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International Court of Justice

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Committee: International Court of Justice

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

Background to the topic and general overview of the topic

In 1964, Mr. Ahmadou Sadio Diallo settled down in the Democratic Republic of the Congo, hereinafter referred to as DRC (then known as the Congo; later, in 1971, renamed Zaire). He founded a private limited liability company (SPRL) in 1974, called Africom-Zaire. By Zairean law, he was its manager. Later he started a second SPRL, called Africontainers-Zaire (1979). In 1980, he became the manager of both companies. In subsequent years, Diallo moved the court to recover alleged debts from his partners (Zaire Fina, Zaire Shell and Zaire Mobile Oil) as well as some sections of the Zairean state. In October 1995, the Prime Minister of Zaire issued an expulsion order to Diallo deporting him to Guinea in January 1996 (1)(4)(5). Soon afterwards, Zaire was renamed the DRC.

Guinea filed a suit against the DRC, alleging that his deportation was to stop him from recovering his debts from the DRC (3). It further stated that there was arbitrary detention and improper interference by the DRC government in the court proceedings. The DRC refuted this stand and claimed that Diallo's deportation was in Zairean public interest (1).

By the DRC law, "refusal of entry" decisions were not appealable, but expulsions were. The point of dispute arose because the DRC argued that it was an expulsion and thus was appealable for reconsideration by the original decision makers or their superiors; Guinea, on the other hand, claimed that Mr. Diallo was "refused entry" and hence was justified in filing his suit (1)(4)(5). The order denominated that "refusal of entry" precluded any possibility of redress (1)(5).

The claim was about diplomatic protection by Guinea (Republic of Guinea) stating that the DRC had violated Mr. Diallo's rights by expelling him from the DRC and confiscating his property (4).

Diplomatic Protection of shareholders and corporations has been a controversial issue in international law since the Barcelona Traction decision (7)(8)(16). In the absence of specific court regulations and the growing incidence of bilateral treaties allowing investors to make direct claims against states, there are claims that the Barcelona Traction does not reflect international laws, as observed in the case of Elettronica Sicula S.p.A. (ELSI)(United States of America v. Italy) (9)(10).

The DRC argued on two counts: (1)(4)(5).

- 1) Guinea could not diplomatically protect Diallo's property because it was not owned by companies of Guinean nationality, and
- 2) Diallo had not exhausted the local remedies available in the DRC.

Guinea had to show that Mr.Diallo exhausted available local remedies while the DRC had to show that there were local remedies available in their legal system but Mr.Diallo did not exhaust them. The court said that the DRC couldn't rely on an error made by their administrative agencies refusing Mr.Diallo entry, and claim that it should have been treated as an expulsion (1).

It was then established that the DRC did not have effective remedies in its domestic legal system, available to Mr.Diallo, in order to challenge his expulsion (1).

The court stated that Guinea had a valid standing in this case because it involved a person of Guinean nationality and the unlawful acts by the DRC infringing on his direct rights as "associé" of the two companies, Arficom-Zaire and Africontainers-Zaire. Mr.Diallo was associé and gérant of both companies; an "associé" of an SPRL holds "part sociales" in its capital, while a "gérant" is a manager or organ of a company acting on the company's behalf (1).

The DRC raised the issue that Guinea had not shown that diplomatic protection of Mr.Diallo "in substitution" for the company possessing the nationality of the respondent state, would be valid in this case as both companies have Congolese nationality. Diplomatic protection by substitution goes beyond the provisions of positive international law and the court's jurisprudence cannot consider that possibility in this case. Hence, the DRC suggested that the court should dismiss any possibility of equity "contra legem" (1)(15).

The court concluded that the two companies were not incorporated such that they could get diplomatic protection by substitution (11).

The court further concluded that Guinea's application for protection of Mr.Diallo's rights as an individual and his direct rights as associé of the two companies, Arficom-Zaire and Africontainers-Zaire, is admissible (1).

The more recent decisions of the International Court of Justice fixed certain time limits for the filing of pleadings (2).

- 1) 19 November 2008 for the reply from Republic of Guinea, and
- 2) 5 June 2009 for the rejoinder of the Democratic Republic of Congo.

Relevant UN treaties and resolutions

1) The Barcelona Traction

The Barcelona Traction, Light and Power Company Limited was a company controlling light and power generation in Spain. It was a Canadian company operating in Spain but mainly controlled by Belgians. Around the 1960s, Spain made it difficult for foreigners to do business there. Belgian stockholders started losing money and decided to file a suit in the International Court of Justice; but the ICJ ruled in favour of

Spain because by international law, only the Canadians, with the same nationality as that of the corporation, can sue. This case of Belgium v Spain is relevant in international law because it states that interests of shareholders constitute indirect interest and therefore don't get international legal protection; and a claimant state cannot claim for its nationals who have invested in foreign corporations, unless there are treaties or agreements that specify otherwise (1)(7)(8)(16).

2) Elettronica Sicula S.P.A. (ELSI)

On 6 February 1987, the United States of America filed a case against Italy in the ICJ, alleging that Italy had violated the bilateral treaty of Friendship, Commerce and Navigation of 1948(FCN Treaty) by preventing two US companies, 'Raytheon' and 'Machlett Laboratories' from liquidating their assets of their wholly owned Italian subsidiary, Elettronica Sicula S.P.A.(ELSI). (1)(9)(10)

3) Draft Articles on Diplomatic Protection, 2006 (11)

These are texts adopted by the International Law Commission at its fifty-eighth session, in 2006 and submitted to the General Assembly.

Definition of key terms

- 1) Societe privee a responsabilite limitee: a private limited liability company (5).
- 2) Deportation: to remove an immigrant or foreigner forcibly to another country; banish.
- 3) Exhaustion of available local remedies: Before resort may be had to an International Court, it is necessary that the country where the violation took place should have an opportunity to redress it within the framework of its own domestic legal system (1).
- 4) Jus standi: Latin "recognized right"; literally means "the right of standing" (6).
- 5) ILC: International Law Commission, established in 1948.
- 6) Associé: partner (12).
- 7) Gérant: manager (12).
- 8) Part sociales: capital is held in the form of membership share (13).
- 9) Diplomatic protection: specific exceptions to immunity under international law (11).

10) Diplomatic protection 'by substitution' for: In this case, protection for the shareholder in substitution for the company (14).

11) Equity contra legem: the equity invoked to overturn or reject the application of unjust laws and where the principles of equity are deployed to strike down a law (15).

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