DECLARATION OF JUDGE *AD HOC* MAHIOU

[Translation]

1. In replying to the preliminary objections raised by the DRC seeking to assert that Guinea's Application is inadmissible, the Court begins by identifying the three categories of rights whose protection Guinea wishes to ensure by resorting to diplomatic protection and which are as follows: the rights of Mr. Diallo as an individual, his direct rights as *associé* in the two companies Africom-Zaire and Africontainers-Zaire and, lastly, the rights of those companies. As regards the prejudice to Mr. Diallo's personal rights arising among other things from his arrest and expulsion and also the mistreatment suffered and the prejudice to his direct rights as *associé*, I fully endorse the Court's conclusions that Guinea has standing, that it has satisfied the rule of the exhaustion of local remedies and that it can therefore take up the case of its national for the protection of these two categories of rights.

2. However, I shall add a brief comment on Mr. Diallo's direct rights as *associé* in order to point out that the Court has thus confirmed and clarified the position it had previously adopted in the *Barcelona Traction* case; indeed, in the Judgment of 15 February 1970, the Court introduced a distinction between the rights of the company and the direct rights of the shareholders by stating:

> "The situation is different if the act complained of is aimed at the direct rights of the shareholder as such. It is well known that there are rights which municipal law confers upon the latter distinct from those of the company . . . Whenever one of his direct rights is infringed, the shareholder has an independent right of action." (*Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 36, para. 47.)

The shareholder's own right of recourse is thus recognized, independently of that of the company; this also means that it is possible for the State whose shareholder is a national to resort to diplomatic protection when that national has suffered prejudice to his direct rights, regardless of the nationality of the company concerned. This right now forms part of the rules of customary international law, since every State is entitled to exercise its diplomatic protection in the event of the violation of the rights of its national, and Article 12 of the draft Articles of the International Law Commission (ILC) on Diplomatic Protection, adopted in 2006, merely confirms this rule by stating 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." (United Nations, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), Report of the International Law Commission on the work of its Fifty-eighth Session, p. 66.)

3. As regards the rights of the companies of which Mr. Diallo is the sole shareholder and owner, while sharing the premises in the arguments adopted by the Court, I am unable to endorse the conclusion it reaches. Indeed, as the starting-point of its reasoning, the Court takes the position adopted on this problem in the *Barcelona Traction* case cited above; after setting out the solution of principle, according to which the rights of a company can only be protected by a State of its nationality and not by the State or States of the shareholders, the Court instances a possible exception by saying that:

> "It is quite true that it has been maintained that, for reasons of equity, a State should be able, in certain cases, to take up the protection of its nationals, shareholders in a company which has been the victim of a violation of international law. Thus a theory has been developed to the effect that the State of the shareholders has a right of diplomatic protection when the State whose responsibility is invoked is the national State of the company. Whatever the validity of this theory may be, it is certainly not applicable to the present case, since Spain is not the national State of Barcelona Traction." (*Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 48, para. 92.)

4. So this is a "theory" which the Court confined itself to instancing, but without discussing it or, *a fortiori*, taking a position on it, as the circumstances of the *Barcelona Traction* case did not lend themselves to that; indeed, there, it was a triangular relationship involving three States: Spain as the host country of the company, Canada as the country of nationality of the company and Belgium as the country of nationality of the company shareholders. We know that another occasion presented itself to the Chamber of the Court with the case concerning *Elettronica Sicula S.p.A. (ELSI) (United States of America* v. *Italy)* since, this time, this was indeed an Italian company, whose American shareholders complained of measures taken by the Italian authorities against that company. However, the Chamber of the Court ruled upon and settled the problem without having to consider the discussion referred to in 1970, and it is most striking to note that the Chamber glossed over the *Barcelona Traction* case throughout the Judgment of 20 July 1989; the fact

that it failed to mention it may appear surprising, although it is true that this may be explained by the fact that, on the one hand, the problem was not set out clearly before the Chamber by the Respondent, which did not raise the question of the *jus standi* of the United States and, on the other hand, that the solution was based on the bilateral agreements concluded between Italy and the United States regarding the protection of investments, without there being any need to give particular consideration to other aspects, notably whether there was a rule of customary international law which might justify the protection of the shareholders in such a case.

5. Now the Court is once again asked in the present case to consider the same problem in order to complete its jurisprudence and provide useful clarifications on this question of the diplomatic protection of shareholders. Although it is true that the question has meanwhile matured owing to the additions to doctrine, the practice of States, bilateral or multilateral international conventions and the jurisprudence of international courts, the solution is not yet clear and one might have expected the Court to settle the question of whether there is a customary rule in this area. The Court has not met this expectation because it finds that there is a lack of sufficiently convincing elements to draw a clear and firm conclusion; this position is perhaps too prudent, but it is understandable in so far as the Court does not wish to act as legislator, above all because the question has been under discussion by States since they have had to consider the draft ILC Articles on Diplomatic Protection. It is for States to indicate the solution which should be adopted on the basis of the ILC proposals and more precisely of Article 11 of the above-mentioned draft, which states:

> "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:
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> *(a)* The corporation has ceased to exist according to the law of the State of incorporation for a reason unrelated to the injury; or
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> *(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." (*Op. cit.*, p. 59.)

6. Were such a solution to be adopted, it seems to me that it would allow for a balance between the legitimate protection of shareholders and the desire not to question the classical diplomatic protection régime; it seeks to identify the conditions making it possible to allow for an exception in this régime, yet without going as far as excessive interference in the relations between a State and companies of its nationality and normally falling entirely within its jurisdiction. Clarifying and developing the argument outlined by the Court in 1970, the ILC believes that there is a possible exception, provided that its implementation is subject to restrictions so as not to open the way to excessive or abusive claims likely to

create upsets in international economic relations; there are two such conditions, stemming respectively from a requirement of nationality and a statutory requirement.

7. On the one hand, the company affected by the prejudice must have the nationality of the State having taken the prejudicial measures; in such a situation, there is no longer any diplomatic protection since:

— on the one hand, the national State of the company is not going to exercise it against itself, as one would then be in the situation described by Judge Tanaka in 1970 in his separate opinion, where he states that "the protection of the shareholders by the national State of the company cannot be expected, either factually or legally" (*I.C.J. Reports 1970*, p. 134);
— and on the other hand, no other State can espouse the cause of that company owing to the absence of a bond of nationality.

Consequently, if one wishes to offer foreign shareholders a minimum of protection, the only possible solution is to grant them the benefit of the diplomatic protection of the State of which they have the nationality. This solution, highly controversial a few years ago, is less so today owing to the development already referred to and above all the much more favourable climate towards the encouragement of foreign investment.

8. On the other hand, the incorporation of the company in that State must be required for it to be able to trade; if the company no longer has any choice regarding the siting of its registered office, that constraint, which prevents the normal operation of diplomatic protection of the company by another State, must not deprive foreign shareholders in that company of all protection; they must be able to defend their rights and thus, where appropriate, enjoy the right of diplomatic protection by the State of which they are nationals. It thus appears that it is not a matter of defending every shareholder in any company, but of seeing the circumstances in which the exception is justified and in which the conditions required for it to come into play are reasonable and convincing; in such circumstances and conditions, the protection of the shareholder's rights is justified as a last resort, as pointed out by the Court in paragraph 88 of the Judgment.

The Court considers that the present case falls within the second exception laid down in Article 11 *(b)* of the draft ILC Articles, which the Commission's commentaries succinctly but adequately explain in order to justify their basis; in paragraph 88 of the Judgment, the Court states:

> "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."

9. However, while referring to this diplomatic protection theory, the Court considers that it does not apply in this particular case, thus espousing the solution in the *Barcelona Traction* case, but on a different basis. Indeed, after noting that the first condition has been met — since the two companies concerned do indeed have the nationality of the Congolese State, the perpetrator of the unlawful acts — it considers that the second condition has not been met, since that nationality stems from the free choice of their owner and not from a requirement of domestic law that would make it possible to invoke diplomatic protection. Admittedly, the choice of Congolese nationality was made by Mr. Diallo, but it seems hasty and questionable to conclude that it was a free choice, as the Court does in paragraphs 92 and 93 of the Judgment.

10. The freedom of choice is more appearance than reality when one analyses Congolese law. According to Legislative Order No. 66-341 of 7 June 1966, any undertaking whose principal activity is in the Congo was obliged to have its registered office and administrative seat in that country. Although the Legislative Order appears to draw a distinction between the administrative seat (Art. 1) and the registered office, it eventually confuses them (Arts. 2-3) and ultimately makes it an obligation for both the administrative seat and registered office to be in the Congo, when the "main centre of operations is situated in the Congo" (Art. 1). Considering that the main — and one may even say only — centre of operations of Mr. Diallo's two companies is in fact situated in the Congo, this necessarily means their establishment and incorporation in that country. They had no choice for, failing such incorporation, "they will be struck off the Trade Register" (Art. 2 (2)), which would prevent them from existing or trading in the Congo. Consequently, owing to this situation of fact and law, it seems clear that, in this case, we are considering matters from the standpoint of Article 11 *(b)* of the ILC draft, corresponding to the situation in which it would be legitimate for the right to diplomatic protection by the shareholders' State of nationality to come into play when prejudicial measures have been taken by the State against the company of its nationality. This is why, while endorsing the Court's approach, I cannot, however, endorse either the interpretation it gives of Congolese legislation or, consequently, its final conclusion on that basis in paragraph 1 *(b)* and paragraph 3 *(c)* of the operative part of the Judgment.

11. I should now like to deal with another aspect of the problem which has come to light as a result of new developments since the end of the oral proceedings. Whereas the case appeared to fall solely within Article 11 *(b)* of the ILC draft, the case could also fall under Article 11 *(a)*, inasmuch as one of Mr. Diallo's two companies — Africom-Zaire — has allegedly disappeared through the action of the Congolese authorities, which have struck it off the commercial register of companies established in that country.

12. In paragraph 22, basing itself on the DRC's letter of 31 January 2007 relating to Africom-Zaire, the Judgment points out that the lat-

ter company had allegedly "ceased all activity in the mid-1980s", which had led to its being automatically struck off the Trade Register. This is a new element — which has arisen since the end of the oral proceedings on the preliminary objections — which may have a direct bearing on the progress of the present case that merits consideration. Paragraph 59 of the Judgment refers to this problem, but in a way which does not seem to me satisfactory; it is not enough, in my opinion, to reserve all the future implications, and what counts above all is to ensure that the Court's decision on the preliminary objections does not prevent the Applicant from raising the problem when the case is considered on the merits. Indeed, were the disappearance of Africom-Zaire to be confirmed, it would create a situation in which there was no longer any possibility for that company to argue its case for itself and thereby to defend the rights and interests of its sole shareholder. This complete impossibility of any action through the company would thus deprive its sole shareholder of any remedy, if he were refused diplomatic protection by Guinea; we would then be faced with an unjust solution running not only counter to equity but also to the fundamental principles governing the rights of defence and human rights. The Court, the International Law Commission and doctrine have all been concerned by this problem.

13. In the *Barcelona Traction* case, the Court expressly refers to this as the first exception to the classical rule of diplomatic protection in paragraphs 64-68 (*I.C.J. Reports 1970,* pp. 40-41). It is true that the Court concludes in that case that the company did not disappear and, consequently, that this exception was not relevant in the case. However, it may be inferred from the Court's reasoning that, if the hypothesis of disappearance had been proven, it would without any doubt have ruled in favour of the operation of the exception. This is the solution adopted in the above-mentioned Article 11 *(a)* of the ILC draft, which makes it the first exception to the general rule of diplomatic protection, enabling the State of nationality of shareholders to exercise protection where "the corporation has ceased to exist according to the law of the State of incorporation". This solution, already supported in the past by part of doctrine, now, since the *Barcelona Traction* case, appears to enjoy widespread support. In conclusion, it seems to me that the Court ought to have said more clearly and precisely, in the present Judgment, that it expressly reserved the situation which might result from the confirmation of the disappearance of Africom-Zaire, with the consequences likely to arise therefrom for the subsequent procedure.

(Signed) Ahmed MAHIOU.