

IN THE INTERNATIONAL COURT OF JUSTICE

THE REPUBLIC OF GUINEA

APPLICANT

V.

THE DEMOCRATIC REPUBLIC OF THE CONGO

RESPONDANT

COUNTER-MEMORIAL OF THE DEMOCRATIC REPUBLIC OF THE CONGO

COMES NOW the Democratic Republic of the Congo and for their Counter-Memorial to the Court states the following:

STATEMENT OF LAW

1. Under the Operation of *jus soli*, international legal convention contends that an individual, over time, essential acquires the nationality of its host State by virtue of long standing residency.

2. Article 4 of the Hague Convention 1930, states as a rule; A State may not afford diplomatic protection to one of its nationals against a state whose nationality such person also possesses.

3. The Working Group established in 1996 by the International Law

Commission expressed concern that foreign investors were in a privileged position vis-a-vis nationals, as they had recourse to three procedures – domestic remedies, diplomatic protection and international arbitration – for the protection of their rights, whereas nationals could avail themselves only of domestic remedies. This is contradictory to the Calvo doctrine, which allows foreign nationals to be bound by the principle of equality with nations who are subject to the sole jurisdiction to their court alone.

4. As a legal requirement for the application of diplomatic protection it has been laid down in the *Ben Tillett* case of 1899 (Great Britain V. Belgium) and later confirmed by the *Virginus* case, the individual provided with protection must not have engaged in improper activities; that is to say the individual must have clean hands. For example, the seaman executed by Spain in the *Virginus* case could not be awarded diplomatic protection by their respective states (Great Britain and the United States) because they had been engaging in an illegal trafficking operation.

5. Under Article 34 paragraph 1 of the official Statute of the International Court of Justice 1945, only States may be parties in the case before the court.

6. In the Draft Articles on State Responsibility adopted by the International Law Commission, Article 42 paragraph 3 states – In no case shall reparations result in depriving the population of a State of its own means of subsistence. Furthermore, Article 43 provides that the injured or claimant State may receive restitution only if it would not seriously jeopardize the political independence or economic stability of the State which has committed the internationally wrongful act.

7. The Vienna Convention on Succession of States in Respect of Treaties (1978)

developed the widely accepted definition of Successor States as those which take over the identity of the Predecessor State.

8. Traditional scholars and jurists have rejected the policy of successor state liability. Legal analyst Jean Phillippe Monnier concurs, finding that there is no customary rule or general principal of international law that postulates the automatic transfer to the successor state of the obligations flowing from the predecessor state s international responsibility.

STATEMENT OF FACT

1. Mr. Ahmadou Sadio Diallo, of his own will and judgment, moved to the Democratic Republic of the Congo in 1964 (where he remained for 32 years) and established two companies: Africom-Zaire for trade and Africacontainers for containerized transport.

2. By 1964, the State had only been independent from Belgium rule for four years and was still experiencing great civil unrest and violent rebellions as it tried to recover from an army mutiny, the near secession of the Katanga region, and the assassination of Prime Minister Patrice Lumumba. In 1965, Lieutenant General Joseph Desire Mobutu overthrew President Joseph Kasavubu by usurping control of the country, dissolving the government of the Democratic Republic of the Congo, and declaring himself President of the successor State, that came to be recognized as Zaire.

3. Despite the illegitimacy of this new military State, ruled as it was by an authoritarian bureaucracy, Mr.Diallo purposefully engaged it in numerous business transactions. Through a corrupt system of bribery and intrigue, Mr. Diallo was able to

obtain exclusive contracts and become an official State supplier to the mining company Gecamines and other establishments and institutions owned by Zaire.

4. Mr. Diallo also conducted business with several major oil companies, all of which were a part of larger multinational conglomerates whose headquarters are located outside of any Congolese territories.

5. For over ten years, Mr. Diallo, like nearly all foreign investors throughout the Congo's long sad history, corroborated with an illegitimate government in order to profit from the people and natural resources of the region. However, this partnership began to disintegrate when both the State and the oil companies began to default on their payments and eventually refuse payment altogether.

6. In the following year, 1995, Mr. Diallo brought proceedings against Zaire Shell. Under decision RC 63.824 rendered on 3 June 1995 in the case between Africacontainers and Zaire Shell (RH 26.767), the Kinshasa Tribunal de Grande Instance ordered Zaire Shell to pay Africacontainers the sum of US\$13,156,704.39. Subsequently, a bailiff's seizure order was issued against the bank accounts and all movable or immovable property owned by Zaire Shell.

7. This ruling was continuously upheld, until the heads of Shell, Mobil Oil, and Fina were able to bribe Prime Minister Kengo Wa Dondo and have Mr. Diallo detained.

8. The good citizens of the Congo were outraged by this conduct, as it is in contradiction to the rights of the people. The domestic press launched an investigation and in several articles vehemently denounced this unlawful act.

4. Under both national and international pressure, Mobutu was persuaded to

order the release of Mr. Diallo. However, in an obstinate struggle over power, Kengo Wa Dondo re-issued Mr. Diallo's detention and had him forcefully expelled from the country.

10. In 1996, Laurent-Desire Kabila led the Alliance des Forces Democratiques pour la Liberation du Congo-Zaire in successfully overthrowing Mobutu and reclaiming the region as the Democratic Republic of the Congo, effectively ending the existence of Zaire. The newly reestablished state is strongly opposed to Mobutu and his form of leadership, condemning his many corrupt practices.

STATEMENT OF JURISDICTION

As the basis of Guinea's claim is the application of diplomatic protection, any decision of the Court that finds Mr. Diallo unqualified to receive such protection will automatically eliminate the jurisdiction of the Court since without a right to diplomatic protection Mr. Diallo cannot be represented by the State of Guinea and only states may appear before the Court.

ARGUMENTS

I. Dual Nationality

As a 32 year resident of Zaire/ the Democratic Republic of the Congo, Mr. Diallo through the operation of jus soli acquired Congolese citizenship making him of dual nationality. As a Congolese national, Guinea is prohibited by the Hague Convention to afford him diplomatic protection against Zaire/ the Democratic Republic of the Congo.

Allowing Guinea to apply diplomatic protection would unfairly bequest upon Mr. Diallo rights that are not equally afforded to other Congolese nationals.

II. Clean Hands

Mr. Diallo by engaging in improprieties with a State that is confirmed to have been highly corrupt and exploitive in nature has, in effect, excluded himself from any claims of clean hands. Without clean hands Mr. Diallo does not meet the requirements of diplomatic protection as determined by this court in both the *Ben Tillett* and *Virginus* cases. This further separates the ability of Guinea to claim representation of an individual, complicating their claim to jurisdiction.

III. Restitution

Currently the gross domestic product of the Democratic Republic of the Congo is US\$ 5.7 billion annually, while total external debt amounts to US\$ 8.211 billion and growing. The Paris Club in July of this year granted the Democratic Republic of the Congo Highly Indebted Poor Country status. Overall, the economy is in a state of collapse and the State itself is highly underdeveloped. Therefore, to award Guinea the nearly US\$ 36 billion in total restitution it is requesting would be materially impossible and irrevocably harmful to the obtainment of economic stability. In such a situation the Draft Articles on State Responsibility discourage the Court from making a judgment in favor of such restitution.

IV. Successor State Liability

When Kabila reestablished the Democratic Republic of the Congo, he took over the international identity of Zaire, making the current Democratic Republic of the Congo a successor state. As a successor state traditional ideology holds that it cannot be held accountable to the obligations or derelicts of Zaire, its predecessor state.

SUMMARY AND PRAYER FOR RELIEF

The people of the Democratic Republic of the Congo, by opposing the illegal detention of Mr. Diallo, became his saviors. If it had not been for the intervention of the brave people, Mr. Diallo may not have been released from detention. He may even have been killed. Now, Guinea is asking that these same people, who have scarified their lives to overthrow the state of Zaire, to be held accountable for the actions of a government it did not support. Furthermore, Mr. Diallo, like many before him, was involved in exploiting the wealth of the Congo, and should not be made to profit while the people suffer.

The people of the Democratic Republic of the Congo have endured incredible injustice and ongoing violence; please do not add insult to injury by forcing them to pay for the crimes of their vanquished oppressor.