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# Human Rights and the International Court of Justice The *Ahmadou Sadio Diallo* Case

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## 1. Introduction

The Permanent Court of International Justice (PCIJ) made a memorable contribution to the protection of minority rights.<sup>1</sup> Similarly, the International Court of Justice (ICJ) has played a significant role in the development of the international protection of human rights, more generally.<sup>2</sup> Since international

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- 1 See, for example, *Certain Questions Relating to Settlers of German Origin in the Territory Ceded by Germany to Poland* (1923) PCIJ, Series B 6; *Rights of Minorities in Upper Silesia (Minority Schools)* (1928) PCIJ, Series A 15; *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* (1932) PCIJ, Series A/B 44; and *Minority Schools in Albania* (1935) PCIJ, Series A/B 64; the PCIJ dealt also with several other cases involving a human rights dimension.
- 2 See generally, Bedi, *The Development of Human Rights Law by the Judges of the International Court of Justice* (Oxford: Hart Publishing, 2007); Goy, *La Cour Internationale de Justice et les Droits de l'Homme* (Brussels: Nemesis Bruylant, 2002); Higgins, 'The International Court of Justice and Human Rights', in Wellens (ed.), *International Law-Theory and Practice: Essays in Honour of Eric Suy* (The Hague: Martinus Nijhoff, 1998) 694; Schwebel, 'Human Rights in the World Court', in Pathak and Dhokalia (eds), *International Law in Transition: Essays in Memory of Judge Nagendra Singh* (New Delhi: Lancers Books/Nijhoff Publishers, 1992) 267; Schwebel, 'The Treatment of Human Rights and Aliens in the International Court of Justice', in Lowe and Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge: Cambridge University Press, 1996) 327; Bedjaoui, 'À Propos de la Place des Droits de la Personne Humaine dans la Jurisprudence de la Cour International de Justice', in Mahoney et al. (eds), *Protecting Human Rights-The European Perspective: Studies in Memory of Rolv Ryssdal* (Köln: Carl Heymans, 2000) 87; and Gros Espiell, 'Les Droits de

human rights treaties generally have their own dispute settlement procedure, the situations in which the Court has dealt with human rights issues have arisen mainly in the context of general international law and non-human rights specific treaties or provisions, which nevertheless have raised such issues. Of course, some human rights treaties such as the Convention on the Prevention and Punishment of the Crime of Genocide 1948 contain provisions specifically referring disputes to the Court.<sup>3</sup> Other human rights treaties, such as the International Convention on the Elimination of All Forms of Racial Discrimination 1965, have a provision permitting referral to the Court after the exhaustion of the pre-condition to resort to the treaty-specific dispute settlement procedure.<sup>4</sup> Thus, the Court has had an abundant opportunity to contribute an important jurisprudence to the international law of human rights in such diverse fields as: genocide, race discrimination, self-determination, immunities of experts, consular access, belligerent occupation, nuclear weapons and, in the *Ahmadou Sadio Diallo* case, diplomatic protection. Nevertheless, the Court is not a 'human rights court'. Even so, as the arguments developed in the *Diallo* case, it is clear that they centred on the rights of Mr Diallo as an individual and that the case became transformed in substance into a human rights protection case instead of one involving the diplomatic protection of a national under the law of state responsibility for the treatment of aliens.

'l'Homme et la Cour International de Justice: Une Vision Latino-Américaine', in Ando, McWhinney, Wolfrum and Roben (eds), *Liber Amicorum Shigeru Oda* (The Hague/London: Kluwer Law International, 2002) 1449.

- 3 See Article IX Convention on the Prevention and Punishment of the Crime of Genocide 1948, 78 UNTS 227, which specifically submits disputes relating to the 'interpretation, application, or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any other acts enumerated in Article III' to the Court at the request of any of the parties to the dispute.
- 4 See Article 22 International Convention on the Elimination of All Forms of Racial Discrimination 1965, 660 UNTS 195, which states: 'Any dispute between two or more States parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.' See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* ICJ, Preliminary Objections, Judgment, 1 April 2011. See also Article 30 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 1465 UNTS 85, which reads: 'Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.' On this provision, see *Case Concerning Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* Case 144, Request for the Indication of Provisional Measures, Order, 28 May 2009. All unreported decisions of the ICJ are available at: <http://www.icj-cij.org/docket/index.php?p1=3&p2=5> [last accessed 7 July 2011].

## 2. The Factual Matrix

Mr Ahmadou Sadio Diallo, a Guinean citizen, settled in the Democratic Republic of the Congo (DRC) in 1964. In 1974, Mr Diallo founded an import–export company, Africom-Zaire, a *société privée à responsabilité limitée* (SPRL)<sup>5</sup> incorporated under Zairean law and entered in the Trade Register of the city of Kinshasa. In 1979, Mr Diallo as *gérant* (manager) of Africom-Zaire, was involved in the founding of another Zairean SPRL, Africontainers-Zaire, specialising in the containerised transportation of goods. This company was also entered in the Trade Register of the city of Kinshasa. Similarly, Mr Diallo became its *gérant*.

At the end of the 1980s, Africom-Zaire and Africontainers-Zaire, acting through Mr Diallo as their *gérant*, instituted legal proceedings against their business partners in an attempt to recover various debts. The various disputes between the parties continued throughout the 1990s and for the main part remained unresolved at the time of delivery of the Court's judgment.

On 25 January 1988, Mr Diallo was arrested and imprisoned in connection with a criminal investigation into fraud. On 28 January 1989, the Public Prosecutor in Kinshasa ordered Mr Diallo's release after the case had been closed for 'inexpediency of prosecution'.

On 31 October 1995, the Zairean Prime Minister issued an expulsion decree against Mr Diallo. On 5 November 1995, Mr Diallo was arrested and detained in order to implement his expulsion. After having been released and re-arrested, he was expelled finally from the DRC on 31 January 1996.<sup>6</sup>

On 28 December 1998, the Government of the Republic of Guinea ('Guinea') filed an Application in the Registry of the Court instituting proceedings against the DRC (named Zaire between 1971 and 1997) in respect of a dispute concerning 'serious violations of international law' alleged to have been committed 'upon the person of a Guinean national'. In its Judgment on Preliminary Objections of 24 May 2007, the Court declared the Application of Guinea to be admissible 'in so far as it concerns protection of Mr Diallo's rights as an individual' and 'in so far as it concerns protection of [his] direct rights as *associé* in Africom-Zaire and Africontainers-Zaire'.<sup>7</sup>

This article will examine and analyse the issues arising out of Mr Diallo's rights as an individual in respect of his detention in 1995–96. The legal

5 Private Limited Liability Company.

6 *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)* Case 103, Judgment, 30 November 2010, at paras 15–9.

7 *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* Preliminary Objections, Judgment, ICJ Reports 2007 II; on the other hand, the Court declared the Application of Guinea to be inadmissible 'in so far as it concerns protection of Mr Diallo in respect of alleged violations of rights of Africom-Zaire and Africontainers-Zaire'.

contours of the relevant provisions under the International Covenant on Civil and Political Rights 1966 (ICCPR),<sup>8</sup> the African Charter on Human and Peoples' Rights 1981 ('African Charter')<sup>9</sup> and the Vienna Convention on Consular Relations 1963 ('Vienna Convention')<sup>10</sup> will be examined. The nature of the relationship between the Court and the Human Rights Committee (through its 'General Comments' and 'views') will be observed and the danger of 'fragmentation' will be raised. Various aspects of Judge Cançado Trindade's remarkable Separate Opinion will be explored. A few brief remarks on 'Reparations' will be followed by some 'Concluding Comments'.

However, it should be observed that this article will not address the Court's reasoning or decision in respect of the protection of Mr Diallo's direct rights as *associé* in *Africom-Zaire* and *Africontainers-Zaire*.

### 3. The Protection of Mr Diallo's Rights as an Individual

In its final arguments, Guinea maintained that Mr Diallo was: (i) the victim of arrest and detention measures by the DRC authorities in 1988–89 in violation of international law; and (ii) the victim of arrest, detention and expulsion measures in 1995–96 also in violation of international law. Accordingly, Guinea asserted that it was entitled to exercise diplomatic protection of its national Mr Diallo in this regard.<sup>11</sup>

In reply, the DRC asserted that the claim relating to events in 1988–89 was presented belatedly and therefore must be rejected as inadmissible. Alternatively, the DRC asserted that: (i) the claim must be rejected because of the failure to exhaust domestic remedies; or (ii) otherwise be rejected on the merits. Furthermore, the DRC denied that its treatment of Mr Diallo in 1995–96 breached its obligations under international law.<sup>12</sup>

The Court found that the claim concerning the arrest and detention of Mr Diallo in 1988–89 was inadmissible as being too late. There was thus no need for the Court to consider whether the DRC could at this stage raise the objection of failure to exhaust local remedies, and if so, if that objection could be maintained.<sup>13</sup>

8 999 UNTS 171.

9 1520 UNTS 217.

10 596 UNTS 261.

11 *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)*, supra n 6 at para 21.

12 *Ibid.* at para 22.

13 *Ibid.* at paras 47–8.

#### 4. The Claim Concerning the Arrest, Detention and Expulsion Measures in 1995–96

Some of the facts relating to the arrest, detention and expulsion measures taken against Mr Diallo between October 1995 and January 1996 were agreed between the Parties. Others were in dispute. After a detailed examination of the facts, the evidence before it and the application of its jurisprudence on burden of proof, the Court found that Mr Diallo remained in continuous detention from 5 November 1995 to 10 January 1996, a period of 66 days. The Court concluded also that Mr Diallo was in detention between 25 January and 31 January (the date of his expulsion from the DRC), a further period of 6 days (making a total of 72 days).<sup>14</sup> The Court's analysis of the legal position proceeded on this footing. Its analysis focused upon the question whether the treatment of Mr Diallo was consistent with the DRC's relevant treaty obligations.

##### A. *The Alleged Violation of Article 13 of the International Covenant on Civil and Political Rights and Article 12, Paragraph 4 of the African Charter on Human and Peoples' Rights*

Guinea and the DRC became parties to the ICCPR on 24 April 1978 and 1 February 1977, respectively.<sup>15</sup> The African Charter entered into force for Guinea on 21 October 1986 and for the DRC on 28 October 1987.<sup>16</sup>

<sup>14</sup> Ibid. at paras 49–60.

<sup>15</sup> The leading monographs on the work of the Human Rights Committee are by Bair, *The International Covenant on Civil and Political Rights and its First (Optional) Protocol: A Short Commentary Based on Views, General Comments and Concluding Observations by the Human Rights Committee* (Frankfurt am Main: Peter Lang, 2005); Ghandhi, *The Human Rights Committee and the Right of Individual Communication: Law and Practice* (Aldershot: Ashgate, 1998); McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford: Clarendon Press, 1994); Tyagi, *The UN Human Rights Committee: Practice and Procedure* (Cambridge: Cambridge University Press, 2010); and Young, *The Law and Process of the Human Rights Committee* (Ardsley, NY: Transnational Publishers, 2004). See also Ando (ed.), *Towards Implementing Universal Human Rights: Festschrift for the Twenty-Fifth Anniversary of the Human Rights Committee* (Leiden/Boston: Nijhoff, 2004) There have been numerous other studies of the ICCPR and the Human Rights Committee by way of reference works, book chapters, articles, reports, cases and materials, etc.

<sup>16</sup> See generally, Evans and Murray (eds), *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2006* (Cambridge: Cambridge University Press, 2008); Murray, *Human Rights in Africa: From the OAU to the African Union* (Cambridge: Cambridge University Press, 2004); Murray, *The African Commission on Human and Peoples' Rights and International Law* (Oxford: Hart Publishing, 2000) and numerous other book chapters and journal articles by Rachel Murray, the leading scholar in the field. See also, Heyns and van der Linde (eds), *Human Rights in Africa* (The Netherlands: Martinus Nijhoff, 2004); Ouguerouz, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (The Hague/London: Kluwer Law International, 2003); and Viljoen, *International Human Rights in Africa* (Oxford: Oxford University Press, 2007).

Before considering whether the Court found that the ICCPR had been infringed, it may be noted that Guinea initiated inter-state proceedings before the Court and not the Human Rights Committee that applies the ICCPR. Neither State Party had accepted the inter-State procedure detailed in Articles 41 to 42 of the ICCPR.<sup>17</sup> The supervisory role of the Human Rights Committee under this procedure can only be activated if both States Parties concerned have declared that they recognise its competence to receive and consider such communications from States Parties. The operative principle is one of reciprocity. The procedure is complex, cumbersome and extended; it is based entirely on the goodwill of States and may be terminated by either party to the dispute before an *ad hoc* Conciliation Commission has been appointed. Even if both States Parties agree to accept the competence of such a Commission, the State alleged to be in breach of its ICCPR obligations is entirely free to accept or reject the contents of the report delivered by the Commission. The Human Rights Committee has appealed repeatedly to States in recent years to make the declaration under Article 41(1) of the ICCPR and to use the mechanism in order to make implementation of the ICCPR more effective. Indeed, in General Comment No 31 on ‘The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’, the Human Rights Committee states expressly that ‘[it] reminds States Parties of the desirability of making the declaration contemplated in Article 41. It further reminds those States Parties already having made the declaration of the potential value of availing themselves of the formal procedure under that article.’<sup>18</sup> Despite the fact that it is a substantial step forward to give one State *locus standi* to complain about the treatment by another State of its own nationals, the inter-State procedure has never yet been invoked. This is hardly surprising given the lack of any meaningful determination of the issue under this procedure, rendering it impotent and toothless in the absence of some fundamental amendments. Accordingly, it is entirely understandable that neither party to this dispute would have wished to refer it to the Human Rights Committee, even if they had accepted the inter-State dispute procedure. It is very doubtful if the Human Rights Committee’s remarkable enthusiasm for highlighting this arcane procedure is likely to bear any fruit in the foreseeable future.

As to whether Mr Diallo’s expulsion infringed the DRC’s human rights treaty obligations, Article 13 of the ICCPR reads as follows:

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in

17 See generally, Leckie, ‘The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?’ (1988) 10 *Human Rights Quarterly* 249; and O’Flaherty, ‘The Reporting Obligation under Article 40 of the ICCPR: Lessons to be Learned from Consideration by the Human Rights Committee of Ireland’s First Report’ (1994) 16 *Human Rights Quarterly* 515.

18 Human Rights Committee, 26 May 2004, CCPR/C/21/Rev.1/Add. 13; 11 IHRR 905 (2004).

accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Similarly, Article 12(4) of the African Charter provides:

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.

The Court declared that these provisions ensured that the expulsion of an alien lawfully in the territory of a State which was a party to both instruments could only be compatible with the international obligations of that State if it was decided in accordance with 'the law' (that is the relevant domestic law), so that compliance with international obligations is to some extent dependent on domestic law. However, there were two additional requirements: first, the applicable domestic law must in itself be compatible with the requirements of both the ICCPR and the African Charter; secondly, 'an expulsion must not be arbitrary in nature, since protection against arbitrary treatment lies at the heart of the rights guaranteed by the international norms protecting human rights, in particular those set out in the two treaties applicable in this case'.<sup>19</sup> This second proposition is rather controversial and will be discussed fully when considering the Joint Declaration of Judges Keith and Greenwood. However, the Court considered that this interpretation was fully corroborated by the jurisprudence of the Human Rights Committee, and in particular its 'views' in *Maroufidou v Sweden*<sup>20</sup> and General Comment No 15 on 'The position of aliens under the Covenant'.<sup>21</sup> What is surprising is that no analysis is made of either the *Maroufidou* case or assessment of the parameters of General Comment No 15.

Furthermore, the treatment of the probative value of the Human Rights Committee's 'views' under Article 5(4) of the First Optional Protocol and the nature and value of General Comments under Article 40(4) of the ICCPR is simply not addressed by the Court. The Court contents itself by stating:

Since it was created, the Human Rights Committee has built up a considerable body of interpretative case law, in particular through its findings in response to the individual communications which may be submitted

19 *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)*, supra n 6 at para 65.

20 (58/79), Merits, CCPR/C/12/D/58/1979 (1981).

21 11 April 1986; 1-2 IHRR 16 (1994). See *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)*, supra n 6 at para 66.

to it in respect of States parties to the first Optional Protocol, and in the form of its ‘General Comments’.<sup>22</sup>

It may be helpful at this point to recall what ‘General Comments’ are and what authority they possess. The practice of preparing ‘General Comments’ on selected articles of the ICCPR or issues arising there under was initiated by the Human Rights Committee in 1981, after it had acquired some considerable experience in examining the reports of State Parties. Such ‘General Comments’ have a variety of functions: (i) to make the Human Rights Committee’s experience available for the benefit of all States Parties in order to promote more effective implementation of the ICCPR; (ii) to draw to the attention of States Parties the inadequacies disclosed by many of their reports; (iii) to elucidate upon the scope and meaning of the requirements of both substantive rights and procedural provisions; (iv) to clarify the obligations of States Parties; and (v) to stimulate the activities of States Parties, international organisations and NGOs to contribute to the promotion and protection of ICCPR rights. ‘General Comments’ are also designed to be of particular interest to States considering becoming parties to the ICCPR in demonstrating the extent of the commitments such States would be adopting. The majority of ‘General Comments’ have focussed on the interpretation of the substantive rights; some have focussed on overarching themes, such as ‘Non-Discrimination’, the ‘Position of Aliens under the Covenant’, and ‘Equality of Rights between Men and Women’; others have dealt with technical matters such as derogations, reservations, denunciations, continuity of obligations, reporting obligations and other procedural matters, such as the ‘The nature of the general legal obligation imposed on States Parties’ and ‘Obligations of States Parties under the Optional Protocol’. What is plainly obvious is that these ‘General Comments’ have moved from a basic and fairly primitive determination of the contours of the rights to a very sophisticated and detailed elaboration, in which the international human rights community can play an active role in its evolution. To date, some 33 ‘General Comments’ have been delivered and the draft of General Comment No 34 prepared by Professor O’Flaherty on ‘Article 19 after the First Reading by the Human Rights Committee’<sup>23</sup> has been adopted in 2010. Some, such as General Comment No 24 titled ‘On issues relating to reservations under art. 41’<sup>24</sup> and General Comment No 31 (mentioned above) in respect of its emphasis on the ‘extra-territorial’ application of the ICCPR, have attracted significant criticism from some States Parties. ‘General Comments’ have become a highly evolved and free-standing method of interpreting and analysing ICCPR provisions and represent the ‘always speaking’ nature of ICCPR obligations. Such ‘General

22 *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)*, *ibid.*

23 3 May 2011, CCPR/C/GC/34/CPR.6.

24 4 November 1994, CCPR/C/21/Rev.1/Add.6; 2 IHRR 10 (1995).



Comments' represent a conceptual understanding and jurisprudential commitment.<sup>25</sup> 'General Comments' are not in themselves strictly speaking binding. However, they constitute an authoritative guidance and interpretation of a legally binding treaty that requires the most serious consideration by States Parties.

Similarly, the precise nature of the 'views' of the Human Rights Committee under Article 5(4) of the First Optional Protocol, in which it gives its opinion as to whether an individual communication under the Protocol reveals a violation of the ICCPR, needs to be considered in order to fully appreciate the Court's discussion of its relationship with the Human Rights Committee. Much has been written about the precise nature of 'views'. The Committee has itself stated in the past when comparing its powers to those of the organs created by the European Convention on Human Rights that '[i]ts decisions on the merits (of a communication), are, in principle, comparable to the reports of the European Commission [of Human Rights], non-binding recommendations. . . . The two systems differ, however, . . . in that the Committee has no power to hand down binding decisions as does the European Court of Human Rights.'<sup>26</sup> In General Comment No 33, the Committee expanded upon the precise nature of its 'views':

While the function of the Human Rights Committee in considering individual communications is not, as such, that of a judicial body, the views issued by the Committee under the Optional Protocol exhibit some important characteristics of a judicial decision. They are arrived at in a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions. . . .

The views of the Committee under the Optional Protocol represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument. These views derive their character, and the importance which attaches to them, from the integral role of the Committee under both the Covenant and the Optional Protocol.<sup>27</sup>

However, as the constant jurisprudence of the Human Rights Committee illustrates, the views of the Committee are 'indirectly' binding through the medium of Article 2(3)(a) encapsulating the right to an effective remedy.<sup>28</sup> Furthermore, the Committee argues that the character of its 'views' must be

25 See generally, Opsahl, 'The General Comments of the Human Rights Committee', in Jekewitz et al (eds), *Des Menschen Recht zwischen Freiheit und Verantwortung, Festschrift für Karl Josef Partsch zum 75. Geburtstag* (Berlin: Dunker & Humblot, 1989) 273.

26 *Selected Decisions of the Human Rights Committee under the Optional Protocol, Vol II*, (1985) CCPR/C/OP/1, at 1–2.

27 5 November 2008, CCPR/C/GC/33; 17 IHRR 605 (2010) at paras 11 and 13.

28 *Ibid.* at para 14.

seen through the lens of the obligation of the States parties to act in good faith and a duty to co-operate with the Committee in the observance of all treaty obligations.<sup>29</sup>

Despite the extraordinary lengths to which the Committee has gone in asserting the indirectly binding character of its ‘views’, the absence of an explicit provision in the Optional Protocol to that effect remains a serious weakness in the implementation system established by it. This defect can be remedied only by an amendment to the Optional Protocol explicitly making the Committee’s ‘views’ binding directly and without jurisprudential contortion. Such a development is not reasonably foreseeable in the near (or even distant) future given the convoluted provisions of Article 11 of the Optional Protocol for introducing amendments.

The Court then pronounced:

Although [it] is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States parties obliged to comply with treaty obligations are entitled.<sup>30</sup>

Of course, the Court was right to draw specific attention to the dangers of ‘fragmentation’ if its jurisprudence diverged significantly from that of the Human Rights Committee. With the massive proliferation of regional and United Nations (or international) institutions, the issue of ‘fragmentation’ has engaged the attention of the international community of legal scholars for a significant period of time.

The joint article by Martti Koskenniemi and Päivi Leino in the *Leiden Journal of International Law* seems to have inspired the modern spate of evaluations of the reality and significance of ‘fragmentation’.<sup>31</sup> Equally important has been the Report of the Study Group of the International Law Commission finalised by Professor Martti Koskenniemi on ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’<sup>32</sup> and the Conclusions of the Work of the Study Group.<sup>33</sup>

29 Ibid. at para 15.

30 *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)*, supra n 6 at para 66.

31 Koskenniemi and Leino, ‘Fragmentation of International Law? Postmodern Anxieties’ (2002) 15 *Leiden Journal of International Law* 553.

32 13 April 2006, A/CN.4/L.682.

33 18 July 2006, A/CN.4/L.702, adopted by the ILC at its 58th Session in 2006 and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/61/10 at para 251).

This is not the place to indulge in any further contribution to this complex and already overpopulated debate.<sup>34</sup> However, the author finds the pragmatic approach suggested by Dame Rosalyn Higgins (then the President of the ICJ) at the Spring meeting of the ILA in March 2006 to be in the finest traditions of the Common Law and preferable to what Dame Rosalyn calls 'the gene therapy approach to fragmentation'.<sup>35</sup> Indeed, this is the approach that Judge Cançado Trindade would endorse, where he states:

Contemporary international tribunals have much to learn from each other. . . . Misleading and deleterious expressions, such as 'proliferation of international tribunals', 'forum shopping', and 'fragmentation of international law', should be definitively discarded, not only for their superficiality (despite the regrettable fascination which they seem to have been exerting upon a large and hectic segment of the legal profession), but also because they do not belong to the lexicon of international law. And they simply miss the point, - the overriding imperatives of justice. Contemporary international tribunals should pursue their common mission - the realization of international justice - working together, without antagonisms, self-sufficiencies or protagonist moves . . . in a spirit of respectful dialogue, learning from each other . . . . By cultivating this dialogue, attentive to each other's work in pursuance of a common mission, contemporary international tribunals will provide avenues not only for

- 34 Some of the most interesting contributions among many include: Guillaume, 'The Future of International Judicial Institutions' (1995) 44 *International & Comparative Law Quarterly* 848; Abi-Saab, 'Fragmentation or Unification: Some Concluding Remarks' (1999) *New York University Journal of International Law & Politics* 919; Guillaume, 'Advantages and Risks of Proliferation: A Blueprint for Action' (2004) *Journal of International Criminal Justice* 300; Rao, 'Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or its Fragmentation?' (2004) 25 *Michigan Journal of International Law* 929; Burke-White, 'International Legal Pluralism' (2004) 25 *Michigan Journal of International Law* 963; Nicolaidis and Tong, 'Diversity or Cacophony? The Continuing Debate About the New Sources of International Law' (2004) 25 *Michigan Journal of International Law* 1349; Fischer-Lescano and Teubner, 'Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999; Prost and Clark, 'Unity, Diversity and the Fragmentation of International Law: How Much Does the Multiplication of International Organizations Really Matter?' (2006) 5 *Chinese Journal of International Law* 341; Leathley, 'An Institutional Hierarchy to Combat the Fragmentation of International Law' (2007) 40 *New York University Journal of International Law & Politics* 259; Benvenisti and Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law' (2007) 60 *Stanford Law Review* 595; Berman, 'Global Legal Pluralism' (2007) 80 *Southern California Law Review* 1155; and Singh, 'The Potential of International Law: Fragmentation and Ethics' (2011) 24 *Leiden Journal of International Law* 23.
- 35 Higgins, 'A Babel of Judicial Voices? Ruminations from the Bench' (2006) 55 *International & Comparative Law Quarterly* 791 at 804. ('We must read each other's judgments. We must have respect for each other's judicial work. We must try to preserve unity among us unless the context really prevents this.')

States but also for human beings everywhere, and in respect of distinct domains of international law, to recover their faith in human justice.<sup>36</sup>

The Court then proceeded to make the same comments about the need to take account of the interpretation of independent monitoring bodies of regional human rights treaties, such as the African Commission on Human and Peoples' Rights in respect of the African Charter. The Court claimed that its interpretation of Article 12(4) of the African Charter was fully consonant with the interpretation given by the African Commission in *Kenneth Good v Republic of Botswana*<sup>37</sup> and *World Organization against Torture and International Association of Democratic Lawyers, International Commission of Jurists, Interafrican Union for Human Rights v Rwanda*.<sup>38</sup>

The Court contented itself with this simple statement of consonance without even a peremptory analysis of these decisions. Similarly, the Court prayed in aid the consistent jurisprudence of both the European Court of Human Rights in respect of the analogous provision in Article 1 of Protocol 7 to the European Convention on Human Rights and the Inter-American Court of Human Rights in respect of the analogous provision in Article 22(6) of the American Convention on Human Rights, without referring to any case law.<sup>39</sup>

Having established the law, the Court proceeded to apply it to the facts. Guinea alleged that the decision to expel Mr Diallo breached Article 13 of the ICCPR and Article 12(4) of the African Charter because the decision was not taken in accordance with Congolese domestic law for three reasons: (i) it should have been signed by the President of the Republic and not by the Prime Minister; (ii) it should have been preceded by consultation of the National Immigration Board; and (iii) it should have indicated the grounds for the expulsion, which it failed to do.<sup>40</sup>

The Court rejected the first of these arguments after an exhaustive examination of the relevant domestic legislation (Zairean Legislative Order of 12 September 1983 and the Constitutional Act of 9 April 1994) and an application of the principle that it is in the first instance for the State to interpret its own domestic law; the Court will not interfere by substituting its own interpretation unless the interpretation advanced by the State is manifestly incorrect, particularly if its purpose is to gain an advantage in the litigation. Thus, the Court was able to find that just because the expulsion decree was signed by

36 *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)*, supra n 6, Separate Opinion of Judge Cançado Trindade at paras 238, 240, 244 and 245.

37 313/05, 28th Activity Report of the ACHPR (2010); 18 IHRR 820 (2011) at para 204.

38 27/89, 46/91, 49/91, 99/93, 20th Ordinary Session of the ACHPR (1996); 6 IHRR 816 (1999).

39 *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)*, supra n 6 at para 68.

40 Ibid. at para 69.

the Prime Minister (and not the President) did not mean that it was not issued 'in accordance with law'.<sup>41</sup>

The second argument was accepted quickly by the Court. The National Immigration Board, whose opinion is required by Article 16 of the Legislative Order before any expulsion measure is taken against an alien holding a residence permit, was not consulted. The DRC did not contest that consultation was necessary in this case and did not take place.<sup>42</sup>

The final argument was also accepted by the Court. The expulsion decree should have been 'reasoned' in accordance with Article 15 of the Legislative Order, in the sense that it should have indicated the grounds of the decision, and it was not. The general, stereotyped reasoning included in the expulsion decree, which simply repeated the text of Article 15, and added a clause so vague that it was impossible to comprehend on the basis of which activities the presence of Mr Diallo was deemed to be a threat to public order, could not be regarded as meeting the requirements of the legislation (the clause that the 'presence and conduct [of Mr Diallo] have breached Zairean public order, especially in the economic, financial and monetary areas, and continue to do so').<sup>43</sup>

Thus, procedural guarantees conferred on aliens by Congolese law and designed to protect such persons against arbitrary treatment were breached in at least two important respects, so that the expulsion of Mr Diallo was not 'in accordance with law'. Consequently, regardless of whether the expulsion was justified on the merits (an issue which the Court returned to later in its Judgment), the expulsion measure violated both Article 13 of the ICCPR and Article 12(4) of the African Charter.<sup>44</sup>

The Court considered also that the provision of Article 13 of the ICCPR, which gives an alien subject to an expulsion measure the right to 'submit [his] reasons against his expulsion and to have his case reviewed by... the competent authority', was breached. Neither before the expulsion decree was signed on 31 October 1995, nor subsequently before the decree was implemented on 31 January 1996, was Mr Diallo allowed to present his defence to the competent authority and to have his arguments considered. Neither did the exemption clause in Article 13 (which stipulates an exception where 'compelling reasons of national security' otherwise require) provide the DRC with any defence, because it had not demonstrated any 'compelling reasons' that the ICCPR required existed or could reasonably be concluded to have existed.

41 Ibid. at paras 70 and 71, citing the Permanent Court's decisions in the *Serbian Loans Case* Judgment No 14, 1929, PCIJ, Series A 20, 46 and the *Brazilian Loans Case* Judgment No 15, 1929, PCIJ, Series A 21, 124.

42 *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)*, supra n 6 at para 72.

43 Ibid.

44 Ibid. at para 73.

**B. *The Alleged Violation of Article 9, Paragraphs 1 and 2, of the International Covenant on Civil and Political Rights and Article 6 of the African Charter of Human and Peoples' Rights***

Article 9(1) and (2) of the ICCPR reads as follows:

- (1) Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.
- (2) Anyone who is arrested shall be informed, at the time of his arrest, of the reasons for his arrest and shall be promptly informed of the charges against him.

Article 6 of the African Charter provides:

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.

Guinea alleged that these provisions were violated in three respects when Mr Diallo was arrested and detained in 1995–96 for the purpose of implementing the expulsion decree: (i) the deprivations of liberty suffered by Mr Diallo did not take place ‘in accordance with such procedures as are established by law’ within the meaning of Article 9(1) of the ICCPR or on the basis of ‘conditions previously laid down by law’ within the meaning of Article 6 of the African Charter; (ii) the deprivations of liberty were ‘arbitrary’ within the meaning of both of these provisions; and (iii) Mr Diallo was not informed at the time of his arrests of: (a) the reasons for those arrests; and (b) the charges against him, which violated his rights under Article 9 (2) of the ICCPR.<sup>45</sup>

The Court’s analysis began with a general remark. The Court pointed out that in principle the provisions of Article 9(1) and (2) of the ICCPR and those of Article 6 of the African Charter apply to any form of arrest or detention effected by a public authority, whatever its legal basis or the objective being pursued. The Court cited in support the Human Rights Committee’s General Comment No 8: ‘The Right to Liberty and Security of Persons’.<sup>46</sup> The Court observed that the scope of these provisions is not confined to criminal proceedings, but apply also to any measures that deprive individuals of their liberty that are taken in the context of any administrative procedure, such as those undertaken necessarily to remove an alien from the national territory. The Court commented that it mattered not whether such action by a State was

<sup>45</sup> Ibid. at para 76.

<sup>46</sup> 30 June 1982, 16th Session of the Human Rights Committee; 1-2 IHRR 7 (1994).

characterised by it as an 'expulsion' or a '*refoulement*'. The Court mentioned that the requirement in Article 9(2) of the ICCPR that the arrested person be 'informed of any charges' against him, was obviously only relevant in the context of criminal proceedings.<sup>47</sup> All these statements by the Court are unremarkable and give no cause for concern.

The Court then examined Guinea's substantive complaint that the DRC's arrest and detention were not in accordance with DRC municipal law. The Court remarked that both Mr Diallo's arrest on 5 November 1995 and detention until 10 January 1996 and his further arrest on 25 January 1996 (at the latest) were for the purpose of implementing the expulsion decree.<sup>48</sup> Article 15 of the Legislative Order of 12 September 1983 concerning immigration control (as in force at the time of Mr Diallo's arrest and detention) provided that an alien 'who is likely to evade implementation' of any expulsion measure may be imprisoned for an initial period of 48 hours, which may be 'extended by 48 hours at a time, but shall not exceed eight days'. Mr Diallo's arrest and detention were not in accordance with these provisions of the DRC's own domestic law. There was no evidence that the DRC authorities made any effort to determine whether Mr Diallo was 'likely to evade implementation' and thus that it was necessary to detain him; the fact that Mr Diallo made no attempt to evade expulsion after his release on 10 January 1996 suggested there was no such pressing need. It is hardly surprising that Mr Diallo had no intention of departing the jurisdiction, given the extent of his then existing assets there. Furthermore, his detention period of an overall 72 days (at least) greatly exceeded the permitted maximum allowed by the Legislative Order. In addition, the DRC produced no evidence to show that Mr Diallo's detention was reviewed every 48 hours, as required by that Order. Accordingly, in this regard, violations of Article 9(1) of the ICCPR and Article 6 of the African Charter were established.<sup>49</sup>

The Court then moved to determine whether Mr Diallo's arrest and detention were 'arbitrary' within the meaning within the meaning of Article 9(1) of the ICCPR and Article 6 of the African Charter. The Court conceded that, in principle, an arrest or detention aimed at implementing an expulsion order taken by the competent authority could not be characterised as being 'arbitrary', within the meaning of the relevant provisions, simply because the lawfulness of the expulsion order might be questionable. Accordingly, the mere fact that the expulsion decree of 31 October 1995 in some respects did not meet the requirements of Article 13 of the ICCPR and Article 12(4) of the

47 *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)*, supra n 6 at para 77.

48 *Ibid.* at para 78; the mention of '*refoulement*' in the notice served on Mr Diallo on 31 January 1996, the day of his expulsion, was described by the Court as 'clearly erroneous', which the DRC acknowledged.

49 *Ibid.* at para 79.

African Charter was not definitive in attributing to it an ‘arbitrary’ character within the meaning of Article 9(1) of the ICCPR and Article 6 of the African Charter.<sup>50</sup>

Nevertheless, the Court declared that in this regard account should be taken of the number and gravity of the infractions of procedural safeguards which tainted Mr Diallo’s detentions: he was held for a particularly long period of time (72 days in total as against a permitted 8 days) and the DRC authorities made no effort to determine whether his detention was necessary. Moreover, the Court found that not only was the expulsion decree not reasoned in a sufficiently precise way, but also that the DRC was unable to provide any grounds which might provide a convincing basis for Mr Diallo’s expulsion: allegations of ‘corruption’ and other offences were made against Mr Diallo, but no concrete evidence was submitted to the Court in support, and no proceedings were instituted before local courts in respect of these accusations (and *a fortiori* there had been no conviction of Mr Diallo). Furthermore, it was difficult not to discern a link between Mr Diallo’s expulsion and the fact that he had attempted to recover debts which he believed were owed to his companies by, amongst others, the Zairean State or companies in which the State held a substantial portion of the capital, and commenced proceedings in civil courts for that purpose. Accordingly, ‘[u]nder these circumstances, the arrest and detention aimed at allowing such an expulsion measure, one without any defensible basis, to be effected can only be characterised as arbitrary within the meaning of Article 9(1) of the ICCPR and Article 6 of the African Charter.’<sup>51</sup>

The Joint Declaration of Judges Keith and Greenwood attacked the interpretation by the Court that the expulsion provisions of Article 13 of the ICCPR and Article 12(4) of the African Charter prohibit expulsions which are ‘arbitrary in nature’, allowing review by the Court of whether the ‘expulsion was justified on the merits’. The Declaration considers whether those provisions impose a general *substantive* non-arbitrariness limit on the power of expulsion, over and above the procedural guarantees they contain.<sup>52</sup>

The Declaration made several preliminary observations: (i) that both Article 13 of the ICCPR and Article 12(4) of the African Charter require compliance with national law—a non-national can only be expelled after a decision reached in accordance with that law; (ii) both instruments require a decision to be taken in relation to the *particular* non-national; (iii) thus, mass expulsions are prohibited as Article 12(5) of the African Charter made explicit and as the Human Rights Committee had stated in its General Comment No 15: ‘Position of Aliens under the Covenant’, paragraph 10; (iv) national law will normally determine who is to make the expulsion decision, the procedure to be followed

50 Ibid. at para 81.

51 Ibid. at para 82.

52 Ibid., Joint Declaration of Judges Keith and Greenwood at para 2.



by the decision maker and may also provide for challenges to the expulsion order; and (v) Article 13 of the ICCPR expressly provides two procedural protections: the right of the individual (i) to submit reasons against expulsion; and (ii) to have his case reviewed by, and be represented before, the competent authority or someone designated by it. The Declaration remarks that these safeguards should help ensure both the quality of the decision and protect the non-national against arbitrary expulsion.<sup>53</sup>

The Declaration highlights two substantive limitations on mass expulsions arising from other provisions of the two instruments: the guarantee of equality before the law and the prohibition on discrimination stipulated by Articles 2(1) and 26 of the ICCPR (and also General Comment No 15, paragraphs 9 and 10) and Articles 2 and 3 of the African Charter. Thus, the Declaration asserts that '[t]o state the obvious, the expulsion articles do not expressly prohibit arbitrary expulsions.'<sup>54</sup> The Declaration stresses that the absence of an express arbitrariness limit is very marked in comparison with other provisions of both instruments which do impose such limits (for example, Articles 12(3) and 12(4) of the ICCPR and Article 12(2) of the African Charter in the context of freedom of movement and residence, and a similar limitation in wider contexts, such as Articles 6 of the ICCPR and 4 of the African Charter—right to life, Articles 9 of the ICCPR and 6 of the African Charter—arrest and detention, Article 17 of the ICCPR—right to privacy).<sup>55</sup>

Thus, the Declaration pronounces that the ordinary terms of Articles 13 of the ICCPR and 12(4) of the African Charter, read in context, do not appear to permit the implication of a prohibition on arbitrary expulsion. The Declaration asks whether such a limitation may be deduced from the object and purpose and suggests that the insistence of compliance with national law and the specific procedural requirements of Article 13 of the ICCPR have as purposes the better making of informed decisions and affording to an individual the opportunity to present his case against expulsion. A safeguard against arbitrary decisions is provided in this manner.<sup>56</sup>

The Declaration determines that the emphasis on fair procedure as the primary (even sole) means of preventing arbitrary expulsions is endorsed by the drafting history of Article 13, which is referred to in the Declaration.<sup>57</sup> Furthermore, the Declaration accepts that the position adopted by the Human Rights Committee in General Comment No 15 is that it is primarily through

53 Ibid. at para 4.

54 Ibid. at para 5.

55 Ibid. at para 6.

56 Ibid. at para 7.

57 Ibid. at para 8; the Declaration cites the Annotations on the Draft Covenants on Human Rights prepared by the UN Secretariat reproduced in Bossuyt, *Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights* (Dordrecht/Boston/Lancaster: Martinus Nijhoff Publishers, 1987) at 267–9.

procedural protections that arbitrary expulsions are to be protected.<sup>58</sup> In addition, the Declaration rightly remarks that, although the Court cites the ‘views’ (incorrectly referred to as ‘Judgment’ in the Declaration) of the Human Rights Committee in *Maroufidou v Sweden* of 8 April 1981, this decision only deals with the question of compliance with national law and the extent to which that Committee can review decisions of national authorities which have applied their national law; the Committee makes no statement in relation to any distinct ‘arbitrariness limit’ imposed by international law.<sup>59</sup> Neither did the two cases decided by the African Commission and cited by the Court (the *World Organisation against Torture* case and the *Kenneth Good* case) provide any credence to any alternative interpretation, as these cases concerned mass expulsions and compliance with the immigration law of Botswana, respectively.<sup>60</sup> Nor did any decisions of the European or Inter-American Human Rights Courts studied by Judges Keith and Greenwood (the Court did not cite any particular decisions) suggest otherwise as they all concerned failure to observe procedural guarantees or involved collective expulsions.<sup>61</sup> In sum, by requiring that national law regulating expulsion be enacted and complied with and, in the case of the ICCPR, that certain procedural rights be protected, both the African Charter and the ICCPR provided important protections against arbitrary expulsions through the medium of procedural guarantees.

The Declaration then remarks that the egregious violations by the DRC authorities in making the arrests and detentions provided ample grounds for holding those actions to be arbitrary under the arrest and detention provisions of the ICCPR, without reference to the purpose of the expulsion. Thus, there was no need for the Court to consider the merits of the expulsion and its substantive arbitrariness, even if that action was open to it.<sup>62</sup>

Finally, the Declaration considers the factual matrix and states that Judges Keith and Greenwood were unpersuaded that the limited evidence before the Court provided a sufficient justification for the Court’s statement that the expulsion order had no defensible basis because of a possible link between the expulsion and Mr Diallo’s attempts to recover debts which he believed were

58 Ibid. at para 10, citing paragraph 10 of the General Comment: ‘Article 13 directly regulates only the procedure and not the substantive grounds for expulsion.’

59 Ibid. at para 11, citing paras 9.3, 10.1 and 10.2 of the Committee’s decision (R.13/58, 9 April 1981, CCPR/C/12/D/58/1979).

60 Ibid. at para 13, citing Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, 2nd revised edn (Kehl/Strasbourg/Arlington Va: N.P. Engel Publisher, 2005) at 290–1; and Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 2nd edn (Oxford: Oxford University Press, 2005) at 377–8.

61 Ibid. at para 14, citing White and Ovey, *Jacobs, White & Ovey: The European Convention on Human Rights*, 5th edn (Oxford: Oxford University Press, 2010) at 544–5; and Harris et al., *Harris, O’Boyle & Warbrick: Law of the European Convention on Human Rights*, 2nd edn (London: Oxford University Press, 2009) at 747–8, confirming that the expulsion provisions of the European Convention confer only procedural and not substantive protection.

62 Ibid. at paras 15–17.

owed to his companies. And, it was that feature of the expulsion order that had lead the Court to the conclusion that the arrests and detention aimed at allowing the expulsion to be effected could only be characterised as arbitrary in paragraph 82 of the Judgment.<sup>63</sup> Clearly, Judges Keith and Greenwood thought that this conclusion was excessively speculative and conjectural and thus were very reluctant to hold that the decision to expel Mr Diallo had no defensible basis and was thus arbitrary. In their opinion, the Court's finding about the arbitrary character of the expulsion was: (i) wrong in law; (ii) unnecessary; and (iii) unsupported on the facts.<sup>64</sup>

The Declaration is closely argued and supported by the evidence. The intention of the drafters of Article 13 of the ICCPR is plain. General Comment No 15 supports entirely the position that Article 13 of the ICCPR provides procedural protections and does not impose a substantive 'arbitrariness' criterion. The *Maroufidou* case does not deal with this specific issue at all. For the Court to extend the meaning of Article 15 beyond that determined by the Human Rights Committee (the implementation body designated to interpret ICCPR provisions) would be wrong in principle as it would risk 'fragmentation' in the interpretation of this provision. It would also fly in the face of the Court's view that it should give great weight to the determinations of the Human Rights Committee and the need for consistency of interpretation. The Joint Declaration by Judges Keith and Greenwood clearly represent the parameters of Article 13 much more accurately than the opinion of the Court.

The final allegation to be examined was that relating to Article 9(2) of the ICCPR. In this regard, the Court observed that, as the provision in Article 9(2) of the ICCPR relating to prompt information of charges brought against an accused applied only when a person was arrested in the context of criminal proceedings, that provision was not breached at the time of Mr Diallo's arrests and detention for the purpose of his expulsion. In contrast, the other provision in Article 9(2) of the ICCPR, the right to be informed at the time of Mr Diallo's arrest of the reasons for his arrest, was clearly breached, as this provision applied outwith the context of criminal proceedings in all cases. The DRC had failed completely to produce any document or any other form of evidence to prove that Mr Diallo was notified of the expulsion decree at the time of his arrest on 5 November 1995 or that he was in some way informed at that time of the reasons for his arrest. Furthermore, the DRC had presented no information to prove the date on which Mr Diallo was notified of the expulsion decree, which would at least have indicated to him that he had been arrested for the purpose of his expulsion and would have given him the information necessary to challenge the lawfulness of the decree. In addition, neither had it

63 Ibid. at para 18.

64 Ibid. at para 24; Judge *ad hoc* Mampuya agreed with the analysis of this issue by Judges Keith and Greenwood.

been established by the DRC, on the second detention occasion in January 1996, that Mr Diallo was informed that he was being forcibly ejected from the DRC in execution of the expulsion decree. Hence, breaches of Article 9(2) of the ICCPR had occurred on the occasion of both arrests.<sup>65</sup>

### C. *The Alleged Violation of the Prohibition on Subjecting a Detainee to Mistreatment*

It was argued by Guinea that Mr Diallo was subjected to mistreatment during his detention: (i) because of the particularly harsh conditions thereof; (ii) because he was deprived of his right to communicate with his lawyers and with the Guinean Embassy; and (iii) because he received death threats from the guards.<sup>66</sup> Guinea invoked in support Article 10(1) of the ICCPR, which reads as follows:

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

The Court referred also to Article 7 of the ICCPR, which reads as follows (in part):

No one shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment.

In addition, the Court adverted to Article 5 of the African Charter, which states (in part):

Every individual shall have the right to the respect of the dignity inherent in a human being.

Before assessing the claim, the Court confirmed that '[t]here is no doubt, moreover, that the prohibition of inhuman or degrading treatment is among the rules of general international law which are binding on States under all circumstances, even apart from any treaty commitments'.<sup>67</sup>

The Court concluded that Guinea had failed to demonstrate convincingly that Mr Diallo had been subjected to the treatment prohibited by the provisions invoked by Guinea and referred to by the Court. There was no evidence to substantiate the allegation that Mr Diallo received death threats. Mr Diallo was able to communicate with his relatives and lawyers without any great difficulty and, even if this had not been the case, such constraints would not *per se* have constituted treatment prohibited by Article 10(1) of the ICCPR; the issue of Mr Diallo's ability to communicate with the Guinean Embassy raised

65 *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, supra n 6 at paras 83–5.

66 *Ibid.* at para 86.

67 *Ibid.*

other issues in relation to Article 36(1)(b) of the Vienna Convention on Consular Relations. The fact that Mr Diallo was properly fed thanks only to deliveries of food by his relatives to the detention facility (which the DRC did not contest) was not sufficient to prove mistreatment, since access to Mr Diallo by his relatives was unhindered. Thus, all these allegations were dismissed by the Court.<sup>68</sup>

The suggestion by the Court that if Mr Diallo had been unable to communicate with his lawyers, this would not have constituted a breach of Article 10(1) is too simplistic an analysis. The case of *Massera v Uruguay* established clearly that Article 10(1) is apt to cover situations where a detainee has been held incommunicado for some months, thus denying him the right to be visited by family members or the possibility of communicating with counsel of his own choosing, which would be an additional breach of Article 14(3)(b) of the ICCPR.<sup>69</sup>

Judge Cançado Trindade in his Separate Opinion was unable to agree with the Court on the dismissal of this particular claim. He stated:

The fact remains that it has not been demonstrated that Article 10(1) has been complied with either. The Court's majority seems to have taken a somewhat hurried decision on this particular point, applying the presumption in favour of the Respondent State. In human rights cases of the kind, presumptions apply in favour of the ostensibly weaker party, the individual, the alleged victim. In the circumstances of the present case, the burden of proof cannot fall upon the applicant State; it is the respondent State that knows - or is supposed to know - the conditions of detention, and it is, accordingly, upon it that the burden of proof lies.<sup>70</sup>

#### **D. The Alleged Violation of the Provisions of Article 36, Paragraph (1)(b) of the Vienna Convention on Consular Relations**

Article 36(1)(b) of the Vienna Convention provides:

If he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person

68 Ibid. at paras 88 and 89.

69 (R1/5), 15 August 1979, CCPR/C/7/D/5/1977 (1979). See also *Drescher Caldas v Uruguay* (43/1979), 21 July 1983, CCPR/C/19/D/43/1979 (1983); *Martinez Machado v Uruguay* (83/1981), 4 November 1983, CCPR/C/20/D/83/1981 (1983); and *Arzuada Gilboa v Uruguay* (147/1983), 1 November 1985, CCPR/C/26/D/147/1983 (1985).

70 *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)*, supra n 6, Separate Opinion of Judge Cançado Trindade at para 73.

arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph.<sup>71</sup>

The Court remarked that these provisions applied to any deprivation of liberty of any description, even outwith those accused of criminal offences. Thus, the Convention applied in this case (a fact which the DRC did not contest).<sup>72</sup>

Guinea alleged that these provisions were violated when Mr Diallo was arrested on both occasions (November 1995 and January 1996) because he was not informed, ‘without delay’ on those occasions of his right to seek consular assistance.<sup>73</sup>

The Court observed that the DRC had not challenged the accuracy of Guinean allegations either in the written proceedings or in the first round of oral argument. The DRC had replied to the Guinean allegations by claiming that: (i) Guinea had failed to prove that Mr Diallo had requested the Congolese authorities to notify the Guinean consular post without delay of his arrest and detention; and (ii) that the Guinean Ambassador at Kinshasa was aware of Mr Diallo’s arrest and detention, as evidenced by the action he took on behalf of Mr Diallo. However, in reply to a question posed by one of the Court’s judges during the hearing on 26 April 2010, the DRC asserted for the first time that it had ‘orally informed Mr Diallo immediately after his detention of the possibility of seeking consular assistance from his State’; this was re-affirmed in the Written Reply delivered to the Registry on 27 April 2010 and confirmed orally at the hearing on 29 April 2010 during the second round of oral argument.<sup>74</sup>

The Court dismissed the two arguments advanced by the DRC as lacking any credence. The Court made three points: (i) it was for the authorities of the State which initiated the arrest to inform, on their own initiative, the arrested person of his right to consular access; (ii) the fact that a detainee in some cases does not make a request for consular access can be explained precisely by the fact that he had not been informed of that right; and (iii) the fact that the consular authorities of the national State of the arrested person had heard somehow of his arrest did not excuse the violation which had occurred already by failure to inform the detainee of his rights without delay.<sup>75</sup>

71 Guinea and the DRC became parties to the Vienna Convention on 30 June 1988 and 15 July 1976, respectively.

72 *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)*, supra n 6 at para 91.

73 Ibid. at para 92.

74 Ibid. at paras 93 and 94.

75 Ibid. at para 95, citing the decision of the Court in *Avena and Other Mexican Nationals (Mexico v United States of America)*, Judgment, ICJ Reports 2004 (I) 46, at para 76.

The suggestion that Mr Diallo had been 'orally informed' of his rights made very late in the proceedings (when the point was at issue since inception) was completely unsupportable. Thus, the DRC had violated the provision in Article 36(1)(b) of the Vienna Convention.<sup>76</sup>

Judge *ad hoc* Mampuya (nominated by the DRC) disagreed with the Court. Judge Mampuya's analysis was premised on the basis that the facts and circumstances of the present case demonstrated that the alleged failure to inform Mr Diallo of his right to consular access did not prevent Guinea from exercising the right conferred by Article 36(1)(b) of the Vienna Convention and performing their consular function. Thus, failure to inform did not render Guinea unable to deliver appropriate consular services to Mr Diallo.

### E. *The Separate Opinion of Judge Cançado Trindade*

Judge Cançado Trindade delivered a breath-takingly wide-ranging opinion on a number of both specific and broad-ranging issues, even outwith the strict confines of that necessitated by the case. It is impossible to analyse all the facets of his Separate Opinion, which sometimes reads more like a learned journal article than a court judgment, in this article with any degree of justice. However, some salient features of his views will be discussed.

A detailed examination of the 'Hermeneutics of Human Rights Treaties' leads Judge Cançado Trindade into an extensive discussion of the 'Principle of Humanity in its Wide Dimension', in which he concludes that 'the principle of humanity permeates the whole *corpus juris* of the international protection of the rights of the human person (encompassing International Humanitarian Law, the International Law of Human Rights, and International Refugee Law), at global (UN) and regional levels'.<sup>77</sup> Judge Cançado Trindade reflects that the principle of humanity is in line with natural law thinking.<sup>78</sup> The discussion of the principle of humanity develops into a considerable examination of the 'Prohibition of *Arbitrariness* in the International Law of Human Rights', with a detailed analysis of the jurisprudence of the Human Rights Committee and

76 *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)*, supra n 6 at paras 96 and 97; the final claim that Mr Diallo's expulsion violated his right to property because he had to leave behind his assets on expulsion (guaranteed by Article 14 of the African Charter) was characterised by the Court (at para 98) as having less to do with the lawfulness of the expulsion and more with the damage suffered, which would be addressed in the context of reparation owed by the DRC.

77 *Ibid.*, Separate Opinion of Judge Cançado Trindade at para 97; see also the statement to similar effect at para 103: '[t]he principle of humanity permeates the whole *corpus juris* of protection of the human person, providing one of the illustrations of the approximations or convergences between its distinct and complementary branches (International Humanitarian Law, the International Law of Human Rights, and International Refugee Law), at the hermeneutic level, and also manifested at the normative and the operational level.'

78 *Ibid.* at para 105.

the African Commission on Human and Peoples' Rights, in addition to that of the other two regional instances—the Inter-American Court of Human Rights and the European Court of Human Rights. After an exhaustive analysis, Judge Cançado Trindade determines that '[t]he letter together with the spirit of those provisions under human rights treaties, converge in pointing to the same direction: the absolute prohibition of arbitrariness, under the International Law of Human Rights as a whole.'<sup>79</sup> Judge Cançado Trindade concludes that '[h]ad the Court pursued the proper hermeneutics of human rights treaties throughout the *whole* Judgment, in all likelihood it would have arrived at a conclusion distinct from that found in resolatory points 1, 5 and 6 of the *dispositif* of the present Judgment'.<sup>80</sup>

In so far as the issue of consular assistance is concerned, Judge Cançado Trindade is scathing about the statement in the *Avena* case by the Court:

Whether or not the Vienna Convention rights are human rights is not a matter that this Court need decide. The Court would, however, observe that neither the text nor the object and purpose of the Convention, nor any indication in the *travaux préparatoires*, support the conclusion that Mexico draws from its contention in that regard.<sup>81</sup>

After an examination of the text of 1963 Vienna Convention, its object and purpose and the *travaux préparatoires* which indicated that there was an awareness among participating delegations as to the need to insert the right to information on consular assistance 'into the conceptual universe of human rights', Judge Cançado Trindade reflected that 'the point at issue – concerning a provision of a UN Convention of universal scope, such as the 1963 Vienna Convention on Consular Relations – is a point which this Court, as the principal judicial organ of the United Nations, needs itself to pronounce upon and decide'.<sup>82</sup> Judge Cançado Trindade concluded:

It is not for this Court to keep on cultivating, in *obiter dicta*, hesitations or ambiguities, such as those of paragraph 124 of its *Avena* Judgment of 2004. Furthermore, in this transparent age of *internet*, to attempt capriciously to overlook or ignore the contribution of other contemporary international tribunals to the progressive development of international law, - in the sense of its irreversible advance of its humanization, - seems to attempt to avoid the penetrating sunlight with a fragile blindfold.<sup>83</sup>

79 Ibid. at para 142.

80 Ibid. at para 226.

81 *Avena and Other Mexican Nationals (Mexico v United States of America)*, supra n 75 at para 124.

82 *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)*, supra n 6, Separate Opinion of Judge Cançado Trindade at para 186.

83 Ibid. at para 188.



Of course, here the Judge was referring most particularly to the landmark Advisory Opinion No 16 of the Inter-American Court of Human Rights.<sup>84</sup> Indeed, in general, Judge Cançado Trindade is critical of what he calls a 'partial or atomized outlook', whereby the contribution of the jurisprudence under other regional human rights treaties such as the American Convention on Human Rights and the African Charter on Human and Peoples' Rights is almost ignored when contrasted with the jurisprudence under the European Court of Human Rights. Judge Cançado Trindade warns against adopting a singularly 'Euro-centric outlook'.<sup>85</sup>

### E. Reparation

The Court recalled that 'reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed'.<sup>86</sup> Where this was not possible, reparation may take 'the form of compensation or satisfaction, or even both'.<sup>87</sup> In the light of the circumstances of this case, in particular the fundamental character of the human rights obligations breached and Guinea's claim for reparation in the form of compensation, the Court stated that reparation due to Guinea for the injury suffered by Mr Diallo must take the form of compensation (in addition to the findings of violations).<sup>88</sup>

Judge Cançado Trindade was critical of the decision of the Court in regard to the duty to make appropriate reparation in paragraphs 7 and 8 of the *dispositif*. In particular, he criticised the further delay of six months for the negotiated settlement between the parties, given that almost 12 years had elapsed between the inception of proceedings in the case (20 December 1998) and the Judgment of the Court (30 November 2010). Such a delay was unconscionable 'particularly when reparation for human rights breaches [was] at stake', and the Court as 'the master of its own jurisdiction, and of its own procedure' should curtail and avoid 'unreasonable prolongation of time-limits for the

84 OC-16/99, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* IACtHR Series A 16 (1999); 7 IHRR 766 (2000).

85 *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)*, supra n 6, Separate Opinion of Judge Cançado Trindade at paras 216 and 219.

86 *Ibid.* at para 161, citing the decision of the PCIJ in *Factory at Chorzów*, Merits, Judgment No 13, 1928, PCIJ, Series A 17, 47.

87 *Ibid.*, citing the decision of the Court in *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* Case No 135, Judgment, 20 April 2010, at para 273.

88 *Ibid.* The Court determined that the parties should enter into negotiations regarding the quantum of compensation payable by the DRC to Guinea for the injury flowing from the wrongful detentions and expulsion of Mr Diallo in 1995–96, including the resulting loss of his personal belongings, and reach an agreed settlement within six months from the date of judgment, failing which the Court would settle the compensation payable in a later phase of the proceedings after a single exchange of pleadings.

performance of procedural acts.’<sup>89</sup> The delay in this case was particularly grave since ‘the subject (*titulaire*) of the rights breached in the present case is not the Applicant State, but the individual concerned, Mr A. S. Diallo, who is also the ultimate beneficiary of the reparations due.’<sup>90</sup> More broadly, Judge Cançado Trindade claimed that had the Court pursued the hermeneutics of the human rights treaties that had been invoked (rather than the hermetic parameters of the exclusively inter-State dimension), the Judgment of the Court ‘would have been entirely a much more consistent and satisfactory one.’<sup>91</sup> Finally, Judge Cançado Trindade adverted to the appropriate reparation, including compensation, according to the practice and procedure of the Human Rights Committee.<sup>92</sup> In this respect, regard had to be paid to General Comment No. 31 on the ‘Nature of the General Legal Obligation Imposed on States Parties to the Covenant’, which states by reference to Article 2(3) of the ICCPR, that ‘whereas the Covenant generally entails appropriate compensation’ that reparation can also involve ‘[r]estitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violation.’<sup>93</sup> Indeed, as Judge Cançado Trindade points out, the Human Rights Committee uses a more or less standard formula addressed to the State Party when it finds a violation of the ICCPR in line with Article 2(3)(a) of that instrument.<sup>94</sup>

Of course, as it is axiomatic that ‘justice delayed is justice denied’, so too is it axiomatic that ‘compensation delayed is compensation denied’. Even Judge Cançado Trindade excuses the Court for the unconscionable delays in this case, save for his criticism of the six month period of delay for a negotiated settlement.<sup>95</sup> However, it is not necessarily the judicial function to settle the amount of damages in all cases as Judge Cançado Trindade implies. It is often the case that courts leave the quantum of damages to be agreed by the parties, with liberty to re-apply to the court for quantification, if no satisfactory agreement between the parties is reached. This seems entirely sensible. A quick *inter partes* agreement may well be possible in many situations and will give both parties a satisfactory conclusion to the litigation, perhaps more so than a court imposed one. Anyhow, a further hearing may be required as in many cases the data for quantification may not be to hand when delivering the

89 Ibid., Separate Opinion of Judge Cançado Trindade at para 202.

90 Ibid. at para 203, and to similar effect at paras 204, 205 and 206.

91 Ibid. at paras 206 and 207.

92 Ibid. at para 209.

93 26 May 2004, CCPR/C/21/Rev.1/Add.13; 11 IHRR 905 (2004) at para 16.

94 *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo*, supra n 6, Separate Opinion of Judge Cançado Trindade at para 210. See further Gandhi, supra n 15 at 334–5, citing McGoldrick, supra n 15.

95 Ibid. at para 202.

judgment on liability. It is suggested that the form adopted by the Court was entirely appropriate and reasonable.

Judge Cançado Trindade concludes that 'reparations... require an understanding of the conception of the law of nations centred on the *human person* (*pro persona humana*). Human beings, - and not States, - are indeed the ultimate beneficiaries of reparations for human rights breaches to their detriment'.<sup>96</sup> However, one should observe in this context that the Human Rights Committee has no precise mechanisms for determining the *quantum* of compensation payable for breaches of the ICCPR; this is to be determined by the State concerned. On the other hand, damages which are agreed by the disputing States, or fixed by the Court in the absence of such agreement, are likely to be significantly more objectively justifiable and more substantial.

## 5. Concluding Comments

In the *Mavrommatis Palestine Concessions* case, the Permanent Court of International Justice stated:

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 which they have been unable to obtain satisfaction through ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic protection or international judicial proceedings on his behalf, a State is in reality asserting its own rights – rights to ensure, in the person of its subjects, respect for the rules of international law.<sup>97</sup>

Thus, the exercise of diplomatic protection is clearly within the absolute discretion of the State. The aggrieved individual has no right to have his claim asserted by the State. Furthermore, it is axiomatic that, in weighing up the decision to bring proceedings, the State will be influenced heavily by political considerations and is completely free to act (or not) in its own interests. The discretionary nature of diplomatic protection rests uneasily with the principles underlying the international law of human rights, which create directly enforceable rights by the individual against his own State. Accordingly, the conceptual foundations of diplomatic protection are anachronistic and redolent of an age where the State was the sole subject of international law. Nevertheless, although limited in scope, as the *Diallo* case illustrates vividly, diplomatic protection may provide the means by which human rights claims may be indirectly enforced in some cases.

<sup>96</sup> Ibid. at para 220.

<sup>97</sup> *Mavrommatis Palestine Concessions*, Judgment No 2, 1924, PCIJ, Series A 2, 12.

As Judge Cançado Trindade observes: '[i]t is reassuring to see that even a tool conceived in the inter-State optics like diplomatic protection, may turn out to be utilized to safeguard human rights' and '[t]he procedure for the vindication of the claim originally utilized (by the applicant State) was that of diplomatic protection, but the substantive law applicable in the present case . . . is the International Law of Human Rights'.<sup>98</sup> Nevertheless, Judge Cançado Trindade warns:

[A]ttempts to revitalize traditional diplomatic protection, with its ineluctable discretionary nature, should not be undertaken underestimating human rights protection, - as suggested to the International Law Commission (ILC) in 2000. . . . The greatest legacy of the international legal thinking of the XXth century, to that of this new century, lies in the historical rescue of the human person as subject of rights emanating directly from the law of nations (the *droit de gens*), as a true subject (not only 'actor') of contemporary international law. The emergence of the International Law of Human Rights has considerably enriched contemporary international law, at both substantive and procedural levels.<sup>99</sup>

As Judge Cançado Trindade points out, this was the first time in its history that the Court had decided a case on the basis of an international human rights treaty, a regional human rights treaty 'in addition to the relevant provision (Article 36(1)(b)) of the Vienna Convention on Consular Relations, situated also in the domain of the international protection of human rights'.<sup>100</sup> The *Diallo* case was essentially a human rights case, but it only reached the Court originally because of the exercise of diplomatic protection.

In his 'Epilogue', Judge Cançado Trindade makes a remarkable statement:

Individuals keep suffering a *capitis diminutio*, as they still need to rely on that traditional instrument [of diplomatic protection] to reach this Court, whilst they already have *locus standi in judicio* or even *jus standi* before other contemporary international tribunals. This shows that there is epistemologically no impediment for individuals to have *locus standi* or *jus standi* before the World Court as well; what is lacking is the *animus* to render that possible, given the usual prevalence of mental inertia.<sup>101</sup>

98 *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)*, supra n 6, Separate Opinion of Judge Cançado Trindade at paras 213 and 233.

99 *Ibid.* at para 215; also footnote 153 in the Separate Opinion, where Judge Cançado Trindade is critical of the ILC 'First Report on Diplomatic Protection' by Rapporteur John Dugard, 7 March 2000, A/CN.4/506, at para 31, where 'the suggestion tried to make one believe that remedies provided by human rights treaties and instruments were "weak", while diplomatic protection offered a "more effective remedy", as "most States" would treat it "more seriously" than a complaint against their conduct to "a human rights monitoring body".'

100 *Ibid.* at para 232; see also at para 1 at the start of the Separate Opinion.

101 *Ibid.* at para 233.

How should we interpret this statement? On face value, it is a naked plea for individuals to be given *locus standi* or *jus standi* before the Court. If this is so, this represents a modern affirmation of the suggestion made as long ago as 1950 by Sir Hersch Lauterpacht that Article 34(1) of the Statute of the Court ('Only states may be parties in cases before the Court') be amended to allow individuals to bring claims against a defendant State in certain circumstances.<sup>102</sup> Indeed, the whole tenor of Judge Cançado Trindade's Separate Opinion resonates closely with the underlying faith proclaimed by Sir Hersch at a lecture at the Royal Institute of International Affairs, Chatham House, London on 27 May 1941 that: '... the protection of human personality and of its fundamental rights is the ultimate purpose of all law, national and international'.<sup>103</sup>

Human rights have been described as the 'idea of our time'.<sup>104</sup> Ever since its establishment, the Court has played a significant part in the evolution and protection of human rights through its Orders, Judgments and Advisory Opinions. While the Court's Bench is served by judges such as Judge Cançado Trindade, with the passion and vision for the international protection of human rights, and the dedication and expertise to translate theoretical stances into practical applications, it will no doubt continue to be engaged actively and successfully in the international protection of human rights.

102 See Lauterpacht, *International Law and Human Rights* (London: Stevens, 1950) at 58.

103 Lauterpacht, *International Law: Being the Collected Papers of Hersch Lauterpacht, Vol II*, (Cambridge: Cambridge University Press, 1975) at 47.

104 Henkin, *The Rights of Man Today* (London: Stevens, 1979) Preface.