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SHAREHOLDERS' RIGHTS IN INTERNATIONAL LAW: (CON)TEMPORARY REFLECTIONS IN THE DIALLO CASE

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Received 18 March 2020, accepted 4 June 2020; published 30 September 2020

Abstract. In the 21st century there is still an ongoing intensive discussion among practitioners and scholars as to whether, under international law, an independent right to property exists. When the International Court of Justice (hereinafter – ICJ) announced its decisions in the *Ahmadou Sadio Diallo* case (*Republic of Guinea v. Democratic Republic of Congo*, 2007, 2010, 2012; hereinafter – *Diallo*), these debates intensified. This article analyzes the decisions of the *Diallo* case, as this case is a valuable source which: (a) help to determine the approach of the most authoritative Court towards the right to property in international law, and (b) assist in evaluating the chance of defending the rights of shareholders in the ICJ. After examination, several observations are made. First, although Guinea claims that the core issue in the case is a violation of property rights, the ICJ is not willing to elaborate on the right to property, its scope, or its content. This silence leads to further queries on the understanding of the concept of a global right to property. Second, the World Court rules that diplomatic protection based on the rule of protection by substitution does not amount to an international custom. A conclusion is made that the *Diallo* case is not a repetition of a standard discussed in the *Barcelona Traction, Light and Power Company, Limited* case (*Belgium v. Spain*, 1970; hereinafter – *Barcelona Traction*), but rather a reflection of a narrowed standard of *Barcelona Traction*. Therefore, the ICJ is not an amiable forum for the protection of the property rights of shareholders.

Keywords: diplomatic protection of shareholders; right to property; shareholders' rights

Reference to this paper should be made as follows: Katuoka, S., Motuzienė, I. 2020. Shareholders' Rights in International Law: (Con)temporary Reflections in the *Diallo* Case, *Entrepreneurship and Sustainability Issues*, 8(1), 249-260. [http://doi.org/10.9770/jesi.2020.8.1\(17\)](http://doi.org/10.9770/jesi.2020.8.1(17))

JEL Classifications: K11, K33, K38

Additional disciplines: law

1. Introduction.

In contemporary international law, two opposite positions exist regarding the concept of a right to property. On the one hand, such scholars as Jose E. Alvarez claim that there is "...no such a thing as a single global regime for property protection" (2018, p. 650), but on the other hand some advocate for the emergence of the global right to property (Sprankling, 2011). Opinions regarding the phenomenon of fragmentation of this right also differ: from defending the distinct international regimes and denying the need to harmonize rights contours either through a global treaty or by recognizing its status as customary law (Alvarez, 2018, p. 581), to promoting initiatives that

bridge the gaps between the areas of human rights law and international investment law and their isolated understanding of a right to property and its protection (Kriebaum & Schreuer, 2007, p. 20).

The protection of a right to property developed independently in human rights law and in international investment law. Therefore, protection for a natural or legal person in the European Court of Human Rights and insurances for an “investor” provided under the International Centre for Settlement of Investment Disputes (hereinafter – ICSID) regime vary enormously in scope. As a result, there is a need to identify what the general international law has to say about the right to property. Naturally, the opinion of the World Court matters.

This article focuses on a single, key case of the ICJ as an authoritative decision in the field on a global scale. *Diallo* (2010) is an important case because it is a rare opportunity to set standards for understanding the right to property as well as pronounce the existing rules on diplomatic protection on behalf of the shareholders.

The aim of this article is two-fold. Firstly, to answer the following questions: what is the current and prevailing test for standing on behalf of the shareholders in the ICJ? Does it represent customary international law? Are there any changes since the *Barcelona Traction* case? Secondly, this article argues for the need to recognize the evolution of a right to property and shareholders’ rights at the international level.

This article consists of two parts. In the first part we address the right to property in international law as it stands today. Secondly, the analysis of the procedural and substantial questions in the *Diallo* case is presented. Lastly, conclusions and observations are made.

Methodology. This study is based on the qualitative methodology principles. A starting point of the research is the need to identify whether a right to property is a self-standing right under international law, and whether a natural person as a shareholder of a company can protect his or her right to property under international law. The method of conceptual analysis helps to collect relevant data (international treaties, case law, reports of international organizations, and scholarly writings on the subject of the study). The comparative method, which is used for data analysis, helps to identify the differences regarding the understanding of the existence of the right to property. Regional courts as well as scholars interpret this right in a variety of ways. Therefore, a method of case study is helpful. The *Diallo* case is a special case, both because it is solved by the most authoritative court – the World Court – and because it is the first opportunity to rule on the shareholders’ rights after the *Barcelona Traction* (1970) case.

2. Right to property in international law

Although a natural person’s right to property is an ordinary and widely accepted right under domestic law, it does struggle to achieve its full acknowledgement in public international law. In the 20th century, international recognition of the right to property as a universal human right failed. Once solemnly announced in the Universal Declaration of Human Rights of 1948 (hereinafter – Universal Declaration) as a basic human right, it was rejected as an existing universal right: first, by the drafters of the International Covenant on Civil and Political Rights (1966; hereinafter – ICCPR) and the International Covenant on Economic, Social and Cultural Rights (1966; hereinafter – ICESCR); and, second, by the UN Commission on Human Rights (1993). While the other fundamental human rights were acknowledged by enshrining them in the 1966 law-making treaties, right to property was undeservedly left out of the list of “human rights and fundamental freedoms inherent to all individuals of all nations” (Universal Declaration, 1948, preamble).

It is true that the right to property is mentioned in several core human rights treaties in specific contexts: the right to own property without distinction as to race, colour, or national or ethnic origin in the International Convention on the Elimination of All Forms of Racial Discrimination (1965, art. 5 (d) (v); hereinafter – ICERD); the right to

enjoy property without discrimination based on gender in the International Convention on the Elimination of All Forms of Discrimination against Women (1979, art. 15 (2), art. 16 (1) (h); hereinafter – CEDAW); prohibition on arbitrarily depriving migrant workers or their family members of their property in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990, art. 15; hereinafter – ICRMW); and the guarantee of access to intellectual property without discriminatory barriers for persons with disabilities in the Convention on the Rights of Persons with Disabilities (2007, art. 30(3); hereinafter – CRPD). Even international humanitarian law protects property rights in times of armed conflict, by prohibiting destruction of real or personal property as stated in the IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949, art. 53; hereinafter, Geneva Convention). But these constant reflections of property rights in various areas are not sufficient for a self-standing universal right. Therefore, even a leading U.S. scholar on the subject, John Sprankling, has noticed that the traditional answer to the question “does a right to property exist under international law” is “no” (2014, p.1). However, further in his article Sprankling (2014) argues that the global right to property should be recognized as a general principle of international law as well as a customary international law.

The most effective way to translate a right into a legally binding obligation is via a multilateral treaty. There are multiple options to be discussed; for example, an amendment to an existing international covenant or a protocol to one of the existing international covenants. We argue for the need to enshrine right to property at a universal level because of the following two reasons: value at the theoretical level; and benefits in practice. In the case of theoretical value, it would encourage a rapid development on such questions as the right’s nature, scope, and content. As for practical considerations, it would help to bridge regional differences regarding standards and limitations as well as enlarge possibilities to protect property rights for those who have no such guarantee under regional human right treaties. For example, the American Convention on Human Rights (1969, art. 21; hereinafter, ACHR) protects only natural person’s right to property, but not legal person’s right to property; therefore the Inter-American Commission on Human Rights has denied standing even where the application had been made not by the company but by its controlling shareholder (*Bendeck-Condinsa v. Honduras*, 1999, para.17): “The Commission therefore considers that the Convention grants its protection to physical or natural person. However, it excludes from its scope legal or artificial persons, since they represent a legal fiction”.

Meanwhile, the existence of the universal right to property as a human right has to be grasped in international customary law. It is widely considered that the rights announced in the Universal Declaration (1948) have at present become binding either by way of custom or general principles of law. On this point a comprehensive analysis and extensive overview is found in the work *The Status of the Universal Declaration of Human Rights in National and International Law* by Hurst Hannum (1995). According to article 17 of the Universal Declaration “1. Everyone has the right to own property alone as well as in association with others. 2. No one shall be arbitrarily deprived of his property”. The most authoritative voice on international customs is the World Court, and it was asked by Guinea to rule on questions regarding the right to property in the *Diallo* case (2007). In that case, three groups of property rights were allegedly violated: a) the personal property of Mr. Diallo (namely, loss of furniture, high-value items, and assets in bank account [*Diallo*, 2012, para. 29]); b) the shareholder’s right to property over Mr. Diallo’s *parts sociales* (or shares) in his companies Africom–Zaire and Africontainer–Zaire; and c) the right to property of the above-mentioned companies. From Guinea’s perspective, property rights triggered by the unlawful arrest and expulsion of Mr. Diallo from the Democratic Republic of Congo (hereinafter – DRC) were the essential part of the case. Nevertheless, the ICJ focused on treaty-based human rights and unanimously found that Mr. Diallo’s expulsion and detention violated both regional and universal treaties – respectively, article 12 (4) of the African Charter on Human and People’s Rights (1982; hereinafter – ACHPR) and article 13 of the ICCPR (1966), and article 6 of ACHPR and article 9(1) and (2) of the ICCPR (*Diallo*, 2010, para. 165). Regrettably, in the final finding of the Court nothing was said about the violation of property rights.

There were two choices available for the ICJ: to rely on the regional treaty, which is binding for Guinea and the DRC and states that “the right to property shall be guaranteed” (ACHPR, 1982, art. 14); or to deliberate on international customary rule of property rights. None of these options was used. Does this mean that the right to property does not exist in international law, as John G. Sprankling summed up as the traditional prevailing approach (2014, p. 1)? Or does it mean that the Court was not persuaded that any of the property rights were violated? We assume that the answer to the first question is “no”, and most probably the answer to the second question is “yes”. However, having in mind the World Court’s authority and contribution to international law development, as well as the unsatisfactory situation that this fundamental right is not a part of a universal treaty, it would be helpful and thoughtful to elaborate on it.

A particularly interesting choice of the Court was to acknowledge that compensation should be paid “...for the material injury suffered by Mr. Diallo in relation to his personal property...” (*Diallo*, 2012, para. 61), but not clearly pronouncing what the violation was. International responsibility requires proving two elements, namely: (a) attributability, and (b) a breach of an international obligation of the state (Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001, art. 2; hereinafter – ARS). What was the international obligation for the breach of which the Court awarded the compensation in the decision of 2012? The Court says:

The Court recalls that Mr. Diallo lived and worked in the territory of DRC for over thirty years, during which time he surely accumulated personal property. (...) Thus, the Court is satisfied that the DRC’s *unlawful conduct* [emphasis added] caused some material injury to Mr. Diallo with respect to personal property that had been in the apartment in which he lived, although it would not be reasonable to accept the very large sum claimed by Guinea for this head of damage. In such a situation, the Court considers it appropriate to award an amount of compensation based on equitable considerations (*Diallo*, 2012, para. 32).

What is the “unlawful conduct” mentioned by the Court? Is it a breach of the right to property? It is doubtful that it was the Court’s intention to say so, because it never mentioned a violation of the right to property in the decisions of 2007, 2010, and 2012. The other possible explanation for what is meant by “unlawful conduct” is the Court’s acknowledged in compliance with the prohibition of unlawful expulsion and detention of Mr. Diallo. According to the judgment, expulsion and detention is the direct reason that caused material injury to personal property. This leads to the conclusion that a breached obligation for which compensation is granted is unlawful expulsion and detention, and not property rights. The authors do agree that these unlawful actions of the DRC prevented him from peaceful enjoyment of the property owned. However, we cannot agree that indirect limitation of property rights caused by unlawful expulsion and detention does not constitute a self-standing breach of the right to property.

One unlawful act can violate more than one international obligation. For example, a person can be tortured and then die, which will cause a violation of the right to life as well as in compliance with the prohibition of torture; or unlawful armed attack can destroy a private house, which causes a violation of the prohibition on use of force and triggers the right to housing and the right to property. This could be the case for Mr. Diallo. The unlawful actions of the DRC caused not only illegal expulsion and detention, but also a violation of the right to property. The choice of the Court to acknowledge the violation of the former but keep silent on the latter leaves uncertainties and fosters further queries on the understanding of the concept of a global right to property.

The other important questions in regard to a global right to property are: what are the recognized types of property in international law? Does shareholding qualify as a protected right? If yes, what is the scope of that right? Do specific rights (i.e., a right to vote, a right to monitor and others) enjoy a property protection standing on their own? Does international law protect only ownership of the shares or reduction of the value of the company as well?

These questions demonstrate the need to find all of the pieces of the puzzle surrounding “right to property” and determine what the scope and content of the right is.

3. Shareholders’ rights according to the *Diallo* case

In the 21st century the ICJ faced questions on shareholders’ property rights on a single occasion. This occasion was the *Diallo* case and its decisions in 2007, 2010, and 2012. In the case there were no options for the full protection of property rights other than at the universal level, as regional instruments were helpless. The African Commission on Human and Peoples’ Rights accepts claims from natural persons but not legal persons. Thus, at the regional level, only a small part of the property rights would be activated. In order to defend his shareholder rights fully, Mr. Diallo had only one option – to ask his state of nationality to advocate for him on the basis of diplomatic protection. And, obviously, the World Court was the only possible forum.

Further we elaborate on the *Diallo* case from two perspectives: procedural questions and findings on the substance.

A. Procedural questions: lack of standing

Guinea relied on diplomatic protection for the following reasons: first, to protect Mr. Diallo’s rights as a shareholder and, second, to protect the property rights of two companies by substitution, i.e., by letting the shareholder’s state of nationality protect Africom–Zaire and Africontainer–Zaire.

To start with, Guinea relies on article 12 of the Draft Articles on Diplomatic Protection (2006; hereinafter – ADP), according to which “to the extent that an internationally wrongful act of a State causes direct injury to the rights of shareholders as such, as distinct from those of the corporation itself, the State of nationality of any such shareholders is entitled to exercise diplomatic protection in respect of its nationals”. Before answering the question of whether the right to protect direct shareholders’ rights in international law exists, the ICJ refers to its former findings in the *Barcelona Traction* (1970) case. The Court states that, in determining whether a legal person is independent and distinct from their *associés* (or shareholders), international law examines the rules of the relevant domestic law (*Diallo*, 2007, para. 61). According to the domestic law of the DRC, Africom–Zaire and Africontainers–Zaire are distinct from Mr. Diallo as a shareholder (*Diallo*, 2007, para. 62). Therefore, the property of the *associé* is completely separate from that of the companies (*Diallo*, 2007, para. 63). To put it in the words of the *Barcelona Traction* case: “So long as the company is in existence the shareholder has no right to the corporate assets” (1970, para. 41). After this explanation, the Court affirms that Guinea does indeed have standing in this case regarding the alleged violation of Mr. Diallo’s direct rights as *associé* (*Diallo*, 2007, para. 65). To summarise, there is a general rule that customary international law acknowledges the diplomatic protection of shareholders’ direct rights, irrespective of whether this is a limited liability company and its *associés* or a public company and its shareholders (*Diallo*, 2007, para. 64). Article 12 of the ADP (2006) reflects customary international law, and this leads to the conclusion that the ICJ is a considerable forum for the protection of shareholders’ rights in case of direct injury. Of course, the effectiveness and quickness of this forum is rather debatable, but in cases like Mr. Diallo’s it is better late than never.

The second question surrounds the exercise of diplomatic protection with respect to Mr. Diallo “by substitution” for Africom–Zaire and Africontainers–Zaire and in defense of their rights (*Diallo*, 2007, para. 76). Guinea asserts that such a possibility was mentioned in the *Barcelona Traction* case as an exception to the general rule that a corporation’s state of nationality has the right to apply diplomatic protection (*Diallo*, 2007, para. 82). This exception is based on the reason of equity *infra legem*. The relevant part of the dictum states: “It has been suggested that if in a given case it is not possible to apply the general rule that the right of diplomatic protection of a company belongs to its national State, considerations of equity might call for the possibility of protection of

the shareholders in question by their own national State” (*Diallo*, 2007, para. 93). The ICJ in the *Barcelona Traction* case admitted that the theory has been developed that a state has the right of diplomatic protection on behalf of its shareholders when the state whose responsibility is invoked is the national state of the company (*Barcelona Traction*, 1970, para. 92). Thus, the standard pronounced in the *Barcelona Traction* case acknowledges that the Court could grant standing to the state of the shareholders, if the state of nationality of the company is violating international law. In other words, the ICJ did recognize the existence of diplomatic protection “by substitution” in 1970.

In the *Diallo* case this is exactly the situation: the two companies cannot be protected by the DRC (i.e., the state of their nationality) because it has allegedly infringed on their property rights. Guinea claims that this exceptional rule is a part of customary international law (*Diallo*, 2007, para. 83). According to Guinea, this is confirmed by certain decisions of the European Commission on Human Rights, the Washington Convention establishing the ICSID and by its jurisprudence, and by the Iran–United States Claims Tribunal (*Diallo*, 2007, para. 83). Moreover, Guinea underlines the importance of protection by substitution because of the factual circumstances that Mr. Diallo is the sole shareholder of the companies as well as their *gerant* (or general manager of the company; *Diallo*, 2007, para. 84). Finally, Guinea refers to article 11(b) of the ADP (2006):

A State of nationality of shareholders in a corporation shall not be entitled to exercise diplomatic protection in respect of such shareholders in the case of an injury to the corporation unless: (b) the corporation had, at the date of injury, the nationality of the State alleged to be responsible for causing the injury, and incorporation in that State was required by it as a precondition for doing business there.

The Court stresses that since the *Barcelona Traction* (1970) case there was no occasion to rule on whether, in international law, an exception to a general rule exists (*Diallo*, 2007, para. 87). The ICJ does confirm that in the *Elletronica Sicula S.p.A. (ELSI)* case (*United States of America v. Italy*, 1989) it “...allowed a claim by the United States of America on behalf of two United States corporations, in relation to alleged acts by the Italian authorities injuring the rights of the latter company” (*Diallo*, 2007, para. 87). However, that decision was based not on customary international law, but rather on bilateral treaty. Thus, the Court faces a task to examine whether Guinea’s assertions are well grounded, and the claimed exception is a part of customary international law. It states that in contemporary international law rights of companies and shareholders are governed by: (a) bilateral or multilateral agreements for the protection of foreign investments; (b) Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965; hereinafter – Washington Convention); and (c) contracts between States and foreign investors; meaning that protection by substitution is the very last resort for the protection of foreign investments and shareholders (*Diallo*, 2007, para. 88). It is, indeed, the very last resort and a rarely used one. We suggest that this is exactly why it has to be comprehensible and reliable when needed.

The Court rejects both arguments for protection by substitution presented by Guinea. First, it concludes that “...at least of the present time – an exception in customary international law allowing for protection by substitution, such as is relied on by Guinea” (*Diallo*, 2007, para. 89) does not exist. The ICJ is not satisfied with the examples of international agreements, bilateral contracts, and the decisions of international tribunals, which rely on these documents, as they are a mere mirroring of established special investment regime governing investment protection and not sufficient to prove that there has been a change in the customary rules of diplomatic protection (*Diallo*, 2007, para. 87). Second, it pronounces that article 11 (b) is a more limited rule of protection by substitution, but it is not relevant in the present case because it does not fall within the scope of the mentioned article (*Diallo*, 2007, para. 94). The Court leaves an open question as to whether this rule is of a customary nature. This doubt expressed by the Court is not a desirable outcome, as one is left to wonder: is any protection by substitution possible at all? Or is this last resort taken away as well? Regrettably, but most likely, at present the World Court is not a suitable forum to offer shareholders property rights protection by substitution even as a last resort.

Several conclusions can be made. First, as is clear from the Court's explanation in the *Diallo* case, international investment law should exclusively deal with the protection of shareholders' property rights. It seems to us that this is true concerning giant multinational corporations, however, this is less true in cases of the protection of a firm, a partnership, a unipersonal limited liability company, or any other similar association of persons. We would propose that a human rights protection mechanism could be more efficient in such or similar cases. Therefore, the demand for an effective present-day tool that could help to protect shareholders' property rights in the field of human rights does exist.

Second, although the Court relied on the *Barcelona Traction* (1970) case a lot, with all due respect, it seems that this was done either superficially or by purposely picking out forceful rhetoric by focusing on the desired result. While carefully reading the *Barcelona Traction* case and the separate opinions of Judges Fitzmaurice, Tanaka, and Jessup, one gets the impression that support for the need to defend shareholders' property rights by substitution was realized in 1970. Judge Fitzmaurice even claims that it is not necessary to prove this principle because the considerations of the principle "...based on domestic law analogies, are quite sufficient in themselves to justify the doctrine of right of intervention on behalf of shareholders "substituted" for a moribund or incapable company of local nationality, in order to protect its interests and their own" (Separate Opinion of Judge Sir Gerald Fitzmaurice, 1970, para. 18). Meanwhile in the *Diallo* case, forty years later, the Court could not find any proof that such a rule exists in international law. Therefore, we cannot agree with some others (for example, Vermeer-Kunzli, 2011) who see the *Diallo* case as a mere repetition of *Barcelona Traction's* dictum. We would rather argue that the *Diallo* case even narrowed the standard pronounced in 1970. Theoretically, it was admitted that intervention by the government of the foreign shareholders is permissible when the company concerned's nationality was that of the state responsible for the damage under review. However, at that time the factual circumstances were different, and the above-mentioned principle was discussed but not applied. When these factual circumstances had arisen in the *Diallo* case, however, the Court rejected Guinea's attempt to rely on it. Thus, this represents a different treatment, and not a mere restatement.

B. Substantial questions on shareholders' rights

A share is one of the forms of property. If the owner is a natural person, then shares are a form of personal property. To own shares means to have an array of certain legal rights (shareholders rights), which are not all of equal significance. A right to property over the shares can be seen as a puzzle made of many small pieces. Each piece represents a distinct and separate legal right. All of them together constitute shareholders right to property. The question then arises: what is considered to be a violation of the shareholders right to property at the international level? What if only one piece (i.e., a right) of the puzzle is triggered? Is this a violation of this single right, or only a limitation on the general right to property? Or does it amount to a breach of a general right to property?

In theory, shareholders' rights are categorized into at least four groups: a) economic rights (i.e., the right to receive dividends or right to sell shares), b) control rights (i.e., the right to vote on fundamental matters), c) information rights (i.e., the right to at least some information about the corporation's affairs), and d) litigation rights (i.e., the right to seek enforcement of management's fiduciary duties; Velasco, 2006, p. 413). Which of these rights can be protected in the World Court? The ICJ pronounced that this would be determined according to the law of the State of the nationality of the company. This is an important principle and a logical finding, because it defines with clarity the legal framework applicable (Alvarez-Jimenez, 2008, p. 543).

The practice of the ICJ does not acknowledge all of the array of the shareholders' rights. The decision in the *Diallo* case to reject standing for protection by substitution shuts the door for protection of the indirect rights of

the shareholders (although they are accepted by the European Court of Human Rights, for example, in *Kaplan v. United Kingdom* [1980], not to mention international investment law forums).

Guinea claims that the DRC violated the following direct rights of Mr. Diallo as a shareholder: a) the right to participate and vote in general meetings of African–Zaire and Africontainers–Zaire; b) the right to appoint *gerant*; c) the right to oversee and monitor the management of the companies; and d) the right to property of Mr. Diallo over his *parts sociales* (*Diallo*, 2010, para. 116).

Before addressing each of these rights, the ICJ announces that a strict distinction should be made between the allegedly violated rights of the two companies and Mr. Diallo as a shareholder, and says (*Diallo*, 2010, para. 115):

The Court understands that such a distinction could appear artificial in the case of an SPRL in which the parts sociales are held in practice by a single associe. It is nonetheless well-founded juridically, and it is essential to rigorously observe it in the present case.

Having that in mind, the Court analyzes all of the direct rights and reaches the conclusion that none of them were breached. Some comments on each of these rights are addressed in turn.

The right to take part and vote in general meetings

The Court is of the opinion that the illegal detention and expulsion of Mr. Diallo from the DRC does not amount to the deprivation of his right to take part and vote in general meetings because there is no evidence that such a meeting has been organized, and, in any event, Mr. Diallo could have appointed a representative (*Diallo*, 2010, para. 126). In practice, it is hard to imagine how Mr. Diallo, being a sole shareholder and *gerant* at the same time, organizes a general meeting with himself and with the help of his representative. It is a bizarre suggestion and not a cogent argument in Mr. Diallo’s case. Even hypothetically, if a person were to be one of the major shareholders, why it is to be considered that removing their right to participate in person in a general meeting and vote does not amount to a violation, if they are illegally expelled from the country by the state authorities? National law of the DRC grants a shareholder the right to choose whether they want to participate directly or appoint a representative. Unlawful acts such as expulsion narrow this right, and a shareholder is forced to appoint a representative. To conclude, the ICJ holds that the limitation of the right to take part and vote in a general meeting caused by illegal acts does not amount to the deprivation of the right to take part and vote in a general meeting. This is a perception we do not share.

The rights relating to the *gerance* (management)

This is quite a rare group of rights to be examined at the international level. Guinea claimed that Mr. Diallo allegedly has the following rights, and that they have been violated: a) a right to appoint a *gerant*; b) a right to be appointed as a *gerant*; c) a right to exercise the function of a *gerant*; and d) a right not to be removed as a *gerant* (*Diallo*, 2010, para. 127). However, Mr. Diallo had been appointed and was still a *gerant* at the time on the case. Consequently, there is no breach for rights a), b), and d). On the right to exercise the function of a *gerant*, the Court notes that “while the performance of Mr. Diallo’s duties as *gerant* may have been rendered more difficult by his presence outside the country, Guinea has failed to demonstrate that it was impossible to carry out those duties” (*Diallo*, 2010, para. 135). The Court suggests appointing a proxy, who could act on Mr. Diallo’s instructions. Again, the ICJ speaks of “difficulties” to exercise the functions of a *gerant*, which implicitly means that the right was indeed limited.

This group of rights is not well-established shareholders’ rights. Rather they are combined *gerant associe* rights. According to the national law of the DRC, a *gerant* is an organ of a company; therefore, a *gerant*’s rights are the

rights of the company, not the rights of the shareholder. This leads to the conclusion that a claim on rights relating to *gerance* cannot be accepted in any case because it was precluded by the judgement of 2007 (*Diallo*, 2010, para. 140).

Two observations are made. First, the ICJ does not see the illegal limitation of a right as a violation of that right. Second, the Court relies on the strict distinction between the rights of a shareholder as a natural person and the rights of a *gerant* as an organ of a company, although Mr. Diallo is a *gerant* as well as a sole *associe*.

The right to oversee and monitor the management

The Court expresses its uncertainty as to whether such a right exists in companies with one *associe* at all, and restates its already articulated point of view: “while it may have been the case that Mr. Diallo’s detention and expulsion from the DRC rendered the business activity of the companies more difficult, they simply could not have interfered with his ability to oversee and monitor the gerance, wherever he may have been” (*Diallo*, 2010, para. 147). According to the national law of the DRC, an *associe* “shall have the powers of an auditor” (*Diallo*, 2010, para. 143); thus, it is very attentive and practical of the Court to express its doubt about the existence of the mentioned right in Mr. Diallo’s case.

The right to property of Mr. Diallo over his shares in Africom–Zaire and Africontainers–Zaire

It is alleged that Mr. Diallo suffered indirect expropriation of his shares (or *parts sociales*) in the two companies because his property rights were interfered with by the DRC’s unlawful conduct – namely, detention and expulsion. These violations prevented Mr. Diallo from the possibility to effectively enjoy his ownership rights. Guinea contends that, from a factual perspective, the property of the two companies merges with Mr. Diallo’s (*Diallo*, 2010, para. 151). The ICJ disagrees with Guinea’s proposition as rights and assets of the company must be considered separately from the rights and assets of the shareholder (*Diallo*, 2010, para. 155). The Court urges us to grasp the difference between the infringement of a right and of an interest, and recites part of the *Barcelona Traction* dictum: “Not a mere interest affected, but solely a right infringed involves responsibility, so that an act directed against and infringing only the company’s rights does not involve responsibility towards the shareholders, even if their interests are effected” (*Diallo*, 2010, para. 156). Therefore, a wish of a shareholder to have valuable shares or a desire to gain profit, which is expected to become a part of dividends, cannot be considered as a legal right. From the moment a natural person acquires property rights over the shares, they gain both ownership over the shares (with an array of shareholders rights), and the risk of not recouping any of the money paid. Their shares represent part of the company’s capital but are distinct from it. In the *Diallo* case, the Court looked into the national law of the DRC and determined that shareholders’ rights to property meant: a) a right to receive dividends; and b) a right to receive any monies payable in the event of the company being liquidated (*Diallo*, 2010, para. 157). However, none of these rights were a part of Guinea’s claim, thus, the Court was not able to find an infringement of Mr. Diallo’s right to property over his shares (*Diallo*, 2010, para. 159).

Arguments presented by Guinea were based on a specific factual perspective. However, it was more than probable that the Court would reject the idea that the property of the companies merges with Mr. Diallo’s; especially having in mind the decision of 2007 (*Diallo*, 2007) and the Court’s willingness to follow the rhetoric of the *Barcelona Traction* case. Moreover, it looks like Guinea was trying to prove that the right to property of a natural person to own shares was violated (as a right under international law for which international responsibility had risen), while the ICJ at the same time was saying that no direct shareholder’s rights were infringed (as rights under the national law of the DRC). Guinea complained that Mr. Diallo was not able to enjoy his ownership rights over the shares peacefully and effectively. Indeed, it is hard not to agree with this assertion having in mind all the difficulties and limitations caused by the unlawful detention and expulsion. However, the Court applied the

national law of the DRC and was not commenting on possible limitations on the right to property under international law (*Diallo*, 2010, para.104).

3. Conclusions

1. The factual circumstances of the *Diallo* case are strangely compelling. Usually, a legal person suffers damage from the illegal actions of an authority and, consequently, a shareholder experience is harmed as well. In the case at hand it was the other way around. The illegal actions were directed at a natural person, Mr. Diallo, as he was unlawfully detained and expelled from the DRC. The consequence was that a unipersonal limited liability company based in the DRC, where he was a *gerant associe*, was allegedly paralyzed and unable to continue its activities. Guinea asserts that the DRC detained and expelled Mr. Diallo with the purpose of ruining the two companies. The key point is to ascertain whether a violation of Mr. Diallo's personal human rights has an impact on or constitutes a violation of his shareholders rights, rather than whether direct infringement of shareholders rights was present as a consequence of a violation of a legal person's rights. Sadly, no comments on this can be found in the decisions.

2. The World Court decided that diplomatic protection on the rule of protection "by substitution" is not an international custom. However, there are contemporary developments and practical needs which call for revision of such a decision. Law does not make human needs; human needs make law. Therefore, the Honorable Court cannot disregard numerous bilateral investment treaties and the extensive practice of international tribunals in the sphere of international investment law, as well as human rights law (on which Guinea relies in its claim), to be free from indirect expropriation.

3. According to the ruling, the unlawful limitation of certain rights of the shareholders, such as the right to take part in the general meeting and vote and the right to exercise the function of a *gerant*, does not amount to a violation. This is a perception that we do not share. It is a dangerous precedent as the mentioned rights cannot be put into practise fully.

4. Although the ICJ avoided elaborating on the right to property and its place in international law in the *Diallo* case, which was primarily about a right to property, we would dare to evaluate it as a temporary phenomenon. We suggest that the national and regional differences as well as contrasts between international human rights law and international investment law regarding the right to property and shareholders' protection can be bridged by means of a multilateral treaty.

5. Finally, the above-mentioned conclusions reached in the *Diallo* case are not a repetition of a standard discussed in the *Barcelona Traction* case. They are rather a reflection of a narrowed standard of the *Barcelona Traction* case. Therefore, it is in no way a contemporary treatment of shareholders' rights. Regrettably, at present the World Court is not an effective last resort regarding the protection of the property rights of shareholders.

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