

SEPARATE OPINION OF JUDGE CANÇADO TRINDADE

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1. This is the first time in its history, to the best of my knowledge, that the International Court of Justice has established violations of the two human rights treaties at issue, *together*, namely, at universal level, the 1966 UN Covenant on Civil and Political Rights and, at regional level, the 1981 African Charter on Human and Peoples' Rights both in the framework of the universality of human rights: I fully concur with the Court's decision in this respect, as well as in respect of the established breach of the 1963 Vienna Convention on Consular Relations (Article 36 (1) (b)), as set forth in the resolutive points 2, 3 and 4 of the *dispositif* of the present Judgment.

2. Yet, pursuing a distinct *rationale*, the Court's majority came to an entirely different conclusion in other aspects of the present case (resolutive points 1, 5 and 6 of the *dispositif*). In relation to these other aspects, I regret not to be able to concur with the conclusions of the Court's majority. In this connection, a point has already been made in a Joint Declaration of five Members of the Court¹, appended to the present Judgment, as to the right to liberty and to security of person (added to the right not to be expelled from a State without a legal basis).

3. In addition thereto, and in relation to other matters dealt with in the present Judgment of the Court in the *A.S. Diallo* case (Guinea *versus* D.R. Congo), I thus feel it my duty to present, in this Separate Opinion, the foundations of my own personal position on them. Before embarking on this presentation, I shall preliminarily draw attention briefly to one significant feature — as I perceive it — of the *cas d'espèce*, as presented to the Court by the contending parties themselves, in relation to the *subject of the rights* and the *object of the claim* in the *cas d'espèce*.

I. Prolegomena: The Subject of the Rights and the Object of the Claim.

4. The present case *A.S. Diallo*, opposing the Republic of Guinea to the Democratic Republic of the Congo, concerns, in reality, the *individual rights* of Mr. A. S. Diallo, as set forth in the 1966 UN Covenant on Civil and Political Rights and in the 1981 African Charter on Human and Peoples' Rights, namely, and mainly, the right to liberty and security of person, and the right not to be expelled from a State without a legal basis². It further concerns his individual right to information on consular assistance in the framework of the guarantees of the due process of law, as enshrined into the 1963 Vienna Convention on Consular Relations. The violations complained of are those of the rights set forth in Articles 9, paragraphs (1) to (4), and 13, of the Covenant, and in Articles 6 and 12 (4) of the African Charter, and in Article 36 (1) (b) of the 1963 Vienna Convention.

5. The two contending States are both Parties to the aforementioned treaties: Guinea is Party to the Covenant on Civil and Political Rights since 24.01.1978, and to the African Charter since 16.02.1982, and the D.R. Congo is Party to the Covenant since 01.11.1976, and to the African Charter since 20.07.1987. They are both, likewise, Parties to the 1963 Vienna Convention: Guinea is Party to it since 30.06.1988, and the D.R. Congo since 15.07.1976. The present case is, thus, significantly, an *inter-State contentious case before the ICJ*, pertaining entirely to *the rights of the individual concerned* (Mr. A. S. Diallo), and the legal consequences of their alleged violation, under a UN human rights treaty, a regional human rights treaty, and a UN codification Convention. This is a significant feature of the present case, unique in the history of the ICJ.

¹Cf. Joint Declaration of Judges Al-Khasawneh, Simma, Bennouna, Cançado Trindade and Yusuf.

²The complaints arise out of the successive arrests and detentions of Mr. A. S. Diallo in D.R. Congo in 1988-1989 and in 1995-1996, as well as his expulsion from the D.R. Congo in 1996.

6. Once identified the *subject of the rights* and the *object of the claim* in the *cas d'espèce*, I purport, in the paragraphs that follow, to address, in logical sequence, some interrelated points. First, I shall focus on the identification of the applicable law in the *cas d'espèce*, with particular attention to the invocation and the incidence of the relevant provisions of the 1966 UN Covenant on Civil and Political Rights and of the 1981 African Charter on Human and Peoples' Rights, in addition to the relevant provision of the 1963 Vienna Convention on Consular Relations.

7. Secondly, I shall turn attention to the saga of the subject of rights (Mr. A. S. Diallo) in the *cas d'espèce*. I shall concentrate my considerations on the vindication of the protected rights under those three treaties, namely, the right to the liberty and security of person, the right not to be expelled from a State without a legal basis, the right not to be subjected to mistreatment, and the right to information on consular assistance in the framework of the guarantees of the due process of law.

8. Thirdly, I shall dwell upon the hermeneutics of human rights treaties (in so far as it has a bearing on the resolution of the *cas d'espèce*), and, fourthly, I shall then concentrate my attention on the *principle of humanity*, as I understand it, in its wide dimension. Fifthly, my next set of considerations will focus on the key issue of the prohibition of *arbitrariness* in the International Law of Human Rights, wherein I shall review and assess the position of the UN Human Rights Committee and of the African Commission on Human and Peoples' Rights, and the jurisprudential construction of the Inter-American and the European Courts of Human Rights.

9. Sixthly, in sequence, I shall examine the material content of the protected rights under the present Judgment (right to liberty and security of person, and right not to be expelled from a State without a legal basis), as well as the jurisprudential construction of the right to information on consular assistance in the conceptual universe of human rights. In respect of this latter, I shall dwell upon the individual right to information on consular assistance beyond the inter-State dimension, and examine and assess the process of humanization of consular law in this connection (as I perceive it), and what I consider the irreversibility of such advance of humanization.

10. Seventhly, I shall examine the notion of “continuing situation”, in the light of the projection of human rights violations in time. This will be followed, eighthly, by my reflections on the individual as *victim* and *titulaire* of the right to reparation, and, ninthly, by a brief presentation of my outlook of international law *for the human person*, beyond the inter-State dimension. The path will then have been paved for the presentation of my concluding observations, and a brief epilogue on the move — as I perceive it — towards a new era of international adjudication of human rights cases by the ICJ.

II. Reflections on the Applicable Law in the *Cas d'Espèce*.

1. Invocation and Incidence of the 1966 UN Covenant on Civil and Political Rights.

11. Throughout the whole proceedings of the present case *A.S. Diallo (Guinea v. D.R. Congo)*, the relevant provisions of the 1966 UN Covenant on Civil and Political Rights marked presence, at the written and oral phases, and formed object of the submissions of the contending parties. This remarkable feature of the *cas d'espèce* before the International Court of Justice is not to be underestimated. Already in its Application Instituting Proceedings (of 28 December 1998), the applicant State contended that under the Covenant on Civil and Political Rights, together with the 1948 Universal Declaration of Human Rights, “no one may be arrested or

detained unless proved guilty according to law by an impartial tribunal acting with regard for the presumption of innocence and the rights of the defence” (p. 29 *in fine*).

12. In its Memorial (of 23.03.2001), Guinea invoked the “relevant principles” applicable in case of “arbitrary arrest and detention and expulsion”, as enshrined in Articles 9 (1) and 13 of the Covenant on Civil and Political Rights (paras. 3.6 and 3.33). On its part, the respondent State, the D.R. Congo, in its Counter-Memorial (of 27.03.2008), addressed the point at issue (para. 1.03), challenging the alleged breaches of Articles 9 and 13 of the Covenant (paras. 1.24-1.31). Shortly afterwards, in its Reply (of 19.11.2008), Guinea dwelt upon the point at issue, at greater length, elaborating further on its submissions of violations — on the part of the D.R. Congo — of Articles 9 (1) to (4) of the Covenant.

13. This occurred, in Guinea’s view, on account of the arrests and detentions of Mr. A. S. Diallo in 1988-1989 and in 1995-1996, expressly referred to (paras. 1.17-1.48), which Guinea regarded as arbitrary, as the alleged victim was not informed of the reasons for his arrests and detentions and the charges against him, nor brought before a judge or a court to decide on their lawfulness within a reasonable time. Furthermore, Guinea sustained that the expulsion of the original complainant from the D.R. Congo in 1996 was effected not in conformity with the Covenant on Civil and Political Rights (Article 12 (4)), nor with the African Charter on Human and Peoples’ Rights (Article 12 (2)) (paras. 1.60-1.90).

14. On its part, in its Rejoinder (of 05.06.2009), the D.R. Congo controverted the applicant State’s submission that it had breached Article 9 (1) to (4) of the Covenant (paras. 1.18-1.35 and 1.39), also expressly referring to Mr. A. S. Diallo’s arrests and detentions of 1988-1989 as well as of 1995-1996 (paras. 1.07-1.49). The two contending Parties dwelt further upon their points in the course of the oral phase of the proceedings before the Court. Thus, in its pleadings of 19.04.2010, Guinea again invoked Articles 9 and 13 of the Covenant, in combination with Article 6 of the African Charter, and Article 36 (1) (b) of the 1963 Vienna Convention on Consular Relations (*cf. infra*)³.

15. Guinea concentrated attention particularly on Article 9 (1) to (5) of the Covenant⁴. For its part, the D.R. Congo, in its pleadings of 26.04.2010, argued that there had been no breach, on its part, of Articles 9 and 13 of the Covenant (on account of Mr. A. S. Diallo’s expulsion of 31.01.1996)⁵. The controversies between Guinea and the D.R. Congo were, thus, sustained by them throughout the whole proceedings of the present case before the Court, in their written and oral phases.

16. The important point here to be retained and singled out, in my perception, is precisely that, in the present case of *A.S. Diallo (Guinea v. D.R. Congo)*, the two contending Parties clearly relied on, as the applicable law in the *cas d’espèce*, mainly the UN Covenant on Civil and Political Rights, and also the African Charter on Human and Peoples’ Rights. It is highly significant — perhaps a sign of the new times — that the ICJ is here called upon, by the contending Parties themselves, to determine whether there has been a breach, or some breaches, by the respondent State, of the relevant provisions of the Covenant and the African Charter, in addition to the relevant provision of the 1963 Vienna Convention.

³ICJ, *Compte rendu* CR 2010/1, of 19.04.2010, p. 34, para. 24; and p. 50, para. 39; and p. 54, paras. 52-55.

⁴*Ibid.*, pp. 36-39, paras. 31-37; and *cf.* ICJ, *Compte rendu*. CR 2010/5, of 28.04.2010, pp. 18-19, paras. 23-24.

⁵ICJ, *Compte rendu* CR 2010/3, of 26.04.2010, pp. 32-36, paras. 58, 62-63, 66 and 70.

17. It may well be that the present case has undergone a certain metamorphosis, since the early days of the Application Instituting Proceedings (of 28.12.1998) and the Court's Judgment on Preliminary Objections (of 24.05.2007), followed by the subsequent proceedings till the present Judgment on the Merits (of 30.11.2010). Earlier on, much emphasis was placed on property rights and diplomatic protection, but enthusiasts of those two traditional issues seemed gradually to lose some or much of their interest (still dreaming of, or longing for, *Barcelona Traction* added to the *Mavrommatis* fiction remindful of Vattel), as the dynamics of the present case has fortunately taken a new course, in the written and oral phases concerning the merits (and reparation).

18. To my mind, the truth is that, along the proceedings on the merits (written and oral phases), the present case has taken the form — as it should — of a clear case of *human rights protection*. After all, since the days of Ulpiano (*circa* 170-228 of our era), *honeste vivere* comes first. *Vivere* itself comes before *habere*, and *dignitatem vivere* surely stands above property rights. Well above discretionary diplomatic protection, this has become a case of human rights protection, and one with far greater interest, in my view, for the *jus gentium* of our times. Each case has a dynamics of its own, and this development in the *cas d'espèce* should not pass unnoticed.

19. It is indeed remarkable that a Court, such as the ICJ, which is entrusted with the settlement of inter-State disputes, is at last requested, in the exercise of its function in contentious matters, to settle a dispute on the basis of two human rights treaties (one of the most important UN human rights treaties, the 1966 Covenant on Civil and Political Rights, and the African Charter on Human and Peoples' Rights), in addition to the relevant provision of the 1963 Vienna Convention on Consular Relations. The submissions of the contending Parties before the Court have been based, on those three treaties, which the two contending States themselves came to identify as the applicable law in the *cas d'espèce*.

20. At least one basic lesson can be extracted there from. This lesson is far more important than the already acknowledged impact of International Human Rights Law even upon a voluntarist, inter-State mechanism, such as diplomatic protection. Beyond the restricted confines of discretionary diplomatic protection, we can nowadays reckon that we have before us as essentially a human rights case, a case pertaining to the international protection of human rights. It is lodged with this Court within the confines of an inter-State mechanism, the one envisaged by the Committee of Jurists which originally devised the PCIJ Statute in 1920, which became, *mutatis mutandis*, the ICJ Statute in 1945.

21. The fact that the mechanism remains a strictly inter-State one, rather anachronistically, as if attempting to defy the ineluctable passing of time, does not mean that the reasoning of the ICJ should nowadays remain also one developed on a strictly inter-State perspective, a reasoning which can only behold States (cf. paras. 203-205, *infra*). We have before us a human rights case, a case concerning the rights of Mr. A. S. Diallo under the UN Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights (in addition to the 1963 Vienna Convention), in respect of the arrests and detentions he was subjected to in 1988-1989 and 1995-1996, prior to his expulsion from the country of his long-time residence in 1996. Despite its inter-State procedure, the Court is called upon to pronounce on the rights of a human person, beyond the inter-State straightjacket.

22. Ours are the times of a new *jus gentium*, focused on the rights of the human person, individually or collectively, which the "*droit d'étatistes*" of the legal profession insist on refusing to reckon, or rather on refusing or failing to understand, willingly or not. Much to the credit of both Guinea and the D.R. Congo, the ICJ is now called upon to settle a dispute brought into its

cognizance, in the course of the proceedings on the merits, on the basis of two human rights treaties (the 1966 Covenant on Civil and Political Rights and the 1981 African Charter on Human and Peoples' Rights) which have a prominent place in the contemporary *corpus juris* of the International Law of Human Rights, in addition to the 1963 Vienna Convention on Consular Relations.

23. In respect of the merits (and reparation), this is indeed and clearly a case pertaining to human rights protection, rather than diplomatic protection. This latter was the *means* (or the tool) whereby the complaint was lodged with the Court, once the cause of Mr. A. S. Diallo was espoused by his State of origin or nationality. But diplomatic protection, ineluctably discretionary in character, has already played its *instrumental* role, and the case now before the Court is *substantively* one pertaining to human rights protection.

2. Invocation and Incidence of the 1981 African Charter on Human and Peoples' Rights.

24. Both the D.R. Congo and Guinea focused their pleadings, — which I have taken the care to review in the present Separate Opinion, — on the UN Covenant on Civil and Political Rights, in so far as the fate of Mr. A. S. Diallo as an individual is concerned; yet, as already indicated, two other treaties were referred to, namely, the 1981 African Charter on Human and Peoples' Rights, and the 1963 Vienna Convention on Consular Relations, also in respect of Mr. A. S. Diallo's fate as an individual. I shall likewise review their pleadings in relation to these three treaties.

25. In so far as the African Charter on Human and Peoples' Rights is concerned, in the consideration of the present case *A.S. Diallo*, it was brought into the picture only at a late stage of the written phase of the proceedings before the Court. It was not until its Reply (of 10.11.2008) that Guinea invoked Article 12 (4) of the African Charter, in connection with the corresponding Article 13 of the UN Covenant on Civil and Political Rights, in its argument on the limits imposed by international law on the expulsion of aliens (paras. 1.60-1.71). The Rejoinder (of 05.06.2009) of the D.R. of Congo did not touch on this point, and concentrated its views, at that stage, only on the alleged unlawfulness of the arrests and detentions of Mr. Diallo in 1988-1989 and 1995-1996, not on his expulsion.

26. In its oral arguments, in addressing the arrests and detentions of Mr. A. S. Diallo, Guinea sustained breaches of “Article 9 of the 1966 Covenant on Civil and Political Rights, to which might be added Article 6 of the African Charter on Human and Peoples' Rights”⁶. Neither Guinea nor the D.R. Congo dwelt much further upon the African Charter in the course of the proceedings, but this did not impede the Court to develop, as it rightly did, its own reasoning to determine the breaches of the relevant provisions of both human rights treaties.

27. In the circumstances of the case, the ICJ was, in my view, perfectly entitled to do so, even *motu proprio*, in so far as the African Charter (in combination with the aforementioned Covenant) is concerned. It may be added that, in Article 60, on “Applicable Principles”, the African Charter discloses a wide horizon for the exercise of its hermeneutics, in providing that its application (by the African Commission — and nowadays also the African Court — on Human and Peoples' Rights) is to:

“draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the

⁶ICJ, *Compte rendu* 2010/1, of 19.04.2010, para. 24, and cf. para. 26.

Charter of the United Nations, the Charter of the [then] Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the specialized agencies of the United Nations of which the Parties to the present Charter are members"⁷.

28. The ICJ, as "the principal judicial organ of the United Nations" (Article 92 of the UN Charter), was perfectly entitled, in the *cas d'espèce* to proceed, *sponte sua*, to the legal construction it undertook to determine the breach of Article 6 of the African Charter together with Article 9 (1) of the UN Covenant on Civil and Political Rights (paras. 74-79). The Court further referred to the relationship between Article 5 of the African Charter and Article 7 of the aforementioned Covenant, in respect of the African Charter's provision on "the right to the respect of the dignity inherent in a human being" (*cit.* in para. 84).

3. Invocation and Incidence of the 1963 Vienna Convention on Consular Relations.

29. Besides the relevant provisions of the Covenant and of the African Charter (*supra*), the contending parties also invoked, throughout the whole proceedings of the present case before the Court, the 1963 Vienna Convention on Consular Relations, and in particular its Article 36 (1) (b). Guinea and the D.R. Congo thus acknowledged such provisions of those three treaties as conforming the applicable law in the *cas d'espèce*. As for Article 36 (1) (b) of the 1963 Vienna Convention, it was Guinea which first invoked and dwelt upon it, at some length, in its Memorial (of 23.03.2001).

30. On the basis of the case-law of the ICJ on the matter, Guinea identified, in its Memorial, the *right of the individual* under that provision of the 1963 Vienna Convention (to be informed of consular assistance and to avail himself of it if he so wished), and the corresponding obligations of the States Parties (to secure that consular assistance be provided) under that Convention, — none of which had in its view been complied with in the present case (paras. 3.11-3.12, 3.30.2, 4.4 and 5.1.1). In its Counter-Memorial (of 27.03.2008), the D.R. Congo challenged the submission of Guinea of a breach of Article 36 (1) (b) of that Convention, by arguing that "Guinea's Ambassador in Kinshasa was aware of Mr. Diallo's arrest and detention in anticipation of his deportation to Conakry" (para. 1.20, and paras. 1.18-1.19 and 1.21-1.23).

31. In its Reply (of 19.11.2008), Guinea contended that "the facts establishing the elements of the violation of the 1963 Vienna Convention" were, in its view, "unquestionable" (para. 1.7). In reiterating, and insisting on, its position (paras. 3.3.1 and 4.1.1), Guinea stated:

"At no time in either 1988-1989 or 1995-1996 was Mr. Diallo, a Guinean national, informed of his rights under Article 36, paragraph 1(b), of the Vienna Convention on Consular Relations. (...) The DRC should have read all three sentences in Article 36, paragraph 1(b), of the 1963 Convention. As stated in the third sentence, the competent authorities of the receiving State 'shall inform the person concerned without delay of his rights under this subparagraph'. This third element cannot be ignored. (...) In the present case Zaire therefore bore an obligation under the 1963

⁷And, further to this provision, Article 61 of the African Charter adds that the African Commission is also to

"take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions laying down rules expressly recognized by member States of the [then] Organization of African Unity, African practices consistent with international norms on human and peoples' rights, customs generally accepted as law, general principles of law recognized by African States as well as legal precedents and doctrine".

Convention to ‘inform the person concerned without delay of his rights’ at the time of his arrest in 1988, and his arrests in 1995 and 1966. This was not done, and it constitutes a further violation of Mr. Diallo’s rights.” (Paras. 1.49 and 1.51-1.53.)

32. In the course of the oral arguments of 19.04.2010 before the Court, Guinea reiteratedly invoked Article 36 (1) (b) of the Vienna Convention on Consular Relations in support of its views⁸. In its turn, the D.R. Congo argued, in the public sitting of 26.04.2010, that there had been no breach on its part of that provision of the 1963 Vienna Convention. In its argument, the D.R. Congo pursued the matter from a strict *inter-State* outlook, referring to the contacts (and a letter) between the Ambassador of Guinea in Kinshasa and the authorities of the Congolese government⁹. The debates between the two contending parties, by no means ended in respect of the three treaties invoked in general before the Court: they were to continue in relation to the specific rights thereunder that were at stake, — which I shall now turn my attention to.

III. The Saga of the Subject of the Rights: Considerations on the Vindication of the Protected Rights.

33. The individual rights vindicated in the present case were alleged to have been breached in the factual context to the arrests, detentions and expulsion to which Mr. A. S. Diallo was subjected, in the period ranging from 1988 to 1996. Such rights comprised the right to liberty and to security of person (Articles 9 (1) to (4) of the UN Covenant on Civil and Political Rights), the right not to be expelled from a State without a legal basis (Article 13 of the Covenant), the right not to be subjected to mistreatment (Articles 7 and 10 of the Covenant), added to the right to information on consular assistance in the framework of the guarantees of the due process of law (Article 36 (1) (b)) of the 1963 Convention on Consular Relations.

34. The question may be asked why this latter is listed herein, as an individual right, provided for in a Convention having in mind consular relations, and celebrated in 1963 in pursuance of a predominantly inter-State optics. I shall address this question, characterizing the right to information on consular assistance as an *individual right*, within the conceptual universe of human rights, in a subsequent section (VIII, *infra*) of the present Separate Opinion, so as to clarify the point and discard any doubts that might still subsist as to the characterization of the right to information on consular assistance. Before embarking on such clarification, may I proceed to examine the aforementioned rights, one by one, in the subsequent paragraphs.

1. The Right to Liberty and Security of Person.

(a) *The Arrests and Detention of 1988-1989.*

35. The first right invoked in the present case was Mr. A. S. Diallo’s right to liberty and security of person, under Article 9 (1) to (4) of the Covenant. The right is asserted in relation to his arrests and detention in the D.R. Congo in 1988-1989 and in 1995. The contending Parties did not dispute the fact that Mr. A. S. Diallo was arrested on 25.01.1988, nor did they disagree that he was placed in detention on 27.01.1988, in the Makala prison, and one year later released, on

⁸ICJ, *Compte rendu*, doc. CR 2010/1, of 19.04.2010, pp. 27, 31 and 34-36, paras. 3 (v), 18, 24 and 28-29; ICJ, *Compte rendu*, doc. CR 2010/2, of 19.04.2010, p. 37, para. 7.

⁹ICJ, *Compte rendu*, doc. CR 2010/3, of 26.04.2010, pp. 26-31, paras. 48-49 and 54; and cf. also *ibid.*, pp. 18 and 26-30, paras. 15, 42-47 and 50-53.

03.01.1989, due to a Presidential pardon granted to him, after intervention by Guinea's Ambassador¹⁰.

36. Guinea argued that Mr. A. S. Diallo's arrest and detention in 1988-1989 were arbitrary, as the sole reason for his imprisonment in January 1988 lay in the fact that the Zairean State was greatly in debt to his company Africom-Zaire¹¹. That was in breach, in the view of Guinea, of the D.R. Congo's obligations arising under Article 9 of the Covenant¹². For its part, the D.R. Congo argued that "Mr. Diallo had been imprisoned in 1988 pursuant to a judicial investigation opened by law officers in the Prosecutor's Office of Kinshasa into acts of fraud of which he had, rightly or wrongly, been accused"¹³. The D.R. of Congo did not challenge Guinea's factual allegations with regard to Mr. A. S. Diallo's arrest and detention in 1988-1989, but considered it to be a new claim¹⁴.

37. The relevant provisions of the Covenant to the present line of consideration of the *cas d'espèce*, are those enshrined into Article 9 (on the right to liberty and security of person), which states:

- "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 procedure as established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

¹⁰ICJ, *Observations of Guinea to the Preliminary Objections of the D.R. Congo*, para. 1.41; ICJ, Oral Arguments CR 2006/51, para. 18, ICJ, *Reply of Guinea*, para. 1.13-1.16. Following this pardon, the *Procureur Général* at the Prosecutor's Office in Kinshasa closed the case on 28.01.1989, for inexpediency of prosecution; ICJ, *Observations of Guinea to the Preliminary Objections of the D.R. Congo*, para. 1.43.

¹¹ICJ, *Reply of Guinea*, para. 1.9.

¹²Guinea referred to a letter dated 04.07.1988 signed by Mr. S. Pida Nbagui, Zaire's First State Commissioner, and sent to the President of the Judicial Council of the Republic of Zaire; ICJ, *Reply of Guinea*, para. 1.14; ICJ, *Observations of Guinea on the D.R. Congo's Preliminary Objections*, Annex 15. That letter indicated, added Guinea, that the head of the D.R. Congo's Executive branch alone gave the order for Mr. A. S. Diallo's arrests and incarcerations, in an example of "the most complete commingling of powers"; ICJ, *Reply of Guinea*, para. 1.15.

¹³ICJ, *Rejoinder of the D.R. Congo*, para. 1.16. It was therefore, — the D.R. of Congo added, — a temporary detention for reasons of judicial investigation. The D.R. of Congo reproduced the version of the facts set out by the Guinean Embassy in Kinshasa, in a letter to the Guinean Minister of Foreign Affairs in Conakry, dated 03.02.1988; ICJ, *Rejoinder of the D.R. Congo*, para. 1.14.

¹⁴ICJ, *Rejoinder of the D.R. Congo*, paras. 1.11 and 1.13.

38. As to the first point to be herein considered, as to whether there has been a violation by the D.R. Congo of the conditions for permissive deprivation of liberty (principle of legality, prohibition of arbitrariness — *Article 9 (1)* of the Covenant), it ensues, from the evidence produced in the present case, that the Zairian judicial authorities did not issue any arrest warrant in 1988. This can surely be regarded, under the relevant provisions of the Covenant on Civil and Political Rights, as an indication of an *arbitrary* arrest. This is in line with the notion of *arbitrariness* under the Covenant, which I subsequently review in this Separate Opinion (section VI, *infra*). Moreover, there was no decision by the competent authorities as to the extension of Mr. A. S. Diallo's detention awaiting trial (*détention préventive*). The fact remains that Mr. A. S. Diallo remained one year in detention without any further judicial proceedings or investigation, charging him of any criminal offense.

39. The D.R. Congo did not provide any evidence that Mr. A. S. Diallo was arrested and imprisoned, as alleged, in the context of a true judicial investigation opened against him for alleged acts of fraud. In this regard, the Human Rights Committee has stated that arrests and detentions effected without charges constitute a violation of Article 9 (1) of the Covenant¹⁵. There is no indication that he was charged with a criminal offense at any time. In the absence of any relevant State party information, it can be concluded, — as the Court correctly did (para. 79), — that Mr. A. S. Diallo's deprivation of liberty was *arbitrary* and in violation of article 9 (1) of the Covenant.

40. Moving on to the right (of the arrested or detained person) to be informed of the reasons for the arrest or detention and the corresponding charges (*Article 9(2)* of the Covenant), Guinea claimed that Mr. A. S. Diallo was never specifically informed, either of the purported acts constituting the alleged offence, or of the provisions under which the accusation was brought against him¹⁶. According to Guinea, the *only* information given to Mr. A. S. Diallo by the judicial authority before which he was brought during his detention was that his arrest was “related to the Prime Minister's *communiqué*”¹⁷. The judicial authority therefore had no file, no indictment, nothing to show to Mr. A. S. Diallo authorizing his arrest and imprisonment, other than the Prime Minister's *communiqué*.

41. The D.R. Congo, on its part, acknowledged that Mr. A. S. Diallo was brought to the office of the Judicial Inspector, who told him that his arrest was related to the Prime Minister's press release (about his being accused of fraud)¹⁸. It thus appears established that a press release of Prime Minister accused Mr. A. S. Diallo of fraud¹⁹, and that this accusation was made public on radio and television channels on 20.01.1988, as well as by the press²⁰. There is no evidence that, at

¹⁵UN/Human Rights Committee (HRC), case *Titiahonjo v. Cameroun*, 2007, n° 1186/2003, para. 6.5; HRC, case *Monja Jaona v. Madagascar*, 1985, No. 132/1982, para. 14; HRC, case *Mpandanjila v. D.R. Congo*, 1986, No. 138/1983, para. 10.

¹⁶Guinea provided documentary evidence of a transcript of Mr. A. S. Diallo, drawn up on 29.10.2008 by two process servers for the courts and tribunals of Conakry, where Mr. A. S. Diallo stated: — “[T]hey did not show me a document of any kind authorizing my arrest, nor did they explain why I was being arrested”; ICJ, *Reply of Guinea*, Annex 1, answer to question 3.

¹⁷ICJ, *Reply of Guinea*, Vol. II, p. 6.

¹⁸ICJ, *Rejoinder of the D.R. Congo*, para. 1.22.

¹⁹CIIJ, *Duplique de la R.D. Congo*, para. 1.22 ; ICJ, *Compte rendu* CR 2010/1, p. 28.

²⁰Letter sent to Guinean Minister for Foreign Affairs in Conakry, dated 03.02.1988. The D.R. Congo referred to a letter dated 03.02.1988 of Mr. Lounceny Kouyate (ICJ, *Compte rendu* CR 2010/3, pp. 16-17), Counsel at the Guinean Embassy in Conakry, in support of its contention that Mr. A. S. Diallo and Guinea itself were aware of the accusations against Mr. A. S. Diallo; ICJ, *Observations of Guinea on the D.R. Congo's Preliminary Observations*, of 03.07.2003, pp. 17-18.

the moment of Mr. A. S. Diallo's arrest, Congolese authorities informed him of the reasons for his arrest, nor is there any evidence that they informed him of the charges against him.

42. The UN Human Rights Committee, on its turn, has stated that the resulting obligation is not merely one of form. Not only must the individual concerned be informed at the time of arrest, but the information given must also be sufficiently specific²¹, so that he knows exactly the reason of the arrest. In the Committee's own words,

“[T]he Committee is of the opinion that article 9(2) of the Covenant requires that anyone who is arrested shall be informed sufficiently of the reasons for his arrest to enable him to take immediate steps to secure his release if he believes that the reasons given are invalid or unfounded. It is the view of the Committee that it was not sufficient simply to inform Adolfo Drescher Caldas that he was being arrested under the prompt security measures without any indication of the substance of the complaint against him.”

In the present case *A.S. Diallo*, in the absence of relevant and precise information from the D.R. Congo, Mr. A. S. Diallo's arrest and detention in 1988 have amounted to a violation of Article 9 (2) of the Covenant.

43. Turning now to the next point, as to rights of persons in custody and pre-trial detention, it may be recalled that *Article 9 (3)* of the Covenant, — already quoted, — stipulates that “anyone arrested or detained on a criminal charge “shall be brought promptly before a judge” or other judicial officer and “shall be entitled to trial within a reasonable time or to release”; it adds that it “shall not be the general rule that persons awaiting trial shall be detained in custody”, but release may be subject to “guarantees to appear for trial” and, should occasion arise, “for execution of the judgment”.

44. In this provision, what does “promptly” (“*dans le plus court délai*”) exactly mean? The Covenant itself has left it open, and so have the corresponding provisions of the European Convention of Human Rights (Article 5 (3)) and the American Convention on Human Rights (Article 7 (5)), which have given rise to a considerable case-law. However, the Human Rights Committee, in its *general comment* No. 8 (of 1982), on Article 9, has emphasized that, in no event, this may last longer than “a few days” (para. 2)²². In interpreting the requirement that a person be brought before a judge or another legal officer “*authorized by law to exercise judicial power*”, one may recall the criteria developed by the ECtHR in the *Schiesser v. Switzerland* case (1979, under Article 5 (3) of the ECHR) for the interpretation of that provision (para. 30), to the effect that:

“Such a judicial officer must be independent of the executive, personally hear the person concerned and be empowered to direct pre-trial detention or to release the person arrested.”

45. This case-law has been confirmed by the Human Rights Committee in the case *Kulomin v. Hungary* (1996), wherein the Committee pondered that:

²¹HRC n.°43/1979, case *Adolfo Drescher Cadas v. Uruguay*, 21.07.1983, paras. 13.2 and 14.

²²Cf. case *Fillastre and Bizouarn v. Bolivia*, No. 336/1988; and cf. also, in the same sense, case *McLawrence v. Jamaica*, No. 702/1996, and case *Kurbanov v. Tajikistan*, No. 1096/2002.

“It is inherent to the proper exercise of judicial power that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with.”²³

In the circumstances of the *Kulomin v. Hungary* case, the Committee was not satisfied that the public prosecutor could be regarded as having the institutional objectivity and impartiality necessary to be considered an officer authorized to exercise judicial power within the meaning of Article 9 (3) of the Covenant. This provision enshrines the principle that pre-trial detention cannot become the general rule, and is thus to be limited to essential reasons²⁴, and should anyway be as short as possible.

46. It should not pass unnoticed that the Covenant regards pre-trial detention, not surprisingly, as an exceptional measure. In the *cas d'espèce*, it is not disputed that Mr. A. S. Diallo was taken on 25.01.1988, the day of his arrest, to the office of the Judicial Inspector, where he was told by the Inspector that his arrest was related to the First State Commissioner's press release. However, Guinea considered that the Judicial Inspector assigned to the Prosecutor's Office, before which Mr. A. S. Diallo was brought, could not be characterized as an officer authorized by law within the meaning of Article 9 (3) of the Covenant²⁵. Guinea added that the aforementioned judicial inspector was obeying the direct orders of the First State Commissioner²⁶.

47. The D.R. Congo asserted that the Covenant does not state that the authority referred to must be independent of the Executive²⁷. However, the D.R. Congo has not provided any evidence of a written arrest warrant or a minute of the first interrogation. Neither was Mr. A. S. Diallo brought before a judge or other officer authorized by law to exercise judicial power, according to the obligation set out in Article 9 (3) of the Covenant, under which anyone arrested or detained on a criminal charge must be brought promptly before a judge or another officer authorized by law to exercise judicial power. During his entire stay in the prison of Makala (from 27.02.1988 to 03.02.1989), Mr. A. S. Diallo did not see any judge²⁸. Therefore, it so appears that the D.R. Congo has incurred into a breach of Article 9(3) of the Covenant.

48. Next, the question may be asked whether the D.R. Congo has breached the right (of an arrested or detained person) to *habeas corpus* (Article 9 (4) of the Covenant)²⁹. This right, to have the detention reviewed in court without delay, exists irrespective of whether deprivation of liberty is unlawful. The Human Rights Committee has stated that the person deprived of liberty must have access to a lawyer³⁰. In the present case, Mr. A. S. Diallo has not been presented any arrest warrant when he was detained, and thus did not have the opportunity to obtain a ruling on the lawfulness or otherwise of his detention. It thus appears that the D.R. Congo has incurred into a breach also of Article 9(4) of the Covenant.

²³No. 521/1992.

²⁴Such as danger of suppression of evidence, of repetition of the offence, or of absconding.

²⁵ICJ, *Compte rendu* CR 2010/1, of 19.04.2010, paras. 16-17; ICJ, *Reply of Guinea*, p. 13, para. 1.24.

²⁶ICJ, *Reply of Guinea*, para. 1.24.

²⁷ICJ, *Rejoinder of the D.R. Congo*, para. 1.26.

²⁸ICJ, *Compte rendu* CR 2010/1, of 19.04.2010, paras. 17-17.

²⁹According to Guinea, Mr. A. S. Diallo was not given the opportunity to take any proceedings to obtain a ruling on the lawfulness of his detention; ICJ, *Reply of Guinea*, p. 14. In turn, the D.R. Congo stated that Guinea has not produced any evidence to show that Mr. A. S. Diallo was prevented by the D.R. Congo from taking such proceedings; ICJ, *Rejoinder of the D.R. Congo*, para. 1.34.

³⁰HRC, *Berry v. Jamaica* case, 1994, No. 330/1988, para. 11.1.

49. As can be seen from the preceding paragraphs, the contending parties — unlike the Court — have taken into account Article 9 of the Covenant *as a whole*, as they should. I have also taken into account Article 9 of the Covenant *as a whole, comme il faut*, in the circumstances of the present case. The Court, however, took into account only paragraphs (1) and (2) of Article 9, as the arguments on paragraphs (3) and (4) of Article 9 pertained to the arrests and detention of Mr. A. S. Diallo of 1988-1989, which the Court excluded from the scope of its considerations in the present case. As I have dissented from that part of the Court's decision (corresponding to resolutive point No. 1 of the *dispositif*), I feel it my duty to pronounce on the breach of Article 9 of the Covenant *as a whole*.

(b) *The Arrests and Detention of 1995-1996.*

50. The contending parties agreed that Mr. A. S. Diallo was arrested and detained more than once in late 1995 and early 1996, but that was as far as they did agree³¹. They disagreed on the duration of the periods in detention (cf. *infra*)³². Guinea maintained that Mr. A. S. Diallo was placed in detention on 05.11.1995 and that he remained imprisoned first for two months, before being released on 10 January 1996, “further to intervention by the [Zairean] President himself”³³. Mr. A. S. Diallo was, according to Guinea, then rearrested and imprisoned for two more weeks before being expelled³⁴. Mr. A. S. Diallo is thus said to have been detained for 75 days in all³⁵.

51. The D.R. Congo, in dismissing these allegations by Guinea, argued that the duration and conditions of Mr. A. S. Diallo's detention during the expulsion process were in conformity with Zairean law; in particular, it contended that the statutory maximum of eight days' detention was not exceeded. According to the D.R. Congo, Mr. A. S. Diallo was arrested on 05.11.1995 and then released two days later³⁶. At a date not provided by the D.R. Congo (but allegedly within eight days before 10.01.1996), Mr. A. S. Diallo was rearrested with a view to expulsion, and then he was released on 10.01.1996 because the Government had been unable to find an aircraft leaving for Conakry within the statutory period of no more than 8 days of detention³⁷. The D.R. Congo claimed at last that Mr. A. S. Diallo was under arrest in Kinshasa on 25.01.1996 (6 days at least before being expelled), but it did not say since when³⁸.

52. It so appears that the respondent State did not provide evidence for all its assertions. In this regard, the only proven facts, not contested by the contending Parties, are the fact that Mr. A. S. Diallo was *arrested on 05.11.1995*³⁹, as well as *his release on 10.01.1996*⁴⁰. However,

³¹ICJ, *Reply of Guinea*, para. 1.29; ICJ, *Counter-Memorial of the D.R. Congo*, pp. 11-12, paras. 1.09-1.11; ICJ, *Compte rendu* CR 2006/50, pp. 39-40, paras. 89-92.

³²The Congolese Legislative Order of 12.09.1983 provided for an 8-day statutory limit on detention.

³³ICJ, *Memorial of Guinea*, para. 2.63.

³⁴ICJ, *Reply of Guinea*, para. 1.40.

³⁵ICJ, case *A.S. Diallo (Guinea v. D.R. Congo)*, Judgment of 24.05.2007 (Preliminary Objections), para. 17; ICJ, *Memorial of Guinea*, para. 2.64. Guinea relied on the documentary evidence of *Avocats sans Frontières* (press release) and an article from the Kinshasa *Business and News*. An article in the Guinean daily newspaper *Horoya* (edition of 06.08.1996), — which echoed the Zairean weekly *L'Ouragan* (edition of 31.01.1996), — was also cited by Guinea. Cf. ICJ, *Memorial of Guinea*, Annexes 190, 193 and 206, respectively.

³⁶ICJ, *Counter-Memorial of the D.R. Congo*, para. 1.10, and Annex 7.

³⁷*Ibid.*, para. 1.11.

³⁸*Ibid.*, para. 1.21.

³⁹*Ibid.*, para. 1.10, and Annex 7: Committal Note (Billet d'écrou); in such handwritten Committal Note it can be read that it was said: — «Sieur Diallo est détenu à la permanence jusqu'à son expulsion du Zaïre».

the D.R. Congo did not prove its assertion that he was released in between those dates; nor did it specify exactly when was Mr. A. S. Diallo incarcerated after 10.01.1996, before he was deported⁴¹.

53. Article 9 of the Covenant on Civil and Political Rights refers, in general terms, to *every* type of deprivation of liberty⁴², whether pursuant a judicial investigation, or following an administrative decision. Article 9 of the Covenant thus applies to the arrests and detentions of Mr. A. S. Diallo in 1995-1996. *Article 9(1)* of the Covenant provides that any deprivation of liberty can only be effected in accordance with a procedure established by law. In the present case, the D.R. Congo did not produce any evidence that Mr. Diallo was likely to evade decisions taken by Zairian authorities and flee away. Nor did it produce any evidence that Mr. A. S. Diallo was released between 05.11.1995 and 10.01.1996. Nor did it provide the decisions extending the detention beyond the first 48 hours⁴³. In any event, the periods of arrests altogether exceeded the statutory period of 8 days⁴⁴.

54. Moreover, the D.R. Congo did not explain why, or whether, it was “absolutely necessary” to incarcerate again Mr. A. S. Diallo on 17.01.1996⁴⁵; nor did it ever demonstrate that it was absolutely necessary to extend Mr. A. S. Diallo’s detention. In conclusion, Mr. A. S. Diallo’s arrest and detention in 1995-1996 appears, in the light of the aforementioned, arbitrary and unlawful, and thus in breach of *Article 9(1)* of the CCPR, as the Court rightly concluded (Judgment, paragraph 79).

55. Next, as to Article 9(2) of the Covenant, in the present case Mr. A. S. Diallo was neither informed of the reasons for the arrests nor promptly informed of the charges against him. He was not even informed of the adoption of the decree of 31.10.1995⁴⁶. The D.R. Congo itself admits that, between 31.10.1995, when the expulsion decree was adopted, and 31.01.1996, when Mr. A. S. Diallo was actually deported, he did not know that there was already an expulsion order against him⁴⁷. It thus appears that, by not informing Mr. A. S. Diallo of the reasons for his arrests and detentions in 1995-1996, the D.R. Congo incurred in breach of *Article 9 (2)* of the Covenant, as the Court rightly determined (Judgment, paragraph 82).

⁴⁰ICJ, *Reply of Guinea*, para. 1.32; MG, Annex 194.

⁴¹The respondent State simply gave two clues: the first was the reference to “several days” after 10.01.1996, and the second was its own statement that on 25.01.1996 Mr. A. S. Diallo was “still in detention in Kinshasa six days before being expelled”; cf. ICJ, *Counter-Memorial of the D.R. Congo*, p. 12, para. 1.11, and p. 16, para. 1.21.

⁴²Cf. text reproduced in para. 35, *supra*.

⁴³ICJ, *Reply of Guinea*, para. 1.46. If Mr. Diallo was released on 10.01.1996, he would have been arrested on 02.01.1996, but there was no proof that he was freed before 02.01.1996.

⁴⁴There is some contradiction in the arguments of the D.R. Congo: it stated that he was released on 10.01.1996 because the Government had been unable to find an aircraft leaving for Conakry, within the statutory period of no more than 8 days of detention, pending expulsion from the Congo; ICJ, *Counter-Memorial of the D.R. Congo*, para. 1.11. However, the only document produced, dated 10.01.1996, stated that Mr. A. S. Diallo had been released “for inquiries”; ICJ, *Memorial of Guinea*, Annex 194. Inaccuracies of the kind make the respondent State’s argument appear vague and without foundation.

⁴⁵ICJ, *Reply of Guinea*, para. 1.40; and Annex 1, Answer to question 22.

⁴⁶ICJ, *Reply of Guinea*, para. 1.48; Annex 1, answer to questions 15, 20 and 26.

⁴⁷ICJ, *Compte rendu* CR 2006/52, pp. 19-20, para. 10.

2. The Right Not to be Expelled from a State without a Legal Basis.

56. Another right vindicated in the framework of the *cas d'espèce*, was the right not to be expelled from a State without a legal basis, set forth in *Article 13* of the Covenant, which states:

“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 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.”

57. In the present case, the fact was not disputed that, on 31.10.1995, the Prime Minister of Zaire issued an expulsion order against Mr. A. S. Diallo⁴⁸, with the following reason: Mr. A. S. Diallo's “presence and conduct have breached public order in Zaire, especially in the economic, financial and monetary areas, and continue to do so”⁴⁹. It was also common ground between the contending Parties that, on 05.11.1995, Mr. A. S. Diallo was placed under arrest with a view to his deportation. However, the parties contested each other's arguments as regards the duration and conditions of the periods of arrest⁵⁰ (cf. *supra*), as well as in respect of the facts related to the specific circumstances of Mr. A. S. Diallo's arrest, detention and expulsion (cf. *supra*).

58. Guinea claimed that Mr. A. S. Diallo's expulsion contravened some international and domestic rules framing the power to expel, namely: a) the respondent State did not fulfil the obligation to state reasons for the expulsion; b) the jurisdictional, formal and procedural rules were deliberately evaded; c) the refusal-of-entry procedure was intentionally and arbitrarily misused to effect an expulsion; and, at last, d) Mr. A. S. Diallo was at no time afforded the opportunity to submit the reasons against his expulsion and to have his case reviewed by the competent authority. All these elements show that the measure taken against Mr. Diallo was wholly arbitrary.

59. There are two different phases in the expulsion of Mr. A. S. Diallo: first, the expulsion decree of 31.10.1995; and secondly, the notice of refusal of entry of 31.01.1996. As for the grounds for expulsion, the lack of statement of reasons (in the legal sense of the term) makes the decree of expulsion vague. In this respect, the African Commission on Human and Peoples' Rights found, in the case of *Amnesty International v. Sudan* (1999), that:

“It is not enough for an arrest to be carried out under a legal provision to satisfy the requirements of Article 6: the law must comply with accepted standards. Thus a decree allowing for arrests for vague reasons, and upon suspicion rather than proven acts, was not in conformity with the African Charter [on Human and Peoples' Rights].”⁵¹

60. As already pointed out, Mr. A. S. Diallo was neither informed of the reasons for the arrests nor promptly informed of the charges against him; he was not even informed of the

⁴⁸ICJ, case *A.S. Diallo (Guinea v. D.R. Congo)*, Preliminary Objections, Judgment of 24.05.2007, paras. 15-16.

⁴⁹ICJ, *Counter-Memorial of the D.R. Congo*, Annex 5 (Decree n° 0043 of 31.10.1995, on deportation of Mr. A. S. Diallo).

⁵⁰ICJ, *Reply of Guinea*, para. 1.31.

⁵¹Cf. African Commission on Human and Peoples' Rights, communications 48/90, 50/91, 52/91 and 89/93, para. 59.

adoption of the 31.10.1995 decree for his deportation⁵². This fact has been admitted by the D.R. Congo⁵³. For that reason, Mr. A. S. Diallo could not submit any reason against the expulsion, nor could he have had his case reviewed by the competent authority, as provided for by *Article 13* of the Covenant. The decree of expulsion was thus not in conformity Article 13 of the Covenant.

61. There is, furthermore, a disagreement between the contending parties as to the form of expulsion of Mr. A. S. Diallo. The D.R. Congo acknowledged that Mr. A. S. Diallo was indeed expelled, and that the notice signed by the immigration officer “inadvertently” referred to “refusal of entry” (*refoulement*), instead of “expulsion”. Guinea sustained, on its part, that Mr. A. S. Diallo was the subjected to a “refusal of entry”⁵⁴. It may here be pointed out that the UN Human Rights Committee, in its *general comment* No. 15, of 1986, on the *position of aliens* under the Covenant on Civil and Political Rights, made it clear that the guarantee of Article 13 of the Covenant relates to any form of “obligatory departure” of aliens, irrespective of how this was described under domestic law⁵⁵ (cf. *infra*). Accordingly, although Article 13 refers to expulsion, it applied likewise to the refusal of entry of Mr. A. S. Diallo.

62. Article 13 of the Covenant states that the individual subject to expulsion must be “allowed to submit the reasons against his expulsion”. Furthermore, the possibility must be afforded “to plead [his] case before the competent national courts”, according to the African Commission on Human and Peoples’ Rights⁵⁶. However, Mr. A. S. Diallo was not given due notice of the decision to expel him before it was carried out, and was not able therefore to oppose any reason against it⁵⁷. Mr. A. S. Diallo should have been enabled to have had his case reviewed by the competent authority.

63. In the leading case of *Hammel vs. Madagascar* (1987)⁵⁸, the UN Human Rights Committee decided against the respondent State because the expellee had not been “indicted nor brought before a magistrate on any charge”, and because “he was not afforded an opportunity to challenge the expulsion order prior to his expulsion” (para. 18.2). The Committee added that the victim “was not given an effective remedy to challenge his expulsion”, and that the State concerned did not show that there were “compelling reasons of national security” to deprive him of that remedy (para. 19.2).

64. In formulating its views on the *Hammel vs. Madagascar* case (1987), the Human Rights Committee also took into account its *general comment* No. 15(27), on the position of aliens under the Covenant, and pointed out in particular that:

⁵²ICJ, *Reply of Guinea*, para. 1.48; Annex 1, answer to questions 15, 20 and 26.

⁵³ICJ, *Compte rendu* CR 2006/52, pp. 19-20, para. 10.

⁵⁴The Court drew attention to this, in its Judgment on Preliminary Objections, stating that Mr. Diallo “was justified in relying on the consequences of the legal characterization thus given by the Zairean authorities”; ICJ, case *A.S. Diallo (Guinea v. D.R. Congo)*, *I.C.J. Reports* 2007 (II), p. 601, para. 46.

⁵⁵On this point, cf. also: ECtHR, Judgment of 05.10.2006, case *Bolat v. Russia* (Application 14139/03), para. 79; ECtHR, Judgment of 12.02.2009, case *Nolan and K. v. Russia* (Application 2512/04), para. 112. And cf. also: UN/International Law Commission (ILC), *Memorandum prepared by the Secretariat — Expulsion of Aliens*, doc. A/CN.4/565, of 10.07.2006, p. 58, para. 67.

⁵⁶Cf. African Commission on Human and Peoples’ Rights, case *Union Inter-Africaine des Droits de l’Homme and Others v. Angola*, No. 159/96, 11.11.1997, para. 20.

⁵⁷Cf. also, on this point, African Commission on Human and Peoples’ Rights, case *Amnesty International v. Zambia*, No. 212/98, 05.05.1999, para. 41 *in fine*.

⁵⁸Communication No. 155/83, Human Rights Committee’s views of 03.04.1987, doc. CCPR/C/29/D/155/1983, pp. 1-9.

“an alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one” (para. 19.2).

In the present case *A.S. Diallo*, the victim did not enjoy either, the right of access to justice (comprising legal assistance) in the context of Article 13 of the Covenant. This Court rightly determined a breach of Article 13 of the Covenant in respect of the circumstances surrounding the expulsion of Mr. A. S. Diallo (para. 74).

3. The Right Not to Be Subjected to Mistreatment.

65. There are two other provisions of the UN Covenant on Civil and Political Rights which are pertinent to the consideration of the present case, namely, Articles 7 and 10 of the Covenant. *Article 7* stipulates that:

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”

And, in addition, *Article 10 (1)* of the Covenant provides that:

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

66. In this connection, the Human Rights Committee has stressed, in its *general comment* No. 29 (on *derogations during a state of emergency*), of 2001, that Article 10 of the Covenant:

“expresses a norm of general international law not subject to derogation. This is supported by the reference to the inherent dignity of the human person in the preamble to the Covenant and by the close connection between Articles 7 and 10” (para. 13.a)⁵⁹.

67. In its Memorial⁶⁰, Guinea claimed that Mr. A. S. Diallo was mistreated during his imprisonment and expulsion. Guinea asserted, on this point, that, in carrying out the deportation order, the law enforcement authorities took Mr. A. S. Diallo away, on 05.11.1995, and secretly placed him in detention in an Immigration Service lock-up, without any form of judicial process or even examination, and that he remained imprisoned there without receiving any visit from his lawyers or officials from the Guinean Embassy until 10.01.1996, i.e., for 75 days.

68. He is alleged to have been incarcerated under dire conditions and to have received no food from the Congolese authorities. In particular, Guinea argued that during “the first four days of [his] detention [he] was kept secretly in a mosquito-infested cell that was permanently illuminated by a very bright light and (...) was deprived of food”⁶¹. Being kept in a cell under those conditions is completely incompatible with Article 10 of the Covenant, according to which “[a]ll persons

⁵⁹The same *general comment* No. 29 adds that “in no circumstances” may States Parties invoke Article 4 (in relation to derogations) “as justification for acting in violation of humanitarian law or peremptory norms of international law”; para. 11).

⁶⁰ICJ, *Memorial of Guinea*, pp. 30-31 and 51 *et seq.*

⁶¹ICJ, *Reply of Guinea*, Annex 1, pp. 6-7.

deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”⁶².

69. Guinea further asserted that Mr. A. S. Diallo’s arrests and expulsion were in violation of the minimum standard of protection owed to aliens⁶³. Moreover, Guinea claimed that this treatment was in breach of such minimum standard and, specifically, of the minimum rules for the treatment of prisoners adopted by ECOSOC in 1955⁶⁴, whose value was reaffirmed by the UN General Assembly in 1990⁶⁵.

70. The D.R. Congo dismissed these claims and asserted that Mr. Diallo was held in a well-appointed facility through which passed all aliens undergoing deportation, there have been no production of evidence to the contrary⁶⁶. It added that at no time did Guinea’s Ambassador in Kinshasa, who followed Mr. A. S. Diallo’s case very closely, complain that their national was subjected to inhuman conditions.

71. In the view of the D.R. Congo, had Guinea presented the Court with evidence that Mr. A. S. Diallo was kept secretly in a mosquito-infested cell that was permanently illuminated by a very bright light and that he was deprived of food — which it did not, — such treatment would not amount automatically to a breach of Article 10 of the Covenant. The D.R. Congo concluded that Guinea had not proved the consequence of the alleged inhuman treatment (physical or mental effects of the circumstances of Mr. Diallo’s incarceration), and there had thus been no breach of Article 10 (1) of the Covenant.

72. In its present Judgment, the Court has found that “it has not been demonstrated that Mr. Diallo was subjected to treatment prohibited by Article 10, paragraph 1, of the Covenant” (para. 89). And the Court’s majority then rejected Guinea’s submissions in this respect (resolutive point 5 of the *dispositif*). Unlike in relation to the previous findings of the Court concerning provisions of the Covenant on Civil and Political Rights (*supra*), on this particular point I regret not to be able to follow the Court’s majority on this particular point.

73. 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.

74. After all, it is the receiving State (of residence), rather than the sending State (of nationality), that is supposed to know what is going on in its own prisons, how are detainees under

⁶²ICJ, *Compte Rendu* CR 2010/5 (translation), para. 23.

⁶³ICJ, *Reply of Guinea*, para. 1.55.

⁶⁴Cf. the *Standard Minimum Rules for the Treatment of Prisoners*, adopted by the I UN Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by ECOSOC resolutions 663 C (XXIV) of 31.07.1957 and 2076 (LXII) of 13.05.1977, in particular Principles 20, 22-26 and 87.

⁶⁵UN, General Assembly resolution 45/111, of 14.12.1990, *Basic Principles for the Treatment of Prisoners*.

⁶⁶ICJ, *Counter-Memorial of the D.R. Congo*, paras. 1.12-1.13, and cf. paras. 1.32-1.33.

its custody being treated. The conditions of living, or of surviving, in the prisons of the world, — in all continents, anywhere in the world, — have been a matter of concern which has, for a long time, transcended legal thinking. Already in the second half of the XIXth century, a universal writer, F.M. Dostoievski, aptly pondered, in his *Souvenirs de la maison des morts* (1862), on the basis of his own personal experience, that the degree of civilization attained by any human society could be assessed by visiting its prisons. This remains so nowadays, anywhere in the world.

4. The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law.

75. Another right vindicated and protected in the framework of the present case *A.S. Diallo*, is the individual right to information on consular assistance, set forth in *Article 36 (1) (b)* of the Vienna Convention on Consular Relations, which significantly provides that:

“If the [national of the sending State] 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 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.”

76. Guinea claimed that Mr. A. S. Diallo was not informed of his right under Article 36 (1) (b) of the Vienna Convention, — neither in 1988 nor in 1995-1996. The D.R. Congo limited itself to asserting that various documents demonstrated that Mr. A. S. Diallo’s case “was known not only to the Guinean consulate in Kinshasa but also to the President of the Republic and the Minister for Foreign Affairs of Guinea”⁶⁷. This Court has held, on previous occasions, that Article 36 (1) (b) of the 1963 Vienna Convention requires the competent authorities of a State Party to advise, without delay, a national of another State party whom such authorities arrest or detain, of his right to the consular assistance guaranteed by that Article (the triad of the *Breard*, *LaGrand*, and *Avena* cases).

77. In this respect, in order to clarify the legal nature and content of the right at issue, I deemed it fit, at the end of the public sitting of the Court held on 26.04.2010, to put to the two contending Parties the following question⁶⁸:

“À votre avis, est-ce que les dispositions de l’article 36, paragraphe 1, alinéa (b), de la Convention de Vienne sur les relations consulaires de 1963 s’épuisent dans les relations entre l’État d’envoi ou de nationalité et l’État de résidence? Est-ce que M. Diallo lui-même a été informé, aussitôt après sa détention, sur l’assistance consulaire? Qui est le sujet du droit à l’information sur l’assistance consulaire? L’État d’envoi ou bien de nationalité ou l’individu?”⁶⁹.

78. In its written answer to my question, handed to the Court’s Registry on 27.04.2010, the respondent State contended that: a) article 36 (1) (b) of the 1963 Vienna Convention creates an “individual right” (Court’s Judgment in the *LaGrand* case, 2001, para. 77), which is, however, inextricably linked to the sending State’s right to communicate with its nationals through consular

⁶⁷ICJ, *Counter Memorial of the D.R. Congo*, p. 16, para. 1.22.

⁶⁸Referred to in paragraph 11 of the present Judgment of the Court.

⁶⁹ICJ, *Compte rendu* CR 2010/3, of 26.04.2010, p. 37, para. 73.

officers; b) although it is an individual right, it remains closely linked to the rights of the State itself; c) they are interdependent rights (Court's Judgment in the *Avena* case, 2004, para. 40), involving relation between the individual and the sending and the receiving States; d) Guinea was aware of Mr. Diallo's situation, and the purpose of the right to information on consular assistance was thus achieved; e) if that right had not been violated in respect of the sending State, it could not have been so in respect of its national; f) Mr. Diallo had "verbally" been informed by the D.R. of Congo, shortly after his detention, of the "possibility of seeking consular assistance from his State"; and g) the individual and his sending State (or State of nationality) hold the right to information in an interdependent way⁷⁰.

79. Nevertheless, the D.R. Congo did not produce any evidence in support of its assertion that Mr. A. S. Diallo had been "verbally" informed promptly, shortly after his detention, of the possibility to count on consular assistance from Guinea. The D.R. Congo did not actually prove that it had duly informed Mr. A. S. Diallo himself, without any delay, of his right under Article 36 (1) (b) of the 1963 Vienna Convention, having thus had its international responsibility engaged in that respect.

80. On its part, Guinea, in its reply to my question, stated, in its oral arguments of 28.04.2010, that: a) the State of residence has a duty to inform the individual concerned of his right to consular assistance; b) it is the individual who has the right to information, as indicated in Article 36 (1) (b) *in fine* of the 1963 Vienna Convention on Consular Relations; c) there is a certain interdependence between the individual right and the rights of the State (Court's Judgment in the *Avena* case, 2004, para. 40), but under Article 36 (1) (b) these latter are subordinated to the former; d) the information by one State to another is not sufficient, and, in the present case, Mr. Diallo was not informed (by the State of residence) about consular assistance, neither shortly after his detention nor later on; e) the assertion by the D.R. Congo in this regard was not accompanied by any proof, and the fact is that Mr. Diallo was not informed of his rights; and f) even if the sending State (of nationality) takes cognizance of the situation by other means, there is an international illicit fact on the part of the State of residence⁷¹.

81. It should not pass unnoticed, in this connection, that, even before the aforementioned *obiter dicta* of this Court in the *LaGrand* (2001) and the *Avena* (2004) cases, the first and pioneering articulation of the individual's right to information on consular assistance was the one developed by the Inter-American Court of Human Rights in its Advisory Opinion No. 16, of 01.10.1999, on the *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*. It was expressly invoked by the contending Parties, and relied upon mainly by the complaining States, in the *LaGrand* (*Germany v. United States*) and the *Avena* (*Mexico v. United States*) cases before this Court, as we shall see subsequently (Section VIII, *infra*) in the present Separate Opinion.

IV. The Hermeneutics of Human Rights Treaties.

82. The invocation, by the contending parties before the ICJ, of such human rights treaties as the 1996 UN Covenant on Civil and Political Rights and the 1981 African Charter on Human and Peoples' Rights, and the vindication of some rights protected there under, — in addition to Article 36 (1) (b) of the 1963 Vienna Convention on Consular Relations in the conceptual universe of human rights, — brings to the fore the issue of the proper interpretation of human rights treaties. These latter go beyond the realm of purely inter-State relations. When one comes to the

⁷⁰ICJ, *Compte rendu* CR 2010/5, of 27.04.2010, pp. 1-2.

⁷¹ICJ, *Compte rendu* CR 2010/5, of 28.04.2010, pp. 9-13.

interpretation of treaties, one is inclined to resort, at first, to the general provisions enshrined in Articles 31-33 of the two Vienna Conventions on the Law of Treaties (of 1969 and 1986, respectively), and in particular to the combination under Article 31 of the elements of the ordinary meaning of the terms, the context, and the object and purpose of the treaties at issue.

83. One then promptly finds that, in practice, while in traditional International Law there has been a marked tendency to pursue a rather restrictive interpretation which gives as much precision as possible to the obligations of States Parties, in the International Law of Human Rights, somewhat distinctly, there has been a clear and special emphasis on the element of the object and purpose of the treaty, so as to ensure an effective protection (*effet utile*) of the guaranteed rights, without detracting from the general rule of Article 31 of the two Vienna Conventions on the Law of Treaties. In effect, whilst in general International Law the elements for the interpretation of treaties evolved primarily as guidelines for the process of interpretation by States Parties themselves, human rights treaties, in their turn, have called for an interpretation of their provisions bearing in mind the essentially *objective* character of the obligations entered into by States Parties: such obligations aim at the protection of human rights and not at the establishment of subjective and reciprocal rights for the States Parties.

84. Hence the special emphasis on the element of the object and purpose of human rights treaties, of which the *jurisprudence constante* of the European and Inter-American Courts of Human Rights has given eloquent testimony in the last couple of decades. The interpretation and application of human rights treaties have indeed been guided by considerations of a superior general interest or *ordre public* which transcend the individual interests of Contracting Parties. As indicated by the *jurisprudence constante* of the two aforementioned international human rights tribunals, those treaties are distinct from treaties of the classic type which incorporate restrictively reciprocal concessions and compromises; human rights treaties, in turn, prescribe obligations of an essentially objective character, implemented collectively, and are endowed with mechanisms of supervision of their own. The rich case-law on methods of interpretation of human rights treaties has enhanced the protection of the human person at international level and has enriched International Law under the impact of the International Law of Human Rights.

85. The converging case-law to this effect has generated the common understanding, in the regional systems of human rights protection, that human rights treaties, moreover, are endowed with a special nature (as distinguished from multilateral treaties of the traditional type); that human rights treaties have a normative character and that their terms are to be autonomously interpreted; that in their application one ought to ensure an effective protection (*effet utile*) of the guaranteed rights; and that permissible restrictions (limitations and derogations) to the exercise of guaranteed rights are to be restrictively interpreted. The work of the European and Inter-American Courts of Human Rights (more recently joined by the African Court on Human and Peoples' Rights) has indeed contributed to the creation of an international *ordre public* based upon the respect for human rights in all circumstances⁷²; it has established limits to excessive State voluntarism, and fostered the vision of the relations between public power and the human being whereby the State exists for the human being, and not *vice-versa*.

86. Furthermore, they have propounded the *autonomous* interpretation of provisions of human rights treaties, by reference to the respective domestic legal systems. Such autonomous meaning of the terms of human rights treaties (as distinct from their meaning, e.g., in domestic law) has been also

⁷²A. A. Cançado Trindade, "Le développement du Droit international des droits de l'homme à travers l'activité et la jurisprudence des Cours Européenne et Interaméricaine des Droits de l'Homme" (Discours du Président de la Cour Interaméricaine des Droits de l'Homme), in CourEDH, *Cour Européenne des Droits de l'Homme — Rapport annuel 2003*, Strasbourg, CourEDH, 2004, pp. 41-50.

endorsed, e.g., by the Human Rights Committee, under the UN Covenant on Civil and Political Rights, for example, in the adoption of its views in the *Van Duzen v. Canada* case (in 1982). Moreover, the dynamic or *evolutive* interpretation of the respective human rights Conventions (the temporal dimension) has been followed by both the European⁷³ and the Inter-American⁷⁴ Courts, so as to fulfil the evolving needs of protection of the human being.

87. Thus, in its pioneering Advisory Opinion No. 16, on *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (1999), which has inspired the international case-law *in statu nascendi* on the matter, the Inter-American Court clarified that, in its interpretation of the norms of the American Convention on Human Rights, it should extend protection in new situations (such as that concerning the observance of the right to information on consular assistance) on the basis of pre-existing rights. The same vision has been propounded by that Court in its subsequent and forward-looking Advisory Opinion No. 18, on the *Juridical Condition and Rights of Undocumented Migrants* (2003).

88. The European Court of Human Rights has likewise reiteratedly pronounced to that effect⁷⁵; in the *Loizidou v. Turkey* case (Preliminary Objections, 1995), for example, the ECtHR expressly discarded undue restrictions which would not only “seriously weaken” its role in the discharge of its functions but “would also diminish the effectiveness of the Convention as a constitutional instrument of European public order (*ordre public*)”⁷⁶. There is, thus, a converging case-law of the Inter-American and European Courts of Human Rights — and indeed of other human rights international supervisory organs — on the fundamental issue of the proper interpretation of human rights treaties, naturally ensuing from the overriding identity of the object and purpose of those treaties.

89. General international law itself bears witness of the principle (subsumed under the general rule of interpretation of Article 31 of the two Vienna Conventions on the Law of Treaties) whereby the interpretation is to enable a treaty to have appropriate effects. In the present domain of protection, International Law has been made use of in order to improve and strengthen — and never to weaken or undermine — the safeguard of recognized human rights⁷⁷ (in pursuance of the principle *pro persona humana, pro victima*). The specificity of the International Law of Human

⁷³E.g., cases *Tyrer v. United Kingdom* (1978), *Airey v. Ireland* (1979), *Marckx v. Belgium* (1979), *Dudgeon v. United Kingdom* (1981), among others.

⁷⁴Cf., in this sense, the *obiter dicta* in: IACtHR, Advisory Opinion OC-16/99, on the *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, of 01.10.1999, paras. 114-115, and Concurring Opinion of Judge A.A. Cançado Trindade, paras. 9-11; IACtHR, case of the “*Street Children*” (*Villagrán Morales and Others v. Guatemala*), Judgment of 19.11.1999 (merits), paras. 193-194; IACtHR, case *Cantoral Benavides v. Peru*, Judgment of 18.08.2000 (merits), paras. 99 and 102-103; IACtHR, case *Bámaca Velásquez v. Guatemala*, Judgment of 25.11.2000 (merits), Separate Opinion of Judge A.A. Cançado Trindade, paras. 34-38; IACtHR, case of the *Community Mayagna (Sumo) Awas Tingni v. Nicaragua*, Judgment of 31.08.2001 (merits and reparations), paras. 148-149; IACtHR, case *Bámaca Velásquez v. Guatemala*, Judgment of 22.02.2002 (reparations), Separate Opinion of Judge A.A. Cançado Trindade, para. 3.

⁷⁵For example, in its judgments in the cases of *Wemhoff v. F.R. Germany* (1968), *Belgian Linguistics* (1968), *Golder v. United Kingdom* (1975), *Ireland v. United Kingdom* (1978) and *Soering v. United Kingdom* (1989), among others.

⁷⁶ECtHR, *Loizidou v. Turkey* case (preliminary objections), Judgment of 23.03.1995, para. 75.

⁷⁷Cf. A.A. Cançado Trindade, “Co-existence and Co-ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)”, 202 *Recueil des Cours de l’Académie de Droit International de La Haye* (1987) p. 401.

Rights finds expression not only in the interpretation of human rights treaties in general but also in the interpretation of specific provisions of those treaties⁷⁸.

90. Both the European and the Inter-American Courts of Human Rights have rightly set limits to State voluntarism, have safeguarded the integrity of the respective human rights Conventions and the primacy of considerations of *ordre public* over the “will” of individual States, have set higher standards of State behaviour and established some degree of control over the interposition of undue restrictions by States, and have reassuringly enhanced the position of individuals as subjects of the International Law of Human Rights, with full procedural capacity. In so far as the basis of their jurisdiction in contentious matters is concerned, eloquent illustrations can be found of their firm stand in support of the integrity of the mechanisms of protection of the two respective regional Conventions⁷⁹.

91. The two international human rights Tribunals, by correctly resolving basic procedural issues raised in the aforementioned cases, have aptly made use of the techniques of Public International Law in order to strengthen their respective jurisdictions of protection of the human person. They have decisively safeguarded the integrity of the mechanisms of protection of the American and European Conventions on Human Rights, whereby the juridical emancipation of the human person *vis-à-vis* her own State is achieved. They have, furthermore, achieved a remarkable jurisprudential construction on the right of access to justice (and of obtaining reparation) at international level.

92. As to substantive law, the contribution of the two international human rights Courts to this effect is illustrated by numerous examples of their respective case-law pertaining to the rights protected under the two regional Conventions. The European Court has a vast and remarkable case-law, for example, on the right to the protection of liberty and security of person (Article 5 of the European Convention), and the right to a fair trial (Article 6). The Inter-American Court has a significant case-law on the fundamental right to life, comprising also the conditions of living, as from its decision in the paradigmatic case of the so-called “*Street Children*” (*Villagrán Morales and Others v. Guatemala*, Merits, 1999); it has also a rich case-law on distinct forms of reparations.

V. The Principle of Humanity in Its Wide Dimension.

93. The previous considerations on the hermeneutics of human rights treaties lead me now to address the principle of humanity in its wide dimension. When one refers to the principle of humanity, there is a tendency to consider it in the framework of International Humanitarian Law. Thus, for example, it is beyond doubt that, in this framework, civilians and persons *hors de combat* are to be treated with humanity. The principle of humane treatment of civilians and persons *hors*

⁷⁸Pertinent illustrations can be found in, e.g., provisions which contain references to general international law. Such is the case, for example, of the requirement of prior exhaustion of local remedies as a condition of admissibility of complaints or communications under human rights treaties; the local remedies rule bears witness of the interaction between International Law and domestic law in the present domain of protection, which is fundamentally *victim-oriented*, concerned with *the rights of individual human beings rather than of States*. Generally recognized principles or rules of International Law — which the formulation of the local remedies rule in human rights treaties refers to, — besides following an evolution of their own in the distinct contexts in which they apply, necessarily suffer, when inserted in human rights treaties, a certain degree of adjustment or adaptation, dictated by the special character of the object and purpose of those treaties and by the widely recognized specificity of the International Law of Human Rights. Cf. A.A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law*, Cambridge, Cambridge University Press, 1983, pp. 1-443.

⁷⁹For example, the decisions of the European Court in the *Belilos v. Switzerland* case (1988), in the *Loizidou v. Turkey* case (Preliminary Objections, 1995), and in the *I. Ilascu, A. Lesco, A. Ivantoc and T. Petrov-Popa v. Moldova and the Russian Federation* case (2001), as well as the decisions of the Inter-American Court in the *Constitutional Tribunal and Ivcher Bronstein v. Peru* cases (Jurisdiction, 1999), in the *Hilaire, Constantine and Benjamin and Others v. Trinidad and Tobago* (Preliminary Objection, 2001), and in the *Barrios Altos v. Peru* case (Merits, 2001).

de combat is provided for in the 1949 Geneva Conventions on International Humanitarian Law (common Article 3, and Articles 12 (1)/12 (1)/13/5 and 27 (1)), and their Additional Protocols I (Article 75 (1)) and II (Article 4 (1)). Such principle, moreover, is generally regarded as one of customary International Humanitarian Law.

94. My own understanding is in the sense that the principle of humanity is endowed with an even wider dimension: it applies in the most distinct circumstances, both in times of armed conflict and in times of peace, in the relations between public power with all persons subject to the jurisdiction of the State concerned. That principle has a notorious incidence when these latter are in a situation of vulnerability, or even *defencelessness*, as evidenced by relevant provisions of distinct treaties integrating the International Law of Human Rights. Thus, for example, at UN level, the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provides, *inter alia*, in its Article 17 (1), that:

“Migrant workers and members of their families who are deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person and for their cultural identity.”

95. Likewise, the 1989 UN Convention on the Rights of the Child stipulates (Article 37 (b)) that: “States Parties shall ensure that [e]very child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age(...)”. Provisions of the kind can also be found in human rights treaties at regional level.

96. To recall but a couple of examples, the 1969 American Convention on Human Rights, in providing for the right to humane treatment (Article 5), determines *inter alia* that “[a]ll persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person” (para. 2). Likewise, the 1981 African Charter on Human and Peoples’ Rights disposes *inter alia* that “[e]very individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status” (Article 5).

97. And the 1969 Convention on the Specific Aspects of Refugee Problems in Africa sets forth, *inter alia*, that “[t]he grant of asylum to refugees is a peaceful and humanitarian act (...)” (Article II (2)). And the examples to the same effect multiply. The point I wish to make here is 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.

98. In respect of the present case *A.S. Diallo (Guinea v. D.R. Congo)*, in particular, it may be pointed out that the principle of humanity underlies Article 7 of the UN Covenant on Civil and Political Rights, which protects the individual’s personal integrity, against mistreatment, as well as Article 10 of the Covenant (concerning persons under detention), which begins by stating that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person” (para. 1). This comprises not only the negative obligation not to mistreat (Article 7), but also the positive obligation to ensure that a detainee, under the custody of the State, is treated with humanity and due respect for his inherent dignity as a human person.

99. The principle of humanity, in effect, underlies the two *general comments*, No. 9 (of 1982, para. 3) and No. 21 (of 1992, para. 4) on Article 10 of the Covenant (humane treatment of persons deprived of their liberty). The principle of humanity, usually invoked in the domain of

International Humanitarian Law, thus extends itself also to that of International Human Rights Law. And, as the Committee rightly stated in its *general comment* No. 31 (of 2004), “both spheres of Law are complementary, not mutually exclusive” (para. 11).

100. The principle of humanity has met with judicial recognition. It is not my intention here, within the confines of the present Separate Opinion in the *A.S. Diallo* case, to review the international case-law to this effect, as I have done so elsewhere⁸⁰. Suffice it here to recall but one selected illustration, on the basis of my own experience. The *jurisprudence constante* of the Inter-American Court of Human Rights has properly warned that the principle of humanity, inspiring the right to humane treatment (Article 5 of the American Convention on Human Rights), applies even more forcefully when a person is unlawfully detained, and kept in an “*exacerbated situation of vulnerability*” (Judgments in the cases of *Maritza Urrutia v. Guatemala*, of 27.11.2003, para. 87; of *Juan Humberto Sánchez v. Honduras*, of 07.06.2003, para. 96; *Cantoral Benavides v. Peru*, of 18.08.2000, para. 90; and cf. *Bámaca Velásquez v. Guatemala*, of 25.11.2000, para. 150).

101. In my Separate Opinion in the Judgment in the case of the *Massacre of Plan de Sánchez* (of 29.04.2004), concerning Guatemala, I devoted a whole section (III, paras. 9-23) of it to the judicial acknowledgement of the principle of humanity in the recent case-law of that Court as well as of the *ad hoc* International Criminal Tribunal for the Former Yugoslavia. Furthermore, I therein expressed my understanding that the principle of humanity, orienting the way one treats the others (*el trato humano*), “encompasses all forms of human behavior and the totality of the condition of the vulnerable human existence” (para. 9).

102. International law is not at all insensitive to that, and the principle at issue applies in any circumstances, so as to prohibit inhuman treatment, by reference to humanity as a whole, so as to secure protection to all, including those in a situation of great vulnerability (paras. 17-20). *Humaneness* is to condition human behaviour in all circumstances, in times of peace as well as of disturbances and armed conflict.

103. The 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 levels. In faithfulness to my own conception, I have, in this Court likewise, deemed it fit to develop some reflections on the basis of the principle of humanity *lato sensu*, in my Dissenting Opinion⁸¹ in the case of the *Obligation to Prosecute or Extradite* ((*Belgium v. Senegal*), Request for Provisional Measures, Order of 28.05.2009), as well as in my Dissenting Opinion⁸² in the case of *Jurisdictional Immunities of the State* (Counter-Claim, (*Germany v. Italy*), Order of 06.07.2010).

104. And, in the Court’s recent Advisory Opinion on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, I devoted one entire section (XIII(4)) of my Separate Opinion expressly to the “fundamental principle of humanity”

⁸⁰Cf. A. A. Cançado Trindade, “Le déracinement et la protection des migrants dans le droit international des droits de l’homme”, 19 *Revue trimestrielle des droits de l’homme* — Bruxelles (2008) pp. 289-328, esp. pp. 295 and 308-316.

⁸¹Paragraphs 24-25 and 61.

⁸²Paragraphs 116, 118, 125, 136-139 and 179.

(paras. 196-211) in the framework of the law of nations⁸³ itself. I saw it fit to recall that the “founding fathers” of international law (F. de Vitoria, A. Gentili, F. Suárez, H. Grotius, S. Pufendorf, C. Wolff) propounded a *jus gentium* inspired by the principle of humanity *lato sensu* (paras. 73-74).

105. It may here be pointed out that the principle of humanity is in line with natural law thinking. It underlies classic thinking on humane treatment and the maintenance of sociable relationships, also at international level. Humaneness came to the fore even more forcefully in the treatment of persons in situation of vulnerability, or even defenselessness, such as those deprived of their personal freedom, for whatever reason.

106. The *jus gentium*, when it began to correspond to the law of nations, came then to be conceived by its “founding fathers” as regulating the international community constituted by human beings socially organized in the (emerging) States and co-extensive with humankind, thus conforming the *necessary* law of the *societas gentium*. This latter prevailed over the will of individual States, respectful of the human person, to the benefit of the common good⁸⁴. The precious legacy of natural law thinking, evoking the natural law of the right human reason (*recta ratio*), has never faded away, and this should be stressed time and time again, particularly in face of the indifference and pragmatism of the “strategic” *droit d’étatistes*, so numerous in the legal profession in our days.

VI. The Prohibition of *Arbitrariness* in the International of Human Rights.

107. For the consideration of the present case *A.S. Diallo*, a proper understanding of the prohibition of *arbitrariness*, in the framework of the International Law of Human Rights, assumes a central importance. To that end, I shall, next, review the notion of *arbitrariness*, consider the position of the UN Human Rights Committee and the African Commission on Human and Peoples’ Rights, as well as the jurisprudential construction of the Inter-American and European Courts of Human Rights on the matter. I shall then present my general assessment of this key issue.

1. The Notion of *Arbitrariness*.

108. The adjective “arbitrary”, derived from the Latin “*arbitrarius*”, originally meant that which depended on the authority or will of the arbitrator, of a legally recognized authority. With the passing of time, however, it gradually acquired a different connotation; already in the mid-XVIIth century, it had been taken to mean that which appeared uncontrolled (arbitrary) in the exercise of will, amounting to capriciousness or despotism. The qualification “arbitrary” came thus to be used in order to characterize decisions grounded on simple preference or prejudice, defying any test of “foresee-ability”, ensuing from the entirely *free will* of the authority concerned, rather than based on *reason*, on the conception of the rule of law in a democratic society, on the criterion of reasonableness and the imperatives of justice, on the fundamental principle of equality and non-discrimination.

109. As human rights treaties and instruments conform a *Law of protection* (a *droit de protection*), oriented towards the safeguard of the ostensibly weaker party, the victim, it is not at all surprising that the prohibition of *arbitrariness* (in its modern and contemporary sense) covers

⁸³Cf. also paragraphs 66-67, 74-76, 96, 176, 185 and 239-240.

⁸⁴A. A. Cançado Trindade, *A Humanização do Direito Internacional*, Belo Horizonte/Brazil, Edit. Del Rey, 2006, pp. 9-14, 172, 318-319, 393 and 408.

arrests and detentions, as well as other acts of the public power, such as expulsions. Bearing in mind the hermeneutics of human rights treaties, as outlined above, a merely exegetical or literal interpretation of treaty provisions would be wholly unwarranted (cf. *infra*).

110. Such has in fact been the understanding of international supervisory organs of human rights protection, as we shall see next. I shall take as illustrations the positions of two supervisory organs (the UN Human Rights Committee and the African Commission on Human and Peoples' Rights), as well as the jurisprudential constructions of two international human rights tribunals (the Inter-American and the European Courts of Human Rights).

111. Preliminarily, as to the determination of the breach of the right not to be deprived arbitrarily of one's liberty (principle of legality, prohibition of arbitrariness — *Article 9 (1)* of the UN Covenant on Civil and Political Rights), may it be recalled that the UN Working Group on Arbitrary Detention⁸⁵ has expressed that view that deprivation of liberty is to be regarded as *arbitrary* "when it manifestly cannot be justified on any legal basis" (such as, e.g., continued detention after the sentence has been served)⁸⁶. The UN Human Rights Committee (HRC), — the supervisory organ of the Covenant on Civil and Political Rights, — has dwelt further upon the matter.

2. The Position of the UN Human Rights Committee.

112. To start with, there are decisions which reveal the position taken by the HRC on the matter at issue. For example, in the *Mukong v. Cameroon* case (1994), the HRC interpreted "*arbitrary*" in a broad sense, as meaning inappropriate, unjust, unpredictable and inconsistent with legality⁸⁷. More generally, the HRC pondered, in the subsequent *Jalloh vs. The Netherlands* case (2002), that "*arbitrary*" ought to be understood as covering "unreasonable action"⁸⁸; in any event, action ought to be deemed appropriate and proportional in the circumstances of the case at issue⁸⁹.

113. In the aforementioned *Mukong v. Cameroon* case, the Committee expressly observed that:

"The drafting history of Article 9(1) confirms that 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law. (...) This means that remand on custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Remand in custody must further be necessary in all the circumstances." (Para. 9.8.)

⁸⁵Established by the former UN Commission on Human Rights, in its resolution 1991/42.

⁸⁶UN General Assembly document A/HRC/7/4/Add.1, of 16.01.2008, p. 3; cf. ICJ, *Reply of Guinea*, para. 1.19.

⁸⁷HRC, No. 458/1991, *Mukong v. Cameroon*, 21.07.1994, para. 9.8.

⁸⁸HRC, No. 794/1998, *Jalloh v. The Netherlands*, 26.03.2002, A/57/40, Vol. II, p. 132, para. 8.2.

⁸⁹Furthermore, the UN Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live (of 13.12.1985) provides (in Article 5) that

"aliens shall enjoy, in accordance with domestic law and subject to the relevant international obligations of the State in which they are present, in particular the following rights: a) the right to life and security of person, whereby "no alien shall be subjected to arbitrary arrest or detention", and "no alien shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established by law"; b) "the right to protection against arbitrary or unlawful interference with privacy, family, home or correspondence (...)"

114. By means of its *Views* on communications, the Committee has further interpreted the Covenant to deal with crucial issues, such as, for example, that of non-derogable rights and states of emergency⁹⁰. It has made it quite clear, in respect of the issue of *arbitrariness* of public authorities, that one is to avoid equating *arbitrariness* only with the expression “against the law”. Thus, in the *Marques de Morais v. Angola* case (2005), *inter alia*, it gave *arbitrariness* a broader interpretation, so as to encompass elements of injustice, lack of due process of law, inappropriateness, and lack of predictability.

115. In the same line of reasoning, earlier on, in the case of *R.Mojica v. Dominican Republic* (1994) and in the case of *Tshishimbi v. Zaire* case (1996), the Committee warned that an interpretation that would allow States Parties “to tolerate, condone or ignore” threats made by public authorities to the personal liberty and security of non-detained individuals under the jurisdiction of the States Parties concerned “would render ineffective the guarantees of the Covenant”⁹¹. Likewise, in the case of *L. Rajapakse v. Sri Lanka* (2006), the Committee again pondered that personal security was to be safeguarded in distinct circumstances, also beyond the context of formal deprivation of liberty (para. 9.7)

116. The HRC’s concerns to ensure protection to individuals against arbitrariness on the part of State authorities is not restricted to the right to personal liberty, but extends to other rights protected under the Covenant as well. It is present in some of its *Views* on communications concerning expulsions, under Article 13 of the Covenant (on the right of aliens not to be expelled arbitrarily). The test of *bona fides* or prohibition of *abus de pouvoir* on the part of those authorities was applied by the HRC in the *A. Maroufidou v. Sweden* case (1981); and in the *E. Hammel v. Madagascar* case (1987) the HRC upheld the right to an effective (domestic) remedy in such cases of expulsion.

3. The Position of the African Commission on Human and Peoples’ Rights.

117. There are several decisions of the African Commission on Human and Peoples’ Rights (AfComHPR) determining the occurrences of breaches of Article 6 of the African Charter on Human and Peoples’ Rights⁹², in so far as the prohibition of arbitrary arrests or detentions is concerned. In one of those cases in which the AfComHPR established a breach of the kind, namely, the case of *L. Zegveld and M. Ephrem v. Eritrea* (2003), the AfComHPR stated quite clearly that, by means of its Article 6:

“The African Charter specifically prohibits arbitrary arrests and detentions.

Evidence before the African Commission indicates that the 11 persons have been held incommunicado and without charge since they were arrested in September 2001 (...). The African Commission notes that to date it has not received any information or substantiation from the respondent State demonstrating that the

⁹⁰Cf., e.g., [Various Authors,] *Droits intangibles et états d’exception* (eds. D. Prémont *et alii*), Bruxelles, Bruylant, 1996, pp. 1 *et seq.*

⁹¹Para. 5.4, in both cases. In the *L. Rajapakse v. Sri Lanka* case (2006), likewise, the Committee again pondered that personal security was to be safeguarded in distinct circumstances, also beyond the context of formal deprivation of liberty.

⁹²Cf., to this effect, e.g., its decisions in the cases *Media Rights Agenda v. Nigeria* (2000), paras. 41-44 and 70-75; *J. D. Ouko v. Kenya* (2000), paras. 21 and 31; *K.Aminu v. Nigeria* (2000), paras. 21 and 26; *D. K. Jawara v. Gambia* (2000), paras. 57-59 and 74; *Constitutional Rights Project v. Nigeria* (1999), paras. 12-16; *Law Office of Ghazi Suleiman v. Sudan* (2003), paras. 48-50 and 67; *K. Achuthan and Amnesty International (on Behalf of A. Banda, and O. and V. Chirwa) v. Malawi* (1994), paras. 8-9 and 12.

11 persons were being held in appropriate detention facilities and that they had been produced before courts of law.

Incommunicado detention is a gross human rights violation (...). The African Commission is of the view that all detentions must be subject to basic human rights standards (...). Furthermore, every detained person must have prompt access to a lawyer and to their families and their rights with regard to physical and mental health must be protected as well as entitlement to proper conditions of detention.”⁹³

118. In stressing, in its decision in the same *L. Zegveld and M. Ephrem* case, the prohibition of arbitrary arrests and detentions under the African Charter (Article 6), the AfComHPR warned that arbitrariness affected the right of access to justice itself. In the words of the AfComHPR,

“the lawfulness and necessity of holding someone in custody must be determined by a court of other appropriate judicial authority. The decision to keep a person in detention should be open to review periodically (...). Persons suspected of committing any crime must be promptly charged with legitimate criminal offences and the State should initiate legal proceedings that should comply with fair trial standards as stipulated by the African Commission in its [1992] *Resolution on the Right to Recourse and Fair Trial* and elaborated upon in its [2003] *Guidelines on the Right to Fair Trial and Legal Assistance in Africa*.”⁹⁴

119. The practice of the African Commission in respect of the prohibition of arbitrariness is not restricted to Article 6, on the prohibition of arbitrary arrests and detentions. It extends, naturally, to other rights protected under the African Charter, such as the right not to be expelled arbitrarily from a country, as provided in Article 12 (4) of the Charter: “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.” In this connection, in the case of the *Organisation Mondiale contre la Torture, Association Internationale des Juristes Démocrates, Commission Internationale des Juristes and Union Interafricaine des Droits de l’Homme v. Rwanda* (1996)⁹⁵, the African Commission clarified that:

“This provision should be read as including a general protection of all those who are subject to persecution, that they may seek refuge in another State. Article 12(4) prohibits the arbitrary expulsion of such persons from the country of asylum. (...)” (Para. 31.)⁹⁶

120. In a case lodged with the Commission by the *Union Inter-Africaine des Droits de l’Homme, Fédération Internationale des Liges des Droits de l’Homme, Rencontre Africaine des Droits de l’Homme, and Organisation Nationale des Droits de l’Homme au Sénégal*⁹⁷, on behalf of certain West African nationals expelled from Angola in 1996, the AfComHPR, in deciding in favour of the complainants on 11.11.1997, pondered, after invoking Article 12 (4) of the Charter (para. 14), that:

⁹³Paragraphs 52-55.

⁹⁴Paragraph 56.

⁹⁵Communications ns. 27/89, 46/91, 49/91 and 99/93, joined.

⁹⁶Text reproduced in: Institute for Human Rights and Development, *Compilation of Decisions on Communications of the African Commission on Human and Peoples’ Rights* (1994-2001) p. 324.

⁹⁷Communication No. 159/96.

“African States in general and the Republic of Angola in particular are faced with many challenges, mainly economic. In the face of such difficulties, States often resort to radical measures aimed at protecting their nationals and their economics from non-nationals. Whatever the circumstances may be, however, such measures should not be taken at the detriment of human rights. (...) By deporting the victims, thus separating some of them from their families, the defendant State has violated and violates the letter of this text.” (Paras. 16-17).⁹⁸

121. Warnings of the kind have been made by the African Commission in its decisions also in the cases of *Modise v. Botswana* (2000, paras. 83-84), *Rencontre Africaine pour la Défense des Droits de l’Homme vs. Zambia* (1997, paras. 30-31), *K. Good v. Botswana* (2010, paras. 206-208), *Institute for Human Rights and Development in Africa v. Angola* (2008, paras. 65 and 69-70). In the aforementioned case of the *Rencontre Africaine pour la Défense des Droits de l’Homme*, the Commission held that the deportations at issue breached Articles 2, 7 and 12 of the African Charter, after pondering that “none of the deportees had the opportunity to seize the Zambian courts to challenge their detention or deportation”⁹⁹. And in the aforementioned *Modise* case, the Commission pondered that the decision as to who is permitted to remain in a country “should always be made according to careful and just legal procedures” (para. 83). In other words, it is not sufficient that State authorities proceed in accordance with the law, as this latter must be in conformity with the African Charter, and reflect the basic requirements of *justice*.

122. In the case of *Amnesty International, Comité Loosli Bachelard, Lawyers Committee for Human Rights, and Association of Members of the Episcopal Conference of East Africa v. Sudan* (1999), concerning the situation prevailing in Sudan between 1989 and 1993, the AfComHPR observed that Article 6 ought to be interpreted in such a way as to effect arrests “only in the exercise of powers normally granted to the security forces in a democratic society”. In its view, the wording of the decree at issue allowed for individuals to be arrested for “vague reasons, and upon suspicion, not proven acts”, and that was “not in conformity with the spirit of the African Charter”; the Commission established “serious and continuing violations of Article 6”, among other provisions of the Charter¹⁰⁰. In sum, the position upheld by the AfComHPR in its practice is that the prohibition of arbitrariness covers not only the right to personal liberty, but other rights protected under the African Charter, such as, *inter alia*, the right not to be arbitrarily expelled from a country.

4. The Jurisprudential Construction of the Inter-American Court of Human Rights.

123. Turning now to the jurisprudential construction of the Inter-American Court of Human Rights (IACtHR) on the matter at issue, in the paradigmatic case of the “*Street Children*” (*Villagrán Morales and Others v. Guatemala*, merits, Judgment of 19.11.1999), the IACtHR held, in respect of the prohibition of unlawful or arbitrary arrest (Article 7 (2) and (3) of the American Convention on Human Rights — ACHR), that no one can be subjected to arrest or imprisonment that, “although qualified as legal”, may be considered incompatible with fundamental human

⁹⁸The Commission declared that the deportation of the victims constituted a violation of Articles 2, 7 (1) (a), 12 (4) and (5), 14 and 18 of the African Charter.

⁹⁹Paragraphs 29-30 and *dispositif* of the Commission’s decision.

¹⁰⁰Paragraphs 59-60 and the *dispositif* of the Commission’s decision.

rights, for being, *inter alia*, “unreasonable, unforeseeable or out of proportion” (para. 131). This has become *jurisprudence constante* of the IACtHR¹⁰¹.

124. The IACtHR was soon to reiterate its position on the matter, in the *Bámaca Velásquez v. Guatemala* case (Judgment of 25.11.2000, para. 139). Later on, applying the same criterion in the *Maritza Urrutia v. Guatemala* case (Judgment of 27.11.2003, para. 65), the IACtHR found that the detention in the *cas d’espèce* had been carried out within the framework of a pattern of arbitrariness on the part of the agents of the State (paras. 69-70). Likewise, in the *Juan Humberto Sánchez v. Honduras* case (Judgment of 07.06.2003), the IACtHR, after reiterating (para. 78) its aforementioned *obiter dictum*, found the detentions arbitrary, for having been effected within a framework of *abus de pouvoir* on the part of the State agents (para. 80).

125. In the case of the *Brothers Gómez Paquiyauri v. Peru* (Judgment of 08.07.2004), the IACtHR established the arbitrariness of the detention, which had occurred within the framework of a systematic practice of human rights violations, with aggravating circumstances (paras. 88-89). In the *Massacre of Mapiripán* case, concerning Colombia (Judgment of 15.09.2005), the IACtHR upheld that the deprivation of liberty had been effected in a *modus operandi* marked by arbitrariness, and other grave violations of human rights (paras. 136 and 138).

126. In the tragic case of *Bulacio*, concerning Argentina (Judgment of 18.09.2003), the Court recalled that there are “material and formal requirements” (causes, cases or circumstances, as well as procedures, defined in law) that must be observed (under Article 7 of the American Convention) in applying a measure or punishment that involves imprisonment. Detainees have the right to “humane treatment” and to live in “conditions of detention that are compatible with their personal dignity” (paras. 125-126). The State, being responsible for detention centres, is “the guarantor of these rights of the detainees” (para. 126).

127. Furthermore, in the same *Bulacio* case, the IACtHR deemed it fit to ponder that:

“State authorities exercise total control over persons under their custody. The way a detainee is treated must be subject to the closest scrutiny, taking into account the detainee’s special vulnerability (...). The vulnerability of the detainee aggravates when the detention is illegal or arbitrary. Then the person is in a situation of complete defenselessness, which causes a definite risk of abridgment of other rights, such as those to humane and decent treatment. (...). This Court has emphasized that solitary confinement of the detainee must be exceptional, as it causes him or her moral suffering and psychological disturbances, as it places the detainee in a situation of particular vulnerability and increases the risk of aggression and arbitrariness in prisons, and because it endangers strict observance of the due process of law.” (Paras. 126-127.)

128. At last, the Court added, in the *Bulacio* case, that detainees have likewise the right to be informed of the causes and reasons of detention “at the time it occurs”, so as to prevent and avoid arbitrariness (para. 128). To this same effect, they are entitled to count on “immediate judicial control” of their detention (para. 129). They have the right to notify a third party that they are under “State custody” (para. 130), as well as to count on appropriate medical care (para. 131). In

¹⁰¹Cf., earlier on, in the same sense, IACtHR, case *Gangaram Panday v. Suriname*, Judgment of 21.01.1994, para. 47; IACtHR, case *Suárez Rosero v. Ecuador*, Judgment of 12.11.1997, para. 43. And cf., subsequently, to the same effect, IACtHR, case *Acosta Calderón v. Ecuador*, Judgment of 24.06.2005, para. 57; IACtHR, case *Palamara-Iribarne v. Chile*, Judgment of 22.11.2005, para. 215.

sum, detention centres “must meet certain minimum standards” that ensure respect for the aforementioned rights (para. 132), so as to prevent and avoid arbitrariness.

129. In the case of *Tibi v. Ecuador* (Judgment of 07.09.2004), the IACtHR found the preventive detention at issue arbitrary, as there had been no sufficient indicia to presume that Mr. D.D. Tibi had been the perpetrator of, or an accomplice to, any delict, nor had it been established that such detention was needed (para. 107). The IACtHR deemed it “indispensable” to underline that the application of preventive detention, being a very severe measure:

“must be exceptional, since it is limited by the principles of lawfulness, presumption of innocence, necessity, and proportionality, indispensable in a democratic society” (para. 106).

130. In the adjudication by the IACtHR of the case *Tibi v. Ecuador*, I gathered some energy to include, in my Separate Opinion, a whole section (I) on “The Impact of Arbitrary Detention and of the Conditions of Incarceration on Human Conscience”, wherein I deemed it fit to ponder:

“D.D. Tibi, like Josef K., was detained without knowing why. ‘Somebody had slandered Josef K.’, — wrote Franz Kafka at the very beginning of *The Trial* (*El Proceso*, 1925), — ‘as without having done anything wrong he was detained one morning’ (chapter I). D.D. Tibi was more fortunate than banker Josef K., but they both suffered something incomprehensible, if not absurd. Josef K. could only await his summary execution, shortly before which he exclaimed: ‘Where was the judge whom I never saw? Where was the high court before which I never appeared?’ (chapter X). From the beginning of the saga to its end, his efforts were futile in face of the arbitrariness of a cruelly virtual and despairing ‘justice’.

D.D. Tibi was less unfortunate than Kafka’s character, because he recovered his liberty and, also, he lives in a time in which, alongside the national courts (with their idiosyncrasies) there are also international human rights tribunals. The present Judgment which the Inter-American Court has just adopted, can contribute to the recovery of his faith in human justice. In his case, a portrait of daily life in the jails not only of Latin America but throughout the world, gives eloquent testimony of the insensitiveness, indifference, and irrationality of the world which surrounds us all.

Few testimonies of the suffering resulting from arbitrary detention have been so eloquently described as Antonio Gramsci’s *célèbres Letters from the Prison* (1926-1936). In an even literary form, he wrote that, during the initial period of his detention, it already seemed to him that time was denser, as space no longer existed for him (...). When he took a train, after 10 years of detention, (...), he experienced a ‘terrible impression’ when he saw that ‘during this time the vast world had continued to exist with its meadows, its forests, the common people, the groups of children, certain trees’ (...); he experienced a terrible impression especially when he saw himself in the mirror after so much time¹⁰².

Three decades before Gramsci, in the late XIXth century, Oscar Wilde gave to the history of universal thought his own personal testimony of the suffering caused by his incarceration, in his renowned *De Profundis* (1897). From the Reading prison, he wrote that, for those unfairly detained, ‘there is only one season, the season of sorrow’.

¹⁰²A. Gramsci, *Cartas do Cárcere*, Rio de Janeiro, Edit. Civilização Brasileira, 1966 (reed.), pp. 135--136 and 370.

(...) And in the sphere of *thought*, no less than in the sphere of time, motion is no more¹⁰³.

It is possible that the *étranger* D.D. Tibi experienced the same feeling as the *étranger* Mersault, that matters pertaining to the detention and the process were treated 'leaving aside' the detainee, reflecting the 'tender indifference' of the outside world (chapters IV-V). As for Gramsci, almost the only thing left to the *étranger* of Albert Camus (*L'étranger*, 1949) was the passing of time; as 'light and shadows alternated', it was 'the same day ceaselessly passing in the cell', and the worst hour was when 'the noise of the night came from all the floors of the prison in an entourage of silence' (chapter II). Mersault also had only the memories of a life that no longer belonged to him (chapter IV). For him, all days passed 'watching, in their face, the decline of the colours that lead from day to night', the latter being 'like a melancholic truce' (chapter V). (...)

In writing on his conditions of detention and his efforts to flee both the suffering and the degeneration of the spirit, Oscar Wilde, referring to the '*Zeitgeist* of a heartless period', reflected that time and space are 'mere accidental conditions of thought', and that, in prison, what he had before him was only his past.¹⁰⁴ (...) This is an evil that knows no borders, and one that reflects the indifference and brutalization of the world around us. Today, the characters of Kafka and Camus are dispersed and forgotten in prisons of all continents. Many of the detainees are innocent, and those who are not, having been aggressors, become new victims. Their survival no longer has a spatial dimension, and the temporal one is what they may, perhaps, fathom in the hidden depths of their inner life. Anyhow, their life, in relation to the others, no longer belongs to them. And they survive in closer and closer intimacy with evil and with the overwhelming brutalization imposed on them. The Law cannot remain indifferent to all this, to the indifference of the world, in particular in the pathetically self-named 'post-modern' societies.

As a matter of fact, abuses of detention and against the detainees are not a recent phenomenon. In his classical work on *Of Crimes and Punishments* (1764), Cesare Beccaria warned about the fact that 'the punishment is often greater than the crime', and the 'refined ordeals' conceived by human intellect 'seem to have been invented by tyranny rather than by justice'¹⁰⁵. With the passing of time, the need for administrative and legislative as well as judicial control (endowed with particular importance) and supervision of the conditions of detention were reckoned, — a control which was transposed from the domestic law level to that of international law in the mid-XXth century. (...)

As the Judgment of the Inter-American Court in the present case of *Tibi v. Ecuador* reveals, the Law comes to protect also those who are forgotten in prison, in the 'house of the dead' so lucidly denounced in the XIXth century by Dostoevsky. The aforementioned reaction of the Law, both *ratione personae* and *ratione materiae*, indicates that human conscience has awoken to the pressing need and aim of decisively putting an end to the scourges of arbitrary detention (...). A role of major relevance is here exercised by the general principles of law. With that, there is reason to nourish the hope that the D.D. Tibis, the Joseph K.s, and the Mersaults, will

¹⁰³O. Wilde, *De Profundis*, Madrid, Ed. Siruela, 2000 (repr.), p. 54.

¹⁰⁴*De Profundis*, op. cit. supra No. (103), pp. 113 and 127.

¹⁰⁵C. Beccaria, *De los Delitos y de las Penas* (with comments by Voltaire), 11th. repr., Madrid, Alianza Ed., 2000 (repr.), p. 129, and cf. p. 149.

gradually diminish in number, until they no longer suffer in the prisons of the ‘post-modern’, insensitive, indifferent and brutalized world in which we live.”¹⁰⁶

5. The Jurisprudential Construction of the European Court of Human Rights.

131. For its part, on the matter at issue, the European Court of Human Rights (ECtHR), in finding (para. 54) a breach of Article 5 (1) of the European Convention of Human Rights (ECHR), for example, in its Judgment (of 25.06.1996) in the case of *Amuur v. France*, pointed out that that provision on the right to liberty was meant to ensure that no one should be dispossessed of liberty in an arbitrary way (para. 42). Any such deprivation of liberty, — the ECtHR added in the *Amuur* case:

“should be in keeping with the purpose of Article 5, namely, to protect the individual from arbitrariness (...). Where a national law authorizes deprivation of liberty — especially in respect of a foreign asylum-seeker — it must be sufficiently accessible and precise, in order to avoid all risk of arbitrariness. These characteristics are of fundamental importance with regard to asylum-seekers at airports, particularly in view of the need to reconcile the protection of fundamental rights with the requirements of States’ immigration policies” (para. 50).

132. Seventeen years earlier, in the *Winterwerp v. The Netherlands* case (Judgment of 24.10.1979), the ECtHR found no violation of Article 5 (1) of the ECHR (para. 52), as the delay at issue had not involved an arbitrary deprivation of liberty in the case, and the detention had been effected, in its view, “in accordance with a procedure prescribed by law” (paras. 49-50). Yet, the ECtHR deemed it fit to express its view that:

“the words ‘in accordance with a procedure prescribed by law’ essentially refer back to domestic law (...). However, the domestic law must itself be in conformity with the Convention. (...) [A]ny measure depriving a person of his liberty should issue from and be executed by an appropriate authority and should not be arbitrary.” (Para. 45.)

133. In the *Saadi v. United Kingdom* case, the Chamber of the ECtHR considered (Judgment of 11.07.2006) the applicant’s claims of arbitrariness, and in particular that “there should be a ‘necessity’ test” for detention (para. 46); this latter “must be compatible with the overall purpose of Article 5, which is to protect the individual from arbitrariness” (para. 40). The case was then referred to the Grand Chamber of the ECtHR, which, though endorsing the finding that there had been no breach on Article 5 (1) in the case (but rather a breach of Article 5 (2) — Judgment of 29.01.2008), elaborated further on the notion of arbitrariness.

134. In this new Judgment, of 2008, in the *Saadi* case, the Grand Chamber of the ECtHR, besides invoking the principle of *bona fides* (on the part of the national authorities — paras. 74. and 77), warned that simple compliance with national law was “not sufficient”, as:

“the notion of ‘arbitrariness’ in Article 5(1) extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention. (...) The notion of arbitrariness

¹⁰⁶ECtHR, case of *Tibi v. Ecuador* (Judgment of 07.09.2004), Separate Opinion of Judge A. A. Cançado Trindade, paras. 2-6, 9, 12-13 and 36.

in the context of Article 5 varies to a certain extent depending on the type of detention involved (...).

One general principle established in the case-law is that detention will be ‘arbitrary’ where, despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities (...). The condition that there be no arbitrariness further demands that both the order to detain and the execution of the detention must genuinely conform with the purpose of the restrictions permitted by the relevant sub-paragraph of Article 5(1) (...).

The notion of arbitrariness (...) also includes an assessment whether detention was necessary to achieve the stated aim. The detention of an individual is such a serious measure that it is justified only as a last resort where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained (...). The principle of proportionality further dictates that where detention is to secure the fulfillment of an obligation provided by law, a balance must be struck between the importance in a democratic society of securing the immediate fulfillment of the obligation in question, and the importance of the right to liberty (...).” (Paras. 67-70.)

135. Earlier on, in the *Baranowski v. Poland* case (Judgment of 28.03.2000), in establishing a breach of Article 5 (1) and (4) of the ECHR (paras. 58, 77 and 86), the European Court reiterated the obligation to conform the substantive and procedural rules of domestic law (under Article 5 (1) of the ECHR — para. 50). Furthermore, it found an absence, in the domestic law at issue, of “any precise provisions” laying down whether “detention ordered for a limited period at the investigation stage could properly be prolonged at the stage of the court proceedings”; this, in the Court’s view, did not satisfy the test of “foresee ability” (para. 55). It then stressed that:

“for the purposes of Article 5(1) of the Convention, detention which extends over a period of several months and which has not been ordered by a court or by a judge or any other person ‘authorized (...) to exercise judicial power’ cannot be considered ‘lawful’ in the sense of that provision” (para. 57).

136. The prohibition of arbitrariness has been upheld by the ECtHR not only in respect of the right to personal liberty (Article 5), but also in relation to other rights protected under the European Convention. Thus, in tryad of cases *Boultif v. Switzerland* (Chamber’s Judgment of 02.08.2001, para. 46), *Üner v. The Netherlands* (Grand Chamber’s Judgment of 18.10.2006, para. 57), and *Maslov v. Austria* (Grand Chamber’s Judgment of 23 June 2008, para. 69), the ECtHR took the care to elaborate on, and to establish the criteria to be pursued in assessing whether an expulsion measure was “necessary” (a “pressing social need”) in a democratic society, and proportionate to the “legitimate aim pursued”, so as to avoid and to discard arbitrariness.

137. In the tryad of the cases of *Al-Nashif* (Chamber’s Judgment of 20.06.2002, paras. 119 and 121), *Musa and Others* (Chamber’s Judgment of 11.01.2007), and *Bashir and Others* (Chamber’s Judgment of 14.06.2007, para. 41), the three concerning Bulgaria, the respective Chambers of the European Court, bearing Article 8 (right to respect for private and family life) of the ECHR in mind, warned that, when fundamental rights are at stake, domestic law would run against the rule of law (*la prééminence du droit*) if the margin of appreciation left to the Executive knew of no limits; domestic law should thus provide sufficient guarantees against arbitrariness. In the *Al-Nashif* case, it added that the phrase “in accordance with the law” implied that the legal basis ought to be “accessible” and “foreseeable”, and that “there must be a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention”

(para. 119), even in case of an interpretation of “national security measures” which turns out to be “unlawful or contrary to common sense and arbitrary” (paras. 123-124).

138. The same warning against such an interpretation of “national security” measures was reiterated by the ECtHR in the case of *C.G. and Others v. Bulgaria* (Chamber’s Judgment of 24.04.2008). In the aforementioned *Musa and Others* case, the ECtHR further warned against “un acte administratif non motivé, délivré en dehors de toute procédure contradictoire et non susceptible de recours” (para. 60). The Court has expressed its concern also in relation to domestic policies on immigration and residence (as in, e.g., the case of *Berrehab v. The Netherlands*, Judgment of 21.06.1988, paras. 28-29).

139. In the same line of reasoning, in the case of *Lupsa v. Romania* (Chamber’s Judgment of 08.06.2006), the ECtHR reiterated the ponderation sedimented in its *jurisprudence constante* on this matter, to the effect that:

“the expression ‘in accordance with the law’ requires firstly that the impugned measure should have a basis in domestic law, but also refers to the quality of the law in question, requiring that it be accessible to the persons concerned and formulated with sufficient precision to enable them — if need be, with appropriate advice — to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

Admittedly, in the particular context of measures affecting national security, the requirement of foresee ability cannot be the same as in many other fields (...). Nevertheless, domestic law must afford a measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power (...). The existence of adequate and effective safeguards against abuse, including in particular procedures for effective scrutiny by the courts, is all the more important since a system of secret surveillance designed to protect national security entails the risk of undermining or even destroying democracy on the ground of defending it (...).” (Paras. 32-34.)

6. General Assessment.

140. The interpretation of the UN Covenant on Civil and Political Rights by the Human Rights Committee, and of the African Charter on Human and Peoples’ Rights by the African Commission on Human and Peoples’ Rights, as well as the jurisprudential construction of the Inter-American and the European Courts of Human Rights, point towards a firm prohibition of arbitrariness in distinct circumstances. It is by no means restricted to the right to personal liberty. It extends likewise to other protected rights under the respective human rights treaties or conventions.

141. It covers likewise, of course, the right not to be expelled arbitrarily from a country, the right to a fair trial, the right to respect for private and family life, the right to an effective remedy, or any other protected right. This is, epistemologically, the correct posture in this respect, given the interrelatedness and indivisibility of all human rights. To attempt to advance a restrictive view of the prohibition of arbitrariness, or an atomized approach to it, would be wholly unwarranted. And it would run against the outlook correctly pursued by international human rights supervisory organs

such as the UN Human Rights Committee and the African Commission on Human and Peoples' Rights, and by international human rights tribunals such as the Inter-American and the European Courts.

142. Human nature being what it is, everyone needs to guard protection against arbitrariness on the part of State authorities. In a wider horizon, human beings need protection ultimately against themselves, in their relations with each other. There is hardly any need to require an express provision to the effect of prohibiting arbitrariness in respect of distinct rights, or else to require the insertion of the adjective "arbitrary" in distinct provisions, in order to enable the exercise of protection against arbitrariness, in any circumstances, under human rights treaties. The 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. Underlying this whole matter is the imperative of access to justice *lato sensu*, the *right to the Law* (*le droit au Droit, el derecho al Derecho*), the right to the realization of justice in a democratic society.

VII. The Material Content of the Protected Rights.

143. Relevant elements of the practice of the UN Human Rights Committee (its general comments, as well as its views or decisions on individual communications or petitions) can here be recalled, for the determination of the *material content* of the vindicated and protected rights under the Covenant on Civil and Political Rights in the present case *A.S. Diallo*, namely, the right to liberty and security of person, the right not to be expelled from a State without a legal basis, and the right not to be subjected to mistreatment. In a subsequent section (VIII, *infra*) I shall cover the jurisprudential construction of the right to information on consular assistance in the conceptual universe of human rights.

144. Under the present section, may I begin by pointing out that, in the course of the previous examination of the vindication of the protected rights in the present case (III, *supra*), reference was made to a couple of views or decisions of the Human Rights Committee on individual communications or petitions. This is an adequate stage of the present Separate Opinion to return to that point, with attention turned to the material content of those rights, and either to stress the pertinence of such views or decisions aforementioned for the *cas d'espèce*, or else to bring to the fore other views or decisions of the Committee not yet referred to, which may have pertinence to the present purposes.

1. The Right to Liberty and Security of Person.

145. In the course of the preceding examination of the present case, reference was made to a couple of views or decisions of the Human Rights Committee on individual communications or petitions. May I return to this point now, either stressing the pertinence of such decisions already mentioned for the *cas d'espèce*, or else bringing to the fore other decisions by the Committee not yet referred to, likewise pertinent to the present purposes.

146. As to Article 9 of the Covenant (right to liberty and security of person), attention may be drawn, e.g., to two leading cases, namely, those of *Adolfo Drescher Caldas v. Uruguay* (1983) and of *Mukong v. Cameroon* (1994). In the former, the case of *Adolfo Drescher Caldas v. Uruguay*, the petitioner had been kept *incommunicado* under detention for six weeks, without the possibility of petitioning for a *habeas corpus*, and was subsequently charged before a military

judge. The Committee found a breach of Article 9 (4) of the Covenant for lack of recourse to *habeas corpus*, and reasoned that:

“Article 9(2) of the Covenant requires that anyone who is arrested shall be informed sufficiently of the reasons for his arrest to enable him to take immediate steps to secure his release if he believes that the reasons given are invalid or unfounded. It is the view of the Committee that it was not sufficient simply to inform Adolfo Drescher Caldas that he was being arrested under the prompt security measures without any indication of the substance of the complaint against him.” (Para. 13.2.)

147. And, later on, in the *Mukong v. Cameroon* case (1994), the Committee found that the respondent State had arbitrarily deprived the petitioner of his freedom, in violation, *inter alia*, of Article 9 (1) of the CCPR; the Committee noted that the mere fact that a State Party had complied with its domestic law did not mean that the arrest and detention of an individual was not arbitrary (para. 9.8). Moreover, in its *general comment* No. 8, of 1982, on the *right to liberty and security of person* (Article 9 of the Covenant), the Human Rights Committee pondered that Article 9:

“has often been somewhat narrowly understood in reports by States Parties, and they have therefore given incomplete information. The Committee points out that paragraph 1 is applicable to all deprivations of liberty, whether in criminal cases or in other cases (...). In particular the important guarantee laid down in paragraph 4, i.e., the right to control by a court of the legality of the detention, applies to all persons deprived of their liberty by arrest or detention. Furthermore, States Parties have, in accordance with Article 2(3), also to ensure that an effective remedy is provided in other cases in which an individual claims to be deprived of his liberty in violation of the Covenant.

(...) If so-called preventive detention is used, for reasons of public security, (...) it must be not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5). And if, in addition, criminal charges are brought in such cases, the full protection of Article 9(2) and (3), as well as Article 14, must also be granted.” (Paras. 1 and 4.)

2. The Right Not to Be Expelled from a State without a Legal Basis.

148. Four years later, the Human Rights Committee issued its *general comment* No. 15, of 1986, on the *position of aliens* (to include not only foreigners, but also refugees and stateless persons) under the Covenant (Article 13 of the Covenant), the Human Rights Committee observed that:

“the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.

Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. (...)

(...) Article 13 (...) is applicable to all procedures aimed at the obligatory departure of an alien, whether described in national law as expulsion or otherwise. If such procedures entail arrest, the safeguards of the Covenant relating to deprivation of liberty (Articles 9 and 10) may also be applicable. (...) If the legality of an alien’s

entry or stay is in dispute, any decision on this point leading to his expulsion or deportation ought to be taken in accordance with Article 13. It is for the competent authorities of the State Party, in good faith and in the exercise of their powers, to apply and interpret the domestic law, observing, however, such requirements under the Covenant as equality before the law (Article 26).

(...) Its purpose [of Article 13] is clearly to prevent arbitrary expulsions. (...) An alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one. (...) Discrimination may not be made between different categories of aliens in the application of Article 13.” (Paras. 1-2 and 9-10.)

149. Also in respect of Article 13 of the Covenant, reference can further be made to three other cases dealt with by the Human Rights Committee, namely, those of *Hammel v. Madagascar* (1987), of *Cañon García v. Ecuador* (1991), and of *Mansour Ahani v. Canada* (2004). In the first of these cases, that of *Hammel v. Madagascar*, the Committee, having found breaches of Articles 9 (4) and 13 of the Covenant, because: (a) the petitioner had been unable to take proceedings before a court to determine the lawfulness of his arrest; and (b) for “grounds that were not those of compelling reasons of national security, he was not allowed to submit the reasons against his expulsion and to have his case reviewed by a competent authority within a reasonable time” (para. 20).

150. The relevance of the *Hammel v. Madagascar* case to the present *A.S. Diallo* case before this Court is manifest, given the fact that the Human Rights Committee not only suggested that, in order to deny an individual the right to challenge his expulsion, the State Party ought to demonstrate that there were “compelling reasons of national security” but also concluded that, *in casu*, the reasons adduced by Madagascar were *not* reasons of “national security”. This seems to contradict the view, advanced by the D.R. Congo in the present case before this Court, that the State concerned would be the sole and final judge in relation to acts presumably threatening its national security.

151. In the second of the aforementioned cases, — that of *Cañon García v. Ecuador*, — the Human Rights Committee, noting that the respondent State had not sought to refute the petitioner’s allegations pertaining to Articles 7, 9 and 13 of the Covenant, found accordingly that the respondent State had incurred in breaches of those provisions (paras. 5(2) and 6 (1)). And, in the third case, that of *Mansour Ahani v. Canada*, the Human Rights Committee found a breach of Article 13 of the Covenant, which encompassed not only the certificate attesting the grounds for expulsion, but also “the Minister’s decision on risk of harm” prior to the deportation of the petitioner to the country wherefrom he sought refuge. The Committee did not accept that “compelling reasons of national security existed to exempt the State Party from its obligation under that Article to provide the procedural protections in question”, and reasoned that the petitioner should be afforded such protections (para. 10.8, and cf. paras. 10.9 and 12).

152. In its *general comment* No. 31, of 2004, on the *nature of the general legal obligation imposed on the States Parties to the Covenant*, the Human Rights Committee further clarified its position on the material content of the right not to be expelled from a State without a legal basis. The Committee added therein that States Parties have an:

“obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable damage, such as that contemplated by articles 6 and 7 of the Covenant,

either in the country to which removal is to be effected or in any country to which the person may be subsequently removed” (para. 12).

This has a bearing on the issue of the interrelationship between the protected rights under the Covenant, to which I shall next turn attention.

3. The Interrelationship between the Protected Rights.

153. I have already referred to the vindication, in the present case, of the right not to be subjected to mistreatment, *stricto sensu*, under Articles 7 and 10 (1) of the Covenant on Civil and Political Rights (*supra*). The Human Rights Committee has a vast practice on those provisions; at regional level, that right has been the object of an extensive case-law of the European and the Inter-American Courts of Human Rights, as well as of the African Commission on Human and Peoples’ Rights to date. It is beyond the purpose of this Separate Opinion to dwell upon this matter. May I only add that, mistreatment *lato sensu* can be inferred also from a combination of those Articles of the Covenant with its own provisions concerning some other protected rights.

154. For example, in the already mentioned case of *Hammel v. Madagascar* (*supra*), the Human Rights Committee related Articles 9 (4) to Article 13 of the Covenant, finding breaches of both of them: of Article 9 (4), because the victim was unable to challenge his arrest (during his detention preceding his expulsion), he was unable to take proceedings before a court to determine the lawfulness or otherwise of his arrest; and of Article 13, because, for grounds that “were not those of compelling reasons of national security”, he was “not allowed to submit the reasons against his expulsion”, and “to have his case reviewed by a competent authority within a reasonable time” (paras. 19(4) and 20).

155. Likewise, Article 13 of the Covenant appears intertwined, e.g., with Article 12 (on the right to freedom of movement). Those two Articles, together, safeguard a set of individual rights related essentially to freedom of movement. Article 12 (1) states that “[e]veryone within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence”. And Article 12 (4) adds that “[n]o one shall be arbitrarily deprived of the right to enter his own country”.

156. It cannot pass unnoticed, in the circumstances of the present case, that Article 12 (4) of the Covenant extends an unrestricted protection against expulsion to aliens who, like Mr. A. S. Diallo, have developed such a close relationship with the State of residence that has practically become his “home country”: in the *cas d’espèce*, Mr. A. S. Diallo came to the State of residence at the age of 17, having been living there for 30 years¹⁰⁷. Likewise, in the previous case of *Hammel v. Madagascar* (1987), Mr. E. Hammel had been a practicing attorney in Madagascar for 19 years, until his expulsion on 11.02.1982, without having been indicted nor brought before a magistrate on any charge (para. 18.2).

157. A holistic view of the protected rights under the Covenant seems to have helped to clarify aspects of concrete cases brought into the cognizance of the Human Rights Committee. For example, in so far as a possible breach of other human rights enshrined into the Covenant is concerned, the Committee has found that there *can be* a violation of a person’s *right to family life* (Article 17), when the expulsion of a person results in a separation from her family. Although the

¹⁰⁷ICJ, Reply of Guinea, para. 1.122.

mere fact that one member of the family is entitled to remain in the territory of a State Party does not necessarily mean that requiring other members of the family to leave involves such interference¹⁰⁸, the Committee specified that:

“the relevant criteria for assessing whether or not the specific interference with family life can be objectively justified must be considered, on the one hand, in light of the significance of the State party’s reasons for the removal of the person concerned, and, on the other, the degree of hardship the family and its members would encounter as a consequence of such removal”¹⁰⁹.

VIII. The Jurisprudential Construction of the Right to Information on Consular Assistance in the Conceptual Universe of Human Rights.

1. The Individual Right beyond the Inter-State Dimension.

158. In its substantial and ground-breaking Advisory Opinion No. 16, of 01.10.1999, on the Right to Information on Consular Assistance in the Framework of the Due Process of Law, the Inter-American Court of Human Rights (IACtHR), after reviewing the legislative history and evolving application of Article 36 (1) (b) of the 1963 Vienna Convention on Consular Relations, pondered that the bearer (*titulaire*) of the rights mentioned therein:

“is the individual. In effect, this Article is unequivocal in stating that rights to consular information and notification are ‘accorded’ to the interested person. In this respect, Article 36 is a notable exception to what are essentially State’s rights and obligations accorded elsewhere in the Vienna Convention on Consular Relations. As interpreted by this Court in the present Advisory Opinion, Article 36 is a notable advance over international law’s traditional conceptions of this subject.

The rights accorded to the individual under sub-paragraph (b) of Article 36 (1), cited earlier, tie in with the next sub-paragraph [(c)] (...). (...) That exercise of this right is limited only by the individual’s choice. (...)

The Court therefore concludes that Article 36 of the Vienna Convention on Consular Relations endows a detained foreign national with individual rights that are the counterpart of the host State’s correlative duties. This interpretation is supported by the Article’s legislative history. There, although in principle some States believed that it was inappropriate to include clauses regarding the rights of nationals of the sending State, in the end the view was that there was no reason why that instrument should not confer rights upon individuals.” (Paras. 82-84.)

159. And the IACtHR added that the consular communication, referred to by Article 36 of the 1963 Vienna Convention,

“does indeed concern the protection of the rights of the national of the sending State and may be of benefit to him. This is the proper interpretation of the functions of ‘protecting the interests’ of that national and the possibility of receiving ‘help and assistance’, particularly with arranging appropriate ‘representation before the tribunals’.” (Para. 87.)

¹⁰⁸Cf. *Winata v. Australia*, CCPR/C/72/D/930/2000, 21 July 2001, para. 7.1.

¹⁰⁹Cf. *Madafferi v. Australia*, CCPR/C/81/D/1011/2001, of 26.07.2004, para. 9.8; and cf. also *Byahuranga v. Denmark*, communication No. 1222/2003, 01.11.2004, para. 11.9.

In sum, in its Advisory Opinion No. 16, of 1999, the IACtHR thus held that Article 36 of the 1963 Vienna Convention recognizes to the foreigner under detention individual rights, — among which the right to information on consular assistance, — to which correspond duties incumbent upon the receiving State (irrespective of its federal or unitary structure) (paras. 84 and 140).

160. The IACtHR pointed out that the evolutive interpretation and application of the *corpus juris* of the International Law of Human Rights¹¹⁰ have had “a positive impact on International Law in affirming and developing the aptitude of this latter to regulate the relations between States and human beings under their respective jurisdictions” (para. 115). The IACtHR thus adopted the “proper approach” in considering the matter submitted to it in the framework of “the evolution of the fundamental rights of the human person in contemporary international law” (paras. 114-115).

161. The IACtHR sustained the view that, for the due process of law to be preserved, “a defendant must be able to exercise his rights and defend his interests effectively and in full procedural equality with other defendants” (para. 117). In order to attain its objectives, “the judicial process ought to recognize and correct the factors of real inequality” of those taken to justice (para. 119); thus, the notification, to persons deprived of their liberty abroad, of their right to communicate with their consul, contributes to safeguard their defence and the respect for their procedural rights (paras. 121-122). The individual right to information under Article 36 (1) (b) of the Vienna Convention on Consular Relations thus renders effective the right to the due process of law (para. 124)¹¹¹.

162. The IACtHR thereby linked the right at issue to the evolving guarantees of due process of law. This Advisory Opinion No. 16 of the IACtHR, truly pioneering, has served as inspiration for the emerging international case-law, *in statu nascendi*, on the matter¹¹², and is having a sensible impact on the practice of States in the region on the issue. That historical Advisory Opinion, furthermore, reveals the impact of the International Law of Human Rights in the evolution of Public International Law itself, specifically for having the IACtHR been the first international tribunal to warn that, if non-compliance with Article 36 (1) (b) of the Vienna Convention on Consular Relations of 1963 takes place, it occurs to the detriment not only of a State Party but also of the human beings at issue¹¹³.

2. The Humanization of Consular Law.

163. That Advisory Opinion was followed, four years later, in the same line of thinking, by Advisory Opinion No. 18 of the IACtHR, of 17.09.2003, on the *Juridical Condition and Rights of Undocumented Migrants*. This latter opened new ground for the protection of migrants, in acknowledging the prevalence of the rights inherent to human beings, irrespective of their

¹¹⁰The Court stated that “human rights treaties are living instruments, whose interpretation ought to follow the evolution of times and the current conditions of life” (para. 114). The Court made it clear that, in its interpretation of the norms of the American Convention on Human Rights, it should aim at extending protection in new situations on the basis of preexisting rights.

¹¹¹The non-observance or obstruction of the exercise of this right affects the judicial guarantees (para. 129).

¹¹²As promptly acknowledged by expert writing; cf., e.g., G. Cohen-Jonathan, “Cour Européenne des Droits de l’Homme et droit international général (2000)”, 46 *Annuaire français de Droit international* (2000) p. 642; M. Mennecke, “Towards the Humanization of the Vienna Convention of Consular Rights — The *LaGrand* Case before the International Court of Justice”, 44 *German Yearbook of International Law/Jahrbuch für internationales Recht* (2001) pp. 430-432, 453-455, 459-460 and 467-468; Ph. Weckel, M.S.E. Helali and M. Sastre, “Chronique de jurisprudence internationale”, 104 *Revue générale de Droit international public* (2000) pp. 794 and 791; Ph. Weckel, “Chronique de jurisprudence internationale”, 105 *Revue générale de Droit international public* (2001) pp. 764-765 and 770.

¹¹³As the ICJ subsequently also admitted, in the *LaGrand* case.

migratory status¹¹⁴. The Court made it clear that States ought to respect and ensure respect for human rights in the light of the general and basic principle of equality and non-discrimination, and that any discriminatory treatment with regard to the protection and exercise of human rights generates the international responsibility of the States. In the view of the IACtHR, the fundamental principle of equality and non-discrimination has entered into the domain of *jus cogens*.

164. The IACtHR added that States cannot discriminate or tolerate discriminatory situations to the detriment of migrants, and ought to guarantee the due process of law to any person, irrespective of his or her migratory status. This latter cannot be a justification for depriving a person of the enjoyment and exercise of his or her human rights, including labour rights. Undocumented migrant workers have the same labour rights as the other workers of the State of employment, and this latter ought to ensure respect for those rights in practice. States cannot subordinate or condition the observance of the principle of equality before the law and non-discrimination to the aims of their migratory or other policies¹¹⁵.

165. Advisory Opinion No. 18 propounded the same dynamic or evolutive interpretation of International Human Rights Law heralded by the IACtHR four years earlier, in its Advisory Opinion No. 16 of 1999¹¹⁶. In 2003, the IACtHR reiterated and expanded its forward-looking outlook, in its Advisory Opinion No. 18, on the *Juridical Condition and Rights of Undocumented Migrants*, constructed upon the evolving concepts of *jus cogens* and of obligations *erga omnes* of protection (in their horizontal and vertical dimensions). This jurisprudential construction points in a clear direction: consular assistance and protection have become much closer to human rights protection.

166. It so happens that consular assistance and protection have indeed undergone a process of *jurisdictionalization*, integrating, in the light of the outlook advanced by the Inter-American Court, the enlarged conception of the *due process of law*, proper of our times. This is gradually being grasped in contemporary expert writing, which now rightly acknowledges that, while diplomatic protection remains ineluctably discretionary, pursuing an unsatisfactory inter-State dimension, consular assistance and protection are now linked to the obligatory guarantees of due process of law, in the framework of the International Law of Human Rights¹¹⁷. The ultimate

¹¹⁴This more recent Advisory Opinion No. 18 is likewise having an impact on the theory and practice of International Law in the present domain of protection of the human rights of migrants, — as also promptly acknowledged by expert writing; cf., e.g., L. Hennebel, “L’humanisation du Droit international des droits de l’homme — Commentaire sur l’Avis Consultatif No. 18 de la Cour Interaméricaine relatif aux droits des travailleurs migrants”, 15 *Revue trimestrielle des droits de l’homme* (2004) No. 59, pp. 747-756; S. H. Cleveland, “Legal Status and Rights of Undocumented Migrants — Advisory Opinion OC-18/03 [of the] Inter-American Court of Human Rights”, 99 *American Journal of International Law* (2005) pp. 460-465; C. Laly-Chevalier, F. da Poian and H. Tigroudja, “Chronique de la jurisprudence de la Cour Interaméricaine des Droits de l’Homme (2002-2004)”, 16 *Revue trimestrielle des droits de l’homme* (2005) No. 62, pp. 459-498.

¹¹⁵In addition, the four Individual Opinions presented were, significantly, all of them, Concurring Opinions. In my own lengthy Concurring Opinion, as [then] President of the Court, I dwelt upon nine points, namely: (a) the *civitas maxima gentium* and the universality of the human kind; (b) the disparities of the contemporary world and the vulnerability of migrants; (c) the reaction of the universal juridical conscience; (d) the construction of the individual subjective right of asylum; (e) the position and the role of the general principles of law; (f) the fundamental principles as *substratum* of the legal order itself; (g) the principle of equality and non-discrimination in the International Law of Human Rights; (h) the emergence, the content and the scope of *jus cogens*; and (i) the emergence and the scope of obligations *erga omnes* of protection (their horizontal and vertical dimensions).

¹¹⁶In that 16th and pioneering Advisory Opinion, of major importance, the Inter-American Court clarified that, in its interpretation of the norms of the American Convention, it should extend protection in new situations (such as that concerning the observance of the right to information on consular assistance) on the basis of preexisting rights (*supra*).

¹¹⁷Cf. E. Decaux, “La protection consulaire et les droits de l’homme”, in: Société française pour le Droit international (SFDI), *La protection consulaire* (Journée d’études de Lyon de 2005), Paris, Pédone, 2006, pp. 56-57, 64 and 69-72.

beneficiaries of this evolution are the individuals facing adversity, particularly those deprived of their personal liberty abroad.

3. The Irreversibility of the Advance of Humanization.

167. Advisory Opinion No. 16 (of 01.10.1999) of the IACtHR, on the *Right to Information on Consular Assistance in the Framework of the Due Process of Law*, was extensively relied upon by the contending Parties in the proceedings (written and oral phases) before the ICJ in the *LaGrand* and *Avena* cases. In the *LaGrand* case, it was invoked in both the Memorial of Germany (of 16.09.1999, para. 4.13) and in the Counter-Memorial of the United States (of 27.03.2000, para. 102, No. 110); and it was object of further attention in the oral arguments of both Germany¹¹⁸ and the United States¹¹⁹.

168. Likewise, in the *Avena* case, that Advisory Opinion of the IACtHR was invoked, in the course of the written phase of the proceedings before the ICJ, by Mexico in its Application (paras. 65, 77 and 271) as well as in its Memorial (of 20.06.2003, paras. 157-158, 194, 332, 336 and 344), and by the United States in its Counter-Memorial (para. 6.84). Mexico further invoked it in its oral arguments before the ICJ¹²⁰. The ICJ was obviously quite aware of the inspiring contents of Advisory Opinion No. 16 of the IACtHR, on *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (1999), when it issued its Judgments in the *LaGrand* (2001) and *Avena* (2004) cases, though it did not care to refer to that relevant judicial precedent, as it should have, on both occasions.

169. In the line of the aforementioned ground-breaking Advisory Opinion No. 16 of the IACtHR, the ICJ also identified, in the *LaGrand* case (Judgment of 27.06.2001), the “individual rights” under Article 36 (1) of the 1963 Vienna Convention (para. 77). But the ICJ’s reasoning remained *à mi-chemin*, not pursuing it up to the point of inserting those individual rights into the conceptual universe of human rights. Subsequently, in the *Avena* case (Judgment of 31.03.2004), the Court related the individual rights there under to the corresponding obligations incumbent upon the State concerned (para. 76).

170. In the same *Avena* case, the Court was then faced with Mexico’s contention — well in conformity with the aforementioned Advisory Opinion No. 16 of 1999 of the IACtHR (*supra*) — that:

“the right to consular notification and consular communication under the Vienna Convention is a fundamental human right that constitutes part of due process in criminal proceedings and should be guaranteed in the territory of each of the Contracting Parties to the Vienna Convention; according to Mexico, this right, as such, is so fundamental that its infringement will *ipso facto* produce the effect of vitiating the entire process of the criminal proceedings conducted in violation of this fundamental right” (*I.C.J. Reports 2004 (I)*, pp. 60-61, para. 124).

¹¹⁸ICJ, *Compte rendu* CR 2000/26, of 13.11.2000, paras. 10-14; ICJ, *Compte rendu* CR 2000/27, of 13.11.2000, paras. 21, 23 and 29; ICJ, *Compte rendu* CR 2000/30, of 16.11.2000, paras. 4-5 and 10-11.

¹¹⁹ICJ, *Compte rendu* CR 2000/29, of 14.11.2000, para. 6.23; ICJ, *Compte rendu* CR 2000/31, of 17.11.2000, paras. 4.7.

¹²⁰ICJ, *Compte rendu* CR 2003/24, of 15.12.2003, paras. 34-36 and 39; ICJ, *Compte rendu* CR 2003/25, of 15.12.2003, para. 451.

171. The Court, after summarizing Mexico's argument grounded in the aforementioned Advisory Opinion No. 16 of the IACtHR, took a step backwards when it added suddenly, in a rather dogmatic and authoritarian tone:

“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.” (*I.C.J. Reports 2004 (I)*, p. 61, para. 124.)

And the Court promptly concluded, *ex cathedra*, that Mexico's submission could not therefore be upheld (para. 125).

172. Yet, if the Court was not prepared to examine Mexico's contention, and felt — for whatever reasons that escape my comprehension — that it did not need to decide on it, it should not have made such a statement without indicating on which assumptions it was based. The authority of argument is always far more persuasive than the argument of authority. The fact is that the Court's statement is, *data venia*, without foundation. It does not resist closer examination, either in respect of the *text* of Article 36 (1) (b) of the 1963 Vienna Convention, or in respect of its *object and purpose*, or in respect of its *travaux préparatoires*.

(a) *The Text of the 1963 Vienna Convention.*

173. As to the *text*, it has already been pointed out that it is the *individual* who has the right to information on consular assistance, as indicated in Article 36 (1) (b) *in fine* of the 1963 Vienna Convention (*supra*). The last phrase of Article 36 (1) (b) leaves no doubt that *it is the individual, and not the State*, who is the *titulaire* of the right to be informed on consular assistance. However intertwined may this provision be with States Parties' obligations, this is clearly an *individual right*. If this individual right is breached, the guarantees of the due process of law will ineluctably be affected.

174. As the Inter-American Court rightly pondered, in this respect, in its Advisory Opinion No. 16 of 1999,

“The International Covenant on Civil and Political Rights recognizes the right to the due process of law (Article 14) as a right that ‘derive[s] from the inherent dignity of the human person’. That Article enumerates a number of guarantees that apply to ‘everyone charged with a criminal offence’, and in that respect is consistent with the principal international human rights instruments.

In the opinion of this Court, for ‘the due process of law’ a defendant must be able to exercise his rights and defend his interests effectively and in full procedural equality with other defendants. It is important to recall that the judicial process is a means to ensure, insofar as possible, an equitable resolution of a difference. The body of procedures, of diverse character and generally grouped under the heading of the due process, is all calculated to serve that end. To protect the individual and see justice done, the historical development of the judicial process has introduced new procedural rights. Examples of the evolving nature of judicial process are the rights not to incriminate oneself, and to have an attorney present when one speaks. These two rights are already part of the legislation and jurisprudence of the more advanced legal systems. And so, the body of judicial guarantees given in Article 14 of the

International Covenant on Civil and Political Rights has evolved gradually. It is a body of judicial guarantees to which others of the same character, conferred by various instruments of international law, can and should be added.

In this regard the Court has held that the procedural requirements that must be met to have effective and appropriate judicial guarantees 'are designed to protect, to ensure, or to assert the entitlement to a right or the exercise thereof' and are 'the prerequisites necessary to ensure the adequate protection of those persons whose rights or obligations are pending judicial determination'.

To accomplish its objectives, the judicial process must recognize and correct any real disadvantages that those brought before the bar might have, thus observing the principle of equality before the law and the courts and the corollary principle prohibiting discrimination. The presence of real disadvantages necessitates countervailing measures that help to reduce or eliminate the obstacles and deficiencies that impair or diminish an effective defense of one's interests. Absent those countervailing measures, widely recognized in various stages of the proceeding, one could hardly say that those who have the disadvantages enjoy a true opportunity for justice and the benefit of the due process of law equal to those who do not have those disadvantages.

This is why an interpreter is provided when someone does not speak the language of the court, and why the foreign national is accorded the right to be promptly advised that he may have consular assistance. These measures enable the accused to fully exercise other rights that everyone enjoys under the law. Those rights and these, which are inextricably inter-linked, form the body of procedural guarantees that ensures the due process of law.

In the case to which this Advisory Opinion refers, the real situation of the foreign nationals facing criminal proceedings must be considered. Their most precious juridical rights, perhaps even their lives, hang in the balance. In such circumstances, it is obvious that notification of one's right to contact the consular agent of one's country will considerably enhance one's chances of defending oneself and the proceedings conducted in the respective cases, including the police investigations, are more likely to be carried out in accord with the law and with respect for the dignity of the human person.

The Court therefore believes that the individual right under analysis in this Advisory Opinion must be recognized and counted among the minimum guarantees essential to providing foreign nationals the opportunity to adequately prepare their defense and receive a fair trial.

The incorporation of this right into the Vienna Convention on Consular Relations — and the discussions that took place as it was being drafted — are evidence of a shared understanding that the right to information on consular assistance is a means for the defense of the accused that has repercussions — sometimes decisive repercussions — on enforcement of the accused' other procedural rights.

In other words, the individual's right to information, conferred upon in Article 36 (1) (b) of the Vienna Convention on Consular Relations, makes it possible for the right to the due process of law upheld in Article 14 of the International Covenant on Civil and Political Rights, to have practical effects in tangible cases; the minimum guarantees established in Article 14 of the International Covenant can be amplified in the light of other international instruments like the Vienna Convention on

Consular Relations, which broadens the scope of the protection afforded to those accused.” (Paras. 116-124.)

(b) *The Object and Purpose of the 1963 Vienna Convention.*

175. As to the *object and purpose* of the Vienna Convention on Consular Relations, they are affected, to the point of not being fulfilled, in case of a breach of the individual right to information on consular assistance (Article 36 (1) (b) of the Convention). Its object and purpose lie in the *commonality* of interests of all the States Parties to the 1963 Vienna Convention, in the sense that compliance by the States Parties, with all the obligations set forth there under, — including the obligation of compliance with the individual right at issue, — is to be secured. Accordingly, in so far as consular assistance is concerned, the preservation of, and compliance with, the individual right to information on it (Article 36 (1) (b)) becomes essential to the fulfilment of the object and purpose of the Vienna Convention on Consular Relations.

(c) *The Travaux Préparatoires of the 1963 Vienna Convention.*

176. The *travaux préparatoires* of that provision of the 1963 Vienna Convention contain valuable indications to the same effect. Those *travaux préparatoires* have been insufficiently explored in expert writing, but were object of close attention on the part of the Advisory Opinion No. 16, of 1999, of the Inter-American Court of Human Rights (IACtHR), on *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*. The aforementioned conclusions, on the matter at issue, arrived at by the IACtHR, were grounded on an in-depth analysis of the *travaux préparatoires* of the 1963 Vienna Convention.

177. Besides the elements of those *travaux* referred to by the IACtHR in its Advisory Opinion No. 16 of 1999¹²¹ (and also discussed in the pleadings before the Court¹²²), I deem it fit to add, in this Separate Opinion in the present *A.S. Diallo* case, which the ICJ has just resolved, the following ones, which I find relevant for the clarification of the point at issue, examined herein. In the debates of the 1963 UN Conference on Consular Relations, held in Vienna, the Delegate of Greece (Mr. Spyridakis), for example, stated that Article 36 (1) (b) of the [then] Draft Convention was intended:

“to establish an additional safeguard for the rights of the individual and to reinforce the ideal of humanism”¹²³.

In stressing the relevance of that provision, he added that that work of codification of international law on consular relations had taken into account the promotion and protection of human rights, and “future generations would be grateful” for that¹²⁴.

178. The Delegate of Australia (Mr. Woodberry), in the same line, stressed the importance, in the present context of consular assistance, of securing respect for the fundamental rights of the individual, emanating from a “principle upon which the United Nations was based”¹²⁵. The

¹²¹Paragraph 90, notes 71-73.

¹²²Cf. e.g., IACtHR, Advisory Opinion No. 16, on *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (1999), Series B (Pleadings, Oral Arguments and Documents), 2000, pp. 39, 66-67, 74, 88, 90-91, 93-94, 117, 129, 131, 146, 167 and 206-207.

¹²³UN, *United Nations Conference on Consular Relations* (Vienna, 04.03-22.04.1963), Vol. I — *Official Records*, N.Y., UN, 1963, p. 39.

¹²⁴*Ibid.*, p. 339.

¹²⁵*Ibid.*, pp. 331-332.

Delegate of Korea (Mr. Chin), in turn, deemed it fit to point out that the duty of the receiving State under Article 36 (1) (b) of the Draft Convention was:

“extremely important, because it related to one of the fundamental and indispensable rights of the individual”¹²⁶.

179. In the same line of reasoning, the Delegate of Tunisia (Mr. Bouziri) also singled out the great importance of consular assistance, as detention was “a serious infringement of the freedom and dignity of the individual”; the measures provided for in Article 36 (1) (b) of the Draft Convention were thus “necessary to protect the rights of foreigners”¹²⁷. The same point was made by the Delegates of the United Kingdom (Mr. Evans)¹²⁸ and of Kuwait (Mr. S.M. Hosni)¹²⁹. The Delegate of France (Mr. de Menthon) stressed the need to secure respect for one of the fundamental rights of the individual, and thus to reinforce further information on consular assistance¹³⁰.

180. The Delegate of Spain (Mr. Pérez Hernández) regarded the right to information on consular assistance and to enjoy willingly such assistance, as “one of the most sacred rights of foreign residents in a country”¹³¹. The Delegate of Vietnam (Mr. Vu-Van-Mau) made the point that, as *titulaire* of the right to information on consular assistance, it was the individual himself who was to decide whether he wished or not to count on the assistance of his consul: one was here faced with “the rights of the detained person”¹³². Likewise, the Delegate of India (Mr. Krishna Rao) also stated that it was for the individual concerned to decide whether to avail himself or not of consular assistance¹³³.

181. In connection with this latter, the Delegates of Ecuador (Mr. Alvarado Garaicoa)¹³⁴ and Ukraine (Mr. Zabigailo)¹³⁵ saw it fit to refer to the 1948 Universal Declaration of Human Rights. The Delegate of Switzerland (Mr. Serra), on his turn, referred, in the present context of consular assistance, to “the freedom of the human person” and “the expression of the will of the individual”, as “fundamental principles” taken into account by the “instruments concluded under the auspices of the United Nations”¹³⁶. He added emphatically that:

“[t]he Swiss Delegation was prepared to agree to any proposal which referred to the freely expressed wish of the person concerned. That was the object of its amendment for the addition of a new paragraph (...). What mattered was that the essential principle which (...) was laid down in a number of bilateral conventions should be

¹²⁶*Ibid.*, p. 338.

¹²⁷*Ibid.*, p. 339.

¹²⁸*Cf. ibid.*, p. 339.

¹²⁹*Cf. ibid.*, p. 332.

¹³⁰*Ibid.*, pp. 38, 332 and 344.

¹³¹*Ibid.*, p. 332, and cf. also pp. 335 and 344.

¹³²*Ibid.*, p. 37.

¹³³*Ibid.*, p. 339, and cf. p. 333.

¹³⁴*Cf. ibid.*, p. 333.

¹³⁵*Cf. ibid.*, p. 46.

¹³⁶*Ibid.*, p. 335.

stated in the text being prepared by the Conference. [It] would be unable to accept any formula which ignored the will of the persons concerned.”¹³⁷

(d) General Assessment.

182. All the aforementioned interventions, at an advanced stage of the preparatory work of the 1963 Vienna Convention on Consular Relations, — which, in historical perspective, preceded in three years the adoption of the two UN Covenants on Human Rights (on Civil and Political Rights, as well as on Economic, Social and Cultural Rights, respectively), — indicated that, already at that time, there was awareness among participating Delegations as to the need to insert the right to information on consular assistance into the conceptual universe of human rights. There were, in the debates of 1963 at the Vienna Conference, no less than 19 interventions pointing in this same direction.

183. In addition to those interventions, the UN High Commissioner for Refugees submitted a memorandum to the 1963 Vienna Conference, wherein it singled out that draft Article 36 of the Draft Convention was one of its two provisions that had a direct bearing upon its own work, in so far as the protection of the rights of nationals of the sending State in the State of residence were concerned¹³⁸. There was indeed an awareness of the imperative of human rights protection, *even before the adoption of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) in 1965 and of the two UN Covenants on Human Rights in 1966*, at the early stage of the legislative phase of UN human rights treaties.

184. Such awareness, and the legal consequences of the consideration of the matter within the conceptual universe of human rights, were grasped and properly developed, more than three decades later, by the IACtHR in its Advisory Opinion No. 16 on *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (1999), — consolidated by its Advisory Opinion No. 18 on the *Juridical Condition and Rights of Undocumented Migrants* (2003), — which contributed decisively for the process of *humanization* of consular law¹³⁹, going well beyond the inter-State dimension.

185. The aforementioned Advisory Opinion No. 16 (1999) was brought into the attention of the ICJ in proceedings before this latter, and paved the way its reasonings in the resolution of the triad of the *Breard/LaGrand/Avena* cases. Such advance of humanization of consular law is bound to be an irreversible one. Human conscience, the universal juridical conscience (as the ultimate material source of International Law), was soon awakened so as to fulfil a pressing need to this effect. Human conscience was soon attentive to fulfil the needs of protection of human beings in all circumstances, including in situations of deprivation of personal liberty abroad. Such irreversibility of the advance of humanization, in the present domain of international law, among others, is a reassuring one.

¹³⁷*Ibid.*, p. 335. On the Swiss amendment, cf. UN, *United Nations Conference on Consular Relations* (Vienna, 04.03-22.04.1963), Vol. II — *Official Records*, N.Y., UN, 1963, p. 83. The comment to draft Article 36 of the Draft Convention observed that “[s]i les droits prévus au présent article doivent s’exercer conformément aux lois et règlements de l’Etat de résidence, cela ne veut pas dire que ces lois et règlements pourraient mettre à néant les droits dont il s’agit”; *ibid.*, p. 25.

¹³⁸Cf. doc. A/CONF.25/L.6, reproduced in *ibid.*, p. 53.

¹³⁹Cf. A. A. Cançado Trindade, “The Humanization of Consular Law: The Impact of Advisory Opinion No. 16 (1999) of the Inter-American Court of Human Rights on International Case-Law and Practice”, 6 *Chinese Journal of International Law* (2007) pp. 1-16.

186. It leaves no room for steps backwards, or hesitations. From the preceding review, it is clear that, contrary to what this Court stated in paragraph 124 (*cit. supra*, para. 171) in its Judgment of 2004 in the *Avena* case (dismissing a submission by Mexico), 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 indeed to pronounce upon or decide.

187. It could have done so in the present *A.S. Diallo* case, — since the point was raised before it in the course of the oral phase of the proceedings of the *cas d'espèce*, — but it preferred to give a rather summary treatment to the consideration of Article 36 (1) (b) of the 1963 Vienna Convention. Moreover, — and contrary again to what this Court asserted in 2004 in the *Avena* case, — both the text, and object and purpose of the 1963 Convention, as well as several indications in its *travaux préparatoires* (*cf. supra*), clearly support the view (then advanced by Mexico, on the basis of the Advisory Opinion No. 16, of 1999, of the IACtHR) that the right to information on consular assistance belongs to the conceptual universe of human rights, and non-compliance with it ineluctably affects judicial guarantees vitiating the due process of law.

188. 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 to ignore the contribution of other contemporary international tribunals to the progressive development of international law, — in the sense of the irreversible advance of its humanization, — seems to attempt to avoid the penetrating sunlight with a fragile blindfold.

IX. The Notion of “Continuing Situation”: The Projection of Human Rights Violations in Time.

189. Having examined the material content of the human rights protected in the *cas d'espèce*, as well as the jurisprudential construction of the right to information on consular assistance in the conceptual universe of human rights, I may now turn to the next point, before moving on to the question of the right to reparation in the present case of *A.S. Diallo*: I allow myself to turn now to the notion of “continuing situation”, in the framework of the projection of human rights violations in time. This is an issue which has not yet been satisfactorily resolved in contemporary international case-law and legal doctrine, and thus requires careful attention in our days.

190. We have already seen that the AfComHPR, in the case of *Amnesty International, Comité Loosli Bachelard, Lawyers Committee for Human Rights, and Association of Members of the Episcopal Conference of East Africa v. Sudan* (1999), established the occurrence of “serious and continuing violations”¹⁴⁰ of Article 6” of the African Charter (*cf. para. 122, supra*). This was not the only occasion wherein the notion of “continuing situation” marked presence in the practice of the AfComHPR.

191. To recall but another example, in its decision in the *L. Zegveld and M. Ephrem v. Eritrea* case (2003), the AfComHPR, having found that 11 persons were being held, since September 2001, under “secret detention without any access to the courts, lawyers or family”, added:

¹⁴⁰Emphasis added.

“Regrettably, these persons’ rights *are continually being violated* even today, as the respondent State is still holding them in secret detention in blatant violation of their rights to liberty and recourse to fair trial.”¹⁴¹

192. Likewise, in its practice the UN Human Rights Committee has acknowledged the existence of “continuing” or “persistent” violations of human rights under the Covenant on Civil and Political Rights. It has also referred to “continuing” or “persistent effects” of certain human rights breaches under the Covenant, in relation with the difficulties it has at times faced to examine *ratione temporis* certain individual communications lodged with it¹⁴². In fact, in its practice, the Committee has displayed its keen awareness of the *time factor* in the settlement of cases raising issues of competence *ratione temporis*.

193. In this respect, reference can also be made to the Committee’s *general comment* No. 26 (of 1997), on the *continuity of obligations*, with an incidence in the law of treaties (cf. para. 3). Reference can further be made to its *general comment* No. 31 (of 2004), where the Committee espoused the view that the individual’s right to an effective remedy

“may in certain circumstances require States Parties to provide for and implement provisional or interim measures to avoid *continuing situations* and to endeavour to repair at the earliest possible opportunity any harm that may have been caused by such violations”¹⁴³.

194. In sum, in the exercise of its functions, the Committee has, in my view, aptly identified, in its interpretation of the Covenant on Civil and Political Rights, the proper *time* and *space* dimensions in all its consequences. Examples of the former are provided by its endorsement of the notions of *continuing situation* and *persistent effects*, in its handling of communications, as well as, in certain circumstances, of *potential victims*. As to the latter, an example is provided by its endorsement of the *extra-territorial* application of the protected rights. It is beyond the scope of the present Separate Opinion to embark on an examination of this latter.

195. I have, in fact, devoted considerable attention to the notion of “continuing situation” in my recent Dissenting Opinion in the case of *Jurisdictional Immunities of the State* ((*Germany v. Italy*), Counter-Claim, Order of 06.07.2010), having devoted four sections of it (VII-X) to: (a) the origins of that concept in international legal doctrine (paras. 60-64); (b) its configuration in international litigation and case-law, in Public International Law as well as in International Human Rights Law (paras. 65-83); (c) its configuration in international legal conceptualization at normative level; and d) its presence in that case. It is not my intention to repeat here the analysis I developed therein.

196. Suffice it here to refer to my considerations on the jurisprudential construction of “continuing situation” on the part of both the European and the Inter-American Courts of Human Rights (paras. 73-83). Particularly illustrative are, *inter alia*, the three Judgments of the Inter-American Court in the leading case of *Blake v. Guatemala* (Preliminary Objections, of 02.07.1996; Merits, of 24.01.1998; and Reparations, of 22.01.1999), and the recent Judgment of

¹⁴¹Para. 57; emphasis added.

¹⁴²For a recent assessment, cf. L. Hennebel, *La jurisprudence du Comité des droits de l’homme des Nations Unies — Le Pacte international relatif aux droits civils et politiques et son mécanisme de protection individuelle*, Bruxelles, Bruylant/Nemesis, 2007, pp. 374-381.

¹⁴³Para. 19; emphasis added.

the Grand Chamber of the European Court in *Varnava and Others v. Turkey* case (of 18.09.2009). It is not at all surprising that the notion of “continuing situation” has been developed to a larger extent in the domain of the international protection of human rights. This significant jurisprudential development cannot pass unnoticed to the ICJ in our days.

197. In the consideration of the present case *A.S. Diallo*, the point at issue is reflected in the Joint Declaration of five Members of this Court¹⁴⁴, appended to the present Judgment. I feel obliged to add yet another remark thereto, in the line of the observations developed in this section (IX) of my Separate Opinion. The griefs suffered by Mr. A. S. Diallo in the present case disclose a *factual nexus* between the arrests and detentions of 1988-1989 and those of 1995-1996, prior to his expulsion from the country of residence in 1996. Those griefs, *extended in time*, were in breach of the applicable law in the present case (Articles 9 and 13 of the Covenant on Civil and Political Rights, Articles 6 and 12(4) of the African Charter on Human and Peoples’ Rights, Article 36 (1) (b) of the Vienna Convention on Consular Relations), as interpreted in pursuance of the hermeneutics of human rights treaties.

198. At the time of his arrests and detention, Mr. A. S. Diallo was not informed of the charges against him, nor could he have availed himself without delay of his right to information on consular assistance. His griefs were surrounded by arbitrariness on the part of State authorities. Moreover, there was a chain of causation, a *causal nexus*, in that *continuity* of occurrences, to be borne in mind (with a direct incidence on the reparation due to Mr. A. S. Diallo), which the Court’s majority regrettably failed to consider. The projection of human rights in time also raises the issue of the prolonged lack of access to justice.

199. This *causal nexus* could at least have been considered as evidence put before the Court, but was simply discarded by the Court’s majority¹⁴⁵. The Court could at least have taken into account — in my view it should have — the circumstances of the arrests and detention in 1988-1989 in its consideration of the arrests and detention of 1995-1996, prior to Mr. A. S. Diallo’s expulsion from the D.R. Congo in 1996. Keeping the aforementioned *factual nexus* and *causal nexus* in mind, it could hardly be denied that there was a *continuing situation* of breaches of Mr. A. S. Diallo’s individual rights (specified *supra*), in the period extending from 1988 to 1996.

X. The Individual as Victim: Reflections on the Right to Reparation.

200. I have now come to the consideration of the issue of the right to reparation in the *cas d’espèce*. As to resolutive points 7 and 8 (duty to make appropriate reparation) of the *dispositif* of the Court’s Judgment in the present *A.S. Diallo* case, which were adopted with my concurring vote, I feel obliged, in addition, to express my concern that the provision of adequate reparation is still to wait further, till the Court eventually decides later on this aspect (pursuant to resolutive point 7), in case the contending Parties fail to reach an agreement on this issue within the forthcoming six months. To my mind, this resembles an arbitral, rather than a truly judicial procedure, and looks somewhat disquieting to me.

201. This is particular so, if we bear in mind the prolonged length of time that the handling of this case by the Court has taken. Since Guinea’s application of 1998 until the delivery by the

¹⁴⁴Cf. Joint Declaration of Judges Al-Khasawneh, Simma, Bennouna, Cançado Trindade and Yusuf.

¹⁴⁵Despite what it partly conceded in para. 82 of the present Judgment.

Court of its decision of 2007 on Preliminary Objections, almost a decade was consumed¹⁴⁶. Subsequently, from the deposit of the D.R. Congo's Counter-Memorial of 2008 until the end of the oral phase of pleadings before the Court in 2010, another three years have passed¹⁴⁷. At last, the Court has just delivered today, 30 November 2010, its present Judgment on the merits of the *cas d'espèce*.

202. The basic claim underlying the present case *A.S. Diallo* has thus remained, for consideration by this Court, before this latter for almost 12 years, from the end of December 1998 to this end of November 2010. It could hardly be denied that this has been a prolonged and cumbersome procedure, and a particularly time-consuming one, for reasons not attributable to the Court itself, except for its apparent outlook of such procedure inadequately resembling rather that of an arbitral tribunal, — something which is, in my view, to be avoided, *particularly when reparation for human rights breaches is at stake*. The Court is the master of its own jurisdiction, and of its own procedure, and unreasonable prolongation of time-limits for the performance of procedural acts is to be curtailed and avoided.

203. By virtue of the decision taken by the Court in resolutive point 8, of the *dispositif* of the present Judgment, the determination of reparation is now extended for another period of up to six months, to start with. This does not appear reasonable to me, as 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. It is thus all too proper to keep in mind the *individual's* right to reparation in the light of the applicable law in the *cas d'espèce*, — the International Law of Human Rights, in particular the Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights (in addition to the Vienna Convention on Consular Relations).

204. This issue takes us beyond the domain of international procedural law, into that of juridical epistemology, encompassing one's own conception of international law in our times. Here, the applicant State is the claimant, but the victim is the individual. The applicant State claims for reparation, but the *titulaire* of the right to reparation is the individual, whose rights have been breached. The applicant State suffered no damage at all, it rather incurred into costs and expenses, in espousing the cause of its national abroad. The damage was suffered by the individual himself (subjected to arbitrary arrests and detention, and expulsion from the State of residence), not by his State of nationality.

205. The individual concerned is at the *beginning* and at the *end* of the present case, and his saga has not yet ended, as a result also of the unreasonable prolongation of the proceedings before this Court. As it can be seen from my own voting on the distinct resolutive points of the *dispositif* of the present Judgment, these latter have left me with mixed feelings, for the lack of consistency of the Court's reasoning on the successive points submitted to its decision. It is about time for this Court to overcome the *acrobaties intellectuelles* ensuing from an undue reliance on the old

¹⁴⁶Guinea's Application instituting proceedings was lodged with the Court on 28.12.1998, and the deposit of its Memorial took place on 23.03.2001. The D.R. Congo raised its Preliminary Objections on 03.10.2002, to which Guinea opposed its Written Statement of 07.07.2003. Four years later, on 24.05.2007, the Court delivered its Judgment on Preliminary Objections.

¹⁴⁷The D.R. Congo's Counter-Memorial dates from 27.03.2008, Guinea's Reply was deposited on 19.11.2008, and the D.R. Congo's Rejoinder on 05.06.2009; the oral arguments of the parties in pleadings before the Court lasted from 19 to 29.04.2010.

Vattelian fiction, revived by the PCIJ in the *Mavrommatis* fiction¹⁴⁸ (not a principle, simply a largely surpassed fiction).

206. It can no longer keep on reasoning within the hermetic parameters of the exclusively inter-State dimension. The recognition of the damage suffered by the individual (para. 98 of the Judgment) has rendered unsustainable the old theory of the State's assertion of its "own rights" (*droits propres*), with its underlying voluntarist approach. The *titulaire* of the right to reparation is the individual, who suffered the damage, and State action in diplomatic protection is to secure the reparation due to the individual concerned¹⁴⁹. Such action in diplomatic protection aims at reparation for a damage, usually already consummated, to the detriment of the individual; consular assistance and protection, much closer nowadays to human rights protection, are exercised in a rather *preventive* way, so as to avoid a probable or a new damage to the individual concerned. This affinity of contemporary consular assistance and protection with human rights protection is largely due to the historical rescue of the individual, of the human person, as subject of international law.

207. Had the Court pursued the hermeneutics of the human rights treaties, invoked by the contending States throughout the *whole* of its proceedings (cf. *supra*), in the whole Judgment, this latter would have been entirely a much more consistent and satisfactory one. In particular, the unreasonable prolongation of the presentation of this case before this Court, and of its examination thereof, now added to the prolongation of the settlement of the reparation due to the individual concerned, brings to the fore a concern I have raised, more than once, within the Court: as I sought to demonstrate, and warn, in my Dissenting Opinion (paras. 46-64) in the case concerning *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, (Order of 28.05.2009), as well as in my Dissenting Opinion (para. 118) in the case of *Jurisdictional Immunities of the State (Germany v. Italy)*, (Counter-Claim, Order of 06.07.2010), the time of human justice is not at all the time of human beings.

208. In the present case *A.S. Diallo*, the criteria followed by the Human Rights Committee on the matter at issue may provide an indication to this Court for the determination of an appropriate reparation for the breaches of the rights under the Covenant (cf. *supra*) suffered by the victim. Ultimately, this may amount to a proper compensation (in the unlikelihood of *restitutio in integrum*), — among other forms of reparation (such as satisfaction, public apology, rehabilitation of the victim, guarantees of non-repetition of the harmful acts, among others) — for the violations of the rights there under, that is, for material and moral damages, fixed to some extent on the basis of considerations of equity.

¹⁴⁸In the words of the Permanent Court of International Justice (PCIJ) in the case of the *Mavrommatis Palestine Concessions* ((*Greece v. United Kingdom*), *Series A, No. 2, 1924*),

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

The question, therefore, whether the present dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint. Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant." (P. 12.)

¹⁴⁹Cf. S. Touzé, *La protection des droits des nationaux à l'étranger — Recherches sur la protection diplomatique*, Paris, Pédone, 2007, pp. 23, 228-229, 255-257, 319, 322-324 and 453-456; and cf. C. Santuli, "Entre protection diplomatique et action directe: la représentation — Eléments épars du statut international des sujets internes", in: Société française pour le Droit international (SFDI), *Le sujet en Droit international* (Colloque de Mans, 2004), Paris, Pédone, 2005, pp. 93-95.

209. In cases of the kind, such reparations are to be granted *from the perspective of the victims*, human beings (their original claims, needs and aspirations). This discloses a wider horizon in the matter of reparations, when human rights are at stake. The most advanced international case-law on such distinct forms of reparation, in cases pertaining to human rights breaches (individually and collectively) is, at present, that of the Inter-American Court of Human Rights (cf. *infra*). As we are here concerned with the UN Covenant on Civil and Political Rights, suffice it now to recall that, in the same line of reasoning, the Human Rights Committee, in its *general comment No. 31* (of 2004), on the *nature of the general legal obligation* (under Article 2) *incumbent upon States Parties to the Covenant*, reminded that Article 2 (3) of the Covenant provides for reparations to individuals whose Covenant rights have been violated, and further noted in this respect that reparations can consist of:

“restitution, 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 violations” (para.16).

210. As already quoted, Article 9 (5) of the Covenant on Civil and Political Rights stipulates that “[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation”. I have already sustained the need to consider Article 9 of the Covenant as a whole (paras. 35-49, *supra*), including, now, its paragraph 5. In its practice, whenever breaches of Article 9 (and other provisions of the Covenant, such as, *inter alia*, Article 13) have been found, the Human Rights Committee has determined compensation (as a form of reparation) utilizing the general formula:

“In accordance with the provisions of Article 2 of the Covenant, the State Party is under an obligation to take measures to remedy the violations suffered by [the petitioner].”

211. Article 2 of the Covenant sets forth a *general obligation* to the States Parties¹⁵⁰, which is added to the specific obligations in relation to each of the rights guaranteed there under. The aforementioned general formula allows for flexibility, in the determination of the measures of compensation or other forms of reparation to the victim(s) concerned. The ultimate aim is, naturally, whenever possible, the *restitutio in integrum*, but, when that is not possible, recourse is to be made to the provision of other adequate forms of reparation, as I have just indicated.

¹⁵⁰Article 2 of the Covenant on Civil and Political Rights states that

“1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its . . . territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps. in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

1. To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; to ensure that any person claiming such a remedy shall have his rights thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
2. To ensure that the competent authorities shall enforce such remedies when granted”.

212. In any case, and whatever the circumstances might be, it is to be borne in mind that the duty to make reparation reflects a fundamental principle of general international law, promptly captured by the Permanent Court of International Justice (PCIJ), early in its case-law, and endorsed by the case-law of the ICJ¹⁵¹. That obligation to make reparation is governed by international law in all its aspects (such as, e.g., its scope, forms and characteristics, and the determination of the beneficiaries). Accordingly, compliance with it cannot be made subject to modification or suspension, in any circumstances, by any respondent States, through the invocation of provisions (or difficulties) of their own domestic law¹⁵².

XI. Beyond the Inter-State Dimension: International Law for the Human Person.

213. The present *A. S. Diallo* case shows that diplomatic protection was initially resorted to herein, keeping in mind property rights or investments, but the dynamics of the case, at the stage of its merits, underwent a metamorphosis, and it reassuringly turned out to be a case, ultimately, of human rights protection, of the rights inherent to the human person, concerning its liberty and legal security. It 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.

214. Whether the outcome of this case corresponded to the original motivations that gave rise to it, is hard to tell. The handling of each case in the course of international adjudication has a dynamics of its own. Yet, the outcome of the *cas d'espèce* is indeed reassuring, in so far as the rights protected are concerned, and it contains a couple of lessons that cannot here pass unnoticed. Let me now address them briefly, as I perceive them.

215. To start with, attempts 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 2000¹⁵³. In my understanding, 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 des 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.

216. Secondly, once we move into the much wider (and more satisfactory and gratifying) conceptual universe of the International Law of Human Rights, we have to guard ourselves against

¹⁵¹Cf. PCIJ, case of the *Factory at Chorzów* (Jurisdiction), Judgment No. 8, 1927, Series A, No. 9, p. 21; PCIJ, case of the *Factory at Chorzów* (Merits), Judgment No. 13, 1928, Series A, No. 17, p. 29; ICJ, Advisory Opinion on the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, ICJ Reports 1950, p. 228; among others.

¹⁵²Cf. PCIJ, Advisory Opinion on the *Jurisdiction of the Courts of Danzig*, 1928, Series B, No. 15, pp. 26-27; PCIJ, Advisory Opinion on the *Greco-Bulgarian “Communities”*, 1930, Series B, No. 17, pp. 32 and 35; PCIJ, case of the *Free Zones of Upper Savoy and the District of Gex*, Order of 06.12.1930, Series A, No. 24, p. 12, and Judgment, 1932, Series A/B, No. 46, p. 167; PCIJ, Advisory Opinion on *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, 1932, Series A/B, No. 44, p. 24.

¹⁵³The 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”; ILC, “First Report on Diplomatic Protection” (*rapporteur* J. R. Dugard), UN doc. A/CN.4/506, of 07.03.2000, para. 31. The suggestion simply begs the question, and ignores the considerable achievements under the International Law of Human Rights in recent decades (including remarkable changes in domestic legislation and administrative practices in numerous countries), that would never have been accomplished under discretionary diplomatic protection.

inclinations towards any partial or atomized outlook¹⁵⁴, such as the one, e.g., put to the ILC one decade ago, to the effect that “[w]hile the European Convention on Human Rights may offer real remedies to millions of Europeans, it is difficult to argue that the American Convention on Human Rights or the African Charter on Human and Peoples’ Rights have achieved the same degree of success”¹⁵⁵.

217. This is simply not true. One could easily be led into such hurried “conclusion” on the basis of statistical data, but statistics are, in my view, to be approached with great caution, if not critically, as they tend to reveal as much as they conceal. Not all advances in the domain of human rights protection are amenable to quantification. To me, quality prevails over quantity. No one would question the considerable achievements in the European system of human rights protection, as disclosed by its vast and remarkable case-law, e.g., on the right to personal liberty and security and the right to a fair trial¹⁵⁶.

218. Yet, there is no reason, or basis, to underestimate or minimize remarkable achievements attained likewise in the inter-American and the African systems of human rights protection. There is general recognition today that the most advanced case-law on reparations (in its distinct forms, and including in collective cases) and on provisional measures of protection (encompassing the members of several human collectivities) is that of the Inter-American Court of Human Rights¹⁵⁷. Likewise, the African Commission on Human and Peoples’ Rights has settled cases of special gravity (on the fundamental right to life itself, and other protected rights)¹⁵⁸ that hardly find any parallel either at the UN or at other regional levels.

219. One is thus to avoid the traditional Euro-centric outlook, so common in the study of the law of nations of the past, and so typical of the static vision of so-called “realists”, and one is to pursue a respectful universalist perspective, not only of UN procedures, but also of regional systems of human rights protection, as these latter operate also within the framework of the universality of human rights. The present case of *A.S. Diallo* affords evidence to this effect, as it

¹⁵⁴If one remains imprisoned in the Vattelian dream-world of exclusive inter-State relations, one is easily led to the vision that “as long as the State remains the dominant actor in international relations”, diplomatic protection “remains the most effective remedy for the promotion of human rights” (*ibid.*, para. 32), — a vision which simply does not hold true. It overlooks the considerable achievements around the world, in recent decades, under the International Law of Human Rights, reassessed by the United Nations, *inter alia*, in its II World Conference on Human Rights (Vienna, 1993).

¹⁵⁵Cf. *ibid.*, para. 25.

¹⁵⁶Articles 5 and 6 of the European Convention of Human Rights.

¹⁵⁷Carefully constructed, in particular, as from the period 1998-2006. On forms of reparation in cases concerning individuals or individualized victims (as distinguished from those concerning members of whole communities), cf. the IACtHR’s Judgments in the cases of *Loayza Tamayo v. Peru* (27.11.1998), *Suárez Rosero v. Ecuador* (20.01.1999), “*Street Children*” (*Villagrán Morales and Others*) v. *Guatemala* (26.05.2001), *Cantoral Benavides v. Peru* (03.12.2001), *Bámaca Velásquez v. Guatemala* (22.02.2002), *Hilaire, Benjamin and Constantine et alii v. Trinidad and Tobago* (21.06.2002), *Myrna Mack Chang v. Guatemala* (25.11.2003), *Maritza Urrutia v. Guatemala* (27.11.2003); and, on forms of reparation in cases concerning a plurality of victims, or members of whole communities, cf. the IACtHR’s Judgments in the cases of *Aloeboetoe et alii v. Suriname* (10.03.1993), *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (01.02.2000), *Massacre of Plan de Sánchez v. Guatemala* (19.11.2004), *Indigenous Community Yakye Axa v. Paraguay* (17.06.2005), *Mapiripán Massacre v. Colombia* (15.09.2005), *Massacre of Pueblo Bello v. Colombia* (31.01.2006), *Moiwana Community v. Suriname* (08.02.2006), *Indigenous Community Sawhoyamaya v. Paraguay* (20.03.2006), *Ituango Massacres v. Colombia* (01.07.2006).

¹⁵⁸Cf. the case of the *D.R. Congo v. Burundi, Rwanda and Uganda* (communication No. 227/99): the African Commission was therein faced with an inter-State communication, in a case involving the use of armed force by the respondent States. In its decision of May 2003, it found the respondent States in breach of Articles 2, 4, 5, 12(1) and (2), 14, 16, 17, 18(1) and (3), 19, 20, 21, 22 and 23 of the African Charter. The AfComHPR found that “the killings, massacres, rapes, mutilations and other grave human rights abuses committed while the respondent States’ armed forces were still in effective occupation of the eastern provinces of the complainant State” were also inconsistent with International Humanitarian Law (para. 79).

has just been resolved by the World Court on the basis of the relevant provisions of a universal instrument (the UN Covenant on Civil and Political Rights) *together* with a regional instrument (the African Charter on Human and Peoples' Rights), and a UN codification Convention (the Vienna Convention on Consular Relations).

220. Thirdly, in order to provide adequate reparation to the victims of violated rights, we have to move into the domain of the International Law of Human Rights, we cannot at all remain in the strict and short-sighted confines of diplomatic protection, as a result of not only its ineluctable discretionary nature, but also its static inter-State dimension. Reparations, here, require an understanding of the conception of the law of nations centered on the *human person* (*pro persona humana*). Human beings, — and not the States, — are indeed the ultimate beneficiaries of reparations for human rights breaches to their detriment.

221. The Vattelien fiction of 1758 (expressed in the formula — “*Quiconque maltraite un citoyen offense indirectement l'État, qui doit protéger ce citoyen*”¹⁵⁹) has already played its role in the history and evolution of international law. The challenge faced today by the World Court is of a different nature, going well beyond such inter-State dimension. It requires from the Court preparedness to explore the ways of incorporating, in its *modus operandi* — starting with its own reasoning, — the acknowledgement of the consolidation of the international legal personality of individuals, and the gradual assertion of their international legal capacity, — to vindicate rights which are theirs and not their own State's, — as subjects of rights and bearers of duties emanating directly from international law, in sum, as true subjects of international law.

XII. Concluding Observations.

222. In this perspective, and as a starting-point in this direction, in its present Judgment in the *A.S. Diallo* case the Court was right in concentrating its attention, in particular, in the breaches found of Articles 9 and 13 of the UN Covenant on Civil and Political Rights, and Articles 6 and 12 (4) of the African Charter of Human and Peoples' Rights, as well as Article 36 (1) (b) of the Vienna Convention on Consular Relations. They concern the rights of Mr. A. S. Diallo as an individual, as a human person. The breaches of his individual rights as *associé* of the two companies come to the fore by way of consequence, having been likewise affected.

223. The subject of the rights, that the Court has found to have been breached by the respondent State in the present case, is not the applicant State: the subject of those rights is Mr. A. S. Diallo, an individual. The 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, — as clarified after the Court's Judgment of 2007 on Preliminary Objections, in the course of the proceedings (written and oral phases) as to the merits, — is the International Law of Human Rights.

224. Whenever the Court diverted, in parts of the present Judgment, from the proper hermeneutics of human rights treaties, it incurred into inconsistencies (such as those of resolutive points 1, 5 and 6 of the *dispositif* of the present Judgment). Those deviations disclosed a somewhat crooked line of reasoning, which could and should have been avoided. Once the applicable law is identified and conformed, as in the present case, by human rights treaties, the Court is to interpret and apply them in pursuance of the general rule of interpretation of treaties (Article 31 of the two

¹⁵⁹E. Vattel, *Le droit des gens* (1758), book II, para. 71.

Vienna Conventions on the Law of Treaties, of 1969 and 1986), bearing in mind their special nature.

225. After all, human rights treaties do apply in the framework of *intra-State* relations (such as, in the present case, the relations between the D.R. Congo and Mr. A. S. Diallo). In properly interpreting and applying such treaties, the Court is thereby giving its contribution to the development of the aptitude of international law to regulate relations at *intra-State*, as well as *inter-State*, levels. In the present case, in the framework of the International Law of Human Rights, the contending parties have sought to substantiate the arguments on the basis of the relevant provisions of two human rights treaties, — the UN Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights, — as well as on the basis of the provision on an individual right enshrined into the Vienna Convention on Consular Relations (Article 36 (1) (b)), and construed in the conceptual universe of human rights.

226. The present case concerns, thus, the human rights (to liberty and security of person; not to be expelled from a State without a legal basis; not to be subjected to mistreatment; and to information on consular assistance in the framework of the guarantees of the due process of law) of which the *titulaire* is Mr. A. S. Diallo. Had 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 resolutive points 1, 5 and 6 of the *dispositif* of the present Judgment, and I would not have needed to vote against them.

227. The fact that the contentious procedure before the Court keeps on being exclusively an inter-State one, — not by an intrinsic necessity, nor by a juridical impossibility of being of another form, — does not mean that the *reasoning* of the Court ought to develop within an essentially and exclusively inter-State optics, above all when it is called to pronounce, in the peaceful settlement of the corresponding disputes, on questions which go beyond the interests of the contending States, and which pertain to the fundamental rights of the human person, and even to the international community as a whole.

228. The relations governed by contemporary international law, in distinct domains of regulation, transcend to a large extent the purely inter-State dimension (e.g., in the international protection of human rights, in the international protection of the environment, in international humanitarian law, in international refugee law, in the law of international institutions, among others), and the ICJ, called upon to pronounce upon those relations, is not bound to restrain itself to an anachronistic inter-State optics. The anachronism of its mechanism of operation ought not to, and cannot, condition its *reasoning*, so as to enable it to exert faithfully and fully its functions of principal judicial organ of the United Nations.

229. In any case, the present Judgment, in so far as resolutive points 2, 3, 4 and 7 of its *dispositif* are concerned, with which I concur, constitutes a valuable contribution of its case-law to the settlement of disputes originated at *intra-State* level, when human rights are at stake. This is indeed a human rights case, decided today, on 30 November 2010, by the ICJ, despite the strict and anachronistic inter-State procedure before this latter. The fact that a human rights case has at last been decided by the ICJ itself is particularly significant to me.

230. It shows that, at times, reality can appear better than the prospects. The human mind does not conform itself to a straightjacket. One is not to lose faith in the progressive development of international law, despite the bias of the majority of the legal profession. The fact that a human

rights case has now been decided by the ICJ itself, further shows that contemporary international law has notably developed to such an extent that States themselves see it fit to make use of a contentious procedure of the kind, originally devised in 1920 and confirmed in 1945 for their own and exclusive utilization, in order to obtain from the Court its decision on human rights, on rights inherent to the human person, ontologically anterior and superior to the State itself.

231. This amounts, furthermore, to a clear and reassuring acknowledgement of the existence of common and superior values that States themselves no longer hesitate to recognize. This is, in so far as the present case is concerned, very much to the credit of both Guinea and the D.R. Congo, two African States, that have thereby given a good example to be followed in other continents and latitudes. It is in line with the evolving international law for the human person (*pro persona humana*), the new *jus gentium* of this beginning of the XXIst century.

XIII. Epilogue: Towards a New Era of International Adjudication of Human Rights Cases by the ICJ.

232. Having endeavoured to identify the lessons extracted from the present *A.S. Diallo* case (*supra*), I could not conclude this Separate Opinion without a brief epilogue on its historical transcendence. The case resolved today by the ICJ had as claimant a State, and as victim — and beneficiary of reparation — an individual. As I pointed out at the beginning of this Separate Opinion, this is the first time in its history that the World Court has resolved a case on the basis of the applicable law conformed by two human rights treaties together, one at universal level (the UN Covenant on Civil and Political Rights) and the other at regional level (the African Charter on Human and Peoples' Rights), 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.

233. It is reassuring that, due originally to the exercise of diplomatic protection; the cause of Mr. A. S. Diallo reached this Court. This was as far as diplomatic protection, a traditional instrument, went, and could go. We cannot expect more from it than what it can provide. It is, after all, as traditional as the *rationale* of the procedure before this Court. Individuals keep suffering a *capitis diminutio*, as they still need to rely on that traditional instrument 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 either *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.

234. Notwithstanding, there is something both reassuring and novel in the present case *A.S. Diallo* now resolved by this Court: as from the proceedings on the merits (written and oral phases), the case of *A.S. Diallo* has been to a large extent heard, and adjudicated upon, in the conceptual framework of the International Law of Human Rights. It is this latter, and not diplomatic protection, that is apt to safeguard the rights of persons under adversity, or socially marginalized or excluded, or in situations of the utmost vulnerability.

235. Diplomatic protection was here originally exercised by Guinea to protect a successful businessman, devoted to making money for many years, who, later on, fell in disgrace abroad, in the country of his residence, the D.R. Congo. Diplomatic protection remains ontologically discretionary, and thus limited in scope and possibilities. What has diplomatic protection been doing to safeguard the human rights of millions of documented and undocumented migrants,

struggling to survive through their own labour, and daily humiliated around the world? Virtually nothing.

236. The only protection that “the wretched of the earth”¹⁶⁰ have been finding is the one provided under certain international instruments and treaties of the International Law of Human Rights. Attention is thus to be shifted from the differing *de facto* capabilities of States to extend protection to their nationals abroad, into the satisfaction of the basic needs of protection of those forgotten by the world, the poor and the oppressed, who have already lost faith in human justice. This is a great challenge to international justice today, a challenge that can effectively be faced only in the realm of the International Law of Human Rights, beyond the purely inter-State dimension.

237. Moreover, this is the first time in its history that the World Court has expressly taken into account the contribution of the case-law of two international human rights tribunals, the European and the Inter-American Courts, to the perennial struggle of human beings against *arbitrariness*. The ICJ, much to its credit, has done so, in paragraph 68 of the present Judgment, in relation to the interpretation, by the European and the Inter-American Courts, respectively, of Article 1 of Protocol No. 7 to the European Convention of Human Rights, and of Article 22 (6) of the American Convention on Human Rights, which it regarded as consistent with what it has found in paragraph 65 of the present Judgment¹⁶¹. Paragraph 65 refers to the protection of the human person against arbitrary treatment, encompassing the prohibition of arbitrary expulsion¹⁶².

238. This discloses a new mentality in relation to another relevant issue. The co-existence of multiple international tribunals, fostering access to international justice on the part of a growing number of *justiciables* around the world in distinct domains of human activity, bears evidence of the way contemporary international law has developed in the old search for the realization of international justice. Contemporary international tribunals have much to learn from each other.

239. Article 92 of the UN Charter states that this Court, the ICJ, is “the principal judicial organ of the United Nations”. In addition, Article 95 of the UN Charter leaves the door open to member States to entrust the solution of their differences to “other tribunals by virtue of agreements already in existence or which may be concluded in the future”. Ours has become the age of international tribunals, and this is a highly positive phenomenon, as what ultimately matters is the enlarged or expanded access to justice, *lato sensu*, comprising the realization of justice.

240. 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 at all belong to the lexicon of international law. And they simply miss the point, — the overriding imperatives of justice. Contemporary international tribunals should pursue their

¹⁶⁰To paraphrase a humanist of the XXth century, Frantz. O. Fanon, *Les damnés de la terre*, 1961.

¹⁶¹By reference to the corresponding provisions of the Covenant on Civil and Political Rights and of the African Charter on Human and Peoples’ Rights.

¹⁶²Particularly relevant, for a study of the right to freedom of movement and residence under Article 22 of the American Convention on Human Rights, are the Judgment of the Inter-American Court, of 15.06.2005, in the case of the *Moiwana Community v. Suriname* (paras. 107-121), as well as the IACtHR’s Order (on Provisional Measures of Protection), of 18.08.2000, in the case of *Haitians and Haitian-Origin Dominicans in the Dominican Republic* (paras. 9-11), and Concurring Opinion of Judge A.A. Cançado Trindade (paras. 2-25).

common mission — the realization of international justice — working together, without antagonisms, self-sufficiencies or protagonist moves.

241. This is another lesson that can be extracted from the adjudication of the present case *A.S. Diallo*. It is indeed reassuring that the ICJ has disclosed a new vision of this particular issue, in so far as international human rights tribunals are concerned. This is particularly important at a time when States rely, in their submissions to this Court, on relevant provisions of human rights conventions, as both Guinea and the D.R. Congo have done in the present case, in their arguments centred on the UN Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights (in addition to the relevant provision of the Vienna Convention on Consular Relations, in the framework of the international protection of human rights).

242. This is not the only example wherein this has occurred. On 29 May 2009, the ICJ delivered its Order (on Provisional Measures) in the case concerning *Questions Relating to the Obligation to Prosecute or Extradite*, wherein Belgium and Senegal presented their submissions concerning the interpretation and application of the relevant provisions of the 1984 UN Convention against Torture. And, very recently, a few days ago, in the public sittings before this Court of 13 to 17 September 2010, Georgia and the Russian Federation submitted their oral arguments in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, another UN human rights treaty. It is reassuring that States begin to rely on human rights treaties before this Court, heralding a move towards an era of possible adjudication of human rights cases by the ICJ itself. The international juridical conscience has at last awakened to the fulfilment of this need.

243. The ICJ, in the exercise of its contentious as well as advisory functions in recent years, has referred either to relevant provisions of a human rights treaty such as the Covenant on Civil and Political Rights, or to the work of its supervisory organ, the Human Rights Committee¹⁶³. These antecedents are not to pass unnoticed, in acknowledging the turning-point which has just occurred in the present case of *A.S. Diallo*: the Court, in the Judgment being delivered today, 30 November 2010, has gone much further, beyond the United Nations system, in acknowledging the contribution of the jurisprudential construction of two other international tribunals, the Inter-American and the European Courts of Human Rights. It has also dwelt upon the contribution of an international human rights supervisory organ, the African Commission on Human and Peoples' Rights. The three regional human rights systems operate within the framework of the universality of human rights.

¹⁶³Thus, as to contentious cases, in its Judgment in the case of *Armed Activities on the Territory of the Congo (D.R. Congo v. Uganda)*, 19.12.2005), the Court held that the Covenant provisions were applicable to the case. Shortly afterwards, in its Judgment in the case of the *Application of the Convention against Genocide (Bosnia-Herzegovina v. Serbia and Montenegro)*, 26.02.2007), the Court recalled the wording of Articles 2 and 3 of the Covenant to support its interpretation of the meaning of the word "undertakes" in the Convention against Genocide (Article 1) — As to its advisory function, the ICJ held, in its Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (09.07.2004), that the Covenant is not unconditionally suspended in times of conflict (para. 106), and that the Covenant applies outside the States Parties' territory when they exercise their jurisdiction therein, as emerges from the legislative history of the Covenant, as well as from the consistent practice of the Human Rights Committee (paras. 107-111 and 134). Earlier on, in its Advisory Opinion on the *Threat of Use of Nuclear Weapons* (08.07.1996), the ICJ referred to Article 6 (on the right to life) of the Covenant. Very recently, in my Separate Opinion in the Court's Advisory Opinion on *Accordance with International Law of the [Unilateral] Declaration of Independence of Kosovo* (22.07.2010), I deemed it fit to refer to Article 1 of the two UN Covenants on Human Rights as well as to the Human Rights Committee's position on the States' automatic succession in respect of human rights treaties and on the extra-territorial application of human rights (paras. 154 and 191).

244. Contemporary international tribunals should pursue their common mission — the realization of international justice — in a spirit of respectful dialogue, learning from each other, keeping in mind the perennial lesson of Socrates, so perspicaciously grasped by Karl Popper in the XXth century:

“Toute solution d’un problème donne naissance à de nouveaux problèmes qui exigent à leur tour solution (...). Plus nous apprenons sur le monde, et plus ce savoir s’approfondit, plus la connaissance de ce que nous ne savons pas, la connaissance de notre ignorance prend forme et gagne en spécificité comme en précision. Là réside en effet la source majeure de notre ignorance : le fait que notre connaissance ne peut être que finie, tandis que notre ignorance est nécessairement infinie.”¹⁶⁴

245. 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 States, but also for human beings, everywhere, and in respect of distinct domains of international law, to recover their faith in human justice. They will thus be enlarging and strengthening the aptitude of contemporary international law to resolve disputes occurred not only at *inter*-State level, but also at *intra*-State level. And they will thus be striving towards securing to States as well as to human beings what they are after: the realization of justice.

(Signed) Antônio Augusto CANÇADO TRINDADE.

¹⁶⁴K.R. Popper, *Des sources de la connaissance et de l’ignorance*, Paris, Éd. Payot et Rivages, 1998, pp. 150-151.