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Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo). Preliminary Objections: The Unfinished Story of Diplomatic Protection

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AHMADOU SADIO DIALLO (REPUBLIC OF GUINEA V. DEMOCRATIC REPUBLIC OF THE CONGO). PRELIMINARY OBJECTIONS: THE UNFINISHED STORY OF DIPLOMATIC PROTECTION

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ABSTRACT

The judgment of the International Court of Justice on preliminary exceptions in the Diallo case shows that the venerable institution of diplomatic protection (and by ricochet the Court that implements it), while conserving its original shape and outline, has incontrovertibly evolved to reflect the structural changes affecting international society. The paper first analyses change within continuity. It also shows that this change is however limited: in the field of protection foreign investment, the Court is reiterating the solutions it came up with in 1970 in *Barcelona Traction*, thus ensuring continuity without change.

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Ever since it has been studied within the International Law Commission with a view to its codification and gradual development, diplomatic protection has been something like Stendhal's mirror, hauled along the highway of international law. It is an institution that seems to reflect 'now the azure of the skies, now the filth of the slough'. Reflecting the glare of contemporary international law on a horizon aglow with universalism, it supposedly spoils and its silvering progressively darkens, before being regenerated in the reflection of a landscape with less distinct colours and outlines.[1]

The Court's judgment of 24 May 2007 on the preliminary objections in *Ahmadou Sadio Diallo* comes in a timely manner to confirm this reflective character of the institution. *Confirm*: in this sense, it must be said from the outset; if pressed to pick and choose, one would hesitate to include the *Diallo* case among the 'leading judgments' of the International Court of Justice, even if its contribution is not negligible.[2] It would come more simply in the wake of the *Barcelona Traction* judgment and would also get a mention in the commentary on *LaGrand* and *Avena*. The *Diallo* case illustrates and accompanies a process of gradual transformation of diplomatic protection: it is neither the starting point, nor the finishing line. It can be read at best as a chapter in the unfinished story of diplomatic protection.

The facts of the matter are pitiable. Two African states – both developing countries, that is, both economically and politically underdeveloped – are at loggerheads before the Court over purely private claims, all against a background of pressure from economic actors and practices that disregard the most elementary principles of the rule of law.[3] The defendant state, the Democratic Republic of the Congo,

1. Compare the approach of the International Law Commission's (ILC) two successive special rapporteurs on diplomatic protection: Mohammed Bennouna questioning the relevance of the institution of diplomatic protection with regard to 'conferring a certain share of legal personality on the individual' (Preliminary Report on Diplomatic Protection, A/CN.4/484, para. 32); and John Dugard for whom 'As long as the State remains the dominant actor in international relations, the espousal of claims by States for the violation of the rights of their nationals remains the most effective remedy for the promotion of human rights' (First Report on Diplomatic Protection, A/CN.4/506, para. 32).

2. On the idea of 'leading judgments' as applied to the Court and understood as judgments setting out new principles of jurisprudence, see Emmanuelle Jouannet, 'Existe-t-il des grands arrêts de la Cour internationale de Justice ?' in Charalambos Apostolidis (ed.), *Les arrêts de la Cour internationale de Justice* (Dijon, Editions universitaires de Dijon, 2005), pp. 168-197.

3. The sorry state of human rights in both countries is familiar enough. Guinea in particular, which here clamours for observance of human rights for one of its nationals abroad, might show more concern for observing those rights for its own nationals

put its finger rather tellingly on the trifling character of the case in view of the high considerations that should and usually do occupy the Court:

> [T]he International Court of Justice was established by the nations of the world to contribute to the maintenance of international peace and security through international justice. The DRC therefore refuses to condone for one instant the action undertaken by Guinea, which effectively, and I stress, brings this prestigious organ down to the level of a mere commercial court or a private agency for the recovery of debts on behalf of its clients. *What Guinea has really requested the Court to do* – and this is extremely serious – is to settle some quarrels over money, arguments about billing, differences over interest rates … It is almost a sign of disrespect to the Court and is certainly a manifest abuse of procedure.[4]

Counsel's histrionics are apparent enough. There is some truth in it all but even so the Court was created not to for 'the maintenance of international peace and security' but more mundanely 'to decide in accordance with international law such disputes as are submitted to it' (art. 38 (1) of the Statute of the Court). Now, actions for diplomatic protection do indeed raise problems of international law. Even if the interests may seem minor on a world scale, diplomatic protection has nonetheless been a non-negligible sector of contentious cases before the International Court of Justice for a very long time. It is true, however, that its importance is in decline for reasons that the reading of the *Diallo* judgment may help us to understand.[5]

Moreover, the interests may seem *symbolically minor* but in money terms it is not sure that they are, at least on the scale of the Democratic Republic of the Congo. It pointed out several times that in the initial request submitted by Guinea, the amount claimed in compensation for the injury

> was first put at no less than US $36 (thirty-six) billion, plus bank and moratory interest set at annual rates of 15 per cent and 26 per cent from the end of the year 1995. This amount, which represents several times the foreign debt of the Democratic Republic of the Congo, is probably one of the highest – if not the highest – ever claimed before an international court.[6]

Although Guinea subsequently accepted that its evaluation of the injury should be entirely revised, plainly the interests at stake are far from negligible.

What is it all about? Ahmadou Sadio Diallo was a Guinean businessman born in 1947 who arrived in the Congo in 1964. Ten years later, in 1974, he founded his first import-export company, a private limited liability company (*société privée à responsabilité limitée* – SPRL) under Zairean law called *Africom-Zaire*. The company worked especially for the state. In 1986, it received an order from the state for a large supply of listing paper, which the state never paid for. In 1987 the payment was apparently decided on and then blocked by the Prime Minister of the time who publicly accused Mr Diallo of trying to defraud the state and had him imprisoned without trial for a year. Africom was also opposed to

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on its own territory. Cf. FIDH, *Guinée : une démocratie virtuelle, un avenir incertain. Mission internationale d'enquête*, no 386, April 2004; Human Rights Watch, *Dying for Change. Brutality and Repression by Guinean Security Forces in Response to a Nationwide Strike*, Vol. 19, No 5(A), April 2007.

4. CR 2006/50, p. 42, translation.

5. See Michel Virally, 'Le champ opératoire du règlement judiciaire international', who observed the 'relatively high number of cases of diplomatic protection'. He counted 13 out of 29 cases for the Permanent Court and 11 out of 39 for the ICJ. His list may be updated with the following cases (the year in brackets is the year the complaint was filed): *Elettronica Sicula S.p.A.* (1988), *Aerial Incident of 3 July 1988* (1989), *Vienna Convention on Consular Relations* (1997), *Ahmadou Sadio Diallo* (1998), *LaGrand* (1999), *Armed Activities on the Territory of the Congo – Democratic Republic of the Congo v. Uganda* (for the counter-claim of Uganda) (1999), *Avena and Other Mexican Nationals* (2003). This makes a total of 18 out of 114 cases. It can be observed from these figures that although diplomatic protection is the source of a non-negligible number of cases it no longer has the scope it used to particularly before the Permanent Court.

6. *Exception préliminaires*, République démocratique du Congo, vol. 1, 1er octobre 2002 (hereafter EP), p. 1 (our translation).

Plantations Lever au Zaire (PLZ) about a lease entered into in 1975 by which PLZ rented out one of the apartments it owned to Africom, who put it at the disposal of its director, Mr Diallo. In 1991 Africom stopped paying the rent, on the ground that since 1975, the rent was that applicable for furnished accommodation whereas the apartment in question was unfurnished.

Meanwhile, in 1979, Africom participated with two other associates who were natural persons in the creation of a second SPRL called Africontainer-Zaire. But very quickly Mr Diallo found himself in sole charge. The other two associates withdrew in 1980 leaving 60 per cent of the shares (*parts sociales*) to Africom and 40 per cent to Mr Diallo, who became besides the manager (*gérant*) of the company. Africontainer was involved in the containerised transport of goods for three mixed petroleum companies (Zaire Shell, Zaire Mobil and Zaire Fina) and for Générale des Carrières et des Mines or Gécamines, the state corporation operating rich mining deposits in the Congo. Difficulties soon arose which it seems were attributable primarily to Africontainers' co-contractors: default on payment for services; improper use of containers for the use of Gécamines or ONATRA, the state company theretofore with a monopoly of transport; extended lay-up time of containers; breach of the contractual exclusivity clause, according to Mr Diallo, which led his co-contractors to resort increasingly to other service providers, including the petroleum companies in question.[7] Never mind the merits at this stage. Mr Diallo undertook various steps to recover his claims through the intermediary of his companies. Non-contentious steps, through negotiations, with the Zairean state and public companies (ONATRA and Gécamines); contentious steps with respect to two of the three petroleum companies – Zaire Shell and Zaire Fina – and PLZ. In the three cases brought before the courts, Mr Diallo's companies won before the trial courts but the claims were dismissed upon appeal. Appeals to the supreme court were filed and seem to be pending at the time the International Court of Justice handed down its judgment.

Mr Diallo's claims – that is, his companies' claims, and it shall be seen that the distinction is not unimportant! – caused a stir in high places. But at this point, the facts become controversial. Guinea itself provides two versions of the facts, the first in its Application of 28 December 1998, the second in its Memorial and in the other items in proceedings. The first version is the crudest and highlights the many interventions by the oil companies to prevent Africontainers from recovering its claims. After several attempts to stop the enforcement of the judgments against them, the oil companies allegedly 'joined forces' and offered to pay the Prime Minister 'who had just founded a new political party' the same amount awarded against Zaire Shell in return for the expulsion of Mr Ahmadou Sadio Diallo. From that point on, Mr Diallo's fate was sealed, according to Guinea: the Prime Minister ordered the attachment of Zaire Shell's goods to be lifted and signed an expulsion order against Mr Diallo. There then began a period of detention, the duration of which was again controversial. According to Guinea, Mr Diallo was held on two occasions, for a total of 75 days before being taken to Kinshasa airport. There a few last tribulations awaited him, that only the Application seeks to explain:

> When the time came for Mr. Diallo to board the aircraft, the airline, Camair, refused to allow him on board, since he had no travel documents and no official expulsion order had been produced.
>
> Kengo Wa Dondo then threatened Camair with the closure of their offices in Kinshasa if they refused to accept this "undesirable passenger" [*passager encombrant*]. An undated refusal-of-entry form was then completed at the airport, with the result that, with the assistance of a ticket purchased by Zaire Shell, Mr.

7. See Memorial of the Republic of Guinea, 23 March 2001, pp. 16–29 and the observations by Guinea on the Preliminary Objections 7 July 2003, pp. 11-13; and the DRC's Preliminary Objections, pp. 11 ff.

> Ahmadou Sadio Diallo was thereupon despatched to Conakry via Abidjan with only the clothes that he stood up in.[8]

The presentation given in Guinea's Memorial is much blander. There it is simply said that 'further to Mr Diallo's repeated actions to recover a number of claims in the name of the companies … the Zairean Prime Minister ordered Mr Diallo to be expelled from the country'.[9] Of the refusal-of-entry form signed at the airport, Guinea said it was simply 'puzzled' 'remembering that Mr Diallo has lived in Zaire for more than thirty years on the basis of a resident permit for an indeterminate period regularly issued by the Zairean authorities'. However, the Memorial adds a few details about the conditions in which Mr Diallo was held:

> He had to endure precarious detention conditions both materially and morally but also acts of mistreatment and death threats from people in charge of his detention. Mr Diallo was also unable to meet or communicate with members of the Embassy of Guinea or with his lawyers. No food ration was brought to him by the detention centre.[10]

As for the DRC, it considered that Mr Diallo's expulsion had a legal basis in the Congolese statute of 12 September 1983 on policing foreigners, which authorised the President of the Republic 'by order stating its reasons' to expel from Zaire 'any foreigner who, through their presence or their conduct, jeopardise or threatened to jeopardise peace and quiet or public order'. In the case in point, the expulsion order allegedly stated that 'the presence and conduct [of the person concerned in Zaire] breach and continue to breach Zairean public order, especially in the economic, financial and monetary areas'. The DRC highlights what to it are the extravagant claims of Mr Diallo, but also the fact that he allegedly 'had been involved in currency trafficking and was moreover guilty of a number of attempts at bribery', accusations for which the DRC has never produced evidence – but perhaps it will in the proceedings on the merits.

According to Guinea, Mr Diallo landed in Conakry, ruined and forced to live 'off the assistance of charitable persons'.[11] He continues, however, to expedite negotiations through the intermediary of lawyers who allegedly work for him *pro bono*. But he has neither the means to assert his rights nor the possibility of managing the companies which apparently continue to exist legally, but whose activities have collapsed. He turned to his state through the intermediary of the Minister for Foreign Affairs. He has also filed an application it seems with the International Centre for the Settlement of Investment Disputes (ICSID), but the absence of any bilateral treaty between the DRC and Guinea means that it is doomed to failure. Thus 'faced with the repeated silences of the Congolese administration, Guinea decided to bring the matter before the Court'.[12]

A first Application was filed by Guinea with the Court Registry on 25 September 1998. The registrar advised Guinea that the case could not be added to the roll because it had failed to state any basis for jurisdiction. Guinea hurriedly – it can be imagined – filed its mandatory declaration of acceptance of the Court's jurisdiction on 11 November 1998. It made out a new Application, recorded by the Registry on 28 December 1998, amending the first. In this way, jurisdiction was established by the two declarations combined, the one made by the DRC having been submitted long before on 8 February 1989.[13] After

8. Application, pp. 11 and 13.
9. Memorial, pp. 29-30 (our translation).
10. *Ibid*.
11. *Ibid*., p. 33 (our translation).
12. *Ibid*., p. 37 (our translation).
13. Cf. the short discussion of this position in Guinea's Memorial, p. 4 and above all the remarks by Judge *ad hoc* Mampuya

Guinea's Memorial was filed upon expiry of the (extended) time-limit fixed by the Court, the DRC filed Preliminary Objections on 3 October 2002. Under the new article 79 of the Rules of Court, which lays down a maximum period of three months, such objections would have been inadmissible. But the DRC pointed out rightly that in the case at hand, concerning an Application filed in 1998, the far less stringent old rules applied allowing objections to be filed 'within the time-limit set for filing the Counter-Memorial'.[14]

Since neither state had a judge of its nationality on the bench, two judges *ad hoc* were designated: Professor Mampuya for the DRC and Professor Bedjaoui for Guinea. When the latter resigned in September 2002, Professor Mahiou was appointed in his stead. One of the judges *ad hoc* signed a 'Separate Opinion' the other a 'Declaration'.

The oral proceedings were representative of the new stringency imposed by the Court: four half days (some quite short) of oral arguments. Reading the reports of them is evidence enough that this was ample.[15]

What are the rights for which Guinea claims to exercise its diplomatic protection? They are of three kinds and, in a way, they are what makes the Application so interesting. First there are Mr Diallo's 'individual personal rights'. This part of the Application sets about denouncing the arrest and arbitrary detention, the denial of the right to consular protection and the expulsion 'associated with the effective deprivation of the right to property'. Then there are Mr Diallo's 'direct rights' as an *associé* of Africom-Zaire and Africontainers-Zaire, that is the rights Mr Diallo derives from the Congolese company's act. Lastly there is company law. From the outset, as shall be seen, Guinea's Application runs up against a sizeable obstacle here, since the two companies in question are Congolese. They therefore fail a priori to meet the condition of nationality underpinning the action for diplomatic protection. They are not Guinean and so cannot in principle enjoy Guinea's diplomatic protection. Accordingly Guinea attempts to overcome the obstacle by invoking the protection of Mr Diallo's rights as *associé* of the companies by 'substitution'.

In its Judgment, the Court finds Guinea's Application admissible in that it relates to the protection of Mr Diallo's rights as an individual (unanimously), and also admissible in that it affects his 'direct' rights as an *associé* of Africom-Zaire and Africontainers-Zaire (by fourteen votes to one, that of Judge *ad hoc* Mampuya). Conversely, it finds inadmissible the part of the Application about Mr Diallo's protection for alleged violations of the rights of the two companies (by fourteen votes to one, that of Judge *ad hoc* Mahiou).

When reviewing the list of rights protected by Guinea, it can be understood that the Court is not the only forum before which the matter might be brought. Had there been a bilateral investment treaty between the two states, the ICSID might well have been the most appropriate forum, since the 'crux' of the Application was plainly the claims of the two Congolese companies under the exclusive control

in his 'Separate Opinion', pp. 2-3. It will be recalled that this type of situation has arisen several times before the Court (cases concerning *The Temple of Preah-Vihear*, *Right of Passage over Indian Territory*, *Military and Paramilitary Activities in and against Nicaragua* and most recently *The Land and Maritime Boundary between Cameroon and Nigeria* (Judgment on Preliminary Objections, 11 June 1998, paras 21-46). In the absence of any particular requirements as to deadlines, the Court has consistently taken the view that the fact that a declaration is made at the last minute, just before the application is filed, does not invalidate the application. In the case in point, the DRC did not raise the issue but, as Judge Mampuya observed 'this was undoubtedly for easily understood reasons – aggression having led to nearly five million Congolese deaths and seven years of rampant violence – but they are of little relevance here' (Separate Opinion, p. 50-51).

14. Cf. Preliminary Objections, p. 8.

15. Even if one of the speakers, Professor Alain Pellet, complained of this, pointing out that in the case concerning *Barcelona Traction* 'the Court heard pleadings by our illustrious predecessors at forty-three sittings in the first phase and sixty-four in the second' (CR 2006/51, p. 40). But is not *Barcelona Traction* the acme of procedural debauchery – especially if the length of proceedings is compared with the skimpiness of the outcome?

of a Guinean national.[16] An organ for the protection of human rights could also have been suitable: one thinks here in particular of the African Commission for Human and Peoples' Rights. This possibility was quite open in practice: Guinea and the DRC are both parties to the African Charter, which is enough to give the Commission jurisdiction under article 47 ff. for inter-state complaints or article 55 ff for individual complaints. Either Guinea or Mr Diallo could have filed all of the dispute on the basis of the articles 4, 6, 14 and 12(4) of the Charter.[17] Several factors must probably have directed the applicants to the ICJ: first – a rather prosaic aspect but which has its importance – an application before the ICJ secures more media coverage and a higher profile than a complaint to the Banjul Commission. Next – and more fundamentally – the ICJ has two advantages over the Charter mechanism: it makes 'judgments' that are binding on the parties whereas the Commission delivers 'decisions' that are not actually binding because they are not of a mandatory character; the ICJ can determine facts not just from the perspective of human rights but in the light of all rules of international law that bind the parties, whether based on treaty or custom, including human rights treaties. The fact remains, though, that proceedings before the ICJ are certainly far more costly (and in most cases lengthier, which is in any event true in the case at hand) than before the Commission. And it is easy to understand, in this respect, the 'unease' expressed by the DRC at Guinea's mention of its own 'economic difficulties' compared with a Congo bled by two wars resulting in more than three million deaths.[18] These considerations notwithstanding, the approach demonstrates once again – after the *LaGrand* and *Avena* judgments – the use that may be made of diplomatic protection in the International Court of Justice. And yet, the matter also confirms that we are indeed faced with 'residuary' institutions that apply only in situations that are not covered by any other mandatory special mechanisms (arbitration commission or court of law) for dispute settlement. Admittedly, we can only agree with former ILC rapporteur, John Dugard, in considering that the 'residue' remains important and it would be a mistake to pack it away among the tools for which there is no longer any use, but that we like to keep essentially for their quaintness.[19] Much more than this, the judgment shows that the venerable institution of diplomatic protection (and by ricochet the Court that implements it), while conserving its original shape and outline, has incontrovertibly evolved to reflect the structural changes affecting international society. It is this change within continuity that we will have to analyse first (Part I). We shall see, though, that this evolution remains limited. *Diallo* demonstrates this with regard to the protection of foreign investments. On this level, the Court, in reiterating the solutions it came

16. According to Judge *ad hoc* Mampuya, mention of the two other sets of rights is just to try to better conceal the fact that the claims – of the companies and not Mr Diallo's directly – are the sole matter at issue. Such a manoeuvre might even, he contends, be a cause of inadmissibility for 'abuse of process' or at least because the applicant allegedly had 'not stated the nature of its claim within [sic] the degree of precision and clearness for the administration of justice (*Phosphates in Morocco, Judgment, 1938, PCIJ series A/B, No. 74*)': see Separate Opinion, pp. 47-55 and especially p. 55.

17. Art. 4 'Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.' Art. 6 'Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.' Art. 14 'The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.' Art. 12(4) 'A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.'

18. Preliminary Objections, pp. 4-5: '[I]t is the Republic of Guinea that chose to bring proceedings before the Court for matters which could have – and still can be – settled within the Congolese legal order […]. The [DRC] is unaware of the reasons that led Guinea to begin long and costly proceedings under these circumstances but, in any event, it believes that the factors evoked, while they should be taken into account, must above all be taken into account with respect to the defendant state which, for its part, did not choose to be brought before the Court. In this respect, the [DRC] shall not insult the Court by reminding it that it is one of the countries in the world must seriously affected by armed conflicts with disastrous human consequences' (our translation).

19. See John R. Dugard, *First Report on Diplomatic Protection*, A/CN.4/506, introduction paras 10 ff.

up with in 1970 in *Barcelona Traction*, ensures continuity again. But this time it is continuity without change (Part II).

I. CHANGE WITHIN CONTINUITY: THE EVOLUTION OF DIPLOMATIC PROTECTION

As said, it is not the Judgment in *Diallo* itself that brings in the change. There is, there too, a degree of continuity in the evolutionary process. But *Diallo* incontrovertibly confirms the change in the nature of diplomatic protection (section A). At the same time, it reasserts both the identity and the autonomy of this form of judicial action (section B).

A. A change in the nature of diplomatic protection

Diplomatic protection is progressively changing its nature much as the mirror reflects the path over which it is carried. That is, diplomatic protection is primarily a framework, a legal channel. In this sense, it does not offer any content, it is directed at a goal: reparation of damage. It is the way this redress is contemplated in terms of procedure that changes. When it is said that this change is part of continuity, this is not just a way of putting things. It can be considered that this change is embedded in the very formulation of the idea that generally serves as a starting point for reflection: the famous *dictum* of the Permanent Court of International Justice in *The Mavrommatis Palestine Concessions*. In fact, this *dictum* can be – and always has been – construed in two different ways: a 'classical' interpretation and what has been called a 'modern' interpretation.[20] Plainly *Diallo* is in the lineage of the Court's jurisprudence that tends to make the latter interpretation its own.

1. Two interpretations of the PCIJ's *dictum* in Mavrommatis

Let us begin by recalling the often quoted passage:

> It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law.[21]

This passage is far more ambivalent than is usually admitted and the diversity of its interpretations attests to this.

A first reading – corresponding to the 'classical' interpretation[22] – elicits the image of the Leviathan, or a host of Leviathans that states form, with in their midst, a yet larger host of small formless

20. See especially Eric Wyler, 'La protection diplomatique : la concurrence des réclamations', SFDI, *Les compétences de l'Etat en droit international* (Paris, Pedone, 2006) pp. 239-262, esp. p. 241.

21. *Mavrommatis Palestine Confessions*, Judgment of 30 August 1924, Series A, No. 2, p. 12. See also *Panevezys-Saldutiskis Railway*, Judgment of 28 February 1939, Series A/B, No. 76, p. 16.

22. In the most recent literature, see in part Raphaële Rivier's hard-hitting criticism about article 1 of the ILC articles on diplomatic protection: 'Travaux de la Commission du droit international (cinquante huitième session) et de la Sixième Commission (soixante et unième session), *Annuaire français de droit international* 2006, pp. 322-325 and esp. p. 323: 'The specificity of diplomatic protection relates, however, to the type of damage for which redress is claimed: the damage incurred by the state because of the infringement of the rights of its nationals, as a result of the violation of international rules on the treatment of aliens'. See also Carlo Santulli, 'Entre protection diplomatique et action directe : la représentation. Eléments épars du statut international des sujets internes', SFDI, *Le sujet en droit international* (Paris, Pedone, 2005) pp. 85 ff. The author makes an unequivocal reading of the *dictum*, which maintains a sharp distinction between action by way of diplomatic protection, action

figures with no particular quality: individuals. Individuals who, as everyone knows, have just one right, in exchange for their total submission – security.[23] This Hobbesian image is mixed with later nineteenth-century phantasms of the growing power of the nation, the exaltation of the nation-state with as its corollary a sort of nationalisation of international law: an international law made *by* and *for national* and *paternalistic* states, with their coexistence as their sole concern. In this nationalised world, the state takes up the case of 'its own' because the individual *belongs* to the nation, because the individual is an inseparable component of it. The national state of the time, like the chief of a tribe, may say he is 'one of mine' (with the subtext: and if this one is 'one of mine', that one is 'one of yours', which differentiates them fundamentally, and which constitutes the ultimate criterion of distinction in a nationalised world). Paternalism too is evoked by the very idea of *protection*: a protection afforded to those lacking in legal capacity, not because there is a duty to do so, but simply because the offence against a member of the tribe is felt by the tribal chief as an offence against him. And this is where the celebrated legal fiction, the stroke of the magic wand comes in, because by 'protecting' the individual in the international sphere, the state does not assert the individual's right. No, the individual's right is extinguished at the very moment the state *takes it on*: it undergoes *novation* in the sense of civil law. The absence of connection between the 'internal sphere' and the 'international sphere' can lead only to its annihilation for the benefit of a new right, which can only be a right of the state, states alone having rights in the 'international sphere'. Thus in 'taking up the cause of one of its own' the state 'is in reality asserting its own rights' and not its national's right. The advocates of such an interpretation observe two additional points which they identify as *consequences* of the nature of diplomatic protection so defined. First, diplomatic protection is a *right of the state*, which means that its exercise is part of its discretionary power. Second, redress owed by the defendant state that caused the injury is due to the state and the state alone. By taking on its national's claim, the state asserts its own right to redress for injury that is caused to it indirectly, and what is more by the intermediary of the breach of a duty existing in respect of it. In this way the state remains the sole master of the decision to pass on any compensation to the national involved. In any event, any such transfer does not concern international law, it is a matter for internal law exclusively.

Upon closer inspection, it is doubtful whether these two characteristics of diplomatic protection are really consequences of the fact that through diplomatic protection the state asserts a substantive right peculiar to itself. The first characteristic is based rather on the fact that the state exercises a *procedural* right that is peculiar to it; that is, it implements a legal channel that is not available to individuals and that is dependent upon its decision alone. Accordingly, the problem comes down to one of the state's obligations with respect to individuals in terms of the conduct of foreign policy (or vice versa of the right of individuals with respect to the state in this field). The question is settled most of the time on the national level in a way that, as the ILC special rapporteur pointed out, tends to progressively restrict the state's freedom.[24] The Commission made note of this in its draft article 19 on 'recommended practices'.[25] General international law has no real response in this field, even if very marked changes are felt

in representation and direct actions, enabling him to maintain the classical interpretation of the institution pristine.

23. On this point, Vattel was indeed Hobbesian as shown by the often quoted passage, as being at the origin of the fiction of diplomatic protection: 'whoever ill-treats a citizen indirectly injures the State, which must protect that citizen.' *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and Sovereigns,* vol. III (1758, English translation by C.G. Fenwick, Carnegie Institution, Washington 1916) Chap. VI, p. 136. Cited in the Commission's commentary under article 1 of the draft articles, A/61/10, p. 25.

24. See the commentary on draft article 4 which was finally not taken up by the ILC: *First report on diplomatic protection*, A/CN.4/506, pp. 223-226.

25. Art. 19: 'A State entitled to exercise diplomatic protection according to the present draft articles, should: (a) give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred'.

regionally.[26] As for the second characteristic – the relative freedom as to the attribution of compensation – it cannot be understood logically: the parallelism of form would require that once the compensation was secured at the end of proceedings, the state should make a reverse novation in its domestic order, replacing the duty of redress of the state responsible for the injury towards it with a new duty of redress which it would owe to the individual.

These two shortfalls of the 'classical' interpretation are compounded by a criticism that is often made: such an interpretation is 'illogical' with respect to the legal regime of diplomatic protection which requires that the protected national keeps the same nationality throughout the proceedings (rule of continuity of nationality) and which leads to making the injury to the individual the 'measuring rod' of the injury theoretically inflicted on the state. Neither of these rules seems compatible with the idea that the state would be defending its own right: if this were the case, there would be no need to worry about the change of nationality of the protected person once the action had been brought; and it should be possible to make an autonomous evaluation of the injury to the state separate from that of the injury to the individual.[27]

These aporias have led several authors to interpret the *dictum* in *Mavrommatis* differently. This is not the place for us to go into the details of these alternative readings. To try to synthesise them, it can be said that they see in the action for diplomatic protection an action to represent the individual who is a victim of injury, in which the state's interest in acting is based on the breach of a duty peculiar to it. In other words, the 'modern' reading considers that there are two – or even three – separate rights at issue and not just one: first *the right of the private person*, which may be subdivided into two sub-rights: the right the violation of which by the defendant state gives rise to the injury and the right to reparation for that injury; second *the right of the state*, which is the state's right to see international law respected 'in the person of its subjects' and which is the basis for its capacity to act. By the 'modern' interpretation, this right is nothing more than the expression of personal jurisdiction attributed to the state by international law in its 'international constituency' to use Georges Scelle's terminology. In this respect, the exercise of diplomatic protection is understood, from a perspective of 'role splitting' (*dédoublement fonctionnel*) , as the exercise of an international function directed at guaranteeing the rights of nationals.[28] Thus, the state acts *on behalf of* a private person, it represents their interests before the international courts when these courts fail to recognise the private person has any *ius standi*. But this action is at the same time justified and founded by a right that belongs specifically to the state.[29] The violation of this right in the person of its subject itself entails an *injury*, but which is essentially a moral or *legal* injury, that could and should be subject to reparation separately from the injury caused to the individual.[30] That is the

26. See especially the contributions by Jean-Françoios Flauss, 'Vers un aggiornamento des conditions d'exercice de la protection diplomatique' in J.F. Flauss, *La protection diplomatique. Mutations contemporaines et pratiques nationales* (Brussels, Bruylant, 2003) pp. 29-61 and 'Contentieux européen des droits de l'homme et protection diplomatique' in *Libertés, Justice, Tolérance. Mélanges en l'honneur du Doyen Gérard Cohen-Jonathan* (Brussels, Bruylant, 2003) pp. 813-838. For developments in the Community legal order, see Denys Simon and Flavien Mariatte, 'Le « droit » à la protection diplomatique : droit fondamental en droit communautaire ?' (novembre 2006) *Europe*, Etude 11.

27. The rule of the exhaustion of local remedies, in some respects, also seems to thwart the classical interpretation. See Michel Cosnard, 'Rapport introductif', SFDI, *Le sujet en droit international*. Colloque du Mans (Paris, Pedone, 2005) pp. 49-50: 'It is not the least of the paradoxes of this institution that it asserts that only the right of the state is at issue, but renders its exercise dependent on action or inaction by the individual'.

28. For a presentation of Scelle's theory in English, see Antonio Cassese, "Remarks on Scelle's Theory of 'Role Splitting' (*dédoublement fonctionnel*) in International Law", *EJIL (1990)*, 210.

29. See Annemarieke Vermeer-Künzli, 'As if: the legal fiction in diplomatic protection' (2007) 18 *EJIL* pp. 37-68 esp. p. 58

30. On the idea of legal injury, see Brigitte Stern, 'Et si on utilisait le concept de préjudice juridique. Retour sur une notion délaissée à l'occasion de la fin des travaux de la CDI sur la responsabilité des Etats' (2001) *AFDI*, pp. 3-34.

conception that was adopted by the International Law Commission in what was a more pragmatic than dogmatic perspective.[31] As for the Court, it is not believed ever to have shown itself reluctant to take this approach. It seems even to have gradually made it its own. *Diallo* comes as confirmation of this choice.

2. The 'modern' interpretation of diplomatic protection and the contribution to it by *Diallo*

Several of the Court's judgments show that it makes a distinction among three types of action in order to secure redress for damage resulting from a wrongful act: an action in which the state relies on its 'own right', in other words the action in which the state invokes damage caused to it directly by violation of an obligation owed to it; an action in which the state relies on the right of one of its nationals, when the damage has been caused to that person through violation of an obligation owed to them; and finally a 'mixed' action in which the state invokes both its 'own right' and that of the private individual, with the internationally wrongful acts having injured both of them simultaneously.

In *Interhandel*, *Barcelona Traction* and *Elettronica Sicula* (*ELSI*), the Court and (in *ELSI*) a chamber of the Court had to answer the same question: the claimant requested the Court to set aside enforcement of the rule of exhaustion of local remedies on the ground that the claim made sought redress for injury caused to it directly. In all three cases, the Court and the Chamber dismissed this argument, observing that the disputes before it were about redress for injury caused to nationals of the claimant states, which through their applications had 'espoused' their cause. In *ELSI* in particular, the Chamber observed that it failed 'to find a dispute over alleged violation of the FCN Treaty resulting in direct injury to the United States, that is both distinct from, and independent of, the dispute over the alleged violation in respect of Raytheon and Machlett' (p. 43). And it concluded, after recalling the conclusions of the Court in *Interhandel*, 'In the present case, likewise, the Chamber has no doubt that the matter which colours and pervades the United States' claim as a whole, is the alleged damage to Raytheon and Machlett, said to have resulted from the actions of the Respondent. Accordingly, the Chamber rejects the argument that in the present case there is a part of the Applicant's claim which can be severed so as to render the local remedies rule inapplicable to that part'.[32]

In *Armed activities on the territory of the Congo (DRC v. Uganda)*, the Second Counterclaim from Uganda juxtaposed the first two types of action: the claim of the state's 'own' right and the claim of an individual right through diplomatic protection. Uganda complained of the mistreatment of its diplomats and of certain persons who did not have diplomatic status. For the diplomats, Uganda relied on the Vienna Convention on Diplomatic Relations. Conversely, 'With regard to other Ugandan nationals not enjoying diplomatic status, Uganda grounds its claim in … the international minimum standard relating to the

31. This was motivated by the concern expressed by Special Rapporteur John Dugard not to take sides too strongly in the quarrel over definitions but to preserve the institution while adapting it to new challenges. See in part the commentary under article 1 of the draft article '(3)… A State does not "in reality" – to quote *Mavrommatis* – assert its own right only. "In reality" it also asserts the right of its injured national… (5) Draft article 1 is formulated in such a way as to leave open the question whether the State exercising diplomatic protection does so in its own right or that of its national – or both'. A/61/10. Article 1 states: 'For the purposes of the present draft articles, diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.' General Assembly Resolution 62/67 of 6 December 2007.

32. Case of *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment of 20 July 1989, ICJ Reports 1989, p. 43. See the commentary by Brigitte Stern, 'La protection diplomatique des investissements internationaux. De *Barcelona Traction* à *Elettronica Sicula* ou les glissements progressifs de l'analyse' (1990) *JDI* 897-945. In *Barcelona Traction*, Belgium alleged that the injury to its shareholders was affecting its 'national economy' and was therefore a direct injury to it. The Court rejected this allegation: *Case of Barcelona Traction Light and Power Company Limited (Belgium v. Spain) (New Application: 1962)* second phase, Judgment of 5 February 1970, *ICJ Reports* 1970, p. 46, §§ 85-86. See the commentary by Jean Chappez in (1970) *AFDI*, 307-328 and especially 315-316.

treatment of foreign nationals who are present on a State's territory'.[33] The Court found the application admissible for diplomatic personnel and other persons not enjoying diplomatic status but present on the Embassy's premises at the time of the incidents. However, for the non-diplomats attacked at Ndjili international airport while trying to leave the country, the Court found that Uganda had not proved the nationality of those persons. Accordingly, one of the conditions for implementing diplomatic protection was not met and the claim was inadmissible.[34]

Lastly, in *LaGrand* and *Avena*, the Court heard a third type of action, a 'mixed' action in which the claim about the state's 'own' rights was intrinsically tied up with the claim about the individual rights of protected persons. This mixed character was related to the very nature of article 36 of the Vienna Convention on consular relations, bestowing 'interdependent' rights in the sense that the violation of the state's rights (to notification and disclosure) necessarily entailed the violation of the rights of the individual (to disclosure and assistance) and vice versa.[35]

These judgments highlight the point that, in a 'pure' action for diplomatic protection, the redress is claimed for the injury incurred by the national and not by the state. The state relies in the first place on the (substantive) rights of its national and not its 'own right'. That does not mean that no right of the state is involved: the respondent's unlawful act does indeed breach a right of the state, but that breach is found only in connection with the breach affecting the national's right. This finding has as its essential function to confer on the state a *capacity to act*, even if it may also entail the granting of non-pecuniary redress for the state. This aspect is highlighted by the Court in *Barcelona Traction*.

Subsequent to the celebrated and often quoted passage in which the Court draws a distinction between obligations *erga omnes* and 'obligations the performance of which is the subject of diplomatic protection', the Court distinguishes between the question of the violation of the right of nationals (shareholders in the case in point), as the basis for the duty to make redress, and the violation of the right of the state, which confers capacity to act on the state:

> In the present case it is therefore essential to establish whether the losses allegedly suffered by Belgian shareholders in Barcelona Traction were the consequence of the violation of obligations of which they were the beneficiaries. In other words: has a right of Belgium been violated on account of its nationals' having suffered infringement of their rights as shareholders in a company not of Belgian nationality? Thus it is the existence or absence of a right, belonging to Belgium and recognized as such by international law, which is decisive for the problem of *Belgium's capacity*.[36]

Two rights were therefore violated: the right of the shareholders and the right of Belgium *because of* the violation of the former. And it is the violation of the latter right that confers on Belgium the *capacity to act*.

Diallo fits into this category of action for pure diplomatic protection in which the state takes up the case for one of its nationals and relies primarily on the substantive rights of its national. Admittedly, in its application Guinea asked the Court first 'To order the authorities of the Democratic Republic of the Congo to make an official public apology to the State of the Republic of Guinea for the numerous wrongs done to it in the person of its national' but it is plain that this is not the core of the Application

33. *Armed activities in the territory of the Congo (DRC v Uganda)*, Judgment of 19 December 2005, p. 97, § 329.
34. *Ibid*. p. 98, §§ 331-333.
35. See para. 40 in *Avena* in which the Court relies on the distinction already made in *LaGrand*.For a commentary, see Myriam Benlolo-Carabot, 'L'arrêt de la Cour internationale de Justice dans l'affaire Avena et autres ressortissants mexicains (Mexique c. Etats-Unis d'Amérique) du 31 mars 2004' (2004) *AFDI*, 259-291 especially 270.
36. Judgment of 5 February 1970, pp. 32-33, paras. 35-36. Emphasis added.

and even less the 'nub of the dispute'; the nub lies in the ensuing claims for repayment of the claims held by Mr Diallo's companies. On this point the application reveals to what extent Guinea and Mr Diallo seem interchangeable as creditor, that is, Guinea really appears to be the representative of Mr Diallo's interests before the Court. Guinea asks the Court 'To order that the Congolese State pay to the State of Guinea *on behalf of its national, Mr Diallo Ahmadou Sadio*, the sums of … in respect of the financial loss suffered by the latter'; it also asks that the Congo be ordered 'to return to the Applicant [that is, not to Guinea] all the non-monetary assets set out in the list of miscellaneous claims'.

The claims as reformulated in the Memorial are more in keeping with the traditional formalism of diplomatic protection. Guinea requests the Court to find that wrongful acts have been committed by the DRC and 'accordingly' the obligation to make full redress for the injury 'incurred by the Republic of Guinea in the person of its national'. It can be seen, however, that beyond the form, the content of the claim remains unchanged. It is a claim for reparation 'covering all of the injuries caused by internationally unlawful acts of the Democratic Republic of Congo, including lost earnings' and 'interest'. In other words, the aim is to make good the injury allegedly caused to Mr Diallo. Being so focused on the injury caused to its national, Guinea even forgot the 'official apologies' that it had asked for in its Application by way of non-pecuniary remedy for the injury to its 'own rights'.

But what, then, is the contribution made by the case of *Diallo*? It lies essentially in the confirmation and enhancement of the 'modern' approach to diplomatic protection.

Confirmation firstly because the Court, when it came to recalling what the institution of diplomatic protection is, dispelled all ambiguity as to its approach by preferring to cite the first of the ILC draft articles rather than the *dictum* of the Permanent Court in *Mavrommatis*. In supporting the ILC's approach in this way, the Court acknowledged that the first article truly reflects customary international law.[37] This if anything is proof that in its eyes diplomatic protection as an institution of general international law has changed its nature since 1924. Next it is an enhancement because for the first time the Court separates in its jurisprudence diplomatic protection from the primary rules of international law applicable to the treatment of foreigners. In an *obiter dictum* that will probably mark legal history, the Court observes the extension of the material scope of diplomatic protection, especially to human rights:

> Owing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, the scope *ratione materiae* of diplomatic protection, originally limited to alleged violations of the minimum standard of treatment of aliens, has subsequently widened to include, *inter alia*, internationally guaranteed human rights.[38]

Theretofore diplomatic protection was exercised only in conjunction with obligations owed exclusively to the state or, possibly, obligations conferring substantive rights on both individuals and the state. The rules of the 'minimum standard of civilisation' protected the individual, certainly, but essentially conferred substantive rights on the state. The rules of article 36 of the Vienna Convention on consular relations conferred rights on both individuals and the state, but the two categories of rights were placed in a position of interdependence and were in the context of an instrument emphasising interstate relations. The 'modern' interpretation thus found its limits. While accepting that diplomatic protection may be exercised essentially to claim individual rights, the Court limited the application to rights that were either inseparable from or interdependent with states' rights.

37. Judgment, p. 21, para. 39.
38. *Ibid*.

In *Diallo*, Guinea invoked – however chaotically[39] – both the rules on the treatment of aliens and human rights recognised by treaties. The Court took the opportunity to observe that, seeing as diplomatic protection could be exercised to protect individual rights that were not related to states' rights, there was no reason to restrict the scope to the rights of aliens. Henceforth, *all* individual rights, whether created by treaty or recognised in customary law, can be invoked in action for diplomatic protection.

In the context of such actions, the state need only justify its capacity to act. This is founded upon the violation of its right to see that rights accorded to private individuals by international law are observed. This solution is obviously applicable to treaties with respect to human rights, insofar as all treaties of this type, in addition to conferring rights on individuals, also create a right for all states parties to see that obligations laid down by the treaty are respected. It is this principle that forms the basis of 'collective guarantee' mechanisms as embodied by interstate complaint procedures. Beyond human rights treaties, it can be considered that this solution is applicable to all *integral* treaties conferring rights on private individuals and creating obligations *erga omnes partes*.

Does this mean that diplomatic protection has become an instrument for human rights protection as has often been claimed in recent years?[40] To some extent, yes, since the state can, through such action, represent one of its nationals whose human rights have been flouted. This development consolidates by the same token the expanding role of the International Court of Justice as 'the judge of human rights'.[41] Yet it remains a limited instrument for the protection of human rights insofar as its framework remains unchanged: the conditions for implementing it remain the same, whether the exhaustion of local remedies or the condition of nationality. This condition of nationality means that a state cannot act in terms of diplomatic protection for the benefit of an individual who does not have its nationality. The action allowing such protection regardless of nationality is different: it is based on the specific logic of *erga omnes* rules (in general international law) or *erga omnes partes* rules (for treaty law), a logic that is shaped in the ILC articles on responsibility for internationally wrongful acts.[42] From this point of view, diplomatic protection retains its identity. It remains an action specifically directed at defending the rights of states' nationals.

B. The unchanged framework of diplomatic protection

Diplomatic protection has changed its nature but it maintains an unchanged framework. There is nothing shocking or disturbing about that.[43] The institution attempts to adapt, it seeks to reflect the new challenges of international law. But maintaining its legal regime makes it possible to preserve its identity and its autonomy with respect to other forms of action: the direct action of individuals to defend their rights,

39. This chaos is particularly apparent in the application. The memorandum on the merits, without putting an end to the chaos, puts a little order into the arguments.

40. See for example Monica Pinto, 'De la protection diplomatique à la protection des droits de l'homme' (2002) *RGDIP* 513-547.

41. The Court increasingly often has the opportunity to speak out about the scope, meaning and even the implementation of internationally recognised human rights. See obviously the two cases on consular protection (*LaGrand* and *Avena*) as well as *Armed activities on the territory of the Congo (DRC v. Uganda)*, *Genocide (Bosnia-Herzegovina v. Serbia)*, the cases on universal jurisdiction *(Arrest warrant of 11 April 2000/Yerodia (DRC v. Belgium)* and *Certain criminal proceedings in France (Republic of the Congo v. France)*. The same trend can be seen in the advisory activity with *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*. On the Court as 'human rights judge', see Emmanuel Decaux, 'La Cour internationale de Justice et les droits de l'homme', *Studi di diritto internazionale in onore di Gaetano Arangio-Ruiz*, vol. II, (Editoriale scientifica, Naples, 2004) pp. 921-970.

42. See article 48 'Invocation of responsibility by a state other than an injured state', General Assembly resolution 56/83.

43. For a critique of this dissociation between the broadening of purpose and the maintaining of the regime see Rivier, 'Travaux de la Commission du droit international', n. 22, p. 325.

for example, on the basis of clauses attributing jurisdiction to judicial or quasi-judicial organs to hear individual complaints about human rights; direct action by the state to defend its 'own' rights; 'mixed' action when individual rights and the state's own rights are inter-tangled or inseparable; and lastly popular action (or *actio popularis*) in defence of the general interest on the basis of an *erga omnes* rule, such as the system of 'collective guarantee' of the European Convention of Human Rights, like that described by the Commission in *Austria v. Italy*.

This identity is reflected by three factors: the diplomatic protection action is exercised by the state (and not by a private individual); to be implemented, the action must fulfil two conditions which remain formally unchanged since 1924, even if their interpretation has been able to evolve in substance: exhaustion of local remedies and the condition of nationality.

The preliminary defences made by the DRC bore essentially on these two points.[44]

1. The condition of exhaustion of local remedies

This is a characteristic of the diplomatic protection action, even if it is not sufficient to identify it.

It is a characteristic of it because when the state acts directly to defend its 'own rights', the condition is not required, even when what is at stake is injury caused to private persons. In *Interhandel*, *Barcelona Traction* and *ELSI*, the claimant states sought to have it acknowledged that their claim had a *direct* character precisely so as to set aside the defence argument based on the rule of exhaustion of local remedies: in all three cases, the Court, on the contrary, confirmed that the claim was indeed an action in diplomatic protection and that consequently it was subject to the rule. More clearly still, in *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, the DRC argued against Uganda on the ground of the exhaustion rule as to its counterclaim concerning the treatment inflicted by the Congo authorities on Ugandan nationals, including diplomats. The Court observed that the rule could not apply to the treatment inflicted on diplomats:

> First, as to alleged acts of maltreatment committed against Ugandan diplomats finding themselves both within embassy premises and elsewhere, the Court observes that Uganda's second counter-claim aims at obtaining reparation for the injuries suffered by Uganda itself as a result of the alleged violations by the DRC of Article 29 of the Vienna Convention on Diplomatic Relations. Therefore Uganda is not exercising diplomatic protection on behalf of the victims but vindicating its own rights under the Vienna Convention. Accordingly, the Court finds that the failure to exhaust local remedies does not pose a barrier to Uganda's counter-claim under Article 29 of the Vienna Convention on Diplomatic Relations, and the claim is thus admissible.[45]

The same reasoning applies to the direct action by the DRC against the arrest warrant issued by Belgium against its former foreign affairs minister in *Arrest Warrant*.[46] The ILC examined the question of the application of the rule to 'mixed' claims of the type made in *LaGrand* and *Avena*: the Commission stated 'it is incumbent upon the tribunal to examine the different elements of the claim and to decide

44. Implicitly the Court set aside the 'clean hands theory' which the Congo had invoked stealthily but explicitly (see Preliminary Objections, p. 99) and implicitly in continuity, by harking back to the character of Mr Diallo, who was accused of many misdeeds (corruption, trafficking of false currency, etc.) and having behaved insultingly and extravagantly towards his debtors. It is known that this theory does not constitute a condition for admissibility of the action in diplomatic protection: it is the conclusion the International Law Commission reached on the basis of the sixth report of its independent expert, John Dugard, A/CN.4.546.

45. *Armed Activities on the Territory of the Congo*, Judgment of 19 December 2005, para. 330, pp. 111-112.

46. *Arrest warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment of 14 February 2002. See the commentary by Carlo Santulli (2002) *AFDI* 257-280.

whether the direct or the indirect element is preponderant'. When the indirect element is preponderant, the rule applies. Conversely, when the application highlights the state's 'own rights', the exhaustion of local remedies is not required.[47]

If the rule of exhaustion of local remedies appears therefore to be characteristic of the action for diplomatic protection, it is not enough to identify it: the condition is required in other types of action, and in particular for the individual's direct action before an international court or tribunal concerning human rights. The reason is that the exhaustion condition is essentially understood as a procedural rule which, reflecting the principle of subsidiarity, is intended to leave the state a chance to repair the injury in its municipal order before resorting to international courts and tribunals.

The *Diallo* judgment handles the condition in accordance with this now widely accepted conception.[48] Following both the structure of the DRC's argument and its own jurisprudence, the Court examines the condition under a preliminary objection about the admissibility of the Application. It does so very sparingly, that is, ultimately, very flexibly. After recalling the definition of the condition as set out in *Interhandel*, it underscores the rule applicable as to the burden of proof:

> In matters of diplomatic protection, it is incumbent on the applicant to prove that local remedies were indeed exhausted or to establish that exceptional circumstances relieved the allegedly injured person whom the applicant seeks to protect of the obligation to exhaust available local remedies … It is for the respondent to convince the Court that there were effective remedies in its domestic legal system that were not exhausted … .[49]

On this basis, the Court is to examine compliance with the condition in connection with the claim about Mr Diallo's individual rights and his 'own rights' as shareholder in his companies. However, it does not have to contemplate it with regard to Mr Diallo's rights in respect of the harm to the companies themselves insofar as the Court was to judge this part of the application inadmissible for want of capacity to act.

As regards Mr Diallo's individual rights, the parties oddly debated only the admissibility of the allegations about his expulsion and not those about his arrest, imprisonment and the maltreatment he allegedly suffered while in detention. The Court confines itself to the parties' pleadings: it only addresses the question of local remedies with respect to Mr Diallo's expulsion, which means that it implicitly finds Guinea's other allegations admissible.[50] And yet the Court did not rule explicitly on the exhaustion of local remedies as to these allegations: might it be thought that the DRC would have grounds to come back to this at some later stage?[51] We rather think that, given the operative wording of the judgment, the

47. See the Commission's comments on Article 14 of the draft articles on diplomatic protection, A/61/10, p. 77. The Commission states this principle unclearly in paragraph 3 of its Article 14: 'Local remedies shall be exhausted where an international claim, or request for a declaratory judgement related to the claim, is brought preponderantly on the basis of an injury to a national or other person referred to in draft article 8.' It can be wondered whether this principle really reflects what the Court wanted to say in paragraph 40 of its Judgment in *Avena*: in the case in point, it is because the two series of rights were interdependent that the Court decided that the application regime had to be aligned on that of the state aspect. See Serana Forlati, 'Protection diplomatique, droits de l'homme et réclamations "directes" devant la Cour internationale de Justice. Quelques réflexions en marge de l'arrêt Congo/Ouganda', (2007) *RGDIP*, t. 111, 89-116, at 111.

48. See the *Second report on diplomatic protection* by John Dugard: A/CN.4/514, pp. 15-34, the commentaries on draft article 12 which was not taken up in the final articles submitted by the Commission to the General Assembly.

49. Judgment, para. 44. The Court cites along these lines the *ELSI* Judgment, para. 53. See on this point draft article 15 of the *Third report on diplomatic protection*, A/CN.4/523, pp. 41 ff.

50. The very broad wording of the operative part of the Judgment seems to accredit this interpretation: 3) a) '*Declares* the Application of the Republic of Guinea to be admissible in so far as it concerns protection of Mr Diallo's rights as an individual'.

51. See Philippe Weckel and Thierry Garcia, with Guillaume Areou, 'Chronique de jurisprudence internationale' (2007) *RGDIP*, 705-713. In *Nottebohm*, the Court ruled on Preliminary Objections of Guatemala in an initial Judgment of 1953. In its Counter Memorial, Guatemala introduced a new objection as to inadmissibility based on the condition of nationality, that was

decision as to admissibility is *res judicata* for alleged treatments. Moreover, by not raising the issue, it is likely that the DRC will incur some form of estoppel.

The Court dismissed the DRC's defence by relying on two arguments. The first evokes the maxim *nemo auditur propriam trupitudinem allegans*; at the time he was deported, Mr Diallo was given a refusal-of-entry form for reasons the Court did not dwell upon, but for which Guinea's application gives some explanations.[52] Now, under Congolese law, refusal of entry is an expressly unappealable measure:

> The Court considers that the DRC cannot now rely on an error allegedly made by its administrative agencies at the time Mr. Diallo was "refused entry" to claim that he should have treated the measure as an expulsion. Mr. Diallo, as the subject of the refusal of entry, was justified in relying on the consequences of the legal characterization thus given by the Zairean authorities, including for the purposes of the local remedies rule.[53]

The second argument seems less contrived. It deals with the types of appeal that the rule requires must be exhausted. The only right of redress that the DRC could rely on was an application to the Prime Minister for him to reconsider his decision as a matter of grace.[54] To this the Court replied by 'recalling' that 'while the local remedies that must be exhausted include all remedies of a legal nature, judicial redress as well as redress before administrative bodies, administrative remedies can only be taken into consideration for purposes of the local remedies rule if they are aimed at vindicating a right and not at obtaining a favour, unless they constitute an essential prerequisite for the admissibility of subsequent contentious proceedings'.[55] The argument displays the influence of construction of the rule by courts or tribunals in human rights matters since it originates in the decision of the European Commission of Human Rights on admissibility in *De Becker*.[56] The ILC cites this judgment and several commentators on doctrine arguing along the same lines, in its commentary on article 14 of the articles on diplomatic protection.[57] It was to this passage that the Applicant drew the Court's attention in its oral arguments, which probably prompted the Court to address the substance of the matter in its reasoning.[58]

Turning now to Mr Diallo's 'own' rights as a company *associé*, the Court took advantage of the approximations in the line of argument of the parties to dismiss the objection in two paragraphs. However, Guinea like the DRC had been prolix on the question of domestic remedies. But in truth they had concentrated their fire on local remedies available for the recovery of the two companies' claims and not to demand Mr Diallo's own rights as *associé*. Accordingly, the Court's reasoning breaks down into two stages: first, it 'notes' that Guinea presented the violation of Mr Diallo's rights as *associé* as a 'direct consequence of his expulsion'. Yet the Court had just found that there was no effective remedy in the DRC against expulsion. Second, the DRC failed to show there were specific remedies against the violations of Mr Diallo's own rights as *associé*, since all the discussions focused on the remedies potentially

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upheld by the Court in its Second Judgment of 1955. Nothing prevents the Court a priori from examining in the second phase of a case an objection on which it has not ruled in its judgment on the preliminary objections.

52. Cf. the introduction above.
53. Judgment, p. 19, para. 46.
54. Cf. Preliminary Objections, pp. 134-135.
55. Judgment, p. 23, para. 47.
56. *De Becker v. Belgium*, no 214/56 (1958–1959), Decision of 9 June 1958, p. 16, *Yearbook of the European Convention on Human Rights*, p. 238.
57. A/61/10, p. 74. See also for more details the *Second report on diplomatic protection* by special rapporteur John Dugard, A/CN.4/514, p. 8.
58. Cf. CR 2006/51, pp. 58-59. But see the Separate Opinion of judge *ad hoc* Mampuya, p. 68, who argues that 'remedies sought from administrative authorities are generally recognized, together with contentious remedies, to be effective local remedies required to be exhausted'.

available to companies. Consequently, the DRC failed to prove its point and the 'question of the effectiveness of those remedies does not in any case arise'.[59]

Any more far-reaching discussion on remedies was thus eluded. This can only be applauded in terms of cutting down on proceedings; the Court is not there to speculate on the future development of international law but to settle disputes. Even so, the arguments exchanged by the parties – in however disorderly a fashion – opened up interesting prospects in this forum, by exploiting the objections to the rule codified by the ILC in article 15 of its articles on diplomatic protection[60] – objections sometimes drawn from case law in matters of human rights[61] – or by exploring problems with still uncertain solutions in positive law.[62]

2. The condition of nationality

Like the condition of exhaustion of local remedies, the condition of nationality is characteristic of the action for diplomatic protection, even if it is not sufficient to identify it.

It is characteristic of the action for diplomatic protection because it is not required for other types of action, such as the individual's direct action in the area of human rights or the state's direct action to ensure observance of an *erga omnes* rule. But conversely, it is a requisite in the context of separate actions for diplomatic protection, such as the individual's direct action for the protection of investments[63] or the state's direct action to protect its 'own rights' in connection with harm to its nationals, as shown by the mixed claims in *LaGrand* and *Avena*.

The condition of nationality is the expression of the state's personal jurisdiction with regard to its nationals. This jurisdiction is exercised in accordance with the 'rule of 'role splitting': in the interest of both the state itself and the international community.[64] Under the first function, diplomatic protection is the expression not just of a *right* of the state to see its nationals respected abroad, but also of an *interest* of the state to further its expansion in the world in economic or cultural terms.[65]

Under the second function, the state exercises its protection in the ambit of the personal jurisdiction attributed to it by international law so as to achieve international law's proper ends, namely to ensure for the benefit of individuals the prevalence of 'regular legal situations': as such, the condition of national-

59. Judgment, p. 31, para. 74.

60. See especially the oral argument by Professor Jean-Marc Thouvenin, CR 2006/51, pp. 50 ff, citing article 15 of the ILC articles to structure his argument: art. 15 (d) 'The injured person is manifestly precluded from pursuing local remedies' because of his expulsion and because that expulsion left him with no financial resources with which to pursue proceedings in Congo; (a) 'There are no reasonably available local remedies to provide effective redress', because of the absence of remedies against the measure of expulsion; a) second part 'or the local remedies provide no reasonable possibility of such redress' because of the executive's intervention in the execution of court judgments; b) 'There is undue delay in the remedial process which is attributable to the State alleged to be responsible' because the two cases in which the remedies were exercised are still pending before the Supreme Court of Congo after 14 and 13 years of proceedings.

61. In his oral statement, Jean-Marc Thouvenin refers notably to the case law of the African Human Rights Commission, the body that supervises the African Charter on Human and Peoples' Rights, to which both states are parties.

62. Notably the question of whether the applicant's poverty can constitute an exception to the rule of exhaustion. Somewhat oddly, Guinea supports this argument in its Memorial, referring to the *Airey v Ireland* of the European Court of Human Rights (Memorial, p. 105) before making a U-turn in the oral stages and asserting the opposite (CR 2006/51, p. 55), a U-turn that the DRC did not fail to pick up on (CR 2006/62, p. 23).

63. Cf. article 25 of the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

64. On the theory of 'role splitting' see note 28 above.

65. This is what Guinea says when explaining the reasons that prompted it to exercise its protection with respect to Mr Diallo: 'If it has decided to protect the interests of Mr. Diallo and his companies, this is because, although Guinea falls into the category of least developed countries, it is convinced it has one rich asset: its nine million people, who see their reflection in the national slogan: "labour, justice, solidarity". To them, the Republic of Guinea has a duty of solidarity and justice, whether they are within its territory or abroad. This is the spirit of Guinea's action here'. (CR 2006/51, p. 9.)

ity is nothing more than the mark of the distribution of competences made by international law among states which are its executing agents.[66]

In the case in point, the Court had to ponder the observance of the condition of nationality for the three aspects of Guinea's claim. As concerns Mr Diallo's individual rights, observance of the condition was hardly a problem insofar as no one contested that Mr Diallo had acquired Guinean nationality by birth. Could the DRC have taken inspiration from *Nottebohm* to object to Guinea that there was no effective connection uniting it to its national?[67] After all, before he was expelled, Mr Diallo had lived in the DRC for thirty-four years and at no time was it said that part of his profits had been reinvested in his country of origin. But it is known that the solution adopted by the Court in *Nottebohm* was considered by doctrine and by the ILC[68] to be limited to the very particular facts of the matter: Nottebohm had acquired the nationality of Liechtenstein by naturalisation (whereas he was of German origin) and had only very tenuous connections with the country, contrary to his connections with Guatemala, the country against which the action was directed. In fact, the rule of effectiveness laid down in *Nottebohm* should be understood essentially as an application of the principle of good faith: 'A conferment of nationality will be recognized for the purpose of diplomatic protection provided it is not made in bad faith'.[69] The facts in *Diallo* obviously raised no question of this kind.

Protection of Mr Diallo's rights as *associé* might appear more problematic and the parties engaged in substantial exchanges over them. Discussion focused on the interpretation of a passage in the Court's judgment in *Barcelona Traction*. In this matter, it will be recalled, Belgium sought to exercise its diplomatic protection for Belgian shareholders of a Canadian company (*Barcelona Traction, Light and Power Company, Limited*) which the Spanish state had allegedly harmed. The Court observed that the limited company as a legal institution is intended to establish a sharp separation between the assets of the company and the assets of its shareholder(s). Such separation is effected by conferring on the limited company its own legal personality, distinct from that of its shareholders.[70] The outcome is that when harm is done to the company, the shareholders may suffer the consequences. Yet, that does not give them any right of redress. In establishing this rule, the Court relied on the distinction between 'right' and 'interest':

> Not a mere interest affected, but solely a right infringed involves responsibility, so that an act directed against and infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected.[71]

We shall discuss the meaning and scope of this rule later. The point here is that just after stating the rule the Court tempered it thus:

> The situation is different if the act complained of is aimed at the direct rights of the shareholder as such. It is well known that there are rights which municipal law confers upon the latter distinct from those of the company, including the right to any declared dividend, the right to attend and vote at general meetings, the right to share in the residual assets of the company on liquidation. Whenever one of his direct rights is infringed, the shareholder has an independent right of action. On this there is no disagreement between the Parties. But a distinction must be drawn between a direct infringement of the shareholder's

66. See Georges Scelle, 'Règles générales du droit de la paix', *Recueil des Cours* 1933 IV, t. 46, pp. 656-658.
67. See *Nottebohm (Liechtenstein v. Guatemala)*, Judgment of 6 April 1995.
68. See the Commission's commentary on draft article 4, A/61/10, p. 33.
69. John Dugard, *First report on diplomatic protection*, A/CN.4/506, para. 118.
70. *Barcelona Traction*, p. 34, paras 39-42.
71. *Ibid*. p. 36, para. 46.

rights, and difficulties or financial losses to which he may be exposed as the result of the situation of the company.[72]

The ILC picked up on this idea in article 12 of its articles on diplomatic protection under 'a savings clause designed to protect shareholders whose own rights, as opposed to those of the company, have been injured':

Direct injury to shareholders

To the extent that an internationally wrongful act of a State causes direct injury to the rights of shareholders as such, as distinct from those of the corporation itself, the State of nationality of any such shareholders is entitled to exercise diplomatic protection in respect of its nationals.[73]

In the case at hand, Guinea invoked Congolese national legislation to highlight Mr Diallo's rights as *associé* of Africom-Zaire and Africontainers. For Guinea, those rights were essentially of two kinds: 'property rights' 'including the right to dividends from these companies'; and 'functional rights' 'including the right to control, supervise and manage the companies'. Now, for Guinea 'the arrest, detention and expulsion of Mr Diallo' not only had the *effect* of preventing him from exercising his own rights but above all had been 'specifically motivated by the intent to prevent him from exercising these rights, from pursuing the legal proceedings brought on behalf of the companies, and thereby from recovering their debts'.[74]

This is characteristic of the Guinean line of argument in this case: it constantly tends to slide imperceptibly from the question of Mr Diallo's rights (as an individual or shareholder) to the company's rights.[75] This is essentially what the DRC argued in its Preliminary Objections: perhaps the company rights were affected by Mr Diallo's expulsion, but it was not the case for his rights as *associé*. He could perfectly well have exercised them from abroad, possibly by delegation.[76] Just as relevantly judge *ad hoc* Mampuya denounces the confusion made by Guinea, encouraged in part he thinks by the defective wording of article 12 of the ILC articles:

The … approach taken by Guinea, and accepted by the Court, was to refrain from seeking to determine whether the complained-of actions by the DRC concerned or, better yet, specifically targeted, Mr. Diallo's direct rights as *associé* "as such" or whether this was merely a collateral effect of a measure aimed solely at Mr. Diallo as an individual; … In so doing, the Court has, in preference to the clear and legally precise language in its Judgment in the *Barcelona Traction* case — an "act … *aimed at* the direct rights of the shareholder as such" —, implicitly ratified the ILC's formulation in Article 12 of its draft — an act which "*causes direct injury* to the rights of shareholders as such" (emphasis added). Indeed, it is this latter, over-broad interpretation, opening a veritable Pandora's box, that informed Guinea's argument dealing with "the alleged violation of Mr. Diallo's direct rights as *associé* … as a direct consequence of his expulsion".[77]

The Court overrides this objection and declares this aspect of the Application admissible by making a fine distinction between questions relating to preliminary objections and questions relating to the

72. *Ibid*., para. 47.
73. John Dugard, *Fourth report on diplomatic protection*, A/CN.4/530, p. 39.
74. Judgment, pp. 21-22, paras 55-57.
75. It should be recalled that the same slide was denounced by Spain with respect to Belgium's line of argument in *Barcelona Traction*; cf. ICJ Reports 1970, p. 31, para. 29.
76. Judgment, p. 21, para. 53.
77. Separate Opinion, p. 16.

merits, that is, the subsequent phase of proceedings. It is enough for the Court at this stage to observe that Guinea has the capacity to act on behalf of its national in defence of his 'own rights' as shareholder. However, the Court need not rule on the precise list of those rights, and even less on whether they have been breached, which are two matters pertaining to the merits of the case.

Now, the realisation of the condition of nationality – and therefore of the right to act – is resolved by itself as it were once it is understood that the statement of the Court in *Barcelona Traction* about shareholders own rights merely nuances, or only clarifies, the general rule set out just before. It does not constitute in any way, from this point of view, an objection, as the Court puts it very well in its Judgment in *Diallo*:

> Ultimately, this is no more than the diplomatic protection of a natural or legal person as defined by Article 1 of the ILC draft Articles; what amounts to the internationally wrongful act, in the case of *associés* or shareholders, is the violation by the respondent State of their direct rights in relation to a legal person, direct rights that are defined by the domestic law of that State, as accepted by both Parties, moreover. [78]

There remained, then, the thorniest problem, that of the capacity to act with regard to the harm caused directly to the companies and not to Mr Diallo. Obviously, this is where the 'nub of the dispute' lay given the astronomical amounts at stake. The question could have been resolved simply had the two companies been incorporated under the laws of Guinea. Guinea could simply have exercised its protection for the benefit of a judicial person with its nationality. But the two companies were constituted under Congolese law. So there was a problem, and when all is said and done a very frequent one, of a company controlled by foreign interests but having the nationality of the host country. The solution found by the Court is unsurprising, since it takes up that hit upon in *Barcelona Traction*. It is no less surprising if it is considered that this continuity is embedded in international law which, in thirty-seven years, has undergone substantial changes.

II. CONTINUITY WITHOUT CHANGE: UPHOLDING THE BARCELONA TRACTION SOLUTION IN MATTERS OF INVESTMENT PROTECTION

In *Barcelona Traction*, the Court set out the customary rule by which shareholders cannot, in principle, apply for redress for harm to the company in which they have a holding. With the consequence that an application from the national state of the shareholders to exercise its diplomatic protection with regard to them is not admissible on the basis of such harm. All that is open to redress and therefore all that is 'protectable' is the harm caused to their own rights as shareholders. When, as is often the case, the company on which the harm is inflicted has the nationality of the host state, the foreign investors are deprived of the protection their state could offer them. As the Court emphasised in 1970: 'The traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office'.[79]

At the time, the well-founded character of such a rule was widely debated among the judges of the Court, which explains in large part the exceptional number of separate opinions appended to the judgment.[80] And the Court itself, if one takes the trouble to read its developments carefully, did not assert so without nuances. Yet, progressively, the rule has imposed itself as self-evident. The consistency with

78. Judgment, p. 28, para. 64.
79. *Barcelona Traction*, p. 42, para. 70.
80. Eight opinions for sixteen judges, for a decision taken by fifteen votes to one (that of the Belgian judge *ad hoc*).

which it has been reasserted by states[81] can be likened to the consistency in efforts to go beyond it in the area of treaties. And the consequences in terms of investment protection are probably rather negligible. Conversely, diplomatic protection as an institution is hard done by since it has lost much of its utility as an instrument for protecting foreign investments. This observation, made by the Court itself in *Diallo*, did not prevent it from reasserting the continuity of the rule (Section A) without in any way impairing its stringency (Section B).

A. The Continuity of the Rule

The Court began its reasoning by reasserting its 1970 dictum: 'Not a mere interest affected, but solely a right infringed involves responsibility, so that an act directed against and infringing only the company's rights does not involve responsibility towards the shareholders, even if their interest are affected'.[82] One may wonder about the reasons for the rule. It may also legitimately be asked what meaning can be given to treaty practice that so bluntly contradicts it.

1. The meaning of the rule

The rule is grounded in part on narrowly technical legal reasons. It can also be explained by considerations of expediency that led states to abandon diplomatic protection as an action for the purposes of protecting foreign investments. The legal reasons are of two orders. The first pertains to the structure of the limited company itself, the importance such companies have in the modern economy being emphasised by the Court in 1970.[83] The limited company is an institution of municipal law 'created by States in a domain essentially within their domestic jurisdiction'.[84] The rules governing it are therefore facts that international law must take into account for the purposes of its own implementation. Now, the limited company has its own personality, separate from that of its shareholders, which means that the shareholder cannot be identified with the company and the assets of the shareholder and the company are wholly separate.[85] The second legal reason is related to the distinction between right and interest. Only the breach of a right can engender liability and therefore a duty to make redress, but not the breach of a mere 'interest'. In fact, these two reasons alone are not decisive. For the first, the Court itself recognises there are 'special circumstances' in which municipal law accepts to 'lift the veil' of the company's legal personality, which shows that this cannot be considered as an insuperable obstacle to shareholder protection. As for the second, it is affected by uncertainties and the fuzziness surrounding the distinction between 'right' and 'interest', a fuzziness that *Barcelona Traction* helps to maintain by speaking of *erga omnes* obligations that all states have an 'interest' in seeing observed. Of course, it is understood by that that the Court draws a distinction between a legal interest, the equivalent of a 'right', and an interest of some other order be it political or, in the case in point, economic. But in doing this, the Court deliber-

81. See the conclusion of John Dugard in this respect, especially in the light of the answers given by states to the sixth commission to the question asked by the ILC as to whether the rule in *Barcelona Traction* should be revised: '[I]t must be acknowledged that, despite its shortcomings, *Barcelona Traction* is today, 30 years on, widely viewed not only as an accurate statement of the law on the diplomatic protection of corporations but as a true reflection of customary international law. The practice of States in the diplomatic protection of corporations is today guided by *Barcelona Traction*. This was clearly demonstrated by the response of the delegates in the Sixth Committee to the question whether the rule in *Barcelona Traction* should be reconsidered. Of the 15 delegates who spoke on this subject, only one suggested that *Barcelona Traction* should be reconsidered'. *Fourth report on diplomatic protection*, A/CN.4/530, pp. 12-13.
82. *Barcelona Traction*, p. 36, para. 46, here cited in *Diallo*, p. 30, para. 86.
83. *Ibid*., p. 34, para. 39.
84. *Ibid*., p. 33, para. 38.
85. *Ibid*., p. 34, para 41.

ately overlooks the point that an economic interest may give rise to a right – or a legal interest – under certain 'special circumstances', and specifically those that authorise 'lifting of the veil'.

Accordingly, the real reasons for the rule are to be sought as much in considerations of expediency, which are very clearly expounded by the Court in its decision and which explain the mainsprings for the creation of the customary rule. Developed states like developing states are not favourable to the protection of foreign investment via diplomatic protection. With a degree of hindsight for the period, the Court in 1970 exposed, in a rather veiled way, the reasons for this shared feeling.[86] They pertain, as is known, to new states gaining their independence, proclaiming sovereignty over their natural resources and declaring a New International Economic Order (NIEO), all of which often led to diplomatic protection being denounced as the instrument of an imperialist policy.[87] For the developed states, the distrust prompted by massive nationalisations led those countries to prefer the channel of bilateral negotiations – face-to-face talks being to their advantage – with a view to obtaining agreements protecting investors' interests. For investors, bilateral agreements providing for the enforcement of international law and combined with dispute settlement mechanisms conferring *locus standi* on them in arbitration proceedings with the host state were far preferable to the old institution of diplomatic protection. Diplomatic protection had two major drawbacks: its unpredictable character related to the state's discretionary faculty to resort to it and the politicisation it necessarily gave to the application by setting two states at loggerheads. As third-world policies dwindled and developing states converted to liberal economic precepts, the number of such bilateral agreements surged, further marginalising the part played by diplomatic protection.[88] In 1970, the Court could already describe this process very precisely:

> Thus in the present state of the law, the protection of shareholders requires that recourse be had to treaty stipulations or special agreements directly concluded between the private investor and the State in which the investment is placed. States ever more frequently provide for such protection, in both bilateral and multilateral relations, either by means of special instruments or within the framework of wider economic arrangements.[89]

Thirty-seven years later, in its *Diallo* judgment, the Court made the same observation. In wondering about 'whether, in international law, there is indeed an exception to the general rule …, which allows for protection of the shareholders by their own national State "by substitution"',[90] it noted that 'in contemporary international law, the protection of the rights of companies and the rights of their shareholders, and the settlement of the associated disputes, are essentially governed by bilateral or multilateral agreements for the protection of foreign investments'.

But the Court further drew the consequences as to the future of diplomatic protection in this area; 'In that context, the role of diplomatic protection somewhat faded, as in practice recourse is only made to it

86. See *Barcelona Traction*, pp. 46-47, para. 89.

87. See from this perspective the Separate Opinion of judge Padilla Nervo, representing the clear hostility of Latin American states to diplomatic protection: 'It is not the shareholders in those huge corporations who are in need of diplomatic protection; it is rather the poorer or weaker States, where the investments take place, who need to be protected against encroachment by powerful financial groups, or against unwarranted diplomatic pressure from Governments who appear to be always ready to back at any rate their national shareholders'. ICJ Reports 1970, p. 248 cited by J. Dugard, *Fourth report on diplomatic protection*, A/CN.4/530, p. 5.

88. On these various points see especially Prosper Weil, 'L'Etat, l'investisseur étranger et le droit international : la relation désormais apaisée d'un ménage à trois' in P. Weil, *Ecrits de droit international* (Paris, PUF, 2000), pp. 409-423; Charles Leben, 'L'évolution du droit international des investissements', SFDI, *Un accord multilatéral sur l'investissement : d'un forum de négociations à l'autre ?* (Paris, Pedone, 1999), pp. 7-29; Wong-Mog Choi, 'The present and future of the investor-state dispute settlement paradigm' (September 2007) *Journal of International Economic Law* 725–747.

89. *Barcelona Traction*, p. 47, para. 90.

90. *Diallo*, p. 36, para. 87.

in rare cases where treaty régimes do not exist or have proved inoperative'.[91] But is there not a paradox here? What can be the scope of the rule with respect to this ubiquitous practice by states that seemingly contradicts it?

2. The scope of the rule with respect to treaty-based developments

This is one of Guinea's two arguments and it is a logical one. It relates to the process of formation of the customary rule and the contribution of treaty law but also case law to this process. While still rare, 'special agreements' and deviant judgments may pass for *lex specialis*; they derogate from the general rule in a *sui generis* manner, making allowance for certain special situations, certain privileged relations established bilaterally, for example. But what of it when 'special' becomes generalised, when all states resort to this type of solution to the point where the general rule is stripped of all effectiveness? It can legitimately be asked whether the 'general practice' has not given rise to a new customary rule. The Court firmly dismissed this idea:

> The fact invoked by Guinea that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal régimes governing investment protection, or that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary. The arbitrations relied on by Guinea are also special cases …[92]

What were the conventions and precedents Guinea invoked? First, of course, the 1965 Washington Convention on the Settlement of Disputes over Investments between States and Nationals of Other States creating the ICSID.[93] But also the North American Free Trade Agreement (NAFTA, article 1117)[94] and the 'very many bilateral treaties for promoting and protecting investments'[95] insofar as many of these treaties define the holding of shares in a company as an 'investment' and contain a clause accepting ICSID jurisdiction. This is compounded by the many awards made on the basis of these treaties. Beyond this contemporary practice, Guinea also evoked a number of older arbitration awards – beginning with *Delagoa Bay Railway*[96] – and a judgment of a chamber of the Court in *ELSI*. In this last case, the Court had ruled admissible the application by the United States for two US corporations that fully owned a company formed under the laws of Italy, the respondent state. On the basis of all of these 'precedents' that 'all consecrate rules and principles designed on the same model, inspired by the same concerns and

91. *Diallo*, p. 36-37, para. 88. John Dugard was more severe in his assessment: 'Barcelona Traction established "an unworkable standard". In practice States will not exercise diplomatic protection merely on the basis of incorporation, that is, in the absence of some genuine connection arising from substantial national shareholding in the corporation'. *Fourth report on diplomatic protection*, A/CN.4/530, p. 6.

92. *Diallo*, p. 37, para. 90.

93. Case law of the ICSID arbitration tribunals invariably recognises *locus standi* of the shareholder of a company incorporated in the territory of a host state, even when a minority shareholder. See for example *AES Corporation v. Republic of Argentina, Decision on Jurisdiction, 26 April 2005*, para. 88; *CMS v. Republic of Argentina, Decision of the Ad Hoc Committee on the Application for the Annulment of the Argentine Republic*, 25 September 2007, para. 72. For a critical view of this case law, found to contradict the very text of the Washington Convention and in particular its article 25, see Gabriel Bottini, 'Indirect claims under the ICSID Convention' (Spring 2008) *University of Pennsylvania Journal of International Law*, 563-639.

94. Under which an investor with the nationality of one contracting state may act in the name of a corporation that is formed under the law of another contracting state that it owns or controls directly or indirectly.

95. CR 2006/51, p. 41.

96. MacMahon arbitration award, 24 July 1875, RSA III, p. 637. The case concerned a US national and a British company with interests in a Portuguese company tasked with building a railway. In 1887, the revolutionary government cancelled the concession and seized the railway. The matter was submitted to the arbitration tribunal on the basis of an agreement signed by the three states which provided for compensation for the creditors of the Portuguese company.

stand as illustrations of the "exception" recommended by the Court thirty-six years ago now',[97] Guinea defended the idea of the creation of a new customary rule, characterised by the combination of repeated practice and *opinio juris*. But at the same time, Professor Alain Pellet, speaking in Guinea's name, conceded:

> I am well aware, Madam President, Members of the Court, that these treaty provisions and this jurisprudence, which are virtually unanimous, do not constitute the direct application of the principles and rules governing diplomatic protection, and the ICSID tribunals do not fail to recall this.[98]

And there's the rub: all of this practice that departs from the general rule identifies itself as *lex specialis*, beginning with the Washington Convention which is so far removed from diplomatic protection that it explicitly excludes resort thereto when the parties consent to submit their dispute to arbitration (article 27). The ICSID arbitration tribunals never fail to point out that they are not in the realm of diplomatic protection and consequently are not bound by the solution produced by the Court in 1970.[99] The earlier arbitration awards made in the wake of the *Delagoa Bay Railway* case – the DRC was well placed to note it and the Court confirmed – were all based on an agreement precisely designed to settle the dispute created because of the harm done to foreign investors.[100] As for the judgment in *ELSI*, doctrine generally considers that it did not depart from *Barcelona Traction* in that the chamber of the Court placed itself essentially in the domain of application of a bilateral treaty between the United States and Italy and recognising certain rights to investors of the two countries.[101] In its Judgment in *Diallo*, the Court confirmed this interpretation.[102]

Accordingly, it is easier to understand the position expressed by the Court that the precedents cited by Guinea do not necessarily point to the formation of a new customary rule but 'could equally show the contrary'. Practice is attested to, and is repeated. But decidedly not the *opinio juris* necessary to show that this practice is perceived other than as a *lex specialis* compared with the general rule that remains. However, one cannot fail to notice the paradox in this position, which is somewhat reminiscent of that of the small village of unconquerable Gauls always and ever holding out against the invader: with the exponential increase in the number of bilateral investment treaties and the establishment of case law recognising a right of redress for shareholders for harm to companies, the *lex specialis* tends to become generalised and general international law to become specialised. Henceforth, one must be resolved to the idea that the customary rule governs only *residual* matters; the 'ordinary' law is treaty law.[103]

97. CR 2006/51, p. 43.
98. CR 2006/51, pp. 42-43.
99. See, for example, ICSID, *CMS v. Republic of Argentina*, Case no ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, paras 43-48. Confirmed on this point by the *ad hoc* committee for hearing the annulation application, decision of 25 September 2007, para. 69: 'Those cases [*Barcelona Traction* and *ELSI*] were concerned with diplomatic protection under customary law and not with the protection of the rights of investors under treaties relating to the protection of investments'.
100. *Diallo*, p. 31, para. 90.
101. For a nuanced judgement on this, see Stern, 'La protection diplomatique des investissements internationaux', n. 31. For a round-up of doctrine, see John Dugard, *Fourth report on diplomatic protection*, A/CN.4/530, pp. 11-12.
102. *Diallo* Judgment, p. 30, para. 87.
103. This is exactly what was observed by the ICSID arbitration tribunal in *CMS v. Argentina*, para. 45: 'To some extent, diplomatic protection is intervening as a residual mechanism to be resorted to in the absence of other arrangements recognizing the direct right of action by individuals. It is precisely this kind of arrangement that has come to prevail under international law, in respect of foreign investments, the paramount example being that of the 1965 Convention'. And para. 48: 'The Tribunal therefore finds no bar in current international law to the concept of allowing claims by shareholders independently from those of the corporation concerned, not even if those shareholders are minority or non-controlling shareholders. Although it is true, as argued by the Republic of Argentina, that this is mostly the result of *lex specialis* and specific treaty arrangements that have so allowed, the fact is that *lex specialis* in this respect is so prevalent that it can now be considered the general rule, certainly in respect of foreign investments and international claims and increasingly in respect of other matters. To the extent that cus-

There remained one way out for Guinea: to argue that this rule – while continuing as a rule of general international law – is even so combined with certain exceptions or liable to be inflected in such a way as to allow the veil to be lifted under 'special circumstances'. No more than the 1970 Judgment does the Judgment in *Diallo* confirm the existence of such exceptions or inflections. In appearance, at any rate, the Court therefore upholds the stringency of the rule.

B. The stringency of the rule

Here again it is *Barcelona Traction* that guides the parties' lines of argument. In its 1970 Judgment, the Court pondered the existence of any exceptions to the general rule. It also wondered whether, as Belgium claimed, considerations of equity did not require a right of protection be recognised to the shareholders' national state. Guinea set itself on this second ground, invoking, however, both equity *infra legem* and the creation of a new exception to the general rule. Ultimately, the Court dismissed Guinea's arguments, but in a way that might be found exaggeratedly sparing. It contemplated only very partially the question of exceptions to the rule and not at all the question of equity.

1. The question of exceptions to the rule

What are the special circumstances that would warrant lifting of the veil and the protection of investors by their national state in relation with the harm incurred by a company with the nationality of the host state? In 1970, the Court identified 'two particular situations … : the case of the company having ceased to exist and the case of the company's national State lacking capacity to take action on its behalf'.[104]

But the Court observed that the facts in the case at hand failed to correspond to these hypotheses: so it refrained from going into the matter and seeking to confirm their character as exceptions. The *Barcelona Traction* judgment therefore leaves the question hanging. The Judgment in *Diallo* does not resolve it further. This is understandable with respect to the second circumstance evoked by the Court in 1970. It was not at issue in the case in point and besides Guinea made no mention of it. Conversely, the first circumstance could have given rise or should be able to give rise to developments, particularly as the exception at issue was enshrined – although in a highly restrictive form – by the ILC in its articles on diplomatic protection.[105] On this point the Court eluded the difficulty in what may seem an unsatisfactory way. Reasons relating to the course of the procedure explain at any rate why the question could not be adequately discussed. In the second round of oral arguments, on 29 November 2006, the DRC caused something of a stir. Coming towards the end of his contribution, Maître Kalala informed the Court of the DRC's 'indignation and anger at the way the Court is being treated by Mr. Diallo and the Applicant'. After 'painstaking research', the DRC reveals that it managed to 'obtain' the articles of association of

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tomary international law or generally the traditional law of international claims might have followed a different approach – a proposition that is open to debate – then that approach can be considered the exception'.

104. *Barcelona Traction*, para. 64. Using the 'general principles of law' approach, the Court relied on municipal law to identify the hypotheses in which it was justified in lifting the corporate veil. See paras. 56-58. See also the case law of the European Court of Human Rights on the notion of 'victim' within the meaning of article 34 of the Convention: *Agrotexim v Greece*, 24 October 1995, Series A, no 300, paras 65-66.

105. Article 11 *(a)*: 'The State or 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 a reason unrelated to the injury;'. The meaning of this last part of the sentence remains unclear. As El Salvador pointed out in its commentary on the draft articles forwarded by the ILC to states: 'it would appear that the more the rights of shareholders are injured, the less their States of nationality can exercise diplomatic protection' A/CN.4/561 (2006), p. 51. The ILC commentaries on draft article 11 are barely more informative, except in that the ILC wished to 'limit the circumstances in which the State of nationality of the shareholders may intervene on behalf of such shareholders for injury to the corporation', A/61/10, p. 62.

Africom-Zaire. Now, allegedly Mr Diallo was not among its *associés*.[106] In reaction to those accusations, Guinea replied through Professor Mathias Forteau that it was not surprising that Mr Diallo did not feature among the *associés* of the company to which the DRC referred insofar as the company – named Africom – had no connection with that of Mr Diallo, called Africom-Zaire, the articles of association of which could not be found by Guinea but which none the less existed in law.[107] The DRC therefore pursued its research beyond the oral arguments. As the Court states in its judgment, it sent to the Court a letter in which it explained that Africom-Zaire 'had indeed existed and been registered in the Trade Register of the city of Kinshasa' but had 'ceased all activity in the mid-1980s',[108] which had probably led to it being struck from the trade register.

The Court was careful not to grasp the hand very carelessly extended to it by the DRC. It evokes the question only to note the existence of a 'disagreement' between the parties and observe, somewhat offhandedly, that 'this disagreement essentially relates to the merits and that it has no bearing on the question of the admissibility of Guinea's Application as challenged in the Congo's objections'.[109]

Yet it was easy to observe that this question was indeed liable to have an impact on admissibility, as it related to possible protection 'by substitution' of company rights, since it referred quite clearly to the first type of 'circumstances' evoked in *Barcelona Traction*: the disappearance of the company. Judge *ad hoc* Mahiou therefore had good cause to consider that the Court had not envisaged the problem satisfactorily:

> Indeed, were the disappearance of Africom-Zaire to be confirmed, it would create a situation in which there was no longer any possibility for that company to argue its case for itself and thereby to defend the rights and interests of its sole shareholder. This complete impossibility of any action through the company would thus deprive its sole shareholder of any remedy, if he were refused diplomatic protection by Guinea; we would then be faced with an unjust solution running not only counter to equity but also to the fundamental principles governing the rights of defence and human rights … In conclusion, it seems to me that the Court ought to have said more clearly and precisely, in the present Judgment, that it expressly reserved the situation which might result from the confirmation of the disappearance of Africom-Zaire, with the consequences likely to arise therefrom for the subsequent procedure.[110]

A final exception was invoked by Guinea and in truth it was the only argument to which the Court consented to answer. It pertains to the situation in which the company in which the foreign investors have a shareholding has the nationality of the state that has harmed it. In this case, it seems obvious that the state will not exercise its protection or more specifically that the company shall be devoid of all protection, which would warrant lifting the veil and consequently protection of the shareholders by substitution for the company. The Court had evoked this possibility in its 1970 Judgment but considering it not from the standpoint of an exception included under the rule but rather as the outcome of considerations of equity:

> It is quite true that it has been maintained that, for reasons of equity, a State should be able, in certain cases, to take up the protection of its nationals, shareholders in a company which has been the victim of a violation of international law. Thus a theory has been developed to the effect that the State of the

106. CR 2006/52, p. 29.
107. CR 2006/53, p. 9.
108. *Diallo*, p. 15, para. 22.
109. *Diallo*, p. 27 para. 59.
110. Cf. Declaration, p. 4.

> shareholders has a right of diplomatic protection when the State whose responsibility is invoked is the national State of the company.

In the case at hand, the Court did not see fit, once again, to examine the validity of this 'theory' on the ground that 'it is certainly not applicable to the present case, since Spain is not the national State of Barcelona Traction'.[111] While recognising its controversial character, the ILC special rapporteur did not hesitate to recommend the ILC should include this 'theory' in its draft article.[112] Which the Commission did, not without having here too reduced the scope of the exception compared with what had initially been proposed.[113] It is the validity of this exception, as formulated by the ILC that was discussed by the parties in the context of *Diallo*. In the course of the debate – conducted in the various written procedural documents and continued in the oral arguments – Guinea and the DRC maintained the confusion over the potential status of the exception. In its Memorial, Guinea presented it by taking up the terms of the Court by which it results from 'considerations of equity'. Accordingly, in its Preliminary Objections, the DRC takes it at face value and responds on this ground: the equity that Guinea allegedly asked the Court to apply was equity *contra legem*, because it authorised the state to exercise its diplomatic protection for the benefit of one of its nationals whose rights had not been violated: 'We are indeed beyond a "suppletive function of law in the case of shortcomings or inadequacies' (equity *praeter legem*) and *a fortiori* a simple "method of interpretation of law' (equity *infra legem*)'.[114] Guinea's observations in response to the preliminary objections sought to counter attack. Guinea seemingly sought to demonstrate the existence of a rule, in the form of an exception to the general rule, and not an 'equitable solution' that would besides be infringed by application of the rule. It would, in other words, at most apply equity *infra legem*. To defend the positive character of the exception, it resorted to old arbitration awards adopted in the wake of the *Delagoa Bay Railway* case. It cited a number of separate opinions appended to the judgment in *Barcelona Traction* and certain scholars (cited in the separate opinions!) such as Paul de Visscher who, in 1961, wrote that when the company has the nationality of the state that committed the internationally unlawful act:

> Its personality is no longer anything but a fiction void of all meaning, in which there can be seen nothing but a bundle of individual rights … In that case, an international tribunal, not being bound by internal law criteria, 'pierces the corporate veil', as it is said, [but] it would be more accurate to say that it registers the absence of all effective personality, of any effectual intermediary between the shareholders and the rights infringed.[115]

The statement was convincing. It plainly did not convince the Court. Or rather, the Court wished not to take sides directly and preferred to follow the method of elliptic reasoning it had adopted in *Bar-*

111. *Barcelona Traction*, p. 48, para. 92. It will be remembered that Barcelona Traction was a Canadian company.
112. Cf. John Dugard, *Fourth report on diplomatic protection*, A/CN.4/530, p. 38 para. 87: 'The Special Rapporteur supports the exception contained in article 18 (b) without qualification. It enjoys a wide measure of support in State practice, judicial pronouncements and doctrine. Moreover, it seems warranted on grounds of equity, reasons and justice. At the very least it should be accepted where the company has been compelled to incorporate in the wrongdoing State, in which case incorporation makes it what some writers have described as a "Calvo corporation', a corporation whose incorporation, like the Calvo Clause, is designed to protect it from the rules on international law relating to diplomatic protection'.
113. Article 11 *(b)*: 'The 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: … *(b)* The corporation had, at the date of the injury, the nationality of the State alleged to be responsible for causing the injury, and incorporation in that State was required by it as a precondition for doing business there.'
114. Preliminary Objections, p. 90.
115. P. de Visscher, 'La protection diplomatique des personnes morales', *Collected Courses of the Hague Academy 1961*, Vol. 102, p. 465, cited in the oral argument by A. Pellet, CR 2006/53, pp. 35-36.

celona Traction. As in the 1970 Judgment, it characterised the facts in such a way that they could not correspond to the definition of the exception. It thereby avoided having to rule on whether or not the exception was well-founded. To do this, it relied not on the definition of the exception as it resulted from the *Barcelona Traction* case law, but the narrower formulation given by the ILC. The Commission in its article 11 *(b)* provided that the national state of the shareholders can exercise its protection with regard to them if the formation of the company in the offending state 'was required by it as a precondition for doing business there'.[116] Now, the Court observed that:

> It appears natural, against this background, that Africom-Zaire and Africontainers-Zaire were created in Zaire … it has not satisfactorily been established before the Court that their incorporation in that country, as legal entities of Congolese nationality, would have been required of their founders to enable the founders to operate in the economic sectors concerned.[117]

On the strength of this observation of fact;

> The Court concludes on the facts before it that the companies, Africom-Zaire and Africontainers-Zaire, 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 referred to by Guinea. Therefore, the question of whether or not this paragraph of Article 11 reflects customary international law does not arise in this case .[118]

This reasoning seems largely artificial.[119] In fact, the Court sought to avoid ruling on the validity of the exception. It can be thought that the reason for this is revealed by judge *ad hoc* Mahiou:

> This position [of the Court] is perhaps too prudent, but it is understandable in so far as the Court does not wish to act as legislator, above all because the question has been under discussion by States since they have had to consider the draft ILC Articles on Diplomatic Protection. It is for States to indicate the solution which should be adopted on the basis of the ILC proposals …[120]

The Court therefore imposes a degree of self-restraint on itself with respect to the 'legislator', on the point of making a ruling. This stance can easily be understood in terms of policy. But that does not make the Judgment in *Diallo* any less disappointing. This negative impression is not rescued by the Court's (implicit) refusal to take account of the specificities of the matter and, given the circumstances, to make a 'reasonable application of law'.

2. The reasonable application of law and the circumstances of the case at hand

In its Judgment in *Barcelona Traction*, the Court looked at length into the question of whether 'considerations of equity' did not require that Belgium be recognised as having the capacity to act in the name

116. The so-called 'Calvo company' case. See the explanation of J. Dugard in n. 106 above.
117. *Diallo*, p. 39, para. 92. Yet Guinea seems to demonstrate clearly there was a statutory requirement to be registered in Zaire: 'In any event, in our case, the legal obligation well and truly exists. It results from the first subparagraph of article 1 of the 1966 order-law related to the headquarters of companies whereby: "Companies whose main operational headquarters is located in the Congo must have their administrative headquarters in the Congo"[translation by the Registry]'CR 2006/51, p. 41, § 21.. See also the statement by judge *ad hoc* Mahiou, p. 4, paras 9/10: 'Admittedly, the choice of Congolese nationality was made by Mr. Diallo, but it seems hasty and questionable to conclude that it was a free choice, as the Court does … The freedom of choice is more appearance than reality when one analyses Congolese law.'
118. *Diallo*, p. 42, paras 92-93.
119. It can be criticised much as Jean Chappez criticised the *Barcelona Traction* Judgment, (1970) *AFDI*, 326: while economical, it is 'unsatisfactory in terms of knowledge' and proves 'yet more worrying in terms of justice' in that it sets aside application of a rule 'without having clarified its foundation and subsequently its scope'.
120. Declaration, p. 2, para. 5.

of its nationals, the majority shareholders in a Canadian company having incurred harm because of wrongful acts attributable to Spain:

> [T]he Court considers that, in the field of diplomatic protection as in all other fields of international law, it is necessary that the law be applied reasonably. It has been suggested that if in a given case it is not possible to apply the general rule that the right of diplomatic protection of a company belongs to its national State, considerations of equity might call for the possibility of protection of the shareholders in question by their own national State.[121]

In the passage that follows, the Court develops several considerations as to expediency that argue against such protection.[122] It observes first of all that if the state of nationality of the shareholders of a company were given the right to exercise its protection, the possibility should be extended whatever the size of the shareholder's holding in the company: 'it would seem that the owner of 1 per cent. and the owner of 90 per cent. of the share-capital should have the same possibility of enjoying the benefit of diplomatic protection'.[123] In the case in point, Belgium declared that its nationals held approximately 88 per cent of the capital of Barcelona Traction, which while large, still left 12 per cent of the capital that might be held by shareholders of other nationalities.

The Court saw in this a risk: 'The Court considers that the adoption of the theory of diplomatic protection of shareholders as such, by opening the door to competing diplomatic claims, could create an atmosphere of confusion and insecurity in international economic relations'.[124] Adopting a principle of subsidiarity, the Court observed, would not really remove this risk because there was nothing to prove that the action by the state of nationality of the company would always be judged favourably by the shareholders. The shareholders might think that the agreement reached at completion of the action failed to correctly redress their harm, which would lead them to ask for the protection of their national state with a view to making a new claim. Such concurrent claims 'would be likely to introduce into the negotiation of this kind of agreement a lack of security which would be contrary to the stability which it is the object of international law to establish in international relations'.[125] The situation is not at all comparable, the Court continued, with situations in which 'parallel rights of protection' are admitted, namely the case of someone who enters the service of an international organisation and the case of dual nationality. Because in such instances, 'the number of possible protectors is necessarily very small, and their identity normally not difficult to determine'.[126] Lastly, the Court observed that it is not inequitable that shareholders assume the risk associated with their holding in a foreign company, which is in a fashion the consideration for the advantages they derive from such holdings.[127]

All of these considerations are obviously, to some extent, very general in scope. As such, it may be thought that the judges of the Court ought to have them in mind when choosing to maintain the status quo in *Diallo*. But at the same time, it must be remembered that when the Court in *Barcelona Traction* set about identifying the reasons against recognising the exception, it did so essentially with respect to the facts in the matter.

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121. *Barcelona Traction*, p. 48, para. 93.
122. According to Jean Chappez, (1970) *AFDI*, p. 322, the procedure of setting equity against expediency amounts for the Court to ruling *ex aequo et bono*.
123. ICJ Reports 1970, p. 48, para. 94.
124. *Ibid.*, p. 49, para. 96.
125. *Ibid*., pp. 49-50, para. 97.
126. *Ibid.,* p. 50, para. 98.
127. *Ibid*., p. 50, para. 99.

Yet in *Diallo*, the Court did not seek to assess whether the facts of the matter differed or not from those in *Barcelona Traction*. This was not for want of Guinea's underscoring those specificities on several occasions and in detail.

Guinea pointed out that the companies in question were not *sociétés anonymes* as in *Barcelona Traction*, but *sociétés privées à responsabilité limitée* whose legal regime is characterised by an important *intuitu personae* component, notably because of the non-transferability of shares (*parts sociales*). Moreover, special regulations apply when the company is held by an alien: a 'discriminatory regime' requires the filing of a substantial financial guarantee, which is not required of nationals, thus making the company a 'foreign national' enterprise. Why, queries Guinea, should this specific 'barely national' status vanish when it comes to diplomatic protection? Guinea also points out an important fact: these companies were wholly-owned directly or indirectly by Mr Diallo, who also happened to be the manager (*gérant*). In other words, the interpenetration between the personality of the companies and that of Mr Diallo was real. From this point of view, the facts of the matter were entirely different from those in *Barcelona Traction*, which was a *société anonyme* in which several Belgian shareholders held some 88 per cent of the capital. In this context, was a multiplication of claims to be feared? Certainly not. A further element distinguished the facts in *Diallo* from those in *Barcelona Traction*. The latter case involved a 'triangular relationship' between Canada, the state of which the company had the nationality, Spain, the state that caused the harm, and Belgium, the state whose nationality was held by the majority shareholders. Accordingly, in this configuration, there might be a problem of priority or of the articulation among the actions in diplomatic protection by Canada and Belgium. There was no such thing in *Diallo*, where the relationship was purely bilateral. Two states were opposed and only one was in a position to exercise any action in diplomatic protection, the one whose nationality the company did not have. In other words, while the alternative of protection by the state of the nationality of the company was possible in *Barcelona Traction*, nothing of the kind could be contemplated in *Diallo*. Consequently there was no risk of concurrent claims nor of duplicated recovery of claims.[128]

All of these differences would probably have justified the Court going beyond the rather cursory application of article 11 *(b)* of the ILC articles. The Court ought to have examined the ways and means to make a 'reasonable application' of the general rule, that is, it had a duty not to favour 'denial of justice' but rather to encourage the opening of new avenues of redress, whenever 'considerations of equity' were no impediment. By reiterating almost identically the 1970 solution (including in the form of argument), the Judgment in *Diallo*, gives on this point an unfortunate impression of immobility. And it confirms *a posteriori* the gloomy picture painted by Alain Pellet at the end of his final oral argument: 'It would be regrettable and paradoxical for the World Court to go against a trend that is so clearly established and to make the principle of non-protection more rigid by going back, a third of a century later, on the "theory" of substitution favourably received by the majority in 1970'.[129]

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Reading the Judgment in *Diallo* has constantly, as seen, taken us back in time. It is impossible to read the Judgment without having in mind *Barcelona Traction*, *ELSI*, *Avena* and *LaGrand*, not to mention *Mavrommatis* and *Delagoa Bay Railway* … In this sense, a closer reading confirms our first impression:

128. CR 2006/51, oral arguments of Professor Alain Pellet, pp. 48-50.
129. CR 2006/53, p. 38.

we are not dealing with a leading judgment because it does not say anything fundamentally new. In terms of investment protection, it confines itself practically to taking up solutions hit upon thirty-seven years earlier. On the nature of the institution and its context, the Judgment essentially confirms solutions already outlined. It draws fresh energy from the completion of the ILC's work on diplomatic protection: the substitution of article 1 of the Commission's articles for the *dictum* in *Mavrommatis* is refreshing and welcome in this respect.

It also enhances reflection somewhat, in particular through explicitly integrating human rights among the primary reference standards in exercising diplomatic protection. That is the main contribution of the judgment and it is probably that which will be remembered about it. Yet, it cannot be said that it is very surprising since the idea of a regeneration of the institution through the slant of human rights had long been defended.

More fundamentally, the Judgment in *Diallo* provides a clearer vision of the future of diplomatic protection, of the direction in which it is to evolve. It gives us to understand that diplomatic protection is a mirror in an unchanged frame: when carried along the path of international law, the institution has changed as has international law, itself the outcome of changes in international society. In the early twentieth century, diplomatic protection was in the image of a society of sovereign states and of international law that was almost exclusively focused on co-existence among sovereign entities. The individual faded away behind the double ubiquity of the state and the nation. The state protected 'its' nationals much as it protected its 'objects'. It upheld *its* rights, *its* flouted sovereignty. As the necessities related to interdependence among states came to light, such a view became ever less tenable. International society evolved towards a reality that was more consistent with Scelle's vision of an inter-social environment and diplomatic protection increasingly appeared as a *competence* exercised by a state in the framework of the international constituency attributed to it by virtue of the law of role splitting (*dédoublement fonctionnel*): the state no longer upholds *its* right, but the right of its nationals. And if such action is always consistent with its interest, it above all obeys the interest of the non-organised international community for which it is the executing agent. But Scelle had given a warning: role splitting is but a poor substitute, it cannot fulfil the international functions required by the growing interpenetration of peoples. The solution therefore eventually consisted in the construction of supranational institutions through which to confer on individuals an active international personality.[130] This progressive construction – which we see being built before our eyes in the two areas of human rights and protection of foreign investments – mechanically reduces the cases of role splitting and consequently marginalises diplomatic protection. In being transformed, in changing nature, diplomatic protection merely takes note of the conditions attendant upon its progressive disappearance. What the mirror reflects is a pathway that individuals and states travel preferably each on their own. It is only in the case of absolute need that they accept to walk side by side and form a single convoy. This can only come about on rare occasions requiring two conditions to hold: the individual encounters on their path obstacles that only the state can overcome; and the state deems it in its interest to have recourse to role splitting and takes the individual on board to have them benefit from its special powers (*pouvoirs exorbitants*).

130. For example, *Précis de droit des gens. Principes et systématique*, II, (Paris, Recueil Sirey, 1934), p. 32: 'It would obviously be infinitely preferable for the individual subject of law, who can normally demand verification in the courts of legal situations in which he is implicated by the municipal courts acting under their international jurisdiction to be able also *to have judicial international actions available*, whenever there is cause to fear a denial of justice or to criticise the use of governmental powers. The instance reduced to a straightforward challenge of individual jurisdictions would immediately lose the dangerous and at the same time political character that it takes on between governments'.

It might be thought, under the circumstances, that the only way to truly regenerate the institution would be to change its framework, that is, to modify the conditions in which it is implemented. In this way, for example, the exercise of diplomatic protection would be made an obligation in international law and the conditions of nationality and of exhaustion of local remedies could be made more flexible – or possibly even abolished – to allow wider and more systematic protection of persons whose rights of all kinds had been violated.

But such modifications would cause diplomatic protection to lose its specificity compared with other legal channels. It might be asked, for example, what advantage there would be in requiring the state to exercise its diplomatic protection in the event of a breach of human rights rather than providing the individual with a direct channel of redress that could be exercised at their own initiative in an international court, possibly with the assistance of their national state.

Besides, it is doubtful that by changing the frame of the mirror one could in any way change the landscape reflected in the mirror itself: 'And it is the man carrying the mirror on his back you shall blame for being immoral! His mirror shows the mire and you blame the mirror! Blame rather the highway on which the slough lies and even more the highway inspector who lets the water stagnate and the slough form'. Conversely, it is highly likely that in tugging too much on the frame, the mirror will be broken! The Judgment in *Diallo* reads like a chapter to be added to the novel of diplomatic protection. As it stands, that novel is unfinished. The ending is yet to be written.