on the opening of the oral proceedings.

7. Public sittings were held from 27 November 2006 to 1 December 2006, at which the Court heard the oral arguments and replies of:

For the DRC: H.E. Mr. Jacques Masangu-a-Mwanza,
Maître Tshibangu Kalala,
Mr. André Mazyambo Makengo Kisala.

For Guinea: Mr. Mohamed Camara,
Mr. Mathias Forteau,
Mr. Samuel Wordsworth,
Mr. Alain Pellet,
Mr. Jean-Marc Thouvenin.

8. A Member of the Court put a question at the hearing on 28 November 2006, which the Parties answered orally, in accordance with Article 61, paragraph 4, of the Rules of Court.

9. By a letter dated 1 December 2006, the Court, acting pursuant to Article 62, paragraph 1, of the Rules of Court, asked the DRC to furnish it with certain additional documents.

*

10. In the Application (Part Two), the following requests were made by Guinea:

"*As to the form:* To admit the present Application.

As to the merits: To order the authorities of the Democratic Republic of the Congo to make an official public apology to the State of Guinea for the numerous wrongs done to it in the person of its national Ahmadou Sadio Diallo;

To find that the sums claimed are certain, liquidated and legally due;

To find that the Congolese State must assume responsibility for the payment of these debts, in accordance with the principles of State responsibility and civil liability;

To order the Congolese State to pay to the State of Guinea on behalf of its national Ahmadou Sadio Diallo the sums of US $31,334,685,888.45 and Z 14,207,082,872.7 in respect of the financial loss suffered by him;

To pay also to the State of Guinea damages equal to 15 per cent of the principal award, that is to say US $4,700,202,883.26 and Z 2,131,062,430.9;

To award to the applicant State bank and moratory interest at respective annual rates of 15 per cent and 26 per cent from the end of the year 1995 until the date of payment in full;

To order the said State to return to the Applicant all the unvalued assets set out in the list of miscellaneous claims;

To order the Democratic Republic of the Congo to submit within one month an acceptable schedule for the repayment of the above sums;

In the event that the said schedule is not produced by the date indicated or is not respected, to authorize the State of Guinea to seize the assets of the Congolese State wherever they may be found, up to an amount equal to the principal sum due and such further amounts as the Court shall have ordered.

To order that the costs of the present proceedings be borne by the Congolese State." (Emphasis in the original.)

11. In the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Guinea,

in the Memorial on the merits:

"The Republic of Guinea has the honour to request that it may please the International Court of Justice to adjudge and declare:

(1) that, in arbitrarily arresting and expelling its national, Mr. Ahmadou Sadio Diallo; in not at that time respecting his right to the benefit of the provisions of the [1963] Vienna Convention on Consular Relations; in subjecting him to humiliating and degrading treatment; in depriving him of the exercise of his rights of ownership and management in respect of the companies founded by him in the DRC; in preventing him from pursuing recovery of the numerous debts owed to him — to himself personally and to the said companies — both by the DRC itself and by other contractual partners; in not paying its own debts to him and to his companies, the Democratic Republic of the Congo has committed internationally wrongful acts which engage its responsibility to the Republic of Guinea;
(2) that the Democratic Republic of the Congo is accordingly bound to make full reparation on account of the injury suffered by the Republic of Guinea in the person of its national;
(3) that such reparation shall take the form of compensation covering the totality of the injuries caused by the internationally wrongful acts of the Democratic Republic of the Congo including loss of earnings, and shall also include interest.

The Republic of Guinea further requests the Court kindly to authorize it to submit an assessment of the amount of the compensation due to it on this account from the Democratic Republic of the Congo in a subsequent phase of the proceedings in the event that the two Parties should be unable to agree on the amount thereof within a period of six months following delivery of the Judgment."

On behalf of the Government of the DRC,

in the preliminary objections:

> "The Democratic Republic of the Congo respectfully requests the Court to adjudge and declare that the Application of the Republic of Guinea is inadmissible,
>
> (1) on the ground that the Republic of Guinea lacks standing to exercise diplomatic protection in the present proceedings, since its Application seeks essentially to secure reparation for injury suffered on account of the alleged violation of rights of companies not possessing its nationality;
> (2) on the ground that, in any event, neither the companies in question nor Mr. Diallo have exhausted the available and effective local remedies existing in Zaire, and subsequently in the Democratic Republic of the Congo."

On behalf of the Government of Guinea,

in the written statement containing its observations and submissions on the preliminary objections raised by the DRC:

> "For the reasons set out above, the Republic of Guinea kindly requests the Court to:
>
> 1. Reject the preliminary objections raised by the Democratic Republic of the Congo, and
> 2. Declare the Application of the Republic of Guinea admissible."

12. At the oral proceedings, the following submissions were presented by the Parties:

On behalf of the Government of the DRC,

at the hearing of 29 November 2006:

> "The Democratic Republic of the Congo respectfully requests the Court to adjudge and declare that the Application of the Republic of Guinea is inadmissible,
>
> (1) on the ground that the Republic of Guinea lacks standing to exercise diplomatic protection in the present proceedings, since its Application seeks essentially to secure reparation for injury suffered on account of the violation of rights of companies not possessing its nationality;
>
> (2) on the ground that, in any event, neither the companies in question nor Mr. Diallo have exhausted the available and effective local remedies existing in the Democratic Republic of the Congo."

On behalf of the Government of Guinea,

at the hearing of 1 December 2006:

> "For the reasons set out in its Observations of 7 July 2003 and in oral argument, the Republic of Guinea kindly requests the International Court of Justice:
>
> (1) to reject the preliminary objections raised by the Democratic Republic of the Congo;
> (2) to declare the Application of the Republic of Guinea admissible; and

(3) to fix time-limits for the further proceedings."

* * *

13. The Court will begin with a brief description of the factual background to the present case.

14. As set out 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* (see paragraph 25 hereunder) 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.

15. 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 expul-

sion: 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.

*

16. Throughout the proceedings Guinea and the DRC have continued to differ on a number of other facts.

17. In respect of the specific circumstances of Mr. Diallo's arrest, detention and expulsion, Guinea maintains that Mr. Diallo was "secretly placed in detention, without any form of judicial process or even examination" on 5 November 1995. He allegedly remained imprisoned first for two months, before being released on 10 January 1996, "further to intervention by the [Zairean] President himself", only then to be "immediately rearrested and imprisoned for two [more] weeks" before being expelled. Mr. Diallo is thus said to have been detained for 75 days in all. Guinea adds that he was mistreated while in prison and was "deprived of the benefit of the 1963 Vienna Convention on Consular Relations". According to Guinea, Mr. Diallo has been without means of support since his expulsion and he has been unable to fulfil his functions as executive officer *(dirigeant)* of, or exercise his rights as shareholder in, Africom-Zaire and Africontainers-Zaire.

18. Guinea further maintains 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, including judgment debts. Guinea claims that, before arresting Mr. Diallo and expelling him in January 1996, the Congolese authorities repeatedly interfered in the affairs of his companies. Guinea contends that Mr. Diallo had already suffered one year of imprisonment, in 1988, after trying to recover debts owed to Africom-Zaire by the Zairean State. Guinea also cites certain steps taken by the DRC in the course of 1995 "arbitrarily to stay the domestic proceedings for the enforcement of decisions handed down in favour of Mr. Diallo's companies". It thus explains:

> "Enforcement of the judgment [by the Kinshasa *Tribunal de grande instance*] in the *Africontainers[-Zaire]* v. *Zaire Shell* case was stayed, on 13 September [1995], by order of the [Zairean Vice-] Minister of Justice, without any legal basis."

After the stay was lifted, property belonging to Zaire Shell was attached but "the attachments were once again revoked on 13 October [1995], this

time permanently, on 'oral instructions' from the Minister of Justice and outside the law". Guinea adds that Mr. Diallo's arrest, detention and expulsion took place just as Zaire Shell, for its part, and Zaire Fina and Zaire Mobil Oil, for theirs, approached Zaire's Minister of Justice, by letters dated 29 August 1995 and 15 November 1995, respectively, "seeking the intervention of the Government to warn the courts and tribunals about Mr. Ahmadou Sadio Diallo's conduct in his campaign to destabilize commercial companies".

19. The DRC rejects these allegations by Guinea and argues that the duration and conditions of Mr. Diallo's detention during the expulsion process were in conformity with Zairean law. In particular, it contends that the statutory maximum of eight days' detention was not exceeded. The DRC adds that the decision expelling Mr. Diallo was justified by his "manifestly groundless" and increasingly exaggerated financial claims against Zairean public undertakings and private companies operating in Zaire and by the disinformation campaign he had launched there "aimed at the highest levels of the Zairean State, as well as very prominent figures abroad". The DRC notes that

> "the total sum claimed by Mr. Diallo as owed to the companies run by him came to over 36 billion United States dollars . . ., which represents nearly three times the [DRC's] total foreign debt".

It adds: "the Zairean authorities also discovered that Mr. Diallo had been involved in currency trafficking and that he was moreover guilty of a number of attempts at bribery". Mr. Diallo's actions thus allegedly threatened seriously to compromise not only the operation of the undertakings concerned but also public order in Zaire.

20. The DRC further claims not to have interfered in the affairs of Africom-Zaire and Africontainers-Zaire or to have expelled Mr. Diallo with a view to preventing the companies from completing the legal proceedings they had brought to recover monies owed them. The DRC does not deny that in September 1995 the Minister of Justice ordered a stay of execution of the judgment rendered by the Kinshasa *Tribunal de grande instance* in the *Africontainers-Zaire* v. *Zaire Shell* case. It nevertheless explains that, "when the enforcement of a judicial decision is liable to . . . lead to serious public disorder", Zairean law allows the Minister of Justice to "stay its execution and request the *Inspectorat général des services judiciaires* (Inspectorate-General of Courts) to review it for legality". It adds that procedures of this type, "found . . . in a number of African States", are "in no way contrary to the principle of separation of powers, as it is understood in that part of the world". The DRC points out that the stay of execution of the judgment in question "was of very short

duration", because a few days after the stay took effect the Minister of Justice "requested the president of the Court of Appeal to 'take the necessary measures to execute' the judgment . . . [on the ground that] 'there had been no manifest error'". The DRC moreover stresses that Mr. Diallo should not be confused with Africom-Zaire and Africontainers-Zaire, that the companies are separate legal entities and that the actions taken against Mr. Diallo cannot be equated with actions against the companies. Specifically, the companies remained completely free, after Mr. Diallo's expulsion, to pursue any and all legal proceedings they had begun and did in fact do so, according to the DRC.

21. At the hearings the DRC made reference to various problems said to exist in connection with Africom-Zaire. Thus, in response to the question put by Judge Bennouna at the end of the first round of oral argument, seeking clarification from both Parties as to

> "whether the legislation of the Democratic Republic of the Congo or the jurisprudence of the courts of the country authorizes the creation of a *sociéte privée à responsabilité limitée* with a single shareholder and by one person" (see paragraph 8 above),

the DRC explained that "Congolese legislation in force does not permit the incorporation of a *société privée à responsabilité limitée* by just one person" and that, contrary to Guinea's contention, Mr. Diallo could not therefore be the sole *associé* in Africom-Zaire.

22. The DRC next argued, for the first time, that in reality Mr. Diallo was not an *associé* at all in Africom-Zaire. In support it cited, and produced at the hearing, the articles of incorporation of a company called "Africom", claiming to have discovered them just a few days earlier in the files of the Trade Register of the city of Kinshasa. After the oral proceedings had closed, the Court, acting pursuant to Article 62 of the Rules of Court, asked the DRC to provide it with the articles of incorporation of "Africom-Zaire". In response, the DRC, by a letter of 20 December 2006, transmitted to the Registry a document identical to the one it had produced at the hearings, accompanied by a note stating that it had been unable to find any reference to Africom-Zaire in the Trade Register of the city of Kinshasa. After Guinea submitted observations on the letter and its annexes, the DRC communicated to the Court, by a letter of 31 January 2007, comments in reply, in which it acknowledged that Africom-Zaire had indeed existed and been registered in the Trade Register of the city of Kinshasa but explained that the company had ceased all activity in the mid-1980s. The DRC stated in that letter that "under Congolese law, a commercial company in such a situation [of inactivity] is automatically struck off the Trade Register as having ceased trading", so that it was "highly possible that [the Africom-Zaire] file was removed from the files, lost or destroyed by the [Congolese] administrative staff".

23. While admitting that Congolese legislation does not allow for the incorporation of an SPRL by one person, Guinea, in answering the question put by Judge Bennouna (see paragraphs 8 and 21 above), rejected the DRC's argument that Mr. Diallo could not be the sole shareholder in Africom-Zaire. It maintained that "the fact of not being able to create a one-person company in no way prevents . . . a company becoming unipersonal subsequently" and in support cited the Decree of 6 March 1951 establishing Zaire's trade register, which "does not mention a company's becoming unipersonal as a case necessitating the cancellation of its registration in the trade register".

24. Guinea further stated that the document referred to by the DRC at the hearing and provided to the Court concerns another company, one "not connected with Mr. Diallo's company". As proof thereof, it pointed out that the registered office addresses, registration numbers in the Trade Register and *gérants* of the two companies are different, as are their corporate purposes and dates of incorporation. Guinea argued that "the existence of [the] company [Africom-Zaire] and its articles of incorporation is beyond dispute". In this connection it pointed out that the validity of the filing of the company's articles of incorporation had been confirmed by the public prosecutor before the Supreme Court of Justice of the DRC, and it cited "many official documents issued by Zairean authorities" recognizing "Mr. Diallo to be the *gérant* of Africom-Zaire". Finally, Guinea maintained that the DRC had acknowledged not only the existence of the two companies in question but also the fact that Mr. Diallo had "become, in fact, the sole executive officer of these two companies incorporated under the laws of Zaire".

* *

25. The Court notes at the outset that Africom-Zaire and Africontainers-Zaire are *sociétés privées à responsabilité limitée* (SPRLs) incorporated under Congolese law, i.e. companies

> "which are formed by persons whose liability is limited to their capital contributions; which are not publicly held companies; and in which the *parts sociales* (shares), required to be uniform and in registered form, are not freely transferable" (Article 36 of the Decree of 27 February 1887 on commercial companies).

Under Congolese law, holders of *parts sociales* ("not freely transferable" shares) in SPRLs, like Mr. Diallo, are termed *"associés"* (see, for example, Articles 43, 44, 45, and 51 of the Decree of 27 February 1887). In their written pleadings and at the hearings, the Parties have however often employed the generic term "shareholder" in referring to Mr. Diallo's status as *associé* in the two companies. In light of the foregoing,

"associé" will be the term primarily used by the Court in the present Judgment, except where it is referring to the Parties' arguments and when they themselves used the generic term "shareholder".

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26. The Court observes that the dispute between Guinea and the DRC comprises many aspects and that the Parties have focused on the one or the other of these at different stages in the proceedings.

27. Thus, the greater part of Guinea's Application concerns the disputes between Africom-Zaire and Africontainers-Zaire, on the one hand, and their public and private business partners, on the other. Specifically, Guinea devotes a lengthy part of its Application to describing the debts allegedly owed to the companies and Mr. Diallo, as well as to expounding the legal grounds on which the DRC is alleged to be liable for all these debts. The claims put forward by Guinea in its Application (Part Two) are also aimed for the most part at obtaining payment of the debts (see paragraph 10 above).

28. Guinea nevertheless also states in its Application that it seeks to exercise its diplomatic protection on behalf of Mr. Diallo "with a view to obtaining [from the Court] a finding that the [DRC] is guilty of serious violations of international law committed upon [his] person". It asserts that the DRC has violated

> "the principle that aliens should be treated in accordance with 'a minimum standard of civilization', the obligation to respect the freedom and property of aliens, [and] the right of aliens accused of an offence to a fair trial on adversarial principles by an impartial court".

In support of these claims, Guinea cites "numerous international agreements concerning the treatment of aliens and the free movement of goods and persons", including in particular the Universal Declaration of Human Rights of 10 December 1948 and the International Covenant on Civil and Political Rights of 19 December 1966. It states that "these various violations of human rights must be construed as breaches of norms of *jus cogens*".

29. In its Memorial on the merits, Guinea continues to devote considerable attention to the issue of the debts allegedly owed to Africom-Zaire and Africontainers-Zaire and to Mr. Diallo. But Guinea also places renewed emphasis on the exercise of its diplomatic protection on behalf of Mr. Diallo and states that it

> "is taking up the cause of one of its nationals, and is acting to enforce his direct rights as an individual and as shareholder and executive officer of companies which he founded . . . and of which he is the sole or principal owner, to the exclusion of distinct rights which these companies may have against the DRC".

It divides Mr. Diallo's rights which it seeks to protect into two separate categories, according to their nature. In the first, it places Mr. Diallo's rights as an individual, including, in addition to those referred to in the Application, Mr. Diallo's right not to be subjected to inhuman and degrading treatment and his right to the benefit of the provisions of the 1963 Vienna Convention on Consular Relations, both of which rights were allegedly violated at the time of his arrest, detention and expulsion. In the second category of rights which Guinea seeks to protect it places the "direct rights" allegedly enjoyed by Mr. Diallo as a shareholder (rights also sometimes called by Guinea "shareholder's rights") in Africom-Zaire and Africontainers-Zaire, specifically his right to oversee, control and manage the companies.

30. Guinea further states in its Application that it is seeking to protect, in addition to Mr. Diallo, "the companies which he founded and owns". In its Memorial on the merits, it makes clear that it seeks to exercise its diplomatic protection on behalf of Mr. Diallo by "substitution" for Africom-Zaire and Africontainers-Zaire. Guinea explains that by "substitution" or "protection by substitution" it means the right of a State to exercise its diplomatic protection on behalf of nationals who are shareholders in a foreign company whenever the company has been a victim of wrongful acts committed by the State under whose law it has been incorporated. Thus Guinea does not confine itself to exercising protection of Mr. Diallo in respect of the violations of his direct rights as shareholder in Africom-Zaire and Africontainers-Zaire but seeks to protect him "in respect of the injuries suffered by [these] companies [themselves]".

31. In sum, Guinea seeks through its action 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".

* *

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.

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33. The Court will now examine the preliminary objections to admissibility raised by the DRC, in respect of each of the various categories of rights alleged by Guinea to have been violated in the present case.

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34. The Court will first address the question of the admissibility of Guinea's Application in so far as it concerns protection of Mr. Diallo's rights as an individual.

35. 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". While this objection, presented by the DRC in its written pleadings and at the hearings, is very broadly worded, in the course of the present proceedings the DRC elaborated on only a single aspect of it: that concerning his expulsion from Congolese territory.

36. On this subject the DRC maintains that its domestic legal system provided for available, effective remedies which Mr. Diallo should have exhausted before his cause could be espoused by Guinea. It first observes that, contrary to Guinea's contention, Mr. Diallo's 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". Further, 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; on the contrary, "if Mr. Diallo had appealed to the Congolese authorities for permission to return to the DRC, that appeal would have had some prospect of success". The DRC cites the general principle of Congolese law that reconsideration of a decision can in all cases be requested from the authority having taken it and, if necessary, from that authority's superior. It maintains that Mr. Diallo never asked the competent authorities to reconsider their position and to allow him to return to the DRC. According to the DRC, such a request would have had a good chance of success, especially after the change in régime in the country in 1997. The effectiveness of requests for redress in respect of expulsion decisions in the DRC is alleged to be confirmed moreover by a substantial practice, the DRC citing in this regard two applications made by foreign nationals

appealing their removal from Zairean territory, each of which led to withdrawal of the removal Order.

37. Guinea responds that "[a]fter eight years of proceedings the DRC has shown itself to be incapable of invoking so much as a single real remedy that would have been available to Mr. Diallo" in respect of the violation of his rights as an individual. On the subject of Mr. Diallo's expulsion from the Congolese territory, Guinea states that there were no effective remedies first in Zaire, nor in the later DRC, against this measure, recalling in this regard that the expulsion Order against Mr. Diallo was carried out by way of an action denominated "refusal of entry" and that, "under Article 13 of the Legislative Order of 12 September 1983 concerning immigration control [in Zaire]; '[a] measure refusing entry shall not be subject to appeal'". Guinea adds that the possibility Mr. Diallo had to approach the Zairean authority having issued the expulsion Order "is not[, in any event,] a remedy within the meaning of the local remedies rule". It asserts that, on the contrary, this is merely an "extra-legal procedure that may be characterized as an appeal to the indulgence of the governmental authorities". And, according to Guinea, "[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 observes moreover that the two instances of remedies against expulsion cited by the DRC in support of its position are not germane since one case involved expulsion on grounds of illegal immigration, in respect of which a remedy of grace *(recours gracieux)* is available, and the other involved a "decision on grounds of undesirability" the reason for which is not specified in the Order revoking the decision.

38. 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. Guinea thus notes that the objective in expelling Mr. Diallo was precisely to prevent him from pursuing legal proceedings and argues that

> "if a State deliberately chooses to remove an alien from its territory . . . because that alien is seeking local redress, that State can no longer reasonably demand that the alien seek redress only through legal avenues available in its territory".

Lastly, it notes that any action taken by Mr. Diallo would have been doomed to fail owing to the personal animosity towards him harboured by certain members of the Congolese Government.

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39. The Court will recall that under customary international law, as reflected in Article 1 of the draft Articles on Diplomatic Protection of the International Law Commission (hereinafter the "ILC"),

> "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 ILC at its Fifty-eighth Session (2006), ILC Report, doc. A/61/10, p. 24).

Owing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, the scope *ratione materiae* of diplomatic protection, originally limited to alleged violations of the minimum standard of treatment of aliens, has subsequently widened to include, *inter alia*, internationally guaranteed human rights.

40. In the present case Guinea seeks to exercise its diplomatic protection on behalf of Mr. Diallo in respect of the DRC's alleged violation of his rights as a result of his arrest, detention and expulsion, that violation allegedly constituting an internationally wrongful act by the DRC giving rise to its responsibility. It therefore 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.

41. To begin with, 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. The Parties have however devoted much argument to the issue of exhaustion of local remedies.

42. As the Court stated in the *Interhandel (Switzerland* v. *United States of America)* case,

> "[t]he rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule 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. Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system." (*I.C.J. Reports 1959*, p. 27.)

43. 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.

44. 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 (see *Elettronica Sicula S.p.A. (ELSI) (United States of America* v. *Italy), I.C.J. Reports 1989*, pp. 43-44, para. 53). It is for the respondent to convince the Court that there were effective remedies in its domestic legal system that were not exhausted (see *ibid.*, p. 46, para. 59). Thus, in the present case, Guinea must establish that Mr. Diallo exhausted any available local remedies or, if not, must show that exceptional circumstances justified the fact that he did not do so; it is, on the other hand, for the DRC to prove that there were available and effective remedies in its domestic legal system against the decision to remove Mr. Diallo from the territory and that he did not exhaust them.

45. The Court will recall at this stage that, in its Memorial on the merits, Guinea described in detail the violations of international law allegedly committed by the DRC against Mr. Diallo. Among those cited is the claim that Mr. Diallo was arbitrarily arrested and detained on two occasions, first in 1988 and then in 1995. It states that he suffered inhuman and degrading treatment during those periods in detention and adds that his rights under the 1963 Vienna Convention on Consular Relations were not respected. The Court observes however that Guinea has not, in any way, developed the question of the admissibility of the claims concerning this inhuman and degrading treatment or relating to the 1963 Vienna Convention on Consular Relations. As the Court has already noted (see paragraph 36), the DRC has for its part endeavoured in the present proceedings to show that remedies to challenge the decision to remove Mr. Diallo from Zaire are institutionally provided for in its domestic legal system. By contrast, the DRC did not address the issue of exhaustion of local remedies in respect of Mr. Diallo's arrest, his detention or the alleged violations of his other rights, as an individual, said to have resulted from those measures, and from his expulsion, or to have accompanied them. In view of the above, the Court will address the question of local remedies solely in respect of Mr. Diallo's expulsion.

46. The Court 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.

47. The Court further observes that, even if this was a case of expulsion and not refusal of entry, as the DRC maintains, 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 (see paragraph 36 above). 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.

48. 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.

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49. The Court now turns to the question of the admissibility of Guinea's Application in so far as it concerns protection of Mr. Diallo's rights as *associé* of the two companies Africom-Zaire and Africontainers-Zaire. The DRC raises two objections to admissibility regarding this aspect of the Application: it 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 will deal

with these objections in turn, beginning with that relating to Guinea's standing.

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50. 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".

51. The DRC maintains first of all that Guinea is not seeking, in this case, to protect the direct rights of Mr. Diallo as *associé*. It takes the view that Guinea "identifies an attack on company rights, resulting in damage to shareholders, with the violation of their direct rights" or, more specifically, 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 states as proof that "in several passages in its written pleadings, Guinea considers claims held by Africom-Zaire and Africontainers-Zaire to be claims held by Mr. Diallo". Such confusion between the rights of the companies and the rights of the shareholders is described by the DRC not only as "contrary to positive international law" but also as "contrary to the logic itself of the institution of diplomatic protection"; it is said to have been expressly "rejected by the Court in the *Barcelona Traction* case".

52. The DRC further asserts that, in any event, action to protect the direct rights of shareholders as such applies to only very limited cases. Since shareholders "can claim to derive their shareholders rights [only from the company]", "by definition, what is envisaged here can only be the rights of shareholders in their relations with the company". According to the DRC:

> "[t]his interpretation is confirmed by the list of examples provided by the Court [in the *Barcelona Traction* case]: the right to dividends, the right to attend and vote at general meetings, and the right to share in the residual assets of the company on liquidation are rights which by definition the shareholder can invoke only against the company, subject to certain conditions and in accordance with certain procedures laid down in the company's articles and in the commercial law of the legal order concerned".

The only acts capable of violating the direct rights of shareholders 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.

53. The DRC agrees, as suggested by Guinea, that

> "the rights listed in the 1970 Judgment [in the *Barcelona Traction* case] are no more than examples, and that the rights in question must be sought in the domestic legislation of the States concerned".

The DRC also agrees with Guinea on the fact that, in terms of Congolese law, the direct rights of *associés* are determined by the Decree of the Independent State of Congo of 27 February 1887 on commercial corporations. The rights of Mr. Diallo as *associé* of the companies Africom-Zaire and Africontainers-Zaire are therefore theoretically as follows: "the right to dividends and to the proceeds of liquidation", "the right to be appointed manager *(gérant)*", "the right of the *associé* manager *(gérant)* not to be removed without cause", "the right of the manager to represent the company", "the right of oversight [of the management]" and "the right to participate in general meetings". However, the DRC notes that in practice, Mr. Diallo "was unable to exercise . . . the right of oversight of the two companies" since "the statutory oversight is oversight of the management *[(gérance)]*" and "such oversight cannot be entrusted to an individual who is already manager *[(gérant)]*". The DRC further maintains that, contrary to what is claimed by Guinea, none of the other rights accorded to Mr. Diallo could have been affected by his expulsion. Hence it points out that the right of "being paid dividends and liquidation bonuses does not require as a condition of its enjoyment that the holder live in the Congo". Likewise, "the functional rights [of the *associé*] . . . are not such as to be essentially affected by the physical absence of the holder from the headquarters of the company". Mr. Diallo could very well have exercised them from foreign territory. He would have had every opportunity of "delegating executive tasks to local administrators, including through the appointment of a new manager". The DRC also notes on this subject

> "that Mr. Diallo himself continued to run Africontainers[-Zaire] and pursued recovery of the debts owed to that company well after his expulsion . . . [by appointing] representatives and lawyers to act on his behalf and on his instructions".

54. In support of its diplomatic protection claim on behalf of Mr. Diallo as *associé*, Guinea refers to the Judgment in the *Barcelona Traction* case, where, 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" (*I.C.J. Reports 1970*, p. 36, para. 46), the Court added that "[t]he situation is different if the act complained of is aimed at the direct rights of the shareholder as such" (*ibid.*, p. 36, para. 47). Guinea further claims that this position of the Court was taken up in Article 12 of the ILC's draft Articles on Diplomatic Protection, which provides that:

"To the extent that an internationally wrongful act of a State causes direct injury to the rights of shareholders as such, as distinct from those of the corporation itself, the State of nationality of any such shareholders is entitled to exercise diplomatic protection in respect of its nationals."

55. According to Guinea, the direct rights of Mr. Diallo as a shareholder of Africom-Zaire and Africontainers-Zaire are essentially determined by the Decree of 27 February 1887 on commercial corporations. This text is said to confer on him firstly a series of "property rights", including the right to dividends from these companies, and secondly a series of "functional rights", including the right to control, supervise and manage the companies. Guinea claims that the Congolese investment code also affords Mr. Diallo certain additional rights as shareholder, for example "the right to a share of the profits of his companies" and "a right of ownership in his companies, in particular in respect of his shares". Guinea thus takes the view that it is confining itself, in its claim, to the violation of the rights enjoyed by Mr. Diallo in respect of the companies, including his rights of supervision, control and management, and that it is therefore not confusing his rights with those of the company.

56. Guinea also points out that, in SPRLs, the *parts sociales* "are not freely transferable", which "considerably accentuates the *intuitu personae* character of these companies, very different in this respect from public limited companies". It argues 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".

57. Guinea considers that 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 the companies Africom-Zaire and Africontainers-Zaire", 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. Such intent is said to emerge from the text of the Order of 31 October 1995, which refers to "[Mr. Diallo,] whose presence and conduct have breached Zairean law and order, especially in the economic, financial and monetary areas, and continue to do so". These measures, moreover, are said to have followed on from moves by the Zairean authorities seeking a stay of execution on a judgment of the *Tribunal de Grande Instance* of Kinshasa ordering Zaire Shell to pay compensation to Africontainers-Zaire.

58. 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. Consequently,

> "[e]ven if he had been in a position to appoint a new 'gérant' and a 'commissaire' — and he was not, given his lack of funds — he was still being deprived of the right to appoint the management of his choice in violation of . . . the 1887 Decree, and he could not be expected to confer or abandon the management to some third party".

Guinea adds that it is unrealistic to claim, as the DRC does, that Mr. Diallo could have exercised, from abroad, his rights of supervision and control, or indeed convoked, taken part in and voted at the general meetings.

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59. The Court begins by noting the existence of a disagreement between the Parties on the circumstances surrounding the establishment of Africom-Zaire and the conduct of its activities, on the continuation of those activities after the 1980s, and on the consequences these questions may have under Congolese law. It nonetheless takes the view that this disagreement essentially relates to the merits and that it has no bearing on the question of the admissibility of Guinea's Application as challenged in the Congo's objections.

60. The Court notes that the Parties have referred frequently to the case concerning the *Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain)*. This involved a public limited company whose capital was represented by shares. The present case concerns SPRLs whose capital is composed of *parts sociales* (see paragraph 25 above).

61. As the Court recalled in the *Barcelona Traction* case, "[t]here is . . . no need to investigate the many different forms of legal entity provided for by the municipal laws of States" (*I.C.J. Reports 1970*, p. 34, para. 40). What matters, from the point of view of international law, is to determine whether or not these have a legal personality independent of their members. Conferring independent corporate personality on a company implies granting it rights over its own property, rights which it alone is capable of protecting. As a result, only the State of nationality may exercise diplomatic protection on behalf of the company when its rights are injured by a wrongful act of another State. In determining whether a company possesses independent and distinct legal personality, international law looks to the rules of the relevant domestic law.

62. The Court, in order to establish the precise legal nature of Africom-Zaire and Africontainers-Zaire, must refer to the domestic law of the DRC and, in particular, to the Decree of 27 February 1887 on commercial corporations. This text states, in Article 1, that "commercial corporations recognized by law in accordance with this Decree shall constitute legal persons having a personality distinct from that of their members".

63. 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. As the Court pointed out in the *Barcelona Traction* case: "So long as the company is in existence the shareholder has no right to the corporate assets." (*I.C.J. Reports 1970*, p. 34, para. 41.) This remains the fundamental rule in this respect, whether for a SPRL or for a public limited company.

64. 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. Ultimately, this is no more than the diplomatic protection of a natural or legal person as defined by Article 1 of the ILC draft Articles; 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, as accepted by both Parties, moreover. On this basis, diplomatic protection of the direct rights of *associés* of a 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.

65. Having considered all of 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.

66. The Court notes that Mr. Diallo, who was *associé* in Africom-Zaire and Africontainers-Zaire, 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. It is not for the Court to determine, at this stage in the proceedings, which specific rights appertain to the status of *associé* and which to the position of *gérant* of an SPRL under Congolese law. It is at the merits stage, as appropriate, that the Court will have to define the precise nature, content and limits of these rights. It is also at that stage of the proceedings that it will be for the Court, if need be, to assess the effects on these various rights of the action against Mr. Diallo. There is no need for the Court to rule on these substantive matters in order to be able to dispose of the preliminary objections raised by the Respondent.

67. 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.

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68. 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.

69. The DRC points out that Guinea

> "does not dispute . . . that there are procedures and machinery for redress, judicial or otherwise, within the legal system of the DRC which would have enabled the companies in question or Mr. Diallo himself to safeguard their rights".

It adds that

> "[i]n the circumstances of the present case, however, there is nothing . . . to warrant the conclusion that it was impossible for Mr. Diallo to avail himself of the machinery and procedures offered by Congolese law which would have enabled him to safeguard his rights".

70. The DRC thus submits first 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. Mr. Diallo could also have "giv[en] one or more representatives power of attorney to act in legal proceedings instituted" or to "institute fresh proceedings in other disputes". In that connection, the DRC observes that in reality the

> "proceedings already set in motion by Mr. Diallo on behalf of the companies of which he was managing director were not interrupted because of his removal from the national territory".

It also notes that

> "the alleged 'extreme poverty' of Mr. Diallo and his finding it 'materially impossible to initiate further . . . proceedings' [, as claimed by Guinea] . . . are affirmations lacking in credibility and quite without evidential value".

In any event, poverty does not constitute "a new exception to the fundamental principle of the prior exhaustion of local remedies".

71. The DRC also asserts that the existing remedies available in the Congolese legal system are effective. It emphasizes in that respect the fact that "the 'effectiveness' of a remedy in no way implies that the plaintiff wins the case", adding that

> "there can clearly be no question of contesting the effectiveness of local remedies simply because Mr. Diallo's initial claims were not upheld in full or were subsequently rejected".

It also points out that in fact

> "the local remedies available within the Congolese legal system have been shown to be effective with respect to the disputes submitted to the ordinary Congolese courts by the companies Africontainers-Zaire and Africom-Zaire"

in which those companies obtained rulings in their favour. Moreover, the DRC considers that, given "the particular situation in which the Democratic Republic of the Congo . . . found itself for some years", it does not appear that the duration of proceedings before its domestic courts was unreasonable.

72. 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".

Guinea adds that the circumstances of Mr. Diallo's expulsion also precluded him from pursuing local remedies on his own behalf or on that of his companies. It recalls that Mr. Diallo was first arrested and imprisoned in 1988, then in 1995 and finally expelled from the territory of the Congo for having "ventured . . . to bring administrative and legal claims". The threat weighing on Mr. Diallo and his exclusion from Congolese territory constituted, according to Guinea, "a factual denial of access to local remedies". The expulsion of Mr. Diallo from Congolese territory is also said to have put him in a financial position in which it was "materially impossible for him to pursue any remedy whatsoever in Zaire". As for the possibility referred to by the DRC of appointing another *gérant* or giving someone else power of attorney to pursue the proceedings already initiated or institute fresh proceedings, Guinea points out that, in the circumstances of the case, "no one could be called upon to take over so dangerous a managerial post" and that "[t]he possible successor . . . would have had good reason to think that he was 'manifestly precluded from pursuing local remedies'".

73. Guinea further emphasizes that the existing remedies in the Con-

golese legal system must, in any event, be regarded as ineffective in view, *inter alia*, of the excessive delays of the Congolese judicial authorities in the settlement of the cases brought before them and the "unlawful administrative practices" allegedly inherent in the Congolese legal system, particularly the obstacles placed by the Government authorities to impede the enforcement of court rulings. Guinea notes in support of these arguments that there has still been no final ruling in two of the cases brought before the Congolese courts by Africom-Zaire and Africontainers-Zaire 14 and 13 years ago respectively. According to Guinea such "excessive lengths were general and probably not exceptional"; they demonstrate, it is claimed, "the futility of the remedies which Mr. Diallo's companies, or indeed he himself, might have done their utmost to seek". Guinea also recalls that, irrespective of the duration of proceedings before Congolese courts, "at the time of the events, the enforcement of legal decisions depended solely on the government's goodwill". It illustrates its argument by referring to "the interference by the Zairean Government in the legal proceedings brought by Mr. Diallo's companies" and more particularly the repeated stays of execution on the ruling of the Kinshasa *Tribunal de Grande Instance* in the case between Africontainers-Zaire and Zaire Shell. According to Guinea,

> "[t]he upshot of this is that any legal action that Mr. Diallo or his companies might have brought against the government could only result in a decision by that government based on political considerations".

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74. 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 given the circumstances in which that expulsion occurred. The Court has already found above (see paragraph 48), that the DRC has not proved that there were effective remedies, under Congolese law, against the expulsion Order against Mr. Diallo. 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. The Parties have indeed devoted 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.

75. The Court concludes from the foregoing 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.

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76. The Court will now consider the question of the admissibility of Guinea's Application as it relates to the exercise of diplomatic protection with respect to Mr. Diallo "by substitution" for Africom-Zaire and Africontainers-Zaire and in defence of their rights. 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 will again address these issues in turn, beginning with Guinea's standing.

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77. The DRC contends that Guinea cannot invoke, as it does in the present case,

> "'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. It recalls that the institution of diplomatic protection is based on the premise "whereby any violation of the rights of a foreign national is also a violation of the rights of his State of nationality". "It is this circumstance, and this circumstance alone, which justifies recourse to diplomatic protection." And the DRC emphasizes that "[c]onversely, if no right of its nationals is violated then no right of the State is violated and, in consequence, that State can in no circumstances have standing". The diplomatic protection "by substitution" proposed by Guinea is thus said to go "far beyond what positive international law provides".

78. The DRC adds that "contrary to what Guinea says, neither the Court's jurisprudence nor State practice recognizes the possibility of diplomatic protection by substitution". It explains that, although it touched upon this possibility in the *Barcelona Traction* case, the Court nevertheless did not "conclude that such a possibility existed under positive international law". On the contrary, the DRC contends that certain judges were "fiercely opposed to it". The DRC submits that

> "Guinea vainly seeks acceptance of the notion of a customary basis for such protection [by substitution] by relying in turn on: arbitral

awards; decisions of the European Commission of Human Rights; the requirements of Article 25 of the Washington Convention; ICSID jurisprudence; and bilateral treaties for the promotion and protection of investments".

According to the DRC, the arbitral awards to which Guinea refers are of no relevance, on the one hand, because of their age and, on the other, because, in each of the cases concerned, the issue of the right to claim on behalf of the shareholders had been settled in a convention enabling the arbitrators to adjudicate without limiting themselves to the application of general international law and which also contained a waiver by the respondent State of any right to raise an objection preventing the tribunal from ruling on the merits. The decisions of the European Commission of Human Rights, "given within a quite specific institutional and conventional framework, applicable at regional level, [are said to be no more] . . . relevant to the circumstances of the present case". As for the ICSID Convention, bilateral and multilateral treaties for the promotion and protection of investments and, ICSID decisions, they are also said to lack relevance, as they "do not constitute the direct application of the principles and rules governing diplomatic protection".

79. According to the DRC, 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, the DRC referred to the Judgment delivered by a Chamber of the Court in the case concerning *Frontier Dispute (Burkina Faso/Republic of Mali)*, and observed that, since the Parties had not, in the present case, requested a decision *ex aequo et bono* under Article 38, paragraph 2, of the Statute, the Court must "also dismiss any possibility of resorting to equity *contra legem*" (*I.C.J. Reports 1986*, p. 567, para. 28). The DRC adds that none of the particular circumstances of the case warrants calling that conclusion into question.

80. The DRC further contends that, even supposing that the Court agreed to take account of the considerations of equity relied on by Guinea, 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. In this connection, the DRC contends first that it has not been established that the solution advocated by Guinea is equitable in principle. On the contrary, the DRC suggests that 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. Some shareholders, such as Mr. Diallo in this case, might enjoy the protection of their national State by virtue of their alien status and of the good relations which they enjoy with their national authorities, whereas the other shareholders, either because they have the same nationality as the companies, or because their country of origin does not wish to exercise diplomatic protection in

respect of them, could have recourse only to domestic law and domestic courts to assert their rights. According to the DRC, such a difference in treatment lacks any objective and reasonable basis and thus constitutes true discrimination.

81. Lastly, the DRC maintains that "even assuming that 'protection by substitution' were accepted as justified, application of this principle to the case of Mr. Diallo would prove fundamentally inequitable". According to the DRC, "Mr. Diallo's personality and the conduct adopted by him since the start of this case are far from irreproachable". Moreover, the DRC alleges that it was those "activities [of Mr. Diallo], fraudulent and detrimental to public order, which motivated his removal from Zairean territory". It adds that Mr. Diallo's refusal to exhaust the available local remedies would also render diplomatic protection by substitution inequitable in this case.

82. For its part, Guinea observes that it is not asking the Court to resort to equity *contra legem* to decide the present case when invoking Mr. Diallo's protection by substitution for Africom-Zaire and Africontainers-Zaire. Rather, Guinea 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". In this connection, it quotes the following passage from the Judgment, which it considers apposite:

> "On the other hand, the Court considers that, in the field of diplomatic protection as in all other fields of international law, it is necessary that the law be applied reasonably. It has been suggested that if in a given case it is not possible to apply the general rule that the right of diplomatic protection of a company belongs to its national State, considerations of equity might call for the possibility of protection of the shareholders in question by their own national State." (*I.C.J. Reports 1970*, p. 48, para. 93.)

According to Guinea, the equity concerned in this case is equity *infra legem*. The alleged purpose of such recourse is to permit "'a reasonable application' . . . of the rules relating to diplomatic protection", in order "not to deprive foreign shareholders in a company having the nationality of the State responsible for the internationally wrongful act of all possibility of protection". Guinea recognizes that the Court did not definitively settle the question of the existence of diplomatic protection by substitution in the *Barcelona Traction* case. It nevertheless considers that the text of the Judgment, read in the light of the opinions of the Members of the Court appended to it, leads one "to believe that a majority of the Judges regarded the exception as established in law".

83. Guinea contends that the existence of the rule of protection by substitution and its customary nature are confirmed by numerous arbitral awards establishing

> "that the shareholders of a company can enjoy the diplomatic protection of their own national State as regards the national State of the company when that State is responsible for an internationally wrongful act against it".

Further, according to Guinea, "[s]ubsequent practice [following *Barcelona Traction*], conventional or jurisprudential . . . has dispelled any uncertainty . . . on the positive nature of the 'exception'". Guinea thus refers to certain decisions of the European Commission of Human Rights, to the Washington Convention establishing the ICSID, to the latter's jurisprudence and to the jurisprudence of the Iran-United States Claims Tribunal.

84. In Guinea's view, the application of protection by substitution is particularly appropriate in this case. Guinea again emphasizes that 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, and in particular Article 1 of the Legislative Order of 7 June 1966 concerning the registered office and the administrative seat of companies "whose main centre of operations is situated in the Congo", to incorporate the companies in Zaire. In this regard, Guinea refers to Article 11, paragraph *(b)*, of the draft Articles on Diplomatic Protection adopted in 2006 by the ILC, providing that the rule of protection by substitution applies specifically in situations where the shareholders in a company have been required to form the company in the State having committed the alleged violation of international law. Under Article 11, paragraph *(b)*:

> "A State of nationality of shareholders in a corporation shall not be entitled to exercise diplomatic protection in respect of such shareholders in the case of an injury to the corporation unless:
>
> . . . . . .
>
> *(b)* the corporation had, at the date of injury, the nationality of the State alleged to be responsible for causing the injury, and incorporation in that State was required by it as a precondition for doing business there."

85. Guinea also submits that the accusations made by the DRC against Mr. Diallo are not supported by any facts. On the contrary, it describes Mr. Diallo as "a shrewd and serious investor and businessman", who has never been accused of not honouring his own commitments to the Zairean State and private companies, and who has rendered great services to the economic development of Zaire by making substantial investments there. Lastly, Guinea rejects as not only inaccurate but also irrelevant in the present context the allegation that Mr. Diallo refused to exhaust all the remedies available in the DRC, this being a

claim concerning a condition for admissibility different from that which is here examined.

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86. 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.)

87. Since its dictum in the *Barcelona Traction* case (*ibid.*, p. 48, para. 93) (see paragraph 82 above), the Court 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" (*ibid.*, p. 48, para. 93), which allows for protection of the shareholders by their own national State "by substitution", and on the reach of any such exception. It is true 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, 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 will now examine whether the exception invoked by Guinea is part of customary international law, as claimed by the latter.

88. The Court is bound to note that, in contemporary international law, the protection of the rights of companies and the rights of their shareholders, and the settlement of the associated disputes, are essentially governed by bilateral or multilateral agreements for the protection of foreign investments, such as the treaties for the promotion and protection of foreign investments, and the Washington Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States, which created an International Centre for Settlement of Investment Disputes (ICSID), and also by contracts between States and foreign investors. In that context, the role of diplomatic protection somewhat faded, as in practice recourse is only made to it in rare cases where treaty régimes do not exist or have proved inoperative. It is in this particular and relatively limited context that the question of protection by

substitution might be raised. The theory of protection by substitution seeks indeed 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.

89. The Court, having carefully examined State practice and decisions of international courts and tribunals in respect of diplomatic protection of *associés* and shareholders, 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.

90. The fact invoked by Guinea that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, 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 arbitrations relied on by Guinea are also special cases, whether based on specific international agreements between two or more States, including the one responsible for the allegedly unlawful acts regarding the companies concerned (see, for example, the special agreement concluded between the American, British and Portuguese Governments in the *Delagoa* case or the one concluded between El Salvador and the United States of America in the *Salvador Commercial Company* case) or based on agreements concluded directly between a company and the State allegedly responsible for the prejudice to it (see the *Biloune* v. *Ghana Investments Centre* case).

91. It is a separate question 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" (Art. 11, para. *(b)*).

92. However, this very special case does not seem to correspond to the one the Court is dealing with here. It is a fact that Mr. Diallo, a Guinean citizen, settled in Zaire in 1964, when he was 17 years of age, and that he did not set up his first company, Africom-Zaire, until ten years later, in 1974. In addition, when, in 1979, Mr. Diallo took part in the creation of Africontainers-Zaire, it was in fact only as manager *(gérant)* of Africom-

Zaire, a company under Congolese law. When Africontainers-Zaire was set up, 70 per cent of its capital was held by *associés* of Congolese nationality, and only in 1980, one year later, did Mr. Diallo become an *associé* in his own name of that company, holding 40 per cent of the capital, following the withdrawal of the other two *associés*, the company Africom-Zaire holding the remaining *parts sociales*. It appears natural, against this background, 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 was already engaged in commercial activities. 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.

93. The Court concludes on the facts before it that the companies, Africom-Zaire and Africontainers-Zaire, 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 referred to by Guinea. Therefore, the question of whether or not this paragraph of Article 11 reflects customary international law does not arise in this case.

94. In view of the foregoing, 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.

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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.

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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.

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97. 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.

* * *

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.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this twenty-fourth day of May, two thousand and seven, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Guinea and the Government of the Democratic Republic of the Congo, respectively.

(Signed) Rosalyn HIGGINS,
President.

(Signed) Philippe COUVREUR,
Registrar.

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.

(Initialled) R.H.

(Initialled) Ph.C.