DISSENTING OPINION OF JUDGE BENNOUNA

[English Original Text]

Link between the arrest, detention and expulsion of Mr. Diallo and the violation of his direct rights as associé — Recovery of debts — Sole associé — Constraints on the exercise of rights — Exercising the functions assigned to the general meetings of the companies — Right to take part and vote in general meetings — Right to exercise the functions of a gérant — Right to oversee and monitor the management of the companies — Usus *and* fructus *of the right to property over the* parts sociales.

1. I voted against subparagraph (6) of the operative part of the Judgment, which "[f]inds that the Democratic Republic of the Congo has not violated Mr. Diallo's direct rights as *associé* in Africom-Zaire and Africontainers-Zaire", since I believe that the unlawful and arbitrary character of Mr. Diallo's arrest, detention and expulsion (subparagraphs (2) to (4) of the operative part) resulted in the violation of his direct rights as *associé* in the two companies.

2. In its Judgment of 24 May 2007 on preliminary objections (*Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 606, para. 66), the Court left it until the merits stage to assess "the effects on these various rights [as *associé* and *gérant*] of the action against Mr. Diallo". It has clearly emerged at the merits stage of this case that when Mr. Diallo was twice detained, in 1988-1989 and 1995-1996, and then finally expelled from the DRC, it was not simply at the whim of the authorities of that country, but because, on each occasion, he had attempted to recover the debts which were allegedly owed to his companies by the State or by companies in which the State holds a significant portion of the capital. The debts owed by the State to Africom-Zaire in the "listing paper" affair were acknowledged by the Finance Minister, who issued bills of exchange to settle them, but payment was then stopped on the order of the Prime Minister on 14 January 1988, Mr. Diallo having been accused of "fraud". On 25 January 1988, he was detained and imprisoned on the order of the Prime Minister for almost a year, without being brought to trial and without the State settling its debt to Africom-Zaire.

3. Mr. Diallo was to meet with similar difficulties when he brought legal proceedings to recover the debts owed by oil corporations in the DRC to Africontainers-Zaire. On 13 June 1995, he obtained a judgment from the Kinshasa *Tribunal de grande instance* ordering Zaire Shell to pay the sum of US$13 million to Africontainers-Zaire, that decision being enforceable. However, he was never to succeed in enforcing it; having been the subject of an expulsion decree issued by the Prime Minister on 31 October 1995, he was arrested on 5 November and expelled from the DRC on 31 January 1996. In the meantime, on 15 November 1995, the Zaire Fina and Zaire Mobil Oil companies wrote to the Prime Minister concerning the "[a]ttempted fraud and destabilization of oil companies by Diallo Amadou Sadio". The two companies drew the Prime Minister's attention to the fact that "in June 1995 Mr. Diallo Amadou Sadio, a Guinean subject, sued Zaire Shell and was awarded US$13,000,000" and that "[e]ncouraged by his success in these proceedings, Mr. Diallo is now threatening Zaire Mobil Oil and Zaire Fina" on the basis of "claims [which] are fictitious and out of all proportion". They added that they "fear that Diallo's greed may imperil their very existence, by endangering their commercial activities and the job security of their employees", concluding "[t]hat is why we seek government intervention to warn the courts and tribunals of Mr. Diallo Amadou Sadio's activities in his campaign to destabilize trading companies".

4. This letter, sent to the Prime Minister by public corporations in the DRC in which the State holds a substantial portion of the capital, reveals the true reason for the detention and expulsion of Mr. Diallo, namely the legal proceedings which he brought to recover the debts owed to Africontainers-Zaire by Congolese companies. It is of little significance that the letter is dated after the expulsion decree, since it is based on the judgment given against Zaire Shell on 13 June 1995 by the Kinshasa *Tribunal de grande instance*.

5. Furthermore, the Court has itself pointed out that

> "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" (Judgment, paragraph 82).

But the Court has not drawn the consequences in terms of the infringements of Mr. Diallo's direct rights as *associé* that were to result from the expulsion.

6. The DRC authorities therefore clearly wished to force Mr. Diallo out of the territory of their country, so that he could no longer exercise his direct rights as *associé* and *gérant* of Africom-Zaire and Africontainers-Zaire. It is thus difficult to understand how the Court can find (in subparagraph (6) of the operative part) that the DRC has not violated these rights, when the very purpose of the expulsion of Mr. Diallo was to prevent him from taking care of his companies. This is tantamount to acknowledging that the authorities of that country were able to get rid of Mr. Diallo in this way and keep him from managing his affairs — which swiftly went into decline — without committing any breach at all of international law, which allows Mr. Diallo's State of nationality to raise the issue of the DRC's responsibility for wrongful acts that infringed Mr. Diallo's direct rights as *associé*.

7. Such is the extent to which the findings of the majority on this point may represent a serious precedent, if they are perceived as giving "carte blanche" for ploys designed to neutralize foreign investors by expelling them from the territory in which they are carrying on their activities. A situation of this kind is all the more troubling because it is accepted, in this case, that Mr. Diallo did in fact become the sole *associé* of the two companies, and that since he was "fully in charge and in control of Africom-Zaire, he was also, directly or indirectly, fully in charge and in control of Africontainers-Zaire" (Judgment, paragraph 110).

8. It is true that, according to the *Barcelona Traction* jurisprudence, there is a distinction between the rights of shareholders and those of the company, so that an infringement of the latter does not necessarily involve a breach of the former (*Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 36, para. 46). However, a forced separation between the sole *associé* and his company is likely to result in a violation of the rights of both. Since that *associé* has been prevented from exercising his rights, the company will be like a ship without a rudder and will inevitably founder; that was to be the case with Africom-Zaire and Africontainers-Zaire.

9. Mr. Diallo's direct rights, as claimed by Guinea, pertain to the right to participate and vote in general meetings, the right to be appointed *gérant* and to exercise that function, the right to oversee and monitor the management of the companies, and the right to property over the *parts sociales* (Judgment, paragraph 116).

10. On the right to take part and vote in general meetings, the Court observes that there is no evidence of a general meeting of either company being held before or after the expulsion of Mr. Diallo, a necessary condition for him to participate in such a meeting. It therefore asks whether Mr. Diallo was deprived of the right to convene a general meeting, which must be held on Congolese territory, and concludes that such was not the case (Judgment, paragraph 121). The Court further adds that Mr. Diallo could have had himself represented by a proxy.

11. Such reasoning, based on the purely formal aspect of Mr. Diallo's direct right to convene general meetings of his companies, which must be held in the DRC, takes no account whatsoever of the nature of his connection with them. It can readily be understood that, as the sole *associé*, Mr. Diallo himself directly exercised the powers vested in the general meeting, for example the allocation of profits, and that in reality the issue which arose following his expulsion was not so much the right to convene a general meeting as that of exercising the functions assigned to it. Clearly, he was the only person able to do that, and he was prevented from doing so as a result of his expulsion.

12. The majority, noting that Mr. Diallo could appoint a proxy for Africom-Zaire, though not for Africontainers-Zaire, has taken the formalistic approach almost to the point of caricature, stating that "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" (Judgment, paragraph 125).

13. On the basis of the fact that Mr. Diallo is a partner with Africom-Zaire (of which he is the sole *associé*) in Africontainers-Zaire, the majority took the view that, by appointing a proxy from the former company, he would no longer be debarred by the provisions of Article 22 of the Articles of Incorporation of Africontainers-Zaire. Formal contortions of this kind are surprising, especially when the issue is ultimately the same, namely, that Mr. Diallo was prevented from genuinely exercising the functions assigned to the general meeting of either of the companies, in which he is the sole *associé*.

14. If it is accepted, as the Court noted in its 2007 Judgment on jurisdiction, that "Mr. Diallo, who was *associé* in Africom-Zaire and Africontainers-Zaire, also held the position of *gérant* in each of them", there remains the question of whether his right to exercise the functions of that position was violated by the DRC. In its Judgment on the merits, the Court considers that "[w]hile 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" (Judgment, paragraph 135). But how could that be demonstrated? Was it not sufficient to look back at the context of the expulsion of Mr. Diallo, who had been blacklisted by

the Congolese authorities, which had accused him of corruption and of having "breached Zairean public order, especially in the economic, financial and monetary areas" (expulsion decree of 31 October 1995), in order for the Court to conclude that it had become impossible for him *ipso facto* to perform his duties as *gérant*, since he was no longer able to liaise with his Congolese discussion partners, in particular the public services involved with the debts owed to his companies?

15. The Court next turns to Mr. Diallo's right to oversee and monitor the actions of management, and observes that "[w]hile 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" (Judgment, paragraph 147). Here again, the Court goes no further than a statement of principle which has no connection with the reality at issue, especially when it is appreciated to what extent such monitoring requires an actual presence in the country concerned of the person responsible for it, who in this case is the sole *associé*, even if the latter succeeds in appointing local collaborators in the DRC.

16. As regards Mr. Diallo's right to property over his *parts sociales*, including his right to receive any dividends or any monies payable in the event of the companies being liquidated, the Court confines itself to stating that "[t]here is . . . no evidence that any dividends were ever declared or that any action was ever taken to wind up the companies" (Judgment, paragraph 157). And yet Mr. Diallo lived well on the income from his companies while he was resident in the DRC!

17. As for the power to decide on the dissolution of the company, which lies with the general meeting (Article 99 of the 1887 Decree), this is in theory a collective act which must be voted for by the *associés*, but in the present case, the decision lay with Mr. Diallo. Having been expelled, it was impossible for him in practice to carry out the winding-up and liquidation of his companies and to realize the remainder of their assets, leaving aside the fact that those companies, neglected and deprived of income from the debts owed to them by the Congolese State, had in the meantime totally collapsed. It may be true that Mr. Diallo was not formally deprived of his right to property over his *parts sociales*, but the fact is that he was completely deprived of the *usus* and *fructus* of that right, since he could neither draw dividends from them nor actually do with them as he wished.

18. In this case, the hindrance to the exercise of Mr. Diallo's rights, as a result of his expulsion, amounted in my view to the DRC depriving him of his direct rights as *associé*, thereby committing wrongful acts which engage its international responsibility. By distinguishing, in its Judgment of 24 May 2007 on preliminary objections, between the rights of *associés* and those of the companies, the Court sought to take into account the legal structure of the latter; in its Judgment of 30 November 2010 on the merits, by refusing to take account of Mr. Diallo's right to exercise his rights as *associé*, the Court has left those rights devoid of any real scope.

(Signed) Mohamed BENNOUNA.