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INTERNATIONAL COURT OF JUSTICE

**CASE CONCERNING
AHMADOU SADIO DIALLO
(REPUBLIC OF GUINEA *v.*
DEMOCRATIC REPUBLIC OF THE CONGO)**

**MEMORIAL OF
THE REPUBLIC OF GUINEA**

VOLUME I

23 March 2001

[Translation by the Registry]

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CHAPTER I

GENERAL INTRODUCTION

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(a) *Seisin of the Court and procedural history*

1.1. On 31 January 1996 Mr. Ahmadou Sadio Diallo, a Guinean businessman who had settled in Zaire in 1964 and spent 32 years and made substantial investments there, was expelled from that country under particularly oppressive conditions, being at the same time deprived of his property and prevented from recovering the numerous and substantial debts owed to him.

1.2. After several fruitless diplomatic initiatives aimed at inducing Zaire, renamed the Democratic Republic of the Congo with effect from 29 May 1997, to accede to requests for compensation made by Mr. Diallo, who had been unjustly reduced to total penury, the Government of Guinea decided to refer this distressing case to the International Court of Justice.

1.3. By letter dated 21 August 1998, received in the Registry of the Court the following 25 September, His Excellency Mr. Lamine Kamara, the Minister for Foreign Affairs of the Republic of Guinea, sent the Court a document entitled "Application for purposes of diplomatic protection", giving notice of his Government's intention to exercise its diplomatic protection in favour of Mr. Diallo against the Democratic Republic of the Congo (referred to hereafter as the "DRC"). Following a letter from the Registrar dated 28 September, this Application was put into proper form on 28 December 1998.

1.4. The Application by the Republic of Guinea was submitted on the basis of Article 36, paragraph 2, of the Statute of the International Court of Justice.

The DRC recognized the compulsory jurisdiction of the Court by a declaration dated 8 February 1989. Guinea did likewise on 11 November 1998. The sole reservation in each declaration is one of reciprocity.

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1.5. Following a meeting held by the President of the Court with the Parties' Agents on 8 September 1999, the Court, by Order dated 25 November 1999, fixed 11 September 2000 as the time-limit for the filing of the Memorial of the Republic of Guinea, and 11 September 2001 as that for the filing of the Counter-Memorial of the DRC.

1.6. By a further Order, dated 8 September 2000, the Court, at the request of Guinea, extended the time-limit for the filing of the Memorial to 23 March 2001, and that for the filing of the Counter-Memorial to 4 October 2002. The present Memorial is submitted accordingly.

1.7. Although it has made every effort to draft the Memorial to the highest standards, following the Rules of Court and customary practice before the Court, the Republic of Guinea is aware that there are some deficiencies of form. It respectfully asks the Court to excuse these shortcomings, due on the one hand to the great difficulties which it faces and on the other to the particular circumstances of the case.

1.8. As regards the former, Guinea draws the attention of the Court to its extremely serious structural economic and financial problems. These have moreover been compounded since the summer of 2000 by tension on its borders and a huge influx of refugees from neighbouring countries, which Guinea has had to cope with under particularly difficult conditions.

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1.9. Moreover, Mr. Diallo was expelled from Zaire so abruptly that he had no possibility of taking his personal belongings, let alone his records, with him; a few friends were subsequently able to recover some of these, but in a haphazard and unsystematic fashion. This has given rise to very great difficulties in gathering evidence. Guinea has endeavoured to adduce, in an organized manner, all evidence in its possession but respectfully asks the Court to make use of its powers of investigation to gather any additional items of evidence which it may deem useful. The Court could doubtless act pursuant to Article 44, paragraph 2, of its Statute and Article 66 of its Rules for this purpose.

(b) *The claims by the Republic of Guinea and the role of the Court*

1.10. As Guinea will set out in greater detail in subsequent chapters of this Memorial, Mr. Diallo has suffered a multitude of injuries as a consequence of internationally wrongful acts by Zaire or attributable to Zaire.

1.11. These injuries have been caused to his person, as a result of the degrading and arbitrary treatment to which he was subjected before and upon his expulsion, and to his movable and immovable property.

1.12. In order to dispel all ambiguity from the outset, the Republic of Guinea wishes to make clear that it is taking up the cause of one of its nationals, and is acting to enforce his direct rights as an individual and as shareholder and managing director of companies founded by him (Africontainers and Africom-Zaire) and of which he is the sole or principal proprietor, to the exclusion of distinct rights which these companies may have against the DRC.

1.13. Guinea particularly wishes to draw the Court's attention to the fact that although, strictly speaking, Africontainers and Africom-Zaire have not been formally confiscated, in practice Mr. Diallo has been deprived of his rights as a shareholder and cannot exercise his rights and discharge his duties as sole managing director of those companies.

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1.14. As the Court stated in its Judgment of 5 February 1970, "[w]henver one of his direct rights is infringed, the shareholder has an independent right of action"¹. That is the situation in this case.

1.15. Moreover, Mr. Diallo is not merely the sole or principal shareholder in the two companies concerned; he is also the Chairman and Chief Executive. There is no way in which he can exercise his rights and powers in that capacity because of the situation in which the DRC has placed him.

¹*Barcelona Traction, Light and Power Company, Limited (New Application: 1962), Second Phase, Judgment, I.C.J. Reports 1970, p. 36, para. 47.*

1.16. In particular Mr. Diallo is unable to recover the substantial debts owed to him. Some of these claims are against the DRC itself; other debts are owed by private companies (in which the DRC is a substantial shareholder), but internationally wrongful acts by the Democratic Republic of the Congo make it completely impossible for him to collect them. Thus it is the responsibility of the respondent State, and of it alone, that is at issue.

1.17. Further, at this stage in the proceedings Guinea will confine itself to setting out the grounds in fact and in law which it believes are capable of establishing the responsibility of the DRC, without seeking to establish the *quantum* of the compensation owed to it as a result.

1.18. As stated in its concluding submissions, Guinea respectfully requests the Court to grant it leave to submit an assessment of the amount of this compensation at a later stage in the proceedings, in case the Parties cannot reach agreement thereon within a reasonable time — which might be six months — after delivery of the judgment.

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(c) *Scheme of the Memorial*

1.19. The present Memorial is organized in accordance with the following scheme:

- in Chapter II the Republic of Guinea sets out the facts of the case and the reasons having led it to exercise its diplomatic protection in favour of its national;
- Chapter III deals with the international responsibility of the Democratic Republic of the Congo, giving a brief account of the applicable principles and then applying them to the facts of the case, concluding that the DRC is under an obligation to make reparation;
- in Chapter IV the Republic of Guinea establishes its right to exercise its diplomatic protection in favour of Mr. Diallo;
- lastly, in accordance with the provisions of Article 49, paragraph 1, of the Rules of Court, Chapter V contains Guinea's submissions.

1.20. Volume II of this Memorial contains the annexes which the Republic of Guinea has been able to gather².

²See para. 1.9 above on this point.

CHAPTER II

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THE FACTS

2.1. After describing the wrongful acts attributable to the Democratic Republic of the Congo (DRC) (A), the Republic of Guinea will set out the reasons which have led it to seise the Court of this case, in the exercise of diplomatic protection of its national (B).

A. THE RELEVANT FACTS

1. Mr. Diallo's settlement in the Democratic Republic of the Congo

2.2. Mr. Ahmadou Sadio Diallo, a Guinean citizen born on 3 January 1947 in Labé (Guinea), is a businessman who settled in Zaire in 1964, where he first founded an import/export company called Africom-Zaire. Africom-Zaire was incorporated by Mr. Diallo with a capital of US\$ 500,000 and was entered in the New Register of Companies under No. 3344 on 24 March 1974.

2.3. In 1979 Mr. Diallo founded a second company, Africontainers, specializing in the carriage of goods. Forty per cent of the shares in this private limited liability company, entered in the Kinshasa New Register of Companies on 3 November 1979³, were subscribed for by Mr. Kibeti Zala, a citizen of Zairean nationality, and 30 per cent each by Africom-Zaire, represented by its managing director, Mr. Diallo, and by Mrs. Colette Dewast, of French nationality⁴. Mr. David, of French nationality, was appointed managing director of Africontainers⁵.

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2.4. Following the Extraordinary General Meeting on 18 April 1980 and the withdrawal of two shareholders, Mr. Kibeti Zala and Mrs. Colette Dewast, 40 per cent of Africontainers was held by Mr. Diallo personally and the remainder by Africom-Zaire, also directly controlled by Mr. Diallo⁶.

2.5. Since that date Mr. Diallo has been permanent managing director of both companies, his appointment to head Africontainers (as statutory managing director) having been recognized at the Extraordinary General Meeting on 18 April 1980 and recorded in the Kinshasa New Register of Companies on the same day⁷.

2.6. Before describing Mr. Diallo's activities in detail, it is doubtless appropriate to emphasize his extraordinary personality, described by the French weekly *Jeune Afrique* as follows in its issue of 16 February 1984:

“Chairman and Chief Executive of two companies, the former ‘Little Sadio Gawal’ leads a team of 120 including 9 executives, ‘all Zaireans’ as he never tires of saying. All that is except his gorgeous West Indian secretary and a Guinean, Balde,

³Ann. 1 and 2.

⁴Ann. 1.

⁵*Ibid.*

⁶Ann. 3.

⁷Ann. 3 and 4.

whose strategic role is to tone down the 'extravagances' of the boss from time to time. For the boss has fits of inspiration. He states with conviction that he is not out to make more money: 'I want to serve Africa. I want no more than to be an African businessman. I am a member of ANEZA (Association nationale des entrepreneurs du Zaïre). I provide employment in Zaïre. I am going to buy a vessel capable of carrying 500 containers. I am proud to work in Africa, to pay taxes to the State.'

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Yet he is sincere and his everyday life matches the man. He invites his guests to the best restaurants in Kinshasa and offers them the finest champagne, without touching a drop himself. His apartment, in an elegant tower on the Boulevard du 30 Juin, is like his suits: clean and plain. It is tastefully furnished, with no gadgets and nothing flashy. The only surprises for the visitor are two huge short-wave radio sets: 'I often listen to the radio. I keep abreast of things.'"⁸

2. The development of Mr. Diallo's Congolese operations

2.7. Africontainers entered into contracts for the carriage of hydrocarbons by container on 1 October 1980 with Zaïre Mobil Oil⁹ and on 24 July 1981 with Zaïre Shell¹⁰. Those contracts were concluded for a term of one year, renewable by tacit agreement (Article 5 of the contract with Zaïre Mobil Oil and Articles 5.01 and 5.02 of the contract with Zaïre Shell).

2.8. The contract with Zaïre Mobil Oil stipulated a guaranteed minimum amount of goods for carriage equal to 300 tonnes, i.e., 20 containers per month, rising to 400 tonnes, 30 containers per month, after the first two months of operation¹¹. The contract with Zaïre Shell gave Africontainers the exclusive right to transport Zaïre Shell products by container¹².

2.9. On 29 June 1982 Africontainers entered into a contract with Gécamines, the national mining company, for carriage of mining products by container from Gécamines to the harbour of export¹³.

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2.10. Gécamines uses large quantities of lubricants at its many plants. Oil companies established in Kinshasa (Mobil Oil, Fina and Shell) obtain these for Gécamines from Kinshasa. These lubricants were usually shipped in loose drums loaded onto Onatra barges, then onto SNCZ wagons. This shipping procedure had several disadvantages, chiefly theft, leakage and difficulty in handling.

2.11. Africontainers soon proposed making its containers available to Gécamines, to be loaded with lubricants and then unloaded at the Gécamines facilities, thus providing containers to transport the copper extracted by the mining company on the return trip. Gécamines approved the proposal, and in 1980 the oil companies began to consign their products to Africontainers, which was their sole freight forwarder.

⁸Ann. 18.

⁹Ann. 6.

¹⁰Ann. 8.

¹¹Ann. 6, Arts. 3.01 and 3.02.

¹²Ann. 8, Art. 3.02.

¹³Ann. 12.

2.12. This solution reduced transport costs for the oil companies and resulted in improved marketing of these products for Gécamines. In 1981, for example, the return of an empty container cost 5,870 zaires, nearly US\$ 1,000 at 1981 values. The proposal was soon adopted, and Zaire Fina, Zaire Mobil, Africontainers and Gécamines entered into a contract on 13 July 1983 for the containerized carriage of the oil companies' products to Gécamines and of Gécamines products to their harbour of export¹⁴.

“This contract is entered into for a period of one year commencing on the date of signing and the rates shall remain firm during such period.

The contract shall be renewed by tacit agreement for successive periods of one year . . .

In the event of a change in the parity of exchange of the zaire, the parties agree to meet to negotiate rates.”¹⁵

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2.13. The contract¹⁶, to which Zaire Shell became a party in August 1983, stipulates in Article 1.04 that “the signing of this contract implies on the part of the freight forwarder (Africontainers) that it has a sufficient number of containers to meet any demand by Zaire Fina and Zaire Mobil Oil”¹⁷.

2.14. Africontainers made substantial investments to meet the requirements of its partners:

- thus in 1981 Africontainers invested nearly 20 billion zaires, and committed itself to creating 60 jobs over five years, for the purchase of 600 containers, new trailers and tractors, a 10-tonne hoist for handling empty boxes and various items of equipment appropriate for the maintenance of Mobil vehicles or of containers¹⁸;
- further, in 1987, Africontainers received approval from the Investment Committee for the purchase of a self-propelled container barge capable of carrying 56 containers, together with spare parts for it¹⁹.

2.15. In respect of this, Africontainers was granted, pursuant to Interdepartmental Order No. CAB/CGP/5537/81 of 5 August 1981, the tax and customs benefits conferred by the Investment Code for foreign investments²⁰.

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2.16. Africontainers also opened offices in Llebo and Lubumbashi²¹. Moreover, the company doubled its staff in order to meet these commitments²².

¹⁴Ann. 13.

¹⁵Ann. 13, Art. 5.

¹⁶Hereafter referred to as “the Tripartite Contract”.

¹⁷Ann. 14.

¹⁸Anns. 9 and 16.

¹⁹Ann. 52.

²⁰Ann. 10.

²¹Anns. 20, 187 and 198.

²²Ann. 187.

2.17. For its part, Africom-Zaire continued its trading operations, as part of which it had regular dealings with the State. Thus in 1986 it responded to a State proposal for an order for computer listing paper and office equipment²³.

2.18. The main trading partners of Africom-Zaire and Africontainers are public or quasi-public bodies: the State (Africom-Zaire's equipment supply business)²⁴, the State-owned Gécamines (contract for carriage of mining products)²⁵, Onatra and SNCZ (National Transport Office and Zairean National Railway Company) and partially State-owned companies (oil companies in which the Congolese State appears to hold a substantial capital interest). As evidence of this, the minutes of the General Meeting of Zaire-Shell dated 20 May 1994: the Congolese State holds 25,680 shares out of a total of 64,200, i.e., 40 per cent of the capital²⁶. In the case of Zaire-Fina, Zaire's share of the capital is also 40 per cent, i.e., 76,680 shares out of a total of 191,700²⁷.

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3. Difficulties encountered by Mr. Diallo's companies with his trading partners

(a) *Africontainers*

(i) Non-payment

2.19. In breach of its commitments under the Tripartite Contract, Gécamines, which was experiencing serious financial difficulties, failed to pay the amounts that it had undertaken to pay Africontainers for the carriage of its products.

2.20. In several letters to Gécamines Mr. Diallo noted the disastrous financial consequences for Africontainers of Gécamines' breaches of contract²⁸, as well as the amounts owed by Gécamines by reason of damage to containers or outright loss of them²⁹. Although Gécamines admitted, in part, its liability under the contracts signed with Africontainers³⁰, it cited reasons which were beyond its control³¹, or whose sole purpose was to gain time³², in order to avoid having to settle its debts to Africontainers.

2.21. Thus Maître Francis Mayar Akon sent reminders to Gécamines on 19 October 1992³³ and 9 March 1993³⁴, demanding that it pay its debts. He was following up several letters from

²³ Anns. 29 and 36.

²⁴ Anns. 29, 36, 15 and 26.

²⁵ Anns. 13 and 12.

²⁶ Ann. 142.

²⁷ Ann. 82.

²⁸ Anns. 25 and 95.

²⁹ Anns. 87, 90 and 95.

³⁰ Anns. 84, 93 and 98.

³¹ Anns. 35, 84 and 98.

³² Anns. 85, 99, 100 and 205.

³³ Ann. 116.

³⁴ Ann. 122.

0 1 7 Africontainers to Gécamines, in particular a debit note dated 3 July 1991 whereby Africontainers claimed over 3 million zaires in respect of the immobilization of a number of its containers³⁵.

(ii) Use of containers in breach of contract

2.22. In breach of its contractual duty to return forthwith the containers which it had received and from which it was to unload the products sent to it, Gécamines used containers belonging to Africontainers for its sole benefit for turnaround trips between Kinshasa and Matadi (362 km) from 1985 to 1989³⁶. It also failed to return other containers, using them to store its own products at its Luilu facilities³⁷.

2.23. While acknowledging its various breaches of contract³⁸, Gécamines has never compensated Africontainers, in whole or in part, for the loss thus caused³⁹; moreover, it has unjustly enriched itself.

2.24. With the complicity of Gécamines, some of the containers belonging to Africontainers were also moved from Kinshasa to Matadi for the benefit of Onatra, which used them to relieve congestion in the port of Kinshasa and, in the case of two of these containers, used them as wagons on the Kinshasa/Matadi route⁴⁰.

0 1 8 **(iii) Breach of obligations concerning guaranteed minimum quantities or exclusivity and unfair competition**

2.25. In breach of their contractual obligations, the oil companies Zaire Shell, Zaire Fina and Zaire Mobil Oil, together with Gécamines, gradually reduced the volume of goods shipped through Africontainers in favour of other companies, and in some cases provided their own transport by containers specially procured for such purpose.

2.26. Thus, in breach of the contract entered into in 1981 with Africontainers guaranteeing the latter the exclusive right to carry Zaire Shell products, that company shipped its products using providers other than Africontainers and also procured its own containers, without however terminating its contract with Africontainers⁴¹.

2.27. Nor did Zaire Mobil Oil respect its obligations to use Africontainers for the carriage of a minimum quantity of its products.

2.28. In general, all the companies party to the Tripartite Contract — Zaire Shell, Zaire Mobil Oil, Zaire Fina and Gécamines — which were at the root of the substantial investment made

³⁵Ann. 88.

³⁶Ann. 198.

³⁷Ann. 19, 24, 44 and 95.

³⁸Ann. 22, 85, 93, 98, 121 and 151.

³⁹Ann. 115.

⁴⁰Ann. 32, 35 and 61 to 63. See also para. 2.22 above.

⁴¹Ann. 95.

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by Africontainers⁴² in order to meet their stated requirements, breached the duties incumbent on any bona fide contracting partner by failing to pay Africontainers what they owed, by making fraudulent use of Africontainers' operating assets, namely, the containers, and by encouraging, if not organizing, a diversion of transport business for the benefit of companies other than Africontainers.

2.29. The oil companies also signed container lease agreements with other freight forwarders such as ATAF, ATRAZA, AFREDEZA, etc., and other companies which were made parties to the Tripartite Contract without the consent of Africontainers⁴³.

2.30. As from December 1984 the lubricants to be shipped were no longer regularly consigned to Africontainers by the oil companies, as is shown by the information set out below⁴⁴. It will be seen that consignments of lubricants to Africontainers for shipment declined substantially. The table below shows the number of containers used by Africontainers from 1983 to 1991 to carry lubricants consigned by the oil companies.

	Containerized tonnes
1983	306
1984	279
1985	200
1986	220
1987	151
1988	58
1989	79
1990	29
1991	0

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(b) *Africom-Zaire*

2.31. Africom-Zaire and the State of Zaire have a long-standing economic relationship. Thus, by letter dated 20 June 1985⁴⁵, the director of the State *Magasins Généraux et Imprimerie* (MGI) [Bonded Warehouses and Printing Works] informed the *Commissaire d'État* for Finance and Budget (Finance Minister) of a bid for the sale of listing paper to MGI for a total amount of 132,530,000 zaires because, as he said, "there is clearly an acute shortage of continuous stationery in the Computer Division".

⁴²Anns. 9, 16 and 52. See also para. 2.14 above.

⁴³Anns. 188, 210 and 213.

⁴⁴Ann. 187.

⁴⁵Ann. 26.

2.32. The Finance and Budget Ministry accordingly placed a large order for listing paper in a letter dated 19 July 1986⁴⁶.

2.33. The State gave Africom-Zaire other orders, including one on 18 June 1986 following a letter from the Company dated 30 April 1986. The order, accepted by the Finance, Budget and Treasury Minister in a letter dated 22 October 1986⁴⁷, would be in two stages:

- the first purchase order on 18 June 1986 totalling 15,080,956.20 zaires (RENAPI purchase order No. 0103, Ann. 197);
- the second purchase order, on the same day, totalling 13,301,916.50 zaires (RENAPI purchase order No. 0104, Ann. 198).

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2.34. A payment schedule was established for this order, totalling 28,382,872.70 zaires: five payments in the amount of 5,000,000 zaires each would be made to Africom-Zaire at the end of each month between October 1986 and February 1987, the balance of 3,382,872.70 zaires to be paid at the end of March 1987. This schedule was not adhered to, and this invoice remains unpaid to this day⁴⁸.

2.35. Because of the accumulation of debts owed to Africom-Zaire by the Public Treasury, the Deputy Finance Minister agreed on 13 November 1987 to pay this liability by means of five bills of exchange⁴⁹ totalling 178,700,000 zaires and falling due between January and April 1988⁵⁰. In a letter dated 14 January 1988 to the Deputy Finance Minister, the Prime Minister requested that the complete file relating to the above payment be transmitted to his staff. He also laid stress on the fact that "such substantial disbursements" to Africom-Zaire were "already disrupting the implementation of the 1988 budget, given the available funds". The Prime Minister added that "[y]ou are doubtless aware that we expect to be required to make substantial outlays in the immediate future", having in mind in particular the imminent holding of municipal elections and transfers relating to Zaire's embassies abroad⁵¹. The bills of exchange have remained unpaid to this day⁵².

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4. Attempts by Africontainers and Africom-Zaire to recover debts due from Zairean companies and from the State

(a) *Litigation*

(i) *Zaire Shell*

(1) *The decision of the Kinshasa Tribunal de grande instance on 3 July 1995*

2.36. By judicial decision RC 63824 handed down on 3 July 1995, a judgment in absentia but after an initial appearance by the parties, the Kinshasa *Tribunal de grande instance* ordered

⁴⁶Ann. 34.

⁴⁷Ann. 36.

⁴⁸Ann. 37.

⁴⁹Ann. 46-50.

⁵⁰Ann. 51.

⁵¹Ann. 53.

⁵²Ann. 57 and 71.

Zaire Shell to pay to Africontainers the sum of US\$ 13,106,704 and 39 cents in principal and US\$ 50,000 in damages on the grounds that Shell had "breached its exclusivity agreement with the plaintiff and had also engaged in an act of competition contrary to fair business practice by purchasing its own containers and by consigning its products for transport to third parties"⁵³.

(2) The decision of the Kinshasa Court of Appeal on 25 August 1995

2.37. By decision dated 24 August 1995, the Kinshasa Court of Appeal, ruling on the appeal lodged by Zaire Shell against the above-mentioned decision of 3 July 1995, upheld the decision at first instance since the parties had failed to produce the appealed judgment in the manner required by the Code of Civil Procedure⁵⁴.

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2.38. In support of its request seeking the reversal of the lower court's decision, Zaire Shell had asserted a defence to the effect that the claim was void, on the ground that it was denominated in foreign currency. It had also alleged that the documents on which Africontainers based its claim were not an acknowledgement of a debt owed to it but merely a request for information, and that the calculation of the debt claimed by Africontainers was questionable. At no time, however, did it deny the breaches of contract or claim that there was no debt.

2.39. On the basis of the judgment by the Kinshasa *Tribunal de grande instance* referred to above, immediate enforcement of which was upheld in the above-cited ruling of the Court of Appeal, enforcement proceedings were taken against Zaire Shell, which had still not paid its debts⁵⁵. Thus, on 5 September 1995, the registrars, in the report seeking approval for execution of the judgment, endorsed the procedure which had been followed and granted approval⁵⁶.

2.40. The proceedings then in progress were at first halted at the request of the Deputy Minister of Justice of the Republic of the Congo on 13 September 1995, following representations by Shell⁵⁷. However, a letter to the registrar from Mr. Lwanda Bindu, First President of the Kinshasa/Gombe Court of Appeal, confirmed that the judgment obtained by Africontainers was still enforceable: "Pending decision by the Court on the fresh appeal filed by Zaire Shell against the same judgment, the decision of the Court dated 24 August 1995 remains enforceable."⁵⁸

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2.41. After reviewing the lawfulness of the proceedings, the Congolese authorities took the view that there was no reason to block execution of the judicial decisions concerned. Thus in a letter from the Ministry of Justice dated 28 September 1995⁵⁹ to the First President of the Court of Appeal of Gombe it was expressly acknowledged that the "review of decision RCA 18.307 of 24 August 1995, rendered by the Court of Appeal of Kinshasa/Gombe, has ruled out any patent failure of justice. I would ask you to make the necessary arrangements for the execution of the said Decision." Thus the highest judicial authority in Zaire declared Mr. Diallo to be in the right and provided the means to enforce these judgments.

⁵³Ann. 153.

⁵⁴Ann. 167.

⁵⁵Ann. 170.

⁵⁶Ann. 169.

⁵⁷Anns. 171 and 166.

⁵⁸Ann. 170.

⁵⁹Ann. 178.

2.42. Property was therefore attached to that end by a bailiff on 6 October 1995⁶⁰. Three Fiat vans, a photocopier, a computer, two printers and a typewriter were seized in the presence of Messrs. Manzambi and Mombe, as witnesses.

2.43. The property seized was clearly insufficient to enable Mr. Diallo to recover the debts owed to him; his expulsion prevented him from pursuing the enforcement of this decision, which had become final.

(ii) Zaire Fina

2.44. Following the loss by Zaire Fina of two containers that Africontainers had leased to it under the contract entered into on 13 July 1983, Africontainers claimed compensation from Zaire Fina based on the replacement value of the containers and also covering compensation for loss of earnings⁶¹.

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2.45. Judgment RC 61538 of the Kinshasa *Tribunal de grande instance* upheld its claim in part⁶².

2.46. Acting on an appeal by Zaire Fina, the Kinshasa Court of Appeal set aside the decision at first instance, while dismissing the cross-appeal by Africontainers on the ground of lack of standing⁶³. Ruling *de novo*, the Court of Appeal dismissed Africontainers' action on the same ground of lack of standing⁶⁴.

2.47. Africontainers lodged an appeal with the Cour de Cassation against this judgment by the Court of Appeal⁶⁵. This was the context in which the State counsel attached to the Cour de Cassation submitted that the Court of Appeal decision in question should be quashed and the case remanded for rehearing on the merits (20 April 1995)⁶⁶. The sudden expulsion of Mr. Diallo prevented him from pursuing this action.

(iii) PLZ

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2.48. Africom-Zaire was involved in a dispute over a lease with PLZ (Unilever), the lessor⁶⁷. After hearing the parties, the Kinshasa *Tribunal de grande instance*, by judgment RC 61320 dated 24 August 1993, ordered PLZ to pay US\$ 32,364,225.50 to Africom-Zaire⁶⁸.

2.49. The Kinshasa Court of Appeal, ruling on the appeal lodged by PLZ against the above-mentioned judgment of 30 April 1993 and after hearing the parties, handed down a decision

⁶⁰Ann. 179.

⁶¹Ann. 149.

⁶²*Ibid.*

⁶³*Ibid.*

⁶⁴*Ibid.*

⁶⁵*Ibid.*

⁶⁶Ann. 149.

⁶⁷Ann. 130.

⁶⁸*Ibid.*

(RCA 17244 dated 9 March 1994) whereby, after declaring the cross-appeal by Africom-Zaire inadmissible, it vacated the judgment of the Kinshasa *Tribunal de grande instance* on grounds of an inadequate statement of reasons⁶⁹. Ruling *de novo*, it ordered Africom-Zaire to pay rent and occupancy fees and to repair the premises in question⁷⁰.

2.50. Africom-Zaire lodged an appeal with the Cour de Cassation against this Court of Appeal decision. As part of the examination of this appeal, the State counsel attached to the Cour de Cassation submitted on 11 January 1995 that the decision should be quashed⁷¹. Here again, Mr. Diallo's expulsion and his impoverishment prevented him from pursuing the action.

(b) Attempts to reach amicable settlement

(i) Gécamines

2.51. Gécamines admitted in a number of documents that all or part of Africontainers' claims against it were valid.

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2.52. Having regard to the financial position of Gécamines as a customer, its status as part of the public sector and its relations with the State, Africontainers agreed to continue to explore with Gécamines the possibility of an amicable agreement for the payment of its claims, which Africontainers never abandoned.

2.53. Thus, after several reminders from Africontainers, Gécamines invited Africontainers to a meeting in Kinshasa on 1 June 1995⁷² with a view to resolving the outstanding issues. Following this meeting Gécamines undertook, in minutes signed by Mr. Diallo and the Director of Gécamines' Import/Export Department, to "re-examine the entire file submitted to it by Africontainers based on the contractual obligations"⁷³, after Africontainers had asserted *inter alia* that it was owed US\$ 30,666,680.57 in respect of 32 containers immobilized by Gécamines and two lost containers⁷⁴.

2.54. In view of Gécamines' inertia and the fact that the situation remained unresolved, Africontainers decided in February 1996 to take legal action. Thus on 5 February 1996 it had a bailiff serve an official demand for payment on Gécamines, setting out the various heads of damage for which compensation was due⁷⁵. That demand did however contain a proposal that Gécamines should specify the terms of an acceptable settlement.

⁶⁹Ann. 146.

⁷⁰*Ibid.*

⁷¹*Ibid.*

⁷²Ann. 150.

⁷³Ann. 151.

⁷⁴*Ibid.*

⁷⁵Ann. 198.

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2.55. Maître Mayar Akon gave notice of this demand to Gécamines by a letter dated 12 February 1996⁷⁶, to which Gécamines replied: “We agree to settle this dispute amicably, subject to negotiations to be held between the legal division and Africontainers.”⁷⁷

2.56. Further discussions took place subsequently but Mr. Diallo was obviously unable to participate in these, and while it seems that Gécamines in 1997 set up a committee tasked with examining the container disputes⁷⁸ (which confirms that it admits owing a debt), the parties never reached agreement on the amount⁷⁹.

2.57. The length of the discussions and the parties' apparent inability to agree on a precise figure may elicit surprise. The explanation can be found in the privileged position of Gécamines, a State company, which knows that it can delay payment of its debts *ad infinitum*, with complete impunity. Although there were sporadic contacts after Mr. Diallo's expulsion, it is obvious that these no longer had any chance of success: the DRC forced Africontainers into complete idleness and the total destitution to which Mr. Diallo was reduced made it impossible for him to negotiate any further with his former trading partner.

(ii) Onatra

2.58. Similarly, owing to Onatra's public status, Africontainers favoured trying to reach an amicable settlement with it in order to recover the debt owed to Africontainers⁸⁰.

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2.59. Thus, a settlement agreement was entered into between Africontainers and Onatra, pursuant to which Onatra acknowledged owing Africontainers compensation for Onatra's use in violation of its contractual commitments of containers belonging to Africontainers⁸¹.

2.60. Furthermore, Onatra admitted in two internal documents that the containers were left sitting idle⁸². The two letters concern the prolonged period during which a number of containers remained in the port of Matadi. In those letters the Director of the Ports Department, writing to the Co-ordination Director for the port of Matadi, stated: “in view of this deplorable situation, we expect to receive an explanation from you forthwith so that we can respond to the customer's demand”⁸³.

2.61. The subsequent discovery that the containers had been used to a much greater extent than Onatra had initially admitted led Africontainers to repudiate those settlements and accordingly to claim a greater amount in compensation⁸⁴.

⁷⁶Ann. 201.

⁷⁷Ann. 198.

⁷⁸Ann. 222.

⁷⁹Anns. 224 and 226.

⁸⁰Anns. 66, 67 and 68.

⁸¹Anns. 69 and 70.

⁸²Anns. 43 and 55.

⁸³Ann. 55.

⁸⁴Ann. 91.

2.62. For the reasons set out above, while Africontainers continues to demand payment of the sums it believes are owed to it, it has been unable to bring legal proceedings against Onatra.

5. Mr. Diallo's arrest and expulsion

(a) *The facts*

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2.63. As a result of Mr. Diallo's repeated efforts to recover on behalf of the companies a number of debts owed to them by the Zairean State and by public and private Zairean companies, the Prime Minister of Zaire ordered Mr. Diallo's expulsion from the country (on this subject see the *Avocats Sans Frontières* press release and the article from the Kinshasa Business and News)⁸⁵. An article from the 6 August 1996 edition of the Guinean daily newspaper *Horoya*, which echoes the 31 January 1996 edition of the Zairean weekly *L'Ouragan*, can also be cited⁸⁶. The Zairean weekly accused Mr. Kengo wa Dondo, the Prime Minister of Zaire, of having ordered that "arbitrary" expulsion "in order to prevent Zaire Shell from paying out the US\$ 13 million belonging to Diallo Cravate". In accordance with that order, Mr. Diallo was arrested and secretly placed in detention, without any form of judicial process or even examination⁸⁷. Further to intervention by the President himself, Mr. Diallo was released after two months in detention⁸⁸, but was immediately rearrested and imprisoned for two more weeks, as the expulsion order had been confirmed by the Prime Minister⁸⁹.

2.64. After those 14 days of detention, Mr. Diallo was removed from Zaire and flown to Conakry. Mr. Diallo spent a total of 75 days in detention. Despite the 32 years he had spent in the Democratic Republic of the Congo, he suffered treatment violating his most basic rights and freedoms. He was held under perilous conditions, both physical and psychological, and was subjected to maltreatment and death threats on the part of those overseeing his detention. He was also prevented from meeting or communicating with members of the Guinean embassy or with his lawyers⁹⁰. He received no food from the detention centre.

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2.65. Moreover, the report by the immigration officer at Kinshasa airport states that Mr. Diallo was "refused entry" on 31 January 1996 at Kinshasa airport on the ground of illegal residence⁹¹. This is certainly surprising given that Mr. Diallo had resided in Zaire for more than 30 years on the basis of a residence permit of unlimited duration duly issued by the Zairean authorities⁹² and had never been notified of the revocation or alleged irregularity of the permit.

(b) *View taken by public opinion at the time*

2.66. The Zairean news media were not indifferent to Mr. Diallo's case. They were responsible for disclosing that he had been unlawfully imprisoned, while taking note of Mr. Diallo's personality, which while unique, was nevertheless appreciated by Zaireans.

⁸⁵Ann. 193.

⁸⁶Ann. 206.

⁸⁷Anns. 193 and 206.

⁸⁸Ann. 193.

⁸⁹Ann. 206.

⁹⁰Ann. 193.

⁹¹Ann. 197.

⁹²Ann. 7.

2.67. Thus, on page 9 of edition No. 22, of Thursday 4 January 1996, of the Kinshasa *Business & News*, an article by Mr. Ngoyi Kabuya Dikateta denounced a “flagrant human rights violation in Zaire”⁹³. The article sets out the history of the Diallo case, thereby directly providing the reader with keys to understanding the case which are still applicable today.

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2.68. The newspaper thus asserted that Mr. Diallo had “disappeared from view” after attempting to enforce a court decision in his favour against Zaire Shell and stated that the connection between Mr. Diallo’s personal situation and the outcome of that trial was “simple, direct and obvious”. The author of the article further concluded that the conduct of the authorities in the case was certain only to worsen “a reputation which does not speak well for our country [Zaire], and even less so for the honour of our leaders”.

2.69. The non-governmental organization *Avocats sans Frontières*, which found the Guinean investor in the detention centre (above-cited article⁹⁴) maintained by the Immigration Department next to the Kin-Mazière building, where he had been languishing since 5 November 1995 without any judicial proceedings, published in the same edition of that newspaper a press release in which its members, condemning the discriminatory treatment inflicted on Mr. Diallo, “protest[ed] against the arbitrary arrest of a Guinean investor”, criticized the false grounds on which the authorities had arrested Mr. Diallo and which could lead to his expulsion and referred *inter alia* to the violation of Article 2.2 of the International Covenant on Economic, Social and Cultural Rights.

2.70. Further, that press release, reprinted in the 15 December 1995 edition of the daily newspaper *Le Phare*⁹⁵, cites the responsibility of the Zairean Prime Minister, Mr. Kengo wa Dondo, as a result of his interference in judicial proceedings⁹⁶.

2.71. In an article entitled “Kengo’s phobia laid bare” in edition No. 75, the newspaper *Elima* also identified the Prime Minister as the perpetrator of this human rights violation (see in this regard the letter from the Ambassador of Guinea to the Minister for Foreign Affairs⁹⁷).

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2.72. Generally, these events were widely reported by the Zairean broadcast and print media⁹⁸, and the international radio station Africa No. 1 did likewise, broadcasting the article *in extenso* on 17 December 1995. For its part, *L’Ouragan*, a Zairean newspaper, readily pointed the finger at Zairean leaders in its edition No. 21 of 31 January 1996: “Kengo implicated in the arbitrary arrest of the Guinean Diallo Amadou at the SNIP”⁹⁹.

(c) Mr. Diallo’s situation after his expulsion

2.73. After his expulsion from Zaire, the dispossessed Mr. Diallo essentially had to live off help from charitable individuals.

⁹³Ann. 193.

⁹⁴*Ibid.*

⁹⁵Ann. 191.

⁹⁶Ann. 193.

⁹⁷Ann. 192.

⁹⁸Ann. 191 and 193.

⁹⁹Ann. 196.

2.74. Once expelled from Zaire, Mr. Diallo had practically no financial resources. An article in edition No. 60 in November 1996 of the newspaper *Evénement de Guinée* bears witness to this: "He arrived in Conakry penniless, having just the coat and pants he was wearing. Rich yesterday, destitute today."¹⁰⁰

B. PROTECTION EXERCISED BY THE REPUBLIC OF GUINEA

0 3 4 2.75. Upon his arrest, Mr. Diallo, by letter dated 30 November 1995¹⁰¹, alerted the highest Zairean authorities to Africontainers' dispute with the various oil companies and Gécamines, believing it to be in his interest to seek an amicable settlement. Mr. Diallo clearly expressed his desire in this respect. Thus, he wrote in this letter, sent to Zaire's Planning Minister and others:

"In conclusion, as our company was granted the benefits provided by the Investments Code, we are convinced that all of the debts now owed to it by the oil companies are and will remain guaranteed by that Code. Thus, we are looking to your high authority with a view to recovering all of our debts. This will also enable us to make repayment in foreign currency of the loans we received for the financing of our business."

2.76. Even though they were never notified of Mr. Diallo's arrest and imprisonment or of the accusations against him, the Guinean authorities quickly grew concerned about the fate of their national.

2.77. Thus, by letter dated 21 December 1995¹⁰², Guinea's Ambassador in Kinshasa informed the President of the Republic and the Minister for Foreign Affairs of Guinea of the prevailing public opinion in Zaire concerning the case.

0 3 5 2.78. A December 1996 letter confirms the active communication which took place between the Guinean Ministries of Justice and of Foreign Affairs¹⁰³. Other documents also evidence the co-operation between the Secretary-General of the Presidency and Mr. Diallo¹⁰⁴. In that letter, Mr. Diallo's situation drew the full attention of the President of the National Assembly: "Being very sensitive to this most unfortunate and deplorable situation, the President of the National Assembly assures you of his support and has already envisaged taking certain measures at Government level with a view to assuring better protection of our citizens abroad." Another letter shows the co-operation between the Guinean Ministry of Foreign Affairs and the Secretary-General of the Republic¹⁰⁵.

¹⁰⁰Ann. 208.

¹⁰¹Anns. 187-189.

¹⁰²Ann. 192.

¹⁰³Ann. 212.

¹⁰⁴Ann. 217.

¹⁰⁵Ann. 203.

2.79. Furthermore, several later documents exchanged between the Ministry of Foreign Affairs of the Republic of Guinea and Guinea's Ambassador to Zaire demonstrate the Government's particular interest in this case and the obvious desire to resolve this dispute as quickly as possible¹⁰⁶.

2.80. Thus, in a letter sent to Guinea's Ambassador to Zaire on 11 February 1997, the Minister for Foreign Affairs himself showed considerable interest in the settlement of this dispute¹⁰⁷: "I am glad to see that this dispute is moving towards final settlement and I urge you to spare no effort to help our countryman recover what is owed him because our Government attaches particular importance to this." Moreover, in that same letter the Minister very clearly expressed his desire to be kept personally informed of developments in the dispute. He also did not hide his intent to employ all "appropriate" means with a view to resolving it: "Accordingly, while asking that you keep me regularly informed of developments in the matter, I would be grateful to you for taking all appropriate measures needed for monitoring the negotiations and defending the interests of our compatriot."

2.81. What is more, the Embassy of Guinea, together with Mr. Diallo's representatives, tried to act as intermediary between Mr. Diallo and Gécamines with a view to resolving the dispute between them: "The Embassy recommended to Mr. Diallo's representatives that they attend [a meeting set up by Gécamines concerning the dispute with Africontainers], listen and gather as much information as possible concerning Gécamines' intentions, so that they could inform Mr. Diallo of them. Mr. Touré, First Secretary for Financial and Consular Affairs, will unobtrusively accompany them."¹⁰⁸ It is clear beyond doubt that the Guinean authorities showed an interest and played an active role in defending their national's interests.

2.82. Through his lawyer, Maître Alpha Oumar Diallo, Mr. Diallo then informed the Guinean Ministry of Foreign Affairs of the extent of the loss he had suffered¹⁰⁹.

2.83. By letter dated 4 February 1998, Maître Alpha O. Diallo, Mr. Diallo's lawyer, also notified the President of the Republic of the Congo, as well as that country's Minister of Justice, that a request instituting proceedings had been submitted to the International Centre for Settlement of Investment Disputes (ICSID).

2.84. In that document Maître Alpha O. Diallo also pointed out that attempts to reach settlement through diplomatic channels had failed, noting that: "In a showing of vexatious disregard for diplomatic courtesy, no response has been forthcoming to any of the letters sent by the Minister for Foreign Affairs of the Republic of Guinea to the Congolese authorities."¹¹⁰

¹⁰⁶ Ann. 216.

¹⁰⁷ Ann. 216.

¹⁰⁸ Ann. 223.

¹⁰⁹ For evidence of this, see, for example, Ann. 219.

¹¹⁰ Anns. 245 and 246.

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2.85. Moreover, Mr. Diallo made clear that amicable settlement, aimed at arriving at an expeditious resolution of the dispute between him and the Democratic Republic of the Congo, remained possible: "Pending that, I wish to inform you of our willingness to resolve the dispute on an amicable basis or before any other international institution of your choosing."¹¹¹

2.86. Given the silence consistently maintained by the Congolese authorities, Guinea decided to refer the dispute to the International Court of Justice.

¹¹¹ Anns. 248 and 249.

CHAPTER III

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THE RESPONSIBILITY OF THE DEMOCRATIC REPUBLIC OF THE CONGO

3.1. It was seen in the preceding chapter that Mr. Diallo was (i) imprisoned and (ii) expelled, resulting in (iii) his being effectively deprived of his property and of his companies, and of any possibility of pursuing the proceedings instituted by those companies. In the second part of this chapter, Guinea will establish in each case the existence of internationally wrongful acts and their attributability to the DRC. It will begin by examining the principles of international law applicable to the relevant facts (A) and then apply those principles to the facts of the case (B) and draw conclusions therefrom as to the obligation incumbent on the DRC to make reparation (C).

A. THE APPLICABLE PRINCIPLES

1. The rights of aliens — arbitrary detention and unjustified expulsion

3.2. The existence of the duty of protection which a receiving State owes to nationals of other States is well established in international law. In *Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana*, the Tribunal (composed of Judge Schwebel (President), Mr. Wallace and Mr. Leigh) held that: "Long established customary international law requires that a State accord foreign nationals within its territory a standard of treatment no less than that prescribed by international law."¹¹²

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3.3. The precise scope of this duty of protection has always been a subject of debate, in the same way as the question whether the duty of protection amounts to a duty of "national treatment", which requires that aliens enjoy equality with nationals in the application of national law, or to a "minimum international standard". Guinea sees no need to enter into a detailed discussion of this issue, nor into the question of the definition of the minimum international standard and its application. It considers that, whether on the basis of the national treatment argument or that of the minimum international standard, international law prohibits any ill-treatment and, *a fortiori*, arbitrary and unjustified detention, imprisonment and expulsion. Thus, for example, according to *Oppenheim's International Law*:

"Protection afforded to the persons and property of aliens: The state in whose territory an alien resides must afford his person and property at least that level of protection which is sufficient to meet those minimum international standards prescribed by international law, and must grant him at least equality before the law with its own nationals as far as safety of person and property is concerned. An alien must in particular not be wronged in person or property by the officials or courts of a state. Thus, the police must not arrest him without just cause, administrative officials must not treat him arbitrarily, and courts must treat him justly and in accordance with the law."¹¹³

¹¹²*Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana*, ILR Vol. 95, p. 203. Also, in *Amco v. Indonesia*, the (first) arbitration tribunal stated:

"it is a generally accepted rule of international law, clearly stated in international awards and judgments and generally accepted in the literature, that a State has a duty to protect aliens and their investment against unlawful acts committed by some of its citizens. If such acts are committed with the active assistance of state-organs a breach of international law occurs." *Amco v. Indonesia*, ILR, Vol. 89, p. 457 (Tribunal: Goldman (President), Foighel and Rubin).

¹¹³Sir Robert Jennings and Sir Arthur Watts, *Oppenheim's International Law*, 9th ed. (1990), Longman, pp. 910-911; emphasis added. As regards the minimum international standard, see pp. 931-933.

3.4. The same principle applies with regard to expulsion:

“Competence to expel aliens: The right of states to expel aliens is generally recognised. It matters not whether the alien is only on a temporary visit or has settled down for professional business or other purposes on its territory, having established his domicile there.

On the other hand, while a state has a broad discretion in exercising its right to expel aliens, its discretion is not absolute. Thus, by customary international law it must not abuse its right by acting arbitrarily in taking its decision to expel an alien, and it must act reasonably in the manner in which it effects an expulsion.”¹¹⁴

3.5. As regards the manner of expulsion, *Oppenheim's International Law* explains:

“How expulsion is effected: Expulsion is, in theory at least, not a punishment, but an administrative measure consisting in an order of the government directing a foreigner to leave the country. Expulsion must therefore be effected with as much forbearance and indulgence as the circumstances and conditions of the case allow and demand, especially when expulsion is decreed against a domiciled alien.”¹¹⁵

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3.6. The relevant principles concerning arbitrary arrest and detention and expulsion are codified in Article 9, paragraph 1, and Article 13 of the International Covenant on Civil and Political Rights:

“*Article 9:* 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law”¹¹⁶.

.....
“*Article 13:* 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.”¹¹⁷

¹¹⁴Sir Robert Jennings and Sir Arthur Watts, *Oppenheim's International Law*, 9th ed. (1990), Longman, pp. 940-941.

¹¹⁵*Ibid.*, p. 945. See also Brownlie, *Principles of Public International Law*, 5th ed. (1997), Oxford, p. 523:

“As might be expected, expulsion is also within the discretion of the state, but tribunals and writers have at times asserted the existence of limitations on this discretion. In particular, the power of expulsion must be exercised in good faith and not for an ulterior motive. While the expelling state has a margin of appreciation in applying the concept of ‘ordre public’, this concept is to be measured against human rights standards. The latter are applicable also to the manner of expulsion.”

¹¹⁶See also Articles 9 (2), 9 (3) and 9 (4) of the Covenant.

¹¹⁷As regards the question whether an expulsion decision has been taken “in accordance with law”, see *Maroufidou v. Sweden* (1981), *ILR* Vol. 62, p. 278, where the Human Rights Committee stated:

3.7. Similarly, Article 5, paragraph 1, and Article 7 of the Declaration of 13 December 1985 on the human rights of individuals who are not nationals of the country in which they live (A/RES/40/144) provide that:

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“Article 5: 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; no alien shall be subjected to arbitrary arrest or detention; 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; . . .

.....

Article 7: An alien lawfully in the territory of a State 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 why he or she should not be expelled and to have the case reviewed by, and be represented for the purpose before, the competent authority or a person or persons specially designated by the competent authority. Individual or collective expulsion of such aliens on grounds of race, colour, religion, culture, descent or national or ethnic origin is prohibited.”

3.8. These principles are intended to protect aliens against arbitrary acts carried out by the State. As regards the nature of an arbitrary act, in *Elettronica Sicula S.p.A. (ELSI) (United States/Italy)*, the criterion applied by the Chamber of the Court was relatively strict. It held as follows:

“Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. This idea was expressed by the Court in the *Asylum* case, when it spoke of ‘arbitrary action’ being ‘substituted for the rule of law’ (*Asylum, Judgment, I.C.J. Reports 1950*, p. 284). It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety. Nothing in the decision of the Prefect, or in the judgment of the Court of Appeal of Palermo, conveys any indication that the requisition order of the Mayor was to be regarded in that light.”¹¹⁸

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3.9. The evocation of “a wilful disregard of due process of law” will suffice; as a definition, it appears more in keeping with the Court’s decision in the *Asylum* case, in which it contrasted the idea of arbitrary action “in the guise of justice” with the concept of the rule of law. In the *Asylum* case, the Court more clearly assimilated protection against an arbitrary act to legality, without reference to any other criteria:

“It is not within the powers or functions of the Committee to evaluate whether the competent authorities of the State party in question have interpreted and applied the domestic law correctly in the case before it under the Optional Protocol, unless it is established that they have not interpreted and applied it in good faith or that it is evident that there has been an abuse of power.”

In fact, in the present case neither has Zairean law been applied nor has there been good faith, and there has been an abuse of power. See Chapter III below.

¹¹⁸*I.C.J. Reports 1989*, p. 76, para. 128.

“In principle, therefore, asylum cannot be opposed to the operation of justice. An exception to this rule can occur only if, in the guise of justice, arbitrary action is substituted for the rule of law. Such would be the case if the administration of justice were corrupted by measures clearly prompted by political aims. Asylum protects the political offender against any measures of a manifestly extra-legal character which a government might take or attempt to take against its political opponents. The word ‘safety’ . . . means that the refugee is protected against arbitrary action by the government, and that he enjoys the benefits of the law.”¹¹⁹

3.10. In any event, an act may obviously be arbitrary without being done in the guise of justice. For example, in *Valentine Petroleum & Chemical Corporation v. Agency for International Development*, the Arbitration Tribunal took the view that the mere annulment of the contract without notice and without recourse to arbitration amounted to an arbitrary act¹²⁰.

3.11. Furthermore, in the present case, both States are parties to the Vienna Convention on Consular Relations of 24 April 1963 (the DRC since 15 July 1976 and Guinea since 30 June 1988). As the Court held in the Breard case (*Vienna Convention on Consular Relations (Paraguay v. United States of America)*) and the *LaGrand (Germany v. United States of America)* case, Article 36, subparagraph 1 (b), of the 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:

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

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3.12. In the Breard case, the Court took note of the obligation under this Article to inform the individual concerned “of his rights under that provision”; it also stated “that among these rights are the right to request that the relevant consular office of the State of which he is national be advised of his arrest and detention, and the right to communicate with that office”¹²¹. In his declaration in this case, Judge Schwebel stressed the importance of this provision:

“It is of obvious importance to the maintenance and development of a rule of law among States that the obligations imposed by treaties be complied with and that, where they are not, reparation be required. The mutuality of interest of States in the effective observance of the obligations of the Vienna Convention on Consular Relations is the greater in the inter-mixed global community of today and tomorrow.”¹²²

2. The rights of aliens (continued) — expulsion associated with effective deprivation of property rights

3.13. There is an equivalence between the protection the State owes to aliens and the protection it owes to their property. According to *Oppenheim's International Law*:

¹¹⁹*I.C.J. Reports 1950*, p. 234.

¹²⁰*ILR*, Vol. 44, p. 79.

¹²¹*I.C.J. Reports 1998*, p. 249, para. 2.

¹²²*I.C.J. Reports 1998*, p. 259.

“A state must not, through its officials or courts, injure an alien through injury to his property; an alien must be allowed access to the courts in order to protect his property, and have equality before the law in doing so; a state’s duty to protect aliens applies as much to their property as to their persons; a state’s obligation to observe in its treatment of aliens certain minimum international standards applies also in respect of their property.

The rule is clearly established that a state is bound to respect the property of aliens, and that for their part aliens have the right to the peaceful use and enjoyment of their property.”¹²³

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3.14. Guinea recognizes that the scope of this rule is somewhat limited by the State’s ability to expropriate an alien’s property lawfully¹²⁴. However, on the relevant facts that is not the situation in the present case¹²⁵; rather, it involved a *de facto* expropriation or effective deprivation of property rights, acts which are universally regarded as unlawful both by case law and scholarly opinion.

3.15. It is clearly established that the concept of expropriation is broader than that of “taking”. In *Starrett Housing Corporation v. Iran*, the Iran-United States Claims Tribunal held as follows:

“it is recognised in international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property remains with the original owner”¹²⁶.

3.16. Again, in *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA*, the Tribunal held: “A deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected.”¹²⁷

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3.17. This concept of “interference” played a decisive role in the *Starrett Housing* case¹²⁸, and has also been adopted by legal scholars and applied recently by arbitral tribunals. Judge (then Professor) Higgins has said that “interference which significantly deprives the owner of the use of his property amounts to a taking of that property”¹²⁹. This was the view taken by the United States in the *ELSI* case; it argued that “in international law a ‘taking’ is generally recognized as including not merely outright expropriation of property, but also unreasonable interference with its use,

¹²³*Oppenheim’s International Law*, 9th ed. (1990), Longman, p. 912.

¹²⁴*Ibid.*, pp. 918-920.

¹²⁵See paras. 2.63 to 2.65 above.

¹²⁶*Starrett Housing Corporation v. Iran*, 4 Iran-US CTR 122, 154.

¹²⁷*Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA*, 6 Iran-US CTR 219, 225.

¹²⁸*Starrett Housing Corporation v. Iran*, 4 Iran-US CTR 122, 155: “It has therefore been proved in the case that at least by the end of January 1980 the Government of Iran had interfered with the Claimant’s property rights in the project to an extent that rendered these rights so useless that they must be deemed to have been taken.”

¹²⁹R. Higgins, “The Taking of Property by the State”, *RCADI* 1982, Vol. III, p. 324. This definition was adopted by the United States in *Elettronica Sicula S.p.A. (ELSI) (United States/Italy), Pleadings, Oral Arguments, Documents*, Vol. 3, p. 105.

enjoyment or disposal”¹³⁰. In the context of NAFTA, in the case of *Metalclad Corporation v. The United Mexican States*, the Tribunal accepted the following conclusion:

“Thus, expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host state, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably to be expected economic benefit of property even if not to the obvious benefit of the host State.”¹³¹

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3.18. Whilst it is true that the tribunal which decided this case was concerned solely with the application of Article 1110 of the treaty establishing NAFTA, Guinea considers that this definition of expropriation may be regarded as a true reflection of what expropriation currently means in customary law¹³². Moreover, the Tribunal based its decision in part on that of the arbitration tribunal in *Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana*, which is clearly relevant to the present case.

3.19. In that case Mr. Biloune, of Syrian nationality, had resided in Ghana for 22 years before being expelled in 1987. He had set up a company there (MDCL), in which he owned 60 per cent of the shares. That company had concluded agreements with Ghanaian entities for the construction of a hotel complex in Accra. On the pretext of the lack of a building permit, the city authorities in Accra stopped the work and demolished part of the project. Mr. Biloune was subsequently arrested, detained for 13 days and expelled.

3.20. The tribunal hearing the case held that government action in stopping and partially demolishing the construction works, arresting and detaining Mr. Biloune and expelling him amounted to “constructive expropriation”:

“What is clear is that the conjunction of the stop work order, the demolition, the summons, the arrest, the detention, the requirement of filling assets declaration forms, and the deportation of Mr. Biloune without possibility of re-entry had the effect of causing the irreparable cessation of the work. Given the central role of Mr. Biloune in promoting, financing and managing MDCL, his expulsion from the country effectively prevented MDCL from further pursuing the project. In the view of the Tribunal, such prevention of MDCL from pursuing its approved project would constitute constructive expropriation of MDCL’s contractual rights in the project and, accordingly, the expropriation of the value of Mr. Biloune’s interest in MDCL, unless the Respondents can establish by persuasive evidence sufficient justification for these events.”¹³³

3.21. The significance of this important decision does not rest solely on the application of the concept of “constructive expropriation”, but also on the importance attributed by the Tribunal to the expulsion of Mr. Biloune, the head of the company involved in the project (MDCL). The link

¹³⁰*Elettronica Sicula S.p.A. (ELSI) (United States/Italy)*, Judgment, I.C.J. Reports 1989, p. 68, para. 114.

¹³¹*Metalclad Corporation v. The United Mexican States*, Award of 30 August 2000, para. 103.

¹³²NAFTA, Article 1110 (relevant extract): “No party shall directly or indirectly... expropriate an investment... or take a measure tantamount to... expropriation... except (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105 (1); and (d) on payment of compensation.”

¹³³*Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana*, ILR, Vol. 95, p. 209.

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established by the Tribunal between the rights of MDCL and Mr. Biloune's interests is likewise fundamental. The case brought before the Court by Guinea clearly involves a deprivation of the use, enjoyment and disposal of property — including property belonging to Mr. Diallo's companies — in respect of which Mr. Diallo's detention and expulsion similarly played a crucial role.

3.22. Moreover, international law does not require that there should be an overt intent effectively to deprive a person of the use, enjoyment or disposal of the property concerned; what matters is the effect of the act of interference. Thus in *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA* the Tribunal held that: "The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact."¹³⁴

3.23. It follows that there are two objective elements establishing the existence of an expropriation, even in the absence of a formal taking of property: (i) substantial interference and (ii) the effective deprivation of the exercise of the rights attaching to ownership. In addition, for the expropriation to become unlawful, there is a more subjective element: the arbitrary character of the measure. Thus *Oppenheim's International Law* concludes a long list of the elements which prevent an expropriation from being unlawful by stating: "Perhaps the most clearly established condition is that expropriation must not be arbitrary and must be based on the adoption of duly adopted laws."¹³⁵

3. Denial of justice

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3.24. Denial of justice, that is to say a breach of the obligation to accord aliens a certain judicial protection, has been characterized as "the principal internationally wrongful judicial act"¹³⁶. The concept of denial of justice is broad in scope:

"Examples of it are refusing aliens access to administrative and judicial courts, excessive delay or conversely undue expedition in the conduct of proceedings, manifestly xenophobic conduct on the part of magistrates, delivery of an unappealable judgment which is incompatible with the State's obligations or manifestly unjust, or refusal to ensure the enforcement of a judgment given in favour of an alien."¹³⁷

3.25. Similarly, according to *Oppenheim's International Law*:

"If the courts or other appropriate tribunals of a state refuse to entertain proceedings for the redress of injury suffered by an alien, or if the proceedings are subject to undue delay, or if there are serious inadequacies in the administration of justice, or if there occurs an obvious and malicious act of misapplication of the law by the courts which is injurious to a foreign state or its nationals, there will be a 'denial of

¹³⁴Iran-US CTR 219, 225-226. With regard to the motivation of the State concerned, see also *Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana*, ILR, Vol. 95, p. 209.

¹³⁵*Oppenheim's International Law*, 9th ed. (1990), Longman, pp. 916-917, 918-919.

¹³⁶P. Daillier and A. Pellet, *Droit International Public* (Nguyen Quoc Dinh), LGDJ, Paris, 6th ed., 1999, p. 751.

¹³⁷*Ibid.*; the authors refer to the ruling of the Italian-Venezuelan Mixed Claims Commission of 3 May 1930, in *Martini*, RIAA, Vol. II, p. 978.

justice' for which the state is responsible (quite apart from the effect which such circumstances might have for the application of the local remedies rule)."¹³⁸

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3.26. Guinea accepts that, for the judicial act in question to be considered a denial of justice, it must not be a mere error of law or fact on the part of the court¹³⁹. However, that is not the issue in the present case, which reveals "serious inadequacies in the administration of justice"¹⁴⁰, consisting partly in the refusal to ensure the enforcement of judgments given in favour of Mr. Diallo, its national, and his inability to pursue pending lawsuits and institute new proceedings.

4. Breaches of contractual undertakings

3.27. Although disagreement exists as to whether the mere breach by a State of its contractual undertakings to a foreign national can constitute an internationally wrongful act, the problem does not arise in the present case. The breaches alleged must be viewed in the light of Mr. Diallo's expulsion and in the general context of effective deprivation of his property and denial of justice. As Professor Brownlie has explained:

"The contracting government may act in breach of contract, legislate in such a way as to make the contract worthless . . . What then is the position in terms of international law?

In principle, the position is regulated by the general principles governing the treatment of aliens. Thus, the act of the contracting government will entail state responsibility if, by itself or in combination with other circumstances, it constitutes a denial of justice (in the strict sense) or an expropriation contrary to international law. The general view is that a breach of contract (as opposed to confiscatory annulment) does not create State responsibility on the international plane."¹⁴¹

3.28. The same reasoning is found in *Oppenheim's International Law*:

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"It is doubtful whether a breach by a state of its contractual obligations with aliens constitutes *per se* a breach of an international obligation, unless there is some additional element as denial of justice, or expropriation, or breach of treaty, in which case it is that additional element which will constitute the basis for the state's international responsibility."¹⁴²

¹³⁸*Oppenheim's International Law*, 9th ed. (1990), Longman, pp. 543-544.

¹³⁹*Oppenheim's International Law*, 9th ed. (1990), Longman, pp. 544-545. See also I. Brownlie, *Principles of Public International Law*, 5th ed. (1997), Oxford, p. 533: "The most controverted issue is the extent to which erroneous decisions may constitute denial of justice. There is authority for the view that an error of law accompanied by a discriminatory intention is a breach of the international standard."

¹⁴⁰In *Amco v. Indonesia*, the (second) arbitration tribunal (Judge Higgins (Pres.), Lalonde and Magid) employed the definition of arbitrary action in *ELSI* — "a wilful disregard of due process of law" — as a definition of the concept of denial of justice, *ILR*, Vol. 89, pp. 621-622. The Tribunal applied three tests:

"And if one applies the test in the *ELSI* case 'a wilful disregard of due process of law'; or in the *Idler* case (the need for 'ordinary justice'); or in the *Chattin* case ('bad faith, wilful neglect of duty, or insufficiency of action to any unbiased man') it can be seen that the BKPM handling of PT Wisma's complaint, which led in turn to the approval of the President of the Republic to the proposal for revocation, constituted a denial of justice."

¹⁴¹I. Brownlie, *Principles of Public International Law*, 5th ed. (1997), Oxford, p. 550.

¹⁴²*Oppenheim's International Law*, 9th ed. (1990), Longman, p. 927.

B. THE DRC'S INTERNATIONALLY WRONGFUL ACTS

1. Ill-treatment of Mr. Diallo — imprisonment and expulsion

3.29. On 5 November 1995 the Zairean Prime Minister, Mr. Kengo wa Dondo, issued an order for the expulsion of Mr. Diallo. He was immediately arrested by the Zairean police and placed in the custody of the Immigration Department; there was no form of judicial process or even any examination. He remained a prisoner, without any visit from his lawyers or members of the Guinean Embassy, until 10 January 1996. The sole ground given to justify this expulsion/detention order appears to have been Mr. Diallo's "dishonourable conduct", but no further details of this charge were provided. In its press release of 13 December 1995 *Avocats Sans Frontières* protested against Mr. Diallo's treatment as follows:

"Avocats Sans Frontières, an organization for the protection and defence of human rights, has just discovered that Mr. Diallo Amadou Sadio, a Guinean businessman and investor, who settled in Zaire 31 years ago, has been imprisoned since 5 November 1995 in the Immigration Department's lock-up in Place Kin-Mazière on the false ground of dishonourable conduct, as part of the phased execution of an expulsion order signed by Prime Minister Kengo wa Dondo.

Avocats Sans Frontières calls the attention of the Zairean authorities to Article 2.2 of the International Covenant on Economic, Social and Cultural Rights, which requires the Member States of the UN to guarantee that economic, social and cultural rights are exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

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Avocats Sans Frontières contends that the diligence displayed by the ill-fated Diallo Amadou Sadio, alias Diallo Cravate, in seeking the enforcement against a joint Zairean-Dutch company of judgment RC 63.824 of 3 July 1995, as upheld by the Court of Appeal of Kinshasa/Gombe in its judgment RCA 18.307 of 24 August 1995, involves nothing dishonourable to the human race. It also notes that the Prime Minister's order has a discriminatory basis capable of discouraging foreign investors who wish to create employment in Zaire."¹⁴³

3.30. An investigation into the facts of the case prompts two observations:

1. The decision to detain Mr. Diallo, and his detention, occurred precisely when he was attempting to enforce judgments in favour of companies of which he was the sole or principal proprietor, in particular the judgment in favour of Africontainers against Zaire Shell¹⁴⁴, and at a time when the Zairean Government was heavily implicated in that case at the highest level; the order to imprison/expel Mr. Diallo came directly from that level; the only inference which can be drawn from these elements is that the order was issued for the sole purpose of preventing the enforcement of those judicial decisions and for no other valid reason.
2. In any event, the imprisonment without trial, examination or formality and without access either to lawyers or staff of the Embassy of the Republic of Guinea was unlawful and thus engage the responsibility of the DRC — whether as regards the ill-treatment of Mr. Diallo, without respect for his most fundamental rights, or as regards the violation of Article 36, paragraph 1, of the Vienna Convention on Consular Relations.

¹⁴³Ann. 191.

¹⁴⁴See paras. 2.37 to 2.43 above.

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3.31. The expulsion order and unlawful detention of Mr. Diallo provoked indignant reactions on the part of the press and amongst NGOs concerned with the protection of human rights. The press release by *Avocats Sans Frontières* was published in the Zairean newspaper *Le Phare* of 15 December 1995 as part of an article entitled “Kengo’s meddling denounced by *Avocats Sans Frontières*”, and also in the *Kinshasa Business & News* of 4 January 1996, which devoted an entire page to this “Flagrant violation of human rights in Zaire”¹⁴⁵.

3.32. It may be that this pressure and the resulting public interest had some effect; in any event, on 10 January 1996 Mr. Diallo was released — briefly¹⁴⁶. In the following week he was again detained unlawfully and, on 31 January 1996, with no opportunity to remove his personal effects, he was expelled. The notice states that he was “refused entry” [*refoulement*] on the ground of a finding by the competent authorities that he was “illegally residing”¹⁴⁷ in the country. This argument is far from convincing and as a ground is totally without foundation. As regards the refusal of entry, this was a totally inappropriate procedure, since its purpose is directed to persons intercepted on entry into national territory who do not possess the valid documents required for entry. In the present case, while Mr. Diallo could be made subject to an expulsion measure, if appropriate, on the basis of lawful proceedings, under no circumstances could he be made the subject of a refusal-of-entry procedure. In any case there was nothing unlawful about Mr. Diallo’s presence in Zaire.

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3.33. As regards the expulsion of Mr. Diallo itself, this was totally arbitrary and unlawful. Without doubt, his presence had become a source of irritation to the Zairean Government, but that could not justify expulsion. It goes without saying that the Zairean Government made no attempt to comply with the requirements of Article 13 of the International Covenant on Civil and Political Rights, to which both States are parties. There was no question of a “decision reached in accordance with law”; Mr. Diallo did not have the slightest opportunity to submit the reasons against his expulsion and to have his case reviewed by the competent authority. On the contrary, there was a total lack of good faith and an abuse of power on the part of the Zairean Government¹⁴⁸. Further, the Zairean Government made no attempt to comply with the requirements of the aforementioned Article 7 of the Declaration on the human rights of individuals who are not nationals of the country in which they live.

3.34. Moreover, after residing there for more than 30 years, Mr. Diallo was obliged to leave Zaire without *any* personal effects, leaving behind *all* his property, whether movable or immovable, and the companies which he had established and developed. This was scarcely an expulsion “effected with as much forbearance and indulgence as the circumstances and conditions of the case allow and demand”¹⁴⁹. Clearly no indulgence was shown: Mr. Diallo was treated like a criminal. It also follows that the manner in which the expulsion was effected, like the expulsion itself, was unlawful.

¹⁴⁵Ann. 191 and 193. See also *L’Ouragan* of 31 January to 6 February 1996, Ann. 196.

¹⁴⁶Ann. 194.

¹⁴⁷Ann. 197.

¹⁴⁸See *Maroufidou v. Sweden* (1981) 62 *ILR*, Vol. 62, p. 278. See also I. Brownlie, *Principles of Public International Law*, 5th ed. (1997), Oxford, p. 523.

¹⁴⁹*Oppenheim’s International Law*, 9th ed. (1990), Longman, p. 945. See also I. Brownlie, *Principles of Public International Law*, 5th ed. (1997), Oxford, p. 523.

2. Effective deprivation of property rights

3.35. Before considering the actions of the Zairean Government which led to Mr. Diallo being effectively deprived of his property rights, we must examine the nature and extent of that property.

0 5 5 (a) *Mr. Diallo's property in the DRC*

3.36. Mr. Diallo's property in the DRC falls into two distinct categories. The first represents his personal effects. An inventory of some of them, formerly in the apartment rented by Mr. Diallo on Boulevard du 30 Juin in Kinshasa, was drawn up in Kinshasa on 12 February 1996, shortly after Mr. Diallo's expulsion¹⁵⁰. This category does not raise any particular legal problems.

3.37. We need, however, to consider the question of the shares held by Mr. Diallo in the companies Africontainers Zaire ("Africontainers") and Africom Zaire ("Africom"), and the assets held by those companies.

(i) Africontainers

3.38. The corporate purpose of Africontainers, registered in the Zairean New Register of Companies on 13 November 1979, was the carriage of goods by container. Since 28 April 1980 Mr. Diallo had been the managing director of this company, appointed for an unlimited period¹⁵¹. In order to implement the transport arrangements devised by Mr. Diallo and described in paragraphs 2.7 to 2.13 above, Africontainers concluded a number of contracts with oil companies and Gécamines, namely:

- the contract of carriage of 1 October 1980: Africontainers and Zaire Mobil Oil¹⁵²;
- 0 5 6 — the contract of carriage of 24 July 1981: Africontainers and Zaire Shell¹⁵³; and
- the contract of carriage of 13 July 1983: Africontainers and Zaire Fina/Zaire Mobil Oil/Gécamines¹⁵⁴.

3.39. At the same time, with a view to expanding this business, Africontainers submitted an investment project to the Zairean Government, specifically to the Investment Committee of the State Planning Commission. On 5 August 1981 the Commission adopted an Order approving Africontainers' investment project for the purchase of 600 containers before the end of 1982¹⁵⁵. Article 2 of the Order granted Africontainers the right to various tax exemptions, while Article 3 specified the value of the investment, namely 19,880,695 zaires. A list of equipment authorized for import was annexed to the Order in this connection.

3.40. Further, and a point of clear relevance to the present case, Article 5 of the Order, referring to the Investment Code, granted "the foreign investor" (namely, Mr. Diallo) certain

¹⁵⁰Ann. 200.

¹⁵¹Ann. 3.

¹⁵²Ann. 6.

¹⁵³Ann. 8.

¹⁵⁴Ann. 13.

¹⁵⁵Ann. 10.

protection designed to guarantee the return of the investment. Thus, Mr. Diallo received an express guarantee in respect of the possible expatriation of his investment. Article 5 of the Order stipulated:

“Article 5:

In the event of assignment or liquidation, the Executive Board shall guarantee that foreign investors granted benefits under the present Code may transfer, in proportion to their initial holding, the value acquired by the undertaking, and previously verified by a committee of experts appointed by the State Planning Commissioner (Article 29 of the Code).

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The State shall guarantee that foreign investors may transfer their earnings, in proportion to their initial contribution in foreign currency or in equipment duly valued in the appropriate currency (Article 30 of the Code).

The State shall guarantee that the principal, interest and related charges to be paid by a Zairean undertaking covered by the general régime or the conventional régime may be exported for the purpose of servicing debt contracted abroad with a view to additional financing of the investment.

Any sums due to a foreign national in consequence of expropriation, as stipulated in Article 4 above, shall also be transferable subject to Article 30 above (Article 32 of the Code).”

3.41. The success of the transport arrangements conceived by Mr. Diallo has been described above¹⁵⁶. Up to the date of Mr. Diallo’s expulsion, Africontainers held: (i) its containers and other equipment, (ii) its claims on debts owed by Gécamines, (iii) its claims on debts owed by Onatra, (iv) its claims arising from the project for the acquisition of a container vessel, (v) its claims against the oil companies.

Containers and other equipment

3.42. An inventory of containers and other equipment belonging to Africontainers was drawn up on instructions from the Embassy of Guinea on 9 February 1996¹⁵⁷. Clearly, this inventory could not include the containers missing as a result of unscrupulous acts by Africontainers’ partners, notably Gécamines and Onatra.

Claims on debts owed by Gécamines

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3.43. Between 1982 and 1995, disputes concerning the loss and non-use of Africontainers’ containers or their misuse arose between Africontainers and Gécamines. In 1995 Africontainers claimed the sum of US\$ 30,667,681 for the non-use of 32 containers and the misuse of and loss of earnings on 480 containers assigned to the Kinshasa/Matadi route between 1985 and 1992. On 8 June 1995, Gécamines undertook to reconsider the whole matter on the basis of the contractual obligations¹⁵⁸. In the months following the meeting of 8 June 1995, Africontainers made substantial claims as follows

¹⁵⁶See paras. 2.7 to 2.13 above. See also para. 3.38 above.

¹⁵⁷Ann. 199.

¹⁵⁸Ann. 151.

- 12 July 1995: debt in respect of under-use (1982-1995) of containers in breach of contract: \$228,354.929 (principal);
- 13 September 1995: debt in respect of containers returning empty (1985-1995) in breach of contract: \$47,077 (principal);
- 13 September 1995: debt in respect of the loss of 20 containers at Gécamines' plants: \$7,725,584 (principal);
- 13 September 1995: debt in respect of the non-use of 28 containers at Gécamines' plants: \$786,387 (principal);
- 13 September 1995: debt in respect of the misuse of 473 containers by Gécamines: \$6,194,854 (principal);
- 28 September 1995: debt in respect of invoice adjustments: \$535,205 (principal);
- 2 November 1995: debt in respect of the failure to invoice for containers in breach of contract: \$44,520 (principal).

3.44. These claims went unanswered.

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Claims on debts owed by Onatra

3.45. During the years 1982-1990, a dispute concerning the non-use of Africontainers' containers arose between Africontainers and Onatra. On 6 April 1990, the two parties agreed that Onatra would pay Africontainers the sum of 150,000,000 zaires to settle the dispute.

3.46. Africontainers subsequently repudiated the settlement on grounds of fraud and falsification of documents (Africontainers discovered that containers had been used to a much greater extent than was initially admitted by Onatra). The precise amount of the debt owed by Onatra has not yet been established.

Claims relating to the container vessel project

3.47. Africontainers also submitted an investment project to the Investment Committee concerning the acquisition of a container vessel capable of carrying 56 containers. On 31 December 1987, the Committee adopted an Order approving this investment project¹⁵⁹. By virtue of Article 5 of the Order, Mr. Diallo was given the same guarantee regarding the possible expatriation of his investment as that provided for in Article 5 of the above-mentioned Order of 5 August 1981.

3.48. The Order contemplated financing by Africontainers in the amount of 211,234,000 zaires and a loan by the Société Financière de Développement ("SOFIDE") in the amount of 316,852,000 zaires. As a result of the Zairean Government's default on its debts, Africontainers was unable to finance its part of the investment and the project fell through. Consequently, Africontainers lost the opportunity to make substantial profits.

¹⁵⁹Ann. 52.

060 Claims on debts owed by the oil companies

3.49. In paragraphs 3.xx-3.xx [reference to be completed] above, Guinea has described the debts owed by Shell Zaire to Africontainers (of which, it should be recalled, Mr. Diallo and Africom — another company belonging to him — are the sole shareholders), as held in the Judgment of 3 July 1995 (RC 63.824) and as confirmed in the Judgment of the Kinshasa Court of Appeal of 25 August 1995, ordering Shell Zaire to pay the sum of \$13,156,704 to Africontainers.

3.50. Further, the three oil companies — Shell Zaire, Zaire Fina and Zaire Mobil Oil — owed debts to Africontainers under contracts of carriage. In particular, Article 5 of the Contract of Carriage of 13 July 1983 (Africontainers and Zaire Fina/Zaire Mobil Oil/Gécamines) imposed an obligation to negotiate rates should there be a change in the zaire's parity of exchange. This Article is based on the obvious need to take into account, when calculating rates of hire for Africontainers' containers, fluctuations in the zaire against the dollar, and the parties undertook to negotiate for this purpose. Having regard to the fluctuations at the time and the need to adjust the 1982-1990 invoices in September-November 1995, Africontainers issued debit notes to the oil companies demanding the following payments:

— 29 September 1995: adjustment of 1982-1990 invoices addressed to Shell Zaire: \$277,158 (principal)¹⁶⁰;

— 2 November 1995: adjustment of 1982-1990 invoices addressed to Zaire Fina: \$323,057 (principal)¹⁶¹;

061 — 2 November 1995: adjustment of 1982-1990 invoices addressed to Zaire Mobil: \$253,522 (principal)¹⁶².

3.51. As a result of Mr. Diallo's expulsion, no negotiations could be entered into on this matter and these sums are still unpaid.

(ii) Africom

3.52. At the time of Mr. Diallo's expulsion, the assets of Africom (registered in the Zairean New Register of Companies on 24 March 1980)¹⁶³ also consisted (and still do consist) essentially of receivables, specifically, unpaid bills of exchange.

3.53. In 1983, the *Direction des Magasins Généraux et Imprimerie de l'Etat* [State Bonded Warehouses and Printing Works Directorate] suffered an acute shortage of continuous stationery. Africom, which had already submitted a bid satisfactory to the Directorate, was selected to supply the material, which it did¹⁶⁴. Nevertheless, the Department of Finance was particularly slow in making payment. On 19 July 1986, it proposed payment of 28,382,872 zaires in six instalments between October 1986 and March 1987¹⁶⁵. Finally, on 22 December 1987, the Department of Finance undertook to pay the sums due to Africom in the form of five bills of exchange falling due

¹⁶⁰Ann. 178.

¹⁶¹Ann. 182.

¹⁶²Ann. 183.

¹⁶³Ann. 2.

¹⁶⁴The order forms appear in Anns. 17, 30 and 31. See also Ann. 15.

¹⁶⁵Ann. 34.

between 13 January and 13 April 1987 and totalling 178,700,000 zaires¹⁶⁶. These bills have remained unpaid.

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(b) *Arbitrary interference in the use, enjoyment and disposal of the property belonging to Mr. Diallo and to his companies and deprivation of the use, enjoyment and disposal of this property as a result of internationally wrongful acts of the DRC*

3.54. Guinea is not claiming that the DRC confiscated the above-mentioned property, in that neither Mr. Diallo's personal possessions nor the shares in Africontainers and Africom were formally transferred to the DRC itself or to any private party. It admits that — in theory — Mr. Diallo retains title to his personal possessions and the shares in the two companies and that the property belonging to the companies has not been "officially" confiscated.

3.55. Nevertheless, Mr. Diallo has been deprived of the use, enjoyment and right of disposal in respect of the property in question. That gives rise to two questions: (i) has there been arbitrary interference in the use, enjoyment and disposal of Mr. Diallo's property and has this resulted in indemnifiable injury? In other words, (ii) has Mr. Diallo been deprived of the use, enjoyment and right of disposal of his property in consequence of the wrongful acts of the DRC, resulting in the losses suffered by him?

(i) *Arbitrary interference*

3.56. It follows from section (b) above that Mr. Diallo's detention and expulsion were totally arbitrary and wrongful. The arbitrary detention and expulsion were expressly intended to prevent Mr. Diallo from conducting his business and recovering the sums owed to him. Further, these wrongful acts must be viewed specifically in the context of the obligations incumbent on the DRC under the Order of 5 August 1981 to protect Mr. Diallo and his investments. It should be recalled that:

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— The DRC clearly encouraged Mr. Diallo's investment. Under Article 5 of the Order of 5 August 1981, the Investment Committee guaranteed to Mr. Diallo that he could freely transfer Africontainers' earnings and the capital which he had invested. Thus, Mr. Diallo based his investment decisions on these commitments. However, the DRC subsequently made it impossible to run Africontainers and deliberately deprived Mr. Diallo of any profit he could have made from his investment.

— Mr. Diallo played an absolutely central role, in truth the only role, in the management of his companies. The inevitable result of his expulsion was the effective cessation of their activities. Thus, the facts of the present case are identical to those in the *Biloune* case, in which the Tribunal concluded: "Given the central role of Mr. Biloune in promoting, financing and managing MDCL, his expulsion from the country effectively prevented MDCL from further pursuing the project."¹⁶⁷

3.57. Where a State has encouraged an alien to invest and has provided him with guarantees as to the return of his investment, but nevertheless has detained the investor and then expelled him,

¹⁶⁶Ann. 51.

¹⁶⁷*Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana*, ILR, Vol. 95, p. 209.

there has unquestionably been interference¹⁶⁸. Further, where the detention/expulsion has been arbitrary and unlawful and, in effect, carried out for the sole purpose of preventing the investor from realizing his investment, the interference has unquestionably also been arbitrary and unlawful¹⁶⁹.

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3.58. As regards “the reality of the impact” of this arbitrary interference¹⁷⁰, Mr. Diallo has been deprived of the use, enjoyment and disposal of his property. Property belonging to Mr. Diallo personally and assets of companies which he owned have remained on the territory of the DRC and, as a practical matter, cannot be removed. From Guinea, he has no possibility of managing or exerting any significant control whatsoever over his affairs or his property. In view of not only the distance involved but also his severely straitened circumstances, he has been unable to contemplate pursuing judicial proceedings or obtaining by any other course of action payment of the moneys due to him. It has been physically impossible for him to guarantee the security of his property; thus, for example, numerous containers have been taken and used as road blocks in the disturbances which have punctuated the DRC’s recent history. In reality, since the end of 1995, Mr. Diallo’s property — that is to say his personal property and his companies — have lost all their value.

3.59. It is not a requirement of international law that the benefit obtained by a State responsible for an internationally wrongful act must be equivalent to the injury caused to the wronged individual¹⁷¹. However, even if such a criterion were imposed by the international law of responsibility, it would be satisfied in this case. The DRC has derived manifest benefit from its internationally wrongful acts: it is directly liable for certain debts to Mr. Diallo (see, in particular, the unpaid bills of exchange of the Ministry of Finance and the debts owed by Gécamines and Onatra). Further, it is patently clear that Zairean political leaders wanted to do oil groups operating in their territory a favour by ridding them of a troublesome creditor. It can only be assumed, in view of the size of the sums involved, that the DRC received substantial benefit in return.

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(ii) Deprivation of the ability to exercise property rights as a result of the internationally wrongful acts of the DRC

3.60. It also follows that Mr. Diallo has been deprived of the use, enjoyment and right of disposal in respect of all his property. This deprivation obviously results from the internationally wrongful acts committed by the DRC and directly entails its responsibility. In accordance with the principle firmly laid down in Article 1 of the ILC Draft Articles on State Responsibility: “Every internationally wrongful act of a State entails the international responsibility of that State.”¹⁷² In this respect, the Court does not need to rule on the DRC’s intent¹⁷³. It need only satisfy itself that a causal connection exists between the internationally wrongful acts of the DRC and the injury suffered by Mr. Diallo and apply the principle that compensation must be given “for any damage

¹⁶⁸In the *Metalclad* case, the Tribunal also referred to government encouragement as an important factor: “These measures, taken together with the representations of the Mexican federal government, on which *Metalclad* relied, and the absence of a timely, orderly or substantive basis for the denial by the Municipality of the local construction permit, amount to an indirect expropriation.” *Metalclad Corporation v. The United Mexican States*, Award of 30 August 2000, para. 107; emphasis added.

¹⁶⁹As regards the importance that tribunals have attached to “due process”, see also *Metalclad Corporation v. The United Mexican States*, Award of 30 August 2000, para. 107.

¹⁷⁰*Tippettts, Abbott, McCarthy, Stratton v. TAMS-AFFA*, 6 Iran-US CTR 219, 225-226.

¹⁷¹*Metalclad Corporation v. The United Mexican States*, Award of 30 August 2000, para. 103.

¹⁷²*ILC Yearbook 1996*, Vol. II, 2nd Part, at p. 63.

¹⁷³*Tippettts, Abbott, McCarthy, Stratton v. TAMS-AFFA*, 6 Iran-US CTR 219, 225-226.

which can reasonably be regarded as the consequence of the act alleged against the State”¹⁷⁴. It is clear that the deprivation of Mr. Diallo’s property rights in this case was the consequence of the detention and expulsion, failing which Mr. Diallo would still be in a position to manage his affairs and run his companies.

(c) *The infringement of Mr. Diallo’s rights as a shareholder*

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3.61. As already noted, Guinea recognizes that the shares in both companies have theoretically remained the property of Mr. Diallo. This fact is, however, of no legal significance. Guinea is aware that the Court drew a distinction in the *Barcelona Traction* case between the rights of a company and those of its shareholders. The Court observed that, while a wrong done to the company could cause prejudice to the shareholders, that does not imply responsibility vis-à-vis the shareholders. However, it considered that such was not the case if the acts complained of were aimed at the direct rights of shareholders as such¹⁷⁵. This distinction was also drawn by Judge Oda in his separate opinion in the *ELSI* case, wherein he concluded that the United States was not entitled to exercise diplomatic protection in favour of its nationals (Raytheon and Machlett) in their capacity as shareholders in an Italian company (*ELSI*)¹⁷⁶.

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3.62. Guinea deals with the implications of this distinction in more detail in Chapter IV of the present Memorial. It may however be noted that international law tends towards a more concrete and effective recognition of protectible rights. In the *ELSI* case the Chamber of the Court rejected Italy’s argument to the effect that the United States of America could not exercise its protection in favour of Raytheon and Machlett because the immovable property in question belonged to *ELSI*, of which they were merely shareholders¹⁷⁷. In the *Biloune* case the Tribunal in its reasoning established a direct connection between the expropriation of the rights of the company registered in Ghana (*MDCL*) and the expropriation of the value of the shareholder’s interests in that company (Mr. Biloune): “In the view of the Tribunal, such prevention of *MDCL* from pursuing its approved project would constitute constructive expropriation of *MDCL*’s contractual rights in the project and, accordingly, the expropriation of the value of Mr. Biloune’s interest in *MDCL*”¹⁷⁸. On the subject of the exercise of its jurisdiction, the Tribunal stated that the shareholder had the same rights to be heard as the contracting company, which was party to the arbitration clause:

“The Tribunal also finds that, in the circumstances of this case, and particularly having regard to *GIC*’s knowledge of Mr. Biloune’s role of financing and directing the project, Mr. Biloune, though not a party to the *GIC* Agreement, may assert his own claims arising out of his investment in *MDCL*.”¹⁷⁹

3.63. The relevant facts are as follows: (i) Mr. Diallo was the owner and sole managing director of the two companies; (ii) these facts were well known to the Zairean authorities; (iii) the Order of 5 August 1981 expressly covered the investment which was made by Mr. Diallo in his capacity as “a foreign investor” (including in respect of the 600 containers) but through one of his

¹⁷⁴Reply of the Netherlands during the preparation of the 1930 Codification Conference, cited by P. Daillier and A. Pellet, *Droit international public (Nguyen Quoc Dinh)*, LGDJ, 6th ed., 1999, at p. 768.

¹⁷⁵*I.C.J. Reports 1970*, pp. 34-36, paras. 40-47.

¹⁷⁶*I.C.J. Reports 1989*, pp. 83-86.

¹⁷⁷*Ibid.*, p. 79, para. 132.

¹⁷⁸*Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, ILR, Vol. 95, p. 209.

¹⁷⁹*Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, ILR, Vol. 95, p. 204.

companies, Africontainers; (iv) as a result of actions taken by the Zairean authorities, Mr. Diallo was deprived of the possibility of using, enjoying and disposing of his companies; (v) these actions were carried out in full knowledge of the facts; (vi) once Mr. Diallo was (permanently) expelled from the DRC, the deprivation of the possibility of using, enjoying and disposing of his companies became permanent and the companies and shares lost all real value. It follows that Mr. Diallo has been effectively deprived of his rights as shareholder.

3. Denial of justice

3.64. It is apparent that there has in this case been (i) a specific denial of justice, namely the measures taken to prevent the execution of the Judgment of 3 July 1995 (RC 63.824) in favour of Africontainers ordering Shell Zaire to pay the sum of US\$ 13,156,704 and (ii) a general denial of justice consisting in the fact that, as a result of his detention and expulsion, Mr. Diallo has been unable to pursue the settlement of disputes relating to his affairs in the DRC.

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3.57. [Sic.] As regards the first point, Guinea has already demonstrated in Chapter II of the present Memorial¹⁸⁰ that Shell Zaire's appeal in connection with the Judgment of 3 July 1995 was rejected by the Court of Appeal of Kinshasa/Gombe on 24 August 1995 and that, on 28 September 1995, the Minister of Justice stated that "review of decision RCA 18.307 of 24 August 1995, rendered by the Court of Appeal of Kinshasa/Gombe, has ruled out any patent failure of justice"¹⁸¹. As execution proceedings had duly commenced, Mr. Diallo's detention and expulsion — leading inevitably to a permanent halt in the execution process¹⁸² — amounts to a denial of justice, an act which "shocks, or at least surprises, a sense of juridical propriety"¹⁸³.

3.65. As regards the general denial of justice, Mr. Diallo's detention and expulsion also constituted under the circumstances a refusal to allow Mr. Diallo access to the administrative and judicial courts¹⁸⁴. The existence of disputes between Africontainers, on the one hand, and Gécamines, Onatra, PLZ and the oil companies, on the other hand, was common knowledge, as was the existence of disputes between Africom and the Minister of Finance (concerning the unpaid bills of exchange). It goes without saying that Africontainers and Africom should have settled their disputes before the Zairean courts, or elsewhere, in order to obtain final resolution. Mr. Diallo's detention and expulsion made it impossible to execute judgments (which had become final) or to initiate new judicial proceedings.

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4. Breach of contractual commitments

3.66. Guinea has already demonstrated¹⁸⁵ that a State's violation of contractual commitments undertaken vis-à-vis a foreign national may constitute an internationally wrongful act at least where the violation is accompanied by other internationally wrongful acts¹⁸⁶.

¹⁸⁰See para. 2.37 above.

¹⁸¹Ann. 177.

¹⁸²See Anns. 179 and 180. As regards the refusal to enforce a judgment favourable to an alien, see P. Daillier and A. Pellet, *Droit international public (Nguyen Quoc Dinh)*, 6th ed., 1999, LGDJ, p. 751, which refers to the Italian-Venezuelan Tribunal, Award of 3 May 1930, *Martini, RIAA*, Vol. II, p. 978.

¹⁸³*Elletronica Sicula S.p.A. (ELSI)*, *I.C.J. Reports 1989*, p. 76, para. 128,

¹⁸⁴*Oppenheim's International Law*, 9th ed. (1990), Longman, pp. 543-544; P. Daillier and A. Pellet, *Droit international public (Nguyen Quoc Dinh)*, 6th ed., 1999, LGDJ, p. 751.

¹⁸⁵See paras. 3.54-3.56 above.

3.67. Such is the situation in the present case where (i) breaches by Gécamines of the contract of carriage of 13 July 1983¹⁸⁷ and (ii) the refusal by the Department of Finance to pay the debts owed to Africom in the sum of 178,700,000 zaires, notwithstanding its commitment represented by the five bills of exchange, were accompanied by other internationally wrongful acts, notably unlawful detention and expulsion, arbitrary interference and denial of justice.

C. THE OBLIGATION TO MAKE REPARATION

3.68. The characteristic function of reparation is to restore as nearly as possible the balance destroyed by the injury and, at the expense of the party bearing responsibility, to place the victim in the position in which he would have been had the injurious act not occurred. Such is the notion underlying the principle of full reparation. The PCIJ ruled accordingly in the *Factory at Chorzów* case:

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3.69. This basic principle is accepted in arbitral jurisprudence¹⁸⁹ and by the International Law Commission¹⁹⁰.

3.70. In the present case the Republic of Guinea is not seeking *restitutio in integrum*, which is materially impossible under the circumstances: even if it were possible to restore to Mr. Diallo's companies the economic vitality and managerial excellence at the root of their dynamism, the circumstances surrounding his expulsion from the DRC and the psychological effects of the present dispute deprive him of any reasonable expectation of regaining control over the management and development of his affairs in the DRC. Further, it is materially impossible to bring about “restitution” in respect of the numerous vexations and human rights violations suffered by Mr. Diallo.

3.71. Accordingly, the Republic of Guinea is seeking reparation by equivalence, in this case compensation. In effect, as the PCIJ noted in the *Factory at Chorzów* case, “It is a principle of international law that the reparation of a wrong may consist in an indemnity.”¹⁹¹

¹⁸⁶I. Brownlie, *Principles of Public International Law*, 5th ed. (1997), Oxford, p. 550. *Oppenheim's International Law*, 9th ed. (1990), Longman, p. 927.

¹⁸⁷See para. 2.35 above.

¹⁸⁸*P.C.I.J., Judgment of 13 September 1928, Series A, No. 17*, p. 47.

¹⁸⁹See, in particular, the *Texaco-Calasiatic* case, Award of 19 January 1977 in *Journal du Droit International* 1977, p. 350.

¹⁹⁰See Article 42 of the Draft Articles on International Responsibility of States, adopted on first reading by the ILC in 1996, *ILC Yearbook* 1996, Vol. II, Part Two, p. 63 and Articles 31 and 35 of the draft provisionally adopted by the Drafting Committee in 2000, Report of the International Law Commission on its work at its 52nd session, A/55/10, p. 132.

¹⁹¹*P.C.I.J., Series A, No. 17*, p. 27.

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3.72. The ILC is more explicit, stating in Article 44, paragraph 1, of its Draft Articles on State Responsibility, adopted on first reading in 1996, that: “The injured State is entitled to obtain from the State which has committed an internationally wrongful act compensation for the damage caused by that act, if and to the extent that the damage is not made good by restitution in kind.”¹⁹²

3.73. It follows that the reparation sought should cover both the *damnum emergens* (loss suffered) and the *lucrum cessans* (expected future loss). As the arbitrator T. M. C. Asser observed in 1902 in the Award in the *Cape Horne Pigeon* case,

“[T]he general principle of civil law, according to which the damages should include an indemnity, not only for the loss suffered, but also for the profit of which one has been deprived, is equally applicable to international litigation, and . . . in order to apply it, it is not necessary that the amount of the profit of which one is deprived should be exactly determined, but . . . it suffices to show that in the natural order of things one would be able to realize a profit of which one is deprived by the act which gives rise to the claim.”¹⁹³

3.74. In more general terms,

“All acts connected to the original act by a cause-and-effect relationship, that is to say all acts which can be traced back to the original act through an unbroken chain of events, should be regarded as consequences of the injurious act and must accordingly be taken into consideration in assessing the extent of the obligation to make reparation.”¹⁹⁴ [*Translation by the Registry*]

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3.75. And, as the International Law Commission has explained, “Causation is . . . to be presumed not only in the presence of a relationship of ‘proximate causation’. It is to be presumed whenever the damage is linked to the wrongful act by a chain of events which, however long, is uninterrupted.”¹⁹⁵

3.76. There is no doubt whatsoever that all the wrongful acts committed against Mr. Diallo by the Respondent and by the various organs or institutions of that State have caused serious injury for which no reparation has been made in the DRC itself, and for the reparation of which the Republic of Guinea, substituting itself for its national, has seised the International Court of Justice. The compensation requested must cover all damage linked to the “chain of events”, including the mental suffering experienced by Mr. Diallo.

3.77. As Mr. Arangio-Ruiz wrote in his Second Report on State Responsibility in summarizing a point relating to compensation for damage in the *Lusitania* case: “According to [the

¹⁹²ILC Yearbook 1996, Vol. II. Part Two, p. 63; see also Article 37, paragraph 1, of the draft provisionally adopted by the Drafting Committee in 2000, Report of the International Law Commission on its work at its 52nd session, A/55/10, p. 133.

¹⁹³Award of 29 November 1902, *RGDIP*, 1903, docs., p. 4 [English text: Foreign Relations of the United States, 1902, App. I, Whaling and Sealing Claims against Russia, Washington, Government Printing Office, p. 453]; see also, for example, *Factory at Chorzów*, *P.C.I.J., Series A, No. 17* and the position of the ILC in *ILC Yearbook 1993*, Vol. II, Part Two, pp. 67-76.

¹⁹⁴J. Personnaz, *La réparation du préjudice en droit international*, Paris, Sirey, 1939, p. 139.

¹⁹⁵ILC Yearbook 1993, Vol. II. Part Two, p. 70.

umpire], international law provided compensation for mental suffering, injury to one's feelings, humiliation, shame, degradation, loss of social position or injury to one's credit and reputation."¹⁹⁶

3.78. This passage is transposable in all respects to the case of Mr. Diallo, each of the injuries referred to corresponding to one of the situations experienced by Mr. Diallo.

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3.79. For the umpire in the *Lusitania* case, "reasonable compensation for . . . mental suffering or shock, if any"¹⁹⁷, is necessary, because such injuries are very real; and: "the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated therefor as compensatory damages"¹⁹⁸.

3.80. International jurisprudence has been settled ever since then in this respect, international arbitral tribunals having granted pecuniary compensation as reparation for moral injury whenever they have considered such injury established — and there can be no doubt that this is so in the present case. This jurisprudence is exemplified by the *Chevreau*¹⁹⁹, *Cage [Di Caro]*²⁰⁰ and *Heirs of Jean Maninat* cases²⁰¹.

3.81. The damages to be paid must be assessed in accordance with the general legal principle that the indemnity necessary to compensate for the injury should be set at the value of the loss on the day that the trial or appellate court judgment is delivered. Accordingly, the amount of the damages should take into account any monetary depreciation since the date on which the amounts owed to Mr. Diallo were fixed by the court or by the Congolese State, so that the victim can be placed in a position identical to that in which he would have been had the internationally wrongful acts not been committed by the DRC.

3.82. Moreover, the compensation awarded must include interest at the legal rate.

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3.83. However, as indicated above²⁰², the Republic of Guinea considers that it would be appropriate at this stage in the proceedings for the Court to confine itself to ruling that the internationally wrongful acts of the DRC engage its international responsibility and that Guinea is entitled to full reparation for the injury it has suffered therefrom in the person of its national, without quantifying in the judgment to be handed down the amount of compensation owed to Guinea. It requests the Court to grant it leave to submit an assessment of that amount at a later stage in the proceedings, should the two Parties fail to agree thereon within a reasonable time following the delivery of the judgment on the existence of responsibility on the part of the DRC and on the different heads of damage suffered.

¹⁹⁶*ILC Yearbook* 1989, Vol. II, Part One, p. 4.

¹⁹⁷Award of 1 November 1923, *RIAA*, Vol. VII, p. 35.

¹⁹⁸*Ibid.*, p. 40.

¹⁹⁹Award of 9 June 1931 (*France v. United Kingdom*), *RIAA*, Vol. II, p. 1113.

²⁰⁰Award delivered in 1903, *RIAA*, Vol. X, p. 597.

²⁰¹Award of 31 July 1905, *RIAA*, Vol. X, pp. 55 *et seq.*

²⁰²See para. 1.14.

CHAPTER IV

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THE RIGHT OF THE REPUBLIC OF GUINEA TO EXERCISE ITS DIPLOMATIC PROTECTION IN FAVOUR OF MR. DIALLO

4.1. Diplomatic protection is closely linked to State responsibility in the event of injury caused to an alien. In general, it is accepted that a State is not obliged to admit aliens, but if it does so, it bears an obligation towards the State of origin of those aliens to guarantee that their legal, physical and personal position conforms with international law. Otherwise, the State of origin is entitled to exercise its diplomatic protection on behalf of its injured nationals.

4.2. While the territorial jurisdiction of the State of residence extends even to aliens, their national State retains personal jurisdiction over them, even when they reside in another State. The right of the national State to exercise its diplomatic protection on the basis of this personal jurisdiction was formulated by the Permanent Court of International Justice for the first time in its 1924 Judgment in the case concerning *Mavrommatis Palestine Concessions (Greece v. United Kingdom)*, as follows:

“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.”²⁰³

4.3. This principle was reiterated by the Permanent Court in the *Panevezys-Saldutiskis Railway (Estonia v. Lithuania)* case²⁰⁴ and confirmed by the current Court, notably in the *Nottebohm* case²⁰⁵.

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4.4. Further, it has a basis in treaty-made law in Article 3, paragraph 1 (b), of the 1961 Vienna Convention on Diplomatic Relations, to which the Republic of Guinea and the DRC are parties. This provision includes amongst the functions of diplomatic and consular missions “[p]rotecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law”. Similarly, Article 5 of the 1963 Vienna Convention on Consular Relations, also ratified by both States, provides that consular functions consist, *inter alia*, in “protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law” and “helping and assisting nationals, both individuals and bodies corporate, of the sending State”.

4.5. The exercise of diplomatic protection is subject to fulfilment of two conditions concerning respectively the nationality of the individual protected and the exhaustion of local remedies.

²⁰³ *P.C.I.J., Series A, No. 2*, p. 12.

²⁰⁴ *P.C.I.J., Series A/B, No. 76*, p. 16.

²⁰⁵ *I.C.J. Reports 1955*, p. 24.

4.6. The injuries, as described in Chapter III above, caused to the person and property of Mr. Diallo by the DRC and the current situation of Mr. Diallo and his companies Africontainers and Africom-Zaire have led the Republic of Guinea, following unsuccessful diplomatic démarches²⁰⁶, to bring proceedings before the Court concerning the DRC's conduct, in the exercise of its right of diplomatic protection of its national (A), all possible means of obtaining redress having been exhausted by Mr. Diallo (B).

A. THE BENEFICIARY OF GUINEA'S DIPLOMATIC PROTECTION

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4.7. It is a recognized rule of international law that a State may exercise its diplomatic protection only for the benefit of its nationals, that is to say persons connected to the State by a bond of nationality. This bond alone confers on the State the right to exercise such protection²⁰⁷ and the possession of a right of protection is a prerequisite for the examination by the Court of the issues raised by the Applicant²⁰⁸. In the present case, there is such a bond of nationality between Mr. Diallo and the Republic of Guinea, and this has never been contested in any way.

4.8. Although Mr. Diallo resided for more than 30 years in Zaire, he never renounced his Guinean nationality. Mr. Diallo's nationality, never questioned by the Zairean authorities, is clearly evidenced by a number of official documents identifying him as Guinean and is confirmed by the official démarches taken on his behalf by the Republic of Guinea.

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4.9. At the time of his expulsion from the Democratic Republic of the Congo in 1997 Mr. Diallo Amadou Sadio, born on 3 January 1947 at Lobé in Guinea to Diallo Abdoulaye (his father) and Diallo Fatoumata (his mother), both of Guinean nationality, was the holder of passport number 054 783/B/85 series C/0²⁰⁹ of the "People's Revolutionary Republic of Guinea". This 32-page passport, issued by the Guinean authorities and still held by Mr. Diallo, contains on page seven a "residence permit of unlimited duration", No. 1292/D. 252 813/C RI/81 issued by the Congolese authorities on 14 April 1981 in Kinshasa. It bears the legible signature and name of the Zairean Director of Immigration, Mr. Gerengbo Kebba-Mokombo. This residence permit, albeit of unlimited duration, proves that Mr. Diallo had alien status in Zaire, since a government cannot issue a residence permit — for whatever duration — to its own nationals. In other words, Mr. Diallo requested such a permit because he was Guinean and not Zairean, and the Congo granted it to him because he was an alien, of Guinean not Zairean nationality.

4.10. Further, the attitude of the Zairean authorities throughout this affair has been consistent, as demonstrated by the "refusal of entry report" concerning Mr. Diallo, dated 31 January 1996²¹⁰. This document — of particular importance in the present case — drawn up by Mr. Djuambe Tegi, the immigration officer at Kinshasa-n'jili Airport, clearly identifies Mr. Diallo Amadou Sadio and states that he is "of Guinean nationality".

²⁰⁶See paras. 2.51 to 2.62 above.

²⁰⁷Case concerning *Panevezys-Saldutiskis Railway*, Judgment, 28 February 1939, P.C.I.J., Series A/B, No. 76.

²⁰⁸Case concerning *Barcelona Traction, Light and Power Company, Limited*, Judgment, 5 February 1970, I.C.J. Reports 1970, p. 51, para. 102.

²⁰⁹Ann. 7.

²¹⁰Ann. 197.

4.11. Thus, the bond of nationality between Mr. Diallo and Guinea is beyond challenge and consequently provides a sufficient legal basis for Guinea to exercise its diplomatic protection in his favour.

4.12. The Application by the Republic of Guinea seeks to protect its national, Mr. Diallo, in all his capacities, that is to say as an individual, as a shareholder and as sole managing director of Congolese companies.

0 8 0 4.13. It is generally accepted that diplomatic protection may be exercised by a State in cases involving the arbitrary arrest of foreign nationals, followed by ill-treatment inflicted on such individuals, or by expulsion under conditions contrary to international law. In the *Chevreau* case between France and the United Kingdom, Mr. Chevreau, a French citizen resident in Persia, was arrested in 1918 by the British authorities on the grounds that he had been caught examining "sensitive" installations and that, as a result of papers found on him and in light of his previous conduct, he was considered an undesirable, being a German sympathizer and suspected enemy agent²¹¹. Imprisoned in Baghdad, he was subsequently deported to India and then to Egypt. Following claims made by the French Government, the Permanent Court of Arbitration was seised and held that "the detention and subsequent deportation . . . of Mr. Chevreau took place under circumstances which justify a claim in international law" and that "the said acts caused Mr. Chevreau moral and material damage" requiring compensation²¹².

4.14. Similarly, in the *Costa Rica Packet* case between the United Kingdom and the Netherlands (Martens Award. 25 February 1897), the Netherlands was held responsible for having arbitrarily arrested and detained Mr. Carpenter, the master of an English vessel; according to Martens, "all the papers and deeds produced go to prove the absence of any real cause for arresting Mr. Carpenter" and "the treatment to which Mr. Carpenter was subjected in prison at Macassar appears to be unjustifiable in view of his being the subject of a civilized State, whose detention was only a precautionary measure"²¹³.

4.15. Likewise, there is no question but that a State may exercise its diplomatic protection in favour of one of its nationals in his capacity as a shareholder. A shareholder has a legal personality distinct from that of the company. In the present case, Mr. Diallo, the majority shareholder in the companies Africom-Zaire and Africontainers, has his own legal personality distinct from that of those companies. Here, Guinea is not seeking to accord its diplomatic protection to Congolese companies, as Belgium had sought to do in the *Barcelona Traction* case. It seeks to obtain reparation for violations of international law imputable to the DRC and committed against Mr. Diallo.

1. Shareholder's diplomatic protection

(a) *Applicable principles*

0 8 1 4.16. It is accepted that a shareholder's rights are capable of protection when they are affected by a wrongful act.

²¹¹Permanent Court of Arbitration, Award of 9 June 1931, *RIAA*, Vol. II, p. 1113. [English translation: *American Journal of International Law*, Vol. 27, 1933, pp. 153-182.]

²¹²*Ibid.*

²¹³*JDI* 1897, p. 624. [English translation: J. B. Moore, *International Arbitrations*, Digest, Vol. 5, p. 4953.]

4.17. In the *Barcelona Traction* case cited above, the Court underlined the existence of direct rights of shareholders; after recalling that injury to the interests of shareholders “in itself does not involve the obligation to make reparation”²¹⁴, it added: “The situation is different if the act complained of is aimed at the direct rights of the shareholder as such.”²¹⁵

4.18. Paul de Visscher also emphasizes that a shareholder indeed has his own personality, which may be defended in certain cases:

“The corporate personality never completely subsumes the personality of the individuals holding an interest in the body corporate. A shareholder of a company retains his own personality; he retains his own rights and his own nationality, which are erased only to the extent strictly required by the demands of the corporate purpose for which the body was formed.”²¹⁶ [*Translation by the Registry*]

4.19. Thus, despite the bonds uniting shareholder and company, the investor has his own, autonomous personality. Far from being subsumed by the corporate personality, it is clearly distinguished from it and combines with it: “Where a shareholder in a company suffers an infringement of his rights as a private person, even if those rights came into being as a result of his participation in the life of a legal entity, such diplomatic protection will be fully justified.”²¹⁷ [*Translation by the Registry*]

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4.20. Paul de Visscher adds: “Even though such measures may cause injury to the company as well as to the shareholders, the latter have suffered a violation of their personal rights distinct from those of the company as such, and that is a sufficient condition to justify a claim by their national State.”²¹⁸ [*Translation by the Registry*] That is precisely the situation in the present case. Manuel Diez de Velasco also notes: “It is undeniable that partners and shareholders have direct rights, deprivation of which may give rise to internationally wrongful acts and to diplomatic protection by the shareholders’ national State, different from the company’s State.”²¹⁹ [*Translation by the Registry*]

4.21. It is generally recognized and not open to dispute that the company’s national State may protect the functional rights of foreign owners.

4.22. Professor Diez de Velasco cites certain situations as examples where diplomatic protection has already been upheld:

“Among situations involving direct rights deprivation of which may give rise to a wrongful act committed by a State, we can point to, for example, preventing a shareholder from attending the company’s general meeting or exercising his right to vote thereat, prohibiting a company from distributing dividends to foreign shareholders on account of their alien status or practicing discrimination in the

²¹⁴ *I.C.J. Reports 1970*, p. 36, para. 46.

²¹⁵ *Ibid.*, para. 47. See also the separate opinion of Judge Oda appended to the Judgment of the Chamber of the Court of 20 July 1989 in the *ELSI* case, *I.C.J. Reports 1989*, p. 85.

²¹⁶ “*La protection diplomatique des personnes morales*”, *RCADI 1961-I*, Vol. 102, p. 463.

²¹⁷ *Ibid.*

²¹⁸ *Ibid.*, p. 464.

²¹⁹ “*La protection diplomatique des sociétés et des actionnaires*”, *RCADI 1974-I*, Vol. 141, p. 148.

taxation of dividends on shares held by foreign shareholders.”²²⁰ [*Translation by the Registry*]

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4.23. For shareholders, being prevented from attending a general meeting or exercising the right to vote is tantamount to being precluded from exercising their right of oversight in respect of management of the company, and being deprived of dividends is tantamount to being prevented from profiting from their investment. Thus, protection must be afforded to all the rights of shareholders: the right to control the management of the company, particularly by appointing the managing director, and the right to the fruits of their investment, through the receipt of dividends thereon, in accordance with the applicable law.

4.24. In the *Barcelona Traction* case the Court accordingly posed, but did not answer, the question whether “it is legitimate to identify an attack on company rights, resulting in damage to shareholders, with the violation of their direct rights”²²¹.

4.25. In the Republic of Guinea’s view, there is no doubt that this question should be answered in the affirmative.

4.26. In the *Elettronica Sicula S.p.A. (ELSI)* case, the Court did not rule on the question of whether the injury to corporate property could be regarded as a violation of shareholders’ rights, basing itself on the ground that the causal link necessary to engage Italy’s responsibility was in all events lacking in the case²²². On the other hand, it did state that injury to corporate property could be regarded as a violation of the rights of shareholders to “control and manage” their companies²²³.

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4.27. Before concluding that Italy had not incurred responsibility, for the reason that the rights of control and management provided for by the treaty had already disappeared at the time of the relevant facts, the Court interpreted the provisions of the treaty as contemplating that the rights of a company’s shareholders to control and manage it could be violated by an injury caused to that company’s property: “It is undeniable that the requisition of a firm’s ‘plant and relative equipment’ must normally amount to a deprivation, at least in important part, of the right to control and manage.”²²⁴ In acknowledging the possibility that the requisition of the Italian company’s property could found a claim by the United States under the above-mentioned provisions, in the exercise of protection of American companies holding shares in the Italian company, the Court elaborated upon the definition of the rights of shareholders to control and manage their companies.

4.28. It is of no importance in this regard that the Court ruled on the basis of the provisions of the above-mentioned treaty, since the Court drew no particular legal inference from this fact in interpreting these classic concepts of company law. Thus, the Court confirmed that shareholders’ rights are dynamic rights, always exercised by reference to an object, namely the company. The protection of those shareholders’ rights consisting of the passive right to receive dividends and the active right to attend general meetings can be understood only in the context of a corporate structure functioning in a normal legal environment. Violation of the rights of shareholders to

²²⁰ “*La protection diplomatique des sociétés et des actionnaires*”, *RCADI* 1974-I, Vol. 141, p. 148.

²²¹ *I.C.J. Reports* 1970, p. 37, para. 48.

²²² *I.C.J. Reports* 1989, pp. 67-71, paras. 113-119.

²²³ *Ibid.*, p. 50, para. 70.

²²⁴ *Ibid.*

enjoy effective influence over corporate policy is thus sanctionable, even when the violation may, in fact, affect the company itself.

4.29. A substantial body of arbitral jurisprudence predating the establishment of the PCIJ may also be cited in support of the broad meaning to be ascribed to shareholders' rights. From the end of the nineteenth century onwards, international tribunals have granted the benefit of diplomatic protection to foreign shareholders whose companies have suffered unlawful acts committed by the State under whose legislation they were formed.

The *Ruden* case

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4.30. In the *Ruden* case²²⁵, the Mixed Commission of the United States and Peru ruled on 26 February 1870 on the claim for compensation submitted by an American shareholder, Mr. Ruden, a partner in a Peruvian company, following the burning and destruction of his plantation in 1868 during a riot for which he held the Peruvian Government responsible. Mr. Ruden did not appear before the Commission solely in his personal capacity but also as a partner in and representative of the firm of Ruden & Co., which consisted of two partners, Mr. Ruden himself and a citizen of New Granada. The umpire stated: "If it may be said that business firms have a nationality, such nationality is that of the country in whose territory they reside, under whose laws they have been formed, and by which they are governed."²²⁶

4.31. The mere assumption of an American name could not confer United States nationality on a company and, consequently, the company not being American, only the shareholder's individual interest in the company could be taken into account²²⁷. The decision is far reaching in scope: for the first time, in admitting the claim by Mr. Ruden, an American partner in a Peruvian company, an arbitrator was looking behind the abstract notion of corporate personality and focusing solely upon the private person of the partner.

The *Delagoa Bay Railway* case

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4.32. In the *Delagoa Bay Railway* case, involving an arbitral award rendered on 29 March 1900, the United States and Great Britain intervened on behalf of an American national, Mr. McMurdo, and a British company (the Delagoa Bay and East Africa Railway Co.) holding interests in a Portuguese company (the Lourenço Marques and Transvaal Railway Company) which had been commissioned to construct a railway linking the port of Lourenço Marques and Delagoa Bay²²⁸. In July 1887, the Portuguese Government cancelled the concession and seized the railway. The United States and British Governments protested against that decision. The Portuguese Government denied that they had any right to intervene in the case, declaring that it would deal only with the Portuguese company, the sole party to the case. The dispute was eventually submitted by way of a protocol to an arbitral tribunal in 1891.

4.33. The arbitration convention stipulated that the Portuguese Government would be released upon receipt of payment by the United States and British Governments, without having to satisfy the claims of individuals having an interest in the case. On that basis, the Tribunal ordered

²²⁵J. B. Moore, *International Arbitrations*, Vol. II, p. 1653.

²²⁶*Ibid.*, p. 1654.

²²⁷See *ibid.*

²²⁸Arbitral Award by MacMahon, 24 July 1875, *RIAA*, Vol. III, p. 637.

Portugal to compensate the United States and Great Britain. The award stipulated that the sum be paid to the bondholders in the Delagoa Bay Company "according to [their] category"; Mrs. McMurdo, claiming as her husband's successor and assign, was therefore considered a senior bond creditor.

The Salvador Commercial Company case

4.34. Another arbitral award may also be mentioned, that rendered in the *Salvador Commercial Company* case on 8 May 1902²²⁹. In 1894, the Government of El Salvador granted a concession to two nationals of the United States and two nationals of El Salvador for the purpose of establishing a steamship service in El Salvador, on condition that they form a company in accordance with El Salvador's laws. This resulted in a company being founded under Salvadoran law under the name El Triunfo Company, the majority of whose shares belonged to the Salvador Commercial Company, an American company having its head office in California.

0 8 7 4.35. An internal conspiracy was hatched for the benefit of competing interests, the object being to oust the existing management in order to usurp the American interests and appropriate the investments made by the company. The American directors were relieved of their managerial duties and replaced by the conspirators, who wasted no time in deliberately placing the El Triunfo Company in bankruptcy. The American shareholders of the parent company attempted to re-establish their rights by calling a general meeting, but the Salvadoran authorities pre-empted their attempt by means of an order cancelling the concession which had been awarded. In response to the claim made by the United States, exercising its diplomatic protection in favour of the American shareholders, the arbitrator ruled:

"It is abhorrent to the sense of justice to say that one party to a contract, whether such party be a private individual, a monarch or a government of any kind, may arbitrarily, without hearing and without impartial procedure of any sort, arrogate the right to condemn the other party to the contract, to pass judgment upon him and his acts, and to impose upon him the extreme penalty of forfeiture of all his rights under it, including his property and his investment of capital made on the faith of that contract."²³⁰

4.36. The arbitrator concluded:

"It follows that the Salvador Commercial Company and the other nationals of the United States who were shareholders in El Triunfo Company, as hereinbefore named, are entitled to compensation for the result of the destruction of the concession and for the appropriation of such property as belonged to that company, excepting such property as was accumulated and constructed under the terms of the concession, to be vested in and owned by the Republic, to the extent of the interests of such American citizens in said concession and such property."²³¹

4.37. The final paragraph of the award states:

"We have not discussed the question of the right of the United States under international law to make reclamation for these shareholders in El Triunfo Company, a

²²⁹ *RIAA*, Vol. XV, p. 467.

²³⁰ *Ibid.*, p. 478.

²³¹ *Ibid.*

domestic corporation of Salvador, for the reason that the question of such right is fully settled by the conclusions reached in the frequently cited and well-understood Delagoa Bay Railway Arbitration.”²³²

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4.38. Thus, explicitly basing itself upon the *Delagoa Bay Railway* case, the Tribunal recognized the right of the American shareholders to compensation by reason of the fraudulent nature of the bankruptcy. This case is interesting on a number of counts, and in particular because of its similarities with the present case. In both cases, the normal functioning of the corporate organs was blocked by the actions of the respective State authorities.

The Shufeldt case

4.39. In the *Shufeldt* case, Mr. Shufeldt, a United States citizen, was the majority shareholder in a Guatemalan company. The company's concession contract, granted in 1922, was cancelled by legislative decree in 1928²³³. The contract granted the concession on condition that the grantee establish a company under Guatemalan law for the purpose of exploiting the concession. In support of the 1928 decision, the Government recognized the rights initially acquired by Mr. Shufeldt but considered that, in forming the company pursuant to the terms of the contract, he had relinquished those rights in favour of the company, thenceforth the sole holder of the contract rights. Accordingly, the Guatemalan Government maintained that Mr. Shufeldt “has no rights under the contract which he could either enforce by action in courts of law or by invoking the aid of the United States as an American citizen”²³⁴. After noting that what was at issue was not the rights of the company — which, although still in existence, no longer had any corporate purpose — but rather Mr. Shufeldt's interests in the company, as stipulated moreover in the protocol of arbitration, the English arbitrator, Sir Herbert K. M. Sissett, stated: “International law will not be bound by municipal law or by anything but natural justice, and will look behind the legal person to the real interests involved.”²³⁵

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4.40. According to the arbitrator, in light of a detailed examination of the company Mr. Shufeldt was alone vested with all the rights conferred by the 1922 contract of concession and was the sole person to suffer injury as a result of the 1928 decree terminating the concession and in effect depriving him of all his property and interests in the company.

The Alsop case

4.41. One final arbitral award, handed down on 5 July 1911 in the *Alsop* case²³⁶, may also be mentioned. Mr. Alsop was a United States citizen who, together with other American nationals, held interests in Alsop and Co., a Chilean company. The company was owed money by Bolivia and had entered into a debt repayment contract with it. The contract provided *inter alia* for payment out of customs duties levied at a particular port and out of profits derived from the exploitation of silver mines in a coastal province of Bolivia. Following a war initiated and won by Chile, the port and province were annexed. Contending that the Chilean State was liable and calling upon it to honour the commitments entered into by Bolivia, Mr. Alsop submitted an initial claim in 1901 to the United States-Chile Mixed Commission; the claim was rejected on the

²³² *RIAA*, Vol. XV, p. 479.

²³³ Award of 24 July 1930, *RIAA*, Vol. II, p. 1083.

²³⁴ *Ibid.*, p. 1097.

²³⁵ *Ibid.*, p. 1098.

²³⁶ *RIAA*, Vol. XI, p. 355.

grounds that: "Alsop and Co. was a Chilean firm and that the claim was therefore not within the jurisdiction of the commission, because the treaty gave the commission no power to consider claims on the part of Chilean citizens against Chile"²³⁷.

4.42. The case was then submitted by the two Governments to the arbitration of the King of England. The reply to the Chilean Government, which repeated its contention that the Chilean company could not benefit from the diplomatic protection of the United States, was as follows:

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"It would practically exclude the possibility of any real decision on the equities of the claim put forward. The remedy suggested would probably be illusory, and, so far from removing friction, an award in this sense, transferring the real decision from an impartial arbitrator with full powers to the courts of the country concerned, which in all probability have not sufficient power to deal equitably with the claim, could afford no effective solution of the points at issue or do otherwise than increase the friction which has already arisen between the two States."²³⁸

4.43. Thus, without seeking substantive justification for his decision but adopting an extremely pragmatic approach — the only one capable of providing reparation for the injury suffered — the arbitrator upheld the claims asserted by Mr. Alsop, who was compensated in his capacity as representative of Alsop and Co.

4.44. In conclusion, arbitral jurisprudence has long recognized that shareholders in foreign companies may receive diplomatic protection from their State of nationality when those companies have been victims of wrongful acts committed by the State under whose legislation they were formed. Ultimately, the present case is quite similar to those just cited. In all those cases where tribunals have allowed diplomatic protection, shareholders have received protection on account of an injury suffered by the company in which they had invested. In this regard, P. de Visscher states:

"I believe that it is no longer possible to contest, in principle, the admissibility of a diplomatic protection claim by the State of nationality of shareholders where they are indirectly injured by the violation of the direct rights of a company possessing a different nationality."²³⁹ [*Translation by the Registry*]

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4.45. Finally, such a view also finds support in the scope extended by international law to property rights. The case law of the organs of the European Convention on Human Rights is enlightening in this respect. It clearly affords to the protection of property rights the scope necessary to protect the assets of persons subject to its jurisdiction. On the issue of whether a corporate shareholder may claim to have suffered injury to his property where the only injury has been to corporate property, the European Commission of Human Rights has taken a reasonable and pragmatic position: whilst responding to this question in the affirmative, it reserves the benefit of this analysis solely for shareholders with a controlling stake in the company, such as, for example, a shareholder possessing a substantial majority of the shares²⁴⁰.

²³⁷ *RJAA*, Vol. XI, p. 369.

²³⁸ *Ibid.*, p. 360.

²³⁹ "*La protection diplomatique des personnes morales*", *RCADI* 1961-I, Vol. 102, p. 472.

²⁴⁰ See decisions of 4 October 1966, *X v. Austria*, Reports 21, pp. 26 *et seq.*; 28 January 1983, *Yarrow et al. v. United Kingdom*, DR 30, p. 221; and 11 December 1986, *Company S. and T. v. Sweden*, DR 50, pp. 136 *et seq.*

4.46. In conclusion, it is apparent that the direct rights of shareholders must be broadly construed and cover both functional rights — the right effectively to control and manage the company — and property rights — the right to receive dividends and rights of ownership, including the economic value of the shares held, etc.

(b) Application to the present case

4.47. Mr. Diallo's direct rights as a shareholder have been violated on two counts by the DRC: both his functional rights, that is to say his ability to exercise the shareholder rights recognized by Congolese law, and his economic rights, that is to say the right to the value of the shares held. In other words, the internationally wrongful acts of the DRC²⁴¹ have affected both his right as a shareholder to participate in the control and management of the company and his property rights.

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4.48. Thus, under the companies' articles, Mr. Diallo has sole authority to act on their behalf and to manage them, while also being the strategic and commercial driving force behind them. Even though the companies have not been formally confiscated since his expulsion in January 1996, Mr. Diallo no longer has any possibility of exercising his rights and responsibilities as owner and sole shareholder and managing director of the companies in question, in which he has invested substantial sums. He is several thousand kilometres away and is opposed by a State which is hostile towards him and shows no scruples with regard to the means employed to achieve its ends. It is, *inter alia*, impossible for him to supervise his employees, to visit the premises where his companies carry out their activities, or to meet his clients: it is therefore totally impossible for him to run his companies. Further, he is obviously unable to pursue the proceedings initiated to recover the moneys owed him, or even to obtain enforcement of the judicial decisions rendered in the DRC and, thereby, to recover the debts owing to him.

4.49. As a result of the conduct of the Congolese authorities, Mr. Diallo, the owner of the Congolese companies Africom-Zaire and Africontainers, sees the value of his property currently reduced to zero by the unlawful conduct of the DRC. The internationally wrongful acts committed by the DRC are preventing him from controlling and managing his companies and from pursuing the recovery of the debts owed to him by the State itself and by various private companies (largely controlled by the State itself) and even from pursuing the effective recovery of debts which are the subject of final judicial decisions.

4.50. Guinea therefore believes itself justified in considering diplomatic protection of Mr. Diallo to extend to all the acts and heads of damage described in its pleadings.

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2. The protection of shareholders' rights by substitution for the company

4.51. Moreover, irrespective of the violation of their direct rights, shareholders may in any event avail themselves of protection by their State of nationality when the foreign company they own is the victim of unlawful acts committed by its national State. In the *Barcelona Traction* case the Court laid down the principle, subject to exceptions, that the right to exercise diplomatic protection of a company is vested in the State under whose laws it is formed and on whose territory it has its head office: "where it is a question of an unlawful act committed against a company

²⁴¹See Chap. III above.

representing foreign capital, the general rule of international law authorizes the national State of the company alone to make a claim”²⁴².

4.52. However, the Court expressly reserved the possibility that, for considerations of equity, the State of the shareholders in the company in question retains the right in certain circumstances, including in particular in situations comparable to the present one, to exercise its diplomatic protection, independently of the violation of the shareholders’ direct rights.

“Thus a theory has been developed to the effect that the State of the shareholders has a right of diplomatic protection when the State whose responsibility is invoked is the national State of the company. Whatever the validity of this theory may be, it is certainly not applicable to the present case, since Spain is not the national State of Barcelona Traction.”²⁴³

4.53. Nevertheless, certain judges wished to explore this theory in more detail in separate opinions. Thus, Judge Jessup stated:

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“There are three situations in which there is wide agreement that a State may extend its diplomatic protection to shareholders who are its nationals, although the company whose shares they hold has the nationality of another State. These three situations are sometimes considered ‘exceptions’ to a general rule allowing protection of the corporation itself.

The first of these situations is where the corporation has been incorporated in the State which inflicts the injury on it without legal justification, and where the shareholders are of another nationality.

It is in such situations that one finds the widest agreement that a State may extend diplomatic protection to shareholders who are its nationals . . . By hypothesis, the respondent State has committed an unlawful act from which injury results. The corporation itself cannot seek redress and therefore the State whose nationals own the shares may protect them *ut singuli*. The equities are particularly striking when the respondent State admits foreign investment only on condition that the investors form a corporation under its law.”²⁴⁴

4.54. Jessup emphasized

“if the foreign shareholders may be protected in such a situation, it is also necessary to choose one horn of a dilemma: either one admits that the right of the shareholders existed at the moment when the injury was done to the corporation, which means that the rights of shareholders may be damaged by an injury to the corporation, or, if that right came into existence subsequently, then one ignores the rule of international law that a claim must be national in origin. Moreover, the admission of this ‘exception’ negates the argument, sometimes advanced against the diplomatic protection of shareholders, to the effect that such claims expose an accused State to a vast variety of claims on behalf of persons of whose existence it was ignorant. Since customary practice has, however, accepted this ‘exception’, other arguments against protection of shareholders are correspondingly weakened, especially since the doctrine in question

²⁴²*I.C.J. Reports 1970*, p. 46, para. 88.

²⁴³*Ibid.*, p. 48, para. 92.

²⁴⁴*Ibid.*, pp. 191-192, paras. 50-51.

generally does not insist that the life of the corporation must have been extinguished so that it could be said the shareholders had acquired a direct right to the assets.”²⁴⁵

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4.55. Judge Fitzmaurice, in his separate opinion appended to the *Barcelona Traction* Judgment, considered precisely the question arising in the present case:

“The question that now has to be asked is how far these domestic law limitations on the exclusive power of the management, allowing of independent action by the shareholders, are reflected at the international level, so as correspondingly to qualify the principle of the exclusive right of the government of the company to intervene, and admitting the possibility of intervention by that of the shareholders, even though the injury is to the company as such, rather than to any independent *stricto sensu* shareholding right.”²⁴⁶

4.56. He recognized that the admissibility of a diplomatic protection claim on behalf of foreign shareholders was not in doubt

“where the company concerned has the nationality of the very State responsible for the acts or damage complained of, and these, or the resulting circumstances, are such as to render the company incapable *de facto* of protecting its interests and hence those of the shareholders. Clearly in this type of case no intervention or claim on behalf of the company as such can, in the nature of things, be possible at the international level, since the company has local not foreign nationality, and since also the very authority to which the company should be able to look for support or protection is itself the author of the damage. Consequently, the normal rule of intervention only on behalf of the company by the company’s government becomes not so much inapplicable as irrelevant or meaningless in the context. The efficacy of the corporate entity and its capability of useful action has broken down, and the shareholders become as it were substituted for the management to protect the company’s interests by any method legally open to them. If some of them have foreign nationality, one such way is to invoke the intervention of their government, and in the circumstances this must be regarded as admissible.”²⁴⁷

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4.57. The judge referred to and adopted the following conclusions of Paul de Visscher:

“In sum, in order to weigh the admissibility of the protection of shareholders, it is necessary to adhere essentially to the idea of the effectiveness of the corporate entity. It matters little whether, according to internal law criteria, the corporal personality subsists or not. Even where it does, an international tribunal can admit the diplomatic protection of shareholders from the moment when it finds as a fact that the damage caused to the corporate entity has had the effect of paralysing or sterilising the usefulness that the mechanism of corporate personality ought normally to bring about for the benefit of the shareholders.

In that case, an international tribunal, not being bound by internal law criteria, ‘pierces the corporate veil’, as it is said, [but] it would be more accurate to say that it

²⁴⁵ *I.C.J. Reports 1970*, p. 193, para. 52.

²⁴⁶ *Ibid.*, p. 71, para. 13.

²⁴⁷ *Ibid.*, pp. 72-73, para. 14; footnotes omitted.

registers the absence of all effective personality, of any effectual intermediary between the shareholders and the rights infringed.”²⁴⁸

4.58. Going even further, and again addressing the facts of the *Barcelona Traction* case, Judge Fitzmaurice concluded: “In consequence, had the Company been Spanish by incorporation, instead of Canadian, I should have had no hesitation in holding that a claim by Belgium on behalf of the Belgian shareholders in the Company was admissible.”²⁴⁹

4.59. Similarly, the facts of the present case, that is to say the respective nationalities of the companies and the shareholders and the existence of internationally wrongful acts which have caused serious injury to the company, must lead to the conclusion — irrespective of the grounds based on a violation of the shareholders’ direct rights, which have also been infringed here — that Guinea’s claim in this case is admissible.

B. EXHAUSTION OF LOCAL REMEDIES

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4.60. In contending that the DRC has violated its international obligations in the case of Mr. Diallo, Guinea is well aware that it must prove that its national has complied with the principle of the exhaustion of local remedies. According to Article 22 of the Draft Articles on State Responsibility adopted by the International Law Commission on first reading in 1996, the principle applies “when the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens”²⁵⁰. That is indeed so in the present case.

4.61. As the Court has recalled in various cases, this is an important principle of customary international law²⁵¹ and, as such, must be observed in proceedings before the Court, even in the absence of a treaty. Guinea will review the scope of this principle as a condition of the exercise of diplomatic protection, before showing that it was implemented by Mr. Diallo in so far as it was possible for him to do so, namely until the time of his deportation from the DRC and the state of poverty to which he was reduced as a result.

1. The scope in international law of the condition of the exhaustion of local remedies

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4.62. The principle of the exhaustion of local remedies is based on two presumptions: one being that an individual staying temporarily in a foreign country or investing there agrees in advance to be bound by local law; the other deriving from State sovereignty, pursuant to which States recognize the equivalence of national legal orders. Such equivalence implies that an individual foreigner should find in the State in which he invests the same legal guarantees and security that he would enjoy in his own country, and above all that the host State offers him all such remedies as may be necessary to enable him to protect his property.

²⁴⁸*I.C.J. Reports 1970*, pp. 74-75, para. 19.

²⁴⁹*Ibid.*, p. 75, para. 20.

²⁵⁰*ILC Yearbook 1996*, Vol. 2, part 2, p. 60.

²⁵¹ICJ, 22 July 1952, *Ambatielos* case, *I.C.J. Reports 1953*, p. 10; 21 November 1959; *Interhandel* case, *I.C.J. Reports 1959*, p. 27; 20 July 1989, *Elettronica Sicula (ELSI)* case, *I.C.J. Reports 1989*, p. 42.

4.63. The principle of the exhaustion of local remedies is a condition of the admissibility of an application, on which, logically, the Court may only rule once it has established that it has jurisdiction. According to Judge Armand-Ugon, in his dissenting opinion in the *Interhandel* case, it is a principle which is not absolute and rigid and one which “has to be applied flexibly according to the case. Some situations or facts may entitle the Court to accede to a request, even if the remedies have not been completely exhausted.”²⁵²

4.64. In fact, the rigour with which the Court applied the principle in the *Interhandel* case²⁵³ is quite exceptional. Moreover, the Permanent Court of International Justice was somewhat reluctant to apply it too strictly. In three cases²⁵⁴, the Permanent Court joined to the proceedings on the merits a preliminary objection based on the failure to exhaust domestic remedies; in one case²⁵⁵ it accepted the principle as a defence on the merits; in yet another case²⁵⁶ it accepted the principle on the basis of treaty undertakings; and lastly, in two cases²⁵⁷ it refused to apply the principle. The present Court also refused it in two cases²⁵⁸.

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4.65. It has to be said that the principle of the exhaustion of local remedies can prove difficult to apply in practice. This can be seen both in public international law and in the European case law on human rights. Thus the exhaustion of local remedies is required only in so far as this is capable of redressing the disputed situation. Consequently, if the local remedies available to the applicant appear to be inappropriate, ineffective, inefficient or, *a fortiori*, impossible to use, it is generally held that the applicant is exempt from exhausting such means of redress²⁵⁹.

4.66. In general international law, as in European law, the expression “remedies” refers to “any legal remedy capable of leading to a satisfactory result in respect of the subject-matter of the international application” [*translation by the Registry*]²⁶⁰. It thus covers both judicial and non-judicial remedies. The applicant may even pursue both avenues of redress at the same time.

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4.67. The scope of the principle also depends on what the term “exhaustion” is understood to mean. Strictly speaking, in a procedural sense, it means in theory that all remedies which would allow the respondent State itself to remedy the breach of the law have been pursued exhaustively, to a conclusion, and in principle have resulted in a final decision.

²⁵²*I.C.J. Reports 1959*, p. 87.

²⁵³By a relatively narrow majority of 9 votes to 6.

²⁵⁴*Prince von Pless Administration, Order of 11 May 1933, Series A/B, No. 54; Losinger, Order of 27 June 1936, Series A/B, No. 67; Panevezys-Saldutiskis Railway, Order of 30 June 1938, Series A/B, No. 75.*

²⁵⁵*P.C.I.J., Series A/B, No. 75, Panevezys-Saldutiskis Railway, Judgment, 1939, Series A/B, No. 76.*

²⁵⁶*Electricity Company of Sofia and Bulgaria, Judgment, 1939, Series A/B, No. 77.*

²⁵⁷*Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 8, 1927, Series A, No. 9.*

²⁵⁸*Ambatielos, Merits, Judgment, I.C.J. Reports 1953; Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989.*

²⁵⁹On the application of this principle at the European Commission of Human Rights, see the commentary by Etienne Picard on Article 26 (now Article 35) of the European Convention on Human Rights, in L. E. Pettiti, E. Decaux and P. H. Imbert ed., *La Convention européenne des droits de l'homme, commentaire article par article, Economica*, Paris, 1995, p. 593. European jurisprudence even allows an application to be filed before the final, definitive domestic decision is pronounced (Commission, D No. 7 438/79, 9 March 1978, *Ventura v. Italy*; DR 12, p. 39, Court, Judgment of 16 July 1971, *Ringeisen*, A No. 13, p. 36; etc.), although the admissibility of the application may only be determined once a final decision has been pronounced.

²⁶⁰E. Picard, *op. cit.* p. 596.

4.68. However, the term cannot be restricted to such a narrow meaning. The term “exhaustion” also has substantive significance. Although the applicant may in principle avail himself of all “reasonable” remedies in order to obtain relief for the alleged violation within the local legal order, such remedies must be “effective” in relation to the objective pursued. In other words, for the application to be admissible, the applicant must have exhausted not all “conceivable” remedies but only those whose effectiveness can be determined on the basis of a number of criteria, having regard to the subject-matter, the nature of such remedies and the conditions governing recourse thereto, as well as their possible outcome in light of the context.

4.69. These criteria will be assessed in light of the various courses of action followed by Mr. Diallo in order to recover the various sums owing to him, thus establishing that it was impossible for him to exhaust local remedies within the DRC.

2. Mr. Diallo’s inability to give effect to the principle

4.70. In order properly to determine whether local remedies have been exhausted, account must always be taken of the circumstances of the case and of the physical and legal situation of the applicant. Guinea will proceed to show that Mr. Diallo did investigate several possibilities of redress, both judicial and administrative, while he was still entitled to reside freely and safely in the Democratic Republic of the Congo, before quite particular circumstances, namely his abrupt expulsion, excluded any other possibility of redress. Moreover, this impossible situation in which the Democratic Republic of the Congo placed Mr. Diallo in itself represents a denial of justice engaging the responsibility of the respondent State²⁶¹.

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(a) *The judicial remedies exercised by Mr. Diallo and their outcome*

4.71. Guinea has already shown, in Chapters II and III of this Memorial, how Mr. Diallo was obliged to take legal proceedings in an endeavour to collect the many outstanding debts owing to his companies. For example, on behalf of Africontainers, of which he is chief executive officer and owner, he brought proceedings against Zaire-Shell before the Kinshasa/Gombe *Tribunal de grande instance*, which found in favour of Africontainers. Following confirmation of this decision by the Kinshasa/Gombe Appeal Court, the Minister of Justice acknowledged that the decision was sound²⁶². Yet it would never be enforced. As execution against Zaire-Shell was being carried out, the then Vice-Minister of Justice, Mr. Kikadi, ordered that “things be left as they are”²⁶³.

4.72. Such an act, which contravenes the principle of the separation of powers, also sets at naught the principle of *res judicata*, which represents the authority underlying any decision of the courts, particularly when this includes an order for execution. Such an act was all the more likely to extinguish any hope that Mr. Diallo might have had of achieving a judicial settlement of his many legal proceedings in that it was not an isolated occurrence. Enforcement of a judicial decision was similarly blocked by the then Prime Minister in person, Mr. Kengo wa Dondo, in October 1995.

²⁶¹ See paras. 3.64. and 3.65. above.

²⁶² See paras. 2.36-2.50 and 3.35-3.53.

²⁶³ *Ibid.*

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4.73. Various other judicial proceedings brought by Mr. Diallo on behalf of Africontainers or Africom produced no result²⁶⁴. Thus, Africontainers won its suit against Zaire-Fina under Judgment RC 61 320 of the Kinshasa/Gombe *Tribunal de grande instance* dated 24 August 1993. However, by a decision of 24 February 1994, the Kinshasa/Gombe Appeal Court reversed the judgment of the *Tribunal de grande instance* and dismissed Africontainers' appeal on a formality, namely a defect in the document appointing Mr. Diallo managing director of his company. Africontainers filed an appeal with the Court of Cassation on 27 December 1994, which has failed to produce any result.

4.74. The case of *Africom v. Plantation Lever du Zaïre (PLZ)* is another case illustrating the deficiencies of Zairean justice²⁶⁵. In light of all these judicial vicissitudes, of so much money spent on various proceedings for no result, it is clear that, even if the courts had found in his favour, Mr. Diallo had scant hope of achieving a satisfactory judicial settlement of his disputes with his trading partners. It must be recalled, moreover, that the rule of the exhaustion of local remedies does not require recourse to a remedy which manifestly has no chance of success²⁶⁶. As the United States/Great Britain Arbitral Tribunal stated to this effect in the *Brown* case: "[where] the futility of further proceedings has been fully demonstrated... the alleged neglect to exhaust legal remedies... could not be considered as in any sense a bar"²⁶⁷.

(b) The non-judicial remedies exercised by Mr. Diallo and their outcome

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4.75. In parallel with the judicial proceedings, and in some cases prior thereto, Mr. Diallo, on behalf of his companies, undertook negotiations with his various trading partners²⁶⁸. More significantly, Mr. Diallo appealed to various Zairean administrative authorities, including the Prime Minister and the President of the Republic, and this is attested in the latter case by letter No. DPR/DA/BYN/3123 from the Bureau of the Founding President, President of the Republic, forwarding Africom's request²⁶⁹. Thus for example in January 1987, at his request, he was received by the State Commissioner for Finance "concerning the bad debts hampering his company's normal business" and obtained only a promise to settle the amount due after 3 February 1987, a promise that was never kept.

4.76. By letter No. 083/AFC/DG/95 of 30 November 1995, Mr. Diallo transmitted to the Prime Minister of Zaire "for information and for action to be taken if necessary" the case files relating to the disputes between his company Africontainers and Gécamines, Zaire-Shell, Zaire-Fina and Zaire-Mobil Oil²⁷⁰. A copy of the letter was sent on the same day to the Finance and Planning Ministers of the Republic of Zaire. These two Ministers were again approached by

²⁶⁴See paras. 2.36-2.50 and 3.35-3.53.

²⁶⁵See paras. 2.48. to 2.50.

²⁶⁶See European Commission of Human Rights, Application No. 5566-5583/72 *Donnelly and Associates v. United Kingdom*, December 1979.

²⁶⁷22 May 1923, *RIAA*, VI, p. 120; see also the Uden Award of 29 March 1933 in the *Forests of Central Rhodope* case. *RIAA*, II, p. 1405 or the Hucheson arbitration of 5 October 1937, *S.S. Lisman (Great Britain/United States)* case, *RIAA*, III, p. 1767.

²⁶⁸See paras. 2.51 to 2.62.

²⁶⁹Ann. 37.

²⁷⁰Ann. 187, 188 and 189. He concluded his letter as follows: "since our company has been recognized as benefiting from the advantages of the Code of Investment, we are convinced that all the debts now owed to it by the oil companies are and will remain guaranteed under this code. *That is the reason why we rely upon your distinguished authority to secure the settlement of all our debts.* It will also enable us to reimburse in hard currency the credits granted to us to finance our business." (Emphasis added).

Mr. Diallo in a letter dated 13 March 1997, transmitting to them a document in which Mr. Diallo detailed "the income and investments which I have lost through the fault of the State of Zaire"²⁷¹. This letter postdates Mr. Diallo's deportation from Zairean territory and was a follow-up to the hopes aroused by the arrival in power of new leaders in Kinshasa, following the fall of President Mobutu in 1997.

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4.77. All these initiatives failed to produce any result and Mr. Diallo's situation did not allow him to pursue them further. As the Court said in the *ELSI* case: "[i]t is never easy to decide, in a case where there has in fact been much resort to the municipal courts, whether local remedies have truly been 'exhausted'"²⁷². However, Guinea considers that there can be no doubt of this in the present case in view of the very numerous judicial proceedings and non-judicial representations to the Zairean authorities undertaken by Mr. Diallo, on the one hand, and the state of extreme poverty into which the internationally wrongful acts of the *DRC itself* had placed Mr. Diallo, who found it materially impossible to initiate further, evidently costly, proceedings or even to provide for his basic needs. Further proceedings would thus, in any event, have been impossible.

(c) The unlawful administrative practices and the specific circumstances which made it impossible for Mr. Diallo to proceed further

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4.78. Guinea has already shown how the Zairean Government under Prime Minister Kengo wa Dondo took steps to halt the execution of a judicial decision which was *res judicata*²⁷³. This is the kind of conduct characterized by jurisprudence, particularly that of the European Commission of Human Rights, as unlawful "administrative practices", precluding application of the rule of the exhaustion of local remedies²⁷⁴. They have been defined as repeated acts, "committed in the majority of cases without any enquiry into the civil, criminal or disciplinary responsibility of their authors, and generally without any legal redress for the victims, to such an extent that such violations . . . may be seen, if not as principles of administrative or government action, at least as conduct accepted or tolerated by the State"²⁷⁵ [*translation by the Registry*].

4.79. In addition to the order to halt the seizure of Zaire-Shell's property, the Zairean Prime Minister instructed the Minister of the Interior to order the deportation of Mr. Diallo from Zairean territory²⁷⁶. In light of his arbitrary arrest and deportation, on top of the "administrative practices" described above, it is difficult to maintain that, at the time of the events in question, Mr. Diallo was dealing with a State observing the rule of law from which he might have continued to seek effective redress.

4.80. For the Republic of Guinea, this situation and the related facts represent what jurisprudence, particularly that of the European Commission of Human Rights, understands by "particular circumstances" which render remedies impossible or ineffective. This applies *inter alia* when the applicant finds it materially impossible to seek redress, namely because of the conduct of the authorities of the respondent State. Thus in the present case there are grounds for applying the

²⁷¹Ann. 219.

²⁷²*I.C.J. Reports 1989*, p. 47, para. 62.

²⁷³See paras. 2.xxx and 3.xxx. FOOTNOTE TO BE COMPLETED.

²⁷⁴See for example D No. 3 321-67 and 3 334-67 *Denmark, Norway, Sweden, Netherlands v. Greece*, 5 November 1969; D No. 5 310-71, *Ireland v. United Kingdom*, 25 January 1976; D No. 8 007-77 *Cyprus v. Turkey*, 10 July 1978; D No. 8 462-79, *United Kingdom*, 8 July 1980; D No. 9 940-82, *France, Norway, Denmark, Sweden and Netherlands v. Turkey*, 6 December 1983.

²⁷⁵E. Picard, *op. cit.*, p. 608

²⁷⁶See paras. 2.63. to 2.72. above.

solution adopted by the European Court of Human Rights whereby, if an applicant finds it impossible to seek any effective redress in the national courts, failure to exhaust local remedies cannot reasonably be relied on against him²⁷⁷.

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4.81. In short, the Republic of Guinea maintains that Mr. Diallo did have recourse to the various local remedies available (however uncertain the outcome) when he was resident in Zaire. However his deportation from that country, in flagrant breach of the rules of international law, created particular circumstances which made further remedies impossible or ineffective. In any event, unlike the example of Italy in the *ELSI* case, in which it appeared to the Chamber "to be impossible to deduce, from the recent jurisprudence cited, what the attitude of the Italian courts would have been had Raytheon and Machlett brought an action, some 20 years ago . . ."²⁷⁸, in the present case everything appears to point to the fact that any further proceedings would have been futile, for, had the Zairean courts found in Mr. Diallo's favour, the Zairean State would have nullified the effects of any decision of the courts by blocking its execution. The exhaustion of local remedies by Mr. Diallo was thus impossible and in any event futile in the circumstances.

²⁷⁷See *Airey v. Ireland* case, Judgment of 9 October 1979, *Series A, No. 32*.

²⁷⁸*I.C.J. Reports 1989*, p. 47, para. 62

CHAPTER V

SUBMISSIONS

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5.1. The Republic of Guinea has the honour to request that it may please the International Court of Justice to adjudge and declare as follows:

- (1) that, in arbitrarily arresting and expelling its national, Mr. Ahmadou Sadio Diallo; in not at that time respecting his right to the benefit of the provisions of the 1961 Vienna Convention on Consular Relations; in submitting him to humiliating and degrading treatment; in depriving him of the exercise of his rights of ownership and management in respect of the companies founded by him in the DRC; in preventing him from pursuing recovery of the numerous debts owed to him — to himself personally and to the said companies — both by the DRC itself and by other contractual partners; in not paying its own debts to him and to his companies,

the Democratic Republic of the Congo has committed internationally wrongful acts which engage its responsibility to the Republic of Guinea;

- (2) that the Democratic Republic of the Congo is accordingly bound to make full reparation on account of the injury suffered by the Republic of Guinea in the person of its national;
- (3) that such reparation shall take the form of compensation covering the totality of the injuries caused by the internationally wrongful acts of the Democratic Republic of the Congo including loss of earnings, and shall also include interest.

5.2. The Republic of Guinea further requests the Court kindly to authorize it to submit an assessment of the amount of the compensation due to it on this account from the Democratic Republic of the Congo in a subsequent phase of the proceedings in the event that the two Parties should be unable to agree on the amount thereof within a period of six months following delivery of the Judgment.

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5.3. The Republic of Guinea reserves the right to supplement or amend these submissions as necessary, in accordance with the provisions of the Statute and Rules of Court, in light of elements of law or fact and of all such evidence as may subsequently be submitted.

23 March 2001,
Ousmane Tolo THIAM.
Agent of the Republic of Guinea

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Annex 208	November 1996	"Diallo — the man who refused to go away" in <i>L'Évènement de Guinée</i> , No. 060
Annex 210	4 December 1996	Letter from Gécamines to agents proposing meeting for 9/12/96 + Agenda for a meeting
Annex 212	11 December 1996	Letter from the Guinean Minister of Justice to the Guinean Minister for Foreign Affairs enclosing a Report on the expulsion of Diallo and on the possibility of exercising diplomatic protection
Annex 213	9 January 1997	Letter from Africontainers to the Guinean Ambassador in the DRC forwarding to him the minutes of the meeting of 9/12/96
Annex 216	11 February 1997	Letter from the Guinean Minister for Foreign Affairs to the Guinean Ambassador to Zaire, following up the Diallo case
Annex 217	24 February 1997	Letter of support from the Secretary General of the Guinean National Assembly to Mr. Amadou S. Diallo
Annex 219	13 March 1997	Letter from Mr. Amadou S. Diallo to Zairean Ministers claiming loss on investment in respect of an Africontainers vessel

Annex 222	26 June 1997	Letter from Gécamines to Africontainers inviting the latter to a working meeting
Annex 223	1 July 1997	Letter from the Guinean Ambassador to Zaire to the Guinean Minister for Foreign Affairs
Annex 224	2 July 1997	Minutes of the working meeting of 2/7/97 between Africontainers and Gécamines
Annex 226	7 July 1997	Minutes of the working meeting of 7/7/97 between Africontainers and Gécamines
Annex 245	4 February 1998	Letter No. 24/AOD/JK/2/98 from Maître Alpha O. Diallo to the President of the DRC for information in the case Ahmadou Sadio Diallo v. the DRC (former Zaire)
Annex 246	4 February 1998	Letter No. 25/A.O.D./JK/2/98 from Maître Alpha O. Diallo to the Minister of Justice of the DRC for information in the case Ahmadou Sadio Diallo v. the DRC (former Zaire)
Annex 248	16 March 1998	Letter No. 48/AOD/JK/3/98 from Maître Alpha O. Diallo to the President of the DRC concerning the dispute Ahmadou Sadio Diallo v. the DRC (former Zaire)
Annex 249	16 March 1998	Letter No. 49/A.O.D./JK/3/98 from Maître Alpha O. Diallo to the Minister of Justice of the DRC concerning the dispute Ahmadou Sadio Diallo v. the DRC (former Zaire)
