DISSENTING OPINION OF JUDGE *AD HOC* MAHIOU

[Translation]

Human rights violations — Arrest and detention of 1988-1989 — Admissibility of the claim — New claim — Late claim — Claim implicit in the Application — Claim arising out of the subject-matter of the Application — Jurisprudence of the Court.

Congolese company law and the specific characteristics of the companies in which Mr. Diallo is the sole shareholder — Mr. Diallo's rights and rights of the companies — Mr. Diallo's direct rights as associé *— Rights of the* associé *in the management and operation of the companies — Right to take part in general meetings — Rights of the* associé *relating to the* gérance *— Right of oversight and control — Right to liquidate the companies and right to the remaining assets — Issue of indirect expropriation — Right to reparation.*

While subscribing to many of the conclusions reached by the Court in the present case, I nevertheless remain unconvinced by both the conclusions adopted and the reasoning relied on to justify them in respect of the two most important points, those concerning, first, the admissibility of the claim relating to Mr. Diallo's arrest and detention in 1988-1989 and, second, the violation of Mr. Diallo's rights as *associé* in Africom-Zaire and Africontainers-Zaire. My reasons for being unable to join the Court on these points therefore call for an explanation.

1. Admissibility of the Claim relating to Mr. Diallo's Arrest and Detention in 1988-1989

After considering the question of the admissibility of Guinea's claim relating to Mr. Diallo's arrest and detention in 1988-1989, the Court takes the view that it is a new claim which does not satisfy the conditions required for it to be included in the proceedings instituted in 1998; the Court concludes that the claim is inadmissible because it was raised late (paragraph 47 of the Judgment). I cannot subscribe to that finding and remain unconvinced by the reasoning on which it is based, because it relies on a very rigid interpretation and overly formalistic application of the Court's jurisprudence.

It is true that the facts concerning the arrest and detention of 1988-1989 are not referred to or described in the Application instituting proceedings of 28 December 1998, or in the document annexed thereto; they are only formally introduced for the first time in the Observations of the Republic of Guinea (hereinafter "Guinea") of 7 July 2003 on the preliminary objections raised by the Democratic Republic of the Congo (here-

inafter the "DRC"). Those same facts are subsequently reiterated in much greater detail in Guinea's Reply of 19 November 2008, which states, moreover, that they "inarguably figure among the wrongful acts for which Guinea is seeking to have the Respondent held internationally responsible". Therefore, they constitute an additional claim, and it must be determined whether or not such a claim could be entertained by the Court.

As we know, under the Court's jurisprudence all new claims are not *ipso facto* inadmissible, since "the mere fact that a claim is new is not in itself decisive for the issue of admissibility" (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. 110); jurisprudence accepts a new claim as admissible if it satisfies either of the following two conditions:

— it is implicit in the Application (*Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment, I.C.J. Reports 1962*, p. 36); or
— it arises directly out of the question which is the subject-matter of the Application (*Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 203, para. 72; *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 266, para. 67).

The rationale behind this two-prong test is quite simply the need to establish a sufficiently close link between the subject-matter of the dispute, as defined in the Application, and the additional claim, in order to ensure the sound administration of justice and to respect the rights of the other party to the case, as well as those of third States. The Court has already had occasion to state that it "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).

What are the content and subject-matter of the Application in the present case? In the above-mentioned Application of 28 December 1998, it is said in the following, very brief terms that Mr. Diallo was "unjustly imprisoned by the authorities of the Democratic Republic of the Congo . . . despoiled of his sizable investments, businesses, movable and immovable property and bank accounts, and then expelled from the country".

It can be seen, therefore, that the Application gives a somewhat vague account of the imprisonment and despoilment suffered by Mr. Diallo, without referring to any specific act. In other words, the content and subject-matter of the initial Application *stricto sensu* are set out using broad and general terms which can cover any act of imprisonment or despoilment, without specifying a date. In addition, it is important to note that there is also no reference to the arrest and detention of 1995-1996, which are the only facts accepted in this Judgment of the Court as the basis for

Guinea's claim. If we confine ourselves to the Application *stricto sensu*, which, as the Court notes, contains "a succinct statement of the subject of the dispute" (paragraph 1 of the Judgment), there is no mention of either the events of 1988-1989 or those of 1995-1996 and therefore, at this stage, the two sets of events are on a par with one another from the point of view of procedure and their status.

It is true that the events of 1995-1996 are referred to and described in the document annexed to Guinea's Application, which sets out the facts underlying the dispute, the legal grounds and Guinea's claims, whereas the events of 1988-1989 are not, along with a number of other events which were only raised in the subsequent stages of the proceedings, and which were nonetheless accepted by the Court. The arrest, detention and expulsion of 1995-1996 are invoked because they form and illustrate the last — and ultimate — stage of a process which started at the end of the 1980s and continued until the expulsion in January 1996. The violations of Mr. Diallo's rights form part of a continuum of wrongful acts which occurred over this entire period, and there was hardly a need to list and detail each of these in the initial claim, since they would have to be described in the subsequent proceedings.

Thus, the facts relating to 1988-1989 did not transform the subject-matter of the dispute defined in the Application, and the question submitted to the Court for decision remains the same: was Mr. Diallo unjustly imprisoned and expelled by the DRC authorities, in violation of both the rules deriving from Congolese domestic law and the international rules binding on the DRC, following attempts to recover the debts owing to his companies?

Admittedly, there are certain apparent differences between the legal bases on which the imprisonment of 1988-1989 and that of 1995-1996 were carried out: as the Court notes, the first is purportedly based on a criminal investigation — which, incidentally, proved to be unfounded —whereas the second is formally based on an administrative procedure with a view to expulsion (paragraph 43 of the Judgment). However, as soon as we look beyond appearances and study the facts more closely, things take on a different light in terms both of the reason for the imprisonment and of the procedure adopted.

The real motive for both imprisonments is the same: to impede Mr. Diallo, or prevent him from recovering the debts which were owing to him by a certain number of Congolese State-owned organizations and businesses. With respect to his imprisonment, the evidence in the record clearly shows that the first arrest took place on the order of the First Zairean State Commissioner (Prime Minister), as confirmed by a letter dated 4 July 1988, sent to the President of the Zairean Judicial Council and signed by the First State Commissioner (a letter relied on by both Parties and appearing at Annex 15 of Guinea's Observations on the Preliminary Objections, dated 7 July 2003). The arrests in 1995-1996 were also ordered by the executive power, for the purposes of implementing

an expulsion decree prepared by the Prime Minister. Thus, it is clear that Mr. Diallo's first detention, like his second, was in fact part of administrative rather than criminal proceedings: both were ordered by an executive power overstepping its authority, the only other occasional involvement being on the part of the prosecutor, who, as we know, is under the direct authority of the executive power.

In substance or materially, there is very little difference between the two situations: both involve the same person, who, for the same reasons and at distinct times, finds himself the victim of arbitrary arrests and detentions ordered by a First State Commissioner or Prime Minister. Accordingly, Guinea's claim relating to the imprisonment of 1988-1989 has sufficiently close links to the principal claim and, far from modifying the subject-matter of the Application, simply completes the chronological chain of violations of Mr. Diallo's rights. For that reason, it satisfies the conditions for it to be declared admissible.

Consequently, and to paraphrase what was said by the Court in the case concerning *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*, the claim relating to the detention of 1988-1989 is implicit in the question which is the subject-matter of Guinea's Application, that is, the strategy of arbitrary imprisonment used by the Respondent against Mr. Diallo, and the violation of his human rights as a direct result of that strategy. The facts relating to 1988-1989 clearly did not transform the nature of the dispute submitted to the Court.

It is regrettable that in this case the Court departed from its established jurisprudence relating to new claims, which has attached less importance to formal requirements. For example, in the case concerning the *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua)*, in which Costa Rica failed to include in its Application its claim relating to fishing — only raising this later in its Memorial —the Court considered that:

> "given the relationship between the riparians and the river and the terms of the Application, there is a sufficiently close connection between the claim relating to subsistence fishing and the Application, in which Costa Rica, in addition to the 1858 Treaty, invoked 'other applicable rules and principles of international law'" (*Judgment, I.C.J. Reports 2009*, p. 264, para. 137).

In my view, the link between the arrest of 1988-1989 and the arrest of 1995-1996 is as close as, and even closer than, the link between fishing and navigational rights. Guinea's claim relating to the detention of 1988-1989, although new, does not seem to contradict the procedural rules governing the Court or the interpretation that the Court gives to those rules in the decision cited above. Therefore, Guinea's claim relating to the unlawfulness of Mr. Diallo's arrest and detention in 1988-1989 is merely an addition to the material facts and the continuum of unlawful acts of which the Respondent is accused, and the Court should have

taken that continuum and those facts into consideration. Since this was not the case, I had no choice but to vote against point 5 of the operative part of the Judgment.

2. Mr. Diallo's Direct Rights as Associé in Africom-Zaire and Africontainers-Zaire

2.1. The Nature and Extent of the Stake Held and Managed by Mr. Diallo in the Two Companies

It is first necessary to recall the nature and extent of the stake held and managed by Mr. Diallo in the two companies (Africom-Zaire, hereinafter "Africom", and Africontainers-Zaire, hereinafter "Africontainers"), in order to better understand the factual and legal implications of that situation.

Although the Articles of Incorporation of Africom, which was founded in 1974, have not been produced by either the Applicant or the Respondent, its legal existence is evidenced by a number of other documents, in particular the Articles of Incorporation of the second company founded by Mr. Diallo, Africontainers. In fact, it is the notarial act of 18 September 1979 on the Articles of Incorporation of Africontainers (Memorial of Guinea, Ann. 1) which shows that this new company was initially founded with three *associés*: two physical persons (Mr. Kibeti Zala of Guinean nationality and Mrs. Dewast of French nationality) and one legal person, Africom, of which it is stated that:

— it is entered in the Kinshasa Register of Companies under No. 80,427;

— it has its administrative seat at the address given;
— and, finally, it is represented by its *gérant*, Mr. Diallo, of Guinean nationality.

That same document states that Africom holds 30 per cent of Africontainers' *parts sociales*.

It is thus through this notarial act of 18 September 1979 that we have some information regarding Africom in the present case and confirmation of its status as a *société privée à responsabilité limitée* in accordance with Congolese law.

It is by means of another notarial act concerning Africontainers of 18 April 1980 that we learn of a substantial change in the share capital distribution of this company, with Africom and Mr. Diallo becoming its sole shareholders. From this date, Africontainers has only two *associés*: a legal person, Africom, holder of 60 per cent of the *parts sociales*; and a physical person, Mr. Diallo, holder of the remaining 40 per cent. Mr. Diallo is also appointed *gérant* of Africontainers in place of its previous *gérant*, Mr. David, of French nationality.

As for Africom's activities, evidence of those through the 1980s is provided by orders, correspondence with several public and private Congolese business partners in the period 1983 to 1996 concerning unpaid debts, in particular, those of the Congolese State, and judicial decisions relating to various disputes.

In the absence of Africom's Articles of Incorporation, it emerges from the notarial acts referred to above that Africom would have had the status of a *société privée à responsabilité limitée* under Congolese law. In practice, however, it would appear to have become a one-person company, inasmuch as Mr. Diallo was apparently the sole *associé*.

Africontainers — which was founded as a classic *société à responsabilité limitée*, with three *associés* — evolved into a company with two *associés* which also appears to be a one-person company, since the division of its shares is essentially a fiction. The fact is that, besides Mr. Diallo, who holds 40 per cent of the shares, the other majority shareholder is Africom, which is itself represented by Mr. Diallo alone. This means that he is ultimately the one and only *associé* of both the companies involved in the present case: Africom and Africontainers. The end result is that, while in strictly legal and formal terms, Mr. Diallo is not the only legal *associé* in Africontainers, he does in practice become so, because there is only one reality behind the other legal *associé* (Africom): Mr. Diallo. This is, furthermore, what the Court states in paragraph 114 of the Judgment, observing that "Mr. Diallo was, both as *gérant* and *associé* of the two companies, fully in charge and in control of them".

There is such interpenetration or osmosis between Mr. Diallo and his two companies, in both fact and in law, that it is very difficult to separate them, and this situation undoubtedly has a bearing on the attempts to establish Mr. Diallo's direct rights for the purpose of settling this dispute. There are two possible solutions:

— either we remove the corporate veil to consider the economic and social reality and accept that Mr. Diallo actually holds all the *parts sociales* as an individual and, for that reason, the damage inflicted on that holding as a whole necessarily affects his direct rights in one way or another;
— or we maintain the illusion and fiction of a distinction between the *parts sociales* belonging to Africom and those belonging to Mr. Diallo as an individual; even in this case, Mr. Diallo's *parts sociales* represent a corpus of direct rights, which he is entitled to assert if they have been infringed by the actions and omissions of the Congolese authorities.

2.2. The Value of Mr. Diallo's Parts Sociales

The value of Mr. Diallo's *parts sociales* clearly depends on the business activity of the two companies in which he is ultimately the sole share-

holder. The two Parties' accounts of that activity are as incompatible as they are improbable. The business situation was neither as thriving as the Applicant claims, nor in a state of bankruptcy, as the Respondent alleges. A close analysis of the Parties' arguments reveals that the disparity in their assessments of the situation is in part due to the fact that often the Parties are referring to different periods in the lifetimes of these two companies: the Applicant focuses on the decade of the 1980s and the start of the 1990s, during which time there was clearly genuine and significant business activity; whereas the Respondent focuses on the mid-1990s, when business activity had undoubtedly declined for a variety of reasons, linked as much to the shrinking of the Congolese economy as to the difficulties and refusals encountered by the two companies when they tried to recover the debts owed to them by taking their case to the relevant authorities and to the competent courts.

Furthermore, the documents which have been produced do not give anywhere near the level of information that is required for a truly satisfactory assessment of business activity. Mr. Diallo's expulsion has clearly prevented him from having access to the relevant accounting documents, and the Applicant has only been able to supply a limited number of documents that allow a very approximate assessment of the two companies' activities. Although these documents do not provide an adequate basis for a precise valuation of all the companies' assets and of the debts owed to them by various operators (the Congolese administration and Congolese public companies: Gécamines, Zaire Fina, PLZ and Zaire Shell) — which they were trying to recover — they do, however, provide a basis for a partial evaluation of those assets. Account should also be taken of the refusals of the various Congolese debtors to honour the debts owed to the companies, and of the interference from the Congolese authorities to prevent or defer their recovery; a huge amount of energy was required over the years from the manager of the two companies in order to overcome the obstacles caused by those actions, and it is evident that this had an adverse effect on the two companies' business activities.

The Respondent rejects most of the assessments which have been produced of the debts owed by the public operators, but its rejections are merely assertions, which are very rarely backed up with evidence; it goes no further than to claim that there is no reliable basis for the amounts, that they are exaggerated or fanciful, even when they have been acknowledged by the authorities in question or confirmed by the Congolese courts. While it is possible that some of the estimates are questionable or difficult to believe, further solid and persuasive information should have been produced in support of the claims, which are presented merely as allegations without any compelling evidence.

It is clear from the written pleadings and oral arguments of the Parties that Africom and Africontainers have ceased their activities, but the Parties disagree on the dates of that cessation and on whether these companies are still in existence. From the information produced to date, it is

as difficult to determine the exact date of the cessation of business activities as it is to work out the exact legal situation of the two companies.

As far as the activities of the two companies are concerned, they experienced — like others operating in Zaire — the consequences of the serious political, economic and monetary difficulties which affected the country at the start of the 1990s and which were the subject of an alarming report by the Congo Central Bank (Counter-Memorial of the DRC, Ann. 2); that there was a decline in their activities is therefore not unusual, and it is understandable that such circumstances, linked to the general economic conditions, are not normally attributable to the authorities, as the Permanent Court of International Justice stated in the *Oscar Chinn* case (*Judgment, 1934, P.C.I.J., Series A/B, No. 63*, p. 88). The fact remains that these difficulties were bound to have been aggravated to an unparalleled extent by Mr. Diallo's expulsion at that critical time, which resulted in the destabilization of the two companies; since that destabilization has continued ever since, it is clear that no company can truly continue to exist after a period of inactivity of almost 15 years. All the more so since both companies are directly and intimately linked to the person of Mr. Diallo, who is both their sole *associé* and only *gérant*. Therein lies the special and distinctive nature of the present case, which precludes us from dealing with it in the same way as other cases previously brought before the Court, such as the *Barcelona Traction* case or the case concerning *Elettronica Sicula*. I will come back to this special nature and the consequences deriving from it in due course.

As far as legal existence is concerned, this can, of course, persist; however, as we shall also see in due course, it is unrealistic to insist on a formal act and to claim that the two companies continue to exist as long as their legal demise has not been recorded in proper legal form, that is to say, through their official dissolution and complete liquidation. A *de facto* situation may lead to consequences which constitute a sort of legal demise, even if the latter is not recorded by a formal act.

2.3. Mr. Diallo's Rights as Associé *in the Management and Operation of His Companies*

Mr. Diallo's expulsion cannot have been without effect on the rights he holds or their exercise, as the only *associé* able to manage and operate the two companies. That is clear from both the legal and factual elements surrounding his right to convene, take part in and vote at any general meeting.

First, in respect of the right to convene general meetings, a single point of law opposes the two Parties: whether this right belongs solely to the company, as the Respondent claims, or whether it is also a right of the *associés*. Reference should therefore be made to Congolese law and more

specifically to the provisions of Article 83 of the Decree of 27 February 1887, which states:

> "The management and the auditors, if any, may convene a general meeting at any time.
>
> They must convene a general meeting at the request of *associés* holding one fifth of the total number of shares.
>
> If the management takes no action on this request within a reasonable time, the meeting may be ordered by the court."

In the light of Article 83, it becomes clear that, while the decision to convene a general meeting is incumbent upon the *gérant* and the auditors (para. 1), shareholders also have the right to request that a general meeting be convened if they hold a fifth of the total number of shares (para. 2). Such a request translates into an obligation for the *gérant* and the auditors, who are required to act upon it.

In this case, given that Mr. Diallo, if not the sole *associé*, personally holds more than a fifth of the total number of shares, he has the right to convene a general meeting. Furthermore, since he is in fact the sole shareholder, that right becomes a sort of monopoly, the violation of which produces a right of action, as the Court pointed out in the *Barcelona Traction* case:

> "It is well known that there are rights which municipal law confers upon the [shareholders] 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." (*Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 36, para. 47.)

I would note that the list given by the Court concerns the most obvious rights and that it is not exhaustive; this is confirmed by the International Law Commission in the commentary on Article 12 of its draft Articles on Diplomatic Protection of 2006, in which it makes reference to the Court's position, stating that it is left to courts to determine, on the facts of individual cases, the limits of such rights, but that care should be taken to draw clear lines between shareholders' rights and corporate rights, particularly in respect of the right to participate in the management of corporations (Report of the International Law Commission, 2006, p. 68).

As regards the right to attend and vote at general meetings, Mr. Diallo's expulsion surely makes his attendance impossible. Although he has the option of appointing a proxy to represent him, this solution does not preclude a violation of his right to attend in person.

In the Judgment, the Court states that, although Mr. Diallo has been

prevented from taking part in person in any general meeting, because of his expulsion, he has not been prevented from taking action to convene a general meeting (paragraph 121), or from being represented at a general meeting by a proxy (paragraph 123), and it concludes from this that the expulsion did not therefore infringe his rights as *associé*. Thus, while acknowledging that Mr. Diallo has been hindered, the Court takes the view that such hindrance "does not amount to a deprivation of his right to take part and vote in general meetings" (paragraph 126 of the Judgment). The Court further asserts that the fact that no general meeting has been convened, nor any attempt made to convene one, confirms that there has been no deprivation of this right. The paragraphs of the Judgment on this point, as on certain other points, contain a series of formal and abstract deductions which fail to take account of the reality of events and lack conviction.

Moreover, the Court recognizes that the situation in relation to Mr. Diallo's rights is highly unusual, and it attempts to explain this in general and succinct terms in paragraph 115, stating that, while it may appear artificial, it is brought about by the distinction which has to be made and which must be strictly maintained between the rights of the shareholder and the rights of the companies, in accordance with the jurisprudence of the *Barcelona Traction* case and the Judgment of 24 May 2007 on the preliminary objections in this case.

It is difficult to endorse such an approach, and in particular the conclusion, according to which the protection of a right is guaranteed only if its exercise is completely precluded, not infringed. If we opt for a strictly literal and formalistic analysis of the texts, that reasoning appears to be perfectly logical. But it is a reasoning based on a social model which presumes the existence of several shareholders, or at least more than one, so that the impeded shareholder can take action to ensure that the general meeting is convened and takes place. Such a model, however, cannot simply be transposed and applied in a mechanical fashion to the present situation, which involves small companies that have become *de facto* one-person businesses.

The two companies at issue in the present case are not multinational businesses with subsidiaries or branches; they do not have multiple executives to whom the management and decision-making powers can be entrusted so as to ensure their smooth running. They are companies of originally two or three *associés* working with a very small number of people for ancillary operations, and directly managed and controlled by one person: Mr. Diallo. In addition, these companies operate exclusively in an African country where it is known that the size of the personal network determines the success of a business. Consequently, this means that any hindrance affecting the sole executive and manager of the two companies — and *a fortiori* any preclusion of activity — has a direct and devastating effect on their operation and places them in a precarious situation, which the Respondent itself describes as quasi-bankruptcy. In the present case, it also means that to convene and hold a general

meeting without Mr. Diallo not only seems somewhat unusual, but quite inconceivable.

To fully understand this, let us imagine the abstract and formal scenario in which Mr. Diallo would convene an Africontainers general meeting, from Guinea, and how those events would unfold. He would send one notice of meeting to Mr. Diallo — that is, to himself — as an *associé* of the company, and another to the second *associé*, Africom, whose only executive is none other than Mr. Diallo. He would therefore simultaneously send and receive two notices of meeting, which he is unable to honour in person, because he is forbidden from entering Congolese territory. It is difficult to accept that such a situation is normal; rather, it should be acknowledged that there is a somewhat surreal aspect to this scenario, which nevertheless seems to be endorsed by the argument and reasoning advanced in this Judgment.

Although it is theoretically possible to appoint two proxies, one for Africom and the other for himself, the fact still remains that there has been a clear breach of Mr. Diallo's right to perform in person all the acts which a shareholder, and *a fortiori* a *gérant*, are entitled to perform. Furthermore, supposing still that a general meeting were to be convened and held without Mr. Diallo, we may ask ourselves how two mere proxies would be able to deliberate on the activities of two companies about whose operation and management they are largely ignorant, since these are directly and intimately linked to the individual actions of the person who is not permitted to attend the meeting. Moreover, reasonably, it is difficult to imagine how the two companies can operate normally when their only shareholder finds himself stripped of all his rights and dependent solely on proxies. Finally, under these circumstances it is somewhat strange to say the least to assert that Mr. Diallo has not been precluded from exercising his rights as *associé*.

2.4. Mr. Diallo's Rights relating to the Management of the Companies

According to Article 65 of the 1887 Decree, "*[g]érants* shall be appointed either in the instrument of incorporation or by the general meeting". Strictly speaking, the act of appointing a *gérant* is neither a right of the company nor an absolutely individual right; it is a collective act, a concept whose definition, characterization and situation in the legal process has given rise to debates within the doctrine of civil law (Cf. G. Roujou de Boubée, *Essai sur l'acte juridique collectif*, Paris, LGDJ, 1961, and A.-L. Pastré-Boyer, *L'acte juridique collectif en droit privé français. Contribution à la classification des actes juridiques*, Presses Universitaires d'Aix-Marseille, 2006). It is an action taken by a group of persons, who may or may not have legal personality and, in the case of Afri-

containers, the *gérant* would normally be appointed by the *associés* in general meeting, with each of them participating in the vote; although the act of appointment is a collective one, participation in the vote is very much an individual right of each *associé*, the violation of which may give rise to redress, as I have indicated above.

In any event, in the present case, as Mr. Diallo has become the sole shareholder in the two companies, the collective right has in practice become an individual right. However, he was precluded from exercising that right, i.e., his right to participate in the vote in person, by his expulsion, while the option of being represented by a proxy poses the problems discussed above. By depriving Mr. Diallo of the right to participate in person, there was indisputably a direct infringement of his right as *associé* to participate in any collective appointment of a *gérant*, who could be Mr. Diallo himself.

Preventing Mr. Diallo from being physically present at the company's administrative seat and the place where the general meetings are held is also an infringement of his right to be a candidate for the post of *gérant* and, *a fortiori* and more importantly, to act as *gérant*.

It seems that, at one point, a Mr. N'Kanza was charged with carrying out certain functions on behalf of Africontainers. However, there is much uncertainty surrounding both the way in which he was appointed and the exact role assigned to him. The only document produced relating to his appointment is a mention of his name in a letter from an attorney dated 16 February 1996, even though the appointment of the *gérant* is legally (Article 65 of the 1887 Decree) and statutorily (Article 14 of Africontainers' Articles of Incorporation) incumbent on the general meeting of the company. The general meeting appointed Mr. David as *gérant* at the constitutive meeting of 18 September 1979; later, an extraordinary general meeting of 18 April 1980 replaced Mr. David with Mr. Diallo, who continues to hold that role, since he was appointed for an indefinite period and has never been replaced.

No serious evidence has been submitted in support of the claim that a *gérant* was properly appointed. The person presented as such, Mr. N'Kanza, undoubtedly represented Mr. Diallo, who was absent from the Congo against his will, for a certain time for some very limited purposes, but that by no means makes him *gérant* of Africontainers in the legal and statutory sense. At most, it could perhaps be argued that he possibly held the role partially and provisionally because of the absence of the legal and statutory *gérant*, an absence caused by the Congolese authorities.

2.5. Mr. Diallo's Right to Oversee and Control

Does the right to oversee and control belong to the *associés*, or is their role confined to appointing statutory auditors *[commissaires]*, who alone are empowered to oversee and control? The answer to this question can

be found in the provisions of Article 71 of the 1887 Decree, which sets out two possibilities depending on the number of *associés*:

— if the number of *associés* is greater than five, the right belongs to the auditors appointed by the *associés* (Art. 71, paras. 1 and 2, and Art. 72);
— if the number of *associés* is fewer than five, the appointment of auditors is not compulsory and Article 71, paragraph 3, in particular, states that "each *associé* shall have the *powers* of an auditor" (emphasis added). In the present case, this second possibility applies, at least for Africontainers, which has only two *associés* (Africom, represented by Mr. Diallo, and Mr. Diallo himself). The law is sufficiently clear for it to be established, in this case, that the power to oversee and control is recognized as a power or right of the *associés*.

Nevertheless, one question may arise: does an *associé* who exercises this right to oversee and control become an organ of the company distinct from his position as *associé*, or does he still remain an *associé*? We know that a single person or a single organ may exercise two different functions, on the basis of the well-known principle of "role splitting" *[dédoublement fonctionnel]*. To take the example of a company which is obliged to appoint auditors, if an *associé* is appointed as an auditor, he will fall under the "role-splitting" heading, since he will exercise quite separately his rights as *associé* and his rights as auditor, the latter establishing him as an organ of the company. This scenario is therefore fairly easy to understand and explain.

It would be tempting to deduce that the same is true for a company which has not appointed auditors and in which each *associé* has the right to oversee and control, in addition to the rights he holds as *associé*. However, it would be wrong to draw that conclusion, because, according to the provisions of Article 71, paragraph 3, these two situations are not the same: Article 71, paragraph 3, does not say that each *associé* obtains the status of auditor, thereby becoming an organ of the company, as in the first scenario; it clearly states that each *associé* "[has] the powers" of an auditor. This is not simply a grammatical or lexical nuance, but a substantive difference which goes to the very heart of the status of *associé* and that of auditor:

— in one case, the *associé* is appointed as auditor, and this appointment therefore establishes him as an organ of the company in a status distinct from his status as *associé*; thus, to carry out the role fully, when acting as auditor he has to set aside his status as *associé* and put on his auditor's hat, so to speak;

— in the other, there is no such distinction: the *associé* simply acquires, by operation of law, additional rights which allow him to oversee and

control the management of the company as *associé* by exercising those new rights; the notion of auditor is therefore subsumed into that of *associé*.

To sum up, we may also say that the first scenario involves a change in status and the establishment of a new organ, whereas the second only involves new rights being added to those of the *associé*. Further, in the present case, the fact that Mr. Diallo is ultimately the sole *associé* results in a somewhat unusual accumulation of roles, since he is at the same time *gérant* and auditor of Africontainers. This multiplicity of roles, far from rendering the consequences of the expulsion meaningless, invites us to make a distinction between, on the one hand, the rights of the *gérant* which are those of an organ of the company and therefore do not fall within Mr. Diallo's direct rights capable of being covered by diplomatic protection (Judgment of the Court of 24 May 2007), and, on the other, the rights of the *associé* to oversee and control, which are direct rights and covered by diplomatic protection.

2.6. Mr. Diallo's Right to Liquidate the Companies and to Realize Their Remaining Assets

Under Article 99 of the above-mentioned 1887 Decree, it is the general meeting that decides to dissolve the company and to realize its remaining assets. This is another of the collective acts which I mentioned earlier, and to which the same analysis and the same conclusion may be applied. The decision to liquidate is taken by the *associés* at the general meeting, with each of them participating in the vote; participation in the vote is an individual right belonging to each *associé* and, consequently, its infringement may give rise to recourse against those responsible for that violation.

Mr. Diallo's expulsion did indeed affect the *gérant*, an organ of both companies, of whom it is alleged that his presence and conduct were threatening Zairean public order; through the same person, however, it affected not only the *gérant*, but also the *associé* overseeing and controlling the companies. Although his activities as *gérant* are tied to the companies and excluded from the scope of the present case by the Judgment of 24 May 2007, his other activities as *associé* constitute Mr. Diallo's direct rights, and he may assert those rights and request the implementation of ways and means to protect them, including diplomatic protection from Guinea.

2.7. The Issue of Indirect Expropriation and Its Consequences

We know that through the decisions of several legal bodies (courts under the aegis of ICSID or the International Chamber of Commerce, the Iran-United States Tribunal, the Inter-American Court of Human Rights, the European Court of Human Rights, etc.), and through doctri-

nal studies (from an abundance of literature I cite here in particular: R. Dolzer, "Indirect Expropriation of Alien Property", *ICSID Review-Foreign Investment Law Journal*, 1986, p. 33; A. K. Hoffmann, "Indirect Expropriation", in A. Reinisch (ed.), *Standards of Investment Protection*, Oxford University Press, 2008, p. 151; Y. Nouvel, "Les mesures équivalant à une expropriation dans la pratique récente des tribunaux arbitraux", *RGDIP*, 2002, p. 79 and B. Stern, "In Search of the Frontiers of Indirect Expropriation", in *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers*, 2007, 2008, p. 29), the rules of international law concerning expropriation have developed so as to embody, after a period of some controversy, the notion of indirect expropriation.

In the present case, each of the various measures taken against Mr. Diallo (breach of contract, interrogation and arrest, obstruction and refusal to pay debts, denial of justice, expulsion) does not individually constitute an expropriation measure. However, when taken together and topped off by the expulsion, they have had an equivalent effect, which allows us to speak of indirect expropriation. Mr. Diallo's property rights and, more specifically, his *parts sociales* were not directly affected by each of these measures, but they were jeopardized by the fact that their holder was materially and legally unable to carry out the necessary acts of management in order to safeguard them and, more importantly, to make them profitable. He became the proprietor of companies which have been turned into empty shells with the passing of time.

Having become the sole *associé*, whether directly or indirectly, and because the situation has led to the disappearance or quasi-disappearance of the companies, Mr. Diallo's personal assets have borne the brunt of the entire injury suffered by his companies. For this reason, there is a clear infringement of his rights as *associé* as they have been defined and within the limits imposed by the Court's Judgment on the preliminary objections of 24 May 2007. To this I would add that the disappearance or quasi-disappearance of the two companies prevents them from pursuing the appropriate remedies which would enable them to assert their rights. This raises an important question which merits further explanation.

The Court has already addressed the issue of the disappearance of a company in the *Barcelona Traction* case, where it listed a number of elements or criteria that had guided its reasoning. The present case offers the Court the opportunity to shed more light on its reasoning by further clarifying the elements and criteria put forward previously.

We know that, by a letter of 31 January 2007, the DRC informed the Court that Africom had ceased all its activities in the mid-1980s, which supposedly led to it being struck off the Trade Register (paragraph 22 of the Judgment of 24 May 2007). At the time, this was a new piece of information, which came to light after the close of the oral proceedings on the preliminary objections; it is likely to have a direct bearing on the question of diplomatic protection of *associés*, which would then be dealt with

in a different context from the narrower one that was adopted in the previous Judgment.

Indeed, the terms of the Respondent's letter confirmed the situation in practice not only of Africom, but also of Africontainers, since, as I have already noted, companies that have been inactive for almost 15 years (1996-2010) have in practice ceased to exist. That requires us to examine the nature of this disappearance, which creates a new situation in which it is no longer possible for one or both of the companies to assert their rights directly themselves, and thus to defend indirectly the rights and interests of their sole *associé*. The fact that no further action is possible through the company would deprive the sole *associé* of any remedy, if he were denied diplomatic protection by Guinea; we would be faced with an outcome which is not only contrary to fairness, but also to the fundamental principles governing due process and human rights. This problem has been a concern for the Court, the doctrine and the International Law Commission and it is useful to recall it briefly in order to understand its significance.

In the *Barcelona Traction* case, the Court recalled a first exception to the classic rule of diplomatic protection in paragraph 64, in which it states that:

> "The Court will now consider whether there might not be, in the present case, other special circumstances for which the general rule might not take effect. In this connection two particular situations must be studied: *the case of the company having ceased to exist* and the case of the company's national State lacking capacity to take action on its behalf." (*Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 40, para. 64; emphasis added.)

It then analysed this situation in paragraphs 65 to 68. Although in that case the Court concluded that the company had not disappeared and that, on those grounds, invoking this exception would not be pertinent to the case, we can infer from the Court's reasoning that, if the disappearance had been established, there would be a situation in which the exception would be taken into consideration. Thus the Court clearly indicates in paragraph 66 of the Judgment that:

> "in the event of the legal demise of the company . . . the shareholders [are] deprived of the possibility of a remedy available through the company; it is only if they became deprived of all such possibility that an independent right of action for them and their government could arise" (*ibid.*, p. 41, para. 66).

In his separate opinion appended to the Judgment, Judge Fitzmaurice clearly identified the problem when he evoked a situation whereby a company is:

> "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 . . . The efficacity of the corporate entity and its capability of useful action has 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." (*I.C.J. Reports 1970*, separate opinion of Judge Fitzmaurice, p. 72, para. 14; footnote not included.)

In so far as it is confirmed in the present case that one or both of the companies have disappeared, we have the situation of the first exception considered by the Court, which opens the way to diplomatic protection. This viewpoint, widely accepted within the doctrine, is also taken up in the draft Articles adopted by the International Law Commission in 2006 as a first exception to the general rule of diplomatic protection, drawing on the Court's position. According to Article 11 of the draft Articles:

> "The State of nationality of shareholders in a corporation shall not be entitled to exercise diplomatic protection in respect of such shareholders in the case of an injury to the corporation unless:
>
> *(a)* the corporation has ceased to exist according to the law of the State of incorporation for a reason unrelated to the injury."

In the present case, it does indeed seem as though we are dealing with such a situation, and even though many of the details remain unclear, it would only be a matter of determining whether the companies have effectively ceased to exist, when and how. The fact remains that this situation should have been clarified by the Court.

Factually, the Parties are agreed that the companies have ceased to exist, because they have been inactive since their *gérant* was expelled. They disagree on the dates on which the companies effectively ceased to exist and, in particular, on the issue of their legal existence, this latter point requiring us to consider how things stand.

We know that in the *Barcelona Traction* case, the Court examined the issue of the disappearance of a company and indicated the reasoning to be followed in order to determine whether or not a company has ceased to exist, adopting an approach considered to be stricter than that which previously prevailed, as the International Law Commission recalled in its commentary on Article 11 (Report of the International Law Commision, 2006, p. 62). The Court's position is clear from paragraphs 65, 66 and 67 of the Judgment, the relevant excerpts of which state:

"65. . . . There can, however, be no question but that Barcelona Traction has lost all its assets in Spain, and was placed in receivership in Canada, a receiver and manager having been appointed. It is common ground that from the economic viewpoint the company has been entirely paralyzed. . . .

66. It cannot however, be contended that the corporate entity of the company has ceased to exist, or that it has lost its capacity to take corporate action. It was free to exercise such capacity in the Spanish courts and did in fact do so. It has not become incapable in law of defending its own rights and the interests of the shareholders. . . . Only in the event of the legal demise of the company are the shareholders deprived of the possibility of a remedy available through the company; it is only if they became deprived of all such possibility that an independent right of action for them and their government could arise.

67. In the present case, Barcelona Traction is in receivership in the country of incorporation. Far from implying the demise of the entity or of its rights, this much rather denotes that those rights are preserved for so long as no liquidation has ensued. Though in receivership, the company continues to exist. Moreover, it is a matter of public record that the company's shares were quoted on the stock-market at a recent date." (*I.C.J. Reports 1970*, pp. 40-41.)

How do these criteria apply to the present case? A side-by-side comparison of Barcelona Traction's situation and that of Mr. Diallo's companies is sufficient for the following conclusions to emerge quite clearly:

— firstly, although Barcelona Traction had ceased to exist in the place of its activity (Spain), it had not ceased to exist in the place of its constitution (Canada); Mr. Diallo's two companies, on the other hand, have ceased to exist *de facto* in the single place of their activity and constitution (DRC), because of the actions of the Congolese authorities;
— secondly, Barcelona Traction had not become incapable in law of defending its own rights and the interests of its shareholders, and the receiver appointed by the Canadian courts was able to take all appropriate remedies; according to the evidence, however, both Mr. Diallo's companies have become incapable of defending themselves, because the Congolese authorities have made it impossible for their *gérant* to take action, materially or legally.

On the basis of all these elements of fact and law, and contrary to the situation in the *Barcelona Traction* case (para. 68 of the 1970 Judgment), in the present case the conditions seem to have been met to allow Guinea to exercise its diplomatic protection on behalf of the *associé*, Mr. Diallo, now the sole holder of shares in the companies (the corporate veil having disappeared), while at the same time abiding by the Judgment of 24 May 2007 on the preliminary objections.

3. The Right to Reparation

Naturally, I agree with the Court's findings on the human rights violations suffered by Mr. Diallo and the need for compensation in accordance with the conditions stated in the operative part of the Judgment; however, I believe that the Court could have reached the same conclusions on the identical violations which took place in the period prior to 1995-1996. On the other hand, for the reasons set out above, which show that Mr. Diallo has been the victim of material and moral injury as a result of the various violations of his human rights, as well as of his rights as *associé*, I cannot subscribe to the Court's very restrictive finding which excludes any violation of Mr. Diallo's rights as *associé* and thereby precludes any reparation under that head.

(Signed) Ahmed Mahiou.