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HAGUE INTERNATIONAL TRIBUNALS

The Subject Matters: The ICJ and Human Rights, Rights of Shareholders, and the *Diallo* Case

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Abstract
On 30 November 2010, the International Court of Justice issued its decision in the merits phase of the *Ahmadou Sadio Diallo* case. This decision turned on the questions of whether the DRC had violated Mr Diallo's human rights and his rights as a shareholder and manager in two corporations he owned in the DRC. This paper analyses the decision of the Court in the light of the choices it made and the methodology it applied, and demonstrates that both issues raise fundamental questions. The Court's decision on Mr Diallo's human rights is often ambitious to the detriment of clarity, whereas the part of the judgment dealing with corporate rights does not seem to move beyond its 1970 predecessor in *Barcelona Traction*. While understandable, this is also regrettable and the consequences for individuals doing business and/or residing in foreign countries may be substantial.

Key words
burden of proof; *Diallo* case; human rights; International Court of Justice; rights of shareholders

1. INTRODUCTION

More than a decade after the original application, the International Court of Justice (ICJ, the Court), has delivered its judgment on the merits in the *Ahmadou Sadio Diallo* case between the Republic of Guinea and the Democratic Republic of the Congo (DRC).[1] Guinea claimed that the DRC had violated various rights of its national, Mr Diallo, for which it requested compensation. Mr Diallo owned two corporations incorporated in the DRC: Africom-Zaire and Africontainers-Zaire. He was their *gérant* (manager) and major shareholder. The corporations were embroiled in endless legal disputes with several other corporations in the DRC and with the DRC itself over the payment of various debts owed to Africom-Zaire and Africontainers-Zaire. In the course of the proceedings, Mr Diallo was detained first on suspicion of fraud and later pending an expulsion order, which was finally executed in January 1996.

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1 *Case Concerning Ahmadou Sadio Diallo (Merits) (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment of 30 November 2010, available online at www.icj-cij.org (not yet published) (hereafter, '*Diallo (Merits)*').

Guinea also claimed that Mr Diallo was subjected to inhuman treatment while in detention.[2]

The case was based on the exercise of diplomatic protection and the DRC duly raised objections to the admissibility of the claim related to the exhaustion of local remedies and the nationality-of-claims rule. Those were settled in 2007, when the Court decided on the admissibility of the claim.[3] Although this decision has been discussed extensively elsewhere, it is important to recall the structure of the Court's approach.[4] The Court divided the claim into three parts and considered these independently. The first part concerned the individual rights of Mr Diallo. Under this heading, the Court considered the detention and expulsion of the Guinean national. The second part concerned Mr Diallo's rights as a shareholder of Africom-Zaire and Africontainers-Zaire. This part included issues such as Mr Diallo's right to attend general meetings and to appoint, or be appointed as, a *gérant*. The third, and most controversial, part concerned the rights of the corporations proper, which Guinea wished to claim on behalf of its national by substitution. Essentially, Guinea had argued that Africom-Zaire and Africontainers-Zaire were not able to protect themselves anymore and that, for this reason, their major shareholder and *gérant*, who, for all intents and purposes, practically incorporated the businesses, Mr Diallo, could pursue the claim, in turn protected by means of diplomatic protection by his state of nationality.

The Court declared the first and second parts admissible and rejected the third. By doing so, the Court narrowed down the dispute considerably and, although it still had reserved some thorny issues for the merits, it had saved itself from taking a position on the most difficult part of the claim.[5] In passing, the Court also changed the weight attributed by the applicant to the various issues. As the Court itself acknowledged, Guinea had placed most weight on the debts owed to Mr Diallo's corporations, and the impression that Guinea's main drive was to receive monetary compensation for these financial losses is unavoidable.[6] The Court was ultimately more interested in the part of the claim concerning the alleged violations of Mr Diallo's human rights and decided to deal with these first.[7]

In what follows, the decision on the merits will be analysed.[8] Section 2 will discuss the issues that arose under the DRC's various human-rights obligations;

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2 The Court had considerable difficulties establishing the facts, but relied on its assessment reflected in the decision on admissibility. See *Case Concerning Ahmadou Sadio Diallo (Preliminary Objections) (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment of 24 May 2007, paras. 13–32, available online at www.icj-cij.org (not yet published) (hereafter, '*Diallo (Preliminary Objections)*').

3 Ibid.

4 See A. M. H. Vermeer-Künzli, 'Diallo and the Draft Articles: The Application of the Draft Articles on Diplomatic Protection in the Ahmadou Sadio Diallo Case', (2007) 20 LJIL 941.

5 For an appraisal of this decision, see ibid.

6 *Diallo (Preliminary Objections)*, *supra* note 2, paras. 27, 29.

7 Ibid., paras. 28, 29, 34.

8 Despite its being of interest, the paper will not discuss the dismissal of Guinea's claim considering the earlier detention of Mr Diallo (between 1988 and 1989). It was a contentious issue before the Court, as demonstrated by a voting record of eight votes to six, with Judges Al-Khasawneh, Simma, Bennouna, Cançado-Trindade, Yusuf, and Judge ad hoc Mahiou voting against. For a criticism on the Court's approach here, see the Joint Declaration of Judges Keith and Greenwood and the Joint Declaration of Judges Al-Khasawneh, Simma, Bennouna, Cançado Trindade, and Yusuf. Also, the issue of the failure of the DRC to allow Mr Diallo to

section 3 will analyse the Court's approach to Mr Diallo's rights as a shareholder and manager; and the final section will present some concluding observations. Despite the fact that the subject matter of the dispute may not have been exactly something of concern to the whole international community, the decision will have serious implications. Perhaps those will not be of the nature of its predecessor, the *Barcelona Traction* case,[9] but there is a certain parallel between the relative insignificance of the actual dispute and the consequences the decision may have. The case has a number of exciting elements, such as the fact that the ICJ engaged in a detailed discussion on the violation of Mr Diallo's human rights and that it awarded compensation, but the Court's approach – very limited at times, sweeping at others – is not beyond criticism. It will be demonstrated that the choices of the Court in matters such as the burden of proof, the interpretation of rights, and the status granted to particular rights are sometimes difficult to understand, to say the least.

2. Human rights at the Peace Palace

By applying to the ICJ, Guinea provided the Court with another opportunity to discuss human rights. The jurisdiction *ratione materiae* was not controversial, since both states had accepted the jurisdiction of the Court under Article 36(2) of the ICJ Statute, without reservations.[10] The more interesting consideration is that Guinea opted for the ICJ to settle its dispute involving human rights. The Court has dealt with human rights before, particularly the *Genocide* case and the *Wall* Advisory Opinion.[11] Yet, none of these instances required such an in-depth analysis of the question of whether certain, rather specific, domestic procedures complied with international human-rights obligations. In the Court's analysis, three issues stand out, which will be discussed in turn – first, the Court's approach to the burden of proof will be discussed; second, the expulsion of Mr Diallo and the way in which the Court determined that it was unlawful; and third, its

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contact his consulate, in violation of the Vienna Convention on Consular Relations, will not be discussed. The Court only discussed it very briefly and apparently considered the issue an *acte éclairé*.

9 *Case Concerning Barcelona Traction, Light and Power Company, Limited (Second Phase) (Belgium v. Spain)*, [1970] ICJ Rep. 3 (hereafter, '*Barcelona Traction*').

10 Guinea submitted its declaration on 4 December 1998, the DRC on 8 February 1989; see www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3&code=CG.

11 *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, available online at www.icj-cij.org (not yet published) (hereafter, '*Genocide* case'). The Court decided it had no jurisdiction to entertain the *Case Concerning the Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)* on a procedural matter. Other relevant cases include the *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, [2005] ICJ Rep. 168; and the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep. 136 (hereafter, '*Wall* Advisory Opinion'). Also, see, e.g., the *Tehran Hostages* case, in which the United States argued that the way in which their diplomatic and consular staff were held constituted inhuman treatment; see *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, [1980] ICJ Rep. 3, paras. 23, 91. In the *LaGrand* and *Avena* cases, the Court, rightly in the opinion of the present author, refused to consider consular assistance from a human-rights perspective. *LaGrand Case (Germany v. United States of America)*, [2001] ICJ Rep. 466, para. 78 (hereafter, '*LaGrand* case'); and *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, [2004] ICJ Rep. 12, para. 124 (hereafter, '*Avena* case').

qualification of the rights in question as fundamental and its relation to the issue of reparation.

Before analysing these issues, a comment on the sources of law resorted to by the Court in the part of the judgment on human rights should be made. The Court relied exclusively on treaties, particularly the International Covenant on Civil and Political Rights[12] and the African Charter on Human and Peoples' Rights.[13] Any reference to the customary status of the relevant rules is glaringly absent, even though Guinea referred to the customary status of the prohibition on arbitrary expulsion, of denial of justice, and of deprivation of property[14] and did not specify the source of the respective obligations of the DRC towards Mr Diallo in its submissions.[15] For reasons of clarity, the Court may have chosen deliberately for the relevant treaties, but it thereby missed an opportunity to confirm the customary status of the relevant rules.

Another curiosity is the way in which the Court dealt with Guinea's allegation of deprivation of property. Guinea had argued that Mr Diallo's expulsion had violated his right to property, since 'he had to leave behind most of his assets when he was forced to leave the Congo'.[16] Although Guinea presented this argument in the context of the expulsion, it did claim a separate violation based on the right to property as provided for in Article 14 of the African Charter. According to the Court, this was not something it should consider separately, but rather an issue related to the expulsion as such. It decided to deal with it in the 'context of reparation'. Does this lead to the conclusion that there is no independent right to property? It is a rather dangerous precedent to discuss only the primary or underlying violation and not the others that this violation caused. Expulsion, particularly when arbitrary, will often lead to deprivation of property, but the connection between the two is not inevitable. It would have clarified matters for both parties with respect to reparation and compensation had the Court explicitly discussed the extent of expropriation.

2.1. A shared burden of proof

An expulsion order was issued against Mr Diallo on 31 October 1995. On 5 November of the same year, he was arrested and detained in connection with the expulsion order. After having been released and detained again, Mr Diallo was finally expelled from the DRC on 31 January 1996. So far, the parties have agreed. There was considerable disagreement on the exact dates of release and rearrest. Obviously, the DRC argued that he was released for most of the period between early November 1995 and late January 1996, whereas Guinea argued the opposite.

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12 International Covenant on Civil and Political Rights, New York, 16 December 1966, UNTS Vol. 999, 171. Entry into force on 23 March 1976. Guinea ratified on 24 January 1978, the DRC on 1 November 1976.

13 African [Banjul] Charter on Human and Peoples' Rights, Nairobi, 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5. Entry into force 21 October 1986. Guinea ratified on 16 February 1982, the DRC on 20 July 1987.

14 Mémoire de la République de Guinée, 23 March 2001, 39–53 (hereafter, 'Memorial'), and again in the Réplique de la République de Guinée, 19 November 2008, 28, 53.

15 *Diallo (Merits), supra* note 1, paras. 12–14.

16 Ibid., para. 98.

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The Court decided that the burden of proof in this regard was shared. A sharing of the burden of proof is not uncommon before the ICJ, as the Court had determined already in the *ELSI* case that, in some cases, the burden of proof does not solely rest on the applicant.[17] Similarly, in the *Avena* case, the Court rejected the argument of the United States that Mexico should demonstrate that the relevant Mexican nationals did not also have US nationality.[18] These cases show that the respondent may have a part of the burden of proof when it comes to procedures or data that only it has access to and/or that would be very difficult for the applicant to access. Thus, in the *ELSI* case, it was for Italy to show that there actually were further remedies available to the corporations involved[19] and, in *Avena*, it was for the United States to show that the relevant Mexican nationals also had US citizenship.[20] In these cases, there was a clear logic in distributing the burden of proof, based on access to the relevant materials or greater familiarity with the system, or even on the structure of the legal argument where, actually, the respondent is the claimant: the United States was claiming that certain Mexicans also were US citizens and Italy was claiming that local remedies were not exhausted. At the same time, in the recent *Genocide* case, the Court, with Judge Higgins presiding, extensively explained its approach to issues of burden of proof.[21] Although many of the legal issues in that case were different from the *Diallo* case, the *Genocide* case is relevant to the present case in this respect, because of the similarities in the kind of facts that required producing: in both cases, the applicant required documentation on decisions taken and executed by the respondent government in order to prove its case. In the *Genocide* case, this concerned documentation on what the 'Scorpions' had done and whether any, and, if so, what kind of, command structures existed between this paramilitary group and the Serbian government. There is no suggestion in that decision of the Court's considering a sharing of the burden of proof or a shifting to the respondent because of the special nature of the dispute. Thus, the Court did not order Serbia to submit uncensored documents and stated that 'the Applicant has extensive documentation and other evidence available to it'.[22] In addition, because of the gravity of the charges against Serbia and Montenegro, the Court stated that it 'required proof at a high level of certainty appropriate to the seriousness of the allegation' from the applicant.[23]

In the present decision, something else is happening that goes beyond the earlier standards of sharing the burden of proof, and this constitutes a marked departure for the Court. The direction of the discussion on the burden of proof was set by a statement of the Court that, although it is generally the responsibility of the applicant to prove its claims in fact, 'it would be wrong to regard this rule, based on the maxim *onus probandi incumbit actori*, as an absolute one, to be applied in all

17 *Case Concerning Elettronica Sicula S.p.A (ELSI) (United States v. Italy)*, [1989] ICJ Rep. 15, para. 59 (hereafter, '*ELSI* case').
18 *Avena* case, *supra* note 11, para. 57.
19 *ELSI* case, *supra* note 17, para. 60.
20 *Avena* case, *supra* note 11, para. 57.
21 *Genocide* case, *supra* note 11, paras. 202–230.
22 Ibid., para. 206.
23 Ibid., para. 210. For a critical view on this part of the judgment in the *Genocide* case, see M. Milanovic, 'State Responsibility for Genocide: A Follow-Up', (2007) 18 EJIL 669.

circumstances'.[24] Rather than being the Court's own, this echoes the language of the European Court of Human Rights (ECtHR), such as in the *Aktas* case. In this case, the ECtHR stated that 'Convention proceedings do not in all cases lend themselves to a rigorous application of the principle *affirmanti incumbit probatio* (he who alleges something must prove that allegation)'.[25] It continued by explaining that:

> [i]t is inherent in proceedings relating to cases of this nature, where an individual applicant accuses State agents of violating rights under the [European] Convention [on Human Rights] – his own or someone else's –, that in certain instances solely the respondent Government have access to information capable of corroborating or refuting these allegations

and even that:

> it is of the utmost importance for the effective operation of the system of individual petition instituted under former Article 25 of the Convention (now replaced by Article 34) that States should furnish all necessary facilities to make possible a proper and effective examination of applications.[26]

Similarly, in the *Aksoy* case, the ECtHR stated that:

> where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation as to the causing of the injury.[27]

This, it should be noted, is markedly different from the ICJ's decision in the *Genocide* case referred to above. The difference is explained by the fact that the ICJ is not the ECtHR and that the latter has developed a sophisticated approach to issues of human rights. Furthermore, the applicant in cases before the ECtHR will usually be an individual, for whom access to such documentation may be denied or impossible given the difference in position between a state and an individual. In that sense, the parties before the ICJ will be more equal and, if necessary, the Court can order the release of certain documents.[28]

In the *Diallo* case, the Court's approach resembled the ECtHR's. The Court stated that 'it cannot as a general rule be demanded of the Applicant that it prove the negative fact which it is asserting'[29] and found that it was the DRC that was required to prove that Mr Diallo had been released from prison.[30] According to the Court, '[a]

24 *Diallo (Merits), supra* note 1, at para. 54.
25 *Aktaş v. Turkey*, No. 24351/94, ECHR 2003–V, para. 272.
26 Ibid.
27 *Case of Aksoy v. Turkey*, No. 21987/93, ECHR 1996-VI, para. 61; see also more recently *Case of D.H. and Others v. Czech Republic*, No. 57325/00, Decision of 13 November 2007 (not yet published, available online at http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en), para. 177: 'As to the burden of proof in this sphere [i.e., non-discrimination], the Court has established that once the applicant has shown a difference in treatment, it is for the Government to show that it was justified.'
28 See Rules of the Court, Art. 62 for request for evidence and Art. 66 for obtaining evidence by the Court itself.
29 *Diallo (Merits), supra* note 1, para. 55.
30 By way of illustration, reference could also be made to the *Nicaragua* case, in which the Court explicitly stated that it should consider the fact that Nicaragua was required to take a negative fact into account in its weighing of evidence. In that case, however, this did not result in a complete shifting of the burden of proof. See *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, [1986] ICJ Rep. 14, para. 147.

public authority is generally able to demonstrate that it has followed the appropriate procedures and applied the guarantees required by law – if such was the case – by producing documentary evidence of the actions that were carried out'.[31] Perhaps this is a somewhat optimistic view on the level of organization of the Congolese administration, but the division of burden set here is the one derived from human-rights law. Thus, since the DRC could not produce any documentation supporting the release of Mr Diallo in November 1995, the Court concluded that Mr Diallo had remained in prison.[32] Yet, the Court did not put the entire burden on the DRC. It reproached Guinea for failing to document its claim that Mr Diallo was rearrested on 14 January 1996, after being released on the tenth of that month. The Court therefore concluded that Mr Diallo was out of prison from 10 January until his arrest on the 25th at the latest, the latter date being acknowledged by the DRC.[33] In all likelihood, it would have been impossible for Mr Diallo or Guinea to prove that he was not released without at least some co-operation of the DRC, but the mere fact that his claim was a negative one should not inspire a shifting of the burden of proof. It is not suggested that this formed the Court's only inspiration. It is only to be noted that its approach here is rather different from earlier cases.

With respect to the expulsion as such, the burden of proof is even more on the respondent. On various occasions, the Court used rather strong language regarding the DRC's failure to meet this burden. Guinea had argued that a failure to comply with the procedural requirements for expulsion (as provided for in the ICCPR and the African Charter, to be explained in the following section) could not be justified on the basis of 'compelling reasons', as is provided for in the relevant treaty provisions. The Court accepted this approach, considering that the DRC 'has not provided the Court with any tangible information that might establish the existence of such "compelling reasons"'.[34] In paragraph 82, the Court reiterated this point by stating that 'the DRC has never been able to provide grounds which might constitute a convincing basis for Mr Diallo's expulsion' and decided that the DRC failed to present 'concrete evidence', thus supporting Guinea's argument. Under a shared burden of proof, the DRC would be required to label Mr Diallo as a threat to its public order and Guinea would have demonstrated that Mr Diallo did not constitute such a threat. In fact, the decision to expel Mr Diallo stated that the DRC considered that his 'presence and personal conduct have breached Zairean public order, especially in the economic, financial and monetary areas, and continue to do so'.[35] Contrary to the Court's statement that the DRC 'never' indicated the reasons for expulsion, this does give a good indication of the reasons why Mr Diallo was considered a threat to the public order of the DRC and it is not excluded prima facie that the reasons brought forward here could qualify as compelling reasons. The financial claims issued by Mr Diallo against the DRC were considerable and would, if upheld, constitute a significant financial burden for the DRC. The DRC may have failed to demonstrate Mr Diallo's pernicious

31 *Diallo (Merits), supra* note 1, para. 55.
32 Ibid., paras. 58–59.
33 Ibid., para. 60.
34 Ibid., para. 74.
35 Ibid., para. 50.

influence on its economic and financial situation conclusively before the Court, but to suggest that it made no suggestions in this direction is not entirely true.

Finally, the Court found against the DRC on Article 9(2) of the ICCPR, in the sense that it had failed to inform Mr Diallo adequately regarding the expulsion and the arrest. The Court stated that the respondent 'has failed to produce a single document or any form of evidence' in this regard.[36] No further evidence was sought from Guinea, which, according to the Court, was 'justified in arguing that Mr Diallo's right to be "informed, at the time of arrest, of the reasons for his arrest" ... was breached'.[37]

Considering these issues, it is not necessarily suggested that the Court erred in its approach towards the burden of proof – rather that it constitutes a notable departure from its earlier stance, which may inform states bringing future cases to reconsider the structure of their arguments.

2.2. Arbitrary and unlawful expulsion

The central issue in the judgment, though not necessarily in the application, concerns the expulsion of Mr Diallo from the DRC and the detention related to the expulsion. The Court also used the expulsion to decide on other matters, such as the exhaustion of local remedies and the right to property, referred to above.[38] The formal decision to expel Mr Diallo was issued on 31 October 1995 and, on 31 January 1996, Mr Diallo was effectively removed from the territory of the DRC. The Court found that Mr Diallo's expulsion was unlawful, for two reasons. First, the expulsion was not decided in accordance with Congolese laws, as required by the applicable human-rights treaties.[39] Second, the Court decided that the expulsion, and the detention imposed to effectuate the expulsion, was arbitrary.[40] Finally, the Court found that the detention as such was not in conformity with the requirement to be informed of the grounds for detention, as provided for in Article 9(2) of the ICCPR.[41]

Guinea had argued that the expulsion constituted violations of Articles 13 of the ICCPR and 12(4) of the African Charter. These provisions allow expulsion of aliens, but on condition that it be based on a decision 'in accordance with (the) law' (both articles) and that the alien can request review by competent authorities of this decision, unless there are compelling reasons to deny this appeal (ICCPR). In its consideration on the lawfulness of Mr Diallo's expulsion, the Court found that the crucial element is whether the decision to expel Mr Diallo was taken in accordance with Congolese law. Although the analysis could have stopped there, since it turned out the decision was not, the Court took an extra step by requiring that

36 Ibid., para. 84.
37 Ibid.
38 For the exhaustion of local remedies related to Mr Diallo's human rights, see *Diallo (Preliminary Objections)*, *supra* note 2, paras. 41–48. The Court further noted that neither party elaborated on the necessity to exhaust local remedies related to his rights as *associé*, and it therefore did not consider this issue as a preliminary objection; see paras. 74–75.
39 *Diallo (Merits)*, *supra* note 1, para. 73.
40 Ibid., para. 82.
41 Ibid., para. 85. This point will not be further discussed.

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'the applicable domestic law . . . itself be compatible with the other requirements of the [ICCPR] and the African Charter'.[42] To complicate matters further, the Court additionally considered that the expulsion 'must not be arbitrary in nature'.[43] Its explanation for this extra requirement, not found in either treaty provision, is that 'the protection against arbitrary treatment lies at the heart of the rights guaranteed by the international norms protecting human rights, in particular those set out in the two treaties applicable in this case'.[44] The Court justified its approach to Articles 9 and 13 of the African Charter and the ICCPR, respectively, by reference to the UN Human Rights Committee's (HRC) interpretation of and approach to the ICCPR, by reference to the African Commission on Human and Peoples' Rights' case law, and by stating that it 'also notes' that this is consistent with the other two regional Courts: the ECtHR and the Inter-American Court of Human Rights.[45] The respective courts may be pleased by the authority with which they have been credited in this judgment, but, since the Court limited its discussion to treaty provisions and did not include customary international law, the opinions of the ECtHR and its Inter-American sister are immaterial to the questions before the ICJ.

The Court relied on these various sources to support its approach to expulsion, particularly the extra requirements it added to the extent that the domestic law must comply with certain requirements of quality and that expulsion may not be arbitrary. The HRC's General Comment, referred to by the Court, does support an extra requirement of non-arbitrariness in relation to expulsion and Article 13. It is stated that 'by allowing only those [expulsions] carried out "in pursuance of a decision reached in accordance with law", its purpose is clearly to prevent arbitrary expulsions'.[46] This, however, is not the equivalent of a substantive requirement of non-arbitrariness. As Judges Keith and Greenwood have pointed out, it forms a procedural requirement of due process that should protect foreign nationals against arbitrary decisions, rather than arbitrary expulsion, even if an arbitrary expulsion may result from an arbitrary decision.[47]

It is further respectfully submitted that the HRC jurisprudence referred to fails to support the Court's approach. The Court referred in its consideration to the *Maroufidou* v. *Sweden* case.[48] In *Maroufidou* v. *Sweden*, the committee merely stated that expulsions were to be in accordance with the domestic law of the respective party, namely Sweden. It specifically stated that:

> the interpretation of domestic law is essentially a matter for the courts and authorities of the State party concerned. It is not within the powers or functions of the Committee to evaluate whether the competent authorities of the State party in question have

42 *Diallo (Merits)*, *supra* note 1, para. 65.
43 Ibid.
44 Ibid.
45 In this context, it is interesting to note that the Court, in the *Wall* Advisory Opinion, *supra* note 11, paras. 133–137, also relied on other human-rights mechanisms for its interpretation of the facts and the law, but these were very specific: Reports of Special Rapporteurs that dealt with the Palestinian Territories and a general comment by the HRC on the provision relevant for the discussion.
46 General Comment No. 15: The Position of Aliens under the Covenant: 04/11/1986, para. 10.
47 *Diallo (Merits)*, *supra* note 1, Joint Declaration of Judges Keith and Greenwood, paras. 7–11.
48 *Diallo (Merits)*, *supra* note 1, para. 66.

> interpreted and applied the domestic law correctly in the case before it under the Optional Protocol, unless it is established that they have not interpreted and applied it in good faith or that it is evident that there has been an abuse of power.[49]

This is quite different from the ICJ's claim that the domestic laws of the DRC could be scrutinized for general compliance with the relevant treaties and that the expulsion order must not be arbitrary. It only mentions absence of good faith and abuse of power, which is not the same as qualitative requirements for the legislation as such. On this first point, the General Comment also seems to profess some restraint:

> It is for the competent authorities of the State party, in good faith and in the exercise of their powers, to apply and interpret the domestic law, observing, however, such requirements under the Covenant as equality before the law (art. 26).[50]

Rather than a substantial requirement of domestic laws regulating expulsion, this is a general reminder of compliance with the ICCPR as such, which is further confirmed by the next paragraph, stating that 'Article 13 directly regulates only the procedure and not the substantive grounds for expulsion'.[51] The conclusion on the interpretation of the relevant provision of the ICCPR must be that expulsion will be unlawful if not imposed in accordance with the domestic laws and regulations (and that the ICCPR generally requires observance of principles such as equality before the law), but not that this covenant prescribes substantial criteria for expulsion. It thus leaves the possibility for a state to make a law providing for expulsion of aliens with claims against the state over a certain amount, say.

A similar analysis of the African Commission's cases referred to by the Court demonstrates that these do not support the extra requirements for expulsion either. As Judges Keith and Greenwood have explained, the first concerns mass expulsion, which is quite different from the situation of Mr Diallo, and the second case insists indeed on violations of domestic laws rendering the expulsion in violation of the African Charter, not on the quality of the laws themselves.[52] It is curious to note that the Court, in the end, did not enter into a review of Congolese law in the light of its obligations under the two human-rights conventions. This renders the problematic approach to the expulsion all the more unnecessary.

The point is, perhaps, that the Court wished to use this point of law, clearly within its jurisdiction, to make a statement on issues beyond its jurisdiction. As the Court had dismissed all claims related to the treatment of Mr Diallo's corporations as such in the *Preliminary Objections* phase, and in the *Merits* phase also dismissed all claims related to Mr Diallo as *associé* or *gérant* of these corporations (to be discussed below), the Court had substantially narrowed down the dispute. In addition, it refused to consider the two instances in which Mr Diallo was detained (1988–89 and 1995–96, respectively) as part of the same violation of international law vis-à-vis a Guinean national.[53] Even if this approach may have been justifiable on points of law, it does

49 *Maroufidou v. Sweden*, Communication No. 58/1979, 8 April 1981, para. 10.1.
50 General Comment No. 15: The Position of Aliens under the Covenant: 04/11/1986, para. 9.
51 Ibid., para. 10.
52 *Diallo (Merits)*, *supra* note 1, Joint Declaration of Judges Keith and Greenwood, para. 12.
53 *Diallo (Merits)*, *supra* note 1, para. 43.

render the judgment somewhat surreal. Even a very cursory reading of the facts of the case reveals that Mr Diallo was effectively prevented from conducting his business in the DRC, first by various obstructions towards his corporations and second due to his incarceration. Although the legal disputes he had were not, or not exclusively, with the DRC as such, there were allegations of interference by Congolese officials in the legal procedures, resulting in a total absence of remedies for Mr Diallo, even in cases that he won.[54] It is not implausible that the DRC intended to remove Mr Diallo from its territory to prevent further claims or payment of existing ones. The Court even stated in this respect that 'it is not difficult to discern a link between Mr Diallo's expulsion and the fact that he had attempted to recover debts'.[55] Yet, the Court had no means to pursue this situation: the 'harassment' of Mr Diallo was financial and related to his corporations, not, say, to his freedom of speech or religion. Thus, the entire case, involving large sums of money and loss of substantial business interest culminating in expulsion, boils down to a violation of procedure over the expulsion at hand. This violation, then, was taken up gratefully and somewhat exploited. Only in the context of everything else that had happened to Mr Diallo, but was kept out of the judgment, can one appreciate the Court's approach to the expulsion and indeed its statement that '[u]nder these circumstances, the arrest and detention aimed at allowing such an expulsion measure, one without a defensible basis, to be effected can only be characterized as arbitrary'.[56]

A final point regarding the Court's approach relates to fragmentation. By entertaining the question of expulsion in this manner and by choosing its very own approach, the Court has added yet another player to the team of interpreters of human-rights obligations. In the context of the debate on fragmentation of international law, some will resent this, others welcome it with applause. The problem is, however, that the Court *seemed* to follow the harmonized view of other bodies concerned with human rights. For instance, it declared that it had no obligation to follow the HRC in its approach to the ICCPR, but also said that 'it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty'.[57] It added that it should give due concern to legal security, suggesting that a *unité de doctrine* was to be preferred. Yet, in the light of the divergent approach to the expulsion, this it did not offer.

2.3. Fundamental human rights

At various instances in the judgment, the Court has commented on the status of the respective rights at issue. In two sweeping statements, the justification of which remains somewhat unclear, the Court found that it was discussing fundamental rights. To start at the end of the judgment, in paragraph 161, the Court stated the following with respect to the appropriate form of reparation:

54 Ibid., para. 150. See also *Diallo (Preliminary Objections)*, *supra* note 2, paras. 14 and 18.
55 *Diallo (Merits)*, *supra* note 1, at para. 82.
56 Ibid.
57 Ibid., para. 66.

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> [i]n the light of the circumstances of the case, *in particular the fundamental character of the human rights obligations breached* and Guinea's claim for reparation in the form of compensation, the Court is of the opinion that, in addition to a judicial finding of the violation, reparation due to Guinea for the injury suffered by Mr Diallo must take the form of compensation.[58]

This qualification is surprising and invites the reader of the judgment to wonder what violations the Court is referring to. The Court nowhere qualified the issues in connection to the expulsion as fundamental. It would also have been an exaggeration, since the primary violation in this regard was of a procedural nature. Even when discussing the arbitrariness of the detention and expulsion, the Court refrained from qualifying the issues as related to fundamental human rights. The only instance in which the Court implicitly refers to a right being fundamental in nature is paragraph 87, even if it does not use that language. Guinea had claimed that its national was subjected to mistreatment while in prison, invoking Article 10(1) of the ICCPR. The Court added to this Article 7, prohibiting torture and cruel, inhuman, or degrading treatment or punishment. On this prohibition, the Court then stated that '[t]here is no doubt, moreover, that the prohibition of inhuman and degrading treatment is among the rules of general international law which are binding on States in all circumstances, even apart from any treaty commitments'.[59] Assuming that this sentence is not the result of careless drafting, it is important to analyse it in detail, in an attempt to expose its sense and implications. A simple, but incorrect, reading would interpret this as stating that the DRC and Guinea are bound by the absolute prohibition on inhuman treatment under the ICCPR, which, in the context of that treaty, indeed allows for no derogation. This reading is a simplification because it would then be nothing more than a statement that a treaty is binding, which requires no explanation. It is incorrect because the Court distinguished the prohibition on inhuman treatment from 'any treaty commitments' not excluding the ICCPR.

The Court defined the prohibition as one of 'general international law'. This is perhaps not the place for an in-depth discussion on the exact scope and meaning of the term 'general international law',[60] but it suggests at least more than just conventional law. Yet, in the present judgment, the Court had limited its discussion on human rights to conventional provisions containing the obligations (see above, introduction to section 2) and, on the point of inhuman treatment, it referred explicitly to the ICCPR.[61] Given that this treaty is binding on both parties, there is no need to find yet another source of law containing the obligation. Apparently, the Court was making another point, though. It further qualified this prohibition under 'general international law' as always binding, irrespective of other treaty obligations. It is not immediately clear what the Court is referring to. It must at least refer to more

58 Ibid., para. 161 (emphasis added).
59 Ibid., para. 87.
60 See, e.g., G. Tunkin, 'Is General International Law Customary Law Only?', (1993) 4 EJIL 534; and C. Tomuschat, 'What Is General International Law?', in *Guerra y Paz: 1945–2009, Obra homenaje al Dr. Santiago Torres Bernardez* (2010), 329–48. The latter also includes analysis of the sparse earlier uses of the term by the ICJ.
61 *Diallo (Merits), supra* note 1, paras. 87 and 88.

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than just the conventional obligation, as the Court mentioned the obligation 'apart from' treaty obligations. This leaves customary international law. However, 'normal' customary international law will not usually overrule obligations under a treaty, so the conclusion must be that the Court is referring to the peremptory status of the customary-law prohibition on inhuman treatment. This interpretation, however, begs the question of why the Court then did not explicitly say so. The Court has recognized the existence of such obligations in the *Congo–Rwanda* case with respect to the prohibition on genocide,[62] so there was, in principle, no need to shy away from using the terms *jus cogens* or peremptory norm. Is this a deliberate vagueness, for fear of broadening the scope of *jus cogens* to include the prohibition on inhuman treatment? Was the Court here creating another sub-category of obligations that is not a 'normal' rule but also not one of *jus cogens*?

And then, one keeps wondering why the Court included this statement in the first place. Strictly speaking, the issue under Article 7 of the ICCPR, let alone any peremptory status of the customary prohibition on inhuman treatment, is *ultra petita*. Guinea discussed Mr Diallo's treatment in two ways. In its memorial, it used the words 'droits fondamentaux' without specifying exactly what it referred to.[63] The oral argument presented a more detailed analysis, but that was limited, in this respect, to Article 10 of the ICCPR.[64] Nowhere did Guinea explicitly refer to Article 7 of the ICCPR, Article 5 of the African Charter, or a peremptory prohibition on inhuman treatment. In addition, the Court dismissed Guinea's claim on this point, finding no violation of Article 10 or inhuman treatment, which reduced the statement to an *obiter dictum*. With all due respect, it is difficult to see the point of inserting such a nebulous phrase.

3. Mr Diallo's direct rights as *associé*

In Part III of the judgment, the Court turned to Guinea's claims regarding Mr Diallo's rights related to Africom-Zaire and Africontainers-Zaire.[65] In its judgment on the preliminary objections, the Court had acknowledged that Guinea was entitled to exercise diplomatic protection with respect to any direct rights that Mr Diallo may have as *associé*, in line with Article 12 of the Draft Articles on Diplomatic Protection.[66] These rights are the following: '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.'[67] Guinea also claimed a violation of the right to property in relation to the shares (*parts sociales*) owned by Mr Diallo. Before entering into these questions, the Court, again, went to some lengths to explain the

62 *Armed Activities on the Territory of the Congo (New Application : 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, [2006] ICJ Rep. 6, para. 64.
63 Memorial, *supra* note 14, para. 3.31.
64 CR 2010/5, Wednesday 28 April 2010 at 4 p.m. (Pellet), para. 23.
65 In the discussion of the respective rights, the Court consistently applied the French terminology. '*Associé*' refers to shareholder, whereas '*gérant*' is comparable to manager.
66 Draft Articles on Diplomatic Protection with Commentaries, ILC Report 2006, UN Doc. GA/A/61/10, Suppl. No. 10, at 66–7.
67 *Diallo (Merits)*, *supra* note 1, para. 116.

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legal difference between the corporations as legal entities and Mr Diallo as *associé*.[68] It established that Mr Diallo was the major shareholder of both corporations and their *gérant* and that, in that function, he was 'fully in charge and in control' of both corporations.[69] The Court also noted that the corporations had not ceased to exist.[70] The importance of this analysis is to distinguish between the rights of the corporations proper (concerning which the claims are inadmissible) and the direct rights of Mr Diallo. Guinea had argued that no such distinction existed[71] and the Court did accept that the distinction 'could appear artificial' in the present case, but kept it because it was 'well-founded juridically'.[72]

If the Court was somewhat overenthusiastic in its consideration of the violations of Mr Diallo's human rights, it compensated for this approach more than adequately in the part of the judgment concerning Mr Diallo's corporate rights. In a very clean and black-letter-law approach, the Court dismissed all claims related to Mr Diallo's direct rights as *associé* and *gérant*. It should be noted that this part of the judgment was not unanimous: the relevant sub-paragraph of the dispositif was adopted with nine votes to five, with Judges Al-Khasawneh, Bennouna, Cançado Trindade, Yusuf, and Judge ad hoc Mahiou voting against. This will now be discussed in the order in which the rights were presented in the judgment.

3.1. The right to participate and vote in general meetings

An *associé* has the right to participate and vote in general meetings. Guinea had argued that Mr Diallo was prevented from exercising this right due to the fact that he was expelled and that, therefore, he was physically unable to attend meetings. It rested on two arguments: first, those meetings were required to be held in the DRC and, second, Mr Diallo could have appointed someone to replace him, but this was only an option, not a requirement. The Court approached this matter very much from the perspective of the corporations. It considered that the right to participate and vote is not an abstract right, but a right that is only relevant in the context of general meetings, *when they are held*. No such meeting was convened, and therefore Mr Diallo's rights were not violated.[73] This line of reasoning is very much focused on the factual situation, not the possible situation, which again is different from earlier decisions of this Court. In *LaGrand*, the Court found that it was:

> immaterial for the purposes of the present case whether the LaGrands would have sought consular assistance from Germany, whether Germany would have rendered such assistance, or whether a different verdict would have been rendered. It is sufficient that the Convention conferred these rights, and that Germany and the LaGrands were in effect prevented by the breach of the United States from exercising them, had they so chosen.[74]

68 Ibid., paras. 103–115. This it had already established in the Preliminary Objections phase.
69 Ibid., paras. 109 (Africom-Zaire) and 110 (Africontainers-Zaire).
70 Ibid., para. 113.
71 Ibid., para. 103.
72 Ibid., para. 115.
73 Ibid., para. 121.
74 *LaGrand* case, *supra* note 11, at para. 74.

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In that case, the Court insisted on the right as formulated in the Convention, not on the actual exercise of it. Similarly, in *Avena*, the Court questioned whether being informed through a non-official person about consular rights, an interpreter, would be sufficient to meet the requirements of Article 36(1)(b) of the Vienna Convention on Consular Relations, even if the effect would still be that the foreign national concerned would then de facto be informed of his rights.[75] The Court's position in the present case was criticized on this point by Judges Al-Khasawneh and Yusuf in their Joint Dissenting Opinion. They wondered how the Court envisaged such general meetings: 'an exiled destitute *associé/gérant* participating in a general meeting with himself?'[76] To them, to require an *associé* to actually organize a general meeting in order to demonstrate his inability to do so due to expulsion was 'quite surrealistic'.[77] In its approach to the matter, the Court chose to ignore certain aspects of the case. It is not suggested that this is not justifiable, but this choice did affect the outcome of its considerations.

Guinea's argument with respect to the appointment of a representative was also rejected: this rule, according to the Court, existed 'to ensure that the general meetings of companies can take place effectively'. This conclusion was not necessarily given on the basis of the law, but involved a particular interpretation of Congolese national law. The Court suggested that the Congolese legislative must have intended this piece of law to ensure effective operation of companies and not just to give *associés* more choices.[78] The alternative would also have been possible: the Court could also have found that the law was designed to protect *associés* and that its purpose was to make sure that they could choose between attending meetings in person or sending a representative.

3.2. *Gérance* and overseeing and monitoring management

The second claim regarding Mr Diallo's direct rights concern the *gérance* of his corporations. Guinea alleged four different aspects, of which three were declared admissible. The first – the right to appoint a *gérant* – was considered a right not of Mr Diallo, but of his corporations.[79] The second, third, and fourth concerned the rights to be appointed *gérant*, the right to exercise the functions of a *gérant*, and the right not to be removed as *gérant*, respectively. Fifth, and separately, Guinea argued that Mr Diallo was prevented from overseeing and monitoring the management of his corporations. Mr Diallo was in fact appointed as *gérant* of his corporations, so also the second claim was dismissed.[80] It is with the third, fourth, and fifth claims that the argument becomes more complicated. Essentially, the issue comes down to the question of whether the detention and expulsion of Mr Diallo, and thereby his physical removal from the territory in which his corporations operated, caused a violation of his rights as manager of these corporations. Considered in this light, it becomes clear why the Court decided to reject the claims. Otherwise, its

75 *Avena* case, *supra* note 11, at para. 95.
76 *Diallo (Merits)*, *supra* note 1, Joint Dissenting Opinion of Judges Al-Khasawneh and Yusuf, at 6.
77 Ibid.
78 *Diallo (Merits)*, *supra* note 1, at para. 124.
79 Ibid., para. 133.
80 Ibid., para. 134.

decision could be generalized into supporting a rule that expulsion of individuals who happen to be *gérants* or *associés* of corporations will lead to a violation of their direct rights as such. Thus, the Court acknowledged that although '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'[81] and therefore that his rights were not violated.[82] The same line of reasoning was applied to his right not to be removed as *gérant* – it may have been difficult, but 'he remained, from a legal standpoint, the *gérant* of both Africom-Zaire and Africontainers-Zaire'[83] – and, again, with respect to overseeing and monitoring management, regarding which the Court stated 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 gerance, wherever he may have been.[84]

While this choice is legally sound and probably the best alternative, it reaffirms the drift of this part of the judgment as being rather technical. Given the limitations it had set itself considering the confinement of the judgment on the merits to the direct rights of shareholders, the Court could not issue a judgment on the detriment that the treatment of Mr Diallo had caused to his corporations. They apparently went quickly into decline after Mr Diallo was expelled.[85] In addition, the Court perhaps faced a similar difficulty as with the human rights of Mr Diallo: there was no law prohibiting the general obstruction of activities of Mr Diallo and his corporations rendering his life difficult. While the Court could hint at this in the earlier part of the judgment by emphasizing the importance of the rights concerned, it had no such option here. As stated above, in all probability, it did not wish to pronounce a rule against expulsion of businessmen in general and could, within the confines of the law, not find that Mr Diallo had in all ways been prevented from exercising his rights. There is a difference in law between a difficult situation and an impossible situation.[86]

3.3. The *Associé*'s property

The final bone of contention and, arguably, the cause of the proceedings in the first place[87] was whether the DRC could be held responsible for the loss of property on the part of Mr Diallo. This, again, is a situation involving various facts, some proven, some alleged, which could not all be discussed by the Court, either due to self-imposed limitations or due to the law's limits.

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81 Ibid., para. 135.
82 Ibid., para. 137.
83 Ibid., para. 138.
84 Ibid., para. 147. Note the word 'detentions', which is plural. Is this an error, or did the Court here actually refer to both periods of detention, including the one in 1988?
85 Ibid., Dissenting Opinion of Judge Benounna, para. 6.
86 Cf. the requirements applicable to the invocation of impossibility of performance under the law of treaties or *force majeure* and necessity under the law on state responsibility.
87 See *supra* note 6 and accompanying text.

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From the perspective of Guinea, the facts are as follows. Mr Diallo had been making a living on the basis of the activities of Africom-Zaire and Africontainers-Zaire. For a while, these companies were successful. It appears from Guinea's Memorial that problems with payment of debts owed to these corporations arose in the 1980s. These did not immediately lead to legal proceedings[88] but, in the late 1980s and early 1990s, Mr Diallo did decide to take the matters to the Congolese courts. His corporations won some cases, appealed against other decisions, and tried amicable settlements; none of this resulted in recuperation of the debts owed and, consequently, the corporations suffered significant financial losses.[89] Mr Diallo must have seen his income decrease accordingly. Instead of enforcing the judgments by its courts in Mr Diallo's favour, the DRC then decided to expel this unwanted foreigner.[90] This perhaps technically did not make it impossible for Mr Diallo to pursue his claims, but it did remove the driving force behind them from the DRC's territory. Mr Diallo effectively lost his investments in the DRC. The DRC may have had its doubts regarding the correctness or otherwise of Mr Diallo's financial claims,[91] and may have considered his litigious behaviour burdensome, but the fact remains that Mr Diallo lost his investments.

This, the Court could not reward. The two major obstacles to taking this into account were, first, that the Court had decided to distinguish sharply between the corporations as such and Mr Diallo as shareholder. In line with the *Barcelona Traction* case, it reiterated that, when corporations suffer losses, this will be reflected in losses by shareholders without, however, giving them any right to claim.[92] It then cited its decision in the earlier case: 'an act directed against and infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected.'[93] Thus, the losses incurred by Africom-Zaire and Africontainers-Zaire due to the non-paid debts were the corporations' and, while they inevitably harmed the investors, they were not theirs to claim. The Court said that 'the capital is part of the company's property, whereas the *parts sociales* [i.e., shares] are owned by the *associés*. The *parts socials* represent the capital but are distinct from it'.[94] The only rights Mr Diallo had were a right to dividends and a share of the money in case of liquidation. There was no evidence that any dividends were ever claimed and the corporations were not officially liquidated. Therefore, those rights were not violated.[95]

88 Memorial, *supra* note 14, section II.3.

89 Ibid., section II.4.

90 Judges Al-Khasawneh, Simma, Bennouna, Cançado Trindade, and Yusuf phrased it as follows: 'For the DRC authorities, it was obviously a matter of removing Mr. Diallo from Congolese territory once and for all, so that he could no longer pursue the debts owed to his companies by the State and Congolese companies', *Diallo (Merits), supra* note 1, Joint Declaration of Judges Al-Khasawneh, Simma, Bennouna, Cançado Trindade and Yusuf, para. 7.

91 The DRC defines the financial claims as 'détentrices'. Exceptions Préliminaires présentées par La République Démocratique du Congo, 1 October 2002, para. 1.59.

92 *Diallo (Merits), supra* note 1, para. 156.

93 *Barcelona Traction, supra* note 9, para. 46.

94 *Diallo (Merits), supra* note 1, para. 157.

95 Ibid., paras. 157–159. Note that the Court does not consider the issue of practically defunct corporations, just as it had not in *Barcelona Traction.*

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The second obstacle was caused by the Court's interpretation of the rules regarding the protection of investors. Without at any time considering this issue in depth, the judgment demonstrated the view that investments as such are not protected separately and that the investor must assume the risk of losing his investment upon damage to the corporation in which he invested. The involvement of shareholders, or *associés*, is characterized by 'interests', not by rights. The approving citations of *Barcelona Traction* support this line of reasoning.[96] In addition, the Court had already rejected all claims based on a customary right of protection for shareholders, allegedly derived from the many bilateral investment treaties that we have now and early case law from various claims commissions and arbitral tribunals.[97] This analysis, which was not revisited in the decision on the merits, was criticized by Judges Al-Khasawneh and Yusuf in their Dissent, who stated that:

> the Court missed a chance to bring into line the standard of protection of investors like Mr. Diallo with the standard now found in jurisprudence emanating from regional courts and arbitral tribunals. The latter standard . . . has arguably become an international minimum standard to which even those investors not covered by bilateral or multilateral investment treaties may be entitled.[98]

The Court had discarded all such instances as 'special' and not capable of creating a rule of general international law.[99] This conclusion does not bode well for foreign investors. The Court was obviously unwilling to revisit its *res judicata*, but, in the light of the dismissal of all claims based on Mr Diallo's direct rights as shareholder, the lesson could be that states can arbitrarily expel foreign investors. They may have to pay compensation for the expulsion, but, depending on the corporate assets that the states may then acquire, this may be worthwhile. This is further exacerbated by the fact that the Court refused to consider Mr Diallo's loss of property as a separate issue.

4. General conclusions

In the *Ahmadou Sadio Diallo* case, the ICJ had the opportunity to entertain a claim with great potential for the development of international law and the Court's function. Through this decision, it decidedly affirmed its place in the list of judicial bodies concerned with human rights and emphasized their importance. It was also faced with an area of law, the protection of shareholders, that is highly developed in the context of specialized regimes but has not gained a solid anchorage in the rules of general international law. In determining the course of these issues, the Court made various fundamental choices and assumptions. These, then, naturally decisively influenced its considerations and findings. On the basis of these choices, the outcome could not have been different. It is therefore not necessarily the conclusions or

96 For a famous criticism of *Barcelona Traction* on this point, see F. A. Mann, 'The Protection of Shareholders' Interests in the Light of the Barcelona Traction Case', (1973) 67 AJIL 259.
97 *Diallo (Preliminary Objections)*, *supra* note 2, paras. 86–90.
98 Dissenting Opinion of Judges Al-Khasawneh and Yusuf, *supra* note 76, at 7.
99 *Diallo (Preliminary Objections)*, *supra* note 2, paras. 86–90.

even the legal analyses leading to these conclusions that should cause criticism. Especially the Court's considerations on the alleged violations of the rights of Mr Diallo as shareholder are, in themselves, legally sound and perhaps not particularly controversial. What is more a cause for concern is the methodology applied by the Court and some of its basic assumptions. Depending on whether the Court will continue on this track, these may have a serious impact on its future reasoning. Yet, what this case also shows is that the methodology and assumptions the Court will actually apply will depend on the subject. The Court's considerations regarding the violations of Mr Diallo's human rights are in line with regional human-rights courts and take a generous view of the human rights concerned. This involves an expansion, arguably unnecessarily, of the prohibition on expulsion to include a substantive requirement of non-arbitrariness, a burden of proof that is more on the respondent than on the applicant, and a qualification of the (procedural) rights involved as of the most important nature. Had the judgment as a whole taken this approach, the Court might have included the earlier detention of Mr Diallo in its consideration and would have considered his loss of property a result of the demise of his corporations. In the remainder of the judgment, these were now all rejected as a result of what can only be characterized as a very technical and legalistic approach.

Considering these issues, what will be the relevance for international law of this judgment? To some extent, this is difficult to say, given the specificity of the case and the particular circumstances of Mr Diallo. Yet, the willingness, or even eagerness, with which the court entertained the issues related to Mr Diallo's human rights contrasts starkly with the reserved and strict approach to his rights as *associé* and *gérant*. It is difficult to say which of the two approaches is to be preferred. In their respective ways, they are both understandable and unsatisfactory. They are understandable in that they are in accordance with the law as the Court had interpreted it, but unsatisfactory in the way the Court needlessly complicated matters in relation to the expulsion and limited its consideration of shareholders' rights. Regrettably, the Court has not allowed the law on the protection of shareholders to develop beyond what it decided in 1970. With respect to the prohibition on expulsion, the intentions are praiseworthy and it is to be hoped that the actual considerations on similar issues will in future be further refined.