

**SPEECH BY H.E. JUDGE ROSALYN HIGGINS,
PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE,**

AT THE 59TH SESSION OF THE INTERNATIONAL LAW COMMISSION

10 July 2007

Mr. Chairman,

Ladies and Gentlemen,

Friends and Colleagues,

I am delighted to address the International Law Commission on the occasion of its Fifty-ninth Session. I congratulate the members elected to the Commission at the end of last year and the newly elected officers, including the Chairman, Mr. Ian Brownlie.

For a decade now the International Law Commission has invited the President of the International Court of Justice to come to Geneva to address the plenary meeting and engage in an exchange of views with the Commission. The Court greatly appreciates these exchanges between our two institutions and I am happy to be among you for a second time.

Today, I will report on the judgments rendered by the International Court over the past year and, as last year, I will draw special attention to aspects that have a particular relevance for the work of the ILC.

This year we have thus far rendered three decisions: an Order regarding provisional measures, a Judgment on the merits (with some jurisdictional issues) and a Judgment on preliminary objections. These three cases have involved States from Latin America, Europe and Africa and the subject-matter has ranged from environmental matters to genocide to diplomatic protection of shareholders. If we needed any evidence that the topics that the ILC examines are of the highest relevance for the Court, it is found in the fact that in every one of these cases the parties relied upon — and the Court carefully considered — the work of the ILC.

I begin with the request for provisional measures in the case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*. As you will remember, shortly before I addressed you last year the Court had handed down its Order for the indication of provisional measures in the same case. At that time, Argentina had initiated proceedings against Uruguay regarding alleged

violations of the 1975 Statute of the River Uruguay, arguing that Uruguay had not respected the procedures under the Statute when authorizing the construction of two pulp mills, and that the construction and the commissioning of these mills would damage the environment. In its Order of 13 July 2006, the Court found that the circumstances of the case, as they presented themselves to the Court at that moment, were not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures.

This time it was Uruguay that submitted a request to the Court for the indication of provisional measures — the first time in 61 years that a *Respondent* has asked the Court for provisional measures. Uruguay argued that since 20 November 2006 organized groups of Argentine citizens had blockaded bridges leading to Uruguay, that this action was causing it enormous economic damage and that Argentina had taken no steps to put an end to the blockade. It asked the Court to order Argentina to take “all reasonable and appropriate steps . . . to prevent or end the interruption of transit between Uruguay and Argentina, including the blockading of bridges and roads between the two States”; to “abstain from any measure that might aggravate, extend or make more difficult the settlement of this dispute; and finally to abstain “from any other measure that might prejudice the rights of Uruguay in dispute before the Court”. By this time, the owner of one of the two planned pulp mills had decided to move the mill out of the River Uruguay area.

As regards the first provisional measure requested, the Court found that, notwithstanding the blockades, the construction of the Botnia pulp mill had progressed significantly since the summer of 2006 and that work was continuing. It was not convinced that the blockades met the test for ordering provisional measures, namely that they represented an imminent risk of irreparable prejudice to the rights of Uruguay in the dispute before it.

With respect to the other two provisional measures sought by Uruguay, the Court recalled that, although it had on several occasions in past cases indicated provisional measures directing parties not to aggravate the dispute, it had never done this where the measure had not been ancillary to other provisional measures. The Court therefore restricted itself to reiterating its call to the Parties made in its earlier Order “to fulfil their obligations under international law”, “to implement in good faith the consultation and co-operation procedures provided for by the 1975 Statute”, and

“to refrain from any actions which might render more difficult the resolution of the present dispute”.

During the proceedings Uruguay argued that the blockades by Argentinean citizens could not be justified as countermeasures taken in response to the alleged violations of the 1975 Statute. Referring to the ILC’s Articles on State Responsibility, counsel for Uruguay argued that the present dispute fell squarely within the terms of Article 52, paragraph 3, the commentary to which explains: “Where a third party procedure exists and has been invoked by either party to the dispute, the requirements of that procedure, e.g. as to interim measures of protection, should substitute as far as possible for countermeasures.”¹ In Uruguay’s view, if countermeasures were not justifiable where the responsible party was complying with a provisional measures order, then it follows *a fortiori* that they cannot be justifiable when the indication of provisional measures have been refused by the Court and where the responsible party (Uruguay) was pursuing dispute settlement procedures in good faith. In the event, Argentina did not claim to be taking countermeasures and the Court did not have to resolve this question.

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One month after the *Argentina v. Uruguay* Order, the Court delivered its Judgment in the first legal case in which allegations of genocide had been made by one State against another: the *Bosnia and Herzegovina v. Serbia and Montenegro* case. The Court was acutely sensitive to its responsibilities and, as it always does, meticulously applied the law to each and every one of the issues before it.

I cannot today recount all the legal and factual findings of the Court contained in the 171-page Judgment, even in summary form. I will focus on the aspects of the case that I think are of particular interest, including those parts of the reasoning that have direct relevance to the work of the ILC.

As you know, this was an extremely fact-intensive case: the hearings lasted for two and a half months, witnesses were examined and cross-examined, and thousands of pages of

¹J. Crawford, ed., *The ILC’s Articles on State Responsibility*, Cambridge 2002, p. 298. See also CR 2006/54, p 53 (Boyle).

documentary evidence were submitted. A substantial portion of the Judgment is devoted to analysing this evidence and making detailed findings as to whether alleged atrocities occurred and, if so, whether there was the specific intent on the part of the perpetrators to destroy in whole or in part the protected group, identified by the Court as the Bosnian Muslims. Given the exceptional gravity of the crime of genocide, the Court required that the allegations be proved by evidence that is “fully conclusive”. We made our own determinations of fact based on the evidence before us, but we also greatly benefited from the findings of fact that had been made by the International Criminal Tribunal for the former Yugoslavia when it was dealing with accused individuals. The Court termed the working methods of the ICTY as rigorous and open, allowing it to treat ICTY findings of fact as “highly persuasive”.

The Court carefully worked through each element of the definition of genocide in Article II of the Convention. With regard to the definition of the protected group, we shared the view of the ILC in its Commentary to its Articles in the draft Code of Crimes Against the Peace and Security of Mankind that the intent must be to destroy “at least a substantial part of the particular group”². As for the question whether the deliberate destruction of the historical, cultural and religious heritage of the protected group could constitute “the deliberate infliction of conditions of life calculated to bring about the physical destruction of the group”, the Court agreed with the Report of the ILC on the work of its Forth-eighth Session that the preparatory work of the Genocide Convention clearly showed that the definition of genocide is limited to the physical or biological destruction of the group³. Consequently, the Court found that the attacks on the cultural and religious property of the Bosnian Muslims could not be considered a genocidal act within the meaning of Article II of the Convention.

The Applicant had argued that the specific intent could be inferred from the pattern of atrocities. The Court could not accept this. The specific intent had to be convincingly shown by reference to particular circumstances; a pattern of conduct would only be accepted as evidence of its existence if genocide was the *only* possible explanation for the conduct concerned.

²*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment*, para. 198.

³*Ibid.*, para. 344.

The Court made 45 pages of findings of fact on various atrocities, and while it had jurisdiction only to make determinations as to genocide, it was clear that it saw these as crimes against humanity. In many cases, Bosnian Muslims were the victims of these acts. However, with one exception, the evidence did not show that these terrible acts were accompanied by the specific intent to destroy the group. The exception was Srebrenica where the Court found that there was conclusive evidence that killings and acts causing serious bodily or mental harm targeting the Bosnian Muslims took place in July 1995. These acts were directed by the Main Staff of the VRS (the army of the Republika Srpska) who possessed the specific intent required for genocide. This finding was consistent with the jurisprudence of the ICTY — at least until the present time.

Having determined that genocide was committed at Srebrenica, the next step was for the Court to decide whether the Respondent was legally responsible for the acts of the VRS. This question had two aspects, which the Court considered separately. First, the Court had to ascertain whether the acts committed at Srebrenica were perpetrated by organs of the Respondent, i.e., by persons or entities whose conduct is necessarily attributable to it, because they are in fact the instruments of its action. If that question was answered in the negative, the Court had then to decide whether the acts in question were committed by persons who, while not organs of the Respondent, did nevertheless act on the instructions of, or under the direction or control of, the Respondent. The ILC's Articles on State Responsibility were central to the Court's reasoning.

With regard to the question of attribution on the basis of the conduct of the Respondent's organs, the Court noted that the rule, which was one a customary international law, was reflected in Article 4 of the ILC Articles. Applying the rule to the present case, the Court had to determine whether the acts of genocide committed in Srebrenica were perpetrated by "persons or entities" having the status of organs of the Federal Republic of Yugoslavia (as the Respondent was known at the time) under its internal law, as then in force. Although there was much evidence of direct or indirect participation by the official army of the FRY, along with the Bosnian Serb armed forces, in military operations in Bosnia and Herzegovina in the years prior to the events at Srebrenica, the Court found that it had not been proved before it that the FRY army took part in the massacres at Srebrenica, nor that the political leaders of the FRY had a hand in preparing, planning or in any way carrying out the massacres. Further, neither the Republika Srpska, nor the VRS were *de jure*

organs of the FRY, since none of them had the status of organ of that State under its internal law. There was no doubt that the FRY was providing substantial support to the Republika Srpska, and that one of the forms that support took was payment of salaries and other benefits to some officers of the VRS, but the Court considered that this did not automatically make them organs of the FRY.

The issue also arose as to whether the Respondent might bear responsibility for the acts of the paramilitary militia known as the “Scorpions” in the Srebrenica area. Judging on the basis of materials submitted to it, the Court was unable to find that the “Scorpions” — referred to as “a unit of Ministry of Interiors of Serbia” in those documents — were, in mid-1995, *de jure* organs of the Respondent. The Court further noted that in any event the act of an organ placed by a State at the disposal of another public authority shall not be considered an act of that State if the organ was acting on behalf of the public authority at whose disposal it had been placed (which finding recalls the language of Article 6 of the ILC Articles).

The Applicant raised an argument that required the Court to go beyond Article 4 of the ILC Articles. The Applicant submitted that that the Republika Srpska, the VRS and the “Scorpions” must be deemed, notwithstanding their apparent status, to have been *de facto* organs of the FRY at the relevant time and that all their acts in connection with Srebrenica were thus attributable to the FRY just as if they had been organs of that State under the internal law. The Court had in fact addressed this question in its 1986 Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua* case, where it held that persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in “complete dependence” on the State, of which they are ultimately merely the instrument. In the *Bosnia* case, the Court found that while the political, military and logistical relations between the federal authorities in Belgrade and the authorities in Pale, and between the Yugoslav army and the VRS, had been strong and close in previous years, they were, at least at the relevant time, not such that the Bosnian Serbs’ political and military organizations should be equated with organs of the FRY. There were some differences over strategic options at the time

that provide evidence that the Bosnian Serb leaders had some qualified, but real, margin of independence⁴.

The Court therefore found that the acts of genocide at Srebrenica could not be attributed to the Respondent as having been committed by its organs or by persons or entities wholly dependent upon it.

The Court then had to address the second question of attribution of the genocide at Srebrenica to the Respondent on the basis of direction or control. On this subject the applicable rule, which was also one of customary law, was laid down in Article 8 of the ILC Articles on Statute Responsibility:

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

This provision had to be understood in the light of the Court's jurisprudence on the subject, particularly that of the 1986 *Nicaragua* Judgment, which set out the test of showing that "effective control" was exercised, or that the State's instructions were given in respect of each operation in which the alleged violations occurred, and not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations. The Applicant questioned the validity of applying this test by, *inter alia*, drawing attention to the Judgment of the ICTY Appeals Chamber in the 1999 *Tadic* Judgment. In that case, as you know, the Appeals Chamber did not follow the *Nicaragua* test and instead took the view that acts committed by Bosnian Serbs could give rise to international responsibility of the FRY on the basis of the "overall control" exercised by the FRY over the Republika Srpska and the VRS, without there being any need to prove that each operation during which acts were committed in breach of international law was carried out on the FRY's instructions, or under its effective control.

Let me step back from the details of the law of State responsibility to reflect for a moment on a topic on which the ILC has recently been occupied: the fragmentation of international law. The Study Group, chaired by Professor Koskenniemi, completed its work last session, and in its Final

⁴*Ibid.*, para. 394.

Report it used the contrast between *Nicaragua* and *Tadic* as an example of a “normative conflict between an earlier and a later interpretation of a rule of general international law”⁵. It states that such conflicts create two types of problem: first, they diminish legal security because legal subjects are no longer able to predict the reaction of official institutions to their behaviour and to plan their activity accordingly; and second, they put legal subjects in an unequal position vis-à-vis each other⁶.

Perhaps the Court’s handling of the *Nicaragua-Tadic* issue in its Judgment will assuage the concerns of those who see a normative conflict between the ICJ and the ICTY. The Court gave careful, and respectful, consideration to the Appeals Chamber’s reasoning, but ultimately decided to follow the *Nicaragua* test. The reasoning was meticulously laid out. First, the Court observed that the ICTY was not called upon in the *Tadić* case, nor is it in general called upon, to rule on questions of State responsibility, since its jurisdiction is criminal and extends over persons only. Thus, in that Judgment the Tribunal addressed an issue which was not indispensable for the exercise of its jurisdiction.

Second, in so far as the “overall control” test is employed to determine whether or not an armed conflict is international — which was the sole question which the ICTY Appeals Chamber was called upon to decide — it may well be that the test is applicable and suitable; the ICJ did not think it appropriate to take a position on that point in the *Bosnia* case, as it was not a question before it.

Third, the Court observed that logic does not require the same test to be adopted in resolving the two issues, which are very different in nature: the degree and nature of a State’s involvement in an armed conflict on another State’s territory which is required for the conflict to be characterized as international, can very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State’s responsibility for a specific act committed in the course of the conflict.

Finally, the Court noted that the “overall control” test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of

⁵United Nations doc. A/CN.4/L.682, p. 32.

⁶*Ibid.*

international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf. In this regard the “overall control” test is unsuitable, for it stretches too far the connection which must exist between the conduct of a State’s organs and its international responsibility.

At the same time as deciding to follow its settled jurisprudence on the test of “effective control” — which is also the position of the ILC in its commentary⁷ to Article 8 — the Court emphasized that it attached the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it and had taken fullest account of the ICTY’s trial and appellate judgments dealing with the events underlying the dispute.

Turning back to the findings on responsibility, the Court held that there was insufficient proof that instructions were issued by the federal authorities in Belgrade, or by any other organ of the FRY, to commit the massacres in Srebrenica, still less that any such instructions were given with specific genocidal intent. Some of the evidence on which the Applicant relied related to the influence, rather than the effective control, that President Milošević had or did not have over the authorities in Pale. It did not establish a factual basis for attributing responsibility on the basis of direction or control.

The Court then came to the question of the Respondent’s responsibility on the ground of the ancillary acts enumerated in Article III of the Genocide Convention, including complicity. The Court referred to Article 16 of the ILC’s Articles, reflecting a customary rule, which provides

“A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) The act would be internationally wrongful if committed by that State.”

This provision concerns a situation characterized by a relationship between two States, which was not the precise situation before the Court. Nonetheless, the Court thought it merited consideration. We found no reason to make any distinction of substance between “complicity in genocide”, within the meaning of Article III (e), of the Convention, and the “aid or assistance” of a

⁷International Law Commission, 2001. *Report of the International Law Commission*. United Nations, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10*, United Nations doc. A/56/10, pp. 104-105.

State within the meaning of Article 16 of the ILC Articles. In other words, to ascertain whether the Respondent is responsible for “complicity in genocide”, it had to examine whether organs of the respondent State, or persons acting on its instructions or under its direction or effective control, furnished “aid or assistance” in the commission of the genocide in Srebrenica. The Court found that it was proven that the Respondent supplied quite substantial aid of a political, military and financial nature to the Republika Srpska and the VRS, long before the tragic events of Srebrenica, and the aid continued during those events. But a crucial condition for complicity was not fulfilled. The Court felt that it lacked conclusive proof that the Respondent’s authorities, when providing this aid, were fully aware that the VRS had the specific intent characterizing genocide.

The Court proceeded to consider the duty to prevent genocide enshrined in Article I of the Genocide Convention. The Court held that the Respondent could, and should, have acted to prevent the genocide, but did not. The Respondent did nothing to prevent the Srebrenica massacres despite the political, military and financial links between its authorities and the Republika Srpska and the VRS. It therefore violated the obligation in the Genocide Convention to prevent genocide. In this regard, the Court made a clear distinction in law between complicity in genocide and the breach of the duty to prevent genocide. The Court did find it conclusively proven that the FRY leadership, and President Milošević above all, *were* fully aware of the climate of deep-seated hatred which reigned between the Bosnian Serbs and the Muslims in the Srebrenica region, and that massacres there were likely to occur. They may not have had knowledge of the specific intent to commit genocide, but it must have been clear that there was a *serious risk of genocide* in Srebrenica. Moreover, the legal issue was not whether, had the Respondent made use of the strong links it had with the Republika Srpska and the VRS, the genocide would have been averted. The Court referred to Article 14, paragraph 3, of the ILC Articles, a general rule of the law of State responsibility, which provides that

“The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.”

This obviously does not mean that the obligation to prevent genocide only comes into being when perpetration of genocide commences; that would be absurd, since the whole point of the obligation is to prevent, or attempt to prevent, the occurrence of the act. A State’s obligation to prevent, and

the corresponding duty to act, arises at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed, which it could contribute to preventing. But if the genocide is not ultimately carried out, then a State that omitted to act when it could have done so cannot be held responsible *a posteriori*, since the event did not happen which must occur for there to be a violation of the obligation to prevent.

The final obligation the Court considered was duty to punish genocide. The Court held that the Respondent had violated its obligation to punish the perpetrators of genocide, including by failing to co-operate fully with the ICTY with respect to the handing over for trial of General Ratko Mladić.

What the Court sought to do in its Judgment in the *Bosnia* case was not only to answer the claims before it, but also systematically to elaborate and explain each and every element in the Convention, believing this latter task is also a necessary contribution to clarity and understanding. I may add that we regard as extremely important, for the future, what we have had to say about the bases of State responsibility for genocide and the precise circumstances in which the duty of a State to prevent genocide in another State's territory may arise, and the scope of that duty.

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Six weeks ago the Court delivered its Judgment on preliminary objections in the *Ahmadou Sadio Diallo* case between Guinea and the DRC, which concerned the diplomatic protection of nationals residing abroad— a classical case, perhaps, in the Western context, but somewhat unusual as an intra-African case. Mr. Diallo, a Guinean citizen, resided in the DRC for 32 years, founding two companies: an import-export company and a company specializing in the containerized transport of goods. Each company was a *société privée à responsabilité limitée* (private limited liability company) of which Mr. Diallo was the *gérant* (manager) and, in the end, the sole *associé*. Towards the end of the 1980s, the two companies, acting through their *gérant*, initiated various steps, including judicial ones, in an attempt to recover alleged debts from the State and publicly and privately owned companies. On 31 October 1995 the Prime Minister of Zaire (as it then was) issued an expulsion Order against Mr. Diallo and on 31 January 1996 he was deported

to Guinea. The deportation was served on Mr. Diallo in the form of a notice of refusal of entry (*refoulement*) on account of “illegal residence” (*séjour irrégulier*).

Since only States may be parties to cases before the International Court, Mr. Diallo’s case came to us by virtue of Guinea seeking to exercise diplomatic protection of Mr. Diallo’s rights. The Court recalled that under customary international law, as reflected in Article 1 of the ILC’s draft Articles on Diplomatic Protection:

“diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, 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 is a national of the former State with a view to the implementation of such responsibility”.

The Court further observed that:

“owing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, the scope *ratione materiae* of diplomatic protection, originally limited to alleged violations of the minimum standard of treatment of aliens, has subsequently widened to include, *inter alia*, internationally guaranteed human rights”.

The DRC challenged the Court’s jurisdiction on two bases: first, that Guinea lacked standing because the rights belonged to the two Congolese companies, not to Mr. Diallo; and second, that neither Mr. Diallo nor the companies have exhausted local remedies. The Court examined whether Guinea had met the requirements for the exercise of diplomatic protection under customary international law in terms of three categories of rights: Mr. Diallo’s individual personal rights, his direct rights as *associé* in the two companies and the rights of those companies, by “substitution”.

In terms of Mr. Diallo’s individual personal rights, the central issue was that of his expulsion and whether local remedies had been exhausted. I note that in 2004 the ILC included the topic of “The expulsion of aliens” in its programme of work and that the second and third reports of Special Rapporteur Mr. Maurice Kamto are being considered this session. As the Third Report states, the right to expulsion is not absolute and must be exercised in accordance with the fundamental rules of international law. It further observes that a study of national and international treaty practice and case law reveals several general principles that are applicable to the expulsion of aliens, including

“the principle of non-discrimination, the principle of respect for the fundamental rights of the expelled person, the principle of prohibition of arbitrary expulsion, the duty to inform and the duty of the expelling State to respect its own law . . . and the procedure prescribed by the law in force”.⁸

Such principles were indeed the backdrop to the Court’s consideration of whether local remedies had in the *Diallo* case been exhausted, or needed to be exhausted, when the expulsion was characterized by the Government as a “refusal of entry” when it was carried out. Refusals of entry are not appealable under Congolese law. The DRC contended that the immigration authorities had “inadvertently” used the term “refusal of entry” instead of “expulsion”, an error which was not intended to deprive Mr. Diallo of a remedy. (Under Congolese law, an expulsion is subject to appeal.) The Court decided that the DRC could not rely on such an error to claim that Mr. Diallo should have treated the measure taken against him as an expulsion. Incidentally, the Special Rapporteur’s Second Report on the expulsion of aliens observes that “no real terminological distinction can be drawn among the three terms ‘expulsion’, ‘reconduction to the frontier’ and ‘refoulement’”⁹. It may be that that depends upon particular circumstances . . .

The DRC maintained that even if the expulsion was treated as a “refusal of entry”, Mr. Diallo could have asked the competent authorities to reconsider their position and that such a request “would have had a good chance of success”. As the Commentary to Article 14 of the ILC’s draft Articles on Diplomatic Protection states, such administrative remedies could only be taken into consideration for purposes of the local remedies rule if they were aimed at vindicating a right and not at obtaining a favour, unless they constituted an essential prerequisite for the admissibility of subsequent contentious proceedings. That was not the situation in the present case and the Court found that Guinea could seek to protect Mr. Diallo’s individual personal rights.

With respect to the second category of rights — Mr. Diallo’s direct rights as *associé* in the two Congolese companies — Guinea referred to the *Barcelona Traction* case and Article 12 of the ILC’s draft Articles on Diplomatic Protection, which provides that:

“To the extent that an internationally wrongful act of a State causes direct injury to the rights of shareholders as such, as distinct from those of the corporation itself, the State of nationality of any such shareholders is entitled to exercise diplomatic protection in respect of its nationals.”

⁸United Nations doc. A/CN.4/581, para. 27.

⁹United Nations doc. A/CN.4/573, para. 170.

After examining the refer to the domestic law of the DRC, particularly the Decree of 27 February 1887 on commercial corporations, the Court found that Guinea did have standing as regards Mr. Diallo's direct rights as *associé* of the two companies.

The companies in the *Diallo* case had some special features: they were private limited liability companies whose capital was composed of *parts sociales* (not freely transferable shares); Mr. Diallo was in essence the sole *associé* of both companies. But these features did not have an impact on the Court's finding. It recalled the statement in the *Barcelona Traction* case: "[t]here is . . . no need to investigate the many different forms of legal entity provided for by the municipal laws of States"¹⁰. What mattered, from the point of view of international law, was to determine whether or not these have a legal personality independent of their members. As the Court explained:

The exercise by a State of diplomatic protection on behalf of a natural or legal person, who is *associé* or shareholder, having its nationality, seeks to engage the responsibility of another State for an injury caused to that person by an internationally wrongful act committed by that State. Ultimately, this is no more than the diplomatic protection of a natural or legal person as defined by Article 1 of the ILC draft Articles; what amounts to the internationally wrongful act, in the case of *associés* or shareholders, is the violation by the respondent State of their direct rights in relation to a legal person, direct rights that are defined by the domestic law of that State, as accepted by both Parties, moreover. On this basis, diplomatic protection of the direct rights of *associés* of a SPRL or shareholders of a public limited company is not to be regarded as an exception to the general legal régime of diplomatic protection for natural or legal persons, as derived from customary international law."¹¹

As regards the exhaustion of local remedies rule, the Court found that Mr. Diallo's direct rights as *associé* were allegedly violated as a consequence of his expulsion. As the Court had already held that the DRC had not proved that there were effective remedies, under Congolese law, against the expulsion Order, the local remedies rule was satisfied. Guinea thus had standing to protect Mr. Diallo's direct rights as *associé*. The question of his rights as a *gérant* was more complex and the Court noted that at the merits stage it would have to define the precise nature, content and limits of the rights of the *gérant* under Congolese law.

¹⁰*Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, I.C.J. Reports 1970, p. 34, para. 40; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, para. 61.

¹¹*Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, para. 64.

By far the most complicated aspect of the *Diallo* case was the question of whether Guinea could exercise diplomatic protection with respect to Mr. Diallo “by substitution” for the two Congolese companies. Guinea sought to invoke the Court’s dictum in the *Barcelona Traction* case where the Court referred to the possibility of an exception, founded on reasons of equity, to the general rule of the protection of a company by its national State, “when the State whose responsibility is invoked is the national State of the company”¹². In the four decades since *Barcelona Traction*, the Court has not had occasion to rule on whether, in international law, there is indeed an exception to the general rule “that the right of diplomatic protection of a company belongs to its national State”, which allows for protection of the shareholders by their own national State “by substitution”, and on the reach of any such exception.

Guinea pointed to the fact that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, had established special legal régimes governing investment protection, or that provisions in this regard were commonly included in contracts entered into directly between States and foreign investors. But the Court found that this specific treaty practice could not with certainty be said to show that there had been a change in the customary rules of diplomatic protection; it could equally show the contrary¹³. The Court further observed that “the role of diplomatic protection [in this context had] somewhat faded, as in practice recourse is only made to it in rare cases where treaty régimes do not exist or have proved inoperative”¹⁴.

Ultimately, the *Diallo* case was not *Barcelona Mark II*. After carefully examining State practice and decisions of international courts and tribunals, the Court was of the opinion that these did not reveal — at least at the present time — an exception in customary international law allowing for protection by substitution, such as is relied on by Guinea.

The Court then considered the separate question whether customary international law contained a more limited rule of protection by substitution, such as that set out by the ILC in

¹²*Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, I.C.J. Reports 1970, p. 48, para. 93. *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, para. 82.

¹³*Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, para. 90.

¹⁴*Ibid.*, para. 88.

Article 11, paragraph (b), of its draft Articles on Diplomatic Protection, which would apply only where a company's incorporation in the State having committed the alleged violation of international law "was required by it as a precondition for doing business there". But that very special case did not seem to correspond to the one before us, as it was not satisfactorily established that the incorporation of Mr. Diallo's two companies in the DRC would have been "required" of their founders to enable them to operate in the economic sectors concerned. Therefore, the question of whether or not the ILC's draft Article 11, paragraph (b), reflects customary international law has been, deliberately, left open. The Court thus found that Guinea's Application was inadmissible in so far as it concerned the protection of Mr. Diallo in respect of alleged violations of the rights of his two companies.

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This concludes my summary of the judicial activities of the Court over the past year.

In terms of our pending cases, after an "African year" with cases between the DRC and Uganda, the DRC and Rwanda, and Guinea and the DRC, we are now in a "Latin American and Asian year". We have concluded hearings in two cases involving Nicaragua and they are both under deliberation: one is a case on the merits concerning a maritime delimitation with Honduras; the other is a case at the preliminary objections stage with Colombia, which concerns territorial sovereignty and maritime delimitation questions. And in November, we will hear arguments on the merits in a case between Malaysia and Singapore concerning sovereignty over certain areas.

Three new contentious cases were filed with the Court last year (one of which was later withdrawn) as well as two requests for the indication of provisional measures. In April, Rwanda filed an Application relating to a dispute with France. Rwanda seeks to found jurisdiction on Article 38, paragraph 5, of the Rules of Court, which means that no action will be taken in the proceedings unless and until France consents to the Court's jurisdiction in the case. Our current docket therefore stands at 12 cases. We have been making every effort to maximize the throughput of the Court. We have committed to a very full schedule of hearings and deliberations, with more than one case being in progress at all times. We are trying to hear cases very shortly after they

become ready: there is only one case on the docket which is ready for hearings and is yet to be scheduled, the rest of the pending cases being still in the written pleadings stage. In terms of strategic planning, we try to establish a Court calendar that has a mixture of preliminary objections and merits cases, always bearing in mind that if a request for provisional measures is made, it has priority under the Statute.

The agenda for your Commission is also a busy one. The topics you are examining are of the highest relevance for the Court and we will continue to follow your work with great interest. On behalf of the Court, I wish the best to the Commission for its work on its Fifty-ninth Session.
