SEPARATE OPINION OF JUDGE *AD HOC* MAMPUYA

[Translation]

Subject and underlying cause of the dispute: ambiguity and conflation of mistreatment of a Guinean national and debts owed to Congolese companies — Need to go to the "heart of the dispute" — Protection of the rights of Congolese companies and protection of a national by way of substitution for the companies — Requirement of the existence of a dispute between States; novelty of certain claims and lack of notification — Non-existence of an international dispute in respect of part of the Application here ruled on — Identity and continuity in time of the subject of the domestic claims and the international claims — Dissimilarity and discontinuity of the claims in the present case — Direct rights of a shareholder — Alleged internationally wrongful acts must have been aimed directly at the direct rights of the shareholder as such — Exhaustion of local remedies and novelty of the claims.

I have voted on the whole with the majority of the Court, in particular in favour of that part of the *dispositif* declaring Guinea's Application to be admissible but only within the clear limits laid down in the Court's Judgment. I do however maintain the formal reservations which I expressed to the Court on a number of points. I should like to explain my vote in favour of the main operative provision and, more importantly, the subject of my reservations as to other aspects.

As the Court itself affirms in the Judgment, the fact is that the way in which the case has been presented to it does not bode well, the subject-matter of the Application was ambiguously defined, the Parties have remained locked in a dialogue of the deaf, as it were, and each has taken inconsistent positions during the proceedings. This has prompted the Court to make clear more than once that it has been forced to tailor its reasoning and approach to the way in which the Parties have presented the facts and their legal arguments. Inconstancy has resulted and this, in my opinion, has seriously impaired both the Court's reasoning and its decisions on various issues of fact and law raised in the present case.

1. The Congo's First Objection

Quality of the Application: Ambiguity and Conflation

In both its written pleadings and oral argument, Guinea sought to found its right to exercise diplomatic protection on two bases: the individual rights of Mr. Diallo, a Guinean national; and protection of a Guinean national as shareholder in Congolese companies. But the first basis for Guinea's action is presented as closely linked to the subject, as

Guinea sees it and describes it to the Court, of the dispute and of the Application, and as relating to the mistreatment allegedly inflicted by Congolese authorities on its national, while Guinea approaches the question of shareholder protection from the perspective of a shareholder's "direct rights" and from the specific perspective, directly linked to the debts owed to the two companies, of substitution of the shareholder for the two Congolese companies in which he is said to be the main shareholder.

I was apparently unsuccessful in advocating the view that the ever-present background to these three different bases for action (individual rights, shareholder rights and substitution) is the protection of the rights of two companies, Africom-Zaire and Africontainers-Zaire, and that it prevails over the Guinean national's direct rights in the Applicant's presentation of the facts and its submissions. In my opinion, the Court should have brought to light the real subject of the dispute before it, as the Applicant, constantly switching back and forth between mistreatment of a Guinean national and claims held by Congolese companies, offered at every turn in its written and oral arguments a confused amalgam sowing doubt and obscuring the true subject. The virtue in doing so would have lain in the ascertainment and finding that Guinea's Application had a primary subject, the rights and claims of the two companies controlled by Mr. Diallo, the outcome of which could affect other subjects, in reality secondary or subsidiary for the Applicant itself. To me, this realization appeared important, because it alone explains why the Democratic Republic of the Congo (DRC) based its first preliminary objection as to Guinea's lack of standing on the fact that "its Application" seeks "essentially to secure reparation for injury suffered on account of the alleged violation of rights of companies not possessing its nationality", i.e., for the non-payment of debts owed to the two Congolese companies. The uneasiness felt by the Court can be explained by the constant shifting between these alleged violations of the companies' rights and violations of Mr. Diallo's rights, and the misunderstanding and loose thinking prevailed throughout, as evidenced specifically by the fact that, in arguing the objection based on failure to exhaust local remedies, the Parties discussed only the remedies pursued by the companies in Congolese courts.

Granted, a State party to a dispute is undeniably entitled, even as late as in its final submissions at the conclusion of the oral phase, to change the way it presents the dispute and its claims in order to make a better case.

But in the instance of Guinea we have two Applications and throughout the proceedings the Applicant kept jumping back and forth between them and even conflating them. The first Application, dated 23 September 1998 and forwarded to Members of the Court by the Registry on 7 October 1998, bore the reference No. 1794/MAE/DAJC/98, and was transmitted by letter dated 21 August 1998 (No. 1579/MAE/DAJC)

regarding "Application for *payment filed against the Government of the Democratic Republic of the Congo*"

> "*concerning the payment of sums due* to Mr. Ahmadou Sadio Diallo, a Guinean national resident for over 30 years in the Congo, who, in 1996, as a result of having claimed payment of sums owed to him by the State and by various companies established in Zaire, was imprisoned for two months and fifteen days and then unjustly expelled from the Congo".

The Application itself states, as its object, that the Guinean national was expelled and,

> "by this unlawful and arbitrary expulsion, was divested of his bank accounts, his moveable and immovable property, the benefits deriving from his businesses *and of the numerous sums owed to him by the State itself and by a large number of private companies established on that State's territory*" (Application of 23 September 1998, p. 2; emphasis added).

Annexed to the Application were "Preliminary Notes" setting out points of fact and law, together with various documents (see the letter acknowledging receipt and the letter transmitting documents from the Registry of the Court dated 28 September). In the submissions in this Application, Guinea requested the Court to declare the Application admissible and, on the merits: to order the DRC to make an official public apology to Guinea; to find that the sums claimed were certain, liquidated and legally due; to find that "the Congolese State must assume responsibility for the payment of these debts"; and to order the DRC to make payment in amounts representing financial losses suffered by Mr. Diallo, damages at the rate of 15 per cent and bank and moratory interest at rates of 15 per cent (on amounts denominated in United States dollars) and 26 per cent (on amounts denominated in zaires, Zaire's national currency at the time).

To justify the admissibility of the Application in Part Two of its "Preliminary Notes", which was devoted to legal arguments, Guinea thought it need only cite: its status as a Member of the United Nations and, *ipso facto*, as a party to the Statute of the Court pursuant to Article 93, paragraph 1, of the United Nations Charter; and Article 35 of the Statute of the Court, providing "The Court shall be open to the States parties to the present Statute." As Guinea failed to state any basis for the Court's jurisdiction in the case, the Registrar asked Guinea to "be good enough to inform [him] as soon as possible of [its] position in this regard", in accordance with Article 38, paragraph 2, of the Rules of Court (acknowledgment of receipt by the Registry dated 28 September 1998).

For an understanding of the confusion to which I am referring, it was helpful to describe the cloudy and muddled circumstances surrounding the filing of Guinea's Application. The first fact is that Guinea at those dates had not yet made a declaration recognizing the Court's jurisdiction. The DRC, for its part, had done so on 6 February 1989. This explains

why the Registry requested an indication of the basis for the Court's jurisdiction in the case being referred to it. But this also explains why Guinea, instead of asserting a jurisdictional basis which did not exist at the time, filed another Application, this one dated 23 December 1998 (No. 2290/MAE/CAB/98, transmittal letter No. 2289/MAE/CAB/98), after having rushed to sign and file, on 11 November 1998, a declaration under Article 36, paragraph 2, of the Statute of the Court, no such declaration having existed in August and September 1998.

The Application of 23 December is indeed a "new Application"; while the Court did not dismiss the defective Application of 23 September, it did not authorize any procedural action pursuant to it. The later Application is genuinely "new", even though the Memorial revealingly conflates the two, describing the Application submitted by means of the letter of 21 August and "received in the Registry of the Court the following 25 September" as having been "put into proper form on 28 December 1998" (Memorial of Guinea, para. 1.3). As we shall see, the truth is that this did not involve merely putting the document into proper form. The 23 December Application relies on different legal grounds: it is an "Application for purposes of diplomatic protection"; it specifies the subject of the "dispute", which is claimed to be that Mr. Diallo was "imprisoned", "despoiled of his sizable investments, businesses, movable and immovable property and bank accounts" and then "expelled" at a time when he was seeking to collect significant sums owed to his companies. The second Application adds the entirely new and important point that Guinea is turning to the Court "[a]fter vain attempts to arrive at an out-of-court settlement", a point repeated in the Memorial, which refers to "several fruitless diplomatic initiatives aimed at inducing Zaire . . . to accede to requests for compensation made by Mr. Diallo, who had been unjustly reduced to total penury" (Memorial of Guinea, para. 1.2). The Application concludes with the assertion that Guinea is entitled to institute proceedings against the DRC, which

> "has violated certain major principles of international law . . .: the principle that foreign nationals should be treated in accordance with a minimum standard of civilization, the obligation to respect the freedom and property of foreign nationals, the right of foreign nationals accused of an offence to a fair trial on adversarial principles by an impartial court" *(ibid.)*.

The problem is not that of a flawed unilateral Application which the Court disregarded because it was not founded on a declaration recognizing the Court's jurisdiction, a compromissory clause or even the Respondent's subsequent consent under Article 38, paragraph 5, of the Rules of Court. This is all the more evident since the DRC, which had been notified on 28 September 1998 and could have relied on the lack of basis for the Court's jurisdiction to challenge any proceedings before the Court, did not react adversely to Guinea's Application; this was undoubtedly for easily understood reasons — aggression having led to nearly five mil-

lion Congolese deaths and seven years of rampant violence — but they are of little relevance here. Nor is the problem Guinea's surreptitious, after-the-fact recognition of the Court's jurisdiction.

It is also true that Guinea strove in its new approach to dissociate its Application from the debts owed to the companies controlled by Mr. Diallo. It stated in its Memorial "[i]n order to dispel all ambiguity from the outset" 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 managing director of companies*" (Memorial of Guinea, para. 1.12; emphasis added) and that "Mr. Diallo has been deprived of his *rights as a shareholder*" (Memorial of Guinea, para. 1.13; emphasis added), adding in its Observations on the DRC's Preliminary Objections that "the Republic of Guinea is only seeking to exercise its diplomatic protection in respect of its national, Mr. Ahmadou Sadio Diallo, in his various capacities" (Observations of Guinea, para. 0.10). But it becomes clear that the object of the first Application, "for *payment filed against the Government of the Democratic Republic of the Congo*" "*concerning payment of sums due* to Mr. Ahmadou Sadio Diallo", remains the ever-present background to all the Applicant's subsequent actions, sometimes even eclipsing the detachment feigned in a number of its assertions. The true subject of the dispute cannot be ignored in assessing the Applicant's case, even and especially in determining the admissibility of the Application. The Court cannot content itself with tactical assertions made by the Parties playing cat and mouse with it; it is duty-bound to pierce the veil and bring to light the real dispute lying concealed behind it.

From this viewpoint, non-payment of the debts clearly emerges as the heart not only of the dispute but also of the Application, as can be seen in the opening lines of the "Preliminary Notes" annexed to Guinea's Application to expound and clarify it; these same notes had been attached to the defective Application submitted in September 1998. At the beginning, among the "facts" (of the dispute) presented in Part One, we find not only a statement of the capital in one of Mr. Diallo's companies but also, and more importantly, a list of the numerous claims held by it (claims against the Congolese State (Section A) and contractual claims (Section B)), the extensive details of which take up all of Part One. Further, it is stated in Section III ("The Right to Diplomatic Protection") of Part Two of the Application, devoted to "The Law": "Whereas Guinea *is his protector, and also the protector of the companies which he founded* and owns." (Memorial accompanying the Application, p. 33; emphasis added.) Likewise, despite the precautions taken, Guinea in its Memorial could not help laying further stress on the debts, seeking to treat their recovery as a right of the shareholder, as seen in its comment in paragraph 1.16: "In particular, Mr. Diallo is unable to *recover the substantial debts owed to him*." (Emphasis added.) However, as we know, these are owed to the two Congolese companies.

Moreover, the statement of facts provides no explanation as to Mr. Diallo's expulsion, which, strangely, is only referred to briefly in the section on "The Statutory Guarantees *of the Debts*" under Section II in Part Two on the law and at considerable length under Section III, "The Right to Diplomatic Protection", in connection with a violation of the conventions governing the rights of aliens; furthermore, the submissions in the Application are the same as those made the previous September and obviously concern the debts alone. The lack of clarity is especially calculated, since the Application dated 25 September 1998 was neither withdrawn nor superseded by another but merely "put into proper form on 28 December 1998" (Memorial of Guinea, para. 1.3) "in the light of the *formal recommendations* [made by the Registrar of the Court]" (as stated in the transmittal letter of 23 December from the Guinean Minister for Foreign Affairs; emphasis added). It is a fact that the only changes made to correct the defective Application consisted of stating the basis for the Court's jurisdiction and the name of the Agent of the Applicant, as the Registrar of the Court had advised the Applicant to do in his letter of 28 September 1998; substantively, the Application of 23 December repeated the same reasoning and same claims as those of 23 September, which so clearly aimed at recovering the debts.

Thus, after stating:

> "[w]hereas in total, given that the compensation due to Guinea should cover all of the damage, both material and moral, it should include not only losses actually suffered *(damnum emergens)* but also loss of profits *(lucrum cessans)*, together with interest on the amounts awarded, calculated by reference to the length of time elapsed between occurrence of the injury and its effective reparation" (Application, p. 37),

the Applicant, having thereby made clear that "the damage" lay in these "amounts" corresponding to *damnum emergens, lucrum cessans* and interest, asked the Court:

> "FOR THESE REASONS:
>
> *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;
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> To find that the sums claimed are certain, liquidated and legally due;
>
> . . . . . .
>
> 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 Z14,207,082,872.7 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." (Application, p. 37; emphasis in the original.)

Similarly, in the submissions in its Memorial, Guinea shows that these debts are the real subject of the dispute and the Application. It states:

"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* — . . .; 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" (Memorial of Guinea, para. 5.1.1; emphasis added).

Seeking the claimed reparation in the form of compensation to which Guinea, no doubt acting within its rights, ascribes no value in the Memorial, unlike in the Application, the Applicant nevertheless adds that the compensation must cover "the totality of the injuries caused . . . including *loss of earnings*, and [must] also include *interest*" (Memorial of Guinea, paras. 5.1 (1)-(3); emphasis added).

These submissions continue with a new element by which Guinea confirms that the commercial difference over the debts owed to Africom and Africontainers is indeed the real subject of the dispute:

"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 . . . 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." (Memorial of Guinea, para. 5.2; emphasis added.)

Similarly, the Respondent itself, in its Preliminary Objections, also confined itself to the dispute as it appeared, based on these various elements, to have arisen from the default in payment of the debts owed to Mr. Diallo's companies. Indeed, it was on the basis of the dispute as thus perceived that the DRC raised its two objections to the admissibility of the Application, on the specific grounds that the dispute concerned claims held by Congolese companies and that Guinea and its protectee had failed to exhaust local remedies in this case.

Further, even as late as in its Observations on the DRC's Preliminary Objections, Guinea continued to refer everywhere to the cases involving the two companies as Mr. Diallo's cases, attributing to him the local proceedings pursued by the companies or in their name (Observations of the Republic of Guinea, paras. 3.9 and 3.15, virtually all of Sections 1 and 2 of the chapter devoted to the objection based on non-exhaustion of local remedies) and treating the claims as the joint property of the companies and Mr. Diallo (e.g., Observations of the Republic of Guinea, para. 3.4).

Finally, in its first round of oral argument Guinea, no longer hiding behind Mr. Diallo in his individual capacity, expressly told the Court that

> "three separate 'persons' are under the Republic of Guinea's protection in this case. Its national, Mr. Diallo, but also the two companies of which Mr. Diallo was the sole *gérant* and *associé* . . ." (CR 2006/51, p. 52, para. 7).

Under these circumstances it may at the very least justifiably be asked where the true subject of Guinea's Application lies amidst the prevailing obscurity.

In my view, the Court has allowed itself to be swayed by "diversionary tactics" such as those suspected by Judge Ranjeva, and referred to in his declaration, in the case concerning *Oil Platforms (Islamic Republic of Iran* v. *United States of America)* (*Judgment, I.C.J. Reports 2003,* p. 220, para. 3, declaration of Judge Ranjeva). As they did in that case, they lend a completely artificial air in the present case to the subject of the alleged dispute, as ultimately described by Guinea, and of the Application, a subject having nothing to do with the cause of action at the root of diplomatic protection. In this case as well, the Court could have "go[ne] directly to the real heart of the dispute" between the Parties to ponder, in addition to the *quid*, the *cur*, by which the underlying cause of the case could be apprehended. This question does of course arise on the merits, but in the present case it is even more acute in respect of admissibility.

From a different perspective, going to the real heart of the dispute would have facilitated the resolution of the actual controversy on more solid bases, including legal grounds. The approach taken by Guinea, claiming to champion the personal cause of its national, will however have the opposite effect, entering into conflict with Mr. Diallo's direct interests. In fact, as shown by Guinea's written pleadings, diplomatic

protection was put in motion by Mr. Diallo and his counsel, acting in the hope that the authorities in his country would help him recover the disputed debts, not out of the desire to see any injury caused by the conditions of his expulsion made good. This is particularly evident in that, as we shall later see, no dispute has arisen between Guinea and the DRC in respect of the Guinean national's expulsion and shareholder rights.

With all the deep respect owed to the Court, I would observe that, notwithstanding the Applicant's obfuscation of them, the real subject of the dispute and its very cause indisputably lie in the unpaid debts owed to the Congolese companies Africom and Africontainers. It is in any case reasonable to ask whether the Court should not have found that the Applicant had, if not committed an abuse of process, at the very least

> "not stated the nature of its claim within the degree of precision and clearness requisite for the administration of justice" (*Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74* (quoting France's Counter-Memorial), p. 16)

and accordingly should not have declared the Application inadmissible, even though the Respondent only touched on this argument in its pleadings (CR 2006/50, p. 41). In any event, had the Court considered the question from this angle, I do not think that it could have confidently responded with the answer given in 1938 to France's concern —

> "the explanations furnished . . . enable [the Court] to form a sufficiently clear idea of the nature of the claim submitted in the . . . Application" (*Phosphates in Morocco, Preliminary Objections, Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 21) —

except in respect of the debts described in the Applicant's submissions. Indeed, the object of the submissions is to reflect what the litigant concludes from the facts and arguments put forward; Guinea's submissions aim primarily at obtaining payment, with interest, of the debts held by companies not of Guinean nationality, even though Guinea was careful to hide behind the façade of its national's individual rights.

Accordingly, in my view, even though the Respondent did not raise the *exceptio obscuri libelli*, the Court should have looked beyond the sole ground of lack of standing to examine the quality of the Application itself and to draw the requisite conclusions from it, in so far as the main claim actually concerns the rights and interests of Congolese companies; and it could have done so without exposing itself to criticism for ruling *ultra petita*. I believe that it would only have been after such a preliminary enquiry that the Court could then have considered whether, in respect of the companies' claims, the heart of the dispute, the Application could be found admissible under the theory of substitution advanced by the Applicant; and it was only after this enquiry that the Court could have turned to the other grievances.

Instead, and without justifying its choice, the Court implicitly went to the heart of the dispute in its own fashion; it favoured the artificially defined dispute over the real dispute, considering, notwithstanding the glaring confusion, that the Application clearly and plainly concerned a Guinean national's individual rights and direct rights as *associé*, and only addressing indirectly, through the doctrine of substitution, the issue I raise here. And on this point, unpersuaded by the Court's implicit approach, I have maintained my reservations, which I expound here.

I did not however wish to vote against the admissibility of the Application on the ground of lack of standing by Guinea, because the secondary and subsidiary subjects of the Application, which have taken precedence in the Court's view, deserve to be examined, especially since they have been presented in the context of respect for human rights. There is another reason for my vote: it is my view that the Court has reaffirmed the *Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain)* case in rejecting in the present Judgment Guinea's attempts to protect the rights of the two companies pursuant to an alleged general rule of international law allowing action by substitution and forming an exception to the time-honoured rule set out in the *Barcelona Traction* Judgment. International law as it now stands contains no customary rule enshrining the diplomatic protection by "substitution" to which some writers, who misinterpret the *Elettronica Sicula S.p.A. (ELSI) (United States of America* v. *Italy)* Judgment, and the ILC's work have given the impression of subscribing. Ultimately, the Court confines itself to its task of resolving disputes submitted to it by applying positive international law *de lege lata*; this means that, whatever role the Court might see for itself in furthering development of the law, development does not take place by means of the Court proclaiming new rules of law or even anticipating, as Guinea asked it to do, the work of the ILC, the outcome of which depends, as for all its projects, on States. Furthermore, the Court reaffirms the established rule, notwithstanding the fact, stressed by Guinea, that, unlike the company which was the focus of the *Barcelona Traction* case, those involved here are not *sociétés anonymes*, but *sociétés privées à responsabilité limitée* (SPRLs). As Guinea had done (CR 2006/51, pp. 46-50, and CR 2006/53, pp. 38-41), it was later argued that SPRLs were characterized by their *intuitu personae* quality, leading to an identity of company and *associé(s)*, especially where there is only one *associé*, and this is how the companies in the DRC controlled by the Guinean national were described. The claimed consequence was that the general rule of diplomatic protection, said to apply only to *sociétés anonymes*, should be set aside and Mr. Diallo's action and that of his national State should be admitted, independently of the doctrine of substitution. But this distinction between *sociétés anonymes* and SPRLs is irrelevant, since the factor relied on by the Court in the *Barcelona Traction* case was the separateness of the company's legal personality and property, on the one hand, from those of its shareholders, on the other. The present Judgment wisely repeats the Court's statement that "[t]here is . . . no need to inves-

tigate the many different forms of legal entity provided for by the municipal laws of States" (*I.C.J. Reports 1970*, p. 34, para. 40), affirming that "[w]hat matters, from the point of view of international law, is to determine whether or not these have a legal personality independent of their members" (Judgment, para. 61) and that "[t]his remains the fundamental rule in this respect, whether for a SPRL or for a public limited company" (Judgment, para. 63). Had it reasoned otherwise, the Court would either have imperiously altered Congolese corporate law — which, while recognizing these corporate classifications, does confer independent legal personality, with all attendant legal consequences, without distinction on all forms of companies, whether *sociétés anonymes* or SPRLs — or have chosen without reason to disregard the municipal law of a party in an area and a case in which it is precisely this body of law alone which applies. Thus, the Court rightly rejected Guinea's argument. However, in refusing to apply the doctrine of substitution, the Court abstains from examining a legal ground which accounted for the greater part of Guinea's case: substitution, as set out in Article 11, paragraph *(b)*, of the ILC draft Articles on Diplomatic Protection, was claimed to be an exception enshrined in customary international law (Judgment, para. 93). For my part, I believe that, as the States to which the ILC proposal has been made have not yet adopted it as a new rule of law, and have not finally resolved the question, the Court could reasonably have been expected to examine the question of the force of the ILC draft language cited in support of Guinea's argument. The view of those who have applied their expertise to the question can be taken:

> "*[t]he solutions are too diverse . . . to support the assertion that they are evidence or constitute a norm of customary international law*" (Diez de Velasco Manuel, "La protection diplomatique des sociétés et des actionnaires", *Recueil des cours de l'Académie de droit international*, Vol. 141 (1974), p. 145; emphasis added).

And the ILC itself states:

> "Judicial decisions are likewise [i.e., like doctrine and State practice] inconclusive. The *Alsop, Cerruti, Orinoco Steamship* and *Ziat Ben Kiran* claims, *sometimes cited* in support of an exception in favour of shareholder claims, *do not really provide such support*. The *Baasch & Romer* and *Kunhardt* claims are at best unclear, but *possibly against the proposed exception*, as in these and other claims, the Venezuelan Mixed Commissions rejected claims on behalf of the shareholders of corporations of Venezuelan nationality." (ILC, *op. cit.*, para. 70; emphasis added.)

Similarly, in respect of all theories based, like this one, on economic control, the ILC's assertion that "it is doubtful whether a rule in favour of economic control enjoys the support of most States in today's world" (A/CN.4/530, para. 36) still holds. Any possible exception would not come into being until States, which are now considering the draft Articles, have taken a decision in accord with draft Article 11, paragraph *(b)*.

Sudden Assertion of the Claims, Dissimilarity of the Grievances and Non-existence of a Dispute

On the subject of the first objection, I still have reservations as to the process by which the Court rejected it in respect of Mr. Diallo's individual rights and his "direct rights as *associé*". This is because the feeling was reinforced early in the hearings that the Court was being presented with a dispute different from the one referred to it by the Application, essentially concerning these rights of the Guinean national, even though Guinea subsequently again conflated them and the debts owed to the two Congolese companies. While it clearly emerged in the hearings that there was a secondary dispute relating to alleged violations of these rights and a subsidiary dispute over protection by substitution, the Court examined these new disputes without ever considering whether their abrupt assertion and their novelty affected the nature of Guinea's action.

The first issue which could have been examined is undoubtedly whether a dispute between States over an individual's private rights arises directly in the internal legal order of the State accused of the alleged violations or in the international order. This does not necessarily involve arguing the conditions required to give rise to a dispute to come before the Court, but I find it logical to ask whether the dispute before the Court existed when the alleged violations of Mr. Diallo's rights under internal law took place or whether an inter-State dispute arose upon the national State's unsuccessful espousal of its national's cause before the competent authorities of the State alleged to be at fault. Under Article 38 of its Statute, the Court's function is "to decide in accordance with international law such *disputes* as are submitted to it" (emphasis added). Thus, for the Court to have jurisdiction, the alleged wrongful act must have given rise to a legal dispute between the States concerned. The mere filing of an Application with the Court does not create a dispute, give rise to one or place one on record. The existence of an internationally wrongful act harmful to an alien does not by itself constitute a dispute between the alien's national State and the State having committed the alleged internationally wrongful act; the dispute remains internal until such time as the national State raises the issue of wrongfulness and asserts a claim against the State having committed the act. What is concerned here is not the diplomatic negotiations required by some jurisdictional clauses as a precondition on referral to the Court, but rather the reasoning usually applied by the

Court in ascertaining whether an inter-State dispute exists over and above the acts from which an individual allegedly suffered.

This is the Court's settled, invariable practice in dealing with unilateral applications. One need only cite one of the oldest cases to have come before the Court, *Phosphates in Morocco* (Preliminary Objections). The Applicant, Italy, established that a dispute had arisen out of acts alleged to have harmed its nationals. After setting out all the facts, including specifically the acts which Italy deemed wrongful on the part of the Shereefian authorities and the authorities of the protecting Power, and describing the *enduring conflict* in the Parties' positions, on *inter alia* the nature of the settlement of the dispute, Italy submitted that

> "*the legal dispute which has arisen* could not form the subject of a special arbitration agreement, owing to the persistently evasive attitude of the Government of the [French] Republic, and is therefore submitted to the Court by a unilateral application" (*Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 14 (quoting the Application of the Kingdom of Italy); emphasis added).

France, the Respondent in the case, asserted in respect of a different grievance that, as no dispute had arisen over some of the facts alleged, they could not be the subject of a claim before the Court:

> "Whereas this question has not been investigated through diplomatic channels and as, accordingly, *it cannot be submitted to the Court by application on the basis of the declarations* whereby France and Italy have accepted the compulsory jurisdiction of the Court." (*Ibid.*, p. 17; emphasis added.)

I shall point out that the Permanent Court responded to this objection without rejecting the underlying principle; on the contrary even, it stated that "the preliminary diplomatic negotiations covered the whole of the controversy submitted to the Court . . .", on this point specifically citing "the positive statements made . . . by the interested parties, by the Italian Embassy and by the Royal Government's Agent" and "the two notes . . . handed" one to Mr. Laval and the other to the Quai d'Orsay (*ibid.*, p. 19).

Further, in the Advisory Opinion on *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase,* one of the questions to be answered by the Court was: "*do the diplomatic exchanges* between [the three States] and certain Allied and Associated Powers . . . *disclose any disputes*" (*I.C.J. Reports 1950*, p. 74; emphasis added) for which the treaties established a settlement mechanism. It was on the basis of the definition formulated in the Judgment in the *Mavrommatis Palestine Concessions* case that, after examining the diplomatic correspondence exchanged between the States concerned and observing that the two

Parties held clearly opposite views, and specifically that the accusations made by some States against others had been denied by those accused, the Court concluded that international disputes had arisen:

> "*In the diplomatic correspondence submitted to the Court*, the United Kingdom, acting in association with Australia, Canada and New Zealand, and the United States of America charged Bulgaria, Hungary and Romania with having violated, in various ways, the provisions of the articles dealing with human rights and fundamental freedoms in the Peace Treaties and *called upon the three Governments* to take remedial measures to carry out their obligations under the Treaties. *The three Governments*, on the other hand, *denied the charges*. There has thus arisen *a situation in which the two sides hold clearly opposite views* concerning the question of the performance or non-performance of certain treaty obligations. Confronted with such a situation, the Court must conclude that *international disputes have arisen*." (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950,* p. 74; emphasis added.)

The Court quoted this very language in the Advisory Opinion on the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947,* highlighting the need to look beyond mere assertions or denials of alleged facts to ascertain whether a dispute existed between the United Nations and the United States. To this end, it cited resolution 42/229 B of 3 March 1988, whereby the General Assembly affirmed

> "the position of the Secretary-General that a dispute exists between the United Nations and the host country concerning the interpretation or application of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations . . ." (*Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, I.C.J. Reports 1988*, p. 13, para. 1),

and recalled a finding that "the opposing attitudes of the parties clearly established the existence of a dispute" (*ibid.*, p. 27, para. 35).

In the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility,* the Court found:

> "there can be no doubt that, in the circumstances in which Nicaragua brought its Application to the Court, and on the basis of the facts there asserted, there is a dispute between the Parties, *inter alia*, as to the 'interpretation or application' of the Treaty" (*Judgment, I.C.J. Reports 1984*, p. 428, para. 83).

The same concern is to be found in the Judgment of 30 June 1995 in the case concerning *East Timor (Portugal* v. *Australia)* (*I.C.J. Reports 1995*, pp. 99-100, para. 22) and in the Judgment of 11 July 1996 in respect of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)* (*I.C.J. Reports 1996 (II)*, pp. 614-615, para. 29).

In a very recent case (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Judgment, I.C.J. Reports 2006*, p. 40, para. 90), the Court began by repeating the definition of "dispute" set out in the *Mavrommatis Concessions* Judgment and quoted its own jurisprudence, providing that "[i]n order *to establish the existence of a dispute,* 'it must *be shown that the claim of one party is positively opposed by the other*'" (emphasis added). In support of this proposition, the Court cited a long list of cases in which it had been so held (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74; *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 100, para. 22; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 17, para. 22; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 122-123, para. 21; *Certain Property (Liechtenstein* v. *Germany), Judgment, I.C.J. Reports 2005*, p. 18, para. 24). The Court then noted:

> "in the present case the DRC *made numerous protests against Rwanda's actions* in alleged violation of international human rights law, both at the bilateral level through direct contact with Rwanda and at the multilateral level within the framework of international institutions such as the United Nations Security Council and the Commission on Human and Peoples' Rights of the Organization of African Unity . . . Whatever may be the legal characterization of such protests as regards *the requirement of the existence of a dispute between the DRC and Rwanda . . .*" (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Judgment, I.C.J. Reports 2006*, pp. 40-41, para. 91; emphasis added.)

While the jurisdiction conferred on the Court by the compromissory clause in that case was subject not only to satisfaction of the condition requiring the existence of a dispute but also to submission of the dispute to negotiations between the two States prior to any referral to the Court, what is important for purposes of the argument of interest here is that the

Court affirmed that there is indeed a *"requirement of the existence of a dispute"* between States before proceedings can be brought before the World Court. This requirement actually signifies that what is properly referred to the Court is not so much the alleged wrongful acts as the dispute having arisen out of them.

A legal dispute cannot be found to exist until it has been established; it cannot simply be presumed from the facts. As in the case of private debt claims, those facts have to have given rise to an unmet demand; the jurisprudence and practice have so required ever since the *Mavrommatis* Judgment. Nor does a dispute come into existence directly out of the referral to the Court. In the absence of an inter-State dispute, alleged violations of an individual's rights remain mere acts; they do not constitute an inter-State dispute. This requirement, expressed in all these cases in respect of inter-State disputes involving international obligations in direct State-to-State relations, is even more compelling in regard to individuals' rights. Granted, in the *Avena and Other Mexican Nationals (Mexico* v. *United States of America)* case Mexico presented its claims concerning its nationals directly to the Court, but it expressly framed its action as one involving "violations of the Vienna Convention on Consular Relations (done on 24 April 1963)", to which the two States are parties (Application of Mexico dated 9 January 2003, p. 1, and *Merits, Judgment, I.C.J. Reports 2004*, p. 17, para. 1, and p. 28, para. 22), not one involving the exercise of diplomatic protection, and the Court took cognizance of this.

That the existence of an inter-State dispute should be required is especially logical and understandable since, as the ILC observes and documents in its Articles on Responsibility of States, it is generally accepted that a State invoking the responsibility of another State must give notice of the claim to it, specifying

> "*(a)* the conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;
> *(b)* what form reparation should take" (James Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries*, Article 43, p. 261).

While the fact alone of a State's breach of an international obligation is capable of giving rise to its responsibility under the law,

> "the first step [by an injured State] should be to call the attention of the responsible State to the situation, and to call on it to take appropriate steps to cease the breach and to provide redress" (*ibid.*, p. 261),

as Crawford says in commenting on Article 43. In fact, it is only where there is no response or an unsatisfactory response that the dispute is born.

The truth is that, more often than not when the definition of "dispute" is under discussion, one stops at that part of it formulated by the Court in its Judgment in the *Mavrommatis Palestine Concessions* case to the effect that a dispute is "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11). Sight is lost of the fact that the Court laid down this definition only after establishing that the conditions for the existence of a dispute had been fulfilled. This was the process followed by the Court in the *South West Africa* case when it made clear:

> "it is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence. *Nor is it adequate to show that the interests of the two parties to . . . a case are in conflict. It must be shown that the claim of one party is positively opposed by the other*." (*Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328; emphasis added.)

And in that 1962 Judgment the Court carried out a thorough analysis in this respect, reviewing the entire diplomatic correspondence between the parties. Once again, it is clear from this that what must be referred to the Court is neither the facts nor the internal controversy, but the inter-State dispute arising out of them. The Permanent Court affirmed this in its own way in the case concerning *Mavrommatis Palestine Concessions* when it said:

> "it is true that the dispute was at first between a private person and a State — i.e. between M. Mavrommatis and Great Britain. *Subsequently, the Greek Government took up the case. The dispute then entered upon a new phase; it entered the domain of international law . . . Henceforward therefore it is a dispute which may or may not fall under the jurisdiction of the Permanent Court of International Justice*." (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2,* p. 12; emphasis added.)

The fact that the DRC has not denied the existence of a dispute between it and Guinea is wholly immaterial, since the existence of a dispute is the first, objective, condition to be met for a valid referral to the Court (whose function, under Article 38 of its Statute, is "to decide . . . disputes . . ."), and the Court is in no way limited in its power to ascertain whether a dispute already exists. Further, in examining this issue in the *South West Africa* case, the Court addressed it not as a preliminary objection raised by the Respondent (the Union of South Africa) but as a "preliminary question relating to the existence of the dispute which is the subject of the Applications" (*Preliminary Objections, Judgment, I.C.J.*

Reports 1962, p. 328), "[b]efore undertaking th[e] task" of considering South Africa's preliminary objections "in the present phase of the proceedings"; the Court only turned to consideration of the preliminary objections afterwards. Nor is it correct to claim that there is no longer any need to deal with this question because the Respondent accepted the Court's jurisdiction at the outset; these are in fact two separate issues — existence of a dispute and jurisdiction — each of which the Court is duty bound to consider.

Now, in this context Guinea's two successive Applications set out the "subject of the dispute", but nowhere does Guinea show, through the circumstances surrounding the submission of its Application or through the facts alleged therein, either when or in what terms *the legal dispute* cognizable by the Court became apparent or acknowledged in respect of the wrongful acts it ascribes to the DRC in connection with Mr. Diallo's alleged mistreatment, his expulsion and even his direct rights as *associé*. Guinea, no doubt aware that the existence of an inter-State dispute is required, seeks to establish one by claiming that it only turned to the Court "[a]fter vain attempts to arrive at an out-of-court settlement" (Application, p. 3) or after "several fruitless diplomatic initiatives aimed at inducing Zaire . . . to accede to requests for compensation made by Mr. Diallo, who had been unjustly reduced to total penury" (Memorial of Guinea, para. 1.2). I believe that for this reason alone the Court could have checked the substance of these allegations; it would then have seen not only that any alleged attempts and diplomatic initiatives which might have been capable of precipitating the conflict of views, that is to say the dispute, concerned only the commercial disagreements involving the companies in which Mr. Diallo is *associé*, but also that they consisted of nothing but correspondence exchanged between various Guinean authorities themselves. Among the hundreds of documents annexed by Guinea, not even one can be found bearing on any diplomatic or other approach made by the Guinean Government, a minister or ambassador to any Congolese authority. Incidentally, it is telling that Guinea made no further reference to these in oral argument. In fact, the only correspondence of the Guinean Government concerning Mr. Diallo was between Guinean authorities themselves or between the Minister for Foreign Affairs and his Ambassador in Kinshasa; moreover, the sole subject dealt with in these letters was Mr. Diallo's debt claims (Memorial of Guinea, Anns. 203, 216, 217 and 223).

The only correspondence sent to the Congolese authorities which appears in the record was from Mr. Diallo's counsel, and him alone, and fell within the scope of steps taken in pursuit of a settlement of the litigation which Mr. Diallo, as the companies' *gérant*, brought over the debts owed to them. This in no way detracts from the fact that no document filed with the Court proves that diplomatic démarches were undertaken to resolve the matter of the alleged harm suffered by Mr. Diallo from his imprisonment and expulsion. What is more, the record before the Court contains no evidence substantiating any official approaches to the DRC

in respect of any aspect of the case, not even the debt claims. In his letter to the President of the Democratic Republic of the Congo, Mr. Diallo's counsel does of course refer to "[a]ll of the letters sent by the Minister for Foreign Affairs of the Republic of Guinea to the Congolese authorities", to which "no response has been forthcoming, in a showing of vexatious disregard for diplomatic courtesy", but he then informs the President of *his client's* decision "to refer the matter to the competent international bodies in order to obtain justice" (Memorial of Guinea, Anns. 245 and 248, letters of 4 February and 16 March 1998, Anns. 246 and 249, letters to the Minister of Justice of the DRC dated 4 February and 16 March 1998, seeking their consent, as required by the Secretary-General of the ICSID, to the submission to that international arbitration body).

However, while Mr. Diallo's counsel, undoubtedly acting in good faith but in no position to check anything, believed the Minister's assertion that he had sent several letters to the Congolese authorities, no evidence of them is to be found in the written record before the Court or the statements made in the oral proceedings.

What is more, no diplomatic démarche followed even from the letter from the Guinean Minister for Foreign Affairs to the Guinean Ambassador referring to Mr. Diallo's banishment from Zaire and raising the possibility of an approach in stating "unless that ban is officially lifted" (Memorial of Guinea, Ann. 216), or from the letter from the Guinean Minister of Justice (Memorial of Guinea, Ann. 212) dated 11 December 1996 (a month-and-a-half after the expulsion order was signed and a month-and-a-half before the expulsion), in which the Minister states that he remains at the "disposal [of the Minister for Foreign Affairs] to follow up the case", transmits *a report on Mr. Diallo's expulsion* to his counterpart at the Ministry of Foreign Affairs and raises the "possibility of exercising diplomatic protection" vis-à-vis the DRC. There is no evidence in the documents before the Court of even a simple diplomatic protest against Mr. Diallo's alleged mistreatment and his expulsion, even though these received media coverage and must therefore be deemed to have been matters of public knowledge; this grievance, insofar as there was any substance to it, was never raised at the international level in such a way as to become a dispute between States.

Finally, in accordance with this logic, it is settled diplomatic practice and an established judicial requirement that, apart from having first to exhaust local remedies, an international applicant must assert the same claims before the international court as those raised before the national courts of the "responsible" State: "the national and international judicial fora must *examine the same questions* . . ."; the claims must "*be identical* and must aim at the *same allegedly violated rights*" (P. Daillier and A. Pellet, *Droit international public,* LGDJ, 7th ed., 2002, p. 814; J. Guinant, "La règle de l'épuisement des voies de recours internes dans le cadre des systèmes internationaux de protection des droits de l'homme", *Revue belge de droit international*, 1968, pp. 476-477; emphasis added).

Now, in the Congolese domestic courts the Applicant sought payment of the debts owed to the two Congolese companies, while what is being sought in this Court is reparation for the alleged mistreatment of an individual and for claimed violations of the direct rights of an *associé*: completely different disputes, completely separate proceedings. In fact, Guinea's claim, insofar as the intertwined arguments allow it to be confined strictly to the alleged mistreatment of Guinea's national, first arose before the Court, its sudden appearance taking the Respondent by surprise. Thus, the DRC, whose knowledge of the controversy was limited to the information presented to the Court when Guinea filed its Application, could only respond as it did in respect of the "dispute" over individual rights and direct rights of an *associé*. The issue here is completely separate from the question of the Court's incontrovertible jurisdiction, which has moreover been accepted unreservedly by the Respondent.

In respect of these points concerning the quality of the Application, *obscuri libelli*, the sudden assertion of the claims and the dissimilarity of the grievances, it was my impression that the Court was retreating from what seemed to me a logical practice, and I failed to understand why. I found it unsatisfactory that the Court should dispense with such a productive analysis. Finally, the fact that the DRC has participated in the proceedings from the outset without reservation or objection on these points is immaterial here and, in acting on a respondent's attempt to have an application declared inadmissible, the Court

> "retains its freedom to select the ground upon which it will base its judgment, and is under no obligation to examine all the considerations advanced by the Parties if other considerations appear to it to be sufficient . . ." (*Application of the Convention of 1902 Governing the Guardianship of Infants, Merits, Judgment, I.C.J. Reports 1958*, p. 62).

2. The Congo's Second Objection

Like the Court, I shall observe that it found itself constrained by the fact that the Parties discussed only those remedies sought by the companies and paid no attention to those which Mr. Diallo might or should have pursued to safeguard his "direct rights" as *associé* or *actionnaire* (Judgment, para. 74).

While this may be understandable in the case of the Respondent, the DRC, which geared its preliminary objections to the subject-matter of the dispute as described in the Application, without tailoring its legal arguments to the new claims asserted by the Applicant, it is less easily understood in the case of the Applicant, Guinea, which found the time to "rectify" its claims by incorporating within them alleged violations of its national's individual rights and direct rights as *associé*, without however

stating that all specific remedies for these had been exhausted or had proved ineffective or non-existent.

I have found myself in disagreement with the Court on the reasoning expounded in rejecting the second objection. Closely following Guinea's contentions, including the most dubious of them, the Court accepted the arguments that the Congolese legal system offered no remedies against the decision to expel Mr. Diallo and that the availability of any remedies against the alleged violations of his direct rights as *associé* was a function of his expulsion.

As upheld by the Court, Guinea's thesis was that the DRC deliberately expelled Mr. Diallo to prevent him from exercising his rights as *associé* and that the expulsion *per se* was a violation of his direct rights as *associé*. The insinuation of a plot by the DRC against Mr. Diallo runs through Guinea's case, even taking form in the argument that the DRC deliberately camouflaged Mr. Diallo's expulsion as a non-appealable "refusal of entry" *("refoulement")*; this contention, described in paragraph 46, resurfaces in the Court's reasoning in paragraph 73 of the Judgment. Further, in sanctioning this interpretation, the Court proceeds on the basis that Mr. Diallo was unaware that he had been expelled, acted as though he thought that he had been refused entry instead, and accordingly refrained from pursuing remedies that were at any rate not available for refusal of entry. However, the correspondence exchanged between Guinean authorities shows that they had knowledge of the decree "expelling an alien from the Republic of Zaire". And these two measures have different objects: expulsion from a country involves someone already residing there, while entry is refused to someone at the border. Further, this charge is all the more prejudicial to a State, and to no avail, in that it introduces a contradiction, or in any event an inconsistency, with paragraphs 47 and 48 of the Judgment, which expound a more acceptable argument, one closer to the truth and sufficient on its own, showing that in reality Mr. Diallo was prevented from pursuing remedies not because the measure involved was a refusal of entry, at least as so designated by the DRC, but because the DRC "has not proved the existence in its domestic legal system of available and effective remedies allowing Mr. Diallo to challenge his expulsion". True, it was not for the Court to seek *proprio motu* to ascertain whether effective remedies against expulsion existed under Congolese law, but the simplistic reasoning rejecting the claim of clerical error and leading to treating refusal of entry and expulsion as alike upon enforcement of the order expelling Mr. Diallo is, I believe, deficient. It would have been easier for me to understand the conclusion, in accordance with unassailable jurisprudence, that Mr. Diallo, having been removed from the Congo, was unable to pursue these remedies, whatever they might be, whereas, in concluding that there are no such remedies, the Court, it seems, is gratuitously passing judgment on the legal system of a State party to its Statute. Moreover, while the DRC was unable to prove the existence of contentious remedies, it did draw attention to remedies of grace. It is not true that remedies of

grace fall outside the scope of the obligation to exhaust local remedies on the ground that they reflect nothing more than mercy or a favour, as the Judgment implies (Judgment, para. 47). This is important because, if it is true, as Guinea contends, that "scholarly opinion has always been hostile" to remedies of grace, another, equally credible, school of thought holds that remedies sought from administrative authorities are generally recognized, together with contentious remedies, to be effective local remedies required to be exhausted: according to P. Daillier and A. Pellet, an individual having suffered from a wrongful act must have "exhausted all local remedies — *both of grace and contentious* — provided for and available in the State's legal order . . ." (*Droit international public*, 2002, p. 812; emphasis added). Moreover, although the Judgment implies that remedies of grace exist in several forms, it cannot help but be observed that, owing to the very nature of a remedy of grace, the outcome of a petition for one, unlike that of an application in a legal action, lies within the discretion of the competent administrative authority and this should not detract from its value as a remedy.

As for the violation of Mr. Diallo's direct rights as *associé*, dealt with "as a direct consequence of his expulsion", it would undoubtedly also have been useful to show more explicitly, but without necessarily addressing the merits in depth, the claimed link between the expulsion and the violation of Mr. Diallo's direct rights as *associé*. The discussion would then have dealt with the question, at the very least as a point to be proved in the merits phase, whether or not the DRC's actions were specifically aimed at the direct rights. In fact, since the direct rights of an *associé* can only be exercised vis-à-vis the company in which the individual is *associé*, third parties can only be concerned where the complained-of acts are, in the words of the Court in the *Barcelona Traction* case, "aimed at the direct rights . . . as such", thus ruling out cases of indirect or collateral impact, or where the State interferes in the operation of the company or in its relations with its *associés*. This can be seen in the Arbitral Award in the case concerning *Salvador Commercial Co.* (*RIAA*, Vol. XV, pp. 474-475), which gives logical examples of interference, such as arbitrarily replacing directors, calling meetings of a company's management bodies in violation of the rules or without notifying majority shareholders, refusing to allow certain shareholders to inspect corporate records, and other acts similar in nature. Yet there has been no allegation by Guinea, not even one which it reserved the right to prove in the merits phase, that the DRC committed internationally wrongful acts "aimed at [Mr. Diallo's] direct rights as *associé* as such"; it merely cited the effect of an action taken against Mr. Diallo as an individual, not against his directs rights as *associé*. The different approach taken by Guinea, and accepted by the Court, was to refrain from seeking to determine whether the complained-of actions by the DRC concerned or, better yet, specifically targeted, Mr. Diallo's direct rights as *associé* "as such" or whether this was merely a collateral effect of a measure aimed solely at Mr. Diallo as an individual; it attached no importance to the fundamental distinction

drawn by the Court itself in the *Barcelona Traction* case. This is akin to insinuating that the DRC's intent in expelling Mr. Diallo was precisely to violate his direct rights as *associé*; the insinuation is tantamount to holding the Respondent responsible — and I cannot countenance this — not for its acts but for its supposed motives, ascribing to it, as the impetus for an action clearly taken against an individual, an unascertainable motive to strike not at the individual himself but at his direct rights as *associé*. In so doing, the Court has, in preference to the clear and legally precise language in its Judgment in the *Barcelona Traction* case — an "act . . . *aimed at* the direct rights of the shareholder as such" —, implicitly ratified the ILC's formulation in Article 12 of its draft — an act which "*causes direct injury* to the rights of shareholders as such" (emphasis added). Indeed, it is this latter, over-broad interpretation, opening a veritable Pandora's box, that informed Guinea's argument dealing with "the alleged violation of Mr. Diallo's direct rights as *associé* . . . as a direct consequence of his expulsion", reasoning which the Court then adopted as its own (Judgment, para. 74).

Another point concerning the objection based on failure to exhaust local remedies bears noting in respect of the direct rights as *associé*. While observing that the Parties "have confined themselves . . . to examining remedies open to Africom-Zaire and Africontainers-Zaire, without considering any which may have been open to Mr. Diallo as *associé*" *(ibid.)*, the Court nevertheless rejects the Congo's objection pursuant to reasoning premised on the DRC's failure to show that remedies "distinct from those in respect of Mr. Diallo's expulsion" *(ibid.)* existed, even though neither the Application nor anything else in the proceedings provides a basis for requiring such a showing by the Respondent. Accordingly, having taken the view that there are no remedies against expulsion, the Court concludes that there are likewise none against any violations of rights as *associé*. In any event, the reasoning that thus leads to equating expulsion and alleged violations of direct rights as *associé,* even where expulsion is deemed the source of the alleged violations, is unpersuasive. But the Court has got round the difficulty created for it by the fact that no conclusive, logical inference as to the existence or non-existence of remedies specific to rights as *associé* can reasonably be drawn from the Parties' silence; it has done so by deciding:

> "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." *(Ibid.)*

This facile assimilation is not self-evident; remedies against expulsion, which are specific owing to the nature itself of expulsion as a matter for the administrative courts, are not the same as those to protect direct

rights of an *associé*, and Congolese law offers the latter remedies, as evidenced in the present case by the avenues of redress pursued by the two companies. The Respondent sought to show this in an argument described in paragraph 69 of the Judgment. Had the Court taken account of the difference between expulsion and direct rights as *associé* and of the distinction between the types of litigation (administrative or commercial) possible in these two subject-matters, it would have recognized the existence under Congolese law of commercial remedies suitable as redress for the alleged violations of direct rights as *associé* and would have examined their effectiveness, even if doing so might have led it to conclude that they were ineffective in this context.

In any event, the previously discussed principle requiring identity and continuity of the subject-matter of the dispute thus lies at the heart of the logic and wisdom of the local remedies rule. Since the assertion of an international claim by a national State is nothing more than the espousal of a claim already referred to and dealt with by a domestic court or the authorities in the State of residence, a State cannot, acting on an individual's behalf, seise an international court of a wholly new cause of action never referred or notified to the national authorities of the State of residence. The dispute as to Mr. Diallo's direct rights as *associé* is just such a new dispute, which sprang into existence directly before the Court. Under the circumstances, it clearly could not have been the object of proceedings for local remedies, which at the very least should have been pursued. While it is true that a remedy, any remedy, is not deemed effective only where the party seeking it prevails and ineffective where that party loses, at the very least, "*however contingent and theoretical these remedies may be, an attempt ought to have been made to exhaust them*", to quote Judge Lauterpacht (*Certain Norwegian Loans, Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 39, separate opinion of Judge Lauterpacht).

In line with this reasoning, the Court could have upheld the preliminary objection on account of non-exhaustion of local remedies in so far as it concerns protection of Mr. Diallo's direct rights as *associé* in Africom-Zaire and Africontainers-Zaire.

(*Signed*) Auguste MAMPUYA.