SEPARATE OPINION OF JUDGE *AD HOC* MAMPUYA

[Translation]

Requirement of the existence of an inter-State dispute as a precondition to any judicial action and novelty of certain claims.

Paragraph 1 (b) of *Article 36 of the Vienna Convention — Content and sense of the obligation to inform — Nature and scope of the obligation contained in Article 36 to inform the arrested or detained alien in the light of the object and purpose of the 1963 Convention — Specificity of the rights identified in Article 36, paragraph 1, and the interrelationship of the three rights set out in subparagraph* (b) *— In the absence of material injury, a declaration by the Court of the wrongful nature of the Democratic Republic of the Congo's conduct should have constituted sufficient reparation for the injury suffered.*

Lawfulness of the expulsion: Article 13 of the International Covenant on Civil and Political Rights (the Covenant or ICCPR) merely stipulates that the decision to expel be taken "in accordance with the law" — Arbitrariness is not contemplated by Article 13 of the ICCPR: the Court imposes a condition additional to those laid down in the ICCPR in order for an expulsion to be lawful — "Arbitrariness" only refers to arrests or detentions in the context of Article 9, paragraph 1, of the Covenant.

Direct rights as shareholder — Enforceability or opposability of an associé*'s direct rights — Notion of interference in company law — Enforceability or opposability of an* associé*'s direct rights — Notion of interference.*

The Court's function is to decide, in accordance with international law, such disputes as are submitted to it; the Court can exercise its jurisdiction in contentious proceedings only when a dispute genuinely exists between the Parties. The Court only takes cognizance of the facts through the inter-State dispute in relation to those facts; an argument expounded during the oral proceedings cannot be evidence of the existence of a dispute between the Parties.

Subparagraph (b) *of paragraph 1 of Article 36 of the Vienna Convention on Consular Relations contains three separate but interrelated elements. The legal conclusions to be drawn from that interrelationship necessarily depend upon the facts of each case. It is necessary to consider the interrelationship of those three elements in the light of the particular facts and circumstances of the present case.*

A purely moral, non-material injury may be redressed by purely moral "satisfaction". There is abundant jurisprudence to show that a declaration by the Court of the wrongful nature of a State's conduct constitutes sufficient reparation for the injury suffered.

The international instruments applied in the present case are not aimed at "arbitrary" expulsion; arbitrariness does not derive from the alleged unlawfulness of an act. The arbitrary character of a measure falling within a prerogative of so discretionary a nature on the part of the State as the determination of the conditions of access or acceptance of foreigners on its territory must therefore, in respect of expulsion, be proved, and not presumed or deduced from the

alleged unlawfulness of the measure. The law affords States a certain latitude to define what, in order to enforce an expulsion measure, is or is not required for their public order or national security.

Direct rights of the shareholder and interests of the shareholder. The alleged internationally wrongful acts must have been aimed directly at the associé*'s direct rights as such. The* associé*'s direct rights are only enforceable against the company and within the context of its relations with the* associés; *the actions of a third party can only be considered as damaging to the direct rights of an* associé *"as such" if they represent acts of interference in the operation of the company or in the relations between the latter and its* associés.

It is with real regret that I have found myself unable to concur fully with the majority of the Court in this case. However, as judge — even *ad hoc* — I did not vote against the principal conclusion of the Judgment finding the Democratic Republic of the Congo guilty of violating certain obligations in relation to the individual rights of a Guinean national, thereby demonstrating, just as I did at the preliminary objections stage, that I have no problem with the universal assertion and safeguarding of human rights.

The purpose of this opinion is not therefore to dispute the provisions of the Judgment relating to that important issue, but to express certain reservations in respect of specific points decided by the Court, while disagreeing with some of the reasoning advanced by the majority or, at times, with certain of its conclusions.

My Reservations

1. Having already voiced my dissent to the 24 May 2007 Judgment on the preliminary objections, I particularly wanted to start by setting out my reservations on a question which I believe to be of undisputed legal significance in international judicial law, concerning a Court practice which has become an established procedural principle — as consistently confirmed by the Court in its jurisprudence — but which was seemingly abandoned in its 2007 Judgment in this case. I am referring to the precondition to any seisin of the Court by unilateral application: there must be, particularly for the exercise of diplomatic protection, *a dispute between the States concerned*, that is, the State of origin of the individual whose rights are alleged to have been violated, and the receiving State, the perpetrator of the alleged internationally wrongful acts.

2. I was concerned at the time, in a purely legal interest, that this would mark the start of an unjustified U-turn in the jurisprudence in this area; the fact that States have since continued to adhere to this requirement (see, in particular, paras. 3.17-3.22 of Russia's preliminary objections in the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)*), is encouragement for me to recall the merits of the opinion I expressed at that time. As I had already pointed out in my

separate opinion to the Judgment on the preliminary objections, the diplomatic practice is well-established: all international litigation, even if it relates to the facts of a situation covered by a bilateral agreement, is always preceded by "diplomatic representations", which are not to be confused with exhaustion of local remedies. On this point the jurisprudence has likewise been well-established since the Judgment of the Permanent Court in the *Mavrommatis Palestine Concessions* case, which defines a dispute as "a disagreement on a point of law or fact, a conflict of legal views or of interests" (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11).

A dispute develops *when a conflict arises between the arguments advanced by the parties* in respect of an act considered by one of them as wrongful; legally, it is this dispute, rather than the act itself, which forms the subject-matter of the proceedings, and it is through the dispute that the Court will take cognizance of the facts (case concerning *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, pp. 636-644).

3. In fact, from the *Mavrommatis Palestine Concessions* case to that of *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda)*, in 2006, the Court's position remained unchanged, until the Judgment on the preliminary objections in the present case. In that Judgment, the Court found that it was entitled to entertain Guinea's Application without first having established that the acts allegedly suffered by Mr. Diallo at the hands of the Congo, besides being unlawful, had given rise to an inter-State dispute between Guinea and the Congo, the only circumstance under which any such act can be referred to the Court by means of an application. In so doing, the Court acted as though this requirement would no longer have to be satisfied, which would have constituted a complete about-turn in a jurisprudence which had never previously been contested.

4. Fortunately, in its preliminary objections in the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)*, the Russian Federation makes it clear, in accordance with jurisprudential tradition, that this requirement is still a precondition to the proper referral of any matter to the Court (para. 3.17); in the case concerning the *Nuclear Tests (New Zealand* v. *France),* the Court states the following:

> "The Court, as a court of law, is called upon to resolve existing disputes between States. Thus the existence of a dispute is the primary condition for the Court to exercise its judicial function; it is not sufficient for one party to assert that there is a dispute, since 'whether there exists an international dispute is a matter for objective determination' by the Court" (*Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 476, para. 58, citing

Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 74).

It adds there::

> "Article 38 of the Court's Statute provides that its function is 'to decide in accordance with international law such disputes as are submitted to it'; but not only Article 38 itself but other provisions of the Statute and Rules also make it clear that the Court can exercise its jurisdiction in contentious proceedings only when *a dispute* genuinely exists *between the parties* . . ." (*Ibid*., p. 477, para. 60; emphasis added.)

When the Order was made on the indication of provisional measures in the *Georgia* v. *Russian Federation* case, seven judges expressed their shared view in a joint dissenting opinion. In asserting that the disputed convention prescribes negotiated settlement ahead of any recourse to the Court, they confirm the requirement that there must be a dispute between the parties relating to the interpretation or application of the said convention (case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Provisional Measures, Order of 15 October 2008*, joint dissenting opinion of Judges Al-Khasawneh, Ranjeva, Shi, Koroma, Tomka, Bennouna and Skotnikov, *I.C.J. Reports 2008*, p. 401, para. 6).

The Judges object that:

> "[m]oreover, . . . unable to find any evidence that the acts alleged by Georgia fall within the provisions of CERD, [the majority] has been content to observe merely that a dispute appears to exist as to the interpretation and application of CERD because the two Parties have manifested their disagreement over the applicability of Articles 2 and 5 of the Convention." (*Ibid*., p. 402, para. 10.)

Thereby contesting the fact that "an argument expounded during oral proceedings has mutated into evidence of the existence of a dispute between the Parties" (*ibid.*, p. 402, para. 10).

The seven judges observe, nevertheless, that

> "[t]he Court . . . admits that the questions concerning CERD *should have been raised between the Parties*, referring specifically in this regard to the bilateral contacts between the Parties and certain representations made to the Security Council, even though *nowhere in these has Georgia accused Russia of racial discrimination*. Thus, in our opinion, the very substance of CERD *was never debated between the Parties before the filing of a claim before the Court.*" (*Ibid*., p. 402, para. 12; emphasis added.)

Like the authors of that dissenting opinion, I myself find it "very surprising that the Court has chosen to disregard this precondition to any

judicial action . . .” (*I.C.J. Reports 2008*, p. 402, para. 13) in the present Judgment, just as it did when it considered the preliminary phase of the *Diallo* case, because I still consider it to be a fundamental condition upon which the Court should have ruled, even in the absence of an objection to that effect, a preliminary objection or any other cumulative condition requiring, for example, prior negotiation or arbitration.

5. That said, in respect of the present Judgment on the merits, while I voted with the majority on the violations of Articles 9 and 13 of the International Covenant on Civil and Political Rights and Articles 6 and 12 of the African Charter on Human and Peoples' Rights, I still have reservations about some of the reasoning, specifically that relating to the conduct of the Congolese authorities, which amounts to little more than suppositions and accusations that, in my view, were unnecessarily malicious, being based on suspicion, or simply redundant. Furthermore, I was unable to subscribe to either the reasoning or the part of the operative clause which finds that the Congo violated the obligations incumbent upon it under Article 36, paragraph 1 *(b)* of the Vienna Convention on Consular Relations, while, in respect of the rejection of Guinea's complaints concerning Mr. Diallo's direct rights as *associé*, although I fully subscribe to the Court's conclusion, it is nevertheless my modest belief that the reasoning behind that conclusion fails to take account of the argument of principle as to why those complaints should be rejected.

6. On the first point, I will confine myself to repeating that, just as the misplaced reductionist reasoning which led the Court to consider it necessary to imply (*Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 601, para. 46) that the Congo acted out of deliberate malice, cunning and calculated self-interest in issuing a notice of refusal of entry *[refoulement]* rather than a notice of expulsion was, to my mind, gratuitous and unconvincing (*ibid.*, opinion of Judge *ad hoc* Mampuya, p. 645), so too its reiteration in this Judgment provokes the same reaction on my part. The same is true of the assertion, which is merely groundless speculation, that a link must have existed “between Mr. Diallo's expulsion and the fact that he had attempted to recover debts . . . bringing cases for this purpose before the civil courts” (paragraph 82 of the Judgment). While it is understandable that so serious a charge might lie in the mouth of the Applicant, the World Court cannot endorse such a charge on the basis of an unfounded presumption.

Furthermore, both of these very serious charges were unnecessary, as neither was required in order for the Court to reach its principal conclusion on the lawfulness of the expulsion.

7. Thus, having voted with the majority of the Court on certain violations attributed to the Democratic Republic of the Congo, I also voted in favour of point 7 of the Judgment's operative clause relating to the reparation owing to Guinea by the Congo as a result of those violations. However, in my view, the Court could have usefully made it clear that the

purely moral and non-material injury found to have been caused by the Respondent's purported violation of its obligation under Article 36, paragraph 1 *(b)*, of the Vienna Convention on Consular Relations — a violation which did not cause any material injury — calls only for "declaratory" or moral reparation. Fully in line with point 7 of the operative clause, which provides for reparation only in respect of the violations of the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights, such clarification would have served to demonstrate the Court's confirmation of a matter which, following its established jurisprudence, has become a principle. Thus, as just one example of this, I cite the following passage from the *Corfu Channel (United Kingdom* v. *Albania)* case — where it was in fact the violation of a State's sovereignty that was at issue — in which the Court unanimously finds that:

> "by reason of the acts of the British Navy in Albanian waters in the course of the Operation of November 12th and 13th, 1946, the United Kingdom violated the sovereignty of the People's Republic of Albania, and that this declaration by the Court constitutes in itself appropriate satisfaction" (*Merits, Judgment, I.C.J. Reports 1949*, p. 36).

Doctrine fully supports this position, for example:

> "A purely moral injury may be redressed by purely moral 'satisfaction'. The simplest form of satisfaction is a declaration by the court of the wrongfulness of a State's conduct; there is abundant jurisprudence in support of the proposition that, in the absence of material injury, a declaration by the court of the wrongful nature of conduct constituted sufficient reparation for the injury suffered (*Corfu Channel, I.C.J. Reports 1949*, p. 35)." (P. Reuter, *Droit international public*, Paris, Presses universitaires de France, 1983, 6th ed., p. 268.) *[Translation by the Registry.]*

While J. Crawford observes that: "[o]ne of the most common modalities of satisfaction provided in the case of moral or non-material injury to the State is a declaration of the wrongfulness of the act by a competent court or tribunal". (In his commentary on the International Law Commission's Article 37, paragraph 2, on State responsibility.)

8. Moreover, in order to enhance the Respondent's responsibility, the Court believed it indispensable to include an additional characteristic, and hence a condition further to those laid down in the ICCPR in order for an expulsion to be lawful: Mr. Diallo's expulsion was not only considered unlawful, it was also "arbitrary". In fact, Article 13 merely stipulates that the decision to expel be taken "in accordance with the law" and that the individual concerned be allowed to "submit the reasons against his expulsion" to "the competent authority or a person or persons especially designated by the competent authority". The same is true of Article 12, paragraph 4, of the African Charter, which states that a non-national "legally admitted in a territory of a State party to the

present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law". There is no mention anywhere of "arbitrary" expulsion, unless that "arbitrary" character derives from unlawfulness or is implied by it. For it can only be one or the other. Either arbitrariness derives from unlawfulness, but manifestly this cannot be so, or arbitrariness is distinct from unlawfulness. In the latter case, in the first place this would impose an additional condition, not contemplated by Article 13 of the Covenant. Indeed, the Court's intent to impose this additional, unwritten condition is clear when it states:

> "[f]irst, the applicable domestic law must itself be compatible with the other requirements of the Covenant and the African Charter; *second, an expulsion must not be arbitrary in nature . . .*" (paragraph 65 of the Judgment; emphasis added);

or when it observes that "the DRC has never been able to provide grounds which might constitute a convincing basis for Mr. Diallo's expulsion", or when it refers to "such an expulsion measure, one without any defensible basis" (paragraph 82 of the Judgment). Secondly, this additional condition creates a need: a need to clarify and explain what then, besides unlawfulness, arbitrariness would consist of.

9. There is no mention anywhere in the Judgment of any of these concerns, which to my mind, the Court, in introducing this further condition relating to arbitrariness, was not entitled to overlook. The Judgment is content to refer to the "considerable body of interpretative case law" of the Human Rights Committee, which the Court describes as "quasi-judicial" and to which it "believes that it should ascribe great weight".

10. However, the two concepts are distinct and must be distinguished, because, while arbitrary can cover unlawful, the opposite is not true. If we confine ourselves to the practice of that same Human Rights Committee, as Sir N. Rodley states in his separate opinion:

> "'Arbitrary' in Article 9, paragraph 1, certainly covers unlawfulness. It is evident from the very notion of arbitrariness and the preparatory work. But I fail to see how the opposite is also true. Nor is there anything in the preparatory work to justify it." (*C.* v. *Australia*, 2002, Communication No. 900/1999.)

This may explain why an act, such as an arrest, which is perfectly legal, can be arbitrary, and why every unlawful act is not necessarily arbitrary. This is how it is understood by the Human Rights Committee when it states:

> "The drafting history of Article 9, paragraph 1, confirms that 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability." (See Communication No. 305/1988, *Hugo van Alphen* v. *The Netherlands*, views adopted

on 23 July 1990, doc. CCPR/C/39/D/305/1988 of 15 August 1990, para. 5.8.)

11. Moreover, it should be noted that the "interpretative case law" of the Human Rights Committee, to which this Judgment refers, relates exclusively to the interpretation of Article 9, paragraph 1, of the Covenant, which makes a distinction between arbitrary arrest or detention (in the second sentence) and the unlawful deprivation of liberty (third sentence):

> "1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

Accordingly, it is only to arrests or detentions in the context of Article 9, paragraph 1, of the Covenant that such "arbitrariness" refers. In support of this assertion, I cite, in particular, the following "case law" of the Committee: *Teófila Casafranca de Gómez* v. *Peru*, 2003, Communication No. 981/2001; *A.* v. *Australia*, Communication No. 560/1993, views adopted on 3 April 1997; *Hugo van Alphen* v. *The Netherlands*, views adopted on 23 July 1990, doc. CCPR/C/39/D/305/1988 of 15 August 1990; *Womah Mukong* v. *Cameroon*, views adopted on 21 July 1994, doc. CCPR/C/51/D/458/1991; *C.* v. *Australia*, Communication No. 900/1999; *Baban* et al. v. *Australia*, Communication No. 1014/2001; *Bakhtiyari* et al. v. *Australia*, Communication No. 1069/2002; *Rafael Marques de Morais* v. *Angola*, 2005, Communication No. 1128/2002.

12. If, therefore, the drafters of the Covenant had wanted to lay down an additional condition, while already using this concept of "arbitrary" in Article 9 in respect of arrest and detention, they would have done so by stating, in Article 13, that an expulsion has to be both in accordance with the law and not arbitrary. Besides the fact that such a characteristic — its nature and content — would need to be established, the undeniable truth is that, even then, Article 13 of the Covenant, whose alleged violation is addressed in this Judgment, is not aimed at the arbitrariness of an expulsion (a concept, moreover, not readily envisageable). Accordingly, the silence of the Covenant and the African Charter in that respect should be considered neither an omission which the Court should seek to make good, nor an error which it should try to correct, because the African Charter, which postdates the Covenant by 15 years, could have incorporated that notion of "arbitrary" had its sponsors so desired. The drafters of the Covenant and, in turn, those of the Charter were guided by common sense, which does not readily permit the contemplation of a condition such as this, which would deem arbitrary a decision of so discretionary a nature on the part of the State as whether or not to allow, under its law, the presence of foreigners on its territory.

13. As relevant jurisprudence on the subject of expulsion, in support

of the further condition that an expulsion should "not be arbitrary in nature", paragraph 68 of the Judgment cites Article 1 of Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, entitled "Procedural safeguards relating to expulsion of aliens". Cited without examples of specific decisions in which it has been interpreted in the same way as by the Court in the present case, this provision stipulates the following:

> "1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:
>
> *(a)* to submit reasons against his expulsion,
> *(b)* to have his case reviewed, and
> *(c)* to be represented for these purposes before the competent authority or a person or persons designated by that authority."

In this provision, we indeed not only find the same substance as in Article 13 of the ICCPR, but also the same question of its interpretation, without, however, anything to corroborate the fact that the European Court has interpreted it in the same way as this Judgment.

On the other hand, should we also wish to "make the case for the defence", we could find support in paragraph 2 of the same Article, which provides: "An alien may be expelled before the exercise of his rights under paragraph 1 *(a)*, *(b)* and *(c)* of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security." The use here of a positive formulation ("An alien may be expelled before the exercise of his rights under . . ." and not "cannot be expelled before the exercise of his rights under . . . unless . . .") shows that territorial authorities are recognized to enjoy a certain latitude in the case, specifically, of a prerogative of a discretionary nature, which cannot be implicitly restricted, even by a suggestion that it is "arbitrary".

Finally, although there are no provisions anywhere for "material safeguards", the title of this same Article 1 of the European Protocol, "Procedural safeguards relating to expulsion of aliens", makes it clear that even the European Convention did not intend for an expulsion measure to be subject to material, substantive conditions, thus also letting it be understood that the content of the only condition approximating to a substantive one, "in the interests of [the] public . . . [and for] reasons of national security", is defined at the discretion of the State authority. Therefore, I do not believe it justified to treat, as the Court does (paragraph 72 of the Judgment), the requirement to provide reasons for the decision to expel laid down by Article 15 of the 1983 Legislative Order as a strictly substantive condition, when only the territorial State is in a position to say what is and what is not "necessary in the interests of public order" or required for its "national security". This argument, expounded at length by the Democratic Republic of the Congo (Counter-Memorial, paras. 1.27-1.28), was not considered by the Court.

I will now turn to the source of my disagreement with the majority of the Court.

My Disagreement

The Alleged Violation of the Obligation under Article 36. paragraph 1 *(b)*, of the Vienna Convention on Consular Relations:

Content and Sense of the Obligation to Inform

14. Article 36, paragraph 1 *(b)*, provides:

> "[I]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph."

The Congo is criticized in particular for failing to inform directly and "without delay" the individual concerned, Mr. Diallo, of his right to request, through the Guinean Embassy in Kinshasa, the intervention of the Guinean authorities. In the Judgment, the allegation is presented, and the relevant provision interpreted, in a way which, in my view, fails to take account of all the pertinent elements as laid down by the Convention. In that Convention, as the Court itself has interpreted it (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 492, para. 74), the fundamental principle in respect of consular protection is set out in paragraph 1 *(a)*, which concerns the right of consular employees to communicate with and have access to nationals of the sending State. I believe this is important to a full understanding of the scope of the receiving State's obligation laid down in subparagraph *(b)* of the same paragraph.

15. The obligation itself is split into three elements: first, the competent authorities of the receiving State must, if the person concerned so requests, notify the arrest to the consular post of the sending State; second, they must transmit any communication addressed to the consular post by the arrested person; and, finally, they must inform "without delay" the individual concerned of his rights. According to the Court's interpretation, this third element — the final element laid down by paragraph 1 *(b)* — is in fact an indispensable precondition to the fulfillment of the other two elements: the person concerned must be informed of his right, as set out in the last sentence of paragraph 1 *(b)*, in order for the first two elements to be realized.

16. Thus, the obligation to inform the consular authorities codified in the Convention is considered as an obligation to inform the person detained of *his right to request* consular assistance, as well as — only if he so requests — *his right to contact* his consular post. It is a positive obligation incumbent upon the State in whose territory a foreign national is detained. This is how the Court interprets it in the *Avena* case:

> "the clear duty to provide consular information under Article 36, paragraph 1 *(b)*, does not invite assumptions as to what the arrested person might prefer, as a ground for not informing him. It rather gives the arrested person, once informed, the right to say he nonetheless does not wish his consular post to be notified." (*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 46, para. 76.)

However, the Court states prior to this that:

> "Article 36, paragraph 1 *(b)*, contains three *separate* but *interrelated* elements: the right of the individual concerned to be informed without delay of his rights under Article 36, paragraph 1 *(b)*; the right of the consular post to be notified without delay of the individual's detention, if he so requests; and the obligation of the receiving State to forward without delay any communication addressed to the consular post by the detained person." (*Ibid.*, p. 43, para. 61; emphasis added.)

Nature and Scope of the Obligation Contained in Article 36 to Inform the Arrested or Detained Alien in the Light of the Object and Purpose of the 1963 Convention

17. It is true that in the *LaGrand* case the Court concludes that, in view of the wording of its provisions, Article 36, paragraph 1, creates individual rights, stating that "[t]he clarity of these provisions, viewed in their context, admits of no doubt" (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 494, para. 77).

And, logically, it is on account of this supposed "clarity" that the Court chose not to have recourse to the classical rules of interpretation, as set forth in Article 31 of the Vienna Convention on the Law of Treaties.

18. In this respect, and without wishing to dispute that conclusion, I do have some doubts about that categorical statement by the Court. When the relevant provision of Article 36 is placed in the general context of the Convention, far from being "clear", its sense and scope need rather to be sought out.

We observe, *first*, that the purpose and object of concluding an international convention on consular relations, as the preamble indicates, is to "contribute to the development of friendly relations among nations".

Second, Article 36, which is entitled "Communication and contact with nationals of the sending State", opens with the phrase: "With a view to facilitating the exercise of consular functions relating to nationals of the sending State". This phrase clearly limits the scope of Article 36 to that of a provision aimed solely at facilitating the exercise of consular functions relating to the nationals of the sending State. *Third*, in accordance with Article 5 *(a)* of the Convention, consular functions primarily consist of "protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law". From this context of consular functions, it is clear that, here, the principle of interpretation according to the natural and ordinary meaning of the words used cannot be absolute. The interpretation should not disregard the purpose and object of the conclusion of an international convention on consular relations, which, as the preamble indicates, is to "contribute to the development of friendly relations among nations" and, in particular, to enable the sending State to exercise its consular functions.

19. Thus, on the one hand, the language of the Convention itself does not seem to corroborate the trend initiated by the interpretation given in 2001 in the *LaGrand* case, making the right of the arrested or detained alien to be informed an exclusively individual right, a trend which purely and simply treats the issue as a human rights one, detaching it completely from the field of diplomatic or consular protection.

Therefore, the United States was not entirely unjustified in seeking to interpret Article 36, in the context and light of the object and purpose of the Convention, in order to argue that:

> "the position of the individual under the Convention derives from the right of the State party to the Convention, acting through its consular officer, to communicate with its nationals. The treatment due to individuals is inextricably linked to and derived from the right of the State." (Counter-Memorial of the United States, p. 84, para. 100.)

20. An examination of the *travaux préparatoires* confirms this reading: it is important to recall the debate which took place on whether mention should be made of the rights accorded to individuals and, in particular, the way in which Article 36, paragraph 1 *(a)* should address the question of a foreign national being able to communicate with a consular officer.

The original text proposed by the ILC was drafted as follows:

> "The competent authorities shall, without undue delay, inform the competent consulate of the sending State, if within its district, a national of that State is committed to prison or to custody pending trial or is detained in any other manner." (A/CONF.25/6, United

Nations Conference on Consular Relations, Vol. II, A/CONF.25/16/Add.1, p. 24.)

That text made no mention of individual rights, and the commentary which accompanied it clearly stated that what mattered was that consular officers were able to carry out their functions.

21. A certain number of delegations took the view that the Convention should recognize the personal right of a foreign national to communicate with the consular officers of his country, but this matter gave rise to a great deal of controversy, from which a clear consensus could not be found. During the negotiating sessions on Article 36, the Venezuelan delegation objected to the opening statement of paragraph 1 *(a)* of the ILC draft, which concerned the rights of nationals of the sending State to communicate with and have access to the competent consulate, arguing that this statement had no place in a convention on consular relations, and stating that:

> "foreign nationals in the receiving State should be under the jurisdiction of that State and should not come within the scope of a convention on consular relations" (United Nations Conference on Consular Relations, Vol. I, Summary records of plenary meetings and of the meetings of the First and Second Committees, A/CONF.25/16, p. 358, para. 32 (meeting of 14 March 1963 of the Second Committee)).

22. This led to the order of the elements of Article 36, paragraph 1 *(a)* being reversed, in such a way that the consul's right to communicate with the individual is mentioned first, and then the individual's right to communicate with the consul (*ibid.*, p. 361, para. 2, amendment proposed by Venezuela and other States).

What this underscores, therefore, is that the individual's position in respect of the Convention derives from the right accorded to the State party to the Convention, acting through its consular officers, to communicate with its nationals; the treatment of individuals is inextricably linked to and derived from the right of the State.

Specificity of the Rights Identified in Article 36, Paragraph 1, and the Interrelationship of the Three Rights Set Out in Subparagraph (b)

23. As we have seen, in the *Avena* case the Court established a link between the three elements of Article 36, paragraph 1 *(b)*, even though it asserted that they were distinct. It is worth pointing out that the Court had already done this in the *LaGrand* case, in very clear terms which described this link as an interrelationship (*I.C.J. Reports 2001*, p. 492, para. 74). However, in the *Avena* case the Court made one very important addition:

> *"The legal conclusions to be drawn from that interrelationship necessarily depend upon the facts of each case . . . It is necessary to*

revisit the interrelationship of the three subparagraphs of Article 36, paragraph 1, in the light of the particular facts and circumstances of the present case." (*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 52, paras. 99-100; emphasis added.)

In that connection, we know that the Democratic Republic of the Congo has argued that it follows from the interrelated link between the right to information of the sending State or State of nationality and the right to information of the arrested or detained alien that, *"if that right has not been violated in respect of the State — here, Guinea — it cannot have been so in respect of its national, Mr. Diallo"* (response of the Democratic Republic of the Congo to a question put by a judge; see doc. Guinea-DRC 2010/15, 27 April 2010).

Thus the Respondent's position is that Article 36, paragraph 1 *(b)* of the Vienna Convention does indeed create "individual rights" (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 494, para. 77), but rights which are inextricably linked to the sending State's right to communicate with its nationals through consular agents. Accordingly, it asserts that, in spite of its individual dimension, this right remains closely tied to the rights of the State itself. Finally, the Democratic Republic of the Congo argues that the right to information is a mutual right of the individual and his sending State (doc. Guinea-DRC 2010/15, 27 April 2010, p. 1). This argument enables it to highlight the fact that the purpose of this right to information is to facilitate the exercise of consular functions relating to nationals of the sending State, which confirms that this individual right is closely linked to the rights of the State itself, and that the treatment of individuals is inextricably linked to and derived from the rights of the State.

24. As in the *Avena* case, the Court, rather than making an interpretation based first and foremost on a "clarity" which, when examined, is doubtful to say the least, could have usefully interpreted Article 36, paragraph 1 *(b)*, in relation both to its context and to the interrelationship of the rights set out therein, *in the light of the particular facts and circumstances* of the case between Guinea and the Democratic Republic of the Congo, as the Court itself recommends in its *Avena* Judgment. Not doing so led the Court to apply purely theoretical considerations. In this connection, it should be pointed out that Guinea defends its position on the basis of the Court's interpretation of this treaty provision in the *LaGrand* and *Avena* cases, even though the legal problems posed in, and the circumstances of, those cases are markedly different from those of the present case.

The facts and circumstances of the present case show that, in contrast to both of the above-mentioned cases, the Democratic Republic of the Congo's failure to inform Mr. Diallo of his rights did not prevent Guinea from exercising the right accorded to it under Article 36, paragraph 1. It is

true that informing Mr. Diallo of his rights might well have "facilitate[d] the implementation of the system of consular protection" (see para. 74 of the *LaGrand* Judgment), but, considering the object of the obligation incumbent upon the receiving State, it is impossible to be indifferent to the fact that the Guinean authorities were undeniably informed or, indeed, that they were able, as they themselves acknowledge, to exercise their consular function. Accordingly, the failure to inform could not have had the effect of preventing Guinea from exercising its rights of consular protection in respect of its national. In fact, in this instance, Mr. Diallo's situation was certainly not unknown to the Guinean authorities, who became aware within a period sufficiently "timely" for them to have been able to act, while remaining entitled to take the Congolese authorities to task, were it indeed the case, for not having complied with the relevant procedure. Thus, this case is not the same as that of the LaGrand brothers, whose situation was, as it were, hidden from the German authorities and remained unknown to them throughout the period when diplomatic action was still possible; Germany was prevented from acting by the American failure to inform the LaGrand brothers of their rights. It is therefore not entirely justified to summarily dismiss the Congolese claim that Mr. Diallo was orally informed. In relation to an information process which can, in practice, only be carried out orally, it is unrealistic to talk of a lack of "the slightest evidence" which would prove that an oral action had been carried out. The Court should have attached no weight whatever to the statement of the individual concerned, Mr. Diallo, questioned 13 years after the event, alleging for the first time that the Congolese authorities had not informed him of his right to request the protection of his country's embassy (Reply of the Republic of Guinea, Vol. II, Annex I: Transcript of hearing of Mr. Ahmadou Sadio Diallo, drawn up on 29 October 2008 by Maîtres Boubacar Télimélé Sylla and Aboubacar Camara). All the more so since there was no evidence to the contrary — which, in any event, would be impossible to produce — and since the alleged violation by the Congo of Article 36, paragraph 1 *(b)*, of the Convention in question did not cause any injury to Guinea, since it did not prevent it from learning of Mr. Diallo's imprisonment and, later, of his expulsion, or, therefore, from protecting him.

My Position on the Alleged Violations of Mr. Diallo's Direct Rights as Associé

25. According to the Democratic Republic of the Congo, the question which arises is whether "Mr. Diallo's expulsion from the Congo resulted in a violation of his direct rights as *associé* in Africom-Zaire and Africontainers" (Counter-Memorial of the Democratic Republic of the Congo, para. 2.02; Rejoinder of the Democratic Republic of the Congo, para. 2.05). It observes in this respect that, in ordering Mr. Diallo's expulsion in 1996, it did not infringe any of his direct rights as *associé*.

Therefore, what must be determined is whether or not the Democratic Republic of the Congo carried out acts specifically aimed at Mr. Diallo's direct rights.

Enforceability or Opposability of an Associé*'s Direct Rights*

26. Guinea treats an attack on company rights, resulting in injury to shareholders, as a violation of their direct rights; in other words, it treats a violation of the rights of Africom-Zaire and Africontainers-Zaire as a violation of the rights of Mr. Diallo. However, to conflate the rights in this way is to misrepresent the general régime of diplomatic protection, which, for its part, always subjects the admissibility of a claim on behalf of shareholders of a foreign company to there having been a violation of the "direct rights" of such shareholders "as such".

In this connection, Guinea has claimed, as it did for the Judgment of 24 May 2007, that Mr. Diallo's arrest, detention and expulsion not only had the effect "of preventing him from continuing to administer, manage and control any of the operations of the companies Africom-Zaire and Africontainers-Zaire", *but were specifically motivated by the intent to prevent him from exercising these rights, from pursuing the legal proceedings brought on behalf of the companies, and thereby from recovering their debts*.

27. Expulsion is indeed a measure which, when taken against an individual, could have an effect on his status as *associé*. But, as the Court ruled in the *Barcelona Traction* case, this is not sufficient to engage the responsibility of a State. It would need to be determined whether the measures taken by the Democratic Republic of the Congo were aimed directly at Mr. Diallo's rights as *associé* or whether, on the contrary, they were aimed at him as an individual and, collaterally, affected his rights as *associé* and their exercise.

28. In order to reject Guinea's claims, however, the Court relies solely on the reasoning previously followed by it in the *Barcelona Traction* case: that in principle it is possible for a State to bring proceedings where the acts complained of were aimed at the "direct rights of the shareholders as such". Accordingly, it proceeded to verify each of the rights invoked by the Applicant, so as to ascertain whether the Congo had taken actions "aimed at [those] rights . . . as such" and found that the allegation was unfounded, because the right claimed to be enjoyed by Mr. Diallo in fact belongs to the company (paragraph 119 of the Judgment), and because the decisions taken by the Congo did not violate the right invoked (paragraphs 134, 137, 138 and 148 of the Judgment). The Court also had a duty to respond to Guinea's allegations on the *intuitu personae* character of the companies in question. The Applicant contends that, in *sociétés privées à responsabilité limitée* [private limited liability companies] (hereinafter "SPRLs"), the *parts sociales* are not freely transferable, which greatly accentuates the *intuitu personae* character of these companies, making them very different in this respect from public limited

companies. It argues that this characteristic is even more marked in the case of Africom-Zaire and Africontainers-Zaire, since Mr. Diallo was their sole *gérant* and sole *associé*. According to Guinea, "in fact and in law it was virtually impossible to distinguish Mr. Diallo from his companies" (Guinea's Reply, para. 2.90; case concerning *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 604, para. 56).

In support of its argument, Guinea cites what it calls "the acts of interference" by the Democratic Republic of the Congo "with Mr. Diallo's property rights in the *parts sociales*", the "interference" through the "arrests and detentions" and through the arrests and expulsion, the "interference" through the expropriation of the companies, which it has made no attempt whatsoever to prove, as well as the "judicial interference".

The Court responds to those allegations (in particular, in paragraphs 155-157) by remaining faithful to the solutions developed and adopted by it in the *Barcelona Traction* case.

29. In my view, however, this was its opportunity to reaffirm the principle, implied in that approach, that the direct rights of an *associé*, whether "functional" or "property" rights, are only enforceable or opposable against the company itself, because they are born, and are deployed and exercised, within the context of the relations between the company and its *associés* or shareholders; they can thus be seen as entitlements held by the *associés* or shareholders vis-à-vis the company. That is why, when those entitlements are violated by actions aimed at the company's rights, the *associé* can only seek redress from the latter. It is also the reason why a claim against a third party will only lie if its actions were aimed at those rights as such.

Notion of Interference in Company Law

30. The other fundamental principle is that of the notion of interference liable to infringe the direct rights of an *associé*. Guinea cites this principle, but applies it incorrectly when it alleges "interference with [Mr. Diallo's] property rights", in the form, in particular, of his arrest, detention and expulsion, measures which prevented Mr. Diallo "from managing his companies and from any participation in the activities of their corporate organs, and . . . deprived [him] of any possibility of controlling and using his *parts sociales*" (Guinea's Reply, paras. 2.86-2.88). Guinea further cites the acts of interference which led to "the Congolese authorities' decision . . . to stay enforcement of the judgment for the plaintiff handed down in *Africontainers* v. *Zaire Shell*" (*ibid.*, and paragraph 150 of the Judgment). However, these "acts of interference", if established, would not have been aimed at the *associé*'s rights "as such", although they might, at best, be evidence of a possible denial of justice, a claim which Guinea has not sought to pursue.

However, the "acts of interference" capable of infringing the direct

rights of an *associé* "as such" are those which obstruct the operation of the company or the relations between the company and its *associés*. In practice, since the direct rights of the *associé* are only enforceable against the company and in the context of its relations with the *associés*, the actions of a third party can only be considered as damaging to the direct rights of an *associé* "as such" if they represent acts of interference as thus defined. No logical process can transform acts aimed at an *associé* as an individual, in his personal capacity, such as the arrest, detention and expulsion of Mr. Diallo, into interference, as defined above and aimed at the rights of the *associé* "as such", in the operation of the company, or in the relations between the company and its *associés*.

31. The Congo gives a good example of such interference when responding to those arguments advanced by Guinea, stating that Guinea "has not demonstrated that the Democratic Republic of the Congo gave the order to Africontainers not to permit Mr. Diallo to control its operations" (CR 2010/4, p. 8, para. 15).

This reasoning is that developed in the *Salvador Commercial Company* case, cited by both Parties, and in particular by the Democratic Republic of the Congo in its preliminary objections (para. 2.35). Although that case seems to be in the nature of an equitable judgment, it is a perfectly good illustration of the notion of interference. Thus the tribunal states that the Salvadoran authorities had adopted measures directly aimed at the direct rights of the shareholders vis-à-vis their company. The arbitral award, referring to those acts of interference, cites the arbitrary replacement of the directors of the Salvadoran company by other directors — apparently in the pay of the State — the calling of meetings of the company's governing bodies without notifying the American majority shareholders, the refusal to allow those shareholders to examine certain company documents, etc. (*Reports of International Arbitral Awards (RIAA)*, Vol. XV, pp. 474-475), and finds that, by undertaking those measures, Salvador had directly prevented shareholders from exercising their rights in relation to their company.

32. By contrast, there is nothing in the circumstances of the present case to suggest that the Congolese authorities interfered in this way with the internal operation of Africom-Zaire or Africontainers-Zaire. The Court reaches the same conclusion, but I felt that this conclusion required better reasoning than the somewhat elliptical reasoning offered in the Judgment.

(Signed) Auguste MAMPUYA.