



INTERNATIONAL COURT OF JUSTICE

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Press Release

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

Preliminary Objections

The Court declares the Application of the Republic of Guinea admissible in so far as it concerns protection of Mr. Diallo's rights as an individual and of his direct rights as associé in Africom-Zaire and Africontainers-Zaire

THE HAGUE, 24 May 2007. The International Court of Justice (ICJ), principal judicial organ of the United Nations, today delivered its Judgment on the preliminary objections raised by the Democratic Republic of the Congo (DRC) in the case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo).

In its Judgment, the Court

(1) As regards the preliminary objection to admissibility raised by the Democratic Republic of the Congo for lack of standing by the Republic of Guinea to exercise diplomatic protection in the present case:

(a) unanimously,

Rejects the objection in so far as it concerns protection of Mr. Diallo's direct rights as associé in Africom-Zaire and Africontainers-Zaire;

(b) by fourteen votes to one,

Upholds the objection in so far as it concerns protection of Mr. Diallo in respect of alleged violations of rights of Africom-Zaire and Africontainers-Zaire;

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Bennouna, Skotnikov; Judge ad hoc Mampuya;

AGAINST: Judge ad hoc Mahiou;

(2) As regards the preliminary objection to admissibility raised by the Democratic Republic of the Congo on account of non-exhaustion by Mr. Diallo of local remedies;

(a) unanimously,

Rejects the objection in so far as it concerns protection of Mr. Diallo's rights as an individual;

(b) by fourteen votes to one,

Rejects the objection in so far as it concerns protection of Mr. Diallo's direct rights as associé in Africom-Zaire and Africontainers-Zaire;

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Bennouna, Skotnikov; Judge ad hoc Mahiou;

AGAINST: Judge ad hoc Mampuya;

(3) In consequence,

(a) unanimously,

Declares the Application of the Republic of Guinea to be admissible in so far as it concerns protection of Mr. Diallo's rights as an individual;

(b) by fourteen votes to one,

Declares the Application of the Republic of Guinea to be admissible in so far as it concerns protection of Mr. Diallo's direct rights as associé in Africom-Zaire and Africontainers-Zaire;

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Bennouna, Skotnikov; Judge ad hoc Mahiou;

AGAINST: Judge ad hoc Mampuya;

(c) by fourteen votes to one,

Declares the Application of the Republic of Guinea to be inadmissible in so far as it concerns protection of Mr. Diallo in respect of alleged violations of rights of Africom-Zaire and Africontainers-Zaire.

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Bennouna, Skotnikov; Judge ad hoc Mampuya;

AGAINST: Judge ad hoc Mahiou.

Reasoning of the Court

The Court notes that the Parties are in agreement as to the following facts. Mr. Ahmadou Sadio Diallo, a Guinean citizen, founded in 1974 in the DRC (called "Congo" between 1960 and 1971 and "Zaire" between 1971 and 1997) an import-export company, Africom-Zaire, a société privée à responsabilité limitée (private limited liability company, hereinafter "SPRL") incorporated under Zairean law of which he became the gérant (manager). In 1979 Mr. Diallo took part, with backing from two private partners, in the founding of another Zairean SPRL, Africontainers-Zaire, specializing in the containerized transport of goods. In 1980 the two partners in Africontainers-Zaire withdrew, giving rise to a redistribution of the parts

sociales in Africontainers-Zaire among Africom-Zaire and Mr. Diallo himself, who became the gérant of Africontainers-Zaire. Towards the end of the 1980s, Africom-Zaire's and Africontainers-Zaire's relationships with their business partners started to deteriorate. The two companies, acting through their gérant, then initiated various steps, including judicial ones, in an attempt to recover alleged debts from the Zairean State and publicly and privately owned companies in Zaire. For the most part those disputes remain unresolved today.

The Court considers to be established that on 31 October 1995 the Prime Minister of Zaire issued an expulsion Order against Mr. Diallo and on 31 January 1996 Mr. Diallo was deported from Zaire and returned to Guinea by air. The deportation was served on Mr. Diallo in the shape of a notice of refusal of entry (refoulement) on account of "illegal residence" (séjour irrégulier) that had been drawn up at the Kinshasa airport.

The Court observes that the Parties differ on the specific circumstances of Mr. Diallo's arrest, detention and expulsion, and on the reasons for it. Guinea maintains that they were the culmination of a policy to prevent him from recovering the debts owed to his companies. The DRC rejects that allegation and argues that his expulsion was justified by the fact that his presence and conduct compromised public order in Zaire.

On examination of the submissions made by Guinea, the Court notes that the Applicant seeks through its action to exercise its diplomatic protection on behalf of Mr. Diallo for the violation, alleged to have occurred at the time of his arrest, detention and expulsion, or to have derived therefrom, of three categories of rights: his individual personal rights, his direct rights as associé in Africom-Zaire and Africontainers-Zaire and the rights of those companies, by "substitution".

With respect to jurisdiction, the Court observes that both Parties have made declarations under Article 36, paragraph 2, of the Statute. The DRC nevertheless challenges the admissibility of Guinea's Application and raises two preliminary objections. According to the DRC, Guinea lacks standing to act in the current proceedings since the rights which it seeks to protect belong to Africom-Zaire and Africontainers-Zaire, Congolese companies, not to Mr. Diallo. Guinea, it is argued, is further precluded from exercising its diplomatic protection on the ground that neither Mr. Diallo nor the companies have exhausted the remedies available in the Congolese legal system to obtain reparation for the injuries claimed.

— Protection of Mr. Diallo's rights as an individual

The Court considers whether Guinea has met the requirements for the exercise of diplomatic protection under customary international law, that is to say whether Mr. Diallo is a national of Guinea and whether he has exhausted the local remedies available in the DRC.

With regard to the first point, the Court observes that it is not disputed by the DRC that Mr. Diallo's sole nationality is that of Guinea and that he has continuously held that nationality from the date of the alleged injury to the date the proceedings were initiated.

With regard to the second point, the Court notes that "[t]he rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law". In considering the issue of the exhaustion of local remedies regarding Mr. Diallo's expulsion, to which the Parties limited their arguments, the Court recalls that the expulsion was characterized as a "refusal of entry" when it was carried out and that refusals of entry are not appealable under Congolese law. In reply to the argument of the DRC whereby the immigration authorities allegedly "inadvertently" used the term "refusal of entry" instead of "expulsion", an error which was not intended to deprive Mr. Diallo of a remedy, the Court considers that the DRC cannot now rely on such an error to claim that Mr. Diallo should have treated the measure taken against him as an expulsion. As for the possibility for Mr. Diallo of requesting reconsideration by the competent administrative authority, the Court indicates that

administrative remedies can only be taken into consideration for purposes of the local remedies rule if they are aimed at vindicating a right and not at obtaining a favour, unless they constitute an essential prerequisite for the admissibility of subsequent contentious proceedings. It finds that this was not the situation in the present case.

The Court concludes that Guinea's Application is admissible in so far as it concerns the protection of Mr. Diallo's rights as an individual.

— Protection of Mr. Diallo's direct rights as associé in Africom-Zaire and Africontainers-Zaire

With respect to Guinea's standing, the Court recalls that 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. In the case of associés or shareholders, what amounts to the internationally wrongful act 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. Having considered the arguments of the Parties, the Court finds that Guinea does indeed have standing in this case in so far as its action involves a person of its nationality, Mr. Diallo, and is directed against the allegedly unlawful acts of the DRC which are said to have infringed his rights, particularly his direct rights as associé of the two companies Africom-Zaire and Africontainers-Zaire.

With respect to the argument that local remedies have not been exhausted, the Court notes that the alleged violation of Mr. Diallo's direct rights as associé of Africom-Zaire and Africontainers-Zaire was dealt with by Guinea as a direct consequence of his expulsion. The Court has already found that the DRC has not proved that there were effective remedies, under Congolese law, against the expulsion Order. The Court further observes that at no time has the DRC argued that remedies distinct from those in respect of Mr. Diallo's expulsion existed in the Congolese legal system against the alleged violations of his direct rights as associé and that he should have exhausted them.

Guinea's Application is consequently admissible in so far as it concerns the protection of Mr. Diallo's direct rights as associé of the two companies Africom-Zaire and Africontainers-Zaire.

— Protection with respect to Mr. Diallo "by substitution" for Africom-Zaire and Africontainers-Zaire

The Court addresses the question of whether Guinea can, as it claims, exercise diplomatic protection with respect to Mr. Diallo "by substitution" for the companies Africom-Zaire and Africontainers-Zaire. The theory of protection by substitution seeks to offer protection to the foreign shareholders of a company who could not rely on the benefit of an international treaty and to whom no other remedy is available, the allegedly unlawful acts having been committed against the company by the State of its nationality. Having examined State practice and decisions of international courts and tribunals, the Court is of the opinion that these do 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 considers whether customary international law contains a more limited rule of protection by substitution, such as that set out by the International Law Commission (ILC) in 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" (Art. 11, para. (b)). The Court notes that this very special case does not seem to correspond to the one it is dealing with here, as it has not satisfactorily been established that the incorporation of Africom-Zaire and Africontainers-Zaire in Zaire 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 does not arise in this case.

The Court cannot thus accept Guinea's claim to exercise diplomatic protection by substitution. Having arrived at this conclusion, the Court need not further consider the DRC's objection based on the non-exhaustion of local remedies.

Guinea's Application is consequently inadmissible in so far as it concerns the protection of Mr. Diallo in respect of alleged violations of the rights of Africom-Zaire and Africontainers-Zaire.

Composition of the Court

The Court was composed as follows: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Bennouna, Skotnikov; Judges ad hoc Mahiou, Mampuya; Registrar Couvreur.

Judge ad hoc Mahiou has appended a declaration to the Judgment of the Court; Judge ad hoc Mampuya has appended a separate opinion.

A summary of the Judgment appears in the document "Summary No. 2007/3", to which summaries of the declaration and opinion are annexed. In addition, this press release, the summary and the full text of the Judgment can be found on the Court's website (www.icj-cij.org), on the "Press Room" and "Cases" pages.

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