JOINT DISSENTING OPINION OF JUDGES AL-KHASAWNEH AND YUSUF

Unable to accept paragraph 6 of dispositif — *Violation of Diallo's rights as sole* associé — *Causal link between expulsion and violations to rights as* associé — *Dangerous precedent for foreign investors — Difference with treaty protected investors — Modern developments in area of foreign investments — Unsatisfactory state of law — Distinction between corporate personality and personality of the shareholder — Inherent in limited liability concept — However not absolute — Distinctions with* Barcelona Traction — *Triangular relation — State of nationality of company same State whose responsibility is invoked — Considerations of equity —* Barcelona Traction *overtaken by events — 2007 Judgment is* res judicata — *Concept of direct rights of* associé *does not detract from* res judicata — *Includes right of ownership — Importance of company size and persons running the company — By not accepting Diallo's rights Court missed a chance to provide redress — Also to take account of modern developments in investment laws and in human rights.*

We are, regrettably, unable to concur in paragraph 6 of the *dispositif* according to which the Court: "*Finds* that the Democratic Republic of the Congo has not violated Mr. Diallo's direct rights as *associé* in Africom-Zaire and Africontainers-Zaire"; nor are we persuaded by the reasoning and considerations on which this finding is based.

Quite the contrary, we feel that by arresting and detaining Mr. Diallo twice, first in 1988-1989 (which the Court found inadmissible) and a second time in 1995-1996 when his incarceration was followed by expulsion from the territory of the DRC, a grave injustice was committed against Mr. Diallo not only as a person but also as sole *associé* and *gérant* of his two companies; an injustice compounded by the horrendous delay in deciding this case, i.e., 12 years after the filing by the Republic of Guinea of its Application.

This injustice begins with the Court's acknowledgment of the illicit nature of Mr. Diallo's treatment at the hands of the DRC authorities in 1995-1996 (Judgment, para. 165 (2) (3) (4)) and of the arbitrariness of the "arrest and detention aimed at [the] expulsion measure", as well as the

Court's recognition — in what may be this part of the Judgment's only concession to reality — that

> "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 civil courts" (Judgment, para. 82).

Nevertheless, the Judgment refuses to draw the manifest and inescapable conclusion that ought, in our respectful opinion, to have been drawn from the Court's aforementioned findings. It is plain that the expulsion of Mr. Diallo was not an end in itself. Its intended consequence was, in all probability, to frustrate Mr. Diallo's attempts to recover his debts. At the very least it had that effect, something that the DRC authorities knew or ought to have known.

The enormity of the injustice committed against Mr. Diallo may also be measured in another way. Mr. Diallo was not one of a multitude of shareholders "[s]eparated from the company by numerous barriers" and therefore "[could not] be identified with it" as paragraph 41 of the *Barcelona Traction* Judgment contemplated (*Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Second Phase, Judgment*, *I.C.J. Reports 1970*, p. 34, para. 41). He was for all intents and purposes one and the same with the two companies. Nor were his *parts sociales* a small amount of his wealth, they were practically all his wealth with the result that, as a consequence of the actions taken by the DRC authorities against him, he was reduced to destitution.

But this injustice will not, in light of the Judgment, be confined to Mr. Diallo. Instead it could become a dangerous precedent for foreign investors. A State seeking to expropriate the assets of a unipersonal company (the term unipersonal is used here to include a *societé privée à responsabilité limitée* which has evolved to have only one *associé gérant* and allowed to do business as such, or one composed of a small number of *associés*) would only have to expel the *associé* from its territory. If that expropriating State also happens to be the State of nationality of the company and hence in theory the protector State, there would be no possibility of redress whatsoever for the investor. In other words the net result would be an indirect expropriation without compensation or the need to show a justifying public interest.

Luckily, those foreign investors whose investments in foreign States are protected by bilateral or multilateral investment treaties would be shielded from such a risk. These treaties typically go much further than what Guinea has asked for in this case, namely in affording protection

through well-established techniques such as compulsory arbitration, dispensing with the need to exhaust local remedies, broadening the scope of the term "investment", incorporating in the State of nationality of shareholders or in a third State, etc. These developments in the field of foreign investments have led to the wholesale abandonment of the distinction between the corporate personality of the company on the one hand and that of the shareholders on the other, resulting in a wide discrepancy between the customary international law standard and the standard contained in most investment treaties, with the customary law standard (if at all represented by what is contained in *Barcelona Traction*) being significantly lower than the one existing in the realm of investment treaties. The least that can be said about the state of customary international law given this discrepancy is that it is unsatisfactory.

The underlying *motif* of the 24 May 2007 Judgment on Preliminary Objections and of the present one is that the distinction between the rights of the company on the one hand and the "mere interests of the shareholders" on the other, is inherent in and flows from the very nature of the limited liability companies whether they be private or public. Thus the argument goes that just as shareholders are protected in municipal law (from which the concept was transposed by analogy into international law) from risk extending to all their assets, they must, by the same logic, be ready to accept loss confined to that part of their wealth which had been separately incorporated, *Fortuna* being a capricious Goddess whose moods the law cannot guarantee, but can at best regulate through limited liability. In the language of paragraph 42 of *Barcelona Traction*: "the shareholders' rights in relation to the company and its assets remain limited, this being, moreover, *a corollary of the limited nature of their liability*" (*Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 35, para. 42; emphasis added).

This may indeed be true as a general proposition. However, in the realm of municipal law from which the concept of limited liability emanated, shareholders were never denied the protection which Judge Sir Gerald Fitzmaurice, in his separate opinion in *Barcelona Traction*, explained balances what he called the "hegemony" of the company (*ibid.*, p. 68, para. 8). In that celebrated opinion, Judge Fitzmaurice analysed why, in municipal law, an action cannot be brought by shareholders on behalf of the rights of the company notwithstanding that injury to the company may recoil or repercuss onto the shareholder:

> "The true *rationale* (outside but underlying the law) of denying to the shareholder the possibility of action in respect of infringements

of *company* rights is that, normally, he does not need this. The *company* will act and, by so doing, will automatically protect not only its own interests but those of the shareholders also. That is the assumption; namely that the company is both capable of acting and will do so unless there are cogent reasons why, in the interests of the company and, hence, indirectly of the shareholders, it should refrain." (*I.C.J. Reports 1970*, separate opinion of Judge Sir Gerald Fitzmaurice, pp. 68-69, para. 10.)

This assumption does not hold in the sphere of international law. A State of nationality of a company retains discretion whether to act on behalf of the company or not. It would be recalled that Judge Fitzmaurice's remarks were addressed to the facts of *Barcelona Traction* where Canada, the protecting State, though it acted at times on behalf of the company, refrained for the most part from doing so.

This situation is *a priori* even more applicable in the circumstances of the present case where the State of nationality of the two companies, Africom-Zaire and Africontainers-Zaire, was the same State accused of wrongdoing.

Elsewhere in his separate opinion Judge Fitzmaurice contemplated this very situation:

"*It seems that, actually, in only one category of situation is it more or less definitely admitted that intervention by the government of foreign shareholders is allowable, namely where the company concerned has the nationality of the very State responsible for the acts or damage complained of, and these, or the resulting circumstances, are such as to render the company incapable* de facto *of protecting its interests and hence those of the shareholders*. Clearly in this type of case no intervention or claim on behalf of the *company* as such can, in the nature of things, be possible at the international level, since the company has local not foreign nationality, and since also the very authority to which the company should be able to look for support or protection is itself the author of the damage. Consequently, *the normal rule of intervention only on behalf of the company by the company's government becomes not so much inapplicable as irrelevant or meaningless in the context*. The efficacity of the corporate entity and its capability of useful action have broken down, and the shareholders become as it were substituted for the management to protect the company's interests by any method legally open to them. If some of them have foreign nationality, one such way is to invoke the intervention of their government, and in the circumstances this must be regarded as admissible." (*Ibid.*, p. 72, para. 14; emphasis added.)

In support of this assertion Judge Fitzmaurice cited Paul de Visscher[1]:

> "From this it necessarily results that if the rational justification for the mechanism of the corporate entity is brought to a collapse by the act of the very State whose law governs the status and allegiance of the corporate entity, its personality is no longer anything but a fiction void of all meaning, in which there can now be seen nothing but a bundle of individual rights."

It may be said that this is but a separate opinion and that the main Judgment in *Barcelona Traction* did not adopt this line of thinking. This is demonstrably not the case.

It is important to recall that in *Barcelona Traction*, the Court was dealing with what it called a "triangular relationship" (*I.C.J. Reports 1970*, p. 42, para. 69) with Canada, Spain and Belgium each representing an apex in that relationship. Reviewing the contacts between the three Governments the Court came to the conclusion that:

> "In sum, the record shows that from 1948 onwards the Canadian Government made to the Spanish Government numerous representations which cannot be viewed otherwise than as the exercise of diplomatic protection in respect of the Barcelona Traction company. *Therefore this was not a case where diplomatic protection was refused or remained in the sphere of fiction*." (*Ibid.*, pp. 43-44, para. 76; emphasis added.)

Notwithstanding the fact that the Court was concerned primarily with a triangular relationship, it nevertheless contemplated a situation where, as a matter of equity, the State of nationality of the shareholders could take up their protection when the State whose responsibility is invoked is the same State of nationality of the company. The Court had the following to say:

> "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.
>
> On the other hand, the Court considers that, in the field of diplomatic protection as in all other fields of international law, it is neces-

[1] Paul de Visscher, "La protection diplomatique des personnes morales", *Recueil [Collected Courses] of the Hague Academy of International Law*, 1961, Vol. 102, p. 465.

> sary that the law be applied reasonably. It has been suggested that if in a given case it is not possible to apply the general rule that the right of diplomatic protection of a company belongs to its national State, considerations of equity might call for the possibility of protection of the shareholders in question by their own national State. This hypothesis does not correspond to the circumstances of the present case.
>
> In view, however, of the discretionary nature of diplomatic protection, considerations of equity cannot require more than the possibility for some protector State to intervene, whether it be the national State of the company, by virtue of the general rule mentioned above, or, in a secondary capacity, the national State of the shareholders who claim protection." (*I.C.J. Reports 1970*, p. 48, paras. 92-94.)

To be sure, the Court went on to speak of practical considerations that might argue against basing the right of protection on considerations of equity especially when there are numerous investors from different nationalities and with minority shareholdings. But the Court never precluded, as a matter of principle, the operation of diplomatic protection of shareholders when there is no protecting State. We cannot think of a situation where considerations of equity would have been more appropriate than in the present case, all the more so since there was no danger of "confusion and insecurity in international economic relations" as a result of "opening the door to competing diplomatic claims" (*ibid.*, p. 49, para. 96).

Moreover the Court, in *Barcelona Traction*, was careful to stress that its conclusion (as to the separate corporate personality from that of the shareholders) was confined to the particular circumstances of *Barcelona Traction*. It stated that "[f]or the above reasons, the Court is not of the opinion that in the *particular circumstances of the present case*, *jus standi* is conferred on the Belgian Government by considerations of equity" (*ibid.*, p. 50, para. 101; emphasis added), thereby acknowledging that the *locus standi in judicio* could *a contrario* be conferred as a matter of equity (equity *infra legum*) in other cases.

It is also significant that those judges who supported the conclusions regarding lack of standing of the shareholders state in *Barcelona Traction* were motivated, in large part, by a practical and what may be a legitimate apprehension that opening the door for protection of shareholders by their national State would lead to abuse by capital-exporting countries and the creation of economic neo-colonization[2]. Thus Judge Ammoun cited, *inter alia*, the work of the Institut de droit international in the following words:

[2] Judge Ammoun cites the opinions of Mr. Nagendra Singh (India), Mr. Kamil Yasseen (Iraq) and Mr. Nihat Erim (Turkey), and in a footnote the observations of Professor Rolin.

> "As for the Institut de droit international, at its Nice session in 1967 it had to study the problem of investment in developing countries. The jurists of the Afro-Asian group who took part in the proceedings of that session expressed the opinion of their group by replying in the negative to the question whether 'shareholders are entitled to ask for diplomatic protection of their State in cases in which the company in which they have invested cannot or will not ask for it itself, as against the developing country'." (*I.C.J. Reports 1970*, separate opinion of Judge Ammoun, p. 330, para. 39.)

The irony of the foregoing is that those concerns were overtaken by events. The proliferation of bilateral and multilateral investment treaties, and the assertion by some States of a right, sometimes expressed in legislation[3], of intervention to protect the interests of national shareholders in foreign companies, together with a parallel development in the field of human rights, to which we shall return later, have all meant that the low standard of protection of shareholders under customary law is now confined to the wretched of the earth like Mr. Diallo. Such a result could not have been contemplated by those judges whose uppermost concern was, in the words of Professor Rolin:

> "to encourage investments for the benefit of developing countries, by giving guarantees on both sides, both to those countries themselves in order to avoid a form of economic neo-colonialism, which would bring about their subjection to the rich countries, and in order to put investors out of reach of certain risks" (cited by Judge Ammoun, *ibid.*, p. 330, footnote 83).

Be this as it may, it was a narrow and, in our respectful opinion, an unwarranted interpretation of *Barcelona Traction* that found its way into the 2007 Judgment on Preliminary Objections where the Court upheld the DRC objection "in so far as it concerns protection of Mr. Diallo in respect of alleged violations of rights of Africom-Zaire and Africontainers-Zaire" (*Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 617, para. 1 *(b)*). This conclusion is now fortified by the force of *res judicata*.

However the 2007 Judgment rejected the DRC objection "in so far as it concerns protection of Mr. Diallo's rights as *associé* in Africom-Zaire

[3] According to the United Kingdom's 1985 Rules Applying to International Claims "where a United Kingdom national has an interest, as a shareholder or otherwise, in a company incorporated in another State and of which it is therefore a national and that State injures the company, Her Majesty's Government may intervene to protect the interests of the United Kingdom national" (Rule VI, reprinted in *ICLQ*, Vol. 37 (1988), p. 1007).

and Africontainers-Zaire" (*I.C.J. Reports 2007 (II)*, p. 617, para. 1 *(a)* of the operative paragraphs). It is to those rights untouched by *res judicata* that we shall now turn.

It would be recalled that *Barcelona Traction* drew a distinction between the rights of the company and the *interests* of the shareholders on the one hand[4] (*I.C.J. Reports 1970*, p. 36, para. 46), and the rights of the company and the *direct rights* of the shareholders, on the other (*ibid.*, p. 36, para. 47).

> "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, including the right to any declared dividend, the right to attend and vote at general meetings, the right to share in the residual assets of the company on liquidation. Whenever one of his direct rights is infringed, the shareholder has an independent right of action. On this there is no disagreement between the Parties. But a distinction must be drawn between a direct infringement of the shareholder's rights, and difficulties or financial losses to which he may be exposed as the result of the situation of the company." (*Ibid.*, p. 36, para. 47.)

In the event, the Court did not pursue the consequences of this distinction because: "[t]he Belgian Government did not base its claim on an infringement of the direct rights of the shareholders. Thus it [was] not open to the Court to go beyond the claim as formulated by the Belgian Government" (*ibid.*, p. 37, para. 49).

By contrast, in the present case, Guinea did (re)formulate its claim in terms of the infringement of the direct rights of Mr. Diallo as an *associé* (para. 13 of the Judgment). Further, since the enumeration of those rights was non-exhaustive (evidenced through the use of the word "including"), Guinea added to the three rights mentioned in the *Barcelona Traction* Judgment, a fourth set of rights, namely, the rights "of ownership and management in respect of the companies founded by him in the DRC", and in which he was the sole *associé*; the rights of "pursuing recovery of the numerous debts owed to him — to himself personally and to the said companies — both by the DRC itself and by other contractual partners"; and the right to be free from *de facto* expropriation.

Those rights and their infringements cannot be measured by a single criterion regardless of the size of the company concerned, or the central-

[4] With regard to the latter distinction the Court in *Barcelona Traction* expounded those rights as follows: "[n]ot a mere interest affected, but solely a right infringed involves responsibility, so that an act directed against and infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected." (*I.C.J. Reports 1970*, p. 36, para. 46.)

ity of the role played by certain persons, in running such a company. In *Barcelona Traction* — where the individual shareholder was "*[s]eparated from the company by numerous barriers*, [and where] the shareholder [could not] be identified with it" (*Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 34, para. 41; emphasis added) — it would have made perfect sense to speak of the right to hold general meetings and to appoint a *gérant*.

The present case undoubtedly differs from *Barcelona Traction* in that regard. The two companies had become one-man companies which operated as such in the DRC — a fact which is not contested by the Parties — and where the sole *associé* was also the *gérant*. To require the *associé* to hold general meetings or to invoke his failure to do so as justification for the assertion that his rights to participate and vote in general meetings, or to appoint a *gérant*, or to monitor the management of the companies, were not violated is quite surrealistic (an exiled destitute *associé/gérant* participating in a general meeting with himself?)

Paragraph 115 of the present Judgment is patently apologetic. It is worth quoting in full:

> "In the following paragraphs, the Court is careful to maintain the strict distinction between the alleged infringements of the rights of the two SPRLs at issue and the alleged infringements of Mr. Diallo's direct rights as *associé* of these latter (see *I.C.J. Reports 2007 (II)*, pp. 605-606, paras. 62-63). The Court understands that such a distinction could appear artificial in the case of an SPRL in which the *parts sociales* are held in practice by a single *associé*. It is nonetheless well-founded juridically, and it is essential to rigorously observe it in the present case. Guinea itself accepts this distinction in the present stage of the proceedings, and most of its arguments are indeed based on it. The Court has to deal with the claims as they were presented by the Applicant."

Of course Guinea had to accept this distinction in view of the *res judicata* of the 2007 Judgment. However, we believe it was well within the Court's power to take cognizance of the reality of the situation, in particular that where there is in effect one *associé/gérant* the infringement of the company rights is *ipso facto* infringement of the direct rights of the owner.

By insisting on a dogmatic application of a one-size-fits all approach, *Barcelona Traction* (or rather on a narrow interpretation of *Barcelona Traction* that did not take account of the absence of a protecting State), the Court missed a chance to provide redress to Mr. Diallo as a matter of equity without at the same time detracting from the formal force of its 2007 Judgment. Equally importantly, the Court missed a chance to bring into line the standard of protection of investors like Mr. Diallo with the

standard now found in jurisprudence emanating from regional courts and arbitral tribunals. This latter standard, as had been previously alluded to, has arguably become an international minimum standard to which even those investors not covered by bilateral or multilateral investment treaties may be entitled.

It is to those pertinent developments that we shall now turn in the remainder of this joint dissenting opinion with the aim of ascertaining the current state of the law.

We start however by stressing that when we speak of modern developments we do not imply a paucity in older authorities, such as *Delagoa Bay Railway Company* case; *Mexican Eagle Company* case, *Romano-Americana* case[5]; *El Triunfo Award of 8 May 1902*[6]; *Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers Award of 5 August 1926*[7].

There are, we believe, three developments in the modern law regulating States' treatment of foreign investments which, taken cumulatively, may justify revisiting the *Barcelona Traction* rule on standing. These are: protection against indirect expropriation; diplomatic protection of shareholders against the national State of the company and the reach coverage of bilateral investment treaties.

Thus in respect of indirect expropriation, the Iran-US Claims Tribunal defined expropriation as occurring "where the State interferes with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated" (122 *Iran-US Claims Tribunal Reports*, p. 154). Similarly in *Tecmed* v. *United Mexican States*, Award of 29 May 2003 (ICSID)[8], the Award spoke of expropriation [occurring] if the claimant "was radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto . . . had ceased to exist" (p. 43, para. 115).

Such injury is the one suffered by Mr. Diallo's companies, caused by his (unarguably wrongful) expulsion. In *Biloune and Marine Drive Com-*

[5] *Delagoa Bay Railway Company* case, *Digest of International Law*, Vol. VI, p. 648; *Mexican Eagle Company (El Aguila)*, M. Whiteman, *Digest of International Law*, Vol. VIII, pp. 1272-1274; *Romano-Americana* case, Hackworth, *Digest of International Law*, Vol. V, p. 841.

[6] *El Triunfo*, Award of 8 May 1902, *RIAA*, Vol. XV, p. 467.

[7] *Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers*, Award of 5 August 1926, *RIAA*, Vol. II, p. 790.

[8] *Tecnicas Medioambientales Tecmed* v. *United Mexican States*, Award of 29 May 2003, ICSID, case No. ARB (AF)/00/2.

plex Ltd. v. *Ghana Investments Centre*[9], also dealing with the expulsion of the central figure of a unipersonal company (though incorporated as a company with limited liability), the Tribunal based itself on the central role of Mr. Biloune in promoting, financing and managing MDCL, to determine that his expulsion from the country effectively prevented MDCL from further pursuing the project. Such prevention would constitute constructive expropriation of MDCL's contractual rights in the project and, accordingly, the expropriation of the value of Mr. Biloune's interest in MDCL, unless the Respondent can establish by persuasive evidence sufficient justification for those events.

With respect to the protection of shareholders in international law, it suffices to recall that paragraph 92 of the *Barcelona Traction* Judgment may, and has been read, for example by the International Law Commission, as not passing negative judgment on the theory that had 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"[10]. The Court merely noted that "[w]hatever 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*" (*I.C.J. Reports 1970*, p. 48, para. 92). With regard to bilateral investment treaties, it should be noted that the scope of protection afforded to the covered investments is significantly more extensive than the protection sought by Guinea in the present case. Indeed, investment treaties extend their protection to cases where the shareholder and the corporation are not as closely identified as they were in the case of Mr. Diallo and his two companies, by *inter alia* extending it to minority shareholders, and to shareholders whose corporation is incorporated in a third State (as was the case in *Barcelona Traction*).

Lastly we wish to point briefly to the impact of developments in the field of human rights on the right to be free from indirect or direct expropriation. Thus the European Court of Human Rights has accepted that the sole owner of a company may claim to be a "victim" (within the meaning of Article 34 of the 1950 Rome Convention for the Protection of Human Rights and Fundamental Freedoms) of measures taken against his company, because in the case of a single shareholder company, there is no risk of differences of opinion among shareholders or between shareholders, and the board of directors, as to the fact of infringements of the

[9] *Biloune and Marine Drive Complex Ltd.* v. *Ghana Investments Centre and the Government of Ghana*, Award on Jurisdiction and Liability, 27 October 1989, 95 *ILR* 184.

[10] International Law Commission Commentary to Draft Article 11 *(b)* on Diplomatic Protection (58th Session), 1 May-9 June and 3 July-11 August 2006, UN doc. A/61/10, pp. 62-65.

rights protected under the Convention or concerning the most appropriate way of reacting to such infringement (see *Ankarcrona* v. *Sweden* (dec.), No. 35178/97, 27 June 2000; *Dyrwold* v. *Sweden*, No. 12259/86, Commission decision, 7 September 1990). In the recent case of *Nosov* v. *Russia* (dec.), No. 30877/02, 20 October 2005, the Court decided that disregarding a company's legal personality as per the question of the shareholder being a victim will be justified only in exceptional circumstances, such as where it is clearly established that it is impossible for the company to apply to the Court through the organs set up under its Articles of Incorporation or — in the event of liquidation or bankruptcy — through the liquidators or trustee in bankruptcy.

In sum, the finding by the Court that Mr. Diallo's direct rights as *associé* have not been violated by the DRC authorities, should not have been adopted by the Court for a number of cogent reasons. First, the clear causal link which existed between the DRC authorities actions culminating in Mr. Diallo's incarceration and eventual expulsion and the resultant loss of his rights of ownership in his companies amounted to an undeclared expropriation. Secondly, the finding is based on a narrow and unwarranted reading of *Barcelona Traction*, which is in any case distinguishable from the present case, in that *Barcelona Traction* contemplated a triangular relationship while in the present case, the State of nationality of the companies (the DRC) was the same State accused of wrongdoing.

Thirdly, we believe that this case sets a dangerous precedent for foreign investors unprotected by bilateral investment treaties. The low standard of protection outside BITs is in stark contrast to the wide reach of modern foreign investment law, which goes far beyond what Guinea had asked for in the present case. The Court missed a chance to do justice to Mr. Diallo, and at the same time, to bring the standard of protection of customary international law up to the standard of modern investment law.

(Signed) Awn Shawkat AL-KHASAWNEH.
(Signed) Abdulqawi Ahmed YUSUF.