JOINT DECLARATION OF JUDGES AL-KHASAWNEH, SIMMA, BENNOUNA, CANÇADO TRINDADE AND YUSUF

[English Original Text]

Admissibility of an additional claim — Subject of the dispute — Legal security and good administration of justice — Continuity between the arrest and detention of Mr. Diallo in 1988-1989 and 1995-1996, and their connection with the attempts to recover the debts.

1. With regret, we were obliged to vote against the first subparagraph of the operative part of the Judgment, according to which "the claim of the Republic of Guinea concerning the arrest and detention of Mr. Diallo in 1988-1989 is inadmissible". We are convinced that this claim, albeit presented belatedly, during the proceedings, falls within the subject of the dispute as indicated in the Application instituting proceedings, pursuant to Article 40 of the Statute of the Court. Our analysis is based on an approach which was set forth with clarity by the Permanent Court of International Justice and has since been reiterated many times by this Court: "The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law." (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 34.)

2. It follows that, first of all, the claim relating to the events of 1988-1989 cannot be rejected solely because it was only presented by Guinea for the first time in its Written Observations of 7 July 2003, in response to the objections in respect of inadmissibility raised by the Democratic Republic of the Congo, and, subsequently, in more detail in its Reply of 19 November 2008 (Judgment, paras. 31 and 32).

3. The question which then arises is not whether the Applicant may add to the facts at issue in the context of the subject of the dispute, which it described in its Application, since according to Article 38, paragraph 2, of the Rules of Court, the latter "shall also specify the precise nature of the claim, together with a succinct statement of the facts and grounds on which the claim is based". At that stage, therefore, it is not a matter of being exhaustive as regards the facts concerned. It is accepted, moreover, that the Parties may amend their submissions up to the end of the oral proceedings, and Guinea was consequently able to refer, in its final submissions, to "arbitrary arrests" in the plural, instead of to the single arrest mentioned in the submissions in its Application. It is true, however, that there are limits to "the liberty accorded to the

Parties to amend their submissions up to the end of the oral proceedings", since "the Court cannot, in principle, allow a dispute brought before it by application to be transformed by amendments in the submissions into another dispute which is different in character" (*Société Commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B, No. 78*, p. 173).

4. In our opinion, what matters as regards the admissibility of a formally new claim is that it should fall within the subject of the dispute which has been brought before the Court, while complying with the Statute and the Rules of Court. Otherwise, "the subject of the dispute on which [the Court] would ultimately have to pass [judgment] would be necessarily distinct from the subject of the dispute originally submitted to it in the Application" (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 266, para. 68). And such a situation would necessarily be incompatible with the requirements of "legal security and the good administration of justice" (*ibid.*, p. 267, para. 69).

5. The Court accepts that the evaluation of additional claims essentially involves asking whether these would have the effect of "transform-[ing] the subject of the dispute originally brought before it under the terms of the Application", referring to the case concerning *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)* (*Judgment, I.C.J. Reports 2007 (II)*, p. 695, para. 108). But it does not apply that test, as such, in order to determine the admissibility of Guinea's claim in respect of the events of 1988-1989. The Court indeed loses sight of this in the course of its argument, which it bases solely on the two criteria that have emerged from the jurisprudence specifically for assessing the connection between a new claim and the subject of the dispute: either that it is implicit in the Application, or that it arises directly out of it. These criteria are intended to make it possible to answer the central question, namely whether the additional claim falls within the subject of the dispute which has been brought before the Court, or whether it introduces a new dispute. Unfortunately, the Court does not answer that question, since it has chosen to embark on a purely formal analysis of the claim in respect of the events of 1988-1989, referring in turn to the two criteria mentioned above. It thus concludes that those events are not implicit in the Application because they concern "arrest and detention measures, taken at a different time and in different circumstances", and that "the legal bases for [the] arrests . . . were completely different" (Judgment, para. 43). This formal line of argument is used again by the Court in order to conclude that it sees no possibility of finding that the new claim arises directly out of the question which is the subject-matter of the Application (*ibid.*, para. 46).

6. We observe that, in the light of this reasoning, the majority has been content to draw a simple comparison between the formal circumstances

of the arrests and detention of Mr. Diallo, and between the legal bases for them which have been alleged by the DRC, without concern for the real continuity between the events of 1988-1989 and those of 1995-1996, and without qualifying the matters of form in municipal law, as advocated by the jurisprudence of the Court.

7. In terms of substance, however, the arbitrary arrests which Mr. Diallo suffered in 1988-1989 and 1995-1996 reflect the continuity of the action taken against him by the Democratic Republic of the Congo whenever he brought more pressure to bear on the authorities in order to recover the debts owed by that State and Congolese companies to his two companies (of which he had become the sole *associé*). On 25 January 1988, Mr. Diallo was arrested and imprisoned for a year, on the order of the Prime Minister of the DRC, after he had tried in vain to recover the debts owed by the Congolese State to the Africom-Zaire company in the "listing paper" affair, even though the Finance Minister had acknowledged the debts in question. The accusation of fraud against Mr. Diallo was not made in any judicial context, but simply formulated by the government authorities of the DRC. The same Prime Minister of the DRC who ordered Mr. Diallo's arrest for fraud had written to the Finance Minister on 14 January 1988 asking him not to settle the debts owed to Africom-Zaire. In 1996, Mr. Diallo was once again arrested and then expelled, after he had sought implementation of the judgment given in favour of the Africontainers-Zaire company. For the DRC authorities, it was obviously a matter of removing Mr. Diallo from Congolese territory once and for all, so that he could no longer pursue the debts owed to his companies by the State and Congolese companies.

8. Furthermore, the Court itself correctly pointed out that:

> "the DRC has never been able to provide grounds which might constitute a convincing basis for Mr. Diallo's expulsion. Allegations of 'corruption' and other offences have been made against Mr. Diallo, but no concrete evidence has been presented to the Court to support these claims. These accusations did not give rise to any proceedings before the courts or, *a fortiori*, to any conviction. Furthermore, it is difficult not to discern a link between Mr. Diallo's expulsion and the fact that he had attempted to recover debts which he believed were owed to his companies by, amongst others, the Zairean State or companies in which the State holds a substantial portion of the capital, bringing cases for this purpose before the civil courts." (Judgment, para. 82.)

9. We can only regret that the majority failed to apply this analysis to the question of admissibility. That would necessarily have resulted in a clear finding that the arrest in 1988-1989 formed a continuity with that of 1995-1996, since it took place for the same reasons, and that it was of the

same arbitrary character. The only difference is that in 1995-1996, it was decided to expel Mr. Diallo from the DRC, whereas previously, in 1988-1989, he was detained for almost a year!

10. Therefore, in our opinion, the events of 1988-1989 are quite clearly connected with the subject of the dispute as set forth in Guinea's Application dated 23 December 1998:

> "Mr. Diallo Ahmadou Sadio, 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 from the country.
>
> This expulsion came at a time when Mr. Diallo Ahmadou Sadio was taking proceedings to recover substantial debts owed to his businesses by the State and by the oil companies established on its territory and of which the said State is a shareholder.
>
> After vain attempts to arrive at an out-of-court settlement, the State of Guinea is filing an Application with the International Court of Justice with a view to obtaining a finding that the Democratic Republic of the Congo is guilty of serious violations of international law committed upon the person of a Guinean national."

11. Hence, whether they are regarded as implicit in that Application or arising out of its subject-matter, the events of 1988-1989 are connected with the subject of the dispute described in the Application, since they involve an unjust arrest of Mr. Diallo linked to the spoliation of his assets by the DRC.

12. We therefore cannot understand how the majority has declared Guinea's claim in respect of those events to be inadmissible, taking a formalistic approach which is inappropriate to a long and costly international dispute, Guinea having brought this case before the Court nearly 12 years ago. It would appear that the Democratic Republic of the Congo was informed at quite an early stage of the addition by Guinea of the facts relating to 1988-1989 and that it had the opportunity to contest them, as indeed it did not refrain from doing during the oral argument (CR 2010/3, pp. 16-17, paras. 11-13 (Kalala)). The Court thus had evidence before it allowing it to pronounce on all the violations of international law committed by the DRC upon the person of Mr. Diallo. If the Court had done so, it would genuinely have met the requirements of "legal security and the good administration of justice". Those requirements must take account, in this case originally based on the exercise of diplomatic protection, the scope of which includes "internationally guaranteed human rights" (case concerning *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 599, para. 39), of the individual rights of Mr. Diallo, who has on two occasions been a victim

of arbitrary measures by the authorities of the host State, and for the same reasons.

(*Signed*) Awn Shawkat AL-KHASAWNEH.
(*Signed*) Bruno SIMMA.
(*Signed*) Mohamed BENNOUNA.
(*Signed*) Antônio Augusto CANÇADO TRINDADE.
(*Signed*) Abdulqawi Ahmed YUSUF.