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The protection of individuals by means of diplomatic protection : diplomatic protection as a human rights instrument

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V | Diallo and the Draft Articles: application of the Draft Articles on Diplomatic Protection in the *Ahmadou Sadio Diallo* case

1 INTRODUCTION

The latest decision of the ICJ involving diplomatic protection is the *Case Concerning Ahmadou Sadio Diallo*,¹ in which the Republic of Guinea brought a claim against the Democratic Republic of the Congo (DRC) in an exercise of diplomatic protection. At the outset, it is clear that the decision is hardly controversial and that in fact not much of it is of prime importance for the development of international law in general or on the issues at hand in particular. Having said that, the case bears witness to some of the developments in this field of law indicated in the previous Chapters, even if the subject of the dispute is not primarily concerned with human rights. The most conspicuous statement in this regard is to be found in paragraph 39 of the decision:

[o]wing to substantive development in international law over recent decades in respect of the rights it accords to individuals, the scope *ratione materiae* of diplomatic protection ... has subsequently widened to include, *inter alia*, internationally guaranteed human rights.²

Indeed, contrary to the opinion of some authors,³ the mere fact that the Republic of Guinea resorted to diplomatic protection to address the injuries inflicted upon Mr Diallo clearly supports the idea that diplomatic protection can be used to address human rights violations and shows that states can use diplomatic protection as a last resort where their nationals have been unable to secure redress for internationally wrongful acts.

On 24 May 2007, the ICJ issued its decision on the preliminary objections in the *Case Concerning Ahmadou Sadio Diallo*. In its decision the Court declared the claim brought forward by the Republic of Guinea to be partly admissible

1 *Case Concerning Ahmadou Sadio Diallo* (Preliminary Objections), (Republic of Guinea v. Democratic Republic of the Congo), Judgment of 24 May 2007. The case is not yet published. All documents, including the Application, Memorials and Verbatim Records of the Oral Proceedings are available at <http://www.icj-cij.org>. This Chapter is based on an article which will be published entitled 'Diallo and the Draft Articles, the Application of the Draft Articles on Diplomatic Protection in the *Ahmadou Sadio Diallo* case' in 19 LJIL issue 4 (*forthcoming*).

2 *Diallo*, at para. 39.

3 See *supra* Introduction.

and decided that it could proceed to the merits stage. In its application the Republic of Guinea relied not only on the customary international law rules on diplomatic protection as codified in the ILC Draft Articles on Diplomatic Protection but also on some elements of progressive development as presented in these Draft Articles. In doing so, it invited the Court to discuss some of the Draft Articles. The DRC raised preliminary objections, both questioning the Republic of Guinea's standing with respect to the corporations and Mr Diallo as shareholder and manager and questioning compliance with the local remedies rule on all accounts.

In the Preliminary Objections phase, the Court essentially dealt with these two issues and a number of questions related to these issues. While the parties to the dispute did not always present their arguments in a clear and concise manner, the Court disentangled the materials presented to it and identified two major questions: whether the Republic of the Guinea had standing to present the various elements of its claim and if so whether the local remedies had been exhausted. The claim presented by the Republic of Guinea consisted of three parts. Exercising diplomatic protection, its first claim concerned the injury suffered by Mr Diallo personally when he was imprisoned and subsequently expelled from the DRC. Secondly, it concerned violation of his rights as an *associé* or shareholder of the two corporations owned by him: Africom-Zaire and Africontainers-Zaire. Thirdly, it exercised protection 'with respect to Mr. Diallo "by substitution" for Africom-Zaire and Africontainers-Zaire and in defence of their rights.'⁴

In many ways, this case presents an interesting dialogue between the leading case on protection of corporations, the 1970 *Barcelona Traction* case,⁵ the ILC draft articles on the protection of corporations and shareholders, for which *Barcelona Traction* served as a starting point, and the ICJ in applying these rules. At the time, *Barcelona Traction* provided in some respects a progressive view on this matter, but it has since become the standard and development beyond the rules presented there has been limited.⁶ In its Draft Articles, the ILC followed *Barcelona Traction* in detail and the ICJ also refrained from questioning its earlier decision. An important distinction between *Barcelona Traction* and *Diallo* is that *Barcelona Traction Ltd* was incorporated in a third state (Canada) whereas the corporations owned by Mr Diallo were incorporated in the defendant state, the DRC. Yet, the law on protection of corporations and shareholders is still largely derived from the 1970 decision. Not surprisingly,

4 *Diallo*, para 76.

5 *Barcelona Traction*, at 3.

6 See e.g. L.J. Lee, 'Barcelona Traction in the 21st Century: Revisiting its Customary and Policy Underpinnings 35 Years Later', 42 *Stan. J. Int'l. L.* 237-275 (2006), at 238. The author argues in favour of development in a different direction, but clearly shows that this has not yet happened.

the DRC relied on *Barcelona Traction* to urge the Court to declare the claim inadmissible since Africom-Zaire and Africontainers-Zaire, like the Barcelona Traction, Light and Power Company, did not have the nationality of the applicant state. The Republic of Guinea for its part argued that the present situation fell within the exceptions spelled out in *Barcelona Traction* and that it could therefore exercise protection “by substitution”.

The Court acknowledged, with one exception to be discussed below, the customary status of the rules incorporated in the ILC Draft Articles. Instead of referring to the *Mavrommatis Palestine Concessions* case or remaining silent on the source of the rule of customary law, the Court defined diplomatic protection under customary international law by citing draft article 1.⁷ The reference to this draft article is of particular interest if one considers its drafting history. In the ILC Draft Articles adopted on first reading, draft article 1 reflected the language of the *Mavrommatis Palestine Concessions* of which draft article 1 as adopted on first reading was a faithful copy.⁸ Even though he was aware of the disadvantages of the *Mavrommatis* formula, the Special Rapporteur initially did not favour re-opening the debate on this draft article,⁹ but the comments and observations received from governments¹⁰ and suggestions from other ILC members triggered a substantial discussion on this point. As a result, the wording was changed significantly to bring the definition on diplomatic protection more in line with a modern approach to international law.¹¹ At the outset, it was, however, not evident that the innovative element of the definition of diplomatic protection, i.e. leaving out the part stipulating that a state was ‘adopting in its own right’ the claim of its national, would be accepted and it is therefore of particular importance that the ICJ confirmed the status of draft article 1. It repeated this in paragraph 64, where it is stated that the protection of shareholders for direct injury caused to the shareholder is ‘no more than the diplomatic protection of a natural or legal person as defined by Article 1 of the ILC draft Articles’.¹² This statement in addition confirms the correctness of draft article 12, which provides for the exercise of diplomatic protection in case of direct injury to shareholders. The Court also stressed that the requirement to exhaust local remedies only applies to

7 *Diallo*, at para. 39.

8 ILC Report 2004, at 17: ‘Diplomatic protection consists of resort to diplomatic action or other means of peaceful settlement by a State adopting in its own right the cause of its national in respect of an injury to that national arising from an internationally wrongful act of another State’. The Commentary also refers to *Interhandel*. See *Ibid.* at 25.

9 Dugard, Seventh Report, at para. 3.

10 In particular those submitted by Italy. See Government Comments and Observations, Add. 2, at 2.

11 See on this issue Chapter I, section 3.B.1.

12 *Diallo*, at para. 64.

legal remedies and not to remedies given as of favour or as of grace, thereby giving support to draft article 14.¹³

In what follows, the decision of the ICJ in the *Diallo* case will be discussed in the light of the ILC Draft Articles, with particular emphasis on the way in which the ICJ applied the elements of progressive development in those Draft Articles. The next section will present a background to the case, present the most important facts and outline some of the limitations to the questions before the Court. The following section will discuss the question of standing of the Republic of Guinea for the various elements of the claim in the light of the relevant provisions of the ILC Draft Articles, which will be followed by a section on the issue of exhaustion of local remedies. A general conclusion will present some observations on the Court's reasoning, or lack thereof, and the implications for the development of the law on diplomatic protection.

2 BACKGROUND: DOING BUSINESS IN THE DRC

On 28 December 1998, the Republic of Guinea instituted proceedings against the DRC. It claimed the DRC had violated various international rights of Mr Ahmadou Sadio Diallo, who is a Guinean national. More specifically, it claimed the DRC had failed to comply with its obligations vis-à-vis Mr Diallo arising under international human rights law. Mr Diallo had allegedly suffered from unlawful detention, unlawful deprivation of property (both moveable and immoveable), illegal expulsion which prevented him from retrieving his property, and a subsequent denial of justice.¹⁴ In addition to this, the Republic of the Guinea also brought claims for violations vis-à-vis Mr. Diallo's corporations, Africom-Zaire and Africontainers-Zaire. These corporations, which Mr Diallo set up in 1974 and 1979 respectively, had been incorporated in the DRC, with Mr. Diallo as their *gérant* (manager) and their primary business was conducted within the territory of the DRC. By the late 1980s, the corporations met with increasing difficulties with its business partners, which resulted in lengthy litigation procedures, which largely remain unresolved today. These

13 *Ibid*, at para. 47. See also the Commentary to draft article 14, ILC Report 2006, at 72 and below section 4.

14 It is interesting to note that the initial application and annexed memorial were of relatively poor quality. The sources relied on to show that there were violations of the law binding upon the DRC range from the Universal Declaration on Human Rights ('signed and ratified' by the DRC) and the ICJ's decision in the *Tehran Hostages* case to the International Covenant on Civil and Political Rights and Article 2 of the Declaration of the Rights of Man and Citizen of 1789 (see Application, at 30-31). Although not specifically mentioned, it is perhaps fair to suggest that the Republic of Guinea wished to claim that the DRC had violated norms of customary international law, most of which 'is in breach of a peremptory norm of general international law.' (Application, at 31). However, in its subsequent memorial and in the oral phase, the Republic of Guinea employed a number of experienced counsels and presented a much more coherent argument.

primarily concern the payment of debt, destruction of property of Diallo's corporations and breach of contract.¹⁵ There is considerable dispute between the parties on the situation of Africom-Zaire and Africontainers-Zaire, in particular with respect to the status of the litigation, the question of whether these corporations suffered a denial of justice and on whether the actual injuries have occurred. The lack of adequate documentation and clarity regarding the legal framework within which the corporations operated, disputes over the relevance and authenticity of existing documents and a general lack of trust between the parties have not helped to solve these issues. Wisely, perhaps, the ICJ deferred these matters to the merits phase of the proceedings.¹⁶ In 1995, the DRC decided to expel Mr Diallo from its territory and motivated this decision by stating that Mr Diallo threatened the public order in the DRC by his presence and conduct 'especially in the economic, financial and monetary areas'.¹⁷ Initially, the DRC argued that, while the document containing the order to leave the country contained the words 'refusal of entry', it should in reality be considered as an expulsion, the point being that Congolese law does not allow for appeal against a 'refusal of entry'. The Court, however, decided that 'the DRC cannot now rely on an error allegedly made by its administrative agencies at the time'.¹⁸ Indeed, *ex injuria jus non oritur*. It was further disputed what exactly preceded the expulsion and whether the treatment received by Mr Diallo prior to being expelled amounted to inhuman or degrading treatment. The DRC however failed to raise the question of exhaustion of local remedies with respect to the injuries allegedly sustained by Mr Diallo prior to his expulsion and the Court subsequently limited the question to the exhaustion of local remedies with respect to the expulsion proper.¹⁹

According to the Republic of Guinea, the apparent unwillingness and inadequacy of the Congolese judiciary and the expulsion of Mr. Diallo constituted ample reasons to waive the local remedies rule or to consider it fulfilled.²⁰ Echoing the Draft Articles on Diplomatic Protection, the Republic of Guinea argued that the remedies were not reasonably available and that Mr. Diallo was manifestly precluded from exhausting them.²¹ The Court, however, decided the matter along the lines of *Avena*, as will be explained in section 4. Finally, with respect to the protection of shareholders of a corpora-

15 *Diallo*, at para. 14.

16 *Ibid.*, at para. 59.

17 *Diallo*, at para. 15. See also Memorial of the DRC, at 41 (para. 1.56) and Memorial of the Republic of Guinea, at 30 (para. 2.64).

18 *Ibid.*, at para 46.

19 *Ibid.*, at para. 45.

20 *Diallo*, Exceptions Préliminaires, Republic of Guinea, (Oral Pleadings), CR 2006/53, p. 18-24 (Thouvenin).

21 The Oral Pleadings refer to draft article 15(a) and 15(d) on pp. 22 (para.13) and 19 (para 6) (Thouvenin) respectively.

tion incorporated in the respondent state, the Republic of Guinea argued that incorporation in the DRC is a prerequisite for doing business there and that therefore draft article 11(b) of the ILC Draft Articles is applicable.²²

3 STANDING FOR THE PROTECTION OF SHAREHOLDERS

The Republic of Guinea's legal interest in protecting Mr Diallo's personal human rights and his direct rights as shareholder is relatively clear. While the protection of shareholders may not be well established in all aspects, *Barcelona Traction* and the subsequent ILC Draft Articles clearly indicate that states can protect the direct rights of their nationals, including their rights as shareholders.²³ Such rights pertain to

the right to any declared dividend, the right to attend and vote at general meetings, [and] the right to share in the residual assets of the company on liquidation.²⁴

The rule formulated in *Barcelona Traction* has been codified in draft article 12 of the ILC Draft Articles. The Commentary explains that the line between the rights of shareholders and the corporate rights, in particular concerning management of the corporation, will not always be clear.²⁵ Since Mr Diallo was both a shareholder and the manager of his corporations, the Court will be forced, in the merits phase, to make a clear distinction between the rights of Mr Diallo and the corporate rights of Africom-Zaire and Africontainers-Zaire. In addition, as the Court had already indicated, it will be required to distinguish his rights as *associé* from those as *gérant*.²⁶ The matter is further complicated by the fact that while Africom-Zaire and Africontainers-Zaire have a separate legal personality distinguishable from its *associés* and *gérants* in law, Mr. Diallo in fact impersonated these companies: as the Republic of Guinea pointed out, in various official documents issued by the DRC, reference is made to Mr. Diallo where it in fact concerned his corporations.²⁷ These will be

²² *Diallo*, *supra* note 1, Exceptions Préliminaires, Republic of Guinea, (Oral Pleadings), CR 2006/53, pp. 33-42. For specific references see pp. 33 (para. 3) and 40 (para. 16) (Pellet).

²³ For an extensive analysis of the law on protection of corporations and shareholders, including many references to scholarly work and judicial decisions on this topic see Dugard, Fourth Report.

²⁴ *Barcelona Traction*, at 36.

²⁵ ILC Report 2006, at 67.

²⁶ The terms *associé* and *gérant* are used by both parties in their pleadings and by the Court in its judgment. A *gérant* is a manager while an *associé* is a 'holder of *parts sociales* ("not freely transferable" shares) in SPRLs'. See *Diallo*, at 13-14 (para. 25). Although the Court will decide on the differences in its decision on the merits, they will be comparable to the differences between an executive officer or director and a shareholder.

²⁷ *Diallo*, *supra* note 1, Rejoinder of the Republic of Guinea (7 July 2003), at 23-24 (paras. 1.56-60).

difficult questions to answer, but it is at this stage difficult to predict the outcome.²⁸ In any event, the Court declared that the Republic of Guinea had standing to protect Mr Diallo's direct rights as *associé*.²⁹

A. The application of draft article 11(b)

While the previous point raises interesting questions regarding corporate law and rights of shareholders vis-à-vis corporate rights, the more controversial question in this phase of the claim was the Republic of Guinea's standing to exercise diplomatic protection by substitution for a corporation having the nationality of the defendant state. This case would allow the Court to provide a litmus test on the validity of the exceptions given to the prohibition on such protection in *Barcelona Traction*, which were included in the ILC Draft Articles. These exceptions are stipulated in Article 11, which provides that

A State of nationality of shareholders in a corporation shall not be entitled to exercise diplomatic protection in respect of such shareholders in the case of an injury to the corporation unless:

- (a) The corporation has ceased to exist according to the law of the State of incorporation for reason unrelated to the injury; or
- (b) The corporation has, at the date of injury, the nationality of the State alleged to be responsible for causing the injury, and incorporation in that States was required by it as a precondition for doing business there.

The Commentary to this provision explains that it is modelled on the dictum in *Barcelona Traction*, but in a restrictive manner, which is indicated by the negative wording.³⁰ The debates in the ILC preceding adoption of this provision and its commentary showed diverging views on the desirability of the protection of shareholders' rights. However, the provision that was adopted on second reading is less restrictive than the one adopted on first reading. Initially, Article 11(b) required that incorporation in the defendant state was a precondition *by law* whereas now, as is explained in the Commentary, other forms of pressure to incorporate in the defendant state may equally trigger the application of Article 11(b).³¹ The deletion of the words 'under the law

28 It is to be hoped that, unlike in *Barcelona Traction*, the Court will this time include developments in international law, derived from state practice and *opinio juris*, to determine the questions of rights of shareholders and rights of corporations, of *gérants* and *associés*. See on this point the very critical paper of R.B. Lillich, 'Two Perspectives on the Barcelona Traction Case: the Rigidity of Barcelona', 65 AJIL 522-532 (1971). A similar point was raised by L.J. Lafaro & R.J. Ried (ed.), 'Protection of Shareholder Interests in Foreign Corporations – *Barcelona Traction* Revisited', 41 Fordham Law Review 396-422 (1973), at 416-418.

29 *Diallo*, paras. 64-67.

30 ILC Report 2006, at 58-9 and 65.

31 *Ibid.*, at 65.

of the latter state [i.e. the state of incorporation]' was not only supported by the Special Rapporteur and some members of the ILC, but also by various states in their comments on the Draft Articles adopted on first reading.³² The question to be answered is thus whether the facts underlying the dispute between the Republic of Guinea and the DRC warrant the application of any of the exceptions to the general prohibition of the protection of non-nationals.

The decision and underlying reasoning of the ICJ in this respect seems fairly straightforward: protection can only be exercised on behalf of nationals; Africom-Zaire and Africontainers-Zaire have been incorporated in the DRC, which also is the state in which they conduct most of their activities. Unless the exceptions formulated in *Barcelona Traction* as reflected in draft article 11 apply, protection on behalf of these corporations by the Republic of Guinea is not admissible. Since the corporations have not ceased to exist (article 11(a)) and since incorporation in the DRC was not a precondition for doing business there (article 11(b)), the exceptions do not apply and this part of the claim is inadmissible.³³ Yet, much can be said about this reasoning.

At the outset, it is submitted that the Court was, in its opinion, choosing the lesser of two evils. It did not wish to reject draft article 11 since it acknowledged the merits of the exceptions provided in this article:

[t]he theory of protection by substitution seeks indeed 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 ... Protection "by substitution" would therefore appear to constitute the very last resort for the protection of foreign investment.³⁴

However, it neither wished to declare admissible the Republic of Guinea's attempt to exercise protection on behalf of the corporations 'by substitution'. Therefore, it avoided the question of whether or not draft article 11(b) reflects customary international law by concluding that

the companies ... were not incorporated in such a way that they would fall within the scope of protection by substitution in the sense of Article 11, paragraph (b) of the ILC draft Articles on Diplomatic Protection.³⁵

In doing so, the court chose a very narrow interpretation both of the facts and of the application of draft article 11, as Judge *ad hoc* Mahiou has pointed out in his declaration. While it may not have been necessary to incorporate in the

32 Government Comments and Observations, at 34 (Norway on behalf of the Nordic Countries), Government Comments and Observations, Add.1, at 10 (Belgium and the United Kingdom).

33 *Diallo*, paras. 86-94.

34 *Ibid.*, para. 88.

35 *Ibid.*, at para. 93.

DRC, Africom-Zaire and Africontainers-Zaire were required, under Congolese law, to establish their *siège social* and the administrative centre in the DRC if they intended to conduct most of its business in the DRC. Failure to do so would lead to loss of registration and loss of licence to conduct business in the DRC. According to Judge *ad hoc* Mahiou, Mr. Diallo in reality had no other choice than to incorporate in the DRC.³⁶ This was also argued by the Republic of Guinea,³⁷ and the argument required more attention than it received in the present decision. It will be recalled that, whereas the exception to the exclusivity of protection of nationals should generally be applied restrictively, the rule provided for in draft article 11(b) applies to forced incorporation both *de jure* and *de facto*. The situation of Mr Diallo's companies, as described by Judge Mahiou, is somewhere in between: the legal requirement to establish the *siège social* and the administrative centre in the DRC *de facto* required incorporation in the DRC.³⁸ The Court merely stated that 'it has not satisfactorily been established' that incorporation in the DRC was required.³⁹ Whereas the applicant naturally has the burden of proof, this is not absolute and it is for the respondent to respond to the proof brought forward by the applicant. In matters concerning national legislation, the burden of proof is often shared,⁴⁰ but even if this were not the case in *Diallo*, the statements made by the Republic of Guinea arguing that incorporation was a prerequisite for doing business in the DRC remained unchallenged. Whereas the way in which the parties addressed the issue of local remedies, in particular the absence of argument by the respondent, led the Court to conclude that the argument of the applicant should be accepted, it dismissed the argument on the obligation to incorporate in the DRC with surprising ease.⁴¹ This is very unfortunate, not necessarily because of the outcome but because of the lack of underlying reasoning since as it stands the decision fails to provide any clarity on this issue.

36 *Ibid*, Declaration of Judge *ad hoc* Mahiou, at para. 10.

37 See *Diallo*, Exceptions Préliminaires, Republic of Guinea, (Oral Pleadings), CR 2006/51, p. 46-50, paras. 19-28 (Pellet) and again in CR.2006/53, p. 40-42, paras. 16-21 (Pellet).

38 This should be read in conjunction with the provision on nationality of corporations. While the state of incorporation usually will be the state of nationality, an exception can be made if the seat of management and financial control is in another state. So even if Africom-Zaire and Africontainers-Zaire had not been incorporated in the DRC, they might still qualify for nationals of the DRC under draft article 9 of the ILC Draft Articles. See on this further below, section 3.2.

39 *Diallo*, at para. 92.

40 See e.g. *ELSI*, p. 15, at 46 (on the availability of local remedies) and *Avena*, p. 12, at 41-42 (on matters concerning nationality).

41 See *Diallo*, at para. 74: '[t]he 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 ... and that he should have exhausted them. ... Inasmuch as it has not been argued that there were remedies [available] ..., the question of the effectiveness of those remedies does not in any case arise'.

B. Africom-Zaire and Africontainers-Zaire's genuine link

Perhaps the reasoning of the Court should be understood in a different manner. In 1955, the ICJ decided that Liechtenstein could not exercise diplomatic protection on behalf of one of its nationals because of the lack of a genuine link with Liechtenstein and the presence of such a link with the respondent state, Guatemala.⁴² The genuine link-test, as used by the Court in *Nottebohm* had been abandoned by the ILC in de draft articles as far as natural persons are concerned,⁴³ but it was retained, in a somewhat different fashion, in the provisions on nationality of corporations. While the most important criterion for the determination of the nationality of a corporation is the state of incorporation, it is not the only criterion:

When the corporation is controlled by nationals of another State ... and has no substantial business activities in the State of incorporation, and the seat of management and the financial control of the corporation are both located in another State, that State shall be regarded as the State of nationality.⁴⁴

In his Fourth Report, John Dugard extensively discussed the question of when states would have standing to protect a corporation and it was clear that this would not always be limited to the state of incorporation.⁴⁵ In particular, when the only link between the corporation and the state of incorporation is the act of incorporation, this state is very unlikely to extend protection to the corporation.⁴⁶ Therefore, as was suggested in the Fourth Report and retained in the Draft Articles adopted on second reading, an exception is created beyond strict nationality based on incorporation to allow more states to exercise diplomatic protection on behalf of a corporation with which they have a link. In his Fourth Report, John Dugard suggested various options for establishing this link (economic control, *siège social*, majority or predominance of shareholders),⁴⁷ but the ILC decided in favour of the 'seat of management and financial control' in draft article 9.

Admittedly, in *Diallo*, the question did not turn on this draft article but on draft article 11(b) and the protection by the state of nationality of the shareholders. Yet the fundamental question was whether protection of the two

42 *Nottebohm Case (Second Phase) (Liechtenstein v. Germany)*, ICJ Reports 1955, p. 4.

43 ILC Report 2006, at 32: 'Draft article 4 does not require a State to prove an effective or genuine link between itself and its national, along the lines suggested in the *Nottebohm* case, as an additional factor for the exercise of diplomatic protection, even where the national possesses only one nationality'.

44 ILC draft article 9. See ILC Report 2006, at 52.

45 Dugard, Fourth Report, at 2-20 (paras 1-46).

46 *Ibid.*, at 6 (para. 16). See also J.R. Crawford, 'The ILC's Articles on Diplomatic Protection', 31 South African Yb of Int'l Law 19-51 (2006), at 36-38.

47 Dugard, Fourth Report, at 12-20 (paras 28-46).

companies by the Republic of Guinea against the DRC would be justifiable and in order to answer this question, one should establish whether there exists sufficient allegiance between the protecting state and the protected entity. Draft article 9 and 11 provide for a framework to answer this question. Both provide for exceptions to the rule that the state of incorporation is the state of nationality and that only the state of nationality can exercise diplomatic protection. These exceptions only apply if there are additional factors lessening the status of the state of incorporation. The situation in which the state of incorporation is allegedly responsible for causing injury to a corporation predominantly or entirely owned by foreigners constitutes an example *par excellence* in which there is no protection, which warrants the application of the exceptions.

In finding an answer to the question in *Diallo*, the fact that Africom-Zaire and Africontainers-Zaire were not only incorporated in the DRC but also clearly had a strong link with the DRC and not with the Republic of Guinea, or any other state for that matter, must have influenced the Court in its decision. The Court actually stated that

[i]t appears natural, against this background, that Africom-Zaire and Africontainers-Zaire were created in Zaire and entered in the Trade Register of the City of Kinshasa by Mr. Diallo.⁴⁸

It would thus not seem justified in these particular circumstances to allow protection of such companies by the Republic of Guinea.

On a final note, an interesting question here is whether this decision reflects the spirit of the regime of protection of corporations and shareholders as provided for in the ILC Draft Articles. While the Special Rapporteur sought to create a legal regime that would be generous towards allowing the protection of natural and legal persons, especially in situations where other mechanisms were lacking, he simultaneously was careful to create such a regime based on existing rules and state practice and to avoid rules that would lead to abuse. For instance, he rejected the argument that there would be a realistic danger of 'nationality shopping' by individuals (natural persons), given the difficulties they generally encounter when changing nationality. Therefore, he was initially not in favour of the continuous nationality rule for natural persons.⁴⁹ The continuous nationality rule was however included in the Draft Articles adopted on first reading and maintained on second reading.⁵⁰ The opinions of the ILC members in the drafting committee were mixed and it was difficult to obtain agreement. Ultimately, a compromise was found and an additional paragraph was added to the draft adopted on first reading to

48 *Diallo*, at para. 92.

49 See Addendum to the First Report, International Law Commission, 52nd Session, A/CN.4/506/Add.1 (2001), at 13-16.

50 See on the Continuous Nationality Rule *supra* Chapter I, section 3.B.3.

accommodate concerns brought forward by the United States in their comments and observations.⁵¹ For legal persons, in particular corporations, the issue was less controversial. Already in the Fourth Report, Dugard indicated that it is less likely that corporations involuntarily change nationality and that the human rights concerns that apply to natural persons are not relevant for corporations.⁵² Throughout the ILC's deliberations on this issue it was clear that the deliberate change of nationality by a corporation to ensure protection was not to be encouraged, which resulted in the adoption of the draft articles preferring the state of incorporation as state of nationality, and in any event not to allow multiple claims, and requiring continuous nationality.⁵³ Draft Article 11 continues in the same spirit: only under exceptional circumstances will the state of incorporation be by-passed and protection be allowed by another state. In the absence of a deficit to the substantive link between the company and the state of incorporation, protection by another state will not be admissible. Although the ICJ regrettably did not spell out these considerations, its decision thus fits well with the ILC Draft Articles.

4 EXPULSION AND LOCAL REMEDIES: NON AVAILABILITY DE JURE OR DE FACTO?

As has been indicated above, the Republic of Guinea argued that the expulsion of Mr. Diallo prevented him from exhausting local remedies: he was not allowed to enter the country, and thus could not be expected to exhaust local remedies. The response by the DRC was twofold. First, it argued that Mr. Diallo could have applied for revision of the expulsion and second that he could have asked another person to pursue litigation in his absence on his behalf.

The argument of the Republic of Guinea much relied on the factual circumstances of the case and the *unreasonableness* to require exhaustion of the local remedies. The expulsion from the DRC resulted in the fact that Mr. Diallo could not enter the territory of the Congo to represent himself and his corporations in an attempt to exhaust local remedies. According to the Republic of Guinea, all complaints by Mr. Diallo related to injuries of his rights, which required his presence. The fact that no procedure was conducted after his expulsion should be read as an indication that indeed, Mr. Diallo's physical presence was indispensable.⁵⁴ In addition, it was argued that the length of the proceedings in the DRC demonstrated the unwillingness of the judiciary of the

51 ILC Report 2006, draft article 5, at 17-18. For the Commentary to the added paragraph see p. 40. For the US-view, see Government Comments and Observations, at 17-21.

52 Dugard, Fourth Report, at 39-41.

53 ILC Report 2006, at 52-58.

54 *Diallo*, Exceptions Préliminaires, Republic of Guinea, (Oral Pleadings), CR 2006/53, at 18-19 (Thouvenin).

DRC to address Mr. Diallo's complaints which was aggravated by the many interferences in these proceedings by the Congolese government.⁵⁵ The Republic of Guinea in reality asked the Court to apply draft article 15(a) and (d). Article 15(a) provides for an exception to the local remedies rule when local remedies are not 'reasonably available' or provide 'no reasonable possibility of ... redress'. The element of reasonableness with respect to the local remedies rule is well established in international law.⁵⁶ Article 15(d) on the other hand is an exercise in progressive development and takes this a step further. It provides for situations in which 'it would be manifestly unreasonable to expect compliance with the [local remedies] rule'.⁵⁷ Although the ILC refrained from giving a comprehensive list of examples of such situations, the one example given is

the situation in which the injured person is prevented by the respondent State from entering its territory, either by law or by threats to his personal safety, and thereby denying him the opportunity to bring proceedings in local courts.⁵⁸

It should be noted that the rule requires strict application, as is indicated by the word 'manifestly'. The unreasonableness of the requirement should be evident and clearly established. One cannot but notice the similarities between the example given by the ILC and the situation of Mr. Diallo and it was for good reasons that the Republic of Guinea relied on this rule in its argument.⁵⁹ The expulsion order manifestly prevented Mr. Diallo from entering the country and the procedures were undeniably lengthy.

While the Court could have taken the opportunity to discuss this rule and apply it to the present case, it took a different approach. Its line of reasoning was much like the one in *Avena*, where it had held that remedies given as of favour or as of grace do not constitute judicial remedies.⁶⁰ Since Mr. Diallo could only apply for 'reconsideration by the competent authority' of his expulsion⁶¹ and since this procedure does not constitute judicial remedy, he had no local remedies left to be exhausted. The Court concluded that the objection raised by the DRC with respect to the exhaustion of local remedies could not be upheld.⁶²

Article 14 of the ILC Draft Articles on Diplomatic Protection provides for the local remedies rule and the Commentary to this draft articles stipulates

55 *Ibid.*, at 19-22.

56 See *supra* Chapter I, section 2.C.

57 ILC Report 2006, at 83.

58 ILC Report 2006, at 83.

59 *Diallo*, Exceptions Préliminaires, Republic of Guinea, (Oral Pleadings), CR 2006/53, at 19 (Thouvenin).

60 *Avena*, at 65-66 (paras. 138-143).

61 *Diallo*, para. 47.

62 *Diallo*, para. 48.

the exception resorted to by the ICJ in *Diallo*: '[l]ocal remedies do not include remedies whose purpose is to obtain a favour and not to vindicate a right, nor do they include remedies of grace'.⁶³ Since the Court declared the claim admissible only in respect of Mr. Diallo's individual rights and not the protection exercised 'by substitution', it was clear that Mr. Diallo's expulsion prevented him from exhausting local remedies since he was the holder of the rights allegedly violated.⁶⁴ The Court's approach did not necessitate a review of the efficiency of the Congolese judiciary nor of the extent of interference by the Congolese government. One could have the same criticism on this line of reasoning as I have expressed in Chapter IV on *Avena*. Yet, the Court's strategy here is justifiable considering the circumstances of this case. Contrary to *Avena*, in which the Court could not only rely on a wealth of information submitted by the parties but also on its findings in *LaGrand*, the situation in *Diallo* was different. The factual circumstances of the case were rather complicated, the Republic of Guinea and the DRC were in disagreement on large parts of the facts and they failed to provide the Court with a clear picture. Considering this lack of clear evidence, the Court may have had no other choice but to adopt the present strategy in which is based its decision on the law in force in the DRC rather than the particular facts of this case.

5 CONCLUSION

In its decision, the ICJ provided support for the ILC Draft Articles on Diplomatic Protection in relying on these draft articles. In a relatively short judgment, the Court declared the claim of the Republic of Guinea admissible with respect to protection on behalf of Mr. Diallo for injuries of his human rights and his rights as shareholder of Africom-Zaire and Africontainers-Zaire. It rejected the claim on behalf of the latter companies 'by substitution'. The above analysis of this decision reveals that while the Court provided valuable support to some of the draft articles, it postponed important questions to the merits and avoided any pronouncement on the controversial question of protection of corporations by the state of nationality of the shareholders as provided for in draft article 11. The effect of this is that, as with *Nottebohm*, it will be difficult to distillate a general rule from the judgment, which could provide guidance in future disputes. In addition, the Court refrained from an in-depth discussion of the local remedies rule. While understandable from a practical point of view, for the purpose of the development of this rule, this is regrettable. It would have had an excellent opportunity to clarify the concept of reasonableness in this connection.

⁶³ ILC Report 2006, at 72 (footnotes and emphasis omitted).

⁶⁴ The corporations could have been represented by counsel, not necessarily by Mr. Diallo, even though this may not have been his preference.

This case may not be a high profile case, especially when compared to the decision rendered just a few months earlier concerning the Genocide Convention.⁶⁵ Nevertheless, it provides significant support to the developments of the law of diplomatic protection: it is an instrument to be resorted to for the protection of individuals, especially where other mechanisms of protection are not available.

65 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ, Judgment of 26 February 2007, available at <http://www.cij-cij.org> (not yet published).

