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INTERNATIONAL COURT OF JUSTICE

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

OBSERVATIONS OF THE REPUBLIC OF GUINEA ON THE PRELIMINARY OBJECTIONS OF THE DEMOCRATIC REPUBLIC OF THE CONGO

VOLUME I

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INTRODUCTION

1 0.01. On 25 September 1998, the Republic of Guinea (hereinafter "Guinea") addressed to the Court an "Application for purposes of diplomatic protection", in which it sought to exercise such protection in respect of one of its nationals, Mr. Amadou Sadio Diallo, against the Democratic Republic of the Congo ("DRC") and requested the Court to render a judgment against the Democratic Republic of the Congo for the serious violations of international law committed by the latter to the detriment of Mr. Diallo, a Guinean national. The Application, founded on Article 36, paragraph 2, of the Court's Statute, was filed in the Registry on 28 December 1998.

0.02. By Order of 25 November 1999, the Court fixed 11 September 2000 as the time limit for the filing of the Memorial and 11 September 2001 for the filing of the Counter-Memorial. Those time-limits were extended by Order of 8 September 2000 by the President of the Court to 23 March 2001 and 4 October 2002 respectively.

0.03. Guinea's Memorial was filed in the Court on 23 March 2001, whilst the Democratic Republic of the Congo chose to file Preliminary Objections 19 months later, on 3 October 2002.

0.04. After meeting the Parties on 5 November 2002, the President of the Court, by Order of 7 November 2002, fixed 7 July 2003 as the time-limit for the submission by the Republic of Guinea of a written statement containing its observations and submissions on the Preliminary Objections raised by the Democratic Republic of the Congo. The present document constitutes the Republic of Guinea's observations and submissions on the Preliminary Objections.

0.05. The Republic of Guinea would recall that it concluded its Memorial by requesting that it may please the International Court of Justice to adjudge and declare:

2 "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".

0.06. The Republic of Guinea further requested 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".

0.07. There are two important aspects of the Application which were deliberately ignored by the Democratic Republic of the Congo in its Preliminary Objections.

0.08. First of all, it is obviously totally irrelevant to address at this stage the issue of the amount of compensation awardable to the Republic of Guinea if the Court were to hold that the Congo's responsibility is engaged towards it. Such a discussion is particularly premature because the proceedings on the merits have been suspended, pursuant to Article 79 of the Court's Statute *[sic.]*, as a result of the filing of Preliminary Objections by the Congo.

0.09. Guinea wishes furthermore to point out that in any event it has no intention of re-presenting unchanged the assessments set out in the Annex to its Application concerning the amount of the damage for which it considers that reparation is due from the DRC. Those assessments were made out in a context which was not conducive to a proper verification of their
3 accuracy. Guinea acknowledges that its methods of calculation are open to debate and it is clear that they should be revised. Guinea accordingly requests the Court kindly to consider that the figures in question are not relevant at this stage and that they will be reviewed at a later stage.

0.10. The second element, which is clearly fundamental to the approach adopted by the Republic of Guinea in these proceedings is that it is only seeking to exercise its diplomatic protection in respect of its national, Mr. Amadou Sadio Diallo, in his various capacities, bearing in mind that Mr. Diallo's Guinean nationality is not contested by the Respondent. That approach is absolutely clear both in the Application and in the Memorial. Accordingly, the repeated allegations by the DRC that Guinea is seeking to exercise its protection in favour of companies incorporated under Congolese law[1] should be regarded as irrelevant.

0.11. The Congo submitted two preliminary objections to justify its claim that the Guinean Application is inadmissible. The first is that the Republic of Guinea has no *locus standi* in the present case; the second is that local remedies have not been exhausted. The two chapters devoted to these points in the Preliminary Objections are preceded by a chapter on the relevant facts.

0.12. For the convenience of Members of the Court, Guinea will follow that same tripartite structure in the present Observations. Chapter I will deal with the relevant facts; Chapter II will show that Guinea is entitled to exercise its diplomatic protection in the present case; and Chapter III will demonstrate that Guinea has met the requirement that local remedies be exhausted.

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[1]See for example Preliminary Objections of the Democratic Republic of the Congo (POC), p. 45, para. 162; p. 47, para. 2.01; p. 47, para. 2.03.

CHAPTER I

THE SALIENT FACTS

5 1.01. In the chapter of its Preliminary Objections devoted to the facts, the DRC presents the disputes which it regards as underlying the Republic of Guinea's Application. It proposes to address "[successively] each of the commercial disputes that the Guinean Application seeks to bring before the Court"[2]. The case is said to consist in a "dispute between Congolese companies and other economic operators in the Congo, i.e., a dispute that is above all a matter of Congolese commercial law and falls within the jurisdiction of the Congolese courts"[3].

1.02. Further to this introduction, the Congolese version of the facts leads the Respondent to set out its two preliminary objections as follows: since "the present claim mainly pertains to disagreements between two Congolese companies and other economic operators in the Congo, with Mr. Diallo always acting in his management capacity in relation to those companies", Guinea does not have *locus standi*[4]; and since domestic courts should naturally have jurisdiction to entertain the disputes as presented, the Court should dismiss the Application as inadmissible on the ground of failure to exhaust Congolese internal remedies[5].

1.03. The DRC also seeks, but in a more underhand way, to allege in its account of the facts that all the problems encountered by Mr. Diallo in the DRC are the result of dishonesty on his part; it asserts for example that Mr. Diallo "moreover, in most cases, conjured [them] up himself, without any real basis"[6]. The DRC also observes that "Mr. Diallo's personality and the conduct adopted by him since the commencement of this case are far from being irreproachable" and refers to "fraudulent . . . activities"[7].

1.04. That version of the facts is both incomplete and biased. The events as experienced by Mr. Diallo and attested by the case file before the Court call for a different construction and a contrary conclusion. Mr. Diallo's history, whose salient aspects Guinea will recall in the following
6 paragraphs, without simply restating what it has already established in its Memorial, shows that for many years the Congolese State regarded him as a valuable and trustworthy investor and company manager, with whom it was easy to do business. He was utilized — one could almost say "instrumentalized" — for his skills and reliability, both by the State and by the public or private-law companies linked to the State. He was never criticized for his work. It was only when he claimed what was due to his companies, i.e., the repayment of debts, that it was sought to undermine his reputation for probity and that the Congolese State strove to prevent him from pursuing his claims. Mr. Diallo's expulsion marked the final outcome of that campaign, whose sole objective was to prevent him, a shareholder and company director, from seeking vindication before the Congolese courts. It is those facts which constitute the crux of the claim brought by Guinea before the Court, and not purely commercial disputes between private-law entities, as the DRC has sought to claim.

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[2]POC, p. 9, para. 1.05.

[3]*Ibid.*, p. 5, para. 0.08; p. 8, para. 1.01; p. 9, para. 1.04.

[4]*Ibid.*, p. 8, para. 1.01.

[5]*Ibid.*

[6]*Ibid.*, p. 46, para. 1.62.

[7]*Ibid.*, pp. 98-99, para. 2.98.

1.05. The first point to be considered is that Mr. Diallo was, through his companies, regarded for many years not only as a valuable and accommodating trading partner, but also as a shrewd investor with high potential. As a businessman, his conduct had never received any criticism and he always acted within the strict framework of Congolese law when he was still a resident of the DRC, prior to his expulsion. There is nothing in the case file which would permit the DRC to portray this Guinean national, on behalf of whom the Republic of Guinea seeks to exercise its diplomatic protection, as a "phoney" victim[8], who is in reality a treacherous manipulator[9] (Section 1).

1.06. Guinea will go on to show that, by contrast, whilst Mr. Diallo showed himself to be a shrewd, serious and law-abiding investor, the Congolese government's attitude towards him was unacceptable and caused both his ruin and that of his companies. Accordingly, it is clear that, in claiming that the Congolese courts are in the best position to address these issues, the DRC, which is an interested party in those disputes, is thereby seeking to set itself up as sole judge and jury in those cases (Section 2).

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1.07. Guinea will also demonstrate that, when the respondent State took action against Mr. Diallo, it was always in his capacity as shareholder and managing director of his two companies. The State purely and simply assimilated him to the companies under his management, in an attempt to undermine them, and for the sole purpose of preventing him from continuing to maintain his effective control and management (Section 3).

1.08. Lastly, Guinea will address Mr. Diallo's current position (Section 4), as well as that of his companies (Section 5).

Section 1: Mr. Diallo always acted in Zaire as a shrewd and serious investor and businessman

1.09. Guinea cannot allow the DRC's deplorable presentation of its national, Mr. Diallo, to go without comment. The DRC makes him out to be some sort of professional conman, who, with Guinea as his accomplice, is seeking to enforce before the Court claims without any foundation, for the sole purpose of extorting money from a State which is, moreover, "one of the countries most seriously affected by armed conflicts, with disastrous humanitarian consequences"[10].

1.10. Such claims can be found in many passages of the Preliminary Objections. Thus, the DRC contends that "Mr. Diallo, according to the facts, played an extremely important role in the emergence, the development and the continuation of these disputes"[11]. The DRC criticizes

> "Mr. Diallo's tendency, in any context whatsoever — the Democratic Republic of the Congo would venture to write 'under any pretext whatsoever' — to advance financial claims which always prove to be exorbitant and to have no connection with reality,

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[8] POC, p. 118, para. 3.36.

[9] *Ibid.*, pp. 44-45, para. 1.61

[10] POC, p. 4, para. 0.07.

[11] *Ibid.*, p. 21, para. 1.20.

> and always on behalf of the companies managed and wholly owned by him . . . [and to use] the companies he manages to put forward abusive claims"[12].

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The DRC also claims, without substantiation or justification of any kind, that

> "Mr. Diallo had been involved in currency trafficking and . . . he was moreover guilty of . . . numerous attempts to bribe Zairean judicial and political officials with a view to obtaining the payment of Africontainers Zaire's fictitious debts . . . Mr. Diallo was obviously ready to use all possible means in order to achieve his goals"[13].

The Respondent refers to "the nuisance potential of Mr. Diallo"[14], later repeating that he "made arbitrary and unjustified claims" and participated in "fraudulent and anti-social activities"[15].

1.11. The DRC basically portrays Mr Diallo as a dangerous fraudster. But it goes even further and accuses the Guinea of being his accomplice. It thus states: "the strategy developed by Mr. Diallo at the time when he was pursuing his commercial activities in Zaire — namely, attempting to obtain excessive sums from his trading partners by means of claims submitted by legal persons acting on his behalf — appears to be continuing even before the Court"[16].

1.12. In the face of such a slew of accusations against its national and itself, Guinea wonders whether it is really necessary to show that local remedies in the DRC were basically unavailable to Mr. Diallo: as the Respondent's pleadings sufficiently show, Mr. Diallo has for long been adjudged guilty in the Congo — finally and without appeal: he is said to be a conman, a manipulator, a briber and a trafficker, making claims of which none have any "basis in reality". In these circumstances, it is hard to see how the DRC can suggest — and indeed insist — that he should and could return to defend his rights in that country.

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1.13. The picture of Mr. Diallo portrayed by the DRC in its pleadings has no basis in reality. Mr. Diallo was for many years regarded as an active investor, who made a major contribution to Zaire's economic development. His investments in that country were considerable, both materially and personally, as shown by Guinea's Memorial, which was not contradicted in this respect by the DRC[17].

1.14. It cannot be disputed that this Guinean investor was regarded by the Congolese State as a truly providential entrepreneur during the periods when the country was experiencing serious shortages of "computer-listing paper". Guinea will return later to this key point, but wishes at the outset to stress that Mr. Diallo never received the slightest criticism for the performance of his own obligations towards the Congolese State — quite the contrary. Moreover, in connection with the various contracts entered into between Africontainers and private companies, there were no complaints by those trading partners of Mr. Diallo's company. Neither the oil companies nor Gécamines hesitated, at any time, to renew their contractual relations with his company.

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[12] *Ibid.*, p. 37, para. 1.52.

[13] *Ibid.*, p. 39, para. 1.53.

[14] *Ibid.*, p. 40, para. 1.55.

[15] *Ibid.*, p. 99, para. 2.98.

[16] *Ibid.*, p. 44, para. 1.61.

[17] Memorial of the Republic of Guinea (MG), pp. 12-15, paras. 2.7-2.18; POC, pp. 10-15, paras. 2.2-2.18.

1.15. Those companies, moreover, made significant profits as a result. This has already been stated in the Memorial[18], without being contradicted: through his company Africontainers[19], Mr. Diallo was the pioneer of a system of container transport for mining and petroleum products which enabled all operators in the industry to make significant savings in the transport of their products within Zaire[20].

1.16. Not content simply to respond to his customers' immediate needs, Mr. Diallo sought also to perfect the service rendered by his companies. His great ambition was to improve container transport, which was under-used in Zaire before he began proposing substantial improvements. It was precisely with this in mind that, in the late 1980s, Mr. Diallo planned to invest in a self-propelled barge for Africontainers. It was clear at that time that Onatra, the public undertaking which had a monopoly over container transport in the Congo, lacked reliability. Mr. Diallo
10 explained this in a letter of 16 October 1987 to the State Commissioner for Transport and Communication:

> "as a result of the random manner in which container barge convoys are organized by Onatra, which is the only waterway carrier currently capable of operating that system of transport, our activities are prevented from being developed — even though the potential market is significant and growing rapidly. This problem compels us to envisage investments with a view to integration of our activities in order to achieve a certain autonomy."[21]

1.17. That project was undoubtedly ambitious. Its success would have undermined Onatra's monopoly and thus would perhaps have represented a threat to certain existing interests. By making Africontainers the only container leasing company with its own facilities for waterway transport, it could also have given that company a decisive competitive edge. But the project was certainly a perfectly serious one and had obtained the backing of a German company, Schiffswerft Germersheim, which provided Mr. Diallo with a detailed, individually tailored technical and financial tender for the supply of the barge. The professional manner in which the German company submitted that tender at the request of Mr. Diallo is evidence of the credibility and standing of Mr. Diallo and his companies, including vis-à-vis European contractors[22].

1.18. In 1987 Africontainers also received approval for the acquisition of the barge by the Zairean Investment Committee[23]. Article 1 of Interdepartmental Order CAB/PLAN/0144/87 of 31 December 1987 grants approval for the "investment project of the company Africontainers Zaire pertaining to the acquisition of a self-propelled container barge with a total load capacity of 56 containers". As for Africontainers' obligations, Article 3 provides that the investment was to be made on the basis of a loan from the credit establishment SOFIDE for 316 million zaires, together
11 with a "down-payment" of 211 million zaires. The project was thus dependent on down-payments by Mr. Diallo and his companies, which were regarded as an asset to the Congolese economy[24].

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[18]MG, pp. 10-12, paras. 2.7-2.18.

[19]Concerning this company, see MG, pp. 10-11, paras. 2.3-2.5.

[20]See *inter alia*, Ann. OG 1.

[21]Ann. OG 9.

[22]Ann. OG 7.

[23]See MG, p. 14, para. 2.14.

[24]MG, Ann. 52.

1.19. The reason why this project failed has nothing to do with Mr. Diallo. Its failure was the immediate consequence of measures taken by the Government against him and his company, Africom-Zaire.

1.20. The project financing package included a loan from the Société Financière de Développement (SOFIDE), which should not theoretically have been problematic, provided Africontainers, for its part, could justify its capacity to supply the 211 million zaires from its own funds required for the "down-payment". In his discussions with SOFIDE, Mr. Diallo relied on the substantial debts owed to him, through Africom-Zaire, by the Zairean State[25]. SOFIDE's Director General replied to him that his company could support the project, subject to "the production by the Zairean State of a schedule for the repayment of your outstanding debts or of a firm promise to pay in the short or medium term"[26].

1.21. Mr. Diallo was unable to produce those documents, for in January 1988 not only was the payment of Africom-Zaire's debts blocked by the Zairean Prime Minister but, in addition, the latter had Mr. Diallo imprisoned at Makala prison outside Kinshasa. Guinea will return later to that event[27], which resulted in the project being abandoned.

1.22. More generally, it was from the late 1980s that Mr. Diallo's trading partners began to cause him serious difficulties[28]. Until then, Mr. Diallo's companies had adopted a conciliatory approach, seeking out-of-court remedies to settle their disputes, whilst showing their determination to arrive at a settlement[29]. However, that attitude led directly to their ruin, as their trading partners took advantage of the situation to avoid fulfilling their contractual undertakings. The case file shows that such an attitude was adopted both by Gécamines and by the oil companies.

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1.23. For example, just after the July 1983 Tripartite Contract had been signed, a similar agreement was entered into between Zaire Mobil Oil and Gécamines on 1 October 1984[30]. That agreement upset the balance of the 1983 contract, under which a simple mechanism had been set up, as in fact the DRC explains in its pleadings[31]: products sold by the oil companies to Gécamines were transported from Kinshasa to Shaba in containers, which were subsequently re-used by Gécamines to transport its own products to Kinshasa. The result was that the containers never travelled empty, thus making them more profitable, for the benefit of all the operators concerned. That logic indeed explains why the contract was multilateral and why it granted exclusivity to Africontainers, which had been the pioneer and linchpin of the whole system. However, in 1984 Zaire Mobil Oil sought to profit from the idea and signed an agreement with Gécamines on 1 November 1984 whereby it would be responsible for the delivery of its own products within the country using its own containers, whilst Gécamines undertook to re-use those containers for the transport of its own products to the capital. It soon transpired that the supply of empty containers for the transport of Gécamines' products exceeded the demand. Africontainers was gradually

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[25]See below, paras. 1.35-1.39.

[26]Ann. OG 8.

[27]See below, paras. 1.40-1.44.

[28]MG, pp. 16-19, paras. 2.19-2.30.

[29]See for example, MG, Ann. 19.

[30]Ann. OG 5.

[31]POC, p. 12, para. 1.07.

edged out of the market. This explains the "immobilization of the Africontainers-Zaire containers in the Gécamines depots, [which] worsened", to quote the observation by the DRC itself[32].

1.24. Moreover, the documentation available shows that, at the same time, Onatra was improperly using the containers entrusted to it by Africontainers. This has not been disputed by Onatra or by the Respondent in the present case[33].

13 1.25. In these circumstances, Mr. Diallo was gradually obliged to abandon all his development projects and to focus on the recovery of the debts owed to his companies. However, the involvement of the Congolese State in most of the disputes confronting him rendered his task impossible.

Section 2: The Congolese State played a key role in the problems encountered by Mr. Diallo and his companies

1.26. The Republic of Guinea has already indicated in its Memorial that the Congolese State was involved in the disputes which led to Mr. Diallo's ruin and to the plight of his companies, following the personal attacks on Mr. Diallo himself[34].

1.27. The DRC denies this, claiming that the disputes in question are essentially commercial disputes between companies and are thus of a private nature. The DRC refers to them as "quite ordinary commercial disputes"[35], which were "treated by the trading partners of Mr. Diallo's companies with seriousness and good faith"[36]. The DRC seems to be claiming in substance that, even if violations of Mr. Diallo's rights were attributable to the Congolese State, they would be totally independent of the disputes between Mr. Diallo's companies and his trading partners, because those partners had no real links with the Congolese State.

1.28. That argument is entirely unconvincing, because the Congolese State is clearly involved in each of the disputes at issue, and indeed on two levels: on the one hand, as a party with an interest in their settlement (A), and on the other as one directly intervening in the various dispute settlement processes, again to the detriment of Mr. Diallo (B).

14 ### A. The involvement of the Congolese State

1.29. There can be no doubt about this involvement as regards Africontainers' dispute with Gécamines and Onatra. Gécamines, a public corporation under the direct supervision of the State, was one of the major trading partners of Africontainers under the July 1983 contract. As for Onatra *(Office National des Transports)*, it is self-evidently controlled by the State and has also been the source of serious injury to Africontainers[37].

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[32] *Ibid.*, p. 16, para. 1.12

[33] *Ibid.*, pp. 23-24, para. 1.25

[34] MG, p. 64, para. 3.59.

[35] POC, p. 46, para. 1.62.

[36] *Ibid.*

[37] MG, pp. 28-29, para. 2.58.

1.30. The State is moreover involved as shareholder of the main private-law companies which entered into contracts with Africontainers. The Congolese State is the principal shareholder in Zaire-Mobil Oil, with a 40 per cent interest. The Congolese State is also the main shareholder in Zaire-Shell, holding 40 per cent of its shares[38]. Zaire-Fina is another company in which the Congolese State has a 40 per cent shareholding[39]. The Congolese State thus has a dominant interest in these companies, and this fact has not been disputed by the Respondent.

1.31. The company Africom-Zaire has also had a confrontation with the Congolese State (Zairean at the time). In this respect it is sufficient to recall that the company entered into contracts with the country's authorities in respect of huge orders for computer paper and office equipment. The invoices have never been disputed, as the DRC acknowledges in its pleadings[40]. However, they remain unpaid to this day[41].

1.32. It is clear that the problems encountered by both Africontainers and Africom with their trading partners have always involved the Congolese State, whose interest in their settlement is contrary to that of Mr. Diallo. These are not therefore "purely private" disputes, in respect of which the Congolese State could intervene as an impartial arbitrator, as suggested in the
15 Preliminary Objections — particularly since, whenever the State actually involved itself in the disputes, it always did so with partiality and to the detriment of Mr. Diallo.

B. Interventions by the Congolese State in violation of Mr. Diallo's rights

1.33. Mr. Diallo cannot be criticized for believing that he benefited from a certain legal security because of the status of his companies' trading partners. The parties concerned were either the State itself or State-owned companies, or indeed semi-public corporations. It was this impression of security in particular which encouraged him to invest considerable sums and energy in fulfilling his companies' contractual undertakings or in order to satisfy his customers.

1.34. It would be an understatement to say that he was mistaken, as well as being misled. In 1988 Mr. Diallo had his first experience of what befalls the creditors of the Congolese State who claim their due, in connection with what might be called the "listing paper affair" (1). He was rewarded for his efforts by one year in prison without trial. This obviously had a dissuasive effect on him, which explains why he subsequently used only out-of-court means to seek the vindication of his rights vis-à-vis the State. He was not thus restricted, however, in pursuing his claims against private trading partners of his companies. In disputes with private companies he felt free to seek judicial remedies if need be. However, such action also proved to be of no avail, because as soon as it began to meet with success, in 1995, the Congolese State intervened — this time more severely than in 1988: it not only imprisoned him but also subsequently expelled him (2).

1. The listing paper affair and Mr. Diallo's imprisonment

1.35. Africom-Zaire began to deliver listing paper to the Congolese authorities in 1983, to the full satisfaction of its customer. That product was difficult to find in the Congo, and Africom-Zaire proposed competitive prices and terms of payment.

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[38] *Ibid.*, p. 15, para. 2.18.

[39] *Ibid.*, Ann. 82.

[40] POC, p. 14, para. 1.10.

[41] *Ibid.*, p. 14, para. 1.09.

16 1.36. In a letter of 20 June 1985, the Zairean State Commissioner for Finance and the Budget, Mr. Malu Biakaluamfiku, *Chargé de mission* at the Government Stores and Printing Directorate, in fact praised Mr. Diallo's company for being capable of meeting the "immense" needs of the Computer Directorate, which was facing an "acute shortage" of listing paper. He emphasized that:

> "The supplier has maintained the same prices that he proposed two years ago despite all the currency fluctuations in the meantime . . . As to the credibility of that company, I can inform you that an order was placed for the same item pursuant to the decision not to advertise for tenders . . . of 16 December 1983. That order was fulfilled to the satisfaction of both parties; however, the corresponding invoice, for an amount of 5,301,250 zaires, has remained unpaid for almost two years now"[42].

1.37. That considerable delay in payment did not prevent Mr. Diallo from being prepared to accept a new order[43]. Africom-Zaire even proposed a scheduling of the payments in a number of instalments, running from October 1986 to March 1987.

1.38. Payment of the company's invoice was ordered, albeit with some delay, by the State Commissioner for Finance (Minister of Finance), Mr. Kinzonzi Mvutukidi Ngindu. He signed five bills of exchange dated 13 November 1987 for, respectively, 17,800,000 zaires to cover the balance of the debt dating back to 1983[44], 32,500.000 zaires[45], 50,000,000 zaires[46], and 50,000,000 zaires[47], to cover a debt dating back to December 1985, and lastly 28,400,000 zaires[48], for a debt of June 1986. Shortly after those bills of exchange were signed, the State Commissioner for Finance duly advised the Governor of the Bank of Zaire of those transactions and ordered him to "pay these instalments as scheduled by debiting the general account of the Treasury"[49].

17 1.39. Informed of the matter by the Governor of the Bank of Zaire, Prime Minister Mabi Mulumba blocked the transaction by a decision of 14 January 1988[50]. Referring to this stage in the sequence of events, the DRC states: "the scheduled instalments were never paid and the Republic of Zaire remained the debtor of Africom-Zaire for an amount which still needs to be determined precisely. No other action appears to have been taken . . ."[51] In reality there was a follow-up to this, and the DRC cannot be unaware of it.

1.40. The then Prime Minister was not content to block payments of the sums owed to Africom. At the very time when Mr. Diallo, being convinced that he would recover his debts, was readily executing the delivery of listing paper to the Computer Directorate[52], the Prime Minister

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[42]MG, Ann. 26.

[43]MG, Ann. 26.

[44]MG, Ann. 46.

[45]MG, Ann. 48.

[46]MG, Ann. 49.

[47]MG, Ann. 50.

[48]MG, Ann. 47.

[49]MG, Ann. 51.

[50]MG, Ann. 53.

[51]POC, p. 14, para. 1.09.

[52]OG, Anns. 11 and 12.

was orchestrating an intensive media campaign denouncing Mr. Diallo for attempting to swindle the State out of 170,000,000 zaires for the benefit of his company Africom-Zaire, before ordering his arrest and imprisonment. This was obviously a tactic to justify the failure to pay the overdue debts, which amounted to just over 170,000,000 zaires. It was not based on any real dispute in respect of the sum owed to Africom-Zaire. Moreover, the pleadings of the Democratic Republic of the Congo acknowledge the existence of the debts in question[53].

1.41. An account of that arrest is given by the adviser to the Guinean Embassy in Kinshasa, Mr. Lounceny Kouyate, in a letter to the Guinean Minister for Foreign Affairs at Conakry, dated 3 February 1988[54]. He states:

> "Mr. Diallo . . . is accused of embezzling 170,000,000 zaires for the benefit of his company Africom-Zaire, of which Mr. Diallo is chairman and chief executive . . .
>
> That accusation was extensively reported on the radio and television in a programme of 20 January 1988, broadcast at considerable length, and was on the front page of all the newspapers of the Zairean capital . .
>
> 18 Until 22 January 1988, when no action had yet been taken against Mr. Diallo and he was still a free man, he saw no harm in putting together certain documents in his possession for his defence, or in going to the press as if to defy the State . . .
>
> Things came to a head on Monday 24 January 1988, when two police officers executed an arrest warrant. Mr. Diallo was taken to the office of the Kinshasa prosecutor for the purposes of interrogation and on Wednesday 27 January 1988 was transferred to the large prison at Makala, eight kilometres from Kinshasa."

1.42. The order to imprison Mr. Diallo was issued by the First State Commissioner (equivalent to the Prime Minister), Mr. Mabi Mulumba. Mr. Sambwa Pida Nbagui, who succeeded him as First State Commissioner, referred in a letter of 4 July 1988 to the President of the Judicial Council to "the order given by my predecessor to take judicial action against Mr. Diallo"[55].

1.43. Mr. Diallo was not released until one year after his imprisonment. A letter of 28 January 1989 from the principal prosecutor of the Kinshasa *Parquet général* confirmed in this respect to Mr. Diallo that: "the annotated judicial case file opened against you has been closed for inexpediency of prosecution"[56].

1.44. Following that unlawful imprisonment, Mr. Diallo pursued his attempts to recover the debts owed to Africom Zaire by the Congolese State. It is true that he did not bring any action before the courts for that purpose, as indicated by the DRC in its Preliminary Objections[57]; but that is hardly surprising: his year in prison left its mark on him and he had understood that any attempt at judicial recovery of the debts owed to him by the Zairean Government would bring him serious problems. He therefore opted for out-of-court settlement of the disputes with his public-law

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[53]POC, p. 14, para. 1.10.

[54]OG, Ann. 14.

[55]OG, Ann. 15.

[56]OG, Ann. 16.

[57]POC, p. 14, para. 1.09.

partners, not only for Africom Zaire but also for Africontainers in its disputes with Gécamines and Onatra.

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2. The Africontainers cases and Mr. Diallo's expulsion

1.45. In parallel with the disputes with the State and with other State-owned corporations, the contracts entered into by Mr. Diallo's companies gave rise to disputes with certain companies, incorporated under Congolese law, with which the Congolese State enjoyed the privileged relations mentioned above[58]. Since no out-of-court solution had been found for settlement of those disputes and those companies were not *a priori* under State control, Mr. Diallo considered that he was entitled to bring legal proceedings. Those proceedings have already been described to the Court in previous pleadings[59], and Guinea will return to the subject in Chapter III below (Section 1, A). However, it might be helpful at this point to describe the situation prevailing in 1995, because that was the direct cause of Mr. Diallo's expulsion.

1.46. In late 1995, proceedings were pending against PLZ; the proceedings against Zaire Fina, with US$38 million at stake, were also pending and were going well for Africontainers; above all, the proceedings against Shell, involving an amount of over US$13 million, had resulted in a judgment by the *Tribunal de grande instance* that was favourable to Africontainers and of which execution was already under way.

1.47. It was precisely at that crucial time when, as a result of his patience and tenacity, Mr. Diallo had finally been vindicated by the Congolese courts, that he was arrested and then expelled from the Congo. That event took effect at the very beginning of 1996.

1.48. At the current stage of the proceedings, it would be premature to discuss the unlawfulness of Mr. Diallo's expulsion or even the length of his detention. The DRC confuses the proceedings by addressing those aspects in its Preliminary Objections, when they are clearly irrelevant at this stage[60].

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1.49. It would be helpful, however, to clarify the reasons for the expulsion. In its pleadings, the DRC appears to dispute the fact that Mr. Diallo was only expelled to prevent him from recovering his debts[61], claiming that the allegation is not supported by "any factual evidence, any document or any reference whatsoever"[62]. That is untrue and the evidence in the case file all points to the contrary.

1.50. Mr. Diallo's expulsion can be explained, above all, by the pressure that the oil companies brought to bear on him. Moreover, the Congolese Government did not hide this fact, since the expulsion order stipulates that the grounds for the measure taken against Mr. Diallo were exclusively related to his economic activity. According to that order, dated 31 October 1995, the measure concerned: "the individual [Mr. Diallo] whose presence and conduct have breached and continue to breach Zairean public order, particularly in economic, financial and monetary

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[58]See above, paras. 1.29 to 1.32.

[59]MG, pp. 22 to 26, paras. 2.36 to 2.50.

[60]POC, pp. 39-40, para. 1.54; pp. 41-42, paras. 1.56-1.58.

[61]POC, p. 6, para. 09.09.

[62]*Ibid.*

matters"[63]. Now, at that time, Mr. Diallo's economic activity consisted solely in settling his disputes with the oil companies.

1.51. In reality, this is what the DRC's Preliminary Objections say[64]. Admittedly, the Court will also find therein the purely gratuitous allegation that Mr. Diallo was involved in currency trafficking or that he was guilty of a number of attempts at bribery[65]. Not a scintilla of evidence is cited and those accusations cannot be regarded as in any way credible. They do show, however, that any claims in local Congolese courts have been, are and will always be unsuccessful, or even dangerous for Mr. Diallo and his companies: not only has the DRC summarily dismissed his claims as being devoid of any foundation, but it has also accused him personally, without the slightest evidence, of dishonesty.

1.52. Other evidence in the case file shows that the debtors of Mr. Diallo's companies, and in
21 particular Zaire Shell, Zaire Fina and Zaire Mobil Oil, had a decisive influence over his treatment at the hands of the DRC authorities.

1.53. Shell was in the most embarrassing situation in 1995, because a Congolese court had found that it owed Africontainers over US$13 million — a sum that it had no intention of paying. Shell conveyed its concern in this respect to the Minister of Justice and Keeper of the Seals in a letter of 29 August 1995, which denounced "those unjust and deliberate orders [which] cast doubt on the fairness and common sense that should be displayed by judges when assessing the damages to be awarded to claimants", and requested "a decision to safeguard the property of our Company"[66]. And there is further evidence of such support being requested. In a summary note of 11 October 1995 "pertaining to the *Shell* v. *Africontainers* case", drafted by the Inspector General of Judicial Services and the General Inspectorate of Courts and Tribunals[67], it is stated that the representative of Zaire Shell: "*demands* (1) the discharge of the seizure order against its accounts . . ."[68]. In the same document, we read that "that wish had already been expressed the day before by the Minister for Energy at the meeting held in the Office of the Minister of Justice"[69].

1.54. The other oil companies also intervened. The chief executives of Zaire Fina and Zaire Mobil Oil wrote to the Zairean Minister of Justice on 15 November 1995 urging him to take measures against Mr. Diallo. The letter began by recalling that Mr. Diallo was "a Guinean subject" — which has nothing to do with the cases in question, but the oil companies certainly had some reason of their own for writing it — and that he had "obtained an award against Zaire Shell for US$13,000,000". The letter indicated that other disputes were pending against Zaire Fina and Zaire Mobil Oil, pointing out that Mr. Diallo's claims were "both imaginary and extravagant". The
22 letter concluded as follows: "For this reason, we are seeking the intervention of the Government to warn the courts about the conduct of Mr. Diallo Amadou Sadio in his campaign to destabilize commercial companies."[70]

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[63]POC, Ann. 75.

[64]POC, p. 30, para. 1.53.

[65]POC, p. 30, para. 1.53.

[66]MG, Ann. 166.

[67]POC, Ann. 72.

[68]*Ibid.*, emphasis added by Guinea.

[69]*Ibid.*

[70]POC, Ann. 74.

1.55. Guinea's Memorial also shows that the then Zairean Prime Minister played a decisive role in this case by deciding to impede the execution of judicial decisions. The DRC disputes that allegation, claiming that "these charges are not backed up by any document in the file"[71]. Guinea continues to maintain that Mr. Diallo's arrest, detention and expulsion prevented him from recovering the debts owed to his companies, including the court award previously rendered in the case of *Africontainers* v. *Zaire Shell*. Guinea also maintains that the interference was mainly initiated by the then Zairean Prime Minister, Mr. Kengo Wa Dondo. It bases that assertion on corroborating information on the subject in Zairean newspapers at the time[72], some of which reported the observations of an authoritative human rights NGO *(Avocats sans Frontières)*, which, according to the newspaper *Le Phare*, denounced "Mr. Kengo's obstruction of the execution of a judicial decision" following the "diligence displayed by Mr. Diallo in order to secure execution of his judgment RC 65-834 of 3 July 1995, as confirmed by the Kinshasa/Gombe Court of Appeal in its judgment RCA 18307 of 24 August 1995 against a Dutch company"[73]. The DRC is entitled to challenge the information published in its own newspapers, but it cannot dispute the fact that Guinea has reproduced it accurately. Furthermore, it must be noted that the press was perfectly correct in stating that government authorities had opposed the execution of the judicial decision. The documents in the case file show that a decision for the "release and restitution of the property
23 seized" pursuant to the judgment of 3 July 1995 against Shell, had been taken "by higher authority"[74] and, more specifically, on the "oral instructions of the Minister of Justice"[75].

Section 3: Mr. Diallo has been assimilated to his companies by the Zairean State and by his companies' trading partners

1.56. In its pleadings, the DRC points out that Mr. Diallo has separate legal personality from that of his companies. That is not in dispute. The DRC further repeatedly states that, when he was in Zaire, Mr. Diallo "always acted in the name and on behalf of a Congolese company with its own legal personality"[76]. That is not disputed either. The key issue, however, is whether the Congolese authorities regarded Mr. Diallo and his companies as one and the same person or as two separate persons. The unlawful measures taken by the DRC against Mr. Diallo were not directed at the individual as such but in reality at the companies managed by him. And it is equally clear that those measures affected the companies, through their effect on Mr. Diallo himself.

1.57. The listing paper affair of 1988 is a clear illustration of this: it was because of a debt owed to Africom Zaire by the Zairean Government (and not owed to Mr. Diallo by that Government), that Mr. Diallo, as managing director and sole shareholder of the company, was imprisoned for one year. In this respect, the Republic of Guinea considers that the DRC can hardly claim with respect to that case that "this dispute involves the contractual rights of a Zairean company and not any rights that may belong to Mr. Diallo individually"[77]. For the company's contractual rights have never been disputed. They have never been "at issue". The DRC moreover acknowledges this expressly: "Neither the Republic of Zaire nor the Democratic Republic of the

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[71]POC, pp. 125-126, para. 3.49.

[72]MG, Anns. 192, 193 and 196.

[73]MG, Ann. 191.

[74]OG, Ann. 26, Discharge order RH 26767 of 13 October 1995.

[75]*Ibid.*, letter from the First President of the Kinshasa/Gombe Appeal Court to the Minister of Justice, dated 13 October 1995.

[76]POC, p. 21, para. 1.20; see also p. 26, para. 1.29; p. 29, para. 1.36; p. 33, para. 1.44; p. 35, para. 1.47.

[77]POC, p. 14, para. 1.09.

Congo more recently have ever disputed the fact that the State owed the said amount to the company Africom Zaire"[78].

What was really "at issue", if the case can be referred to in such terms, was an unlawful act
24 by the Zairean authorities against Mr. Diallo to prevent his company from obtaining payment of its debts, which were, moreover, incontestable. The Government's approach consisted, in this case as in others, of assimilating Mr. Diallo to his company.

1.58. Similarly, when Mr. Diallo was arrested in 1995, and subsequently expelled in 1996, it was exclusively because of his economic and financial activities, which had only ever been pursued through his companies. The objective of the authorities was visibly to prevent Africontainers from effectively enforcing its rights before the Congolese courts, but the measures they took were *only* directed against Mr. Diallo, who once again was wholly assimilated to his companies.

1.59. The trading partners of Mr. Diallo's companies were also making that assimilation, as shown by the letter of 15 November 1995 from the chief executives of Zaire Fina and Zaire Mobil Oil. It stated: "Mr. Diallo Amadou Sadio, a Guinean national, obtained an award against Zaire Shell for US$13,000,000"[79]. In the minds of the writers, it was not the company Africontainers, a company incorporated under Congolese law, which had obtained an award in its favour, but it was Mr. Diallo, "a Guinean national". The letter continues as follows: "On the strength of his success in those proceedings, Mr. Diallo is currently threatening Zaire Mobil Oil and Zaire Fina with demands for the payment of US$1,660,626,994.67 in respect of Zaire Mobil Oil and US$2,604,479,706.56 in respect of Zaire Fina"[80]. Once again, it was not Africontainers which, in the minds of the oil company executives, was "threatening" legal proceedings, but "Mr. Diallo". And it was finally against Mr. Diallo, not against Africontainers, that they requested the Prime Minister to act.

1.60. In view of the foregoing, it would be quite wrong to consider in the present case that the losses suffered by Mr. Diallo and those suffered by his companies were totally unconnected: they are in fact inseparable.

25 **Section 4: Mr. Diallo has been without resources since his expulsion**

1.61. Following his expulsion, Mr. Diallo has not been in a position to run his companies since 1996. He can no longer pursue his duties as managing director or exercise his rights as shareholder in the companies Africom Zaire and Africontainers.

1.62. His companies were his sole source of income. Mr. Diallo first settled in Zaire in 1964 and had not retained any economic ties with Guinea. After his expulsion from the DRC in 1996 he was left totally without financial means. In its Preliminary Objections, the DRC criticizes Guinea for not providing sufficient evidence of his impoverishment[81]. The DRC argues that Mr. Diallo would be perfectly capable of continuing to run his companies from outside the country and that it would be open to him to pursue or initiate judicial proceedings.

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[78]POC, p. 14, para. 1.10.

[79]POC, Ann. 74.

[80]*Ibid.*

[81]POC, p. 116, para. 3.33, p. 117, para. 3.34.

1.63. It should first be said that it is somewhat surprising to hear such claims from a State which ordered Mr. Diallo's expulsion precisely to prevent him from running his companies and from pursuing his legal actions. In any event, it is undeniable that Mr. Diallo's situation does not permit him to dispose of the means that he would need to run his companies at a distance. In particular, he is not in a position to hire an agent to represent him in the DRC and manage his companies on the spot, or even to engage lawyers capable of defending his rights.

1.64. The DRC justifies its doubts on the basis of arguments derived from the fact that, during a short period after his expulsion, certain lawyers intervened on behalf of Mr. Diallo's companies[82]. But the fact that Mr. Diallo was able to maintain personal relations with certain lawyers, which led them to provide him with disinterested support, does not prove that Mr. Diallo had the means to pay them.

26 1.65. Moreover, Mr. Diallo was already impoverished in 1995 when he was bringing proceedings against Zaire Shell. Mr. Diallo's lack of resources, which was the direct consequence of the refusal by his companies' trading partners to honour their debts, is illustrated by certificate of insolvency No. 1.DUAS/B.2/0974/95, signed by the Head of the Urban Division of the city of Kinshasa. That certificate, dated 12 July 1995, states:

> "Mr. Dialo *[sic.]* Amadou Sadio, a Guinean national, statutory Director of the company Africontainers SPRL, whose registered address is 20 immeuble PLZ, ninth floor, Gombe District, is hereby declared temporarily destitute, insolvent and devoid of any livelihood, after an examination of his file."[83]

Mr. Diallo's insolvency, while recognized officially, did not prevent lawyers from defending his interests before Congolese courts in 1995.

Section 5: The situation of Mr. Diallo's companies since his expulsion

1.66. After Mr. Diallo's expulsion, Africontainers retained certain assets, in particular containers, and pursued certain activities. This enabled a small portion of the staff to keep the company running at a minimal level, such that it was able to continue certain activities for just over one year after the expulsion of its managing director, as the DRC has pointed out [84].

1.67. The negotiations engaged with Gécamines, if they had succeeded, might have enabled Africontainers to re-acquire sufficient resources to enable it to resume a degree of activity. This was not possible, however, because the negotiations broke down in 1997. The DRC accuses Mr. Diallo of being responsible for that breakdown[85]. But this overlooks the fact that Gécamines was at that time using pressure against which Mr. Diallo could not raise any effective resistance. From one day to the next, Gécamines claimed to have discovered evidence of "fraudulent conduct"
27 by Africontainers "dating back to the 1980s"[86]. As in 1988, in the listing paper affair, the State was again resorting to the method of unfounded accusations. From outside the Congo, Mr. Diallo was not in a position to conduct the necessary inquiries to prove that those accusations were unfounded. He thus broke off the discussion, taking the most reasonable option then open to him.

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[82]POC, p. 117, para. 3.34.

[83]OG, Ann. 22.

[84]MG, pp. 27-28, paras. 2.54-2.57.

[85]POC, p. 18, para. 1.15.

[86]POC, pp. 18-19, para. 1.16.

1.68. Since then, Africontainers has fallen into ruin. Many of its containers were scattered over the city of Kinshasa, before being retrieved and stored by order of the local authorities[87]. In any event, they were no longer involved in any activity of the company. Moreover, the judgment of the Kinshasa Appeal Court of 20 June 2002 states that Africontainers has no current known address in the DRC[88].

Conclusion of Chapter I

1.69. The Republic of Guinea considers that its national's history shows that he was an honest and efficient investor, businessman and company director, whose activities, together with those of his companies, were impeded by a multitude of abuses and violations affecting both Mr. Diallo's own rights and those of his companies. The Congolese State is involved in all the problems he has encountered and took action on two occasions, in 1988 and 1995, against Mr. Diallo personally, regarding him as the very embodiment of his companies, in order to prevent him from acting usefully on their behalf. As a result of those actions, both Mr. Diallo and his companies have been ruined.

1.70. After that statement of the pertinent facts, Guinea will now respond in the following chapter to the first preliminary objection of the DRC, namely that the Republic of Guinea is not entitled to exercise its diplomatic protection in the present case.

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[87]OG, Anns. 31, 32 and 33.

[88]POC, Ann. 64.

CHAPTER II

GUINEA IS ENTITLED TO EXERCISE ITS DIPLOMATIC PROTECTION ON BEHALF OF MR. DIALLO

29 2.01. In its Memorial Guinea showed that international law recognizes that it is entitled to protect its national, Mr. Diallo, both in person and in his capacity as managing director and shareholder of two Congolese companies, Africom-Zaire (Africom) and Africontainers-Zaire (Africontainers)[89].

2.02. The DRC has raised a preliminary objection in this regard, but it should be noted from the outset that at no time does it dispute the fact that Guinea has capacity to act with a view to obtaining reparation for the violations of international law constituted by the arbitrary arrest, illegal detention and expulsion of its national, Mr. Diallo. Thus the Respondent admits, through its silence, of which Guinea expressly asks the Court to take note, that no argument as to the applicant State's lack of capacity to act could succeed in so far as such action concerns a violation of international law against the person of Mr. Diallo.

2.03. However, in its first preliminary objection the DRC argues that Guinea has no capacity to act in the present proceedings. Its position on this point is set out in Chapter II of the Preliminary Objections. Its argument runs as follows:

(i) The essential aim of Guinea's Application is to obtain compensation for the totality of the losses suffered by two Congolese companies[90];

(ii) Since it seeks compensation for a violation of the rights of legal persons not possessing its nationality, Guinea's Application must be rejected as inadmissible[91];

(iii) The fact that the principal shareholder of these companies, Mr. Diallo, is of Guinean nationality cannot affect this conclusion, since the Court is bound to apply to the present
30 case the reasoning adopted by it in the *Barcelona Traction* case which led it to dismiss the Belgian Application[92];

(iv) Neither the particular circumstances of the present case nor considerations of equity are capable of overturning that conclusion[93].

2.04. The DRC's argument rests more specifically on two claims: first, Guinea is seeking to act on behalf of companies which do not possess its nationality; secondly, it follows from the principle laid down by the Court in the *Barcelona Traction* case[94] that Guinea's claim must be adjudged to be inadmissible. These two basic premises are mistaken. This is clear from the following three points.

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[89]MG, pp. 76-96, paras. 4.1-4.59.

[90]POC, p. 47, para. 2.01.

[91]*Ibid.*, p. 47, para. 2.03.

[92]*Ibid.*, pp. 47-48, para. 2.03.

[93]POC, p. 48, para. 2.04.

[94]Judgment of 5 December 1970, case concerning the *Barcelona Traction, Light and Power Company, Limited, I.C.J. Reports 1970*, p. 52.

2.05. First, it is incorrect to claim that Guinea is in reality seeking to exercise its diplomatic protection on behalf of companies of Congolese nationality. It is, and always has been, in order to protect the rights of its national, Mr. Diallo, both in person and in his capacity as shareholder and managing director of companies registered in Zaire (now the DRC) that Guinea is acting[95].

2.06. Secondly, contrary to what the DRC claims, the *Barcelona Traction* case, on which its first objection is essentially founded, does not offer the "great many similarities" with the present one which the DRC claims to be able to see and which would accordingly lead to the same solution being applied here[96]. The very simple factual framework of the present case is about as far removed as it is possible to be from that in the *Barcelona Traction* case. In that dispute between Belgium and Spain, what was at issue was a complex interplay of multinational relations. The present case merely involves two companies controlled by a single shareholder, Mr. Diallo, who, before his expulsion, was the sole person actively engaged in managing them; and, moreover, the
31 very purpose of that expulsion was to disrupt his management of the two companies concerned[97]. That event is obviously fundamental: it clearly shows that the relevant acts must in reality be regarded as directly aimed at the sole shareholder and manager, Mr. Diallo, and at him alone[98].

2.07. Thirdly, in so far as the decision in the *Barcelona Traction* case may be relevant in order to throw light on the reasoning in the present case, it is not so much because it lays down a general principle as that it envisages an exception. That exception concerns the situation where the place of incorporation of the company in which the shareholder of the applicant State has invested is in fact the respondent State.

2.08. In the remainder of this chapter these points will be developed. After showing what distinguishes the present case from the *Barcelona Traction* case (Section 1), Guinea will return to the issue of its right to exercise its diplomatic protection on behalf of Mr. Diallo in his capacity as investing shareholder (Section 2), then to that of its right to exercise its diplomatic protection in the very particular circumstances of the present case, which are characterized by the fact that Mr. Diallo's two companies were incorporated in Zaire, now the DRC (Section 3).

Section 1: The *Barcelona Traction* case revisited

2.09. In stating that the *Barcelona Traction* case "offers a great many similarities to the present one"[99], the overall logic of Congo's argument runs as follows: the issues posed in the present case are the same as those posed in the *Barcelona Traction* case; the decision on those issues went against the Applicant, Belgium; Guinea does not contend that the *Barcelona Traction* case does not reflect the current state of positive international law; conclusion: just as with Belgium's Application in 1970, Guinea's Application must be adjudged inadmissible.

32 2.10. That logic is defective in two respects. First, it takes no account of the differences — nonetheless, substantial differences — between the facts which led Guinea to seise the Court and

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[95]MG, p. 79, para. 4.12, and p. 80, para. 4.15.

[96]POC, p. 47, para. 2.03.

[97]Obviously, in the *Barcelona Traction* case, there was never any question of detention or expulsion of the Belgian shareholders.

[98]On this point, see above, Chapter I, Section 3.

[99]POC, p. 47, para. 2.03.

those on which the Court based its decision in the *Barcelona Traction* case (A). Furthermore, the DRC misinterprets that decision, since it takes no account of the limits on the general principle laid down therein by the Court (B).

A. The facts in the *Barcelona Traction* case are altogether different from those in the present proceedings

2.11. As regards the nationalities of the companies concerned and of their shareholders, the *Barcelona Traction* case is characterized by the following elements:

(i) The Barcelona Traction, Light and Power Company Limited was a company incorporated in Toronto, Canada, where it also had its head office.

(ii) The Belgian Application was based on the fact that 88 per cent of the company's shares were held by persons of Belgian nationality. In particular, Belgium had emphasized the very high percentage of shares held by the Société Internationale d'Energie Hydro-Electrique (SIDRO), whose principal shareholder, the Société Financière de Transports et d'Entreprises Industrielles (Sofina) was a company in which Belgian interests were preponderant. However, Belgium's involvement in the shareholding was disputed by Spain. Large blocks of shares had been transferred to American nominees, to protect them in the event of invasion of territory during the Second World War, and for a time the shares were vested in a trustee. Spain contended that the trustee and the nominees should be regarded as the true shareholders, and disputed the reality of their Belgian nationality on that ground[100].

33 2.12. As the Court stated in paragraph 31 of its Judgment:

> "Thus the Court has to deal with a series of problems arising out of a triangular relationship involving the State whose nationals are shareholders in a company incorporated under the laws of another State, in whose territory it has its registered office; the State whose organs are alleged to have committed against the company unlawful acts prejudicial to both it and its shareholders; and the State under whose laws the company is incorporated, and in whose territory it has its registered office."[101]

2.13. The differences in relation to the case brought by Guinea before this Court are clear. In the first place, Africom and Africontainers were not incorporated in a State not party to the proceedings, but in Zaire, now the DRC, the respondent State. The triangular relationship characterizing the facts of the *Barcelona Traction* case is absent here. Secondly, there is no ambiguity or dispute regarding the nature of Mr. Diallo's interest in the shareholdings of Africom and Africontainers. He is the owner of the entirety of the shares, a fact not disputed by the DRC[102].

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[100]Judgment of 5 February 1970, case concerning the *Barcelona Traction, Light and Power Company, Limited, I.C.J. Reports 1970*, pp. 7-8, paras. 8-9.

[101]*I.C.J. Reports 1970*, p. 31, para. 31.

[102]Mr. Diallo is the sole shareholder in Africom, and the sole active shareholder in Africontainers, directly or through his holding in Africom. See MG, p. 11, para. 2.4. In such circumstances, it has been suggested that the State of the shareholder might properly exercise a right of diplomatic protection; see C. Staker, "Diplomatic protection of Private Business Companies: Determining Corporate Personality for International Law Purposes", (1990), 61 *British Year Book of International Law*, p. 172:

Thirdly, in the present case Guinea's Application is partly founded on the right to exercise diplomatic protection in order to protect the direct rights of a shareholder[103].

2.14. As regards this third difference between the present case and that between Belgium and Spain, the Court, in the very passages from the 1970 Judgment on which the DRC relies[104], states that it will address:

34 "what was originally presented as the subject-matter of the third preliminary objection: namely the question of the right of Belgium to exercise diplomatic protection of Belgian shareholders in a company which is a juristic entity incorporated in Canada, the measures complained of having been taken in relation not to any Belgian national but to the company itself"[105].

The Court then formulated the question in the following terms:

> "In other words: has a right of Belgium been violated on account of its nationals' having suffered infringement of their rights as shareholders in a company not of Belgian nationality?"[106]

The Court then addressed the issue of a possible violation of the rights of Belgian nationals, but not in terms of the violation of their direct rights as shareholders, since Belgium had not based its Application on such a claim. The Court stated in this regard:

> "The Court has noted from the Application, and from the reply given by Counsel on 8 July 1969, that the Belgian Government did not base its claim on an infringement of the direct rights of the shareholders. Thus it is not open to the Court to go beyond the claim as formulated by the Belgian Government and it will not pursue its examination of this point any further."[107]

2.15. It is clear from this comparison that, contrary to what the DRC would have us believe, Guinea's Application is in reality totally different from that of Belgium in the *Barcelona Traction* case:

"In the case of an enterprise conducted by a 'one-person' company incorporated in State A, in which the 'one-person' is a national of State B, State A has no greater, and State B no lesser, interest in protecting a company than in a case in which the enterprise was conducted in the person's own name. As there is no reason for international law to apply automatically the consequences of municipal law, it is submitted that the better view is that any injury inflicted on such an enterprise should be the subject of a potential claim by State B only."

The simplicity of this approach presents a number of advantages. It should also be noted that the objections invoked by the Court in its Judgment of 5 February 1970 (*I.C.J. Reports 1970*, p. 32, paras. 95-96) are not relevant in this type of situation.

[103]MG, p. 80-92, paras. 4.16-4.50.

[104]POC, pp. 52-55, paras. 2.13-2.18.

[105]Judgment of 5 February 1970, case concerning the *Barcelona Traction, Light and Power Company, Limited, I.C.J. Reports 1970*, p. 32, para. 32. The Court decided that the issue should be joined to the merits: Judgment of 24 July 1964, *Barcelona Traction, Light and Power Company, Limited, I.C.J. Reports 1964*, pp. 44-46. It is somewhat surprising that in its preliminary objections the DRC took no account of this decision.

[106]*Ibid.*, pp. 32-33, para. 35. See R. Higgins, "Aspects of the Case concerning the Barcelona Traction, Light and Power Company, Ltd." (1971) 11 *Virginia Journal of International Law* 327, 330: "The relevant question, as Fitzmaurice correctly observed, is what person or entity has a cause of action in regard to damage sustained by shareholders, resulting from illicit treatment of the company."

[107]Judgment of 5 February 1970, case concerning the *Barcelona Traction, Light and Power Company, Limited, I.C.J. Reports 1970*, p. 37, para. 49.

— it seeks to protect the rights of a foreign shareholder;

— that shareholder has exclusive, or a totally preponderant, ownership of the shares in the companies incorporated in the respondent State;

35 — the case involves bilateral relations, to the exclusion of any potential right or interest of a third State or its nationals.

B. The solutions adopted in the *Barcelona Traction* case are irrelevant for purposes of the present proceedings

2.16. It follows from the foregoing that the general rule established by the Court in 1970, whereby: "where it is a question of an unlawful act committed against a company representing foreign capital, the general rule of international law authorizes the national State of the company alone to make a claim"[108], has no application to the present case. Even if that rule is frequently criticized[109], Guinea has no need to take any position in that regard, for it is not asking the Court to redebate this issue. It is precisely the questions raised but not settled in the *Barcelona Traction* case which are posed here: one relates to the extent of shareholders' rights, as distinct from those of the companies, which may, if they are infringed, support the exercise of diplomatic protection; the other concerns the relevance of the exception to the general rule which the Court evoked in 1970, without however examining it.

2.17. As regards the extent of shareholders' direct rights, the Court admitted in the *Barcelona Traction* case that:

> "The situation is different if the act complained of is aimed at the direct rights of the shareholder as such. It is well known that there are rights which municipal law confers upon the latter distinct from those of the company, including the right to any declared dividend, the right to attend and vote at general meetings, the right to share in the residual assets of the company on liquidation. Whenever one of his direct rights is infringed, the shareholder has an independent right of action. On this there is no disagreement between the Parties. But a distinction must be drawn between a direct infringement of the shareholder's rights, and difficulties or financial losses to which
36 he may be exposed as the result of the situation of the company."[110]

2.18. This point is in fact not disputed, and the DRC itself accepts the principle of a right of diplomatic protection of the shareholder where his direct rights are involved[111]. The first issue before the Court in the present case is thus not whether Guinea is entitled to exercise its diplomatic protection in order to protect Mr. Diallo in his capacity as shareholder. What is at issue is rather to determine the extent of the "direct rights of shareholders as such", and to ascertain whether such rights have been infringed in this case. Guinea will develop its argument on this point below (Section 2).

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[108]Judgment of 5 February 1970, case concerning the *Barcelona Traction, Light and Power Company, Limited, I.C.J. Reports 1970*, p. 46, para. 88.

[109]In the Fourth Report on Diplomatic Protection submitted to the ILC by J. Dugard, the Special Rapporteur summarizes the considerable criticism provoked by the Judgment (pp. 6-10, paras. 14-21 of the Report).

[110]Judgment of 5 February 1970, case concerning the *Barcelona Traction, Light and Power Company, Limited, I.C.J. Reports 1970*, p. 36, para. 47.

[111]POC, p. 76, para. 2.60.

2.19. The second question concerns the exception to the general rule evoked in 1970 by the Court in the following terms:

> "it has been maintained that, for reasons of equity, a State should be able, in certain cases, to take up the protection of its nationals, shareholders in a company which has been the victim of a violation of international law. 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."[112]

2.20. The question raised by Guinea's Application is whether this theory is accepted by international law, since in this case the national State of the companies concerned, the DRC, is also the Respondent. The Court did not have to decide the issue in the *Barcelona Traction* case, for it did not arise: the company in question was incorporated not in Spain but in Canada. It unquestionably arises here, and Guinea will return to it below (Section 3).

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Section 2: Guinea's right to exercise its diplomatic protection on behalf of Mr. Diallo in his capacity as shareholder

2.21. The DRC contends that none of Mr. Diallo's direct rights as shareholder have been infringed in this case. But that contention is based on a misconception of the extent of shareholders' direct rights (A), and on a presentation of events which disregards the crucial fact that Mr. Diallo was expelled in his capacity as managing shareholder of the companies Africom and Africontainers, with the undeniable aim of preventing him from continuing to manage and control those companies (B). The DRC ignores this latter point. However, assuming that in the *Barcelona Traction* case, before initiating liquidation proceedings, Spain had expelled its shareholders, it is more than doubtful that the Court would have taken the view that the shareholders' rights were not affected.

A. The extent of shareholders' rights

2.22. Guinea argued in its Memorial that shareholders have 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"[113]. In order properly to define the rights of shareholders, it is not sufficient, as the DRC does[114], to confine oneself to the examples given by the Court in the *Barcelona Traction* case. It is true that these include such important rights as the right to any declared dividend, the right to attend and vote at general meetings and the right to share in the residual assets of the company on liquidation. But the Court itself stated that these examples are merely illustrative[115].

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[112]Judgment of 5 February 1970, case concerning the *Barcelona Traction, Light and Power Company, Limited, I.C.J. Reports 1970*, p. 48, para. 92.

[113]MG, pp. 82-83, para. 4.23.

[114]POC, pp. 77-78, para. 2.63.

[115]Judgment of 5 February 1970, case concerning the *Barcelona Traction, Light and Power Company, Limited, I.C.J. Reports 1970*, p. 36, para. 47.

38 2.23. Guinea acknowledges that international practice in this field is somewhat scant, as the Respondent indicates[116]. But what it does show is that recourse should primarily be had to the domestic law of the State of incorporation of the company in order to determine the extent of shareholders' rights vis-à-vis the company. In the *Barcelona Traction* case, the Court makes explicit reference to municipal law for purposes of determining "the rights of States with regard to the treatment of . . . shareholders, as to which rights international law has not established its own rules". For the Court:

> "international law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. This in turn requires that, whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law. Consequently, in view of the relevance to the present case of the rights of the corporate entity and its shareholders under municipal law, the Court must devote attention to the nature and interrelation of those rights."[117]

The Court goes on to state, in regard to shareholders:

> "It is well known that there are rights which municipal law confers upon the latter distinct from those of the company, including the right to any declared dividend, the right to attend and vote at general meetings . . . Whenever one of his direct rights is infringed, the shareholder has an independent right of action."[118]

2.24. In his Fourth Report, Professor John Dugard, ILC Special Rapporteur on diplomatic protection, states: "In most cases it seems that this is a matter to be decided by the law of the State of incorporation . . . That the Court had municipal law, and not international law, in mind as the governing legal order is clear from its own dictum." He adds: "This may, however, be a case for the invocation of general principles of law, particularly where the company is incorporated in the wrongdoing State, to ensure that the rights of foreign shareholders are not subjected to discriminatory treatment."[119]

39 2.25. Guinea considers that this analysis is correct. Nonetheless, it takes the view that the facts alleged by it, on which it is not necessary to decide at this phase of the proceedings, show that Mr. Diallo's direct rights as shareholder have been infringed, both under the domestic law of the DRC and in terms of shareholders' rights in accordance with the examples given by the Court in the *Barcelona Traction* case.

1. Shareholders' rights under Congolese law

2.26. Under the Congolese Companies Act, a shareholder (described in the Act as a "member") in a private limited liability company has a series of important rights, pursuant to the Commercial Companies Decree of 1887:

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[116]POC, p. 79, para. 2.66.

[117]*I.C.J. Reports 1970*, pp. 34-35, para. 38.

[118]*Ibid.*, p. 37, para. 47.

[119]Fourth Report on Diplomatic Protection submitted to the ILC, J. Dugard, p. 40, para. 92.

(i) Article 51 establishes a régime whereby each share engenders certain rights: "Each share confers an equal entitlement in the exercise of members' prerogatives as well as in the distribution of profits . . ."

(ii) Article 65 gives shareholders the right to appoint the company's directors, either by naming them in the instrument of incorporation or by participation in the general meeting: "The directors shall be appointed either in the instrument of incorporation or by the general meeting, for a period which may be fixed or indeterminate."

(iii) Article 71 provides for a power (where the number of shareholders does not exceed five) of oversight in respect of the management of the company: "Oversight of the management shall be entrusted to one or more administrators, who need not be members, called 'commissioners' . . . If the number of members does not exceed five, the appointment of commissioners shall not be obligatory and each member shall have the powers of a commissioner." Article 75 specifies the content of this important right: "The power of the commissioners shall consist in an unrestricted right of oversight and control over all acts carried out by the management, over all the company's operations and over the register of members."

(iv) Articles 78 and 79 define the wide powers of the general meeting and the right of shareholders to participate therein: "The general meeting of members shall have the widest powers to perform or ratify acts concerning the company . . ." (Article 78); "Notwithstanding any provision to the contrary, all members shall have the right to take part in general meetings and shall be entitled to one vote per share" (Article 79).

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2.27. These rights are embodied in the constituent instruments of Mr. Diallo's two companies. It should moreover be emphasized that Mr. Diallo, as shareholder in companies whose number of members did not exceed five, enjoyed the additional rights conferred by Article 71[120].

2.28. Africontainers further enjoyed a number of the protections provided for by the Investment Code, including protection in the event of expropriation:

(i) Article 5 of the Interdepartmental Decree of 5 August 1981 provides: "The State guarantees to foreign investors the right to transfer their income, in proportion to the amount of their original investment, either in foreign currency or in materials valued in foreign currency (Article 30 of the Code)."[121]

(ii) Article 5 of the said Interdepartmental Decree of 5 August 1981 further provides: "Also transferable is . . . any compensation owed to foreigners in respect of expropriation as provided in Article 4 above (Article 31 of the Code)"[122].

(iii) Article 5 of the Investment Code contains a still wider guarantee: "Individual or collective property rights acquired by the investor in accordance with Zairean law are guaranteed by the Constitution of the Republic of Zaire."[123]

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[120]See, for example, Article 19 of the constituent instrument of Africontainers, MG, Ann. 1: "The oversight of the company shall be exercised by each of the members."

[121]MG, Ann. 10.

[122]MG, Ann. 10.

[123]Investment Code of 5 April 1986.

2.29. It follows from the foregoing that Mr. Diallo, as shareholder, enjoyed a number of basic rights in regard to his two companies, namely:

(i) The right to a share of the profits of his companies;

41 (ii) A right of ownership in his companies, in particular in respect of his shares;

(iii) The right to appoint the director of his companies;

(iv) An unrestricted right of oversight and control in respect of all acts performed by the management and of all operations of his companies;

(v) The right to take part in general meetings.

2.30. In addition to these rights, there was an obligation of particular significance in this case. Article 1 of Law 66-341 concerning the registered office or administrative seat provides that "Companies whose main centre of operation is situated in the Congo must have their administrative seat in the Congo. For purposes of this Decree-Law, 'administrative seat' means the place where the company has its central administration and where general meetings and board meetings are held". Since the principal centre of operations of Mr. Diallo's two companies was situated in the DRC, it follows that their administrative seats also had to be situated in the DRC.

2. Shareholders' rights: relevant principles of international law

2.31. Both Parties agree that there are rights of shareholders recognized by international law[124]. They disagree as to the extent of those rights. Three observations will suffice at this point.

2.32. First, as regards the illustrative list given by the Court in the *Barcelona Traction* case, it should be made clear that, in the case of the right to take part in general meetings, this cannot be defined in any purely formal sense. Participation in general meetings only has any meaning to the extent that it gives the shareholder the right to participate in the company's decisions. That indeed is the very meaning of the corporate bond between the shareholder and the company whose shares he holds: investment in the capital of an undertaking entitles the investor not only to shares to
42 which there attaches a right to any dividends, but also to voting rights enabling a right of control and management to be exercised over the company for the specific purpose of ensuring that the policies adopted by it will be profitable to the shareholders. In these circumstances, it is clear that any action aimed at preventing the sole shareholder in an undertaking from controlling and managing his company by *inter alia* preventing him from taking part in general meetings would be a violation of his rights as shareholder. That is the situation in the present case.

2.33. Secondly, there should be added to the illustrative list given by the Court in the *Barcelona Traction* case a specific proprietary right in respect of the shares held by the shareholder. According to *Oppenheim's International Law*:

> "Shareholders may, furthermore, have their rights directly infringed (as where shares held only by a particular category of owners are expropriated), as opposed to suffering loss indirectly through damage inflicted upon the company. In such cases

[124] As regards the DRC, see Preliminary Objections, pp. 76-80, paras. 2.61-2.66.

the shareholder will have an independent ground of complaint which his national state may take up on his behalf."[125]

2.34. Thirdly, the DRC has criticized Guinea's reliance on the *Elettronica Sicula S.p.A. (ELSI)* case[126]. It is true that in the *ELSI* case Article III (2) of the Treaty of Friendship created an express right of control and management in respect of corporations; but the important point is that the Court viewed this right as a shareholder's right and not as a right of the company itself[127].

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3. Acts constituting infringements of the rights of the shareholder, Mr. Diallo

2.35. Guinea is of the view that at the stage of consideration of the admissibility of its Application, the following facts impel the conclusion that Mr. Diallo's direct rights as a shareholder have indeed been infringed:

(i) Mr. Diallo, a Guinean national, is the sole shareholder in two companies incorporated in Zaire, now known as the DRC; that is not contested;

(ii) The Zairean authorities were fully aware of that state of affairs; that is not contested;

(iii) Mr. Diallo was imprisoned, and expelled from the country; that is not contested;

(iv) Those measures were intended to prevent Mr. Diallo from exercising his rights as a shareholder, including his right to oversee and control all the operations of his companies; that issue of fact is in dispute between the Parties;

(v) Since then, he has no longer been able to exercise his rights as shareholder; the Parties also differ on that issue of fact;

(vi) Guinea is exercising its right of diplomatic protection with respect to the shareholder, Mr. Diallo, *inter alia* on the grounds that his direct rights as a shareholder have been infringed; this point is incontestable.

These facts constitute infringements of Mr. Diallo's rights as a shareholder, as defined *supra*[128].

3.36. Mr. Diallo's periods of imprisonment in 1988 and 1995 were manifestly measures preventing him from participating in any aspect of corporate activities, and, in particular, in the

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[125] *Oppenheim's International Law*, 9th ed. (1990), Longman, p. 520. For Guinea's arguments regarding the protection owed by the State to the property of foreigners, see MG, paras. 3.13-3.23.

[126] POC, pp. 70-73, paras. 2.51-2.54.

[127] The DRC suggests that in the *ELSI* case Italy did not claim that the application was inadmissible on account of the company's Italian nationality (POC, para. 2.52). But the Judgment establishes the contrary (*I.C.J. Reports 1989*, p. 64, para. 106 and p. 79, para. 132). Moreover, the Judgment shows that the Chamber did not regard itself as precluded from exercising its jurisdiction notwithstanding these objections, of which it was well aware (*I.C.J. Reports 1989*, pp. 64 and 68, paras. 106 and 135). Some authors have concluded from this that the Judgment recognized that the right to control and manage a company was a shareholder's right. V. Lowe, "Shareholder's Rights to Control and Manage: from *Barcelona Traction* to *ELSI*", in *Liber Amicorum Judge Shigeru Oda*, ed. N. Ando *et al.* (2002), p. 269; A. Watts, "Nationality of Claims: Some Relevant Concepts", in *Fifty Years of the International Court of Justice. Essays in Honour of Sir Robert Jennings* (1996), p. 435, Note 56.

[128] See *supra*, paras. 2.26-2.34, and in particular para. 2.29. With regard to the statement of the facts, Guinea will refer where necessary to Chapter I, in which they are set out.

44 administration of his companies[129]. Moreover, one need only recall that the general meetings of Mr. Diallo's companies were required to be held in the DRC[130] to realize that his expulsion in 1996 prevented him, *de facto,* from participating in any way in those general meetings, and in the administration, management and control of any of the operations of his companies. Consequently, he was unable to exercise any of his rights as a shareholder.

2.37. Guinea also points out that Mr. Diallo, an investor enjoying the protection of the Investment Code, must be regarded as the lawful owner of the shares in the companies set up by him in order to realize his investments[131]. This is in any case acknowledged by the DRC in paragraph 2.76, page 85, of its Preliminary Objections. Mr. Diallo's shares were expropriated *de facto,* in contravention *(inter alia)* of Article 5 of the Investment Code[132].

3.38. Although the DRC claims the contrary[133], Guinea considers it undeniable that the measures taken against Mr. Diallo infringing his rights as a shareholder were specifically directed against those rights. Thus, the facts of the case as set out in Chapter I of these Observations show that the arrests of Mr. Diallo and his expulsion had the purpose and effect of preventing him from continuing to administer, manage and control any of the operations of the companies Africom and Africontainers, of which he was the sole active shareholder and the sole director[134]. It is clear that in 1988 and 1995 the Congolese authorities acted against Mr. Diallo not because, as a natural person of Guinean nationality, he was causing them difficulties, but because he seemed to them to represent the very personification of his companies[135]. Moreover, such a confusion is readily explicable by the fact that Mr. Diallo was the sole active shareholder in his companies. As Professor Brigitte Stern rightly notes: "One can well imagine that in a factual situation of this type, a confusion between the shareholders and the company may creep in more easily, and, so to speak,
45 'painlessly'."[136] In the present case, the confusion between the two that crept in was clearly not "painless" for the shareholder.

2.39. Consequently, even if it is incontestable that the relevant Zairean law at the time of the acts effectively distinguished the legal personality of the shareholder, on the one hand, from the legal personality of the companies of which he is a shareholder, on the other, it was that country's authorities who voluntarily pierced the corporate veil and took measures against the rights of the shareholder in order to attack his companies.

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[129]On the events of 1988 and 1995, see *supra,* Chapter I, paras. 1.35-1.55.

[130]See *supra,* para. 2.30.

[131]See *supra,* paras. 2.28, 2.33.

[132]On expropriation and unreasonable interference, see MG, pp. 44-48, paras. 3.13-3.23, and pp. 54-67, paras. 3.35-3.63.

[133]POC, p. 80, headings 2, and 2 *(a)*.

[134]The analysis that must be made of Mr. Diallo's situation is, furthermore, not dissimilar from the one made by the Chamber of the Court with regard to Raytheon, shareholder in the *ELSI* case. In that case, the Chamber of the Court noted: "It is . . . undeniable that this requisition . . . had the design of preventing Raytheon from exercising, for six critical months, what was at that time a most important part of its right to control and manage ELSI . . ." (*I.C.J. Reports 1989,* p. 50, para. 70.)

[135]See *supra,* Chapter I, paras. 1.56-1.60.

[136]B. Stern, "La protection diplomatique des investissements internationaux", *JDI* 4, 1990, pp. 897 *et seq.*, p. 932.

B. The right of Guinea to exercise its diplomatic protection on the grounds that Mr. Diallo's two enterprises were incorporated in the DRC

2.40. In its Memorial Guinea argued in the alternative that, even if the only pertinent rights in the case were found to be those of Mr. Diallo's two companies, and not his rights as a shareholder, Guinea would still be entitled to exercise its diplomatic protection, on the basis of the exception authorizing such action when the State in which the companies concerned are incorporated is the very State to which the Applicant attributes wrongdoing[137]. This hypothesis will be referred to hereafter as the "exception", so as not to overburden the text unnecessarily.

2.41. The DRC argues that the exception is neither justified in positive international law nor applicable to the present case[138]. The Respondent's position is based on its interpretation of the jurisprudence, but also on its hostility on principle to application of this exception to the extent that it is claimed to derive from principles of equity[139].

46 2.42. On this latter point, the Republic of Guinea stands by what it stated in its Memorial[140], and considers that a theoretical debate on the matter would be unhelpful. It considers that the facts of the case, and in particular the conduct of the Zairean authorities, must justify application of the exception in respect of Mr. Diallo[141]. It will not revert to the theoretical debate, since Guinea's claim to be entitled to exercise its diplomatic protection in the circumstances of the case is based (1) on the relevant exception to the principle of international law, as evoked by the Court in the *Barcelona Traction* case, (2) on other jurisprudence, doctrine and State practice, and (3) on the most recent work of the International Law Commission, particularly Professor Dugard's Fourth Report on Diplomatic Protection (2003).

1. The exception as invoked by the Court in the *Barcelona Traction* case

2.43. In referring to the possibility of an exception to the general rule "when the State whose responsibility is invoked is the national State of the company", in the *Barcelona Traction* case the Court remained ostensibly neutral with regard to the question whether that exception was valid in international law. It had no need to reach a final conclusion on this matter, since the exception would in any case clearly not have been applicable to the facts of the case.

The Court confined itself to stating:

> "On the other hand, the Court considers that, in the field of diplomatic protection as in all other fields of international law, it is necessary that the law be applied reasonably. It has been suggested that if in a given case it is not possible to apply the general rule that the right of diplomatic protection of a company belongs to its national State, considerations of equity might call for the possibility of protection of the shareholders in question by their own national State. This hypothesis does not correspond to the circumstances of the present case.

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[137]MG, pp. 93 *et seq.*, paras. 4.51 *et seq.*

[138]POC, pp. 88 *et seq.*, paras. 2.80 *et seq.*

[139]*Ibid.*, pp. 88-94, paras. 2.82-2.89.

[140]MG, pp. 93-96, paras. 4.51-4.59.

[141]See Section 4, *infra*.

> In view, however, of the discretionary nature of diplomatic protection, considerations of equity cannot require more than the possibility for some protector State to intervene, whether it be the national State of the company, by virtue of the
47 general rule mentioned above, or, in a secondary capacity, the national State of the shareholders who claim protection."[142]

2.44. This latter observation is of course an *obiter dictum*. It is thus all the more significant that the Court found it necessary to include it in the text of its Judgment. Its additional comments lead one to believe that a majority of the judges regarded the exception as established in law.

2.45. In this regard Guinea has already pointed out in its Memorial that Judges Jessup and Fitzmaurice supported the existence of this exception[143]. So did Judge Tanaka[144], and also Judge Wellington Koo, who explained, at the Preliminary Objections stage:

> "For this reason [the fact that these were problems hitherto unknown in international law, to which a just and equitable solution must be found], the original simple rule of protection of a company by its national State has been found inadequate and State practice, treaty regulation and international arbitral decisions have come to recognize the right of a State to intervene on behalf of its nationals, shareholders of a company which has been injured by the State of its own nationality, that is to say, a State where it has been incorporated according to its laws and therefore is regarded as having assumed its nationality."[145]

2.46. Admittedly, not all the judges took the same view, and it was indeed in all likelihood because of the opposition of certain of them that the existence of the exception was evoked only in somewhat cautious terms in the body of the 1970 Judgment. Three judges were opposed to it: Judges Morelli, Ammoun and Padilla Nervo[146]. It was the latter who expressed the most vigorous opposition to the exception, making clear his hostility to the notion that paragraph 92 of the Judgment could be interpreted as expressing any particular view on the matter. But it should be pointed out that his opposition was based on political grounds which, in the present case, do not apply. His concern was to avoid a situation where international law should recognize a right of States to accord their protection to "powerful international corporations" involved in "the
48 exploitation of natural resources of many countries in the process of development"[147], thus strengthening their control over such resources. That concern clearly cannot have any relevance to the present case, which relates to two developing countries, and, inasmuch as corporations are involved, they are neither multinational nor engaged in the exploitation of the natural resources of any country whatever.

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[142]Judgment of 5 February 1970, case concerning the *Barcelona Traction, Light and Power Company, Limited, I.C.J. Reports 1970*, p. 48, paras. 93-94.

[143]MG, pp. 93-96, paras. 4.53-4-58.

[144]Judgment of 5 February 1970, case concerning the *Barcelona Traction, Light and Power Company, Limited, I.C.J. Reports 1970*, p. 134, where he specifies that it is "following the general tendency of international practice and doctrine".

[145]Judgment of 24 July 1964, case concerning the *Barcelona Traction, Light and Power Company, Limited, I.C.J. Reports 1964*, p. 58, para. 20.

[146]Judgment of 5 February 1970, case concerning the *Barcelona Traction, Light and Power Company Limited, I.C.J. Reports 1970*, pp. 240-241, 257-259 and 318.

[147]*Ibid.*, pp. 258-259.

2.47. The view of the Court's Judgment taken in *Oppenheim's International Law* is that, while the Court did not adopt any position on the exception "a majority of the ICJ supported [its] existence"[148]. F. A. Mann reached the same conclusion. In an article which sought: "to discover the judicial attitudes inherent in the Court's judgment and also to ascertain what, in the light of the factual background was actually decided by the Court, whether in express terms or by necessary implication", his conclusion was that the Judgment appears to establish the following proposition: "7 *(a)* It is likely that the shareholders' state has a right of diplomatic protection if the company is a national of the Respondent state."[149]

2.48. The Court's Judgment in the *Barcelona Traction* case must accordingly be regarded as supporting Guinea's position. The same applies to other decisions, including those of the Court, to doctrine and to State practice (2), and to the draft articles and conclusions recently presented by the Special Rapporteur to the International Law Commission, Mr. Dugard, in his Fourth Report on Diplomatic Protections (3).

2. Jurisprudence, doctrine and State practice

2.49. Guinea has already cited in its Memorial a series of arbitral awards recognizing that shareholders in foreign corporations can obtain diplomatic protection from their State of nationality
49 when such corporations have been the victims of unlawful acts on the part of the State under whose law they were constituted[150]. Guinea maintains its position in regard to those decisions.

2.50. The DRC obviously takes a different view. It dismisses the cases cited as irrelevant, contending that each one of them is explicable by reason of the fact that the arbitral agreement authorized the tribunal to look beyond positive international law, or indeed expressly authorized it to address the merits. It points out, moreover, that these cases were decided before the *Barcelona Traction* case[151], which purportedly rendered them obsolete by ruling to the contrary of what they appeared to have decided.

2.51. This latter argument misses the point. The Court was certainly aware of the sense of the arbitral jurisprudence when it deliberated in the *Barcelona Traction* case. However, if it wished to disregard that jurisprudence, it was only in relation to the general rule laid down by the Judgment, which, as we have already pointed out, is not at issue in the present proceedings[152]. In so far as the prior jurisprudence relates to direct rights of shareholders, or to the exception which may be invoked where the State whose responsibility is at issue is the State of nationality of the corporation, it cannot be regarded as overturned by the 1970 Judgment, since those questions never arose in the case.

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[148] *Openheim's International Law*, 9th ed., (1990), p. 520, note 14.

[149] F. A. Mann, "The Protection of Shareholder's Interests in the Light of the Barcelona Traction Case" (1973) 67 *AJIL* 259, 264, 269, 273.

[150] MG., pp. 84-90, paras. 4.30-4.44.

[151] POC, pp. 67-69, paras. 2.44-2.46.

[152] Judgment of 5 February 1970, case concerning the *Barcelona Traction, Light and Power Company Limited, I.C.J. Reports 1970*, p. 40, para. 63. See R. Lillich, "The Rigidity of *Barcelona*" (1971) 65 *AJIL*, pp. 522 to 525-526, note 24.

2.52. As regards the DRC's first argument, the arbitral jurisprudence cited by Guinea certainly cannot be dealt with in a manner as reductionist as that adopted by the DRC. Professor Mervyn Jones offers a very helpful overall view in his article entitled: "Claims on Behalf of National who are Shareholders in Foreign Companies"[153]. He looks in detail at the question of whether the exceptions to be found in municipal law which authorize courts to "pierce the veil" of
50 the legal personality of corporations can be applied in an international context. The second exception addressed by the article concerns the situation where "the State which is entitled to protect a corporation may be the very one which is oppressing it". The author writes:

> "In such cases intervention on behalf of the corporation is not possible under the normal rule of international law, as claims cannot be brought by foreign States on behalf of a national against its own Government. If the normal rules applied, foreign shareholders are at the mercy of the State in question; they may suffer serious loss, and yet be without redress. This is an extension in the international field of the situation which may arise in municipal law when those who should be defending the interest of the corporation fraudulently or wrongfully fail to do so (e.g. *Foss* v. *Harbottle*)."[154]

He concludes:

> "The practice of states in the matter has, however, proceeded in an *ad hoc* fashion, and the principles on which intervention has been undertaken have not always been clear. Suffice it to say generally that there is a substantial body of evidence that international practice and arbitral decisions recognize, in certain exceptional cases, intervention on behalf of individual shareholders, notwithstanding the fact that the corporation itself is the legal person that has sustained the injury, and is not a national of the intervening state."[155]

2.53. The Republic of Guinea agrees with this overall analysis. The following points, taken from the jurisprudence, confirm its correctness:

— the *Delagoa Bay Railway* case: it is true that this case was submitted to arbitration by a special agreement, and that the principles applied were not precisely defined[156]. However, the case, notwithstanding its great age from today's perspective, retains a real relevance as precedent for

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[153]Mervyn Jones, "Claims on Behalf of Nationals who are Shareholders in Foreign Companies", *BYBIL*, 1949, pp. 225-268.

[154]Mervyn Jones, "Claims on Behalf of Nationals who are Shareholders in Foreign Companies", *BYBIL*, 1949, p. 236. See also, although she expresses no opinion in regard to the applicability of exceptions under municipal law in an international context: R. Higgins "Aspects of the Case Concerning the Barcelona Traction, Light and Power Company, Ltd."(1971) 11 *Virginia Journal of International Law* 327, 334:

> "In stating that only the national state of the company has a right of legal action, the Court did look to see whether any of the known exceptions were applicable in this case. Municipal law is familiar with the technique of 'lifting the corporate veil', which is permitted in exceptional circumstances. Such lifting of the corporate veil has been permitted when the company appears, *per contra,* to be engaged in fraud or malfeasance or to be evading legal obligations."

[155]Mervyn Jones, *op. cit.*, p. 237; see also p. 251.

[156]POC, p. 62, para. 2.31.

subsequent arbitral awards, and in particular for the *Salvador Commercial Company* case,
51 where the principle at issue in the present proceedings was formulated[157];

— the *Salvador Commercial Company* case: there can be no doubt that the tribunal did ask itself the question whether international law authorized the United States to file an application on behalf of shareholders of a company incorporated in Salvador, and that it decided that it did, inasmuch as the State against whom the proceedings were brought was indeed El Salvador[158].

2.54. Taken overall, the old decisions support the existence of the exception[159]. The same can be said of the doctrine for the period prior to the *Barcelona Traction* case, even though there was no unanimity in this regard. In its Memorial, Guinea cited the work of Paul de Visscher[160], whilst the position of Mervyn Jones has already been mentioned above[161]. Other writers cited by J. Dugard in his Fourth Report on Diplomatic Protection (2003) take a similar view: Beckett[162], Charles de Visscher[163], Petren[164], Alexandre-Charles Kiss[165], and Caflisch[166], even though it is true that doctrine remains divided in this area[167].

52 2.55. As far as more recent precedents are concerned, the Judgment rendered in the *ELSI* case has been analysed by some as supporting those judges who were in favour of the existence of

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[157]*RIAA*, Vol. XV, pp. 467-479. For a similar anaylsis, see for example A.C. Kiss, "La protections diplomatique des actionnaires dans la jurisprudence et la pratique internationale" in *La personnalité morale et ses limites, étude de droit comparé et de droit international public*, Travaux et recherches de l'Institut de droit comparé de l'Université de Paris, *LGDJ*, 1960 pp. 179 *et seq.*, p. 181. See also J. Dugard, Fourth Report on Diplomatic Protection (2003), para. 71: "Respect for the *Delagoa Bay Railway Principle* was also expressed in the *Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers*, in which the tribunal stated that in the *Delagoa Bay Railway* and *El Triunfo* cases, the shareholders were exercising "not their own rights but the rights which the company, wrongfully dissolved or despoiled, was unable thenceforth to enforce; and . . . they were therefore seeking to enforce not direct and personal rights, but indirect and substituted rights".

[158]*RIAA*, Vol XV, p. 479. There is no reason to accord particular significance, as the DRC does (see POC, p. 65, para. 2.38), to the fact that the decision refers to a "sense of justice" or to "natural justice".

[159]See also J. Dugard, Fourth Report on Diplomatic Protection (2003), para. 72, or Mervyn Jones, *op. cit.*, p. 257, where he concludes that the exception (on which the Republic of Guinea relies in the present proceedings) is established in international law:

> "The normal rules require exhaustion of local remedies even before intervention on behalf of the corporation. Supposing, however, that the corporation is a national of the state oppressing it, and local remedies have been exhausted, then, if the normal rule is observed, the shareholders will be without possibility of redress; for *ex hypothesi* no state can intervene on behalf of a corporation against its own government. In such a case it is believed that modern international law is sufficiently developed to allow us to say that there is a legal right to intervene on behalf of individual shareholders".

[160]MG., paras 4.18-4.20.

[161]Para. 2.52.

[162]W.E. Beckett, "Diplomatic Claims in Respect of Injuries to Companies", *Transactions of the Groutis Society*, Vol. 17, 1932, 188-189.

[163]C. de Visscher, "De la protection diplomatique des actionnaires d'une société contre l'Etat sous la législation duquel la société s'est constituée", Revue de droit international et de législation comparée (third series), 1935, 15, p. 624.

[164]"La confiscation des bien étrangers et les réclamations internationales auxquelles elle peut donner lieu", (1963-II) 109 *Recueil des cours de l'Académie de droit international de la Haye*, 192, 506, 510.

[165]A.-C. Kiss, "La protection diplomatique des actionnaires dans la jurisprudence et la pratique internationale" in *La personnalité morale et ses limites, étude de droit comparé et de droit international public*, Travaux et recherches de l'Institut de droit comparé de l'Université de Paris, *LGDJ*, 1960 pp. 179-210, in particular, p. 186.

[166]L. Caflisch, "La protection des sociétés commerciales et des intérêts indirects en droit international public". The Hague: Martinus Nijhoff, 1969.

[167]For examples, see J. Dugard, Fourth Report on Diplomatic Protection (2003), para. 85.

the exception in the *Barcelona Traction* case[168]. The decisions of the Iran-United States Claims Tribunal and of the ICSID have extended protection to shareholders in a manner consistent with the existence of the exception.

2.56. Moreover, the exception has received express confirmation in State practice, in particular:

— in the practice of the United Kingdom:

> "where a United Kingdom national has an interest, as a shareholder or otherwise, in a company incorporated in another State and of which it is therefore a national, and that State injures the company, Her Majesty's Government may intervene to protect the interests of the United Kingdom national"[169].

— or in that of the United States:

> "A State may exercise diplomatic protection on behalf of its shareholders for unrecovered losses to their ownership interests in a corporation registered or incorporated in another State that is expropriated or liquidated by the State of registration or incorporation, or for other unrecovered direct losses."[170]

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3. The Fourth Report on Diplomatic Protection (2003) and the work of the International Law Commission at its fifty-fifth session

2.57. In his Fourth Report on Diplomatic Protection (2003), Mr. Dugard defined the exception to the general rule that the State of nationality of the shareholders in a corporation is not entitled to exercise diplomatic protection on behalf of such shareholders in the case of an injury to the corporation (draft Article 18) in the following terms:

> "The State of nationality of the shareholders in a corporation shall not be entitled to exercise diplomatic protection on behalf of such shareholders in the case of an injury to the corporation unless:
>
> . . . . . .
>
> *(b)* The corporation has the nationality of the State responsible for causing injury to the corporation."

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[168]Y. Dinstein, Diplomatic Protection of Companies under International Law, in *International Law: Theory and Practice* (1988) (ed. K. Wellens), p. 505 and 512; B. Stern, *"La protection diplomatique des investissements étrangers"*, J.D.I., 4, 1990, p. 897, p. 926:

> "The Court, as we know, reached no decision in the *Barcelona Traction* case as regards the solution to be adopted in such a situation, but it left the door partially open to circumstances where the general rule laid down by that case would not apply. The Chamber, for its part, threw itself headlong into this opening, but — and this is somewhat hard to understand — without ever explaining why: in other words, it accepted the fact of diplomatic protection of shareholders in a corporation having the nationality of the respondent State, but without justifying this in law on the ground that, because the corporation had the nationality of the respondent State, its diplomatic protection by that State was impossible."

See also pp. 934-935.

[169]1985 Rules Applying to International Claims, Rule VI, (1988) *ICLQ* 1007.

[170]Debate of the Sixth Committee in 2002 on the Commission's Report, A/C.6/57/SR.23, para. 52.

His report concludes with a firm statement of position in regard to this Article:

> "The Special Rapporteur supports the exception contained in article 18 *(b)* without qualification. It enjoys a wide measure of support in State practice, judicial pronouncements and doctrine. Moreover, it seems warranted on grounds of equity, reason and justice."[171]

2.58. Guinea agrees with this analysis, which, moreover, has been accepted by the International Law Commission.

4. Application of the law to the relevant facts

2.59. The DRC argues that, even assuming the exception to be valid in international law, it nonetheless cannot apply in this case, for the solution to which it would lead would be inequitable[172]. It relies on three arguments in support of its views. All of them are mistaken.

2.60. First, it contends that to apply the exception in this case would result in a régime of discriminatory protection[173]. Apart from the fact that Guinea has some difficulty in understanding this argument, it would point out that, in the present case, it is the DRC which may be accused of
54 having adopted a discriminatory attitude in regard to a foreign shareholder, since it was only able to expel Mr. Diallo from its territory because he is a foreign national.

2.61. The DRC then invokes Mr. Diallo's alleged "improper conduct"[174]. As has already been shown in Chapter I above, that accusation is not supported by any fact. It cannot therefore have the slightest relevance.

2.62. Finally, the DRC invokes "Mr. Diallo's refusal to exhaust all the remedies available in the Democratic Republic of the Congo"[175]. That contention is incorrect, as Guinea will show in Chapter III of these Observations. It cannot therefore have the slightest effect, and relates, moreover, to a condition of admissibility of the Application different from that at issue here.

2.63. Guinea considers that it would be manifestly inequitable and contrary to current rules of international law not to recognize its right to exercise diplomatic protection in order to protect its national in his capacity as holder of shares in his Congolese companies, inasmuch as, on the one hand, those companies have the nationality of the State responsible for the unlawful acts and no local remedy is available in respect thereof, while, on the other, the unlawful acts complained of injured the Guinean shareholder by targeting the Congolese companies.

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[171] J. Dugard, Fourth Report on Diplomatic Protection (2003), para. 87.

[172] POC, pp. 95-101, paras. 2.91-2.105.

[173] *Ibid.*, pp. 97-98, paras. 2.95-2.97.

[174] POC, p. 100, paras. 2.100 and 2.101.

[175] *Ibid.*, pp. 100-101, paras. 2.102-2.105.

Conclusion of Chapter II

2.64. In Chapter IV of its Memorial, Guinea established the existence of its right to exercise its diplomatic protection in favour of Mr. Diallo. It showed, and has again shown in the present Chapter II, that its right in that case derives from three independent principles of international law.

55 — Guinea is entitled to exercise its diplomatic protection on behalf of its national, Mr. Diallo, in the case of unlawful acts of which he himself has been the victim. That is not disputed and, as regards this point, the preliminary objection cannot therefore be accepted.

— Secondly, Guinea is entitled to exercise its diplomatic protection on behalf of Mr. Diallo in his capacity as shareholder in his two companies. The existence in principle of such a right is not at issue between the Parties, but they disagree in regard to the relevant facts and to the application of the principle in the present case. That disagreement can be resolved only at the merits stage of the case. In relation to this issue, the preliminary objection therefore cannot be decided at this stage of the proceedings.

— Thirdly, Guinea is entitled to exercise its diplomatic protection on behalf of Mr. Diallo by virtue of the exception to the general rule in the *Barcelona Traction* case, which applies where the place of incorporation of the company in which the shareholder of the applicant State has invested is in fact the respondent State. It is not disputed that Mr. Diallo's two companies were incorporated in Zaire, now the DRC, that is to say, under the laws of the respondent State. On this point, the preliminary objection must therefore be dismissed.

2.65. In the following Chapter, Guinea will reply to the DRC's second preliminary objection and show that that objection is equally misconceived.

CHAPTER III

THE REQUIREMENT OF EXHAUSTION OF LOCAL REMEDIES IS SATISFIED

57 3.01. In its Memorial of 23 March 2001, Guinea stated that it "is well aware that it must prove that its national has complied with the principle of the exhaustion of local remedies"[176]. It accordingly did so without waiting for the issue to be raised by the DRC and endeavoured to show that Mr. Diallo had exhausted the remedies offered to him by the Congolese legal system, within the specific context obtaining in that country and under the conditions in which he found himself placed by the Congolese authorities.

3.02. In its Preliminary Objections, the DRC, seeking to present a "comment in regard to methodology", draws a distinction between "[t]he disputes opposing, on the one hand, Africom-Zaire and Africontainers Zaire and, on the other, those companies' trading partners or the Congolese State". According to the DRC, the local remedies rule must be applied differently to these various disputes, which are said to "differ considerably in this regard"[177]. On this basis it claims:

(i) that there "existed and still exists, within the legal order of Zaire and subsequently of the Congo, remedies enabling Africontainers Zaire and Africom-Zaire, as well as Mr. Diallo himself, to safeguard their rights"[178];

(ii) that "[t]he Republic of Guinea has not shown that the existing remedies under the Zairean, then Congolese, legal order were or are unavailable or inaccessible"[179];

(iii) "[t]he Republic of Guinea has not shown that the existing remedies under the Zairean, then Congolese, legal order were or are ineffective"[180].

3.03. The Republic of Guinea does not intend to repeat in these Observations the arguments already presented in its Memorial in support of the proposition that Mr. Diallo and his companies had exhausted local remedies. It will provide the necessary clarification on certain aspects of that line of argument disputed by the respondent State, as well as supplementary arguments calculated
58 to establish that, in terms of international law, local remedies have effectively been exhausted by Mr. Diallo and his companies in the particular circumstances of the case.

3.04. It should at this point be noted that the distinction drawn by the DRC between the disputes opposing Mr. Diallo's companies and its trading partners and those opposing those companies and the Congolese State for purposes of the operation of the local remedies rule derives from a misperception of the terms of the dispute submitted to the Court. The Republic of Guinea has not seised the Court on account of unresolved disputes between Mr. Diallo and his companies on the one hand and their trading partners based in the DRC on the other, but for the injury suffered by Mr. Diallo's companies and by Mr. Diallo himself in, respectively, their business relations with the Congolese State and with their trading partners, *as a result of the wrongdoing of the Congolese State*. More specifically, it is because the DRC, acting in its capacity as a State, has made it

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[176] See MG, p. 97, para. 4.60.

[177] See POC, p. 105, para. 3.06.

[178] *Ibid.*, pp. 107 *et seq.*, paras. 3.07 *et seq.*

[179] *Ibid.*, pp. 112 *et seq.*, paras. 3.20 *et seq.*

[180] *Ibid.*, pp. 120 *et seq.*, paras. 3.39 *et seq.*

impossible for Mr. Diallo and his companies to recover the debts owed to them by their trading partners based in the Congo, and in particular the companies Shell, Zaire-Fina and PLZ, that the loss suffered by them on this account is attributable to the DRC. It follows that the internal proceedings engaged by Mr. Diallo with the Congolese authorities and through the Congolese courts in order to settle these disputes in no way "differ" from those whereby he sought to settle his disputes with the State: in both cases, the proceedings were aimed at securing a solution from the relevant decision-making body, in this instance the Congolese State.

3.05. That said, it is now necessary to recall the meaning and scope of the rule of exhaustion of local remedies in international law. Guinea has already succinctly addressed this issue in its Memorial[181]. However, we must now return to it: before addressing the issue of proof on which the DRC focuses attention in its Preliminary Objections, it is essential to establish what has to be proved, namely what matters the evidence must address.

3.06. The purpose of the local remedies rule is to give a State the opportunity to redress the wrongful conduct of its organs through its own legal system and thus do justice to the
59 complainant[182]. This rule is never applied in an abstract manner, but always in light of the specific circumstances of a particular case.

3.07. As the International Law Commission (ILC) stated in its 1977 Report[183], the local remedies rule is regarded, according to the authors, either as a substantive issue (in that case the breach of international law arises not from the failure of local remedies, but from an initial wrongful act which local remedies are intended to redress), or as a procedural issue (in which case the breach of international law results from a series of successive acts by the State rendering exhaustion of local remedies impossible), or as presenting intermediate aspects combining procedure and substance (in that case the breach of international law results solely from the action of the judicial organs by reason of their inability to provide the injured person with the judicial protection required under international law). In all cases, it is accepted that the rule has procedural aspects.

3.08. Moreover, these approaches are not mutually exclusive. As we shall see[184], the present case discloses both deficiencies in the available remedies themselves and reprehensible conduct on the part of the respondent State which render such remedies as exist illusory.

3.09. The issue of exhaustion of local remedies raises the question of how far the complainant must pursue those remedies. As the ILC stated in its 1977 commentary on Article 22 of the draft Articles on State responsibility: "the claimant must show that he wants to win the case"[185] . The numerous initiatives, both administrative and judicial, undertaken without success by Mr. Diallo and described in their essentials by Guinea in its Memorial[186], sufficiently demonstrate this. Mr. Diallo and his companies did not launch these various proceedings in order simply to place the administrative authorities and judicial organs of the DRC on notice of their

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[181]MG, pp. 97-100, paras. 4.6-4.69.

[182]See the report of the Committee on Diplomatic Protection of Persons and Property of the International Law Association, Sixty-Ninth Conference held in London, 25th-29th . . . 2000, p. 611.

[183]See *Yearbook of the International Law Commission*, 1977-II/2, pp. 30 and 34, Note 137.

[184]See below, Sections 1, 2 and 3.

[185]*Yearbook of the International Law Commission*, 1977-II/2, p. 47.

[186]MG, pp. 22-29, paras. 2.36-2.62.

60 claims, but to seek justice, and with the firm hope of succeeding. That is self-evident; in no sense was Mr. Diallo bringing these proceedings with a future view to diplomatic protection by Guinea, a procedure which he had never for a moment contemplated before his expulsion from the DRC.

3.10. It is not enough for the respondent State to demonstrate the existence within its legal order of utilisable remedies in order for it to be concluded that such remedies could in practice have been "exhausted". As the ILC Special Rapporteur on diplomatic protection stated in his Third Report, such remedies have to be "effective"[187]. This criterion of the effectiveness of the remedies, which had been proposed in debates both within the ILC and also at the Sixth Committee of the United Nations General Assembly[188], finds support in doctrine, in particular in the work of the *Institut de droit international* in a resolution adopted in 1956 at its Grenada Session[189], and more recently in the work of the International Law Association presented at its London Session in 2000[190], as well as in international jurisprudence[191].

3.11. According to the ILC Special Rapporteur on diplomatic protection, whose proposals on this issue of exhaustion of local remedies were approved by the Commission: "[a] local remedy is ineffective when it is 'obviously futile'/'offers no reasonable prospect of success'/or 'provides no reasonable possibility of an effective remedy'"[192].

All three of these options "enjoy some support among the authorities"[193]. To these should be added the case where "the respondent State is responsible for undue delay in providing a local remedy"[194].

61 3.12. The Republic of Guinea will show that Mr. Diallo and his companies were unable to exhaust local remedies within the DRC for four main reasons:

— the remedies were ineffective or futile (Section 1);

— the delays in the administration of justice are excessively long (Section 2);

— Mr. Diallo's expulsion from the DRC constituted an obstacle to pursuit of the proceedings (Section 3);

— Mr. Diallo's impoverishment as a result of the loss of his assets was such that he was unable to pursue legal proceedings (Section 4).

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[187] John Dugard, Third Report on Diplomatic Protection, doc. A/CN.4/523 of 7 March 2002, p. 7.

[188] *Ibid.*, p. 6, para. 18.

[189] See *Annuaire de l'Institut de droit international*, 1956, p. 364.

[190] The International Law Association, Report of the Sixty-ninth Conference, London, 2000, pp. 606, 629 and 630.

[191] See, *inter alia*: *Ambatielos* claim (1956), 12 *RIAA 1956*, p. 83 at pp. 122-123; *Panevezys-Saldutiskis Railway* case, where the PCIJ required that the ineffectiveness of the remedy be clearly demonstrated (*P.C.I.J., Series A/B, No. 76*, p. 19).

[192] See Third Report, p. 7, para. 20.

[193] *Ibid.*

[194] See draft Article 14 *(e)* in the Third Report on Diplomatic Protection, p. 6 and pp. 35-37.

Section 1: The remedies were ineffective or futile

3.13. The DRC argues that remedies were available both against private companies and against public undertakings as well as against the Zairean State[195], and places on Guinea the burden of proving that such remedies were ineffective[196].

3.14. In reality, in all three instances, between which it is unnecessary to distinguish for legal purposes[197], the remedies were ineffective for various reasons, which Guinea will endeavour to explain, but in an overall context which rendered them futile and nugatory. Thus:

— in the litigation between Mr. Diallo's companies and other private companies, it was interference by the Zairean State which rendered the remedies ineffective (A);

62 — in his companies' litigation with public undertakings, the attempts at settlement proved to be a stratagem on the part of corporations backed by the power of the State; the remedies were thus futile (B);

— in the case of the litigation with the Zairean State itself, the remedies were likewise futile; thus it was totally illusory, having regard to the nature of the Zairean politico-judicial structure, to imagine that legal proceedings could have succeeded, particularly in the climate of the time (C);

— finally, the damaging environment within the Zairean judicial system, widely denounced by the Zaireans themselves, presented litigants such as Mr. Diallo and his companies without the slightest prospect of any guarantee that their rights would be protected by the courts (D).

A. The proceedings by Mr. Diallo's companies against private undertakings were ineffective as a result of action by the Zairean State

3.15. The DRC claims to be surprised that Africontainers did not commence any legal proceedings against Mobil Oil, arguing that "no obstacle can be derived from the specific features of the Zairean, then Congolese, judicial order" which could explain this decision[198]. It cites the rare decisions rendered on the merits by the Zairean courts in favour of Mr. Diallo's companies, but only as illustrations of the sound functioning of the Congolese judicial system and in an attempt to give credence to the notion that the DRC offers effective remedies.

3.16. The DRC refrains from mentioning the difficulties in enforcing the sole judicial decision favourable to one of Mr. Diallo's companies[199], Africontainers, or from noting that this was an isolated case among a series of proceedings which he had commenced on behalf of his companies at a time when he was still able to reside in Zaire.

63 3.17. The decision in question was rendered in the case of *Africontainers* v. *Zaire Shell*. Initially, judgment RC 63824, handed down on 3 July 1995 by the Kinshasa *Tribunal de grande*

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[195]POC, pp. 108-111, paras. 3.11-3.19

[196]*Ibid.*, pp. 112-116, paras. 3.20-3.31.

[197]See above, para. 3.4.

[198]POC, p. 108, para. 3.11.

[199]As to these decisions, see MG, pp. 22-23, paras. 2.36-2.38.

instance found against Zaire Shell[200]. That decision was upheld by the Kinshasa Court of Appeal in a judgment dated 24 August 1995[201]. Its enforcement encountered problems created by the Congolese authorities and covered only an insignificant part of the debts owed by Shell to Africontainers, and Mr. Diallo's expulsion from Congolese territory prevented him from pursuing these proceedings any further[202].

3.18. The DRC accuses Guinea of presenting matters in this regard in a manner which is "manifestly mistaken on a number of points", and of being "quite wrong" in what it says regarding enforcement of the judgment of the *Tribunal de grande instance* of 3 July 1995. However, the Republic of Guinea gave a comprehensive account of the facts in regard to enforcement of that judgment and stands by what it stated in its pleadings, which it would like to recall here *in extenso*:

> "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 debts[203]. 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 approval[204].
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> 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 Shell[205]. 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.'[206]
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> 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
64 concerned. Thus in a letter from the Ministry of Justice dated 28 September 1995[207] 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.
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> Property was therefore attached to that end by a bailiff on 6 October 1995[208]. Three Fiat vans, a photocopier, a computer, two printers and a typewriter were seized in the presence of Messrs. Manzambi and Mombe, as witnesses.

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[200]MG, Ann. 153 and *ibid.*, p. 22, para. 2.36.

[201]*Ibid.*, Ann. 167, and *ibid.*, paras. 2.37-2.38.

[202]See *ibid.*, p. 24, paras. 2.42-2.43, and above, Chap. I, para. 1.62.

[203]*Ibid.*, Ann. 170.

[204]*Ibid.*, Ann. 169.

[205]*Ibid.*, Anns. 171 and 166.

[206]*Ibid.*, Ann. 170.

[207]*Ibid.*, Ann. 178.

[208]*Ibid.*, Ann. 179.

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."

3.19. Apart from this case, Mr. Diallo undertook various other proceedings before the Zairean courts on behalf of his companies, but was unable to pursue these proceedings to their close because of his expulsion from Zaire. Thus, on behalf of Africontainers, he had commenced proceedings before the Kinshasa *Tribunal* against Zaire Fina in respect of two containers leased to the latter by Africontainers under a contract entered into on 13 July 1983. Judgment RC 61538 of the Kinshasa *Tribunal de grande instance* allowed Africontainers' claim in part, which was for compensation based on the replacement value of the containers, and also for loss of earnings[209].

3.20. The Kinshasa Court of Appeal found against Africontainers on the ground of lack of standing[210]. Africontainers lodged an application for cassation against the Court of Appeal judgment[211]. On 20 April 1995 the Court of Cassation Prosecutor lodged submissions arguing that the judgment should be quashed and referred back for rehearing on the merits[212]. Unfortunately, Mr. Diallo's brutal expulsion from Zaire prevented him from pursuing these proceedings.

65 3.21. The same applies to the proceedings initiated by Mr. Diallo on behalf of his company Africom-Zaire against PLZ (Unilever) in respect of a dispute concerning a tenancy agreement between the two companies. By judgment RC 61320 of 24 August 1993 the Kinshasa *Tribunal de grande instance* found against PLZ. By judgment RCA 17244 of 9 March 1994 the Kinshasa Court of Appeal set aside that judgment on grounds of inadequate reasoning[213] and, ruling *de novo*, it ordered Africom-Zaire to pay rent and occupancy fees and to repair the premises. Africom-Zaire sought cassation of the Court of Appeal judgment. On 11 January 1995 the Court of Cassation Prosecutor submitted that the decision should be quashed[214]. But, here again, Mr. Diallo's expulsion from Zaire prevented him from pursuing the proceedings.

3.22. In these circumstances, it is altogether specious to reproach Mr. Diallo and his companies with not having initiated legal proceedings "against Mobil Oil", as the DRC does[215]. These companies were under no obligation to commence such proceedings against all their debtors at the same time. It was no mean achievement to have launched legal proceedings directly against Zaire Shell, Zaire Fina and PLZ in parallel with the negotiations being pursued by Mr. Diallo on behalf of his companies with Gécamines and Onatra on the one hand and the Zairean State on the other. And he would assuredly have initiated proceedings against Mobil Oil if he had been in a position to do so, that is to say if he had remained in Zaire and still had the resources available to him before the all-out attack on him by his trading partners and the Zairean authorities.

3.23. Furthermore, the fact that Mr. Diallo failed to institute legal proceedings on behalf of his companies against a particular trading partner is certainly no business of the DRC's, which has

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[209]MG, pp. 24-24, paras. 2.44 and 2.45.

[210]*Ibid.*, Ann. 149.

[211]*Ibid.*

[212]*Ibid.*, Ann. 149.

[213]*Ibid.*, Ann. 146.

[214]*Ibid.*, p. 26, para. 2.49.

[215]POC, p. 108, para. 3.11.

no right to criticize him for this. What Guinea reproaches the DRC with is having rendered ineffective Mr. Diallo's legal actions, on the one hand by his brutal expulsion, which reduced his financial resources to zero and, on the other hand, by hindering the enforcement of judicial
66 decisions favourable to him. Yet such hindrance was not accidental; it was not attributable to the individual conduct of certain officials and other unscrupulous government figures. On the DRC's own admission, such interference is an intrinsic feature of to the Congolese legal system:

> "Thus, when the enforcement of a judicial decision is liable to provoke social unrest or to lead to serious public disorder, the Minister of Justice can suspend its enforcement and request the Inspectorate-General of Courts to review it. After hearing all the parties and the judge or judges who gave the decision in question, the Inspectorate sends a report to the Minister of Justice. In light of this report, the Minister of Justice may either withdraw the suspension and permit enforcement of the decision to continue or maintain the suspension in force and invite the parties, in the case of a final decision, to negotiate a settlement under the guidance of senior members of the judiciary with a view to safeguarding certain national interests and interests of the parties concerned."[216]

3.24. In an attempt to justify this curious judicial phenomenon, which places litigants in a situation of total uncertainty, the DRC defends itself by citing similar hypothetical circumstances, which are claimed to exist "in a number of African States"[217], not a single example of which is provided. However, even assuming that such an example can be found, that is a perfect illustration of a situation where the existence of local remedies provides the litigant with no guarantee of justice. The remedy is futile because its outcome, even if favourable to the applicant, remains totally contingent as far as its enforcement is concerned. It serves no purpose to secure a favourable Court decision if its enforcement cannot be guaranteed. Moreover, the DRC fails to indicate any grounds for the particular manner in which the Minister of Justice might choose to rule.

3.25. Furthermore, a legal system in which a "final" judicial decision is not final as long as the Government, through the Minister of Justice, has not so decided offers no guarantee to litigants. At the very least, it raises doubts as to the effectiveness of existing remedies.

3.26. Nonetheless, Mr. Diallo and his companies trusted in this judicial system right to the end, that is to say until Mr. Diallo was placed by the Congolese State in a situation where he was no longer able to act. The DRC is not entitled to criticize Mr. Diallo and his companies for their
67 judicial inaction or for making allegations which are "not supported by any factual evidence, any document or any reference whatsoever"[218], in particular as regards interference by the Zairean authorities in the administration of justice, and at the same time reproach the Republic of Guinea with having "appended to its Memorial the submissions of the Prosecutor of the Congolese Supreme Court of Justice in the cases *Africom-Zaire* v. *PLZ* and *Africontainers-Zaire* v. *Fina*", gratuitously adding insinuations regarding "the manner in which they were obtained"[219]. The Republic of Guinea notes that, notwithstanding its "great suspicion", the DRC does not challenge the authenticity of these documents, nor, above all, the fact that they irrefutably demonstrate that the Prosecutor had lodged submissions in the cases in question that were favourable to Mr. Diallo and his companies, and that that submission had taken place some time ago.

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[216]POC, p. 126, para. 3.50.

[217]*Ibid.*

[218]*Ibid.*, p. 6, para. 0.09.

[219]*Ibid.*, p. 5, para. 0.08.

3.27. The DRC itself notes that the two cases in question, namely *Africom-Zaire* v. *PLZ* and *Africontainers-Zaire* v. *Fina* are still pending before the Congolese Supreme Court[220]. Note should be taken in this regard of the unreasonable delays in the Zairean/Congolese judicial system in cases in which several years have elapsed since the Prosecutor's office lodged its submissions. The Republic of Guinea will return to the consequences of such delays on the exhaustion of local remedies[221].

B. Proceedings against the public undertakings Gécamines and Onatra were futile

3.28. The DRC further reproaches Mr. Diallo and his companies with not having utilized local remedies against the public undertakings, namely Gécamines and Onatra, notwithstanding that such remedies were available both in light of existing legislation and of "specific precedents"[222].

68 3.29. The Republic of Guinea recalls that, until the expulsion of Mr. Diallo in 1996, attempts were being made to achieve a friendly settlement of the disputes between his companies and the public undertakings in question. Being well aware of the Zairean politico-legal environment, and in particular of the close interconnection between the State, the then sole political party, the MPR — officially described as the "State Party" — and the public undertakings in question, Mr. Diallo followed the course which presented him with the least risks[223], and was most likely to result in a settlement of the disputes with the latter and to enable his companies to recover their debts from those undertakings. Thus, as Guinea has described in its Memorial, taking account of the status of Gécamines as a public sector undertaking "and of its relations with the State", Africontainers agreed to continue to seek a negotiated settlement and amicable agreement for the payment of its claims, which it never abandoned[224]. The Republic of Guinea has given a detailed account of the course of this search of a negotiated settlement in paragraphs 2.52 to 2.57 of its Memorial and supports it in the documents produced in Annexes 150, 151, 198, 201, 222, and 224 to 226.

3.30. Faced with deadlock, at a time when Mr. Diallo no longer had anything to fear personally since he had already been expelled, Africontainers attempted to exert legal pressure on its trading partner. Thus on 5 February 1996 it sent a payment demand to Gécamines setting out the various heads of damage in respect of which compensation was required. That pressure produced some effect, since Gécamines stated itself "ready to settle this dispute on a friendly basis subject to future negotiations between its legal division and Africontainers"[225]. Letter DIE/DIR/22-123 of 20 October 1992 "internal to Gécamines" concerning the Africontainers dispute, reproduced by the DRC in Annex 11 to its Preliminary Objections, predates this undertaking by Gécamines to negotiate, with a view to settling the dispute and confirms that, at the date of that letter, the parties had not found a solution to the dispute, having been unable to agree on the amount owing. The committee charged with examining the dispute was created by Gécamines in 1997, but to date has taken no action in the dispute.

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[220]POC.

[221]See below, Section 2 of the present Chapter.

[222]POC, p. 109, para. 3.12.

[223]On the sense of risk which might have dissuaded Mr. Diallo from taking legal proceedings against his public trading partners, see above, Chapter I, paras. 1.34 and 1.44.

[224]MG, p. 27, para. 2.52.

[225]See *ibid.*, Ann. 198.

69 3.31. Mr. Diallo adopted the same approach, consisting in seeking an amicable settlement, in order to recover the sums owed to Africontainers by Onatra, as the Republic of Guinea has described in paragraphs 2.58 to 2.62 of its Memorial, substantiating its account with Annexes 43 to 55, 66 to 70 and 91.

3.32. The rare judicial decisions produced by the DRC to illustrate the "specific practice" of local remedies against Zairean public undertakings[226] call in the main for two comments: first, their rarity in relation to the geographical extent of the DRC, its population and the significant number of first instance and appeal courts composing the judicial system of this immense country of over 2 million km^2 and more than 40 million inhabitants. The fact that a trawl of the registries of courts of appeal, in particular those of Kinshasa-Gombe and Matadi, produced four judgments, three of which were rendered after the expulsion of Mr. Diallo from Zaire, shows that proceedings against such public undertakings are rare, for reasons unknown to the Republic of Guinea. Moreover, the four cases involving Gécamines and Onatra were against Zairean nationals, which is not the case for Mr. Diallo, whom the Zairean authorities — who exercise a right of supervision over those undertakings — have not hesitated on occasion to present as a swindler[227]. It is understandable that Mr. Diallo sought above all to enable his companies to enforce their rights through negotiated settlement.

3.33. The DRC is particularly unjustified in citing against the Republic of Guinea any failure by Mr. Diallo and his companies to take legal action, in light of its statement that "Gécamines is fully prepared, even now, to resume negotiations with Africontainers-Zaire . . . or even to submit this dispute to the Congolese Courts, should the parties fail to arrive at a satisfactory settlement."[228]

3.34. This statement belies the argument that "the claim was time-barred", which the Respondent also relies on[229], since it recognizes that recourse to the courts still remains open.
70 Moreover, it also implicitly recognizes that the search for a negotiated settlement is a relevant remedy which Mr. Diallo was right to explore in depth on behalf of the company.

3.35. Furthermore, doctrine considers that a remedy is exhausted when the applicant has taken all steps capable of enabling him to obtain a favourable settlement of his dispute. The American Law Institute's *Restatement of the Law (Second) of the Foreign Relations Law of the United States (1965)* takes this view:

> "Exhaustion of a remedy does not require the taking of every step that might conceivably result in a favourable determination, but the alien must take all steps that offer a *reasonable possibility, even if not a likelihood*, of success . . . The expense or delay involved, if substantial in relation to the amount or nature of the reparation sought, may be relevant in determining what step should reasonably be taken to exhaust the available remedies. The alien is not required to incur substantial expense and delay in trying to invoke a remedy where there is no *reasonable possibility* that the remedy would be available."[230]

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[226]POC, pp. 131-132, para. 3.62.

[227]See the accusation of fraud against Mr. Diallo, *supra*, Chapter I, paras. 1.41-1.44; more generally, on the allegations of dishonesty against Mr. Diallo, see *ibid.*, paras. 1.03, 1.09, 1.10, 1.11.

[228]POC, p. 21, para. 1.19.

[229]*Ibid.*, p. 20, para. 1.19.

[230]Cited in J. Dugard, Third Report on Diplomatic Protection doc. A/CN.4/523 of 7 March 2002, p. 12, para. 32.

3.36. Mr. Diallo and his companies were already engaged in a number of legal proceedings against private companies, some of which are still pending before the Congolese courts, while the only one that produced a result in his favour encountered the difficulties of enforcement which the Republic of Guinea has described in its Memorial and recalled in the preceding paragraphs. Under these circumstances, and in view of the personal risks to which he would have been exposed[231], he could not take the risk of engaging in a judicial confrontation with public undertakings, namely Gécamines and Onatra. Still less, could he undertake such a confrontation directly with the Zairean State itself.

C. The remedies against the Zairean State were futile

3.37. The DRC cites provisions from its Judicial Code in an attempt to show that remedies were available against the Zairean State. And to lend credence to that notion, it refers to a
71 judgment rendered on 3 February 2000 in the case of *Abdoul Karim* v. *Congolese State*[232].

3.38. This judgment, apparently unique and without precedent in Congolese judicial annals — the DRC does not produce a single other example, even from the distant past — cannot conceal the reality of the impossibility of bringing legal proceedings against the State at the time in question. It is the single tree which conceals the wood. Moreover, it occurred well after Mr. Diallo's expulsion from Zaire, and there is reason to believe that it was possible only as a result of the régime change which occurred in 1997. Unless it was rendered in order to provide "self-serving evidence".

3.39. A simple description of Zairean judicial procedure is insufficient to demonstrate that it was feasible in practice to bring legal proceedings against the Zairean State. Various but consistent sources establish that the Zairean legal system, at least at the time when Mr. Diallo was residing in the country, offered no chance of success in proceedings against the State. As is stated in a note on the Zairean judicial system under the 1974 Constitution, which remained in place until the mid-1990s:

> "Although in theory magistrates were to remain independent and free in the execution of their judicial powers, they were obligated to be active party members and to interpret the law in the spirit of the party. As with other government officials, the degree of their devotion to the party was continually monitored. Thus the MPR [the sole political party] became the source of all legality. The President of the Republic could not interpret the law, but justice was carried out in his name and under his authority."[233]

3.40. This comment is largely confirmed by the more detailed studies carried out by Zairean nationals. In a piece of recently published academic research, Mr. Matadi Nenga Gamanda notes that, as a result of a constitutional amendment introduced by Law No. 74-020 of 15 August 1974, the Popular Revolutionary Movement (MPR), the only political party, became "the country's sole institution". It was supreme in all fields. It followed that the "Judicial Council", in which judicial

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[231]Mr. Diallo had the opportunity to experience the reality of these risks in connection with the "listing-paper case"; see above, Chap. I, paras. 1.35-1.44.

[232]See POC, p. 110, paras. 3.17 and 3.18.

[233]See United States Library of Congress Country Studies, http://lcwebz.loc.gov/cgi-bin/query/r?frd/csdy:@field (DOCID + zr 0154). (26/05/2003).

72 authority was vested, "operated as a simple department of the Popular Revolutionary Movement"[234], into which it was integrated pursuant to Article 66 of the Constitution[235].

3.41. True, the judicial system had continued to function with relative independence in various other African countries under a one-party system. But the situation in Zaire was altogether special, because the single party was enshrined in the constitution as the Party of the State, dominating all State institutions, which were subordinated to it. As Mr. Matadi further notes, "[t]his was the starting point for an unprecedented loss of integrity within the Congolese judiciary. Interference by leading members of the single party had devastating effects . . . The entire judicial system became imbued with the arbitrary values of politics."[236] He continues: "The consolidation of powers within a single institution, even a single individual, cannot favour an independent judiciary. That is an historical truth."[237]

3.42. In these circumstances, the political and legal harassment to which Mr. Diallo was subjected for having sought to recover his debts can readily be appreciated. A particular example was the listing-paper case, described in detail earlier[238]. This was a dispute between Africom-Zaire and the Zairean/Congolese State for non-payment in respect of a large consignment of listing-paper ordered by the Budget and Finance Ministry in July 1986. In 1988, the then Prime Minister, Professor Mabi Malumba, ordered Zairean national radio and television to broadcast for a week a report alleging that the CEO of Africom-Zaire, Mr. Ahmadou Sadio Diallo, had attempted to defraud the Zairean State of the amount of the debt claimed by him. This campaign of denigration led to Mr. Diallo being arrested and imprisoned without trial for over a year, despite the strength of the documentary evidence in support of the debt and the official denial at a press conference by the State Commissioner of Finance. Mr. Diallo was subsequently freed for "inexpediency of prosecution", as can be seen from letter No. 431 of 28 January 1989 to Mr. Diallo from the
73 Kinshasa Appeal Court Prosecutor[239]. But he was freed like a pardoned political prisoner, without any compensation for the grave material and moral injury unjustly suffered by him.

3.43. Thus, when Mr. Diallo seeks to defend the interests of his companies he is wrongfully imprisoned or detained, and when, having had his fingers burnt, he seeks an amicable settlement with the State or its organs, he is criticized for his failure to take legal action. His fate is dependent on the indulgence of the Head of State himself, or on the comprehension of his entourage, rather than on the courts. That is how things were under the politico-judicial system in Zaire.

3.44. The minor relaxation of the system reflected in Law No. 86-006 of 23 November 1986, which provided for the restructuring of the Judicial Council, formerly headed by a single individual, was of very short duration. It is to be noted that, without any further amendment to this text, the arbitrary element was reintroduced at the end of the 1980s:

> "Thus the Minister could once more, without consulting the Bureau, which at that time constituted a collegiate and indeed technical organ of the Judicial Council,

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[234]Matadi Nenga Gamanda, *La question du pouvoir judiciaire en République démocratique du Congo,* Preface by Michel Toper, Editions Droits et idées nouvelles, p. 263.

[235]See B. Lissendja Bolimbo, *Monopartisme et pouvoir personnel dans l'évolution politique du Zaïre*, in *Zaïre-Afrique*, No. 309, 1996, p. 475.

[236]Matadi Nenga Gamanda, *op. cit.*, p. 265.

[237]*Ibid.*

[238]See above, Chap. I, paras. 1.35-1.44.

[239]Ann. OG 16.

and without reference to the Higher Judicial Council, reassign or dismiss judges and prosecutors. *Court Presidents have even testified that certain Ministers went so far as to require the Bench to be composed as they wished in a particular case.* The Minister was thus the sole master on board the good ship *Justice*."[240]

3.45. It should be emphasized here that among the circumstances in which local remedies have been adjudged ineffective or futile, are those where "[t]he local courts are notoriously lacking in independence"[241]. This principle finds support in the jurisprudence, principally in the *Robert E. Brown* claim[242], cited by the ICJ Special Rapporteur in his Third Report on Diplomatic Protection[243].

3.46. In the context in which the difference between the Zairean State and Mr. Diallo and his company arose, proceedings against the Zairean State would thus have been futile, given the total
74 subjection and subordination of the judiciary to the single Party, to its Supreme Head and Founding Father, the President of the Republic, and to the Government.

3.47. It is true that in the *Finnish Ships* Arbitration, Arbitrator Bagge applied the strict criterion of so-called "obvious futility". In his view: "a certain strictness in construing this rule appears justified by the opinion expressed by Borchard when mentioning the rule applied in the prize cases"[244].

This interpretation of the criterion was subsequently accepted by the majority of the Arbitral Tribunal in the *Ambatielos* claim[245] and accords with that of the PCIJ in the *Panevezys-Saldutiskis Railway* case[246].

3.48. As the ILC Special Rapporteur on diplomatic protection noted: "[t]he 'obvious futility' test has been strongly criticized by some writers and was not followed in the *ELSI* case in which a chamber of the International court of Justice was ready to assume the ineffectiveness of local remedies"[247].

3.49. The position of Amerasinghe, extensively cited by the DRC, is extremely interesting in this regard. He argues that Arbitrator Bagge was wrong to apply the strict test expounded in prize cases, arising in the context of war and in respect of which States have special powers of jurisdiction, to the law of diplomatic protection. According to Amerasinghe:

"The real objection, however, to the strict criterion enunciated in the *Finnish Ships Arbitration* would seem to lie in the absence of justification for applying such a

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[240]Matadi Nenga Gamanda, *op. cit.*, p. 270; *emphasis added.*

[241]See J. Dugard, Third Report on Diplomatic Protection, p. 15, para. 41; Jiménez de Aréchaga, "International Responsibility", in *Manual of International Public Law*, 1958, p. 589; C. F. Amerasinghe, "Local Remedies in International Law", Cambridge, Grotius, 1990, p. 198.

[242]*RIAA* (1923), pp. 120-129.

[243]See J. Dugard, op. cit., p. 15; for an account of that case, see the same author: "Chief Justice versus President: Does the Ghost of Brown v. Leyds NO Still Haunt our Judges?" (1981) *De Rebus*, p. 421.

[244]See *RIAA* (1934), Vol. III, p. 1504.

[245]See 12 *RIAA* (1956), p. 119.

[246]*P.C.I.J., Series A/B, No. 76*, p. 19.

[247]J. Dugard, *op. cit.*, p. 11, para. 30.

> strict criterion to the resort by aliens to the local remedies when, pragmatically speaking, litigants can in normal circumstances be expected not to spend time and money exercising available recourse, if it appears reasonable rather than highly probable that they are not likely to succeed. The argument in the case of the alien is even more cogent. In his case what is involved is really not a choice between resorting to remedies and completely failing to secure redress by not so resorting, as is the case with the ordinary litigant. It is a choice between resorting to remedies both at the local level and at the international level and not resorting to remedies at the local
> 75 level while invoking an international remedy which could result in adequate redress."[248]

3.50. This is what Mr. Diallo found himself obliged to do, not by deliberate choice but on account of the particular nature of the Zairean judicial system as described above and of his brutal expulsion from Zaire.

D. The general context of the Zairean judicial system constitutes a special circumstance precluding the exhaustion of local remedies or rendering such remedies futile

3.51. The DRC has seen fit not only to make insinuations in regard to Mr. Diallo's conduct in relation to the Zairean judicial system[249], but also to accuse him of corruption[250].

3.52. Guinea notes that the DRC provides no evidence whatever in support of its accusations in this regard against Mr. Diallo. It is true that it is difficult for it to dispute the fact of the corruption of its judicial system, which has been described both by foreign observers[251] and in Zairean studies.

3.53. A Congolese researcher has described in detail what he calls "the techniques of corruption" in his country's judicial system[252]. He writes as follows:

> "Generally speaking, the judge, after commencing deliberation of a case, waits for one of the parties to make contact with him. However, he carefully reads the file, thus preparing himself for a discussion to which he is greatly looking forward. When the time comes, he explains to the party which has taken the initiative of meeting him that his case will fail because his lawyer forgot to file a particular document or his oral argument was flawed. He adds that, notwithstanding that the prosecutor's submissions may be favourable, it is he, the judge, who decides the case. However, he is careful to add, it is not too late: the litigant himself can do whatever is necessary to make good his lawyer's mistakes. Of course, there will be a price to pay. The bargaining begins. The price is paid in cash or in kind according to the judge's

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[248]C. F. Amerasinghe, "The Local Remedies Rule in an Appropriate Perspective" (1976) 36 *Zeitschrift für Ausländisches öffentliches Recht und Völkerrecht*, p. 726, cited by J. Dugard, Third Report . . ., *op. cit.*, p. 11, para. 30.

[249]POC, p. 5, para. 0.08.

[250]*Ibid.*, p. 39, para. 1.53.

[251]See note by the US Library of Congress, http://lcweb2.loc.gov/cgi_bin/query/r?frd/cstdy:@field (DOCID+zro154)).

[252]Nenga Gamana, *op. cit.*, p. 184.

76 requirements. The lawyer is immediately informed by his client of this 'successful' contact: he is going to win his case."[253]

He continues two paragraphs further on:

> "The judges are greedier at appeal level. They behave like veritable gods, responsible for the final decision on the outcome of a case. Their corrupt proposals are put forward on a take-it-or-leave-it basis, depending on whether one wishes to go to 'heaven' or to 'hell'. The price is very high, given that at appeal level three judges sit, so that litigants have to deal with three individuals instead of just one! To take one example among many, a litigant challenged the jurisdiction of the Lubumbashi Court of Appeal, seeking to have his case remitted to a different court on the ground that it appeared that the judges were asking for money. The application raising this justified suspicion included the following statement:
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> > 'Whilst the case was pending before the Court of appeal, Mr. K received a phone call from one of the Lubumbashi Court of Appeal judges asking him for US$ 5,000 to intervene with the other judges to secure a favourable decision.
> >
> > When Mr. K refused, the said judge launched a campaign of denigration against him with the other judges, repeatedly stating that in these circumstances he could expect no assistance.'"[254]

3.54. Recalling Mummery's apt suggestion that "[t]he international tribunal should look not merely at the paper remedy but also at the circumstances surrounding the remedy"[255], Guinea would draw the Court's attention to the particular circumstances prevailing within the Zairean judicial system. These preclude any prospects of a calmly and fairly dispensed justice, offering litigants a reasonable possibility of a fair hearing and of obtaining effective compensation.

3.55. Moreover, although the DRC has sought in advance to play down the impact of the Congo war on the functioning of the Congolese judicial system and hence on the availability of local remedies, it nonetheless admits: "[i]t cannot be denied that the circumstances of civil war, then of international conflict, experienced by the Congo in the course of recent years have on occasion had negative impact on the effective and timely functioning of the courts"[256].

77 3.56. In reality, the disturbances in the Zairean/Congolese judicial system have lasted a great deal longer than the period of the armed seizure of power in 1997, and have included periods of total paralysis. Thus, starting from the opening of the National Conference, which lasted from 1991 to 1997, the political destabilization of the country resulted in an institutional breakdown of the State, from which the judicial system was not spared. The latter, having totally ceased to function at the start of the National Conference, subsequently operated in slow motion until 1996 and ceased functioning altogether in 1997 during the period when the insurrection launched in the east of the country was challenging for power in Kinshasa, which it succeeded in securing following a military offensive lasting several weeks.

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[253] *Ibid.*

[254] *Ibid.*, pp. 185-186.

[255] "The Content of the Duty to Exhaust Local Remedies" (1964), 58 *AJIL*, pp. 400-401, cited by J. Dugard, Third Report on Diplomatic Protection, *op. cit.*, p. 15, para. 37.

[256] POC, p. 118, par. 3.37.

3.57. It is doubtless this disturbance of the judicial system as a result of the political crises and of the war which has ravaged the country for over six years which explains the sparseness of Congolese jurisprudence during this period.

3.58. Thus the DRC has at times lacked an effective system offering a judicial guarantee of the rights and interests of litigants, and the fact that, since 1995, it is only from 1999 that new judicial decisions appear is significant in this respect. Such a failure of the judicial system is also regarded as a circumstance in which local remedies are considered ineffective[257]. Thus, in the case of *Mushikiwabo and others* v. *Barayiza*, a United States district court held that the local remedies rule could be dispensed with, as: "the Rwandan judicial system [was] virtually inoperative and [would] not be able to deal with civil claims in the near future"[258]. The judicial system of the DRC operated for almost a decade in a disrupted and irregular fashion, and that included the courts of the capital, Kinshasa. That is a further aspect of the ineffectiveness of the remedies which that judicial system offered to Mr. Diallo and his companies.

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Section 2: The excessive delays in the administration of justice

3.59. The DRC writes that it "does not dispute that particularly long delays can render local remedies ineffective"; it accepts that "where it is impossible to have a dispute decided within a reasonable period that can render a claim before the local courts pointless or futile"[259]. In so stating, the DRC is simply recalling a well established principle of international law, in course of codification by the ILC[260]. Nonetheless, it considers that, in view of "the particular situation in which the Democratic Republic of the Congo has found itself for some years, it would not, however, appear that the duration of the proceedings in the case between Africontainers-Zaire and Fina has gone beyond what may be regarded as reasonable"[261].

3.60. According to the DRC, "only" seven years have elapsed since the application for cassation was lodged in respect of the judgment by the Kinshasa-Gombe Court of Appeal in the case of *Africontainers-Zaire* v. *Fina*. That delay is claimed not to be "problematic in relation to the norms generally accepted in international law"[262]. In support of this claim, the DRC puts forward two arguments, which the Republic of Guinea will successively refute.

3.61. First, the DRC notes that, in the *Interhandel* case, the Court did not consider that a period of ten years "between the commencement of proceedings by the Swiss company before the United States courts and the date when the case, after being taken as far as the Supreme Court, was referred back to the American courts of first instance represented an unreasonable delay"[263], so as to compel it to conclude that the remedies offered were ineffective.

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3.62. Guinea would first draw attention to the errors in the DRC's calculation of delays in the present case by comparison with what the Court did in the *Interhandel* case. Since the date

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[257]See J. Dugard, Third Report on Diplomatic Protection, p. 28, para. 44.

[258](1997) 107 *International Law Reports*, pp. 453-460, at p. 457.

[259]POC, p. 128, para. 3.54.

[260]See draft Article 14 *(e)* of the draft Articles on Diplomatic Protection contained in the Third Report by J. Dugard, *op.cit*, p. 37.

[261]POC, p. 128, para. 3.54.

[262]*Ibid.*, p. 128, para. 3.55.

[263]*Ibid.*

when proceedings were first commenced before the Zairean courts in *Africontainers-Zaire* v. *Fina*, namely at latest 1993, the year in which, on 24 August, the *Tribunal de grande instance* gave judgment in the case, it should be noted that *ten years* (and not seven) have elapsed. And the Supreme Court, with which an application for cassation was lodged seven years ago, has to date still given no ruling, and there is not the slightest indication of when such a ruling might be given. If that hypothetical judgment were to accept the submissions of Africontainers, the case would then have to be remitted to the lower courts, to be reheard on the merits at some yet unknown time in the future.

3.63. It should be emphasized that, in the *Interhandel* case, the Court did not seek to fix a threshold beyond which a delay must be regarded as unreasonable. It did not exclude the possibility that excessive delay might ultimately result in relaxation of the local remedies rule; it simply did not consider that, *in the case in question*, ten years constituted a delay which would justify lifting that rule, in particular because *Interhandel* had contributed to the delay by failing to produce certain essential documents[264]. In other words, this 1959 Judgment confirms the principle of reasonable delay, but is of no great help in determining what that should be.

3.64. Moreover, a delay regarded by jurisprudence as excessive and constituting an exception to the local remedies rule varies from one case to another, and the court reserves the power to rule in that regard by giving the applicant the opportunity of arguing before it that there has been unwarrantable delay by a court in rendering its decisions[265]. In the case of *Abdoulaye Mazu/Cameroon*[266], the African Commission on Human and Peoples' Rights held that, since the plaintiff's suit had been before the Cameroonian authorities and courts for 12 years, local remedies must be regarded as exhausted. In that case, the applicant had addressed a personal appeal to the
80 President of the Republic, requesting that he be reinstated as a judge. He had subsequently proposed an amicable settlement to the Ministry of Justice. Having received no reply either from the Presidency or from the Ministry, the applicant had then put the matter before the Administrative Chamber of the Supreme Court, which dismissed his application. Then he had appealed to the Plenary Assembly of the Supreme Court, before taking the case to the Commission.

3.65. In the *El Oro Mining and Railway Co.* case, the delay regarded as unreasonable was shorter. Thus the Anglo-Mexican Claims Commission arbitrating on the matter decided that *"a period of nine years by far exceeds the limit of the most liberal allowance that may be made"*[267]; the Commission accordingly considered that local remedies were not effective and did not need to be exhausted[268].

3.66. The Republic of Guinea thus indeed accepts the DRC's second argument that "the notion of a reasonable period cannot be determined in a rigid manner, by reference to predetermined periods"[269]. However, Guinea cannot accept the grounds invoked by the DRC in support of its contention. According to the DRC, account must be taken of the fact that its Supreme Court has to deal with "appeals against decisions from all of the courts in the Congo's

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[264]See C. F. Amerasinghe, "Local Remedies . . .", p 203.

[265]See PCIJ, case concerning *Prince von Pless Administration*, Order of 4 February 1933 (Preliminary Objections), *P.C.I.J, Series A/B, No. 52*, p. 16.

[266]Communication No. 39/90, Annette Pagnoule (on behalf of Abdoulaye Mazou/Cameroon), African Commission on Human and Peoples' Rights, 21st ordinary session, Nouakchott (Mauritania), April 1997.

[267]*RIAA*, Vol. V, p. 198 (emphasis added).

[268]*Ibid.*

[269][POC, p. 129, para. 3.56]

immense territory, irrespective of the subject-matter, whether civil, commercial or criminal. Each of these applications must be examined individually, with proper respect for the rights of the respondent, which in practice involves what may appear to be lengthy delays between the filing of the application and the rendering of the decision"[270].

3.67. In this basic description of judicial activity there is nothing specific to the DRC; the same procedural requirements apply in every country, without thereby justifying abnormally long delays. As to the reference to the size of the DRC's territory and to the fact the Supreme Court and its cassation jurisdiction have to deal with applications in respect of decisions — not from "all of the courts" in that territory, but only from appeal courts, which are clearly far less numerous — it
81 demonstrates *a contrario* that the DRC does not dispute that the delay in question, even reduced to seven years between the Court of Appeal and the Supreme Court, is unreasonable, but rather seeks to justify that delay.

3.68. To say that this delay (in reality a delay of ten years) "cannot be regarded as excessive"[271] is to ignore the particular circumstances of the case. Thus it cannot seriously be argued that a litigant, the fruits of whose labours of over 30 years are ruined by trading partners acting in an unscrupulous or underhand manner, has not suffered sufficiently after some ten years of negotiations and procedural battles. The importance of the interests at stake, and above all the fact that the continuing delays brought about the ruin of Mr. Diallo's companies, requires that the delays in this case be viewed in a different light. If, as the DRC recalls, "the *Ministère Public* has filed his submissions which . . . recommend cassation of the Court of Appeal judgment"[272], Guinea asks itself why the long-awaited decisions still have not been handed down, given that the submissions in question have been on the file since January 1995. Whatever may be the answer to this question, it is clear that, for purposes of exercising its right of diplomatic protection, Guinea could not await indefinitely a decision of whose future date it remained in total ignorance. It was legitimately entitled to take the view that local remedies in this case must be regarded as exhausted or ineffective. As the African Commission on Human and Peoples' Rights stated in the case of *Civil Liberties Organization/Nigeria*, "it is reasonable to assume that domestic remedies would not only be prolonged but were certain to yield no results"[273]. As is well demonstrated by Article 9 of the draft articles adopted on first reading by the Third Committee of the Conference for the Codification of International Law at The Hague in 1930, "when the claimant had encountered in the proceedings unjustifiable obstacles or delays implying a refusal to do justice", that represents a denial of justice; and it is agreed that "local remedies need not be exhausted when there is a denial of justice"[274].

82 Section 3: Mr. Diallo's expulsion constituted a circumstance excluding the exhaustion of local remedies

3.69. According to the DRC, what it terms Mr Diallo's "removal"[275] — an astonishing euphemism — in referring to his brutal expulsion from Congolese territory[276] did not in any way affect the operation of the local remedies rule. Thus the Respondent considers that Mr. Diallo

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[270] *[Ibid.]*

[271] *Ibid.*, para. 3.57.

[272] *Ibid.*, para. 3.58.

[273] Communication 129/94 *Civil Liberties Organization/Nigeria.*

[274] See J. Dugard, Third Report on Diplomatic Protection, p. 9 para. 26.

[275] POC, p. 39, para. 1.54; p. 134, p. 367

"was in a position, even after he had been obliged to leave Zairean territory, not only to have his companies represented in the proceedings already pending, but also to continue negotiations and, if necessary, to commence new proceedings before the Zairean/Congolese Courts having jurisdiction in the other pending proceedings"[277]

3.70. These statements are at variance with the principles of international law in this regard. It is nowadays accepted that exhaustion of local remedies is not required where certain specific circumstances render such remedies impossible or futile. Such specific circumstances have been held by the African Commission on Human and Peoples' Rights to include detention and expulsion[278] and residence outside the country[279].

3.71. Moreover, in the present case Mr. Diallo cannot be accused of not having attempted to continue to defend the interests of his companies even from his country of origin, Guinea, to which he had been deported. As Guinea explained in its Memorial, he continued to have Africontainers-Zaire represented in negotiations with Gécamines until October 1997, that is to say, more than a year and a half after his expulsion. His company was represented there by what still remained of the managerial staff, Messrs. Kanza Ne Kongo and Ibrahim Diallo, as well as by two Congolese lawyers, Maître Musanhu and Maître Kabasele[280].

83 3.72. Moreover, it is totally wrong to state, as the DRC does in order to provide a basis for its speculations on the possible consequences of the régime change in the Congo on the outcome of the "Diallo case", that "Mr. Diallo has never asked the competent [Congolese] authorities to reconsider their position and to permit him to return to the country"[281]. Similarly, it is contrary to the facts to state that after his expulsion "Mr. Diallo preferred to make a direct approach to the Guinean authorities in order to seek their espousal of his claim . . . against the Democratic Republic of the Congo"[282]. The Republic of Guinea dealt with the approaches made by Mr. Diallo to the new Congolese authorities after his expulsion in a paragraph which appears to have escaped the attention of the respondent State and which Guinea accordingly reproduces here:

"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 Oil[283]. 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 Mr. Diallo in a letter dated

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[276]The Republic of Guinea described the circumstances of Mr. Diallo's expulsion in its Memorial: MG, pp. 29-30, paras. 2.63-2.64.

[277]POC, pp. 114-115, para. 3.28

[278]Com. 71/92 RHADDO/Zambia; Com. 64/92 and 68/92 *Amnesty International/Malawi*; Com. 74/92 CNDHL/Chad.

[279]Com. 103/93; Com. 159/96 *Union internationale*; FIDH; RHADDO; ONDH; etc/Angola; Com. 212/98 *Amnesty International/Zambia.*

[280]MG, pp. 27-28, paras. 2.54-2.57; Anns. 224 and 226.

[281]POC, p. 134, para. 3.67.

[282]*Ibid.*

[283]MG, Anns. 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).

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"[284]. 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."[285]

3.73. All these initiatives remained fruitless. And Mr. Diallo cannot be required to continue indefinitely with the pursuit in the DRC of legal proceedings and administrative demarches having no prospect of success. First, because that is unreasonable and no rule of international law requires it. Secondly, because Mr. Diallo, reduced to poverty by the acts of the Congolese State, has exhausted the meagre resources still available to him in the proceedings undertaken by him in the
84 DRC between his expulsion and seisin of the Court by the Republic of Guinea.

3.74. But what does the DRC care for the facts, as it seeks to force Guinea into an impasse. Thus, if Mr. Diallo fails to undertake legal proceedings, the DRC accuses him of inaction; and when he does attempt to organize himself so as to address the treatment accorded by his various debtors, including the Congolese State, to the sums owned to his companies, the DRC proclaims that he is rich and could afford to pay for the services of all the lawyers required in order to continue or undertake endless proceedings. However, it is an undeniable — because verifiable — fact that the prosperous businessman that Mr. Diallo once was finds himself today totally bereft of means. In his absence from the DRC, his companies are in a state of dereliction. In Judgment RCA18.307 of the Kinshasa-Gombe Court of Appeal dated 20 June 2002 in the case of *Zaire Shell* v. *Africontainers*, the Court can only indicate for Africontainers' address: "currently without an address in the Democratic Republic of the Congo"[286]. Thus here again it is incorrect to state, as the DRC does, that each of Mr. Diallo's companies "involved in these proceedings has its headquarters at Kinshasa"[287]. A ruined man, Mr. Diallo is incapable of ensuring his companies' survival.

3.75. The DRC attempts a number of times to minimize the consequences for the exhaustion of local remedies of Mr. Diallo's expulsion from Zaire — and not "refusal of entry" for "illegal residence" as the Notice of 31 January 1996 alleges[288]. Guinea will demonstrate the lack of substance in these attempts[289]. It should be noted here that that expulsion was quite simply the culmination of a campaign orchestrated by certain debtors of Mr. Diallo's companies — as is evidenced by the letter from Zaire Shell dated 29 August 1995 to the Zairean Minister of Justice[290] — and reflects the proven hostility of certain Zairean authorities to Mr. Diallo's stubborn efforts to recover his companies' debts[291].

85 3.76. The Republic of Guinea considers that these facts created a general climate rendering the exhaustion of local remedies impossible or at least futile. As the Rapporteur of the

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[284]MG, Ann 219 (13 March 1997, Letter No. 38/AOD/JK/3/97 from Maître Alpha Oumar Diallo, *Avocat à la Cour*, to the Minister for Foreign Affairs of the Republic of Guinea regarding a claim of the Africontainers vessel).

[285]MG, p. 103, para. 4.76.

[286]See POC, Ann. 64.

[287]POC, p. 118, para. 3.37.

[288]MG, Ann. 197.

[289]See below, Section 4.

[290]See MG, Ann. 166.

[291]MG, pp. 29-30, paras. 2.63-2.64.

International Law Association suggested in regard to the issue of "Exhaustion of Local Remedies" in the report submitted by him in 2003 to the Committee on Diplomatic Protection:

> "Futility for factual reasons particularly includes cases of danger for the life or limb to the applicant in the country where he would have to pursue the remedy. This can be due to a 'general atmosphere of hostility' towards nationals of other countries or it can be based on dangers regarding the alien in particular or a group of persons, provided those dangers are satisfactorily established."[292]

3.77. The Republic of Guinea has sufficiently demonstrated, both in its Memorial and in these Observations, the dangers that the situation held for Mr. Diallo. While the DRC does not dispute the damaging actions, as described above, taken by the oil companies trading with Mr. Diallo's companies, by contrast it claims that Guinea's arguments are "totally unfounded" in so far as they allege that the Zairean Prime Minister at the time, Mr. Kenzo Wa Dondo, "had prevented enforcement of the judicial decision in question or ordered withdrawal of the warrant of execution on the goods of Shell"[293]. However, the Memorial demonstrated this[294], and Guinea returned to the point in Chapter I, above[295].

3.78. The DRC further contends that Mr. Diallo's expulsion ("removal from national territory", as it calls it) could have been challenged by him "with a prospect of success within the framework of Zaire's domestic legal order". More specifically, according to the DRC Mr. Diallo could have challenged the measure by appealing to a higher authority[296]. However, apart from the fact that such an appeal, as the DRC itself recognizes, is an "informal possibility", for which there is no statutory procedure, there is no evidence that such an approach might have had a favourable
86 outcome in Mr. Diallo's case. The personal animosity of certain members of the Congolese Government, in particular Prime Minister Kenzo Wa Dondo, towards Mr. Diallo ensured that such action would fail. And the two examples cited by the DRC contain nothing to suggest the contrary.

3.79. The case of the Lebanese national, Yaghi, was a case of illegal or clandestine immigration: following his appeal to the National Immigration Commission, the President of that body informed Mr. Yaghi that he had instructed the immigration authorities to "grant him an entry visa" on his presenting himself within a period of one month "at the border posts of N'Djili or Ngobila Beach"[297]. However, in the case of Mr. Diallo, this was not, as we know, an immigration issue, since he had been residing perfectly legally in Zaire for over 30 years, but rather a case of a clash of economic and financial interests.

3.80. As for the case of Mr. de Villers, a Belgian national expelled in 1989, the document produced by the DRC as an annex to its Preliminary Objections does not disclose the grounds for his expulsion. Decree No. 0010 of 16 March 1996, which revokes that expulsion, speaks only of "withdrawing the declaration of undesirability"[298]. We are told nothing more.

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[292]Juliane Kokott, "Exhaustion of Local Remedies", in *International Law Association*, Report on the Sixty-Ninth Conference(2002), pp. 624-625, cited by J. Dugard, Third Report . . ., *op. cit.*, p. 41, para. 101.

[293]POC, p. 124, para. 3.47 and p. 125, para. 3.49.

[294]MG, p. 101, para. 4.72.

[295]See above, para. 1.55.

[296]POC, p. 134, para. 3.68.

[297]*Ibid.* Ann. 69.

[298]*Ibid.*, Ann. 68.

3.81. In any event, one is bound to ask how Mr. Diallo could have approached a higher authority or invoked his right of defence, given his incarceration prior to expulsion. On several occasions, the African Commission on Human and Peoples' Rights has held that specific circumstances of this kind, namely detention and expulsion, rendered remedies impossible or futile[299]. Moreover, Guinea has already recalled that, even after his expulsion from Zaire and return to Guinea, Mr. Diallo put his case to the new Congolese authorities in the hope that an outcome worthy of the rule of law might be achieved in the cases having resulted in his expulsion from Zaire. But those approaches remained fruitless[300].

87 **Section 4: Mr. Diallo was unable to pursue the pending proceedings or undertake new local remedies because of his state of financial impoverishment caused by the DRC**

3.82. According to the DRC, Mr. Diallo's impoverishment did not prevent him from securing representation before the Zairean courts. It contends that Guinea's reference to Mr. Diallo's "extreme lack of means" simply reflects "the unease which [the applicant State] clearly feels on account of the negligence of its national, or rather of the strategy of a businessman which consists in presenting himself as a victim and at the same time refusing to have recourse to the remedies available to him"[301]. Moreover, adds the respondent State, Mr. Diallo's "alleged extreme poverty" is supported by no "form of substantiation, or indeed reference to evidence"[302] on Guinea's part, and would in any event have no effect in international law[303].

3.83. Guinea notes that the facts of the case readily explain the financial exhaustion of Mr. Diallo and his companies. While it is unnecessary to retrace the background to the case, it suffices to recall that Mr. Diallo had to undertake three separate legal actions against the private trading partners of his companies, Shell, Zaire Fina and PLZ. All of these proceedings were lengthy and costly, having all three been pursued as far as the Supreme Court, thus involving substantial legal costs, in particular in lawyers' fees.

3.84. The DRC itself recalls that, in the negotiations conducted in July 1997 between Africontainers-Zaire and Gécamines, Mr. Diallo's company was represented, *inter alia*, by two Congolese lawyers, Messrs. Musangu and Kabasele. But, curiously, it does so only in order to lend credence to the notion that Mr. Diallo had the resources to pursue indefinitely proceedings before the Congolese courts or to initiate new proceedings. Yet the DRC also notes that in the July 1997 negotiations "no result could be reached, once the representatives appointed by Mr. Diallo had
88 ceased to attend"[304]. It need only have asked itself why those representatives were absent to have been answered with evidence of Mr. Diallo's state of impoverishment: they had ceased to attend because Mr. Diallo no longer had the means to pay their fees and other costs arising out of such attendance.

3.85. Well before 1997, Mr. Diallo's problems with the Zairean authorities and his difficulties in recovering his debts, both from the Zairean State and its public undertakings as well as with the private trading partners of his companies, had virtually ruined him, as is demonstrated

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[299]See, in particular: Com. *71/92 RAHDOOZ/Zambia* (detention and expulsion); see above, para. 3.70.

[300]See above, paras. 3.72 and 3.73.

[301]POC, p. 118, para. 3.36.

[302]*Ibid.*, p. 116, para. 3.33.

[303]*Ibid.*, p. 116, para. 3.35.

[304]*Ibid.*, p. 115, para. 3.29.

by the Certificate of Indigence issued to him by the Head of the Urban Affairs Division of the City of Kinshasa on 12 July 1995[305].

3.86. It should be noted that this Certificate of Indigence, issued to Mr. Diallo at a time when only recovery of the debts due to his companies could have enabled them to survive, shows that, as sole or principal shareholder of his companies, the latter were identified with Mr. Diallo to the point where their paralysis would necessarily lead to his own financial asphyxiation, and Mr. Diallo's ruin to that of his companies. Thus, Mr. Diallo's arbitrary detention followed by his expulsion at the end of January 1996 deprived him of any income, just as it deprived its companies of the foundation on which they rested. Hence, there can be no doubt as to Mr. Diallo's state of poverty, and this is confirmed by his inability to provide financial support, from Guinea where he is obliged by events to reside, for any legal action in Congo after 1997.

3.87. In this regard, the DRC's argument that Mr. Diallo possesses resources or is not impoverished because he was able to have himself represented at the July 1997 negotiations with Gécamines is contradictory or leads to an impasse when contrasted with the charges of judicial inaction levied at Mr. Diallo and his companies, even after his expulsion from Zaire. Here again we see an attempt to square the circle: when Mr. Diallo tries to organize the defence of his companies' interests, the Zairean State imprisons him, and the DRC sees this as an indication of
89 financial well-being; when, for lack of resources, he fails to pursue pending proceedings or to launch fresh proceedings and seeks the diplomatic protection of his country of origin, the DRC reproaches him for his failure to act and for having failed to exhaust local remedies within Zaire.

3.88. It is specious on the part of the DRC to cite the participation of Maître Alpha O. Diallo in the proceedings instituted by the Republic of Guinea before the Court in 1998 in order to contend that Mr. Diallo had the financial resources to continue to have the interests of Africontainers in Zaire defended by lawyers, even after his expulsion[306]. The DRC must be aware that the proceedings before the Court are conducted by the Republic of Guinea under the head of diplomatic protection, and not by Mr. Diallo, and that accordingly the lawyers who participate in these proceedings — whether Maître Alpha O. Diallo or others — are acting on behalf of Guinea and not for Mr. Diallo.

3.89. According to the DRC, the Republic of Guinea has failed to demonstrate the existence of a legal rule which would make indigence an exception to the basic principle that non-exhaustion of local remedies constitutes a ground for the inadmissibility of an application for diplomatic protection[307]. The DRC contends that, on the contrary, it is accepted that, "even where the plaintiff finds himself in a difficult financial situation, the obligation to exhaust local remedies continues to apply"[308]. The DRC finds it "significant" in this regard that Guinea cites "not a single legal authority" in support of its claim[309].

3.90. The Republic of Guinea observes on this point that, while the position defended by the DRC, which is founded on the views of Mr. Amerasinghe, may have prevailed at one time, the contemporary rule is to regard the plaintiff's lack of means as a circumstance excluding the

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[305]On this point, see above Chapt. 1, Sect. 4, para. 1.65 and Ann. OG 22.

[306]POC, pp. 115-116, para. 3.30.

[307]*Ibid.*, p. 116, para. 3.33.

[308]*Ibid.*, p. 117, para. 3.35.

[309]*Ibid.*

obligation to exhaust local remedies. The Advisory Opinion of the Inter-American Court of Human Rights handed down on 10 August 1990 demonstrates this tendency. That court was asked to answer the following question, posed by the Inter-American Human Rights Commission:

90 "1. Does the requirement of the exhaustion of internal legal remedies apply to an indigent, who because of economic circumstances is unable to avail himself of the legal remedies within a country?

2. In the event that this requirement is waived for indigents, what criteria should the Commission consider in making its determination of admissibility in such cases?"[310]

3.91. The Inter-American Court, after examining the relevant provisions of the American Convention on Human Rights, emphasized that the mere fact that an individual is indigent does not mean that he need not exhaust local remedies, inasmuch as Article 46 (1) of the Convention is of a general nature. However, the provisions of Article 46 (2) suggest that the question of whether an indigent individual need or need not exhaust those remedies "will depend on whether the law or the circumstances" permit him to do so"[311]. And at the end of its analysis, the Court unanimously delivered the following opinion: "That if his indigency or a general fear in the legal community to represent him prevents a complainant before the Commission from invoking the domestic remedies necessary to protect a right guaranteed by the Convention, he is not required to exhaust such remedies."[312]

3.92. Although the DRC claims — often on the basis of a simple formal description of the Congolese legal system — that local remedies were available to Mr. Diallo, the Republic of Guinea has shown that, even before his expulsion from Zaire, Mr Diallo was already in financial difficulty and that after his expulsion he found himself, at least from 1997, in a position where it was totally impossible for him to hire the services of a lawyer to defend the interest of his companies. In light of that circumstance of Mr. Diallo's financial deprivation and of the collapse of his companies on account of their unpaid debts, it is clearly apparent that Mr. Diallo could not do any more than he did in order to exhaust the remedies available before the Zairean/Congolese courts.

91 **Conclusion to Chapter III**

3.93. It follows from the foregoing that Mr. Diallo, acting on behalf of his companies, has exhausted the local remedies available within Zaire/DRC in the disputes between those companies and their private trading partners.

3.94. The proceedings against Zaire Shell, Zaire Fina and PLZ were taken from the *Tribunal de grande instance* right up to the Supreme Court of the DRC, passing via the Kinshasa Court of Appeal.

3.95. The disputes with the Zairean State and with public undertakings which are in practice equivalent to the State — namely Gécamines and Onatra — were dealt with, in accordance with a

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[310]See Exception on the Exhaustion of Domestic Remedies (Arts. 46 (1), 46 (2) *(a)* and 46 (2) *(b)* of the American Convention on Human Rights). Advisory Opinion Oc-11/90, 10 August 1990, Inter-Am. Ct. H. R. (Ser.A) No. 11 (1990) [file://C:\WINDOS\TEMP\Arrêt%20CIDH.htm], Ann. OG, No. 34.

[311]*Ibid.*, para. 20.

[312]*Ibid.*, para. 42.

pragmatic approach dictated by the local social, political and judicial environment, by negotiation. Despite the volte-face by certain State authorities and by the managers of those public undertakings, those negotiations appeared to be making good progress until Mr. Diallo's brutal expulsion from Zaire on 31 January 1996.

3.96. That expulsion plunged Mr. Diallo into a state of total indigence and compromised the future of his companies, thus making it impossible for him to exhaust local remedies.

3.97. Furthermore, the Zairean judicial system, which was plagued with corruption and characterized over the previous decade by disruption and manifest operational failure, offered Mr. Diallo and his companies no reasonable prospect of success. Interference by Government authorities in the administration of justice had a discouraging and dissuasive effect in this regard.

3.98. For all these reasons, there can be no doubt that the rule of the exhaustion of local remedies has been properly complied with in the present case, having regard to the best established principles of international law.

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SUBMISSIONS

For the reasons set out above, the Republic of Guinea kindly requests the Court to:

1. Reject the Preliminary Objections raised by the Democratic of the Congo, and

2. Declare the Application of the Republic of Guinea admissible.

(Signed) Kazaliou BALDE.
Agent of the Republic of Guinea
Before the International Court of Justice

LIST OF ANNEXES

Annex OG 16	Letter No. 431 of 28 January 1989 from the Prosecutor-General of the Kinshasa Court of Appeal to Mr. Diallo.
Annex OG 17	Letter (1989 ???) to the Prosecutor-General agreeing on the expediency of the current proceedings against Mr. Diallo.
Annex OG 18	Letter of 30 November 1989 from Mr. Diallo to the Governor of the Bank of Zaire requesting payment of Zaire's debts to Africom.
Annex OG 19	Application dated 17 December 1994 by Africontainers for cassation in respect of proceedings against Zaire Fina.
Annex OG 20	Circular No. 002 of 13 March 1995 from the Ministry of Justice to Presidents and Officers of the courts of the city of Kinshasa.
Annex OG 21	Service of Reply dated 15 March 1995 in the case of *Africontainers* v. *Fina*.
Annex OG 22	Certificate of Indigence No. 1 of 12 July 1995.
Annex OG 23	Order No. 0455/D.15/95, release of judicial documents, 18 July 1995.
Annex OG 24	Certificate No. 0309/95 of 24 July 1995 regarding non-filing of notice of opposition to execution.
Annex OG 25	Report dated 25 July 1995 approving execution of judgment in the case of *AFC* v. *Shell*.
Annex OG 26	Notice of 13 October 1995 revoking the seizure of property belonging to Shell.
Annex OG 27	Notice of arrest dated 5 November 1995.
Annex OG 28	Letter from Gécamines of 18 November 1996 to the CEO of Africontainers.
Annex OG 29	Minutes of contact meeting with freight forwarding companies, parties to the tripartite contract, held in Kinshasa on 9 December 1996.
Annex OG 30	Minutes of the working meeting held with AFC on 3 July 1997 in connection with consideration of the container disputes.
Annex OG 31	Letter of 21(29?) May 1998 from the Mayor of Gombe municipality regarding AFC containers (request for removal).
Annex OG 32	Letter of 19 June 1998 from the Mayor of Gombe municipality regarding AFC containers (notice that containers are scattered throughout town).
Annex OG 33	Three documents from Africontainers (24/06/98; 26/06/98; 07/07/98): location of containers: execution of order for removal of containers.
Annex OG 34	Exceptions to the exhaustion of Domestic Remedies (Atrs. 46 (1), 46 (2) *(a)* and 46 (2) of the American Convention on Human Rights),

Advisory Opinion OC11/90 10 August 1990, Inter-Am.Ct.H.R. (Ser.A) No.11(1990).

Annex OG 35

Texts on Congolese company law and Investment Code:

— Decree of 27 February 1887 on commercial corporations, as amended and updated

— Royal Decree of 22 June 1926 on public companies limited by shares

— Order-Law No. 66-341 of 7 June 1966 on the registered and administrative offices of corporations having their main centre of operations in the Congo

— Order-Law No. 67-404 of 23 September 1967 supplementing the Order-Law of 21 April 1966 requiring foreign corporations and certain Congolese corporations to provide financial guarantees as a condition of entry in the Register of Foreign Businesses

— Ministerial Decree No. CAB/EN/0025/72 of 17 June 1972 regarding the corporate instruments of public companies limited by shares

— Order-Law No. 86-028 of 5 April 1986 establishing the Investment Code.