

Claims — Admissibility — Diplomatic protection — Local remedies — Claim by Guinea on behalf of Guinean national — Whether Guinea lacking standing — Whether remedies under Congolese law exhausted — Claim concerning arrest, detention and expulsion measures taken by Democratic Republic of Congo against Guinean citizen in 1995-6 — Additional claim concerning arrest and detention measures taken by Democratic Republic of Congo against Guinean citizen in 1988-9 — Whether additional claim implicit in or arising directly out of question which was subject matter of Application — Guinea claiming violation of Guinean citizen's rights by Democratic Republic of Congo — Claim as individual — Claim on behalf of company — Whether DRC violating its obligations under international treaties — Whether compensation due

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Consular relations — Treaties — Vienna Convention on Consular Relations, 1963, Article 36(1)(b) — Right to request consular assistance — Right to be informed without delay upon arrest of right to request consular assistance — Whether DRC violating Article 36(1)(b) of the Vienna Convention on Consular Relations, 1963 — Whether compensation due

Aliens — Alien lawfully in territory of Democratic Republic of Congo — Expulsion of alien — Whether DRC violating rights of alien in contravention of international agreements — International Covenant on Civil and Political Rights, 1966, Article 13 — African Charter on Human and Peoples' Rights, 1981, Article 14(4) — Whether decision to expel in accordance with Congolese law — Compatibility of Congolese law with Covenant and African Charter — Whether DRC violating international law obligations

Relationship of international law and municipal law — Treaties — International Covenant on Civil and Political Rights, 1966 — African Charter on Human and Peoples' Rights, 1981 — Arrest, detention and expulsion of alien lawfully in Democratic Republic of Congo — Whether DRC violating international treaties — Whether in accordance with Congolese law — Compatibility of Congolese law with Covenant and African Charter — International jurisprudence

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AHMADOU SADIO DIALLO

(REPUBLIC OF GUINEA *v.* DEMOCRATIC REPUBLIC OF THE CONGO)¹

International Court of Justice

Preliminary Objections. 24 May 2007

(Higgins, *President*; Al-Khasawneh, *Vice-President*; Ranjeva, Shi, Koroma, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Bennouna and Skotnikov, *Judges*; Mahiou and Mampuya, *Judges ad hoc*)

¹ At the preliminary objections phase, the Republic of Guinea was represented by Mr Mohamed Camara, as *Agent*; Professor Alain Pellet, as *Deputy Agent, Counsel and Advocate*; Professor Mathias Forteau and Mr Samuel Wordsworth, as *Counsel and Advocates*; Mr Daniel Müller and Mr Luke Vidal, as *Advisers*. The Democratic Republic of the Congo was represented by HE Mr Pierre Ilunga M'Bundu wa Biloba, Minister of Justice and Keeper of the Seals of the Democratic Republic of the Congo, as *Head of Delegation*; Ambassador Jacques Masangu-a-Mwanza, as *Agent*; Maître Tshibangu Kalala, as *Co-Agent, Counsel and Advocate*; Professor André Mazyambo Makengo Kisala, as *Counsel and Advocate*; Mr Yenyi Olungu, Mr Victor Musompo Kasongo, Mr Nsingi-zi-Mayemba, Mr Bamana Kalonji Jerry, Maître Kikangala Ngoie, Maître Kadima Mukadi and Maître Lulufwabo Tshimpangila, as *Research Assistants*; Ms Ngoya Tshibangu, as *Assistant*.

At the merits phase, the Republic of Guinea was represented by Colonel Siba Lohalamou, Minister of Justice and Keeper of the Seals, as *Head of Delegation*; Ms Djénabou Saïfon Diallo; Mr Mohamed Camara, as *Agent*; Professor Alain Pellet, as *Deputy Agent, Counsel and Advocate*; Professor Mathias Forteau, Mr Daniel Müller, Professor Jean-Marc Thouvenin, Mr Luke Vidal and Mr Samuel Wordsworth, as *Counsel and Advocates*; Ambassador Ahmed Tidiane Sakho, Mr Alfred Mathos, Mr Hassan II Diallo, Mr Ousmane Diao Balde, Mr André Saféla Leno and HE Mr Abdoulaye Sylla, as *Advisers*; and Mr Ahmadou Sadio Diallo. The Democratic Republic of the Congo was represented by Ambassador Henri Mova Sakanyi, as *Agent and Head of Delegation*; Professor Tshibangu Kalala, as *Co-Agent, Counsel and Advocate*; Professor Lwamba Katansi, Ms Corinne Clavé, Mr Kadima Mukadi, Mr Bukasa Kabeya, Mr Kikangala Ngoie, Mr Moma Kazimbwa Kalumba, Mr Tshimpangila Lulufuabo, Ms Mwenze Kisonga Pierrette and Mr Kalume Mbingo, as *Advisers*; Mr Mukendi Tshibangu, Ms Ali Feza and Mr Makaya Kiela, as *Assistants*.

At the compensation phase, for which there were no oral proceedings, the Republic of Guinea was represented by Mr Mohamed Camara, as *Agent*, and Mr Hassane II Diallo, as *Co-Agent*. The Democratic Republic of the Congo was represented by Ambassador Henri Mova Sakanyi, as *Agent*, and Professor Tshibangu Kalala, as *Co-Agent*.

Merits. 30 November 2010(Owada, *President*; Tomka, *Vice-President*; Al-Khasawneh, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf and Greenwood, *Judges*; Mahiou and Mampuya, *Judges ad hoc*)*Compensation.* 19 June 2012(Tomka, *President*; Sepúlveda-Amor, *Vice-President*; Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja and Sebutinde, *Judges*; Mahiou and Mampuya, *Judges ad hoc*)

SUMMARY:² *The facts*:—Mr Diallo, a Guinean citizen, settled in the Democratic Republic of the Congo (“the DRC”)³ in 1964. He founded two companies there in 1974 and 1978, Africom-Zaire, an import–export company, and then Africontainers-Zaire, which specialized in the containerized transport of goods (“the companies”). Both were *sociétés privées à responsabilité limitée* (private limited liability companies or “SPRLs”)⁴ incorporated under Congolese law.⁵ Mr Diallo was the *gérant* (manager) and *associé* (a shareholder) in the two SPRLs.⁶ Following ongoing disputes with their business partners towards the end of the 1980s, the two companies initiated steps, including judicial steps, to recover alleged debts acting through Mr Diallo, their *gérant* (manager).

On 31 October 1995 the Prime Minister of Zaire issued an expulsion Order against Mr Diallo on the ground that his presence and conduct threatened public order in Zaire, especially in the economic, financial and monetary areas. On 5 November 1995 he was arrested and detained and on 10 January 1996 he was released. He was arrested for a second time on 25 January 1996. On 31 January 1996 Mr Diallo was deported from Zaire and returned to Guinea by air, having been served with a notice of refusal of entry (*refoulement*) into Zaire on account of unauthorized residence on that same day. The Parties disagreed on the facts concerning Mr Diallo’s situation

² Prepared by Ms Karen Lee, Co-Editor.

³ The DRC was called Congo between 1960 and 1971 and Zaire between 1971 and 1997.

⁴ SPRLs were companies formed by persons whose liability was limited to their capital contributions. They were not publicly held companies. Their *parts sociales* (shares), which were required to be uniform and in registered form, were not freely transferable.

⁵ Article 1 of the Decree of 27 February 1887 on commercial corporations stated that: “commercial corporations recognized by law in accordance with this Decree shall constitute legal persons having personality distinct from that of their members.”

⁶ Under Congolese law, the *gérant* was an organ of the SPRL acting on its behalf and an *associé* held *parts sociales* or shares in its capital that were not transferable.

between 5 November 1995, when he was first arrested, and his release on 10 January 1996, and also on his situation from 10 January 1996 until his actual expulsion on 31 January 1996.⁷ At the time of Mr Diallo's arrest and detention, the Legislative Order of 12 September 1983 ("the Legislative Order") concerning immigration control was in force in the DRC.

In its Application⁸ the Republic of Guinea ("Guinea") instituted proceedings against the DRC in respect of disputes between Africom-Zaire and Africontainers-Zaire, on the one hand, and their private and public business partners, on the other. It claimed that the DRC was liable for the debts owed to the companies and to Mr Diallo for which it sought payment.

Guinea also sought to exercise its diplomatic protection on behalf of Mr Diallo, its national, for the violation of his rights, which allegedly arose from his arrest, detention and expulsion and constituted an internationally wrongful act by the DRC giving rise to its responsibility. It sought protection with respect to three categories of rights: Mr Diallo's individual personal rights, his direct rights as *associé* in the companies, and his rights as a shareholder of companies which were victims of wrongful acts committed by the DRC under whose law they were incorporated (i.e. rights of the companies by "substitution"). Guinea sought a finding that the DRC was guilty of serious violations of international law committed upon Mr Diallo's person and reparation in the form of compensation for the injury suffered by Guinea in the person of its national.

Judgment on Preliminary Objections (24 May 2007)

While accepting that the Court had jurisdiction under the declarations made by the Parties under Article 36(2) of the Statute, the DRC raised two preliminary objections to the admissibility of Guinea's Application. It claimed that Guinea lacked standing since the rights it sought to protect belonged to Congolese companies rather than to its national, Mr Diallo. It also maintained that neither the companies nor Mr Diallo had exhausted local remedies available in the Congolese legal system to obtain reparation for the injuries claimed by Guinea.

Held:—Guinea's Application was admissible in so far as it concerned protection of Mr Diallo's rights as an individual and his direct rights as *associé* in the companies, but inadmissible in so far as it concerned the rights of the companies themselves.

A. Rights as an individual

(1) (unanimously) Guinea's Application was admissible in so far as it concerned protection of Mr Diallo's rights as an individual. The DRC's

⁷ See paras. 51-2 of the Judgment on the Merits for further details.

⁸ Further details of the two-part Application can be found at paras. 1 and 10 of the Judgment on Preliminary Objections and paras. 1 and 12 of the Judgment on the Merits.

preliminary objection to admissibility on account of non-exhaustion by Mr Diallo of local remedies was rejected.

(a) Under customary international law, as reflected in Article 1 of the International Law Commission's ("ILC's") draft Articles on Diplomatic Protection, diplomatic protection consisted of the invocation by a State of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that was a national of the former State. International law had developed in respect of rights accorded to individuals; the scope *ratione materiae* of diplomatic protection had broadened from alleged violations of the minimum standard of treatment of aliens to include internationally guaranteed human rights (para. 39).

(b) Guinea had met the requirements for the exercise of diplomatic protection. Mr Diallo's Guinean nationality, held solely and continuously from the date of the alleged injury until the initiation of proceedings, was undisputed. The DRC had not proved that available and effective remedies existed in its legal system to allow Mr Diallo to challenge his expulsion. His expulsion was characterized by Congolese authorities as a "refusal of entry", which was not appealable under Congolese law. Neither had the DRC shown that there was redress for a case of expulsion (paras. 40-7).

(c) The DRC's objection to admissibility based on the failure to exhaust local remedies could not be upheld in respect of Mr Diallo's expulsion (para. 48).

B. Direct rights as associé in the companies

(2) (by fourteen votes to one, Judge ad hoc Mampuya dissenting) Guinea's Application was admissible in so far as it concerned protection of Mr Diallo's direct rights as *associé* in the companies.

(a) (unanimously) The DRC's preliminary objection to admissibility for lack of standing by Guinea to exercise diplomatic protection was rejected in so far as it concerned protection of Mr Diallo's rights as *associé* in the companies.

(i) In international law, it was important to determine whether a legal entity had a legal personality independent of its members. Conferring independent corporate personality on a company implied granting it rights over its own property, rights which it alone was capable of protecting. Thus, only the State of nationality could exercise diplomatic protection on behalf of the company when its rights were injured by the wrongful act of another State. Relevant domestic law determined whether a company possessed independent and separate legal personality (paras. 59-61).

(ii) Congolese law accorded an SPRL independent legal personality distinct from that of its *associés*. The property of the *associés* was completely

separate from that of the company. The *associés* were responsible for the company's debts only to the extent of the resources they had subscribed. Consequently the company's debts receivable from and owing to third parties related to its respective rights and obligations. The fundamental rule, for an SPRL or public limited company, was that the shareholder had no right to corporate assets so long as the company was in existence (para. 63).

(iii) Under international law the State of nationality had the right to exercise its diplomatic protection in favour of *associés* or shareholders when there was an injury to their direct rights. The exercise by a State of diplomatic protection on behalf of a natural or legal person having its nationality, who was *associé* or shareholder, was ultimately diplomatic protection of a natural or legal person as defined by Article 1 of the ILC's draft Articles. The internationally wrongful act was the violation by the respondent State of an *associé's* direct rights in relation to a legal person; those direct rights were defined by the domestic law of that State, as both Parties accepted. Diplomatic protection of the direct rights of *associés* of an SPRL was no exception to the general legal regime derived from customary international law (para. 64).

(iv) Guinea thus had standing since its action involved a person of its nationality, Mr Diallo, and was directed against the allegedly unlawful acts of the DRC said to infringe his rights, particularly his direct rights as *associé* of the two companies (para. 65).

(b) (by fourteen votes to one, Judge ad hoc Mampuya dissenting) The DRC's preliminary objection to admissibility on account of non-exhaustion by Mr Diallo of local remedies was rejected in so far as it concerned protection of Mr Diallo's direct rights as *associé* in the companies.

(i) The alleged violation of Mr Diallo's direct rights as *associé* was dealt with by Guinea as a direct consequence of his expulsion and there had already been a finding that the DRC had not proved that there were effective Congolese remedies against his expulsion Order (paras. 68-73).

(ii) No other arguments concerning remedies in respect of Mr Diallo's direct rights as *associé* had been advanced (paras. 74-5).

C. *Rights of the companies*

(3) (by fourteen votes to one, Judge ad hoc Mahiou dissenting) Guinea's Application was inadmissible in so far as it concerned protection of Mr Diallo in respect of alleged violations of rights of the companies. The DRC's preliminary objection to admissibility for lack of standing by Guinea to exercise diplomatic protection was upheld in so far as it concerned protection of Mr Diallo in respect of alleged violation of rights of the companies.

(a) As regards diplomatic protection, an act directed against and infringing only the company's rights did not involve responsibility towards the shareholders, even if their interests were affected (paras. 77-87).

(b) The Court had not yet ruled on whether, in international law, there was an exception to the general rule that the right of diplomatic protection of a company belonged to its national State, which allowed for protection of the shareholders by their own national State “by substitution” and the reach of any exception (para. 87).

(c) In contemporary international law, the protection of company and shareholder rights, and the settlement of associated disputes, was governed primarily by bilateral or multilateral agreements for the protection of foreign investments, such as the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965 (para. 88).

(d) State practice and international decisions did not reveal an exception in customary international law allowing for protection by substitution, so as to offer protection to the foreign shareholders of a company who could not rely on an international treaty or any other remedy (paras. 89-90).

(e) The two companies had not been required to incorporate in the DRC as a precondition for doing business there so did not fall within the scope of protection by substitution in the sense of Article 11(b) of the ILC draft Articles on Diplomatic Protection (paras. 91-3).

(f) Guinea could not exercise diplomatic protection by substitution. The normal rule of the nationality of the claims governed the question of the diplomatic protection of the companies, which had Congolese nationality (para. 94).

(g) Given the finding on Guinea’s lack of standing, there was no need to consider the DRC’s objection based on the non-exhaustion of local remedies (para. 95).

Declaration of Judge ad hoc Mahiou: (1) The legal and factual situation meant that the case fell within the scope of Article 11(b) of the ILC draft Articles on Diplomatic Protection. It was questionable to conclude that the choice of Congolese nationality was a free one and legitimate for the right to diplomatic protection to be exercised if prejudicial measures were taken by the State against a company having its nationality (paras. 1-10).

(2) The case could also fall within the scope of Article 11(a) of the ILC draft Articles on Diplomatic Protection since one of the two companies, Africom-Zaire, had now been struck off the commercial register by the Congolese authorities. Guinea was not to be prevented from raising the problem at the merits stage. If the disappearance of Africom-Zaire was confirmed, its sole shareholder would be deprived of any remedy should diplomatic protection by Guinea be refused. The Court ought to have stated more clearly and precisely that it reserved the situation which might result from the confirmation of Africom-Zaire’s disappearance (paras. 11-13).

Separate Opinion of Judge ad hoc Mampuya: (1) As regards the protection of the direct rights of a Guinean national as *associé*, Guinea’s Application did not

state the nature of its claim with the degree of precision and clarity requisite for the administration of justice. The admissibility of Guinea's Application was at least problematic on grounds of *obscuri libelli* if not lack of standing (paras. 1-23).

(2) By upholding the direct rights of Mr Diallo as an object of the Application, the Court was admitting quite new private claims, not known to the Congolese authorities (paras. 24-41).

(3) The DRC's preliminary objection that domestic remedies concerning direct rights as *associé* had not been exhausted should have been upheld. It could not be assumed that there were no remedies against the alleged infringement of direct rights as *associé* because the DRC had not shown that remedies against the expulsion Order existed (paras. 42-9).

Judgment on the Merits (30 November 2010)

Guinea maintained that it was entitled to exercise diplomatic protection of its national in relation to the arrest and detention measures taken in 1988-9 by DRC authorities in violation of international law as well as in relation to their arrest, detention and expulsion measures in 1995-6. With respect to the measures taken by the DRC in 1995-6 Guinea maintained that the expulsion of Mr Diallo breached Article 13 of the International Covenant on Civil and Political Rights, 1966 ("the Covenant")⁹ and Article 12(4) of the African Charter on Human and Peoples' Rights, 1981 ("the African Charter").¹⁰ Guinea also asserted that Mr Diallo's arrest and detention violated Article 9 (1) and (2) of the Covenant¹¹ and Article 6 of the African Charter.¹² It argued that Mr Diallo was mistreated during his detention in violation of Article 10(1) of the Covenant¹³ and that the DRC had violated Article 36(1) (b) of the Vienna Convention on Consular Relations, 1963¹⁴ in not informing Mr Diallo without delay upon his arrests of his right to request consular assistance.

The DRC asserted that the claim relating to the 1988-9 measures was inadmissible since it was presented belatedly or, alternatively, due to failure to exhaust local remedies or, otherwise, rejected on the merits. The DRC

⁹ Guinea and the DRC became parties to the Covenant on 24 April 1978 and 1 February 1977 respectively. For the text of Article 13, see para. 64 of the Judgment on the Merits.

¹⁰ The African Charter entered into force for Guinea on 21 October 1986 and for the DRC on 28 October 1987. For the text of Article 12(4), see para. 64 of the Judgment on the Merits.

¹¹ For the text of Article 9(1) and (2) of the Covenant, see para. 75 of the Judgment on the Merits.

¹² For the text of Article 6 of the African Charter, see para. 75 of the Judgment on the Merits.

¹³ For the text of Article 10(1) of the Covenant, see para. 87 of the Judgment on the Merits.

¹⁴ The Vienna Convention on Consular Relations, 1963 entered into force for Guinea on 30 July 1988 and for the DRC on 14 August 1976. For the text of its Article 36(1)(b), see para. 90 of the Judgment on the Merits.

denied that its treatment of Mr Diallo in 1995-6 breached its international law obligations.

With respect to Mr Diallo's direct rights as *associé*, Guinea claimed that the DRC had committed several international wrongful acts which engaged its responsibility.¹⁵ These claims pertained to the right to participate and vote in general meetings, the right to appoint a *gérant* and the right to oversee and monitor the management of the companies. Guinea also presented a claim relating to the right to property concerning Mr Diallo's *parts sociales* in the companies. The DRC denied committing any internationally wrongful acts towards Guinea in this respect.

In addition to any judicial finding, Guinea sought compensation for the injury suffered by Mr Diallo on account of the international law obligations breached by the DRC.

Held:—The DRC had violated Articles 9(1), 9(2) and 13 of the Covenant and Articles 6 and 12(4) of the African Charter in respect of the circumstances in which Mr Diallo was arrested and detained in 1995-6, and in which he was expelled. The DRC had also violated Article 36(1)(b) of the Vienna Convention on Consular Relations, 1963 by not informing Mr Diallo without delay of his rights upon that detention. However, the DRC had not violated Mr Diallo's direct rights as *associé* in his companies. The DRC was obliged to compensate Guinea for its violations of the Covenant and African Charter.

A. Rights as an Individual

(1) (by eight votes to six, Judges Al-Khasawneh, Simma, Bennouna, Cançado Trindade, Yusuf and Judge ad hoc Mahiou dissenting) Guinea's claim concerning the arrest and detention of Mr Diallo in 1988-9 was inadmissible.

(a) Guinea's claim in respect of events in 1988-9 was introduced into the proceedings in its Reply, filed on 19 November 2008, after the judgment on preliminary objections. It detailed the circumstances surrounding Mr Diallo's arrest and detention, included them as wrongful acts for which Guinea was seeking to hold the DRC internationally responsible and indicated the treaty-based international obligations it considered that the DRC had breached (paras. 27-34).

(b) The DRC could object to the lateness of Guinea's additional claim since it had not been introduced until after delivery of the judgment on preliminary objections (para. 35).

(c) According to Article 40(1) of the Statute of the Court and Articles 38(2) and 49(1) of the Rules, additional claims were inadmissible

¹⁵ For details of Guinea's final submissions in this respect, see para. 101 of the Judgment on the Merits.