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Summary
Not an official document

Summary 2010/3
30 November 2010

Ahmadou Sadio Diallo
(Republic of Guinea v. Democratic Republic of the Congo)

Summary of the Judgment of 30 November 2010

After recalling the history of the proceedings and the submissions of the Parties (paragraphs 1 to 14 of the Judgment), the Court presents its reasoning in four parts.

I. GENERAL FACTUAL BACKGROUND (paras. 15-20)

The Court devotes the first part of its Judgment to recalling the general factual background of the case. It notes that, in its Judgment of 24 May 2007, it declared the Application of the Republic of Guinea to be admissible in so far as it concerns protection of Mr. Ahmadou Sadio Diallo's rights as an individual, and in so far as it concerns protection of his direct rights as associé in Africom-Zaire and Africontainers-Zaire. It states that it will therefore consider in turn the questions of the protection of Mr. Diallo's rights as an individual (paras. 21-98) and the protection of his direct rights as associé in Africom-Zaire and Africontainers-Zaire (paras. 99-159). In the light of the conclusions it comes to on these questions, the Court will then examine the claims for reparation made by Guinea in its final submissions (paras. 160-164).

II. PROTECTION OF MR. DIALLO'S RIGHTS AS AN INDIVIDUAL (paras. 21-98)

In its arguments as finally stated, Guinea maintains that Mr. Diallo was the victim in 1988-1989 of arrest and detention measures taken by the DRC authorities in violation of international law and in 1995-1996 of arrest, detention and expulsion measures also in violation of international law. Guinea reasons from this that it is entitled to exercise diplomatic protection of its national in this connection.

The DRC maintains that the claim relating to the events in 1988-1989 was presented belatedly and must therefore be rejected as inadmissible. In the alternative, the DRC maintains that the said claim must be rejected because of failure to exhaust local remedies, or, otherwise, rejected on the merits. The DRC denies that Mr. Diallo's treatment in 1995-1996 breached its obligations under international law.

Accordingly, the Court must first rule on the DRC's argument contesting the admissibility of the claim concerning the events in 1988-1989 before it can, if necessary, consider the merits of that claim. It must then consider the merits of the grievances relied upon by Guinea in support of its claim concerning the events in 1995-1996, the admissibility of which is no longer at issue in this phase of the proceedings.

A. The claim concerning the arrest and detention measures taken against Mr. Diallo in 1988-1989 (paras. 24-48)

In order to decide whether the claim relating to the events in 1988-1989 was raised late, the Court must first ascertain exactly when the claim was first asserted in the present proceedings.

The Court observes that, to begin, note should be taken that there is nothing in the Application instituting proceedings of 28 December 1998 referring to the events in 1988-1989, and nor are these facts mentioned in the Memorial Guinea filed pursuant to Article 49, paragraph 1, of the Rules of Court on 23 March 2001. It notes that it was not until the Applicant filed its Written Observations on the preliminary objections raised by the Respondent on 7 July 2003 that Mr. Diallo's arrest and detention in 1988-1989 were referred to for the first time.

In the opinion of the Court, the claim in respect of the events in 1988-1989 cannot be deemed to have been presented by Guinea in its "Written Observations" of 7 July 2003. According to the Court, the purpose of those observations was to respond to the DRC's objections in respect of admissibility. As those were incidental proceedings opened by virtue of the DRC's preliminary objections, Guinea could not present any submission other than those concerning the merit of the objections and how the Court should deal with them. Accordingly, the Written Observations of 7 July 2003 cannot be interpreted as having introduced an additional claim by the Applicant into the proceedings. In particular, the Court goes on to observe that Guinea first presented its claim in respect of the events in 1988-1989 in its Reply, filed on 19 November 2008, after the Court had handed down its Judgment on the preliminary objections. The Reply describes in detail the circumstances surrounding Mr. Diallo's arrest and detention in 1988-1989, states that these "inarguably figure among the wrongful acts for which Guinea is seeking to have the Respondent held internationally responsible" and indicates for the first time what, from the Applicant's point of view, were the international obligations, notably treaty-based ones, breached by the Respondent in connection with the acts in question.

Having determined exactly when the claim concerning the events in 1988-1989 was introduced into the proceedings, the Court can now decide whether that claim should be considered late and inadmissible as a result. The Judgment handed down on 24 May 2007 on the DRC's preliminary objections does not prevent the Respondent from now raising the objection that the additional claim was presented belatedly, since the claim was introduced, as just stated, after delivery of the 2007 Judgment.

Relying on its jurisprudence concerning additional claims introduced — by an Applicant — in the course of proceedings, the Court is of the opinion that such claims are inadmissible if they would result, were they to be entertained, in transforming "the subject of the dispute originally brought before [the Court] under the terms of the Application" (Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007 (II), p. 695, para. 108).

However, the Court recalls that it has also previously made clear that "the mere fact that a claim is new is not in itself decisive for the issue of admissibility" and that:

> "In order to determine whether a new claim introduced during the course of the proceedings is admissible [it] will need to consider whether, 'although formally a new claim, the claim in question can be considered as included in the original claim in substance'." (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, in part quoting Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992, pp. 265-266, para. 65.)

In other words, a new claim is not inadmissible ipso facto; the decisive consideration is the nature of the connection between that claim and the one formulated in the Application instituting proceedings.

In this regard, the Court has also had the occasion to point out that, to find that a new claim, as a matter of substance, has been included in the original claim, "it is not sufficient that there should be links between them of a general nature" (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).

The Court recalls that, in order to be admissible, either the additional claim must be implicit in the Application or it must arise directly out of the question which is the subject-matter of the Application.

The Court finds itself unable to consider this claim as being "implicit" in the original claim as set forth in the Application. The initial claim concerned violations of Mr. Diallo's individual rights alleged by Guinea to have resulted from the arrest, detention and expulsion measures taken against him in 1995-1996. It is hard to see how allegations concerning other arrest and detention measures, taken at a different time and in different circumstances, could be regarded as "implicit" in the Application concerned with the events in 1995-1996. This is especially so given that the legal bases for Mr. Diallo's arrests in 1988-1989, on the one hand, and 1995-1996, on the other, were completely different. His first detention was carried out as part of a criminal investigation into fraud opened by the Prosecutor's Office in Kinshasa. The second was ordered with a view to implementing an expulsion decree, that is to say, as part of an administrative procedure. Among other consequences, it follows that the applicable international rules — which the DRC is accused of having violated — are different in part, and that the domestic remedies on whose prior exhaustion the exercise of diplomatic protection is as a rule contingent are also different in nature.

The Court considers that this last point deserves particular attention. Since, as noted above, the new claim was introduced only at the Reply stage, the Respondent was no longer able to assert preliminary objections to it, since such objections have to be submitted, under Article 79 of the Rules of Court as applicable to these proceedings, within the time-limit fixed for the delivery of the Counter-Memorial (and, under that Article as in force since 1 February 2001, within three months following delivery of the Memorial). A Respondent's right to raise preliminary objections, that is to say, objections which the Court is required to rule on before the debate on the merits begins (see Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 26, para. 47), is a fundamental procedural right. This right is infringed if the Applicant asserts a substantively new claim after the Counter-Memorial, which is to say at a time when the Respondent can still raise objections to admissibility and jurisdiction, but not preliminary objections. This is especially so in a case involving diplomatic protection if, as in the present instance, the new claim concerns facts in respect of which the remedies available in the domestic system are different from those which could be pursued in respect of the facts underlying the initial claim.

The Court considers that it cannot therefore be said that the additional claim in respect of the events in 1988-1989 was "implicit" in the initial Application.

For similar reasons, the Court sees no possibility of finding that the new claim "arises directly out of the question which is the subject-matter of the Application". It would be particularly odd to regard the claim concerning the events in 1988-1989 as "arising directly" out of the issue forming the subject-matter of the Application in that the claim concerns facts, perfectly well known to Guinea on the date the Application was filed, which long pre-date those in respect of which the Application (in that part of it concerning the alleged violation of Mr. Diallo's individual rights) was presented.

For all of the reasons set out above, the Court finds that the claim concerning the arrest and detention measures to which Mr. Diallo was subject in 1988-1989 is inadmissible.

In light of the above finding, the Court deems that there is no need for it to consider whether the DRC is entitled to raise, at this stage in the proceedings, an objection to the claim in question based on the failure to exhaust local remedies, or, if so, whether the objection would be warranted.

B. The claim concerning the arrest, detention and expulsion measures taken against Mr. Diallo in 1995-1996 (paras. 49-98)

The Court presents its reasoning on this point in two subsections, the first of which is devoted to the proven facts in the case and the second to the consideration of these in the light of the applicable international law, namely: (a) the International Covenant on Civil and Political Rights; (b) the African Charter on Human and Peoples' Rights; (c) the prohibition on subjecting a detainee to mistreatment; and (d) the Vienna Convention on Consular Relations.

1. The facts (paras. 49-62)

The Court recalls that some of the facts relating to the arrest, detention and expulsion measures taken against Mr. Diallo between October 1995 and January 1996 are acknowledged by both Parties; others, in contrast, are in dispute. It briefly sets forth (para. 50) the facts on which the Parties are in agreement, before moving on to those on which the Parties disagree markedly. These concern, on the one hand, Mr. Diallo's situation between 5 November 1995, when he was first arrested, and his release on 10 January 1996, and, on the other hand, his situation during the period between this latter date and his actual expulsion on 31 January 1996.

As regards the first of these periods, Guinea maintains that Mr. Diallo remained continuously in detention for 66 consecutive days. According to the DRC, Mr. Diallo was only detained for two days in the first instance and subsequently for no longer than eight days. With regard to the period from 10 January to 31 January 1996, Guinea maintains that Mr. Diallo was rearrested on 14 January 1996, on the order of the Congolese Prime Minister for the purpose of effecting the expulsion decree, and kept in detention until he was deported from Kinshasa airport on 31 January, i.e., for another 17 days. On the other hand, the DRC asserts that Mr. Diallo remained at liberty from 10 January to 25 January 1996, on which date he was arrested prior to being expelled a few days later, on 31 January.

In addition, the Court recalls that the Parties also differ as to how Mr. Diallo was treated during the periods when he was deprived of his liberty.

Faced with a disagreement between the Parties as to the existence of the facts relevant to the decision of the case, the Court must first address the question of the burden of proof. The Court recalls that, as a general rule, it is for the party which alleges a fact in support of its claims to prove

the existence of that fact (see, most recently, the Judgment delivered in the case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment of 20 April 2010, para. 162). It points out, however, that it would be wrong to regard this rule, based on the maxim onus probandi incumbit actori, as an absolute one, to be applied in all circumstances. The determination of the burden of proof is in reality dependent on the subject-matter and the nature of each dispute brought before the Court; it varies according to the type of facts which it is necessary to establish for the purposes of the decision of the case.

The Court goes on to state that in particular, where, as in these proceedings, it is alleged that a person has not been afforded, by a public authority, certain procedural guarantees to which he was entitled, it cannot as a general rule be demanded of the Applicant that it prove the negative fact which it is asserting. A public authority is generally able to demonstrate that it has followed the appropriate procedures and applied the guarantees required by law — if such was the case — by producing documentary evidence of the actions that were carried out. However, it cannot be inferred in every case where the Respondent is unable to prove the performance of a procedural obligation that it has disregarded it: that depends to a large extent on the precise nature of the obligation in question; some obligations normally imply that written documents are drawn up, while others do not. The Court observes that the time which has elapsed since the events must also be taken into account.

It is for the Court to evaluate all the evidence produced by the two Parties and duly subjected to adversarial scrutiny, with a view to forming its conclusions. In short, the Court finds that when it comes to establishing facts such as those which are at issue in the present case, neither party is alone in bearing the burden of proof.

The Court is not convinced by the DRC's allegation that Mr. Diallo was released as early as 7 November 1995 and then only rearrested at the beginning of January 1996, before being freed again on 10 January. After setting out the reasons which led it to form this view (para. 59), it concludes that Mr. Diallo remained in continuous detention for 66 days, from 5 November 1995 to 10 January 1996. On the other hand, the Court does not accept the Applicant's assertion that Mr. Diallo was rearrested on 14 January 1996 and remained in detention until he was expelled on 31 January. This claim, which is contested by the Respondent, is not supported by any evidence at all. However, since the DRC has acknowledged that Mr. Diallo was detained, at the latest, on 25 January 1996, the Court will take it as established that he was in detention between 25 and 31 January 1996. Nor can the Court accept the allegations of death threats said to have been made against Mr. Diallo by his guards, in the absence of any evidence in support of these allegations.

2. Consideration of the facts in the light of the applicable international law (paras. 63-98)

Guinea maintains that the circumstances in which Mr. Diallo was arrested, detained and expelled in 1995-1996 constitute in several respects a breach by the DRC of its international obligations.

First, the expulsion of Mr. Diallo is said to have breached Article 13 of the International Covenant on Civil and Political Rights (hereinafter the "Covenant") of 16 December 1966, to which Guinea and the DRC became parties on 24 April 1978 and 1 February 1977 respectively, as well as Article 12, paragraph 4, of the African Charter on Human and Peoples' Rights (hereinafter the "African Charter") of 27 June 1981, which entered into force for Guinea on 21 October 1986 and for the DRC on 28 October 1987.

Second, Mr. Diallo's arrest and detention are said to have violated Article 9, paragraphs 1 and 2, of the Covenant, and Article 6 of the African Charter.

Third, Mr. Diallo is said to have suffered conditions in detention comparable to forms of inhuman or degrading treatment that are prohibited by international law.

Fourth and last, Mr. Diallo is said not to have been informed, when he was arrested, of his right to request consular assistance from his country, in violation of Article 36 (1) (b) of the Vienna Convention on Consular Relations of 24 April 1963, which entered into force for Guinea on 30 July 1988 and for the DRC on 14 August 1976.

The Court examines in turn whether each of these assertions is well-founded.

(a) The alleged violation of Article 13 of the Covenant and Article 12, paragraph 4, of the African Charter (paras. 64-74)

The Court recalls that Article 13 of the Covenant reads as follows:

> "An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."

Likewise, Article 12, paragraph 4, of the African Charter provides 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."

The Court finds that it follows from the terms of the two provisions cited above that the expulsion of an alien lawfully in the territory of a State which is a party to these instruments can only be compatible with the international obligations of that State if it is decided in accordance with "the law", in other words the domestic law applicable in that respect. Compliance with international law is to some extent dependent here on compliance with internal law. However, it is clear that while "accordance with law" as thus defined is a necessary condition for compliance with the above-mentioned provisions, it is not the sufficient condition. First, 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, since protection against arbitrary treatment lies at the heart of the rights guaranteed by the international norms protecting human rights, in particular those set out in the two treaties applicable in this case.

The Court adds that the interpretation above is fully corroborated by the jurisprudence of the Human Rights Committee established by the Covenant to ensure compliance with that instrument by the States parties (see for example, in this respect, Maroufidou v. Sweden, No. 58/1979, para. 9.3; Human Rights Committee, General Comment No. 15: The position of aliens under the Covenant).

Since it was created, the Human Rights Committee has built up a considerable body of interpretative case law, in particular through its findings in response to the individual communications which may be submitted to it in respect of States parties to the first Optional Protocol, and in the form of its "General Comments".

The Court observes that although it is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was

established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled.

Likewise, the Court notes that when it is called upon, as in these proceedings, to apply a regional instrument for the protection of human rights, it must take due account of the interpretation of that instrument adopted by the independent bodies which have been specifically created, if such has been the case, to monitor the sound application of the treaty in question. In the present case, the interpretation given above of Article 12, paragraph 4, of the African Charter is consonant with the case law of the African Commission on Human and Peoples' Rights established by Article 30 of the said Charter (see, for example, Kenneth Good v. Republic of Botswana, No. 313/05, para. 204; World Organization against Torture and International Association of Democratic Lawyers, International Commission of Jurists, Interafrican Union for Human Rights v. Rwanda, No. 27/89, 46/91, 49/91, 99/93).

The Court also notes that the interpretation by the European Court of Human Rights and the Inter-American Court of Human Rights, respectively, of Article 1 of Protocol No. 7 to the (European) Convention for the Protection of Human Rights and Fundamental Freedoms and Article 22, paragraph 6, of the American Convention on Human Rights — the said provisions being close in substance to those of the Covenant and the African Charter which the Court is applying in the present case — is consistent with what has been found in respect of the latter provisions in paragraph 65 of this Judgment.

According to Guinea, the decision to expel Mr. Diallo first breached Article 13 of the Covenant and Article 12, paragraph 4, of the African Charter because it was not taken in accordance with Congolese domestic law, for three reasons:

— it should have been signed by the President of the Republic and not by the Prime Minister;

— it should have been preceded by consultation of the National Immigration Board;

— and it should have indicated the grounds for the expulsion, which it failed to do.

The Court is not convinced by the first of these arguments. It is true that Article 15 of the Zairean Legislative Order of 12 September 1983 concerning immigration control, in the version in force at the time, conferred on the President of the Republic, and not the Prime Minister, the power to expel an alien. However, the DRC explains that since the entry into force of the Constitutional Act of 9 April 1994, the powers conferred by particular legislative provisions on the President of the Republic are deemed to have been transferred to the Prime Minister — even though such provisions have not been formally amended — under Article 80 (2) of the new Constitution, which provides that "the Prime Minister shall exercise regulatory power by means of decrees deliberated upon in the Council of Ministers".

The Court recalls that it is for each State, in the first instance, to interpret its own domestic law. The Court does not, in principle, have the power to substitute its own interpretation for that of the national authorities, especially when that interpretation is given by the highest national courts (see, for this latter case, Serbian Loans, Judgment No. 14, 1929, P.C.I.J., Series A, No. 20, p. 46 and Brazilian Loans, Judgment No. 15, 1929, P.C.I.J., Series A, No. 21, p. 124). Exceptionally, where a State puts forward a manifestly incorrect interpretation of its domestic law, particularly for the purpose of gaining an advantage in a pending case, it is for the Court to adopt what it finds to be the proper interpretation.

The Court finds that that is not the situation here and states that the DRC's interpretation of its Constitution, from which it follows that Article 80 (2) produces certain effects on the laws already in force on the date when that Constitution was adopted, does not seem manifestly incorrect. It goes on to explain that it has not been contested that this interpretation corresponded, at the time in question, to the general practice of the constitutional authorities. The DRC has included in the case file, in this connection, a number of other expulsion decrees issued at the same time and all signed by the Prime Minister. Consequently, although it would be possible in theory to discuss the validity of that interpretation, it is certainly not for the Court to adopt a different interpretation of Congolese domestic law for the purposes of the decision of this case. The Court finds that it therefore cannot be concluded that the decree expelling Mr. Diallo was not issued "in accordance with law" by virtue of the fact that it was signed by the Prime Minister.

However, the Court is of the opinion that this decree did not comply with the provisions of Congolese law for two other reasons.

First, the Court notes that it was not preceded by consultation of the National Immigration Board, whose opinion is required by Article 16 of the above-mentioned Legislative Order concerning immigration control before any expulsion measure is taken against an alien holding a residence permit. The DRC has not contested either that Mr. Diallo's situation placed him within the scope of this provision, or that consultation of the Board was neglected. This omission is confirmed by the absence in the decree of a citation mentioning the Board's opinion, whereas all the other expulsion decrees included in the case file specifically cite such an opinion, in accordance with Article 16 of the Legislative Order, moreover, which concludes by stipulating that the decision "shall mention the fact that the Board was consulted".

Second, the Court observes that the expulsion decree should have been "reasoned" pursuant to Article 15 of the 1983 Legislative Order; in other words, it should have indicated the grounds for the decision taken. The fact is that the general, stereotyped reasoning included in the decree cannot in any way be regarded as meeting the requirements of the legislation. The decree confines itself to stating that the "presence and conduct [of Mr. Diallo] have breached Zairean public order, especially in the economic, financial and monetary areas, and continue to do so". The first part of this sentence simply paraphrases the legal basis for any expulsion measure according to Congolese law, since Article 15 of the 1983 Legislative Order permits the expulsion of any alien "who, by his presence or conduct, breaches or threatens to breach the peace or public order". As for the second part, while it represents an addition, this is so vague that it is impossible to know on the basis of which activities the presence of Mr. Diallo was deemed to be a threat to public order (in the same sense, mutatis mutandis, see Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, I.C.J. Reports 2008, p. 231, para. 152).

The Court takes the view that the formulation used by the author of the decree therefore amounts to an absence of reasoning for the expulsion measure.

The Court thus concludes that in two important respects, concerning procedural guarantees conferred on aliens by Congolese law and aimed at protecting the persons in question against the risk of arbitrary treatment, the expulsion of Mr. Diallo was not decided "in accordance with law". Consequently, it adds, regardless of whether that expulsion was justified on the merits, a question to which it returns later in the Judgment, the disputed measure violated Article 13 of the Covenant and Article 12, paragraph 4, of the African Charter.

Furthermore, the Court considers that Guinea is justified in contending that the right afforded by Article 13 to an alien who is subject to an expulsion measure to "submit the reasons against his expulsion and to have his case reviewed by . . . the competent authority" was not respected in the case of Mr. Diallo. It observes that it is indeed certain that, neither before the expulsion decree was

signed on 31 October 1995, nor subsequently but before the said decree was implemented on 31 January 1996, was Mr. Diallo allowed to submit his defence to a competent authority in order to have his arguments taken into consideration and a decision made on the appropriate response to be given to them.

It is true, as the DRC has pointed out, that Article 13 of the Covenant provides for an exception to the right of an alien to submit his reasons where "compelling reasons of national security" require otherwise. The Respondent maintains that this was precisely the case here. However, the Court notes that the DRC has not provided it with any tangible information that might establish the existence of such "compelling reasons". The Court goes on to assert that in principle it is doubtless for the national authorities to consider the reasons of public order that may justify the adoption of one police measure or another. But when this involves setting aside an important procedural guarantee provided for by an international treaty, it cannot simply be left in the hands of the State in question to determine the circumstances which, exceptionally, allow that guarantee to be set aside. It is for the State to demonstrate that the "compelling reasons" required by the Covenant existed, or at the very least could reasonably have been concluded to have existed, taking account of the circumstances which surrounded the expulsion measure.

In the present case, the Court considers that no such demonstration has been provided by the Respondent. On these grounds too, it concludes that Article 13 of the Covenant was violated in respect of the circumstances in which Mr. Diallo was expelled.

(b) The alleged violation of Article 9, paragraphs 1 and 2, of the Covenant and Article 6 of the African Charter (paras. 75-85)

The Court first recalls that Article 9, paragraphs 1 and 2, of the Covenant provides that:

> "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.
>
> 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him."

It also recalls that Article 6 of the African Charter provides that:

> "Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained."

According to Guinea, the above-mentioned provisions were violated when Mr. Diallo was arrested and detained in 1995-1996 for the purpose of implementing the expulsion decree, for a number of reasons. First, the deprivations of liberty which he suffered did not take place "in accordance with such procedure as [is] established by law" within the meaning of Article 9, paragraph 1, of the Covenant, or on the basis of "conditions previously laid down by law" within the meaning of Article 6 of the African Charter. Second, they were "arbitrary" within the meaning of these provisions. Third, Mr. Diallo was not informed, at the time of his arrests, of the reasons for those arrests, nor was he informed of the charges against him, which constituted a violation of Article 9, paragraph 2, of the Covenant.

The Court examines in turn whether each of these assertions is well-founded.

The Court states that it is first necessary to make a general remark. The provisions of Article 9, paragraphs 1 and 2, of the Covenant, and those of Article 6 of the African Charter, apply in principle to any form of arrest or detention decided upon and carried out by a public authority, whatever its legal basis and the objective being pursued (see in this respect, with regard to the Covenant, the Human Rights Committee's General Comment No. 8 of 30 June 1982 concerning the right to liberty and security of person (Human Rights Committee, CCPR General Comment No. 8: Article 9 (Right to Liberty and Security of Person))). It observes that the scope of these provisions is not, therefore, confined to criminal proceedings; they also apply, in principle, to measures which deprive individuals of their liberty that are taken in the context of an administrative procedure, such as those which may be necessary in order to effect the forcible removal of an alien from the national territory. In this latter case, it is of little importance whether the measure in question is characterized by domestic law as an "expulsion" or a "refoulement". The position is only different as regards the requirement in Article 9, paragraph 2, of the Covenant that the arrested person be "informed of any charges" against him, a requirement which is only meaningful in the context of criminal proceedings.

The Court now turns to the first of Guinea's three allegations, namely, that Mr. Diallo's arrest and detention were not in accordance with the requirements of the law of the DRC. It first notes that Mr. Diallo's arrest on 5 November 1995 and his detention until 10 January 1996 (see paragraph 58 of the Judgment) were for the purpose of enabling the expulsion decree issued against him on 31 October 1995 to be effected. The second arrest, on 25 January 1996 at the latest, was also for the purpose of implementing that decree: the mention of a "refoulement" on account of "illegal residence" in the notice served on Mr. Diallo on 31 January 1996, the day when he was actually expelled, was clearly erroneous, as the DRC acknowledges.

The Court then observes that Article 15 of the Legislative Order of 12 September 1983 concerning immigration control, as in force at the time of Mr. Diallo's arrest and detention, provided that an alien "who is likely to evade implementation" of an expulsion measure may be imprisoned for an initial period of 48 hours, which may be "extended by 48 hours at a time, but shall not exceed eight days". The Court finds that Mr. Diallo's arrest and detention were not in accordance with these provisions. There is no evidence that the authorities of the DRC sought to determine whether Mr. Diallo was "likely to evade implementation" of the expulsion decree and, therefore, whether it was necessary to detain him. The fact that he made no attempt to evade expulsion after he was released on 10 January 1996 suggests that there was no need for his detention. The overall length of time for which he was detained — 66 days following his initial arrest and at least six more days following the second arrest — greatly exceeded the maximum period permitted by Article 15. In addition, it adds that the DRC has produced no evidence to show that the detention was reviewed every 48 hours, as required by that provision.

The Court further finds, in response to the second allegation set out above (see paragraph 76 of the Judgment), that Mr. Diallo's arrest and detention were arbitrary within the meaning of Article 9, paragraph 1, of the Covenant and Article 6 of the African Charter.

The Court acknowledges that in principle an arrest or detention aimed at effecting an expulsion decision taken by the competent authority cannot be characterized as "arbitrary" within the meaning of the above-mentioned provisions, even if the lawfulness of the expulsion decision might be open to question. Consequently, the fact that the decree of 31 October 1995 was not issued, in some respects, "in accordance with law", as the Court has noted earlier in the Judgment in relation to Article 13 of the Covenant and Article 12, paragraph 4, of the African Charter, is not sufficient to render the arrest and detention aimed at implementing that decree "arbitrary" within the meaning of Article 9, paragraph 1, of the Covenant and Article 6 of the African Charter.

However, the Court considers that account should be taken here of the number and seriousness of the irregularities tainting Mr. Diallo's detentions. As noted above, he was held for a particularly long time and it would appear that the authorities made no attempt to ascertain whether his detention was necessary.

Moreover, the Court can but find not only that the decree itself was not reasoned in a sufficiently precise way, as was pointed out above (see paragraph 70), but that throughout the proceedings, the DRC has never been able to provide grounds which might constitute a convincing basis for Mr. Diallo's expulsion. Allegations of "corruption" and other offences have been made against Mr. Diallo, but no concrete evidence has been presented to the Court to support these claims. It notes that these accusations did not give rise to any proceedings before the courts or, a fortiori, to any conviction. Furthermore, it is difficult not to discern a link between Mr. Diallo's expulsion and the fact that he had attempted to recover debts which he believed were owed to his companies by, amongst others, the Zairean State or companies in which the State holds a substantial portion of the capital, bringing cases for this purpose before the civil courts. The Court is of the opinion that, under these circumstances, the arrest and detention aimed at allowing such an expulsion measure, one without any defensible basis, to be effected can only be characterized as arbitrary within the meaning of Article 9, paragraph 1, of the Covenant and Article 6 of the African Charter.

Finally, the Court turns to the allegation relating to Article 9, paragraph 2, of the Covenant. It observes that, for the reasons discussed in paragraph 77 of the Judgment, Guinea cannot effectively argue that at the time of each of his arrests (in November 1995 and January 1996), Mr. Diallo was not informed of the "charges against him", as the Applicant contends is required by Article 9, paragraph 2, of the Covenant. This particular provision of Article 9 is applicable only when a person is arrested in the context of criminal proceedings; the Court finds that that was not the case for Mr. Diallo.

On the other hand, it adds, Guinea is justified in arguing that Mr. Diallo's right to be "informed, at the time of arrest, of the reasons for his arrest" — a right guaranteed in all cases, irrespective of the grounds for the arrest — was breached.

The Court observes that the DRC has failed to produce a single document or any other form of evidence to prove that Mr. Diallo was notified of the expulsion decree at the time of his arrest on 5 November 1995, or that he was in some way informed, at that time, of the reason for his arrest. Although the expulsion decree itself did not give specific reasons, as pointed out above (see paragraph 72), the notification of this decree at the time of Mr. Diallo's arrest would have informed him sufficiently of the reasons for that arrest for the purposes of Article 9, paragraph 2, since it would have indicated to Mr. Diallo that he had been arrested for the purpose of an expulsion procedure and would have allowed him, if necessary, to take the appropriate steps to challenge the lawfulness of the decree. The Court notes, however, that no information of this kind was provided to him; the DRC, which should be in a position to prove the date on which Mr. Diallo was notified of the decree, has presented no evidence to that effect.

The Court takes the view that the same applies to Mr. Diallo's arrest in January 1996. On that date, it has also not been established that Mr. Diallo was informed that he was being forcibly removed from Congolese territory in execution of an expulsion decree. Moreover, on the day when he was actually expelled, he was given the incorrect information that he was the subject of a "refoulement" on account of his "illegal residence" (see paragraph 50). This being so, the Court finds that the requirement for him to be informed, laid down by Article 9, paragraph 2, of the Covenant, was not complied with on that occasion either.

(c) The alleged violation of the prohibition on subjecting a detainee to mistreatment (paras. 86-89)

The Court recalls that Guinea maintains that Mr. Diallo was subjected to mistreatment during his detention, because of the particularly tough conditions thereof, because he was deprived of his right to communicate with his lawyers and with the Guinean Embassy, and because he received death threats from the guards. The Applicant invokes in this connection Article 10, paragraph 1, of the Covenant, according to which: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

According to the Court, Article 7 of the Covenant, providing that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment", and Article 5 of the African Charter, stating that "[e]very individual shall have the right to the respect of the dignity inherent in a human being", are also pertinent in this area. The Court states that there is no doubt, moreover, that the prohibition of inhuman and degrading treatment is among the rules of general international law which are binding on States in all circumstances, even apart from any treaty commitments.

It notes, however, that Guinea has failed to demonstrate convincingly that Mr. Diallo was subjected to such treatment during his detention. There is no evidence to substantiate the allegation that he received death threats. It seems that Mr. Diallo was able to communicate with his relatives and his lawyers without any great difficulty and, even if this had not been the case, such constraints would not per se have constituted treatment prohibited by Article 10, paragraph 1, of the Covenant and by general international law. The question of Mr. Diallo's communications with the Guinean authorities is distinct from that of compliance with the provisions currently under examination and will be addressed under the next heading, in relation to Article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations. Finally, that Mr. Diallo was fed thanks to the provisions his relatives brought to his place of detention — which the DRC does not contest — is insufficient in itself to prove mistreatment, since access by the relatives to the individual deprived of his liberty was not hindered.

In conclusion, the Court finds that it has not been demonstrated that Mr. Diallo was subjected to treatment prohibited by Article 10, paragraph 1, of the Covenant.

(d) The alleged violation of the provisions of Article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations (paras. 90-98)

Article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations provides that:

> "[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 Court observes that these provisions, as is clear from their very wording, are applicable to any deprivation of liberty of whatever kind, even outside the context of pursuing perpetrators of criminal offences. They therefore apply in the present case, which the DRC does not contest.

According to Guinea, these provisions were violated when Mr. Diallo was arrested in November 1995 and January 1996, because he was not informed "without delay" at those times of his right to seek assistance from the consular authorities of his country.

At no point in the written proceedings or the first round of oral argument did the DRC contest the accuracy of Guinea's allegations in this respect; it did not attempt to establish, or even claim, that the information called for by the last sentence of the quoted provision was supplied to Mr. Diallo, or that it was supplied "without delay", as the text requires. The Respondent replied to the Applicant's allegation with two arguments: that Guinea had failed to prove that Mr. Diallo requested the Congolese authorities to notify the Guinean consular post without delay of his situation; and that the Guinean Ambassador in Kinshasa was aware of Mr. Diallo's arrest and detention, as evidenced by the steps he took on his behalf. The Court notes that it was only in replying to a question put by a judge during the hearing of 26 April 2010 that the DRC asserted for the first time that it had "orally informed Mr. Diallo immediately after his detention of the possibility of seeking consular assistance from his State" (written reply by the DRC handed in to the Registry on 27 April 2010 and confirmed orally at the hearing of 29 April, during the second round of oral argument).

The Court points out that the two arguments put forward by the DRC before the second round of oral pleadings lack any relevance. It adds that it is for the authorities of the State which proceeded with the arrest to inform on their own initiative the arrested person of his right to ask for his consulate to be notified; the fact that the person did not make such a request not only fails to justify non-compliance with the obligation to inform which is incumbent on the arresting State, but could also be explained in some cases precisely by the fact that the person had not been informed of his rights in that respect (Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004 (I), p. 46, para. 76). The Court considers, moreover, that the fact that the consular authorities of the national State of the arrested person have learned of the arrest through other channels does not remove any violation that may have been committed of the obligation to inform that person of his rights "without delay".

As for the DRC's assertion, made in the conditions described above, that Mr. Diallo was "orally informed" of his rights upon his arrest, the Court can but note that it was made very late in the proceedings, whereas the point was at issue from the beginning, and that there is not the slightest piece of evidence to corroborate it. The Court is therefore unable to give it any credit.

Consequently, the Court finds that there was a violation by the DRC of Article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations.

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Guinea has further contended that Mr. Diallo's expulsion, given the circumstances in which it was carried out, violated his right to property, guaranteed by Article 14 of the African Charter, because he had to leave behind most of his assets when he was forced to leave the Congo.

In the Court's view, this aspect of the dispute has less to do with the lawfulness of Mr. Diallo's expulsion in the light of the DRC's international obligations and more to do with the damage Mr. Diallo suffered as a result of the internationally wrongful acts of which he was a victim. The Court therefore examines it later in the Judgment, within the context of the question of reparation owed by the Respondent (see paragraphs 160-164 of the Judgment).

III. PROTECTION OF MR. DIALLO'S DIRECT RIGHTS AS ASSOCIÉ IN AFRICOM-ZAIRE AND AFRICONTAINERS-ZAIRE (paras. 99-159)

The Court observes that it is especially important to clarify the issues of the legal existence of the two sociétés privées à responsabilité limitée (private limited liability companies, hereinafter "SPRLs") incorporated under Zairean law, Africom-Zaire and Africontainers-Zaire, and of Mr. Diallo's participation and role in them, since the Parties are in disagreement on these points.

After carefully considering the situation (paras. 99-113), the Court reaches the conclusion that Mr. Diallo was, both as gérant and associé of the two companies, fully in charge and in control of them, but that they nevertheless remained legal entities distinct from him. The Court then addresses the various claims of Guinea pertaining to the direct rights of Mr. Diallo as associé. In doing so, it has to assess whether, under DRC law, the claimed rights are indeed direct rights of the associé, or whether they are rather rights or obligations of the companies. As the Court has already pointed out, claims relating to rights which are not direct rights held by Mr. Diallo as associé have been declared inadmissible by the Judgment of 24 May 2007; they can therefore no longer be entertained. In particular, this is the case of the claims relating to the contractual rights of Africom-Zaire against the State of Zaire (DRC), and of Africontainers-Zaire against the Gécamines, Onatra, Fina and Shell companies.

In the following paragraphs, the Court is careful to maintain the strict distinction between the alleged infringements of the rights of the two SPRLs at issue and the alleged infringements of Mr. Diallo's direct rights as associé of these latter (see I.C.J. Reports 2007 (II), pp. 605-606, paras. 62-63).

Guinea's claims relating to Mr. Diallo's direct rights as associé pertain to the right to participate and vote in general meetings of the two SPRLs, the right to appoint a gérant, and the right to oversee and monitor the management of the companies. Guinea also presents a claim in relation to the right to property concerning Mr. Diallo's parts sociales in Africom-Zaire and Africontainers-Zaire. The Court addresses these different claims.

A. The right to take part and vote in general meetings (paras. 117-126)

Guinea maintains that the DRC, in expelling Mr. Diallo, deprived him of his right, guaranteed by Article 79 of the Congolese Decree of 27 February 1887 on commercial corporations, to take part in general meetings and to vote. It claims that under DRC law general meetings of Africom-Zaire and Africontainers-Zaire could not be held outside the territory of the DRC. Guinea admits that Mr. Diallo could of course have exercised his rights as associé from another country by appointing a proxy of his choice, in accordance with Article 81 of the 1887 Decree, but argues that appointing a proxy is merely an option available to the associé, whose recognized right is clearly to have a choice whether to appoint a representative or to attend in person. Guinea adds that, in the case of Africontainers-Zaire, it would have been impossible for Mr. Diallo to be represented by a proxy, since Article 22 of the Articles of Incorporation of the SPRL stipulates that only an associé may be appointed proxy of another, whereas he had become its sole associé at the time of his expulsion.

The DRC maintains that there cannot have been any violation of Mr. Diallo's right to take part in general meetings, as there has been no evidence that any general meetings were convened and that Mr. Diallo was unable to attend owing to his removal from DRC territory. The DRC asserts that in any case Congolese commercial law places no obligation on commercial companies in respect of where general meetings are to be held.

The Court observes that, under Congolese law, the right to participate and vote in general meetings belongs to the associés and not to the company. It then turns to the question of whether the DRC, in expelling Mr. Diallo, deprived him of his right to take part in general meetings and to vote, as guaranteed by Article 79 of the Congolese Decree of 27 February 1887 on commercial corporations.

In view of the evidence submitted to it by the Parties, the Court finds that there is no proof that Mr. Diallo, acting either as gérant or as associé holding at least one-fifth of the total number of shares, has taken any action to convene a general meeting, either after having been expelled from the DRC, or at any time when he was a resident in the DRC after 1980. Nor has any evidence been provided that Mr. Diallo would have been precluded from taking any action to convene general meetings from abroad, either as gérant or as associé.

The Court recalls that an associé's right to take part and vote in general meetings may be exercised by the associé in person or through a proxy of his choosing. There is no doubt in this connection that a vote expressed through a proxy at a general meeting has the same legal effect as a vote expressed by the associé himself. On the other hand, it is more difficult to infer with certainty from the above-mentioned provisions that they establish the right, as Guinea maintains, for the associé to attend general meetings in person. In the opinion of the Court, the primary purpose of these provisions is to ensure that the general meetings of companies can take place effectively. Guinea's interpretation of Congolese law might frustrate that objective, by allowing an associé to prevent the organs of the company from operating normally. According to the Court, it is questionable whether the Congolese legislators could have desired such an outcome, which is far removed from the affectio societatis. In respect of Africom-Zaire and Africontainers-Zaire, the Court does not see how the appointment of a representative by Mr. Diallo could in any way have breached in practical terms his right to take part and vote in general meetings of the two SPRLs, since he had complete control over them.

Furthermore, with regard to Africontainers-Zaire, the Court finds that it cannot accept Guinea's argument that it would have been impossible for Mr. Diallo to be represented at a general meeting by a proxy other than himself because he was the sole associé of that SPRL and Article 22 of Africontainers-Zaire's Articles of Incorporation stipulates that an associé may only appoint another associé as proxy. As the Court has already observed (see paragraph 110 of the Judgment), that company has two associés, namely, Mr. Diallo and Africom-Zaire. Therefore, pursuant to the above-mentioned Article 22, Mr. Diallo, acting as associé of Africontainers-Zaire, could appoint the "representative or agent" of Africom-Zaire as his proxy for a general meeting of Africontainers-Zaire. Prior to the appointment of that proxy, and acting as gérant of Africom-Zaire pursuant to Article 69 of the 1887 Decree (see paragraph 135 of the Judgment), Mr. Diallo could have appointed such a "representative or agent" of the latter company.

The Court therefore concludes that it cannot sustain Guinea's claim that the DRC has violated Mr. Diallo's right to take part and vote in general meetings. The DRC, in expelling Mr. Diallo, has probably impeded him from taking part in person in any general meeting, but, in the opinion of the Court, such hindrance does not amount to a deprivation of his right to take part and vote in general meetings.

B. The rights relating to the gérance (paras. 127-140)

The Court observes that, at various points in the proceedings, Guinea has made four slightly different assertions which it has grouped under the general claim of a violation of Mr. Diallo's right to "appoint a gérant". It has contended that, by unlawfully expelling Mr. Diallo, the DRC has committed: a violation of his alleged right to appoint a gérant, a violation of his alleged right to be appointed as gérant, a violation of his alleged right to exercise the functions of a gérant, and a violation of his alleged right not to be removed as gérant.

In particular, the DRC contends that the right to appoint the gérant of an SPRL is a right of the company, not of the associé, as it lies with the general meeting, which is an organ of the company. It also submits that Mr. Diallo did appoint Mr. N'Kanza as gérant of Africontainers-Zaire following his expulsion.

The Court observes that the appointment and functions of gérants are governed, in Congolese law, by the 1887 Decree on commercial corporations, and by the Articles of Incorporation of the company in question. It begins by dismissing the DRC's argument that Mr. Diallo's right to appoint a gérant could not have been violated because he in fact appointed a gérant for Africontainers-Zaire in the person of Mr. N'Kanza. It has already concluded that this allegation has not been proved (see paragraphs 111 and 112 of the Judgment).

As regards the first assertion put forth by Guinea that the DRC has violated Mr. Diallo's right to appoint a gérant, the Court notes that the appointment of the gérant falls under the responsibility of the company itself, without constituting a right of the associé; accordingly, the Court concludes that Guinea's claim that the DRC has violated Mr. Diallo's right to appoint a gérant must fail.

As regards the second assertion put forward by Guinea that the DRC has violated Mr. Diallo's right to be appointed gérant, the Court notes in particular that this right cannot have been violated in this instance because Mr. Diallo has in fact been appointed as gérant, and still is the gérant of both companies in question.

As regards Guinea's third assertion, that a right of Mr. Diallo to exercise his functions as gérant was violated, the Court finds in particular that while the performance of Mr. Diallo's duties as gérant may have been rendered more difficult by his presence outside the country, Guinea has failed to demonstrate that it was impossible to carry out those duties. The Court further observes that in fact, it is clear from various documents submitted to it that, even after Mr. Diallo's expulsion, representatives of Africontainers-Zaire have continued to act on behalf of the company in the DRC and to negotiate contractual claims with the Gécamines company. The Court accordingly concludes that Guinea's claim that the DRC has violated a right of Mr. Diallo to exercise his functions as gérant must fail.

As regards Guinea's fourth assertion, that the DRC has violated Mr. Diallo's right not to be removed as gérant, the Court notes that although it may have become more difficult for Mr. Diallo to carry out his duties as gérant from outside the DRC following his expulsion, as previously discussed, he remained, from a legal standpoint, the gérant of both Africom-Zaire and Africontainers-Zaire. Accordingly, it concludes that Guinea's claim that the DRC has violated Mr. Diallo's right not to be removed as gérant must fail.

In light of all the above, the Court concludes that the various assertions put forward by Guinea, grouped under the general claim of a violation of Mr. Diallo's rights relating to the gérance, must be rejected.

C. The right to oversee and monitor the management (paras. 141-148)

The Court considers that, even if a right to oversee and monitor the management exists in companies where only one associé is fully in charge and in control, Mr. Diallo could not have been deprived of the right to oversee and monitor the gérance of the two companies. While it may have been the case that Mr. Diallo's detentions and expulsion from the DRC rendered the business activity of the companies more difficult, they simply could not have interfered with his ability to oversee and monitor the gérance, wherever he may have been. Accordingly, the Court concludes that Guinea's claim that the DRC has violated Mr. Diallo's right to oversee and monitor the management fails.

D. The right to property of Mr. Diallo over his parts sociales in Africom-Zaire and Africontainers-Zaire (paras. 149-159)

The Court first observes that international law has repeatedly acknowledged the principle of domestic law that a company has a legal personality distinct from that of its shareholders. This remains true even in the case of an SPRL which may have become unipersonal in the present case. The Court states, therefore, that the rights and assets of a company must be distinguished from the rights and assets of an associé. In this respect, it is legally untenable to consider, as Guinea argues, that the property of the corporation merges with the property of the shareholder. Furthermore, it must be recognized that the liabilities of the company are not the liabilities of the shareholder. In the case of Africontainers-Zaire, as an SPRL, it is specifically indicated in its Articles of Incorporation that the "liability of each associé in respect of corporate obligations shall be limited to the amount of his/her parts sociales in the company" (Art. 7; Annex 1 to Guinea's Memorial; see also paragraphs 105 and 115 of the Judgment).

The Court recalls that it has already indicated that the DRC has not violated Mr. Diallo's direct right as associé to take part and vote in general meetings of the companies, nor his right to be appointed or to remain gérant, nor his right to oversee and monitor the management (see paragraphs 117-148 of the Judgment). The Court reaffirms that Mr. Diallo's other direct rights, in respect of his parts sociales, must be clearly distinguished from the rights of the SPRLs, in particular in respect of the property rights belonging to the companies. It observes in this connection that, together with its other assets, including debts receivable from third parties, the capital is part of the company's property, whereas the parts sociales are owned by the associés. The parts sociales represent the capital but are distinct from it, and confer on their holders rights in the operation of the company and also a right to receive any dividends or any monies payable in the event of the company being liquidated. The only direct rights of Mr. Diallo which remain to be considered are in respect of these last two matters, namely, the receipt of dividends or any monies payable on a winding-up of the companies. There is, however, no evidence that any dividends were ever declared or that any action was ever taken to wind up the companies, even less that any action attributable to the DRC has infringed Mr. Diallo's rights in respect of those matters.

Finally, the Court considers there to be no need to determine the extent of the business activities of Africom-Zaire and Africontainers-Zaire at the time Mr. Diallo was expelled, or to make any finding as to whether they were in a state of "undeclared bankruptcy", as alleged by the DRC.

The Court concludes from the above that Guinea's allegations of infringement of Mr. Diallo's right to property over his parts sociales in Africom-Zaire and Africontainers-Zaire have not been established.

IV. REPARATION (paras. 160-164)

Having concluded that the Democratic Republic of the Congo has breached its obligations under Articles 9 and 13 of the International Covenant on Civil and Political Rights, Articles 6 and 12 of the African Charter on Human and Peoples' Rights, and Article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations (see paragraphs 73, 74, 85 and 97 of the Judgment), it is now for the Court to determine, in light of Guinea's final submissions, what consequences flow from these internationally wrongful acts giving rise to the DRC's international responsibility.

The Court recalls that "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed" (Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 47). Where this is not possible, reparation may take "the form of compensation or satisfaction, or even both" (Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment of

20 April 2010, para. 273). In the light of the circumstances of the case, in particular the fundamental character of the human rights obligations breached and Guinea's claim for reparation in the form of compensation, the Court is of the opinion that, in addition to a judicial finding of the violations, reparation due to Guinea for the injury suffered by Mr. Diallo must take the form of compensation.

In this respect, Guinea requested in its final submissions that the Court defer its Judgment on the amount of compensation, in order for the Parties to reach an agreed settlement on that matter. Should the Parties be unable to do so "within a period of six months following [the] delivery of the [present] Judgment", Guinea also requested the Court to authorize it to submit an assessment of the amount of compensation due to it, in order for the Court to decide on this issue "in a subsequent phase of the proceedings" (see paragraph 14 of the Judgment).

The Court is of the opinion that the Parties should indeed engage in negotiation in order to agree on the amount of compensation to be paid by the DRC to Guinea for the injury flowing from the wrongful detentions and expulsion of Mr. Diallo in 1995-1996, including the resulting loss of his personal belongings.

In light of the fact that the Application instituting proceedings in the present case was filed in December 1998, the Court considers that the sound administration of justice requires that those proceedings soon be brought to a final conclusion, and thus that the period for negotiating an agreement on compensation should be limited. Therefore, the Court concludes that, failing agreement between the Parties within six months following the delivery of the present Judgment on the amount of compensation to be paid by the DRC, the matter shall be settled by the Court itself in a subsequent phase of the proceedings. Having been sufficiently informed of the facts of the present case, the Court finds that a single exchange of written pleadings by the Parties would then be sufficient in order for it to decide on the amount of compensation.

V. OPERATIVE CLAUSE (para. 165)

For these reasons,

THE COURT,

(1) By eight votes to six,

Finds that the claim of the Republic of Guinea concerning the arrest and detention of Mr. Diallo in 1988-1989 is inadmissible;

IN FAVOUR: President Owada; Vice-President Tomka; Judges Abraham, Keith, Sepúlveda-Amor, Skotnikov, Greenwood; Judge ad hoc Mampuya;

AGAINST: Judges Al-Khasawneh, Simma, Bennouna, Cançado Trindade, Yusuf; Judge ad hoc Mahiou;

(2) Unanimously,

Finds that, in respect of the circumstances in which Mr. Diallo was expelled from Congolese territory on 31 January 1996, the Democratic Republic of the Congo violated Article 13 of the International Covenant on Civil and Political Rights and Article 12, paragraph 4, of the African Charter on Human and Peoples' Rights;

(3) Unanimously,

Finds that, in respect of the circumstances in which Mr. Diallo was arrested and detained in 1995-1996 with a view to his expulsion, the Democratic Republic of the Congo violated Article 9, paragraphs 1 and 2, of the International Covenant on Civil and Political Rights and Article 6 of the African Charter on Human and Peoples' Rights;

(4) By thirteen votes to one,

Finds that, by not informing Mr. Diallo without delay, upon his detention in 1995-1996, of his rights under Article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations, the Democratic Republic of the Congo violated the obligations incumbent upon it under that subparagraph;

IN FAVOUR: President Owada; Vice-President Tomka; Judges Al-Khasawneh, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood; Judge ad hoc Mahiou;

AGAINST: Judge ad hoc Mampuya;

(5) By twelve votes to two,

Rejects all other submissions by the Republic of Guinea relating to the circumstances in which Mr. Diallo was arrested and detained in 1995-1996 with a view to his expulsion;

IN FAVOUR: President Owada; Vice-President Tomka; Judges Al-Khasawneh, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Yusuf, Greenwood; Judge ad hoc Mampuya;

AGAINST: Judge Cançado Trindade; Judge ad hoc Mahiou;

(6) By nine votes to five,

Finds that the Democratic Republic of the Congo has not violated Mr. Diallo's direct rights as associé in Africom-Zaire and Africontainers-Zaire;

IN FAVOUR: President Owada; Vice-President Tomka; Judges Simma, Abraham, Keith, Sepúlveda-Amor, Skotnikov, Greenwood; Judge ad hoc Mampuya;

AGAINST: Judges Al-Khasawneh, Bennouna, Cançado Trindade, Yusuf; Judge ad hoc Mahiou;

(7) Unanimously,

Finds that the Democratic Republic of the Congo is under obligation to make appropriate reparation, in the form of compensation, to the Republic of Guinea for the injurious consequences of the violations of international obligations referred to in subparagraphs (2) and (3) above;

(8) Unanimously,

Decides that, failing agreement between the Parties on this matter within six months from the date of this Judgment, the question of compensation due to the Republic of Guinea shall be settled by the Court, and reserves for this purpose the subsequent procedure in the case.

Judges Al-Khasawneh, Simma, Bennouna, Cançado Trindade and Yusuf append a joint declaration to the Judgment of the Court; Judges Al-Khasawneh and Yusuf append a joint dissenting opinion to the Judgment of the Court; Judges Keith and Greenwood append a joint declaration to the Judgment of the Court; Judge Bennouna appends a dissenting opinion to the Judgment of the Court; Judge Cançado Trindade appends a separate opinion to the Judgment of the Court; Judge ad hoc Mahiou appends a dissenting opinion to the Judgment of the Court; Judge ad hoc Mampuya appends a separate opinion to the Judgment of the Court.

Joint declaration of Judges Al-Khasawneh, Simma, Bennouna, Cançado Trindade and Yusuf

Judges Al-Khasawneh, Simma, Bennouna, Cançado Trindade and Yusuf voted against the first subparagraph of the operative part of the Judgment, according to which "the claim of the Republic of Guinea concerning the arrest and detention of Mr. Diallo in 1988-1989 is inadmissible", because they believe that that claim, albeit presented belatedly, falls within the subject of the dispute as defined in the Application instituting proceedings.

The judges regret that the majority was content with a formal analysis of the circumstances of the arrests and detention of Mr. Diallo in 1988-1989 and 1995-1996, and of the legal bases for them which have been alleged by the DRC, without concern for the continuity which exists between Mr. Diallo's detentions and the attempts to recover the debts said to be owed to the companies Africom-Zaire and Africontainers-Zaire by the State and by Congolese companies. In the judges' view, the detentions in 1988-1989 and 1995-1996 took place for the same reasons and were of the same arbitrary character.

Furthermore, since the Democratic Republic of the Congo was informed at quite an early stage by Guinea of the new claim concerning the facts relating to 1988-1989 and had the opportunity to contest these during the oral argument which took place in April 2010, the judges believe that the Court had evidence before it allowing it to pronounce on all the violations of international law committed by the DRC upon the person of Mr. Diallo. In their view, by adjudicating on the new claim, the Court would have met the requirements of legal security and the good administration of justice in a case based on the exercise of diplomatic protection, the scope of which includes internationally guaranteed human rights.

Joint dissenting opinion of Judges Al-Khasawneh and Yusuf

Judges Al-Khasawneh and Yusuf appended a joint dissenting opinion in which they outlined their reasons for not concurring in paragraph 6 of the dispositif which states that the Court "[f]inds that the [DRC] has not violated Mr. Diallo's direct rights as associé in Africom-Zaire and Africontainers-Zaire".

"On the contrary" the two judges argued, a great injustice to Mr. Diallo, not only with regard to his personal rights but also his rights as associé, was committed by his arrest and expulsion which intended/or at least had the effect of causing great loss to his companies.

This injustice was all the more enormous since in contradistinction to Barcelona Traction he was one and the same with his two companies being the sole associé/gérant.

This is a dangerous precedent for small investors unprotected by bilateral or multilateral treaties. All a State has to do is expel the sole associé or a number of them and the company will have no protector if it is incorporated in the same State that carried out the alleged wrongful act. In effect this is tantamount to an indirect expropriation without compensation, and even without the need to show a legitimizing public interest.

Investors protected by treaties on the other hand will be shielded, and while this may be lucky for them, it creates an unsatisfactory law where to some the reach of investment law is much greater that what Guinea has asked for, while the customary law standard is low for the wretched of the earth like Mr. Diallo.

Barcelona Traction on closer reading does not support the low standard of protection given in the 2007 Judgment and the present one. Barcelona Traction contemplated a triangular relationship (Spain, Canada, Belgium) where diplomatic protection was never in the realm of

fiction. Here the relationship is bilateral and there is no possibility of diplomatic protection by the State of nationality of the company.

Moreover, the size of the company does matter and the relevant role of the associé and gérant are relevant. The Court followed a one-size-fits-all approach and this has led to some surrealistic results. The Court requires Mr. Diallo to have general meetings before it can pass judgment that his direct rights as associé have been violated, but why should a destitute exiled sole associé/gérant hold a general meeting with himself?

With regard to the more central question of his right to "own his companies". The Court did not take into account major developments in investment treaty law and human rights law that would have provided Mr. Diallo with redress. The two judges explored this area of the law and came to the conclusion that the law was much more advanced and nuanced than the Court's Judgment. The Court missed a chance to give justice to Mr. Diallo and in doing so to bring the customary law standard into line with the standard under the modern law of foreign investments.

Joint declaration of Judges Keith and Greenwood

Judges Keith and Greenwood in their joint declaration give their reasons for disagreeing with the Court's interpretation of the provisions of the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights regulating the expulsion of non-citizens. The Court rules that those provisions prohibit expulsions which are arbitrary in nature, allowing review by a court of whether the expulsion was justified on the merits. The judges' reasons for disagreeing with that interpretation are based on the words of the particular provisions which impose no such limit, the contrasting terms of the provisions of the two treaties which do expressly place substantive arbitrariness limits on interference with the rights they affirm, the drafting history of the provisions of the Covenant, and the views of the Human Rights Committee and the African Commission.

Judges Keith and Greenwood emphasize that, by requiring the enactment and application of national law regulating expulsion and, in the case of the Covenant, by requiring particular procedural rights, the Covenant and Charter do provide important protections against arbitrary actions. "The history of freedom, it has been wisely said, is largely the history of the observance of procedural safeguards." The facts of the case, in the judges' opinion, demonstrate the force of that proposition: the arrests and detentions preceding the expulsion were unlawful for egregious breaches of the requirements of DRC law and the expulsion itself was, as well, in breach of the procedural requirements of the Covenant. Because of those breaches the judges agree with the Court's conclusions about the arrests, detentions and expulsion.

Dissenting opinion of Judge Bennouna

Judge Bennouna believes that the arbitrary character of Mr. Diallo's arrest, detention and ultimate expulsion from the Democratic Republic of the Congo resulted in the violation of his direct rights as sole associé in the two companies Africom-Zaire and Africontainers-Zaire. In his view, the Court did not accept that violation because it relapsed into a formalistic approach which has no connection with the reality of this case, the Congolese State having forced Mr. Diallo out of its territory so that he could no longer exercise his direct rights as sole associé in his two companies. According to Judge Bennouna, by hindering the exercise by Mr. Diallo of his direct rights as associé, the Democratic Republic of the Congo has thus committed wrongful acts which engage its international responsibility.

Separate opinion of Judge Cançado Trindade

1. In his Separate Opinion, composed of 13 parts, Judge Cançado Trindade presents the foundations of his personal position on the matters dealt with in the present Judgment of the Court, having supported its resolutory points 2, 3, 4, 7 and 8 of the dispositif, and dissented on points 1, 5 and 6 of the dispositif. He begins his Separate Opinion by identifying (part I) the subject of the rights and the object of the claim in the cas d'espèce: the present case concerns, in reality, the individual rights of Mr. A. S. Diallo, namely, his right to liberty and security of person, his right not to be expelled from a State without a legal basis, and his individual right to information on consular assistance in the framework of the guarantees of the due process of law.

2. His considerations then turn to the applicable law in the present case (part II), namely, the relevant provisions of the 1966 UN Covenant on Civil and Political Rights (Articles 9, paragraphs (1) to (4), and 13), of the 1981 African Charter on Human and Peoples´ Rights (Articles 6 and 12 (4)), and of the 1963 Vienna Convention on Consular Relations (Article 36 (1) (b)). Judge Cançado Trindade points out that the present case is, thus, significantly, an inter-State contentious case before the ICJ, pertaining entirely to the rights of the individual concerned (Mr. A. S. Diallo), and the legal consequences of their alleged violation, under a UN human rights treaty, a regional human rights treaty, and a UN codification Convention. This is a significant feature of the present case, unique in the history of the ICJ.

3. Moreover, this is the first time in its history that the ICJ has established violations of the two human rights treaties at issue together (the Covenant and the African Charter), as well as of the relevant provision of the 1963 Vienna Convention, all in the framework of the universality of human rights. He then moves his analysis (from the perspective of the subject of rights) on to Mr. A. S. Diallo's vindication of the protected rights (part III). These latter comprise, in his view, the right to liberty and security of person (in respect of Mr. A. S. Diallo's arrests and detentions of 1988-1989 as well as 1995-1996), the right not to be expelled from a State without a legal basis, the right not to be subjected to mistreatment, and the right to information on consular assistance in the framework of the guarantees of the due process of law.

4. Judge Cançado Trindade ponders that ours are the times of a new jus gentium, focused on the rights of the human person, individually or collectively. Much to the credit of both Guinea and the D.R. Congo, the ICJ has been called upon, in the course of the proceedings on the merits, to settle a dispute on the basis of two human rights treaties and a relevant provision of a UN codification Convention. In respect of the merits (and reparation), this became a case pertaining to human rights protection. Diplomatic protection was the means whereby the complaint was originally lodged with the Court. Yet, once diplomatic protection, ineluctably discretionary in character, played its instrumental role, the case before the Court became substantively one pertaining to human rights protection.

5. The next part (IV) of his Separate Opinion is devoted to the hermeneutics of human rights treaties (in so far as it has a bearing on the resolution of the cas d'espèce). While in traditional international law there has been a marked tendency to pursue a rather restrictive interpretation, in the International Law of Human Rights, somewhat distinctly, there has been a clear and special emphasis on the element of the object and purpose of the treaty, so as to ensure an effective protection (effet utile) of the guaranteed rights, without detracting from the general rule of Article 31 of the two Vienna Conventions on the Law of Treaties (1969 and 1986).

6. While in general international law the elements for the interpretation of treaties evolved primarily as guidelines for the process of interpretation by States Parties themselves, human rights treaties, in their turn, have called for an interpretation of their provisions bearing in mind the essentially objective character of the obligations entered into by States Parties: such obligations aim at the protection of human rights and not at the establishment of subjective and reciprocal rights for the States Parties. Human rights treaties have propounded the autonomous interpretation of their provisions (by reference to the respective domestic legal systems).

7. Moreover, the dynamic or evolutive interpretation of such treaties (the temporal dimension) has been followed in the jurisprudence constante of both the European and the Inter-American Courts of Human Rights, so as to fulfil the evolving needs of protection of human beings (under the European and the American Conventions on Human Rights, respectively). General international law itself bears witness of the principle (subsumed under the general rule of interpretation of Article 31 of the two Vienna Conventions on the Law of Treaties) whereby the interpretation is to enable a treaty to have appropriate effects. In the present domain of protection, International Law has been made use of in order to improve and strengthen — and never to weaken or undermine — the safeguard of recognized human rights (in pursuance of the principle pro persona humana, pro victima**).**

8. Judge Cançado Trindade adds that both the European and the Inter-American Courts of Human Rights have rightly set limits to State voluntarism, have safeguarded the integrity of the respective human rights Conventions and the primacy of considerations of ordre public over the "will" of individual States, have set higher standards of State behaviour and established some degree of control over the interposition of undue restrictions by States, and have reassuringly enhanced the position of individuals as subjects of the International Law of Human Rights, with full procedural capacity. The two international human rights Tribunals have aptly made use of the techniques of Public International Law in order to strengthen their respective jurisdictions of protection of the human person. As to substantive law, the contribution of the two international human rights Courts to this effect is illustrated by numerous examples of their respective case-law pertaining to the rights protected under the two regional Conventions.

9. The following part (V) of his Separate Opinion dwells upon the principle of humanity. Despite the current tendency to approach this principle in the framework of International Humanitarian Law, in the understanding of Judge Cançado Trindade the principle of humanity in endowed with an even wider dimension: it applies in the most distinct circumstances, both in times of armed conflict. In the former, it applies in the relations of public power with all persons subject to the jurisdiction of the State concerned. That principle has a notorious incidence when these latter are in a situation of vulnerability, or even defencelessness, as evidenced by relevant provisions of distinct treaties integrating the International Law of Human Rights (e.g., the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 17 (1); the 1989 UN Convention on the Rights of the Child, Article 37 (b); the 1969 American Convention on Human Rights, Article 5; the 1981 African Charter on Human and Peoples' Rights, Article 5; the 1969 Convention on the Specific Aspects of Refugee Problems in Africa, Article II (2); among others).

10. Judge Cançado Trindade sustains that the principle of humanity permeates the whole corpus juris of the international protection of the rights of the human person (encompassing International Humanitarian Law, the International Law of Human Rights, and International Refugee Law), at global (UN) and regional levels. The principle at issue provides an illustration of the approximations or convergences between those complementary branches, at hermeneutic level, and also manifested at normative and operational levels. In respect of the present case A. S. Diallo,

the principle of humanity underlies Article 7 of the Covenant on Civil and Political Rights, which protects the individual's personal integrity, against mistreatment, as well as Article 10 of the Covenant (concerning detainees), which begins by stating that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person" (para. 1). This comprises not only the negative obligation not to mistreat (Article 7), but also the positive obligation to ensure that a detainee, under the custody of the State, is treated with humanity and due respect for his inherent dignity as a human person.

11. The principle of humanity has met with judicial recognition, — he proceeds, — as exemplified by some Judgments of the Inter-American Court of Human Rights and the ad hoc International Criminal Tribunal for the Former Yugoslavia. Furthermore, the principle at issue orients the way one treats the others, extending to all forms of human behaviour and the totality of the condition of human existence. In his vision, international law is not at all insensitive to that, and the principle at issue applies in any circumstances, so as to prohibit inhuman treatment and to secure protection to all, including those in a situation of great vulnerability. In sum, humaneness is to condition human behaviour in all circumstances.

12. Judge Cançado Trindade then points out that the principle of humanity is in line with natural law thinking; it underlies classic thinking on humane treatment and the maintenance of sociable relationships, also at international level. Humaneness comes to the fore even more forcefully in the treatment of persons in situation of vulnerability, or even defencelessness, such as those deprived of their personal freedom, for whatever reason. He recalls that the jus gentium, — when it began to correspond to the law of nations, - came then to be conceived by its "founding fathers" (F. de Vitoria, A. Gentili, F. Suárez, H. Grotius, S. Pufendorf, C. Wolff, who propounded a jus gentium inspired by the principle of humanity lato sensu), — as regulating the international community constituted by human beings socially organized in the (emerging) States and co-extensive with humankind, thus conforming the necessary law of the societas gentium. This latter prevailed over the "will" of individual States, respectful of the human person, to the benefit of the common good. He concludes on this point that the legacy of natural law thinking, evoking the natural law of the right human reason (recta ratio), has never faded away, and this should be stressed time and time again.

13. His next set of considerations (part VI) focuses on the key issue of the prohibition of arbitrariness in the framework of the International Law of Human Rights, for the consideration of the present case of A. S. Diallo. After reviewing the notion of "arbitrariness" in legal thinking, Judge Cançado Trindade considers it under human rights treaties and instruments, which conform a Law of protection (a droit de protection), oriented towards the safeguard of the ostensibly weaker party, the victim. Accordingly, the prohibition of arbitrariness covers today arrests and detentions, as well as other acts of the public power, such as expulsions. Bearing in mind the hermeneutics of human rights treaties (supra), a merely exegetical or literal interpretation of treaty provisions would be wholly unwarranted.

14. He then reviews and assesses the position of the UN Human Rights Committee and of the African Commission on Human and Peoples' Rights, and the jurisprudential construction of the Inter-American and the European Courts of Human Rights, on the matter at issue. He concludes that they all point towards a firm prohibition of arbitrariness in distinct circumstances; that prohibition is not restricted to the right to personal liberty, but extends likewise to other protected rights under the respective human rights treaties or conventions. It covers, likewise, the right not to be expelled arbitrarily from a country, the right to a fair trial, the right to respect for private and family life, the right to an effective remedy, or any other protected right. In

Judge Cançado Trindade's conception, this is, epistemologically, the correct posture in this respect, given the interrelatedness and indivisibility of all human rights.

15. To attempt to advance a restrictive view of the prohibition of arbitrariness, or an atomized approach to it, would be wholly unwarranted. And it would run against the outlook correctly pursued by international human rights supervisory organs such as the UN Human Rights Committee and the African Commission on Human and Peoples' Rights, and by international human rights tribunals such as the Inter-American and the European Courts. The letter together with the spirit of the relevant provisions under human rights treaties, converge in pointing to the same direction: the absolute prohibition of arbitrariness, under the International Law of Human Rights as a whole. In Judge Cançado Trindade's perception, underlying this whole matter is the imperative of access to justice lato sensu, the right to the Law (le droit au Droit, el derecho al Derecho), the right to the realization of justice in a democratic society.

16. In the following part of his Separate Opinion (VII), he examines the material content of the protected rights under the present Judgment (right to liberty and security of person, and right not to be expelled from a State without a legal basis), and the interrelationship between them; as to the right to information on consular assistance in the conceptual universe of human rights, he devotes an entire section (part VIII) of his Separate Opinion to its jurisprudential construction. In this respect, he dwells upon the individual right to information on consular assistance beyond the inter-State dimension, and examines and assesses what he perceives as the process of humanization of consular law in this connection, and what he regards as the irreversibility of such advance of humanization.

17. Despite the fact that the right to information on consular assistance was initially set forth in a provision (Article 36 (1) (b)) of the Vienna Convention on Consular Relations) having in mind consular relations, and celebrated in 1963 in pursuance of an apparently predominant inter-State optics, the fact remains that it came to be regarded in subsequent practice as an individual right, within the conceptual universe of human rights. In this respect, in order to clarify the legal nature and content of the right at issue, at the end of the public sitting of the Court held on 26.04.2010, Judge Cançado Trindade put to the two contending Parties in the present A. S. Diallo case, the question whether the provision of Article 36 (1) (b) of the 1963 Vienna Convention exhausted itself in the relations between the sending State (of nationality) and the receiving State (of residence); he further asked them whether the sending State (of nationality), or the individual concerned, was the subject (titulaire) of the right at issue. On the basis of the responses provided by the two contending Parties (Guinea and the D.R. Congo), Judge Cançado Trindade concluded that it was clearly an individual right, and that it had not been complied with in the present case.

18. He then proceeded to review and assess the jurisprudential construction of the right at issue to date. He recalled that, even before the pertinent obiter dicta of the ICJ in the LaGrand (2001) and the Avena (2004) cases, the first and pioneering articulation of the individual's right to information on consular assistance was the one developed by the Inter-American Court of Human Rights (IACtHR) in its Advisory Opinion No. 16, of 01.10.1999, on the Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law. That Advisory Opinion of the IACtHR was expressly invoked by the contending Parties, and relied upon mainly by the complaining States, in the LaGrand (Germany v. United States) and the Avena (Mexico v. United States) cases before this Court.

19. He added that the IACtHR had adopted the proper approach, in considering the matter submitted to it within the framework of the evolution of the "fundamental rights of the human person" in contemporary international law. The IACtHR sustained the view that the individual right to information under Article 36 (1) (b) of the 1963 Vienna Convention renders effective the right to the due process of law. The IACtHR linked the right at issue to the evolving guarantees of due process of law, — an approach that has served as inspiration for the emerging international case-law, in statu nascendi, on the matter. Thus, if non-compliance with Article 36 (1) (b) of the 1963 Vienna Convention takes place, it occurs to the detriment not only of a State Party but also of the human beings concerned.

20. That Advisory Opinion was followed, four years later, in the same line of thinking, by Advisory Opinion No. 18 of the IACtHR, of 17.09.2003, on the Juridical Condition and Rights of Undocumented Migrants. This latter opened new ground for the protection of migrants, in acknowledging the prevalence of the rights inherent to human beings, irrespective of their migratory status. The IACtHR made it clear that States ought to respect and ensure respect for human rights in the light of the general and basic principle of equality and non-discrimination, and that any discriminatory treatment with regard to the protection and exercise of human rights generates the international responsibility of the States. In the view of the IACtHR, the fundamental principle of equality and non-discrimination has entered into the domain of jus cogens, with corresponding obligations erga omnes of protection (in their horizontal and vertical dimensions). This jurisprudential construction pointed in a clear direction: consular assistance and protection became much closer to human rights protection.

21. It so happens that consular assistance and protection have indeed undergone a process of jurisdictionalization, integrating, in the light of the outlook advanced by the IACtHR, the enlarged conception of the due process of law, proper of our times. This is gradually being grasped nowadays, as while diplomatic protection remains ineluctably discretionary, pursuing an unsatisfactory inter-State dimension, consular assistance and protection are now linked to the obligatory guarantees of due process of law, in the framework of the International Law of Human Rights. The ultimate beneficiaries of this evolution are the individuals facing adversity, particularly those deprived of their personal liberty abroad.

22. Advisory Opinion No. 16 (of 1999) of the IACtHR, on the Right to Information on Consular Assistance in the Framework of the Due Process of Law, was extensively relied upon by the contending Parties in the proceedings (written and oral phases) before the ICJ in the LaGrand and Avena cases, although the ICJ preferred to guard silence on that judicial precedent, and in neither occasion referred to it. In the Avena case (Judgment of 31.03.2004), the ICJ was faced with Mexico's contention — well in conformity with the aforementioned Advisory Opinion No. 16 of 1999 of the IACtHR (supra) — that if the right at issue, under Article 36 (1) (b) of the 1963 Vienna Convention, is infringed, it "will ipso facto produce the effect of vitiating the entire process of the criminal proceedings conducted in violation of this fundamental right" (para. 124).

23. The ICJ stated that it did not need to decide that question, and that, in any case, in its view "neither the text nor the object and purpose of the Convention, nor any indication in the travaux préparatoires, support the conclusion that Mexico draws from its contention in that regard" (para. 124). And the ICJ promptly concluded that Mexico's submission could not therefore be upheld (para. 125). The present case of A. S. Diallo provided, in Judge Cançado Trindade's view, a unique opportunity for the Court to clarify and sustain its position on this particular point. After all, the point was again raised before it.

24. This being so, contrary to what the Court said in the Avena case, Judge Cançado Trindade upheld, in relation to the debates raised in the present A. S. Diallo case, that the view that Article 36 (1) (b) links the individual right at issue — in the framework of human rights protection — to the guarantees of the due process of law, is supported by the text of Article 36 (1) (b) of the 1963 Vienna Convention, by the object and purpose of that Convention, as well as by its travaux préparatoires. As to the text, the last phrase of Article 36 (1) (b) leaves no doubt that it is the individual, and not the State, who is the titulaire of the right to be informed on consular assistance; however intertwined may this provision be with States Parties' obligations, this is clearly an individual right. If this individual right is breached, the guarantees of the due process of law will ineluctably be affected.

25. As to the object and purpose of the 1963 Vienna Convention, — Judge Cançado Trindade proceeds, — they lie in the commonality of interests of all the States Parties to the 1963 Vienna Convention, in the sense that compliance by the States Parties with all the obligations set forth thereunder, — including the obligation of compliance with the individual right at issue, — is to be secured. Accordingly, in so far as consular assistance is concerned, the preservation of, and compliance with, the individual right to information on it (Article 36 (1) (b)) becomes essential to the fulfilment of the object and purpose of the Vienna Convention on Consular Relations.

26. Last but not least, on this particular matter, Judge Cançado Trindade surveys in his Separate Opinion the travaux préparatoires of that provision of the 1963 Vienna Convention, finding valuable indications to the same effect, particularly in the debates of the 1963 UN Conference on Consular Relations, held in Vienna. Already at that time (three years before the adoption of the two UN Covenants on Human Rights (on Civil and Political Rights, as well as on Economic, Social and Cultural Rights, respectively), in the debates of 1963 at the Vienna Conference, no less than 19 interventions pointed in the same direction, namely, that there was already awareness among participating Delegations as to the need to insert the right to information on consular assistance into the conceptual universe of human rights.

27. In addition to those interventions, the UN High Commissioner for Refugees submitted a memorandum to the 1963 Vienna Conference, wherein it singled out that draft Article 36 of the Draft Convention was one of its two provisions that had a direct bearing upon its own work, in so far as the protection of the rights of nationals of the sending State in the State of residence were concerned. There was indeed an awareness of the imperative of human rights protection, even before the adoption of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) in 1965 and of the two UN Covenants on Human Rights in 1966, at the early stage of the legislative phase of UN human rights treaties.

28. Such awareness, captured more than three decades later by the IACtHR in its Advisory Opinion No. 16 (1999), — consolidated by its Advisory Opinion No. 18 (2003), — contributed decisively for the process of humanization of consular law, going well beyond the inter-State dimension. Such advance of humanization of consular law is, in Judge Cançado Trindade's assessment, bound to be an irreversible one. Human conscience, the universal juridical conscience (as the ultimate material source of International Law), was soon awakened so as to fulfil a pressing need to this effect, that of protection of human beings in all circumstances, including in situations of deprivation of personal liberty abroad.

29. It leaves no room for steps backwards, or hesitations. A clear statement from this Court in the same direction — namely, that the right to information on consular assistance belongs to the conceptual universe of human rights, and non-compliance with it ineluctably affects judicial guarantees vitiating the due process of law, — would be indeed reassuring. The Court could have done so in the present A. S. Diallo case, — since the point was raised before it in the course of the oral phase of the proceedings in the cas d'espèce, — but it preferred to give a rather summary treatment to the consideration of Article 36 (1) (b) of the 1963 Vienna Convention in the present Judgment.

30. In the following part (IX) of his Separate Opinion, Judge Cançado Trindade examines the notion of "continuing situation", in the light of the projection of human rights violations in time, and of the decisions of the African Commission on Human and Peoples' Rights and the pronouncements of the UN Human Rights Committee on the matter, as well as the case-law of the Inter-American and the European Courts of Human Rights in this respect. In the view of Judge Cançado Trindade, the griefs suffered by Mr. A. S. Diallo in the present case disclose a factual nexus between the arrests and detentions of 1988-1989 and those of 1995-1996, prior to his expulsion from the country of residence in 1996. Those griefs, extended in time, were in breach of the applicable law in the present case (Articles 9 and 13 of the Covenant on Civil and Political Rights, Articles 6 and 12 (4) of the African Charter on Human and Peoples' Rights, Article 36 (1) (b) of the Vienna Convention on Consular Relations), as interpreted in pursuance of the hermeneutics of human rights treaties (supra).

31. At the time of his arrests and detention, Mr. A. S. Diallo was not informed of the charges against him, nor could he have availed himself without delay of his right to information on consular assistance. His griefs were surrounded by arbitrariness on the part of State authorities. Moreover, there was a chain of causation, a causal nexus, in that continuity of occurrences, to be borne in mind (with a direct incidence on the reparation due to Mr. A. S. Diallo), which the Court's majority regrettably failed to consider. The projection of human rights in time also raises the issue of the prolonged lack of access to justice.

32. This causal nexus could at least have been considered as evidence put before the Court, but was simply discarded by the Court's majority. The Court could at least have taken into account — in his view it should have — the circumstances of the arrests and detention in 1988-1989 in its consideration of the arrests and detention of 1995-1996, prior to Mr. A. S. Diallo's expulsion from the D.R. Congo in 1996. Keeping the aforementioned factual nexus and causal nexus in mind, — Judge Cançado Trindade concludes on this point, - it could hardly be denied that there was a continuing situation of breaches of Mr. A. S. Diallo's individual rights, in the period extending from 1988 to 1996.

33. The next line of his reflections (part X) pertains to the individual concerned as victim and as titulaire of the right to reparation. As resolutory points 7 and 8 (duty to make appropriate reparation) of the dispositif of the Court's Judgment in the present A. S. Diallo case, were adopted with his concurring vote, Judge Cançado Trindade feels obliged, in addition, to express his concern that the provision of adequate reparation is still to wait further, till the Court eventually decides later on this aspect (pursuant to resolutory point 7), in case the contending Parties fail to reach an agreement on this issue within the forthcoming six months. To his mind, this resembles an arbitral, rather than a truly judicial procedure, and looks somewhat disquieting to him.

34. This is particular so, if one bears in mind the prolonged length of time that the handling of this case by the Court has taken (almost 12 years, from the end of December 1998 to this end of November 2010), for reasons not attributable to the Court itself. In any case, such delays are to be avoided, particularly when reparation for human rights breaches is at stake. The further extension of the determination of reparation, for another period of up to six months, does not appear reasonable, as the subject (titulaire) of the rights breached in the present case is not the applicant State, but the individual concerned, Mr. A. S. Diallo, who is also the ultimate beneficiary of the reparations due.

35. It is thus all too proper to keep in mind the individual's right to reparation in the light of the applicable law in the cas d'espèce, the International Law of Human Rights. This issue takes one beyond the domain of international procedural law, into that of juridical epistemology, encompassing one's own conception of international law in our times. In Judge Cançado Trindade's conception, in the present case A. S. Diallo, the applicant State is the claimant, but the victim is the individual. The applicant State claims for reparation, but the titulaire of the right to reparation is the individual, whose rights have been breached. The applicant State suffered no damage at all, it rather incurred into costs and expenses, in espousing the cause of its national abroad. The damage was suffered by the individual himself (subjected to arbitrary arrests and detention, and expulsion from the State of residence), not by his State of nationality.

36. The individual concerned is at the beginning and at the end of the present case, and his saga has not yet ended, as a result also of the unreasonable prolongation of the proceedings before this Court. It is about time for this Court — he adds — to overcome an undue reliance on the old Vattelian fiction, revived by the PCIJ in the Mavrommatis fiction (not a principle, simply a largely surpassed fiction). The ICJ can no longer keep on reasoning within the hermetic parameters of the exclusively inter-State dimension. The recognition of the damage suffered by the individual (para. 98 of the Judgment) has rendered unsustainable the old theory of the State's assertion of its "own rights" (droits propres), with its underlying voluntarist approach.

37. The titulaire of the right to reparation is the individual, who suffered the damage, and State action in diplomatic protection is to secure the reparation due to the individual concerned. Such action in diplomatic protection aims at reparation for a damage, usually already consummated, to the detriment of the individual; consular assistance and protection, much closer nowadays to human rights protection, are exercised in a rather preventive way, so as to avoid a probable or a new damage to the individual concerned. This affinity of contemporary consular assistance and protection with human rights protection is largely due to the historical rescue of the individual, of the human person, as subject of international law.

38. Had the Court pursued the hermeneutics of the human rights treaties, invoked by the contending States throughout the whole of its proceedings, in the whole Judgment, this latter, in Judge Cançado Trindade's assessment, would have been entirely a much more consistent and satisfactory one. As for the determination of an appropriate reparation for the breaches of the rights under the Covenant suffered by the victim, it may ultimately amount to a proper compensation (in the unlikelihood of restitutio in integrum), — among other forms of reparation (such as satisfaction, public apology, rehabilitation of the victim, guarantees of non-repetition of the harmful acts, among others), — for the violations of the rights thereunder, that is, for material and moral damages, fixed to some extent on the basis of considerations of equity.

39. In cases of the kind, such reparations are to be granted from the perspective of the victims, human beings (their original claims, needs and aspirations), and not States. This discloses a wider horizon in the matter of reparations, when human rights are at stake. Article 2 of the UN Covenant on Civil and Political Rights sets forth a general obligation on the States Parties, which is added to the specific obligations in relation to each of the rights guaranteed thereunder. The aforementioned general formula allows for flexibility, in the determination of the measures of compensation or other forms of reparation to the victim(s) concerned. The ultimate aim is, naturally, whenever possible, the restitutio in integrum, but, when that is not possible, recourse is to be made to the provision of other adequate forms of reparation.

40. In any case, and whatever the circumstances might be, it is to be borne in mind, — Judge Cançado Trindade further ponders, — that the duty to make reparation reflects a fundamental principle of general international law, promptly captured by the Permanent Court of International Justice (PCIJ), early in its case-law, and endorsed by the case-law of the ICJ. That obligation to make reparation is governed by international law in all its aspects (such as, e.g., its scope, forms and characteristics, and the determination of the beneficiaries). Accordingly, compliance with it cannot be made subject to modification or suspension, in any circumstances, by any respondent States, through the invocation of provisions (or difficulties) of their own domestic law.

41. In the following part (XI) of his Separate Opinion, Judge Cançado Trindade contends that the present A. S. Diallo case shows that diplomatic protection was initially resorted to herein, keeping in mind property rights or investments, but the case, at the stage of its merits, underwent a metamorphosis, and it reassuringly turned out to be a case, ultimately, of human rights protection, of the rights inherent to the human person, concerning his or her liberty and legal security. The handling of each case in the course of international adjudication has a dynamics of its own. Yet, the outcome of the cas d'espèce is reassuring, in so far as the rights protected are concerned, and it contains a couple of lessons that cannot here pass unnoticed.

42. To start with, attempts to revitalize traditional diplomatic protection, with its ineluctable discretionary nature, should not be undertaken underestimating human rights protection. In Judge Cançado Trindade's understanding, the greatest legacy of the international legal thinking of the XXth century, to that of this new century, lies in the historical rescue of the human person as subject of rights emanating directly from the law of nations (the droit des gens), as a true subject (not only "actor") of contemporary international law. The emergence of the International Law of Human Rights has considerably enriched contemporary international law, at both substantive and procedural levels.

43. In order to provide adequate reparation to the victims of violated rights, one has to move into the domain of the International Law of Human Rights, one cannot at all remain in the strict and short-sighted confines of diplomatic protection, as a result of not only its ineluctable discretionary nature, but also its static inter-State dimension. Reparations, here, require an understanding of the conception of the law of nations centred on the human person (pro persona humana). Human beings, — and not the States, — are indeed the ultimate beneficiaries of reparations for human rights breaches to their detriment.

44. Judge Cançado Trindade ponders that the Vattelian fiction of 1758 (expressed in the formula — "Quiconque maltraite un citoyen offense indirectement l´État, qui doit protéger ce citoyen") has already played its role in the history and evolution of international law. The challenge faced today by the World Court is of a different nature, going well beyond such inter-State dimension. It requires from the Court preparedness to explore the ways of

incorporating, in its modus operandi — starting with its own reasoning, — the acknowledgement of the consolidation of the international legal personality of individuals, and the gradual assertion of their international legal capacity, — to vindicate rights which are theirs and not their own State's, — as subjects of rights and bearers of duties emanating directly from international law, in sum, as true subjects of international law.

45. In this perspective, and as a starting-point in this direction, — Judge Cançado Trindade adds in his concluding observations (part XII), — in its present Judgment in the A. S. Diallo case the Court was right in concentrating its attention, in particular, in the breaches found of Articles 9 and 13 of the UN Covenant on Civil and Political Rights, and of Articles 6 and 12 (4) of the African Charter of Human and Peoples' Rights, as well as of Article 36 (1) (b) of the Vienna Convention on Consular Relations. They concern the rights of Mr. A. S. Diallo as an individual, as a human person. The breaches of his individual rights as associé of the two companies come to the fore by way of consequence, having been likewise affected.

46. The subject of the rights breached in the present case is Mr. A. S. Diallo, an individual. The procedure for the vindication of the claim originally utilized (by the applicant State) was originally that of diplomatic protection, but the substantive law applicable in the present case is the International Law of Human Rights. This latter applies in the framework of intra-State relations (such as, in the present case, the relations between the D.R. Congo and Mr. A. S. Diallo). In properly interpreting and applying human rights treaties, the Court is thereby giving its contribution to the development of the aptitude of international law to regulate relations at intra-State, as well as inter-State, levels.

47. Judge Cançado Trindade argues that the fact that the contentious procedure before the ICJ keeps on being exclusively an inter-State one, — not by an intrinsic necessity, nor by a juridical impossibility of being of another form, — does not mean that the reasoning of the Court ought to develop within an essentially and exclusively inter-State optics, above all when it is called to pronounce, in the peaceful settlement of the corresponding disputes, on questions which go beyond the interests of the contending States, and which pertain to the fundamental rights of the human person, and even to the international community as a whole.

48. The relations governed by contemporary international law, in distinct domains of regulation, transcend to a large extent the purely inter-State dimension (e.g., in the international protection of human rights, in the international protection of the environment, in international humanitarian law, in international refugee law, in the law of international institutions, among others), and the ICJ, called upon to pronounce upon those relations, is not bound to restrain itself to an anachronistic inter-State optics. The anachronism of its mechanism of operation ought not to, and cannot, condition its reasoning, so as to enable it to exert faithfully and fully its functions of principal judicial organ of the United Nations in our times.

49. The present Judgment, in so far as resolutory points 2, 3, 4 and 7 of its dispositif are concerned, with which Judge Cançado Trindade concurs, constitutes in his view a valuable contribution of the Court's case-law to the settlement of disputes originated at intra-State level, when human rights are at stake. The fact that a human rights case has at last been decided by the ICJ itself is particularly significant to him. It further shows that contemporary international law has notably developed to such an extent that States themselves see it fit to make use of a contentious procedure of the kind, originally devised in 1920 and confirmed in 1945 for their own and

exclusive utilization, in order to obtain from the Court its decision on human rights, on rights inherent to the human person, ontologically anterior and superior to the State itself. This is in line with the evolving international law for the human person (pro persona humana), the new jus gentium of this beginning of the XXIst century.

50. Having endeavoured to identify the lessons extracted from the present A. S. Diallo case, Judge Cançado Trindade concludes his Separate Opinion with a brief epilogue (part XIII) on its historical transcendence. The case just resolved by the ICJ had as claimant a State, and as victim — and beneficiary of reparation — an individual. He reiterates that this is the first time in its history that the World Court has resolved a case on the basis of the applicable law conformed by two human rights treaties together, one at universal level (the UN Covenant on Civil and Political Rights) and the other at regional level (the African Charter on Human and Peoples' Rights), in addition to the relevant provision (Article 36 (1) (b)) of the Vienna Convention on Consular Relations, situated also in the domain of the international protection of human rights.

51. It is reassuring that, due originally to the exercise of diplomatic protection, the cause of Mr. A. S. Diallo reached this Court. This was as far as diplomatic protection, a traditional instrument, went, and could go. One cannot expect more from it than what it can provide. It is, after all, as traditional as the rationale of the procedure before the ICJ. Individuals keep suffering a capitis diminutio, as they still need to rely on that traditional instrument to reach this Court, whilst they already have locus standi in judicio, or even jus standi, before other contemporary international tribunals. This shows that there is epistemologically no impediment for individuals to have either locus standi or jus standi before the World Court as well; what is lacking is the animus to render that possible.

52. Notwithstanding, there is something both reassuring and novel in the present case A. S. Diallo now resolved by this Court: as from the proceedings on the merits (written and oral phases), the case of A. S. Diallo has been to a large extent heard, and adjudicated upon, in the conceptual framework of the International Law of Human Rights. It is this latter, and not diplomatic protection, that is apt to safeguard the rights of persons under adversity, or socially marginalized or excluded, or in situations of the utmost vulnerability. This reflects a great challenge to international justice today, a challenge that can effectively be faced only in the realm of the International Law of Human Rights, beyond the purely inter-State dimension.

53. Moreover, this is the first time in its history that the World Court has expressly taken into account the contribution of the case-law of two international human rights tribunals, the European and the Inter-American Courts (para. 68), to the perennial struggle of human beings against arbitrariness (para. 65), encompassing the prohibition of arbitrary expulsion. This discloses a new mentality in relation to another relevant issue. The co-existence of multiple international tribunals, fostering access to international justice on the part of a growing number of justiciables around the world in distinct domains of human activity, bears evidence of the way contemporary international law has developed in the old search for the realization of international justice. Contemporary international tribunals have much to learn from each other.

54. Article 92 of the UN Charter states that this Court, the ICJ, is "the principal judicial organ of the United Nations". In addition, Article 95 of the UN Charter leaves the door open to member States to entrust the solution of their differences to "other tribunals by virtue of agreements already in existence or which may be concluded in the future". Ours has become the

age of international tribunals, and this is a highly positive phenomenon, as what ultimately matters is the enlarged or expanded access to justice, lato sensu, comprising the realization of justice.

55. This is another lesson that can be extracted from the adjudication of the present case A. S. Diallo, and it is indeed reassuring that the ICJ has disclosed a new vision of this particular issue, in so far as international human rights tribunals are concerned. This is particularly important at a time when States rely, in their submissions to this Court, on relevant provisions of human rights conventions, as both Guinea and the D.R. Congo have done in the present case. Judge Cançado Trindade deems it reassuring that States begin to rely on human rights treaties before the ICJ, heralding a move towards an era of possible adjudication of human rights cases by the ICJ itself. The international juridical conscience has at last awakened to the fulfilment of this need.

56. The ICJ, in the exercise of its contentious as well as advisory functions in recent years, has referred either to relevant provisions of a human rights treaty such as the Covenant on Civil and Political Rights, or to the work of its supervisory organ, the Human Rights Committee. The Court, in its Judgment in the present case of A. S. Diallo, 30 November 2010, has gone much further, beyond the United Nations system, in acknowledging the contribution of the jurisprudential construction of two other international tribunals, the Inter-American and the European Courts of Human Rights. It has also dwelt upon the contribution of an international human rights supervisory organ, the African Commission on Human and Peoples' Rights. The three regional human rights systems operate within the framework of the universality of human rights.

57. Judge Cançado Trindade concludes that contemporary international tribunals should pursue their common mission — the realization of international justice — in a spirit of respectful dialogue, learning from each other. By cultivating this dialogue, attentive to each other's work in pursuance of a common mission, contemporary international tribunals will provide avenues not only for States, but also for human beings, everywhere, and in respect of distinct domains of international law, to recover their faith in human justice. They will thus be enlarging and strengthening the aptitude of contemporary international law to resolve disputes occurred not only at inter-State level, but also at intra-State level. And they will thus be striving towards securing to States, as well as to human beings, what they are after: the realization of justice.

Dissenting opinion of Judge ad hoc Mahiou

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 a summary explanation.

As for the claim regarding the arrests and detentions in 1988-1989, there is no difference between them and those in 1995-1996 in respect of either the legal form they took or their purpose (to prevent Mr. Diallo from recovering debts owed by certain Congolese public or private organizations). It is true that the claim was raised late, but under the Court's jurisprudence, as we know, 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"; a new claim is admissible thereunder if it satisfies either of the following two conditions: it is implicit in the Application or it arises directly out of the question which is the subject-matter of the Application. In my view, the claim in respect of the arrests and detentions in 1988-1989 meets one or the other condition and even both; these were in

fact merely the first in a series of actions taken by the Congolese authorities in a continuum of unlawful acts which should have been declared admissible by the Court.

As for Mr. Diallo's direct rights, the Court considers that, while the arbitrary expulsion he suffered did give rise to certain impediments, these neither hindered nor prevented the exercise of those rights. This analysis and the conclusions to which it has led can be criticized for having failed to take account of the specific context of this case, in which changes in the factual situation over time resulted in a single individual coming to be the sole shareholder in the two companies, which he managed and operated to such a point as to become one with them. Thus, any constraint imposed on the various rights of the associé, such as the rights to take part in general meetings, to be gérant of the companies, to oversee and monitor the operation and management of the companies, and to liquidate them and realize the residual assets, results in preventing the exercise of these rights and ultimately in infringing them.

Accordingly, while the Court rightly recognizes that Mr. Diallo's human rights have been violated and provides for reparation in this connection, it should also have found at least some, if not all, of the violations of Mr. Diallo's direct rights and have provided for compensation for them.

Separate opinion of Judge ad hoc Mampuya

Before setting out my views on the substantive positions taken in the Judgment, I express my more general reservations in respect of certain questions raised by the Judgment. First of all, in respect of an issue of international adjective law, I note that, while the Court appeared to have turned its back on its traditional jurisprudence on the subject by agreeing to adjudicate the case even though no dispute had arisen beforehand between Guinea and the Democratic Republic of the Congo, the two States concerned, over the matters referred to the Court, the situation has fortunately been rectified in the practice between parties. As evidence, I cite Russia's preliminary objection in the pending case between it and Georgia concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination, wherein Russia is challenging the admissibility of Georgia's Application and arguing that "the Court can exercise its jurisdiction in contentious proceedings only when a dispute genuinely exists between the parties . . ." and that there was no inter-State dispute over the facts concerning the interpretation or application of the Convention on the Elimination of All Forms of Racial Discrimination, to which the two States are parties. I then set out my reservations in respect of certain language used by the Court in evaluating the conduct of the Congolese authorities, and of certain judgments made by the Court on that subject, language which appears highly prejudicial to the honour of the Congolese State. Without showing this to be the case, the majority insinuates, as in the Judgment on the preliminary objections, that the Congo deliberately issued a notice of "refoulement" rather than expulsion for the purpose of making it impossible to appeal against its decision, or that it must be shown that there was "a link between Mr. Diallo's expulsion and the fact that he had attempted to recover debts . . . bringing cases for this purpose before the civil courts" (para. 82). While one might expect to hear such serious accusations from the Applicant, the World Court cannot rely on an unfounded presumption to take them to be true.

On the substance, I explain my reasons for having voted with the majority of the Court on the violations by the Congo of Article 9, paragraphs 1 and 2, and Article 13, paragraph 4, of the International Covenant on Civil and Political Rights and of Articles 6 and 12 of the African Charter on Human and Peoples' Rights in connection with Mr. Diallo's arrest, detention and expulsion, especially given that these measures were taken in violation of Congolese law itself. However, my interpretation of the meaning of these Articles differs from that of the Court where the Judgment imposes an additional requirement, one not laid down, on top of that of the formal propriety of the expulsion: it adds that the expulsion must be not only in accordance with the law but also "not arbitrary" in nature. This is not to say that such a measure may be arbitrary, but only that the provisions applicable here do not impose such a requirement. Article 13 merely requires that the

decision to expel have been taken "in accordance with the law" and that the individual concerned have been 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 an alien "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". The Court's interpretation treats these provisions like Article 9 of the Covenant, which links this requirement not to the expulsion but to the arrest and detention. There is no justification for such treatment, notwithstanding the "jurisprudence" cited by the Court on the basis of United Nations Human Rights Committee practice, it too concerned in its entirety with arrest and detention, not expulsion. Further, I find on the basis of Article 1, paragraph 2, of Protocol No. 7 to the European Convention for the Protection of Human Rights that territorial authorities are recognized to enjoy a certain latitude in exercising a prerogative of such a discretionary nature as that of a State in deciding to allow or bar entry, in accordance with its law, by aliens into its territory; and implicit limitations cannot be placed on the exercise of this prerogative, even by implying that it is "arbitrary".

On the other hand, I do not join in finding the Democratic Republic of the Congo responsible for the alleged violation of Article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations, which lays down an obligation to inform an arrested or detained alien of his right to contact with the consular authorities of his national State. My view is that the Court has omitted to take into consideration its own prior conclusions (in the LaGrand and Avena cases): that Article 36, paragraph 1 (b) contains three "interrelated" elements; and that "[t]he legal conclusions to be drawn from that interrelationship necessarily depend upon the facts of each case"; or that this provision "contains three separate but interrelated elements"; and that "[i]t 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". Had it done this, it would have applied a teleological interpretation and would have found that, unlike in the two above-mentioned cases, the facts and circumstances of the present case show that the Democratic Republic of the Congo's alleged omission to inform Mr. Diallo of his rights did not prevent Guinea from exercising the right conferred upon it by Article 36, paragraph 1. When the question is seen from this angle, being that of the purpose underlying the obligation, i.e., to enable the national State to perform its consular function, one cannot ignore the facts that the Guinean authorities were indisputably aware of the situation and, more importantly, that, as they themselves admit, they were able to perform their consular function. Thus, the failure to inform could not have rendered Guinea unable to exercise its rights to afford consular protection to its national. In the light of all this, I could not subscribe to the majority's finding that the Democratic Republic of the Congo violated this provision of the Vienna Convention on Consular Relations. In any case, in all logic I voted in favour of the operative subparagraph of the Judgment concerning the reparation owed to Guinea by the Congo, while regretting that the Court has not provided helpful clarification of the judicially formulated principle that the injury — one exclusively non-pecuniary and non-material — found in respect of the claimed violation by the Respondent of the obligation under Article 36 (1) (b) of the Vienna Convention on Consular Relations — a violation which gave rise to no material injury — calls only for "declaratory", non-material, and non-pecuniary relief.

Finally, while agreeing with the Court's finding that the Democratic Republic of the Congo has not violated Mr. Diallo's direct rights as associé, I have considered it necessary to set out my reasoning, which differs from the majority's. The majority has confined itself to asserting that the Guinean national's expulsion did not breach his rights as associé "as such", yet it seems to me that it would have been helpful and legally correct to state that, beyond the interpretation of the facts, which may be open to criticism or challenge, there are legal principles justifying that conclusion. An associé's direct rights come into being, take effect and are exercised in regard to the operation of the company and in the relations between the company and its associés. As a result, they may be asserted, and are therefore operable, only against the company and it alone. Accordingly, a third

party's acts can violate these rights "as such" only if those acts amount to interference by the third party in the operation of the company or in its relations with its associés; thus, these acts, aimed as they, like the arrest, detention and expulsion, were exclusively at Mr. Diallo in his individual capacity, could not have infringed his rights as associé "as such".
