

The Jurisdiction analyses and admissibility challenges of International Court of Justice in diplomatic protection of legal persons with respect to Mr. Diallo case

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Abstract: Diplomatic protection is to be understood as the protection given by a subject of international law to individuals, i.e. natural or legal persons, against a violation of international law by another subject of international law [1]. The essential elements of diplomatic protection which must be considered in any case in international court of justice (ICJ) for stating its Jurisdiction are state hood of parties, Nationality of individual, Home state, Continuity of nationality, and Pre requisite conditions of diplomatic protection. Diplomatic protection can originally be seen as belonging to the study on state responsibility , which is mainly based on customary international law, but has been influenced by some important changes in respect of non – nationals protection specially, " stateless Persons, refugees and human rights violation". Diplomatic protection dealing with the legal consequences of an internationally wrongful act and responsibility of the states for making full reparation for the injury caused by an international delict, this reparation may take the form of "restitution, compensation or satisfaction", either singly or in combination which is determined by the court. This paper analysis the prerequisite conditions for obtaining court jurisdiction and admissibility in diplomatic protection of legal persons with respect to Mr. Diallo case.

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1. Introduction

1-1. Guinea reasons for diplomatic protection

Violation of rights invoked by guinea for which it seeks to exercise diplomatic protection are:

"claiming the payment of debts. Due to Mr. Diallo and his companies, violation alleged to have occurred at the time of his arrest, detention and expulsion, or to have derived there from, of three categories of rights, "his individual personal rights, his direct rights as share holder or partner (associate) in Africom – Zaire and Africontainers – Zaire and his right to those companies, by substitution." [2]

1-2. Jurisdiction of the court

The right to exercise diplomatic protection is for states. Since the necessary qualification to be a part in any contentious cases in the international court of justice is state hood which is preliminary condition due to *ratione personae* according to Article

34, paragraph one of the statutes of the court [3]. That statehood has been supplemented by formal conditions which have been determined in court statute and united nation's (UN) charter [4].

But statehood alone does not give the court jurisdiction over that state in a concrete case. The essential element in this respect is the definite consent of the states concerned that the court should decide about it. It is the element of a state's express consent that constitutes jurisdiction of the court *ratione material* [5]. Therefore the court has competence in its judgments to give a construction of the legal position of a state , including its legal position in regard to entities either than states , particularly when dealing with individual's claim espoused by a state in exercise of its right of diplomatic protection [6].

To establish the jurisdiction of the court in case concerning Mr. Diallo, guinea relies on the declarations made by the parties

under article 36, paragraph 2, of the court statute [7].

The DRC acknowledges that the declarations are sufficient to found the jurisdiction of the court in the present case. But DRC challenges the admissibility of Guinea Application and raises two preliminary objections. First of all according to the DRC, Guinea lacks standing to act in the current proceedings since the rights which it seeks to protect belong to Africom-Zaire and Africontainers- Zaire, Congolese companies, not to Mr. Diallo. Secondly, neither Mr. Diallo nor the companies have exhausted the remedies available in the Congolese legal system to obtain reparation for the injuries claimed by Guinea before the court.

In this respect, this paper is about to analyze the reasoning of the court in dealing with preliminary objections of DRC about admissibility of Guinea a application after considering definition of Diplomatic protection and its prerequisite conditions for obtaining court jurisdiction and the arguments of parties in this respect.

2. Definition of Diplomatic protection

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 implement the latter state for reparation of its wrongful acts through "restitution, compensation or satisfaction", either singly or in combination, the form of reparation will be determined by the court after obtaining its jurisdiction[8]. Hence the key elements of diplomatic protection are:

"a- it belong to study of state responsibility, b- Obtaining reparation for wrongful act, c- The form of treatment of aliens, d- It is a right which belongs to the state of nationality of injured alien."

In Diallo case, guinea is about to protect his rights as an individual; protect Mr. Diallo direct right as partner in Africom-Zaire and Africontainers – Zaire; and protect him with respect to Mr. Diallo's right "by substitution for" Africom – Zaire and Africontainers – Zaire.

3. Prerequisite conditions of diplomatic protection

States are entitled to exercise diplomatic protection when a significant injury has occurred with respect to their nationals abroad. In every cases of diplomatic protection in international court of justice for the reason of obtaining court jurisdiction, the court must determine the prerequisite conditions of diplomatic protection for each case these prerequisite conditions are: "a-right to exercise diplomatic protection; b- An international delict; c- Nationality and its continuousness; d- and, exhaustion of local remedies."

3-1. Right to exercise diplomatic protection

Broadly speaking, a state has the right to exercise diplomatic protection (home state) against another state (defendant state) because of its international delict committed against claimant state individual. In this respect this paper will analyses "individual, Home – state, and defendant state attitude toward diplomatic protection, with respect to Mr. Diallo case.

3-1-1. Individual

Individual in diplomatic protection includes natural or legal persons which engaged in business (like: important concessions or investing on large scale abroad (foreign investment) or corporation, etc) or residing or traveling abroad expects the foreign state to observe and carry out all its internationally binding obligations beneficial to himself. Individuals believing that the foreign state not fulfilling these obligations are likely to ask their home state for protection against any kind of confiscation or expropriation and nationalization or any other kind of international delict which causes any injury to them without adequate reparation.

In Mr. Diallo case, the individual was a private limited liability company (Africom-Zaire and Africontainers – Zaire) incorporated under Zairian law and entered in the trade register of the city of Kinshasa which Mr. Diallo was their manager and a partner in latter company.

3-1-2.The home state

Home state is a state which the individuals injured abroad has its

nationality. In international law a state is under no duty or obligation to exercise its diplomatic protection, but internal law of a state may oblige it to grant diplomatic protection to a national [3]. In this respect there are two principles which must be considered, first, municipal law if it determines the home state of nationals or individuals; secondly, there are limits imposed by international law on the grant of nationality which will be dealt with in due respect later.

Home state reasons for diplomatic protection are: "a- enforcement of its legal principle, b- Political prestige, c- Economic importance of individual injury, d- The possibility of a future switch in role of the protecting state (the claimant of today, may be the defendant of tomorrow)."

Home state reasons for not granting its protection are: "a- possibility of losing an alliance, b- Prohibition of future business or transactions with that state or others, c- Refuse of giving loan, d- Or, mustering a majority in an international organization against the protecting state in a decision of paramount importance to the latter" [10]. In Mr. Diallo case, the home state was guinea which accepted to grant its diplomatic protection to him.

3-1-3. Defendant state

The defendant state is a state that is responsible for its international delict towards other state's nationals (aliens) which usually don't have positive view to diplomatic protection. Since they think that aims of diplomatic protection are: "a- an expression of political antagonism, b- Wholesale distrust of its legal system, c- Dissatisfaction of its citizens, d- A possible pretext by stronger states for economic coercion, intervention, intrusion and neo colonialism, e- The economic defeat and ruling of state towards individual rights especially for states which exports few goods or services and little capital, f- Believing in philosophy of collective thinking"[11].

In Mr. Diallo case, the defendant state is democratic republic of Congo (DRC) which arrested and detained Mr. Diallo two times and expelled him from Congolese territory wrongfully.

3-2. International delict

Diplomatic protection often aims at reparation for damages caused by an international delict or at prevention of such delict which depends on the law of internationally wrongful acts and its reparation.

Today there is a growing tendency toward diplomatic protection which is due to following considerations:

a- expansions of contracts between individuals and foreign states because of, broad streams of trade, capital investment and other business activities where constantly crossing state boundaries,

b- Working (migrant workers) or living abroad as refugees, growing interest for visiting more countries as tourists,

c- Extension of states jurisdiction in regard to territorial economic zones, and the continental self,

d- Nowadays thousands of relevant treaties have been concluded since the end of world war III, and this number is still rising,

e- the most – favored – nation (MFN) clause is of no little importance today, since there is a fresh approach in the human rights and humanitarian rights covenants and conventions which cover all individuals regardless of their nationality [12].

In Mr. Diallo case, the wrongful acts of the DRC as defendant state were a bout the violation of three categories his rights: "Mr. Diallo's individual personal rights, Mr. Diallo's direct rights as partner or shareholder in Africom – Zaire and Africontainers- Zaire, and rights of these companies"; which is due to wrongful arrest, detention and expulsion of him.

Hence the DRC is responsible for arbitrarily arresting and compelling Mr. Diallo since at that time not respecting his right to benefit provisions of Vienna convention on consular relations (1963) ; by subjecting him to humiliating and degrading treatment , in depriving him of the exercise of his rights of ownership and management in respect of companies founded by him in the DRC in preventing him from pursuing recovery of his companies numerous depts. Owned to him (to himself personally and to the said companies) both by the DRC it self and by other contractual partners ; in not

paying its own debts. to him and to his companies.

3-3. Nationality and its continuousness

Under customary international law, Subjects of international law are entitled to protect only those individuals with whom they have a particular relationship through nationality [13], special agreement, or even non – nationals in special circumstances [14], and stateless persons [15]. In general, nationality includes: "natural persons, legal persons and shareholders, ships and aircrafts".

The other point is that this nationality must be continuous at the time of internationally wrongful act and at the time that the claim has been presented or settled on the international level [16].

In Mr. Diallo case, the DRC preliminary objections to the court jurisdiction were about admissibility of guinea application with respect of Guinea standing and non exhaustion of local remedies. We will consider in this paper, these two aspects of prerequisite conditions of diplomatic protection in brief.

3-4. Exhaustion of local remedies

A state may give diplomatic protection only to individuals who have exhausted the effective domestic remedies available under the law of the defendant state against acts or omissions in violation of international law. This rule has become customary international law and has mentioned in numerous treaties. Many court decisions based on this rule [17]. Not only natural and legal persons required to exhaust local remedies, but also a foreign company financed partly or mainly by public capital and non – nationals of the state which in exceptional circumstances may have entitled to diplomatic protection required to do so [18].

3-4-1. Specification of local remedy rule

The specifications of the local remedy rule which must be considered in each case are [19]:

a- this rule may vary from one state to another,

b- if the municipal law in question permits an appeal in the circumstances of the case to highest court, such an appeal must be brought in order to secure a final

decision in the matter, even if there is no appeal as of right to a higher court, but such a court has a discretion to grant leave to appeal, it must be done.

c- Courts in this connection include both ordinary and special ones,

d- Administrative remedies must also be exhausted, if it may result in a binding decision,

e- It is not required to approach the executive for relief in the exercise of its discretionary powers,

f- Local remedies do not include remedies whose purpose is to obtain a favor and not to vindicate a right, nor do they include remedies of grace unless they constitute an essential prerequisite for the admissibility of subsequent contentious proceeding. Requests for clemency and resort to an ombudsman generally fall into this category [20],

g- The foreign litigant must raise the basic arguments that he intends to raise in international proceedings in the municipal proceedings [21],

h- The claimant state must produce the evidence available for exhaustion of local remedy without any success,

i - This rule (local remedy) applies only to cases in which the claimant state has been injured indirectly, that is, through its national. In the cases of a mixed claim, it is incumbent upon the tribunal to examine the different elements of the claim and to decide whether the direct or indirect element is preponderant [22], Which is mostly depend on the subject of dispute, the nature of claim and remedy claimed,

j- The injured person must himself have exhausted all local remedies. This does not preclude the possibility that the exhaustion of local remedies may result from the fact that another person has submitted the substance of the same claim before a court of respondent state [23].

3-4-2. Exceptions of the local remedy rule

The local remedies don't need to be exhausted in the following circumstances:

a- There are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress [24]: this exception includes three tests: "The obvious futility test [25], the test of reasonable prospects of success and the no -reasonable

possibility of effective redress test"[26]. The other point is that, it is not sufficient for the injured person to show that the possibility of success is low or that further appeals are difficult or costly. All of these conditions must be determined in the context of local law and prevailing circumstances by the international tribunal and on the assumption that the claim is meritorious [27].

b- Undue delay on remedial process,

It means that, in the following circumstances the respondent state is responsible for an unreasonable delay in allowing a local remedy to be implemented:" If it confirmed by codification attempts [28]; Human rights instruments and practice; judicial decision or, scholarly opinions".

c- There was no relevant connection between the injured person and the state alleged to be responsible,

It means that in the following circumstance, the effective local remedies exist, but due to aspects of injuries it would be unreasonable and unfair to require an injured person to exhaust local remedies:

I- the alien property has suffered environmental harm caused by "pollution, radioactive fall out or a fallen space object emanating from a state, in which his property is not situated",

II. Where the alien is on board of an aircraft that is shot down, while on oversight of another state's territory,

III-The link required between injured individual and the respondent state for exhaustion of local remedies i.e. voluntary physical presence, residence, owner ship of property or a contractual relationship with the respondent state [29].

The other point is that , the local remedies rule has undergone major changes in recent years where as in the early history diplomatic protection was characterized by situations in which a foreign national resident and doing business in a foreign state was injured by the action of that state and could therefore be expected to exhaust local remedies in accordance with the philosophy that the national going abroad should normally be obliged to accept the local law as he finds it , including the means afforded for the redress of a delict on individual may today be injured by the act of a foreign state outside its territory or by some act within its territory in circumstances in which the

individual has no connection with the territory. Like: "Trans boundary environmental harm (for example, the explosion at the Chernobyl nuclear plant near Kiev in the Ukraine in 1986, which caused radioactive fallout as far away as Japan and Scandinavia, French nuclear tests or Japan earthquake few days ago ...) and the shooting down of an aircraft that has accidentally stayed into a state's air space (as illustrated by the aerial incident in which Bulgaria shot down on ELAL flight that had incidentally entered its airspace)".

Therefore it is only where the alien has subjected him self voluntarily to the jurisdiction of respondent state that he would be expected to exhaust local remedies [30]. Hence" **voluntarily link**" between injured alien and the host state requires the existence of a "**relevant connection** "in a sense that:

"It must relate in some way to injury suffered, and the tribunal must examine not only the question whether the injured individual was present, resided or doing business in the territory of defendant state but also whether, in the circumstance, the individual by his conduct, had assumed the risk that if he suffered an injury it would be subject to adjudication in the host state".

The word "**relevant** "allow the tribunal to consider the essential elements governing the relationship between the injured alien and the respondent state in the context of the injury in order to determine whether there had been and assumption of risk on the part of the injured alien.

d- The injured person is manifestly precluded from pursuing local remedies; this means that, a tribunal has the power to dispense with this rule where, in all the following circumstances of the case, it would be manifestly unreasonable to expect compliance with this rule.

I- The situation in which injured person is prevented by the respondent state from entering its territory , either by law or by threats to his or her personal safety and there by denying him the opportunity to bring proceedings in local courts,

II- Where criminal syndicates in the respondent state obstruct him from bringing such proceedings.

III- the respondent state costs of legal proceedings are prohibitively high and

manifestly preclude compliance with this rule.

e- The state alleged to be responsible has wired the requirement that local remedies be exhausted; the purpose of this exception is to protect the interest of the state accused of mistreating an alien. The waiver of local remedies by respondent state may be done expressly or impliedly. The circumstances for express waiver of this rule are:

I- Through concluding a bilateral or multilateral treaty before or after the dispute arises,

II- or through concluding an ad hoc arbitration agreement to resolve an already existing dispute or in a general treaty providing that dispute arising in the future are to be settled by arbitration or some other form of international peaceful settlement,

III- or this matter is included in a contract between a state and an alien.

Today waivers are a common feature of contemporary state practice and many arbitration agreements, i.e. article 26 of the convention on settlement of investment disputes, contain waiver clause.

It is generally agreed that express waivers are irrevocable, even if the contract is governed by the law of the host state [31]. Implied circumstances of waiving local remedies by respondent state can be determined in the light of the language of the instrument in each case, where the respondent state has agreed to submit disputes to arbitration that may arise in future with the applicant state, there is support for the view that such an agreement does not involve the abandonment of the claim to exhaust all local remedies in cases of diplomatic protection [32].

There is a strong presumption against implied or tacit waiver by chamber of international court of justice in the ELSI case [33]. A waiver of local remedies may be more easily implied from an arbitration agreement entered into after the dispute in question has arisen. Hence such a waiver may be implied, if the respondent state entered into an arbitration agreement with the applicant state covering disputes relating to the treatment of nationals after the injury to the national who is the subject of the dispute and the agreement is silent on the retention of local remedies rule.

In general, it is wiser to allow conduct from which a waiver of local remedies might be inferred to be treated as implied waiver.

4. The DRC challenges to the admissibility of Guinea Application

The DRC accepts that the court has jurisdiction according Article 36, paragraph 2, of the statute, but raises two preliminary objections about admissibility of Guinea Application. The first objection of DRC was about lack of standing of Guinea to act in the current proceedings. The second objection of DRC was about non – exhaustion of local remedies.

4-1. The protection of Mr. Diallo's right as an individual

According to DRC, Guinea's claim in respect of Mr. Diallo's rights as an individual are inadmissible because, he has not exhausted the available and effective local remedies existing in DRC concerning his expulsion from Congolese territory. Since his expulsion from the DRC territory was lawful and the notice signed by the immigration officer "inadvertently" refers to "**refusal of entry**" instead of "**expulsion**", and not intended to deprive Mr. Diallo of a remedy.

Guinea responds, with respect to Mr. Diallo expulsion is that there were no effective remedies in Zaire or DRC. The fact is that the expulsion order against Mr. Diallo was carried out by way of an action denominated as **refusal of entry**, which precluded him from any possibility of redress. More over the remedies available are not judicial or quasi – judicial and are discretionary in nature and not taken into account by local remedies rule.

Guinea further contends that, even though some remedies may in theory have been available in Congolese legal system. But they were not effective.

The court recalls that under customary international law, as reflected in article 1 of the draft articles in diplomatic protection of the international law commission (hereinafter the ILC), " diplomatic protection consists of the invocation by a state through diplomatic action or other means of peaceful settlements, of the responsibility of another state of an injury caused by an international delict 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"[34].

In this respect, it falls to the court to ascertain whether Mr. Diallo is a national of guinea and whether he has exhausted the local remedies.

On the first point, the court observes that there is no dispute between parties about Mr. Diallo's nationality and its continuousness.

On the second point, the court by recalling its jurisprudence in Interhadel case state that the rule of local remedies is a well – established rule of customary law which must be observed by home state of any individual previous international proceeding" [35].

In matters of diplomatic protection, it is incumbent on the applicant state (Guinea) 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 [36]. It is for the respondent state (the DRC) to convince the court that there were effective remedies in its domestic legal system that were not exhausted [37].

The court will recall that, guinea described in its memorial that DRC international delict was about Mr. Diallo arbitrarily arrest, detention on two occasions (in 1988 and 1995). Since he suffered inhuman and degrading treatment during those periods and adds that his right under the 1963 Vienna convention on consular relations was not respected.

In view of the arguments made by parties, the court addresses the question of local remedies in respect of Mr. Diallo's expulsion, which had been characterized as "a refusal of entry ". It is apparent that refusal of entry are not applicable under Congolese law. Even if it was a case of expulsion and not refusal of entry, the DRC has also failed to show that means of redress against this matter are available in its domestic law.

The court concludes that the DRC objection to admissibility based on the failure to exhaust local remedies can not be upheld in respect of that expulsion.

4-2. The protection of Mr. Diallo's direct rights as "associate" in Africom – Zaire and Africontainers- Zaire

The DRC raises two objections to admissibility regarding this aspect of the application: "The guinea's standing, and not exhaustion of local remedies".

4-2-1. Guinea standing

Under international law the most fundamental principle of diplomatic protection of corporation is that a corporation is to be protected by the home state and not by the state or states of nationality shareholders in a company. The reasons for this as stated by the court in Barcelona traction case are:

a- when shareholders invest in a corporation doing business abroad they undertake risks, including the risk that the state of nationality of the corporation may in the exercise of its discretion decline to grant its protection [38].

b- If the home state of shareholder is permitted to exercise diplomatic protection, this might lead to multiplicity of claims by different states, as frequently large corporations which comprise of share holders of different nationalities [39].

c- The court was always reluctant to apply by way of analogy rules relating to dual nationality to corporations and shareholders and to allow the states of nationality of both to exercise diplomatic protection [40].

d- The adoption of the theory of diplomatic protection of share holders as such, could create an atmosphere of confusion as of insecurity in international economic relations [41].

The diplomatic protection by home state of share holders could be justified in the following exceptional circumstances:

I- If that corporation is a "limited Liability Company whose capital is represented by shares or joint stock companies"[42].

II - Where an injury to the company is aimed at the direct rights of the shareholders which will be determined by municipal law [43]. III - There may be agreement about lifting the veil of corporate personality in certain cases where the share holders have suffered damages through a damage to company, But that company may be expropriated or dissolved .This

circumstances may leave the shareholders without legal remedies. Some reasons of justice and equity speak out for right of shareholders home state to grant its diplomatic protection [44].

IV- A home state severe restriction of a company's activities, entirely preventing it from reaching its economic goals and leaving the shareholders no influence, which means these companies have become paralyzed or practically defunct.

V- The Corporation had, at the date of injury; the nationality of the state alleged to be responsible for causing the injury, and in corporation in that state was required by it as a precondition for doing business there [45].

VI- There are some circumstances where, a home state is not entitled or willing to protect shareholders of a foreign company and their company is unable to serve their shareholders it is easier to demand of international law more consideration for economic realities in diplomatic protection of legal persons and shareholders than to agree on the rules necessary for implementing this demand [46].

The DRC asserts: "the arrest, detention and expulsion of Mr. Diallo" could not constitute acts of interference on its part in relations between the associate (shareholder) Mr. Diallo and said companies. As a result, they could not injure Mr. Diallo's direct rights. Since he could very well have exercised his rights as manager from foreign territory by delegating his tasks to local administrators.

The court recalls that these two companies are private limited, which their precise legal nature can be established by referring to the DRC domestic law. It indicates that Congolese law accords a SPRL independent legal personality distinct from that of its advocates. Particularly in that the property of the associate is completely separate from that of company and in that the associates are responsible for the debts of the company receivable from and owing to third parties relate to its respective rights and obligations.

In view of foregoing, the court concludes that Guinea does indeed have standing in this case in so far as its action involves a person of its nationality, Mr. Diallo, which his direct rights infringed by the DRC, particularly his direct right as

associate and manager of his two companies since the manager is an organ of the company acting on its behalf. So the objection of inadmissibility raised by the DRC due to Guinea's lack of standing to protect Mr. Diallo cannot be upheld in so far as it concerns his direct rights as associate of Africom – Zaire and Africontainers – Zaire [47].

4-2-2. Non – exhaustion of local remedies

The DRC claims, in this respect, that Mr. Diallo's absence from Congolese territory was not an obstacle to the proceedings already initiated or for him to bring other proceedings, and that Mr. Diallo could also have appointed representatives to that end. The DRC also asserts that existing remedies available in Congolese legal system are effective.

The Guinea reasons for non – exhaustion of local remedies are:

a- the Congolese state deliberately chose to deny access to its territory to Mr. Diallo because of the legal proceedings that he had initiated on behalf of his companies.

b- with respect to present circumstances, to accuse Mr. Diallo of not having exhausted the local remedies would not only be manifestly a reasonable and unfair, but also an abuse of this rule.

c- Circumstances of Mr. Diallo's expulsion precluded him from pursuing this rule on his own behalf or on that of his companies.

d- Existing remedies in the DRC legal system are ineffective in view, inter alia of excessive delays, unlawful administrative practice and the fact that at the time of the events, the enforcement of legal decisions of local courts depended solely on the government's good will.

The court notes that the alleged violation of Mr. Diallo's direct rights as associate was dealt with by Guinea as a direct consequence of his expulsion. Since the DRC failed to prove that there were effective remedies, under Congolese law. Against the expulsion order [48], the court concludes that the objection of the DRC as to inadmissibility due to non – exhaustion of local remedies cannot be upheld [49].

4-3. Protection of the right of Africom – Zaire and Africontainers – Zaire by substitution

The DRC raises two objections to admissibility of Guinea's application, derived respectively from Guinea's lack of standing and non – exhaustion of local remedies.

4-3-1. Guinea's standing

The DC contends that Guinea cannot invoke "considerations of equity" in order to justify the right to exercise its diplomatic protection in favor of Mr. Diallo and by substitution for Africom – Zaire and Africontainers – Zaire independently of the violation of the direct rights of Mr. Diallo, on the ground that the state whose responsibility is at issue, is also the state of nationality of the companies concerned. Because Guinea has not demonstrated that protection of the shareholders in substitution for the company which possesses the nationality of the respondent state would be justified in the present case [50]. The other point is that such protection would lead to a discriminatory regime of protection. Resulting as it would in the unequal treatment of shareholders. Guinea reasons for having a stand to protect Mr. Diallo by substitution for his companies are:

a- in the Barcelona Traction case, the court referred, in a dictum, to the possibility of an exception, founded on reasons of equity, to the general rule of the protection of a company by its national state, when the state whose responsibility is invoked is the national state of the company [51].

b- The rule of protection by substitution and its customary nature are confirmed by numerous arbitral awards [52].

c- These two companies are SPRL, which have a marked personal institution character and which, moreover, are statutorily controlled and managed by one and the same person.

d- Mr. Diallo was bound, under Zairian legislation, to incorporate the companies in Zaire [53].

The court recalls that, as regards diplomatic protection, the principle as emphasized in the Barcelona Traction case is that: "Not a mere interest affected, but solely a right infringed involves responsibility, so that an act directed against and infringed only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected [54]. Then it observes that in case concerning Electronic Sicula S.P.A (ELSI),

protection "by substitution for" companies, chamber of the court based its decision not on customary international law but on treaty of "friendship, commerce and navigation" between two countries which directly granting to their nationals, corporations and associations certain rights in relation to their participation in corporations and associations having the nationality of the other state.

According to the court, the theory of protection "by substitution" seeks to offer protection to the foreign shareholders of a company who could not rely on the benefit of an international treaty and to whom no other remedy is available, the allegedly unlawful acts having been committed against the company by the state of its nationality [55,56].

The court then turns to the article 11, paragraph (b) of draft articles on diplomatic protection, and observes: "it appears natural that Africom – Zaire and Africontainers – Zaire were created in Zaire and entered in the trade register of city of Kinshasa by Mr. Diallo who had settled in the country in 1964".

The court then concludes that two companies were not incorporated in such a way that would fall within the scope of protection by substitution in the sense of article 11 (b), of the ILC draft articles on diplomatic protection.

Therefore, the objection as to inadmissibility owing to Guinea's lack of standing to offer Mr. Diallo diplomatic protection by substitution for his companies well founded and must be upheld. As Guinea is without standing in this respect the court need not further consider the DRC objection based on the non – exhaustion of local remedies [56].

5. Conclusion

According to jurisprudence of international court of justice the Jurisdiction and admissibility challenges in diplomatic protection of legal persons with respect to Mr. Diallo case are as following:

a- It belong to study of state responsibility,

b- Obtaining reparation for wrongful act,

c- The form of treatment of aliens,

d- It is a right which belongs to the state of nationality of injured alien.

e- Nationality and its continuousness;

F -Exhaustion of local remedies.

A state may give diplomatic protection only to individuals who have exhausted the effective domestic remedies available under the law of the defendant state against acts or omissions in violation of international law.

In Mr. Diallo case, guinea is about to protect his rights as an individual; protect Mr., Diallo direct right as partner in his two companies (Africom- Zaire and Africontainers – Zaire); and protect him with respect to Mr. Diallo`s right "by substitution for him in his two companies. The DRC preliminary objections to the court jurisdiction were about admissibility of guinea application with respect of" Guinea standing and non exhaustion of local remedies".

In this respect the court recalls that:

The most fundamental principle of diplomatic protection of corporation is that a corporation is to be protected by the home state and not by the state or states of nationality or share holders in a company. But the diplomatic protection by home state of share holders could be justified in following exceptional circumstances:

I- If that corporation is a "limited liability company whose capital is represented by shares or joint stock companies".

II- An injury to the company is aimed at the direct rights of the shareholders which must be determined by municipal law.

III- There may be agreement about lifting the veil of corporate personality in certain cases where the share holders have suffered through damage to company, But that company may be expropriated or dissolved .This circumstances may leave the shareholders without legal remedies. Some reasons of justice and equity speak out for right of shareholders home state to grant its diplomatic protection.

IV- A home state severe restriction of a company's activities, entirely preventing it from reaching its economic goals and leaving the shareholders no influence, which means these companies have become paralyzed or practically defunct.

V- The corporation had, at the date of injury, the nationality of the state alleged

to be responsible for causing the injury, and in corporation in that state was required by it as a precondition for doing business there.

VI- There was some circumstances where, a home state was not entitled or willing to protect shareholders of a foreign company and their company was unable to serve their shareholders.

Then the court recalls that these two companies are private limited (SPRL), which their precise legal nature can be established by referring to the DRC domestic law. It indicates that Congolese law accords a SPRL independent legal personality distinct from that of its advocates. Therefore court concludes that guinea does indeed have standing in this case in so far as its action in involves a person of its nationality, Mr. Diallo which his direct rights infringed by the DRC, particularly his direct right as associate and manager of his two companies.

The court notes that the alleged violation of Mr. Diallo`s direct rights as associate was dealt with by Guinea as a direct consequence of his expulsion. Since the DRC failed to prove that there were effective remedies, under Congolese law. Against the expulsion order, the court concludes that the objection of the DRC as to in admissibility due to non – exhaustion of local remedies cannot be upheld.

The most challenging point of this case is that guinea invoked to the "considerations of equity" in order to justify his right to exercise its diplomatic protection in favor of Mr. Diallo by substitution in his two companies independently of the violation of his direct rights, on the ground that the state whose responsibility is at issue is also the state of nationality of the companies concerned. The DRC preliminary objections to the court jurisdiction were about Guinea standing and non exhaustion of local remedies because the guinea has not demonstrated that protection of the share holders in substitution for the company which possesses the nationality of the respondent state would be justified in the present case. The other point is that such protection would lead to a discriminatory regime of protection. Resulting as it would in the unequal treatment of share holders.

Guinea reasons for having a stand to protect Mr. Diallo by substitution for his companies are:

I- in the Barcelona traction case , the court referred , in a dictum , to the possibility of an exception , founded on reasons of equity , to the general rule of the protection of a company by its national state , :when the state whose responsibility is invoked is the national state of the company,

II- The rule of protection by substitution and its customary nature are confirmed by numerous arbitral awards,

III- These two companies are SPRL, which have a marked personal institution character and which, moreover, are statutorily controlled and managed by one and the same person,

IV- Mr. Diallo was bound, under Zairian legislation to incorporate the companies in Zaire.

According to the court, the theory of protection by substitution seeks to offer protection to the foreign shareholders of a company who could not rely on the benefit of an international treaty and to whom no other remedy is available, the allegedly unlawful acts having been committed against the company by the state of its nationality.

The court then turns to the article 11, paragraph (b) of draft articles on diplomatic protection, and observes that it appears natural that Africom – Zaire and Africontainers – Zaire were created in Zaire and entered in the trade register of city of Kinshasa by Mr. Diallo who had settled in the country in 1964. The court then concludes that two companies were not incorporated in such a way that 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.

Therefore, the objection as to inadmissibility owing to guinea's lack of standing to offer Mr. Diallo diplomatic protection by substitution for his companies well founded and must be upheld.

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