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CR 2006/50 (translation)

CR 2006/50 (traduction)

Monday 27 November 2006 at 10 a.m.

Lundi 27 novembre 2006 à 10 heures

8 Le PRESIDENT : Veuillez vous asseoir. L'audience est ouverte.

La Cour se réunit aujourd'hui, en application du paragraphe 4 de l'article 79 de son Règlement tel qu'adopté le 14 avril 1978, pour entendre les Parties en leurs plaidoiries sur les exceptions préliminaires soulevées par le défendeur en l'affaire *Ahmadou Sadio Diallo (République de Guinée c. République démocratique du Congo)*.

Le juge Parra-Aranguren a informé la Cour que, pour des raisons médicales, il serait empêché de siéger pendant la durée des présentes audiences. Le juge Sepúlveda-Amor a également informé la Cour qu'il serait empêché de siéger pendant la durée des présentes audiences.

Avant de rappeler les principales phases de la procédure, il échet de parachever la composition de la Cour.

La Cour ne comptant pas sur son siège de juge de la nationalité des Parties, chacune d'elles a usé de la faculté qui lui est conférée par le paragraphe 2 de l'article 31 du Statut de désigner un juge *ad hoc*. La République de Guinée avait initialement désigné M. Mohammed Bedjaoui ; celui-ci ayant démissionné de ses fonctions le 10 septembre 2002, elle a désigné M. Ahmed Mahiou. La République démocratique du Congo a désigné M. Auguste Mampuya Kanunk'A-Tshiabo.

L'article 20 du Statut dispose que «[t]out membre de la Cour doit, avant d'entrer en fonction, prendre l'engagement solennel d'exercer ses attributions en pleine impartialité et en toute conscience». En vertu du paragraphe 6 de l'article 31 du Statut, cette disposition s'applique également aux juges *ad hoc*.

Bien que M. Mahiou ait été désigné juge *ad hoc* en d'autres affaires dans lesquelles il a fait des déclarations solennelles, il lui faut, conformément au paragraphe 3 de l'article 8 du Règlement de la Cour, en faire une nouvelle en la présente affaire.

Avant de les inviter à faire leurs déclarations solennelles, je dirai d'abord quelques mots de la carrière et des qualifications de MM. Mahiou et Mampuya.

M. Mahiou, de nationalité algérienne, est bien connu de la Cour puisqu'il a siégé en qualité de juge *ad hoc* en deux autres affaires. Il est docteur d'Etat de la faculté de droit de Nancy et
9 agrégé de droit public et de science politique. Il a occupé divers postes d'enseignement et de

recherche en Algérie, en France et dans d'autres pays, et a été doyen de la faculté de droit de l'Université d'Alger. M. Mahiou a été membre de la Commission du droit international de 1982 à 1996, et a été élu président de cette Commission lors de sa quarante-huitième session en 1996. M. Mahiou a représenté l'Algérie dans de nombreuses conférences internationales et a été membre de divers organes internationaux. Il a été vice-président du Conseil d'appel de l'UNESCO et a exercé les fonctions d'arbitre dans le cadre de plusieurs différends internationaux. M. Mahiou est membre de divers organes et institutions scientifiques et membre associé de l'Institut de droit international. Il a publié de nombreux ouvrages et articles dans différents domaines du droit international.

M. Mampuya, de nationalité congolaise, est également docteur d'Etat de la faculté de droit de Nancy et titulaire d'un diplôme d'études supérieures de science politique de cette même université. M. Mampuya est professeur à la faculté de droit de l'Université de Kinshasa, ainsi que professeur invité auprès de plusieurs universités françaises. Il a occupé différents postes au sein du Gouvernement de la RDC, notamment ceux de commissaire d'Etat à la justice, de conseiller politique à la présidence de la République et de directeur de cabinet adjoint à la présidence de la République. M. Mampuya a publié de nombreux ouvrages et articles dans le domaine du droit international public et des relations internationales.

J'invite maintenant MM. Mahiou et Mampuya à prendre l'engagement solennel prescrit par l'article 20 du Statut et demande à toutes les personnes présentes à l'audience de bien vouloir se lever. M. Mahiou.

M. MAHIOU :

«I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously.»

Le PRESIDENT : Je vous remercie, M. Mahiou. M. Mampuya.

M. MAMPUYA :

«I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously.»

10 Le PRESIDENT : Je vous remercie, M. Mampuya. Veuillez vous asseoir. La Cour prend acte des déclarations solennelles faites par MM. Mahiou et Mampuya et je déclare ceux-ci dûment installés en qualité de juges *ad hoc* en l'affaire *Ahmadou Sadio Diallo (République de Guinée c. République démocratique du Congo)*.

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Je rappellerai maintenant les principales étapes de la procédure. Le 28 décembre 1998, le Gouvernement de la République de Guinée a déposé au Greffe de la Cour une requête introductive d'instance contre la République démocratique du Congo au sujet d'un différend relatif à de «graves violations du droit international» qui auraient été commises «sur la personne d'un ressortissant guinéen». Dans ladite requête, la Guinée soutenait que

> «M. Diallo Ahmadou Sadio, homme d'affaires de nationalité guinéenne, a[vait] été, après trente-deux (32) ans passés en République démocratique du Congo, injustement incarcéré par les autorités de cet Etat, spolié de ses importants investissements, entreprises et avoirs mobiliers, immobiliers et bancaires puis expulsé.»

L'arrestation et l'expulsion de M. Diallo constitueraient entre autres des violations

> «[du] principe du traitement des étrangers selon «le standard minimum de civilisation», [de] l'obligation de respect de la liberté et de la propriété des étrangers, [et de] la reconnaissance aux étrangers incriminés du droit à un jugement équitable et contradictoire rendu par une juridiction impartiale».

Dans sa requête, la Guinée invoquait, pour fonder la compétence de la Cour, les déclarations par lesquelles les deux Etats ont accepté la juridiction obligatoire de celle-ci au titre du paragraphe 2 de l'article 36 du Statut de la Cour.

Par ordonnance du 25 novembre 1999, la Cour a fixé au 11 septembre 2000 la date d'expiration du délai pour le dépôt du mémoire de la Guinée et au 11 septembre 2001 la date d'expiration du délai pour le dépôt du contre-mémoire de la RDC. Par ordonnance du 8 septembre 2000, le président de la Cour, à la demande de la Guinée, a reporté au 23 mars 2001 la date d'expiration du délai pour le dépôt du mémoire ; la date d'expiration du délai pour le dépôt du contre-mémoire a été reportée, par la même ordonnance, au 4 octobre 2002. La Guinée a dûment déposé son mémoire dans le délai ainsi prorogé.

11 Dans le délai prescrit pour le dépôt du contre-mémoire, la RDC a soulevé certaines exceptions préliminaires portant sur la recevabilité de la requête de la Guinée, en vertu du paragraphe 1 de l'article 79 du Règlement de la Cour dans sa version adoptée le 14 avril 1978. Conformément au paragraphe 3 de l'article 79 dudit Règlement, la procédure sur le fond a alors été suspendue. Par ordonnance du 7 novembre 2002, la Cour, compte tenu des circonstances particulières de l'espèce et de l'accord des Parties, a fixé au 7 juillet 2003 la date d'expiration du délai pour la présentation par la Guinée d'un exposé écrit contenant ses observations et conclusions sur les exceptions préliminaires soulevées par la RDC.

La Guinée a déposé un tel exposé dans le délai fixé, et l'affaire s'est ainsi trouvée en état pour ce qui est des exceptions préliminaires.

Conformément au paragraphe 2 de l'article 53 de son Règlement, la Cour, après s'être renseignée auprès des Parties, a décidé que des exemplaires des pièces de procédure et des documents annexés seraient rendus accessibles au public à l'ouverture de la procédure orale. En outre, conformément à la pratique de la Cour, l'ensemble de ces documents, sans leurs annexes, sera placé dès aujourd'hui sur le site Internet de la Cour.

Je constate la présence à l'audience des agents, conseils et avocats des deux Parties. Conformément aux dispositions relatives à l'organisation de la procédure qui ont été arrêtées par la Cour, les audiences comprendront un premier et un second tours de plaidoiries. La RDC présentera son premier tour de plaidoiries ce matin jusqu'à 13 heures. La Guinée présentera son premier tour de plaidoiries demain matin à partir de 10 heures. La RDC présentera ensuite sa réponse le mercredi 29 novembre à partir de 15 heures. La Guinée, pour sa part, présentera sa réponse le vendredi 1er décembre à partir de 10 heures.

J'appelle l'attention des Parties sur les prescriptions du paragraphe 1 de l'article 60 du Règlement de la Cour, lequel se lit comme suit :

> «Les exposés oraux prononcés au nom de chaque partie sont aussi succincts que possible eu égard à ce qui est nécessaire pour une bonne présentation des thèses à l'audience. A cet effet, ils portent sur les points qui divisent encore les parties, ne reprennent pas tout ce qui est traité dans les pièces de procédure, et ne répètent pas simplement les faits et arguments qui y sont déjà invoqués.»

12 Je rappellerai également à cet égard que l'instruction de procédure VI précise que «[l]a Cour exige le plein respect de[s] dispositions [de l'article 60] ainsi que du degré de brièveté requis» et

que, «[l]ors de l'examen des exceptions d'incompétence ou d'irrecevabilité, la procédure orale doit se borner à des exposés sur les exceptions».

Je donne maintenant la parole à l'agent de la République démocratique du Congo, S. Exc. M. Masangu-a-Mwanza.

Mr. MASANGU-A-MWANGA: Madam President, Members of the Court, it is with great pleasure that I am appearing this morning before your prestigious Court to speak on behalf of our country, the Democratic Republic of the Congo, in this case.

We thus offer the Court our heartfelt greetings, trusting that it will perform good work in the interests of international justice.

The delegation of the Democratic Republic of the Congo is as follows:

1. H.E. Mr. Pierre Ilunga M'Bundu wa Biloba, Minister of Justice and Keeper of the Seals, Democratic Republic of the Congo,

as Head of Delegation;

2. H.E. Mr. Jacques Masangu-a-Mwanza, Ambassador Extraordinary and Plenipotentiary of the Democratic Republic of the Congo to the Kingdom of the Netherlands,

as Agent;

3. Maître Tshibangu Kalala, Deputy, Congolese Parliament, member of the Kinshasa and Brussels Bars, Tshibangu et Associés,

as Co-Agent, Counsel and Advocate;

4. Mr. André Mazyambo Makengo Kisala, Professor of International Law, University of Kinshasa,

as Counsel and Advocate;

5. Mr. Yenyi Olungu, Principal Advocate-General of the Republic, Principal Private Secretary to the Minister of Justice and Keeper of the Seals,

6. Mr. Victor Musompo Kasongo, Private Secretary to the Minister of Justice and Keeper of the Seals,

7. Mr. Nsingi-zi-Mayemba, Minister-Counsellor, Embassy of the Democratic Republic of the Congo in the Netherlands,

8. Mr. Bamana Kalonji Jerry, Second Counsellor, Embassy of the Democratic Republic of the Congo in the Netherlands,

9. Maître Kikangala Ngoie, member of the Brussels Bar,

as Advisers;

10. Maître Kadima Mukadi, member of the Kinshasa Bar, Tshibangu et Associés,

11. Mr. Lufulwabo Tshimpangila, member of the Brussels Bar,

12. Mr. Tshibwabwa Mbuyi, member of the Brussels Bar,

as Research Assistants;

13. Ms Ngoya Tshibangu,

as Assistant.

The schedule of the oral proceedings today is as follows:

1. Presentation of the delegation by myself.
2. Address by the Minister of Justice, Pierre Ilunga M'Bundu wa Biloba, Minister of Justice and Keeper of the Seals of the Democratic Republic of the Congo.
3. The facts on which the two preliminary objections raised by the Democratic Republic of the Congo are based, by Maître Tshibangu Kalala, Co-Agent, Counsel and Advocate.
4. The Republic of Guinea does not have the capacity to act before the Court in this case, by Professor Mazyambo.
5. Mr. Diallo has not exhausted the internal remedies in the Democratic Republic of the Congo, by Maître Tshibangu Kalala.
6. The submissions of the Democratic Republic of the Congo by its Agent, H.E. Mr. Jacques Masangu-a-Mwanza, Ambassador.

That is our schedule, Madam President. Thank you.

Le PRESIDENT : Merci, Excellence. A qui souhaiteriez-vous que je donne la parole à présent ?

14 Mr. MASANGU-A-MWANZA: May I ask the Minister of Justice to take the floor?

Le PRESIDENT : Oui. Merci infiniment. Nous invitons le Ministre de Justice à prendre la parole.

Mr. ILUNGA: Madam President, Members of the Court, the President of the Democratic Republic of the Congo, H.E. Joseph Kabila Kabange, has instructed me to convey his warm greetings to the Court and to express his deep respect for the high mission it performs on a daily basis for the peaceful settlement of disputes between States, thereby strengthening peace and justice in the world.

Madam President, Members of the Court, the Democratic Republic of the Congo is one of the African countries which for many years have placed their trust in the principal judicial organ of the United Nations. Indeed, my country has since 1989 signed the optional declaration accepting the compulsory jurisdiction of the Court without reservation; as early as 1975 it participated in proceedings for an advisory opinion and has several times appeared before your Court, as applicant, in contentious cases.

The case which today brings me to this prestigious setting, and which formed the subject of an application instituting proceedings of 28 December 1998, is between the Democratic Republic of the Congo and the Republic of Guinea. The Democratic Republic of the Congo wishes to emphasize before the Court that its bilateral relations with the Republic of Guinea are excellent. Therefore, it is not this dispute that is going to destroy them.

Mr. Ahmadiou Sadio Diallo is a son of Africa who had chosen the Democratic Republic of the Congo as his second country. He lived in our country for over 30 years. That is quite considerable. He was, it is true, expelled from Congolese territory for wrongful conduct under Congolese law. But, where this expulsion case is concerned, it should be noted that the Democratic Republic of the Congo has always pardoned other foreign nationals who have been expelled on the same grounds. They have returned to the Congo are now living there peacefully.

15 The Democratic Republic of the Congo has never expropriated Mr. Diallo's assets The two companies of which he is associate managing director still exist. If Mr. Diallo had wished to return to the Democratic Republic of the Congo to resume his activities, the Congolese authorities would have given favourable consideration to his request.

Alas, he did not take this route. He opted for the international stage, levelling accusations at my country. The Government of the Democratic Republic of the Congo regrets that the Republic of Guinea encouraged Mr. Diallo in this action instead of opening bilateral diplomatic negotiations to settle the problem.

Since the matter has been brought before the Court, whose task is to state the law, the Democratic Republic of the Congo has no choice but to defend itself. My country therefore places its trust in the wisdom of the Court in order to obtain justice.

I thank the Court for its kind attention.

Le PRESIDENT : Je vous remercie infiniment. Pourriez-vous indiquer qui vous voudriez faire appeler après à la barre ?

Mr. MASANGU-A-MWANZA : May I ask the honourable Mr. Tshibangu to take the floor.

Le PRESIDENT : Dois-je comprendre que c'est M. Kalala que vous voudriez faire appeler à la barre maintenant ? Veuillez prendre la parole, Maître Kalala.

Mr. KALALA:

1. Madam President, Members of the Court, please allow me first to make known my great joy as I stand, for the second time in the space of a few months, before this prestigious Court to represent the interests of my country in the present case. I cannot help but in this connection express my deep thanks to the governmental authorities of my country, here represented at a senior level by His Excellency the Minister of Justice and Keeper of the Seals,
16 Mr. Ilunga M'Bundu wa Biloba, for having afforded me a second opportunity, rare in the career of a lawyer and specialist in international law, to partake of this momentous experience.

2. Madam President, I shall confine myself in this statement to setting out for the Court the facts on which the Democratic Republic of the Congo has relied in raising the two preliminary objections to admissibility with a view to seeing the Republic of Guinea's Application rejected.

3. Madam President, Members of the Court, it was nearly eight years ago, on 23 December 1998, that the Applicant filed an Application against the Democratic Republic of the Congo in the Registry of the Court. In its Application, Guinea stated that it was seeking to exercise

diplomatic protection on behalf of one of its nationals, Mr. Ahmadou Sadio Diallo, to obtain compensation for the prejudice resulting from internationally wrongful acts allegedly committed by the Congolese authorities against two Congolese companies in which Mr. Diallo is shareholder and managing director. The amount claimed by the Republic of Guinea is some *thirty-six* (36) billion United States Dollars, plus bank and default interest at annual rates of 15 and 26 per cent accruing from the end of 1995[1]. This amount, equal to several times the Democratic Republic of the Congo's annual budget, is undoubtedly one of the highest ever claimed before an international court.

4. Mr. Ahmadou Sadio Diallo is a Guinean national who arrived in the Democratic Republic of the Congo in 1964. During his long stay of more than 30 years in the Democratic Republic of the Congo, he, in association with other partners, founded two private commercial companies of which he was to become shareholder and managing director. An important point should be noted here: Congolese law, which defines a commercial company as a contract between several persons, does not recognize sole-shareholder commercial companies[2]. Mr Diallo therefore formed a first company, Africom-Zaire (hereinafter "Africom"), having general trade and import-export as its corporate purpose. In 1979, Mr Diallo, in association with two other partners, formed a second company, Africontainers-Zaire (hereinafter "Africontainers"). The corporate purpose of this
17 company is the containerized transport of goods. Mr. Diallo is the managing director/shareholder of these two companies incorporated under Congolese law. Under Congolese law, Africom-Zaire and Africontainers-Zaire, which are private limited liability companies, have legal personality distinct from that of their shareholders[3]. Thus, Mr. Diallo did not engage in his activities in the Democratic Republic of the Congo in his capacity as a natural person of Guinean nationality, but rather through these two autonomous commercial companies formed under Congolese law.

5. As part of their activities, Africom and Africontainers entered into contracts with other Congolese economic operators, contracts to which I shall revert to in a moment. The performance

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[1]Application, p. 37.

[2]According to Article 446/1 of the Decree of 30 July 1888: "A company is a contract by which two or more persons agree to pool something, with a view to sharing the profit which may arise from it".

[3]See Article 1 of the Decree of 27 February 1887 on commercial companies, providing: "Commercial companies legally recognized in accordance with the present Decree shall be legal persons distinct from their shareholders".

of those commercial contracts gave rise to the disputes which the Applicant has seen fit to submit to the Court.

6. The DRC would at the outset point out to the Court that *all* the commercial disputes in question are between two commercial companies of Congolese nationality and other commercial companies formed under Congolese law and concern contractual commitments assumed by the parties and governed by Congolese law. The DRC and Mr. Diallo stand completely outside these contracts and the disputes which have arisen from them.

Further, in these disputes, the local remedies available in the DRC have not been exhausted either by Mr. Diallo or by the two companies, Africom and Africontainers.

7. Moreover, Mr. Diallo's general conduct in 1995 in respect of the laws and internal and external security of the DRC compelled the competent Congolese authorities to expel him from Congolese territory. Once back in his home country, Mr. Diallo succeeded in convincing the Guinean authorities to exercise diplomatic protection on his behalf before the Court with a view to helping him recover the colossal fortune of which he was allegedly robbed by the DRC authorities.

8. Madam President, Members of the Court, so as to enable the Court to have a clear understanding of the facts relied on by the DRC in raising its two preliminary objections, I have organized my statement this morning in three parts. In the first part I shall discuss Africom's

18 disputes with the Congolese State and with the company Plantations Lever au Zaïre (hereinafter "PLZ"). Then, in the second part, I shall explain to the Court the position in respect of the litigation between Africontainers and its Congolese business partners. Finally, in the third and last part, I shall describe to the Court Mr. Diallo's expulsion from Congolese territory in January 1996.

9. I shall now turn to the first part of my statement, devoted to Africom's disputes with the Congolese State and with Plantations Lever au Zaïre.

I. THE DISPUTES BETWEEN AFRICOM-ZAIRE AND ITS CONTRACTING PARTNERS

10. Madam President, Members of the Court, Africom-Zaire is involved in two disputes. The first is between it and the Congolese State, the second between it and PLZ, a subsidiary of the multinational company Unilever. Let us begin with the dispute between Africom and the Congolese State.

Africom-Zaire* v. *DRC

11. Africom had regular commercial dealings in the 1980s with the Congolese State. In June 1986, the Congolese State ordered various items of stationery and small office equipment from Africom. The orders totalled 28,382,872.70 zaires. A payment schedule for that amount was proposed by Africom and accepted by the competent authorities. It provided for complete payment of this debt by the end of March 1987.

12. As a result of the failure by the Congolese State to honour this payment schedule, Mr. Diallo sent a letter of reminder to the Minister of Finance on 17 January 1987. In December 1987 the Minister of Finance informed the Governor of the Central Bank of the Congo that he had agreed to the payment, in five instalments, of the amounts owed to Africom-Zaire further to the order placed in 1986. The payment dates ran from January to April 1988. The payments were not made and the DRC continued to owe Africom-Zaire a total amount, as determined in December 1987, of more than 178,700,000 zaires.

13. Madam President, Members of the Court, an essential point I wish to make to the Court is that from 1987 until Mr. Diallo's expulsion from the DRC in January 1986, that is for nearly ten

19 years, no judicial action was taken against the Congolese State, either by Africom or by Mr. Diallo in any capacity whatsoever, to recover this debt through judicial channels.

14. Thus, it is before the Court that Mr. Diallo is for the first time demanding, through Guinea, payment of the debt I have just mentioned. I shall return to the legal consequences of this fact in my second statement today.

15. The Democratic Republic of the Congo has never denied owing this sum to Africom-Zaire. In accordance with settled practice in this area, the amount of the unpaid balance of the debt has been added into the Congo's domestic public debt. The matter was thus referred to the *Office de gestion de la dette publique* (OGEDEP) [Office for the Management of the Public Debt] to find a satisfactory solution[4]. Thus, the debt owed to Africom-Zaire was treated in the same manner as the debts owed to many other Congolese commercial companies which are

[4]Memorial of the Republic of Guinea (MRG), Ann. 71.

creditors of the Congolese State. These companies generally remain in contact with OGEDEP and regularly have their claims certified by the Ministry of Finance and OGEDEP[5].

16. Thus, Africom-Zaire's case is far from an isolated one. At any rate, this dispute involves only a modest sum and is the sole dispute in which the Congolese State is directly involved. What is most important is that it concerns the contractual rights of a Congolese company, not the rights of Mr. Diallo as a natural person. Professor Mazyambo will revert to this issue in the course of his statement today.

17. If you would allow me, Madam President, I shall now turn to the second dispute, which is between Africom-Zaire and PLZ (Plantations Lever au Zaire).

Africom-Zaire* v. *PLZ

18. Madam President, Members of the Court, unlike the other disputes referred to in the present case, which are commercial in nature, the dispute between Africom and Plantations Lever
20 au Zaire originates in the *lease* entered into on 1 November 1975 between the two companies. Under that lease, PLZ leased one of its apartments to Africom-Zaire, which, in turn, placed the apartment at the disposal of its managing director, Mr. Diallo.

19. In 1991 Africom stopped paying the rent owed to PLZ. Notwithstanding the notices of default sent to it, Africom persisted in its refusal to pay the claimed rents, contending that its lessor, PLZ, was charging rent at rates applicable to furnished apartments, even though the apartment made available to Mr. Diallo, as managing director of the company, was unfurnished.

20. In reaction to this continuing default in payment, PLZ terminated the lease agreement, as from 30 April 1992, and brought proceedings before the *Tribunal de grande instance* of Kinshasa-Gombe at the end of that year to force Africom to vacate the premises and to pay the accrued rent, which amounted to US$32,964 at 19 November 1992.

21. Africom, meanwhile, brought a counter-claim against PLZ and asked the *Tribunal* to order PLZ to pay it more than *32 million dollars*, which was claimed to represent the

[5]Preliminary Objections of the Democratic Republic of the Congo (PODRC), Ann. 1.

"over-payment of monthly rent for 17 years, given that Africom paid as if the apartment had been rented furnished when it was not"[6]. Africom also sought $200,000 in damages and interest.

22. Madam President, in its judgment of 24 August 1993, the *Tribunal de grande instance* of Kinshasa-Gombe rejected PLZ's claim and upheld Africom's counter-claim. The *Tribunal* ordered PLZ to pay US$90,000 in damages and interest and US$32 million — I repeat, US$32 million — for over-payment of the rent and refund of the rental guarantees.

23. PLZ immediately appealed against this decision. By judgment of 9 March 1994 the Court of Appeal of Kinshasa-Gombe vacated the appealed judgment on the ground of "lack of reasoning" and ordered Africom to pay the past-due rents and to quit the apartment[7]. Africom in turn filed an appeal, in August 1994, to the Supreme Court against the judgment handed down by the Court of Appeal.

21 24. The DRC does not know the upshot of this lawsuit, in which it is in no way involved and which is between two private commercial companies, that is to say a lessee and its lessor.

25. This case confirms Mr. Diallo's propensity to make exaggerated, exorbitant financial claims on behalf of the companies he runs and in which he holds the shares. This case shows above all, once again, how Mr. Diallo uses the commercial companies of which he is managing director in an attempt to enrich himself personally and unduly to the detriment of the companies' business partners. In any event, Madam President, no one but Ahmadou Sadio Diallo could claim more than US$32 million for the alleged over-payment of monthly rent on an unfurnished apartment. This case also shows the circumstances in which the Congolese authorities, tired of Mr. Diallo's many illegal manoeuvres, finally decided in 1996 to expel him from Congolese territory.

26. Madam President, Members of the Court,

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[6]PODRC, Ann. 46.

[7]PODRC, Ann. 47.

II. THE DISPUTES BETWEEN AFRICONTAINERS AND ITS BUSINESS PARTNERS

27. In its written pleadings the DRC has thoroughly set out the facts concerning the disputes between Africontainers and its Congolese business partners. So I shall not go over them again in detail here. I therefore kindly ask the Court to refer to the DRC's written pleadings.

28. To summarize, Africontainers developed business relations with certain Congolese economic operators, entering into a substantial service contract with them during the 1980s. These operators were two Congolese public undertakings (Gecamines and Onatra) and three oil companies (Fina, Shell, and Mobil Oil). I shall first briefly describe the situation involving the public undertakings and then that of the private oil companies.

Africontainers v. *the public undertakings*

29. As I have just said, Africontainers had commercial dealings with two State undertakings, Gecamines and Onatra, in the 1980s.

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Africontainers v. *Gécamines*

30. Commercial relations between Africontainers and Gécamines date back to 1982, in connection with a contract for containerised transport between the two economic operators. These relations between the two partners ran smoothly until certain difficulties arose in the performance of their contract. Africontainers sent letters on this matter to the management of Gécamines protesting that its containers were immobilized for long periods in Gécamines depots, resulting in downtime for Africontainers, and that they were used by Gécamines without authorization.

31. At the outset the protests by Africontainers did not give rise to any claims supported by figures. Subsequently the dispute escalated, in particular because of the difficulties caused by the closure of the port of Kinshasa and the resulting increase in container turnaround times.

32. Many letters passed between Africontainers and Gécamines about problems of downtime and misuse of containers, and the financial consequences for Africontainers that these situations involved[8]. The dispute between the partners then focused on three essential points.

33. The first point of dispute related to Africontainers' complaint in 1991 about eight of its containers that the company accused Gécamines of damaging and rendering unusable[9].

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[8]See for example MRG, Anns. 25, 29, 87, 90, 95.

34. The second point of dispute was the disagreement on the downtime of Africontainers' containers in Gécamines' depots. Africontainers submitted a financial claim amounting to about 3 billion zaires to compensate for this alleged loss[10].

35. The third point of dispute concerned allegations by Africontainers that Gécamines remained liable for serious breaches of contract, in particular by using other commercial partners to

23 carry certain products. Africontainers was of the opinion that such acts were contrary to the clause in the 1983 contract which, in its view, granted it the exclusive right to such carriage[11].

36. As regards the first point of dispute, Gécamines rejected the claims by Africontainers, which quoted a figure of US$17,000 per unit as the replacement value of the damaged containers[12], whereas the public undertaking's view was that the value of a new container at the time was only $3,000[13].

37. Madam President, the DRC is anxious to draw the attention of the Court to the attempt to despoil Gécamines orchestrated by Mr. Diallo, acting under cover of Africontainers. To replace a container that had already been used several times, Diallo claimed US$17,000 from Gécamines, whereas a new container cost only US$3,000! It is easy to understand how Mr. Diallo, using such a method for improper enrichment at every turn, might claim some US$36 billion from the DRC.

38. The fact remains that Gécamines, having first considered reconditioning the eight containers belonging to Africontainers[14], decided after all to offer to compensate the carrier at the rate of $1,400 per container. This offer was rejected by Africontainers and this dispute has never been settled and has never been brought before the courts and tribunals in the DRC.

39. Madam President, and this is very important, negotiations to find a satisfactory solution began between Africontainers and Gécamines[15] and continued until early July 1997[16], i.e., until after Mr. Diallo's expulsion from Congolese territory. The various meetings between the parties

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[9]See letter from Africontainers-Zaire dated 26 June 1991, MRG, Ann. 87.

[10]See debit note dated 3 July 1991, MRG, Ann. 88.

[11]See letter dated 9 September 1991, MRG, Ann. 95.

[12]Above-mentioned letter dated 26 June 1991, Ann. 87.

[13]Letter dated 16 July 1991, MRG, Ann. 90.

[14]Letter dated 7 January 1992, MRG, Ann. 98.

[15]See the minutes of the meeting between the parties on 1 June 1995, MRG, Ann. 151.

[16]See the minutes for 2 and 7 July 1997, MRG, Anns. 224 and 226.

made a complete inventory of the situation possible, and led Africontainers to admit that the number of containers to which its claim related was overstated.

40. Madam President, as I have pointed out in this statement, Gécamines had set up a special internal Commission with responsibility for negotiating with all the carriers who were claiming

24 compensation from it in respect of the disappearance of their containers. Thus it devised a new timetable of work with the various carriers, with a view to reaching a final agreement with each of them[17].

41. This is the context in which working meetings between Gécamines and Africontainers were scheduled in 1997 in order finally to settle the commercial dispute between them. So on 26 September 1997 Gécamines sent Africontainers an invitation to take part in this new series of working meetings. This invitation was actually received by Mr. N'Kanza, the administrative director of Africontainers, on 29 September 1977[18]. Madam President, Members of the Court, you will find this document in your judges' folder, tab No. 1. Representatives of Africontainers initially attended these meetings, then dropped out.

42. Madam President, the refusal by the representatives of Africontainers to continue with the negotiations is no mere chance. It should be noted that before the invitation to which I have just referred was sent, Gécamines had sent Africontainers a letter protesting about the fraudulent operations detrimental to Gécamines to which that company, and therefore its managing director, had resorted and which had just been discovered during the in-depth examination of the claims by Africontainers[19]. These fraudulent operations, organized by Mr. Diallo in his capacity as managing director of Africontainers during the 1980s and which Gécamines had just discovered, involved "adding to the consignment of containers sent for Gécamines to the city of Lumumbashi, the site of its operational headquarters" several other containers which were sent to the same city by Africontainers but for other companies there. Carriage for the return of these containers empty to Kinshasa would have cost Africontainers some US$1,000 per unit. Thus by fraudulently including them in the regular consignment of containers sent to Gécamines, Africontainers made that

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[17]See EPRDC, Anns. 7 and 8.

[18]See EPRDC, Ann. 9.

[19]Letter DAT/DIR/54.137/97 dated 17 September 1997, Ann. 10, POC.

company pay the cost of their return to Kinshasa. In fact it was Mr. Diallo himself who was wrongfully enriching himself in this way at the expense of Gécamines. Initially Gécamines had

25 discovered 186 cases of such fraudulent use and intended to pursue its investigations further[20]. Thus the discovery of this large-scale long-term fraudulent practice by Africontainers to the detriment of Gécamines is why, despite several threats[21], Africontainers has never dared to bring its dispute with Gécamines before the Congolese courts, so as to avoid judicial investigations. The fact that this practice was discovered is also the main reason for Mr. Diallo's flight from the negotiation table with Gécamines in order to bring the dispute before the Court by way of diplomatic protection. I will revert to this point during my second statement on the objection that local remedies have not been exhausted.

43. Madam President, the DRC wishes to inform the Court that the prospects for final settlement held out by the negotiations in September 1997 have been confirmed for several of the other carrier companies that attended these meetings. Thus in this second round of negotiations Gécamines arrived at an amicable solution with Kincontainers, Ataf and Flucoco, which recovered a total of several hundred thousand American dollars at the end of these discussions[22]. I also wish to stress that the documents that record these agreements show that the other carrier companies invoiced the hire of their containers at rates that were from six to twenty times lower than those used by Africontainers[23].

44. Since formulating its demands, Madam President, Africontainers has updated its financial claims several times on the basis of the number of containers allegedly immobilized by Gécamines. Africontainers has also claimed to update its rates, leading it to make ever more substantial financial claims. Thus — and what I am going to say is important, Madam President — whereas in 1992 the company put the damage it had suffered as a result of this situation at

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[20] *Ibid.*

[21] See *inter alia* the summons served on Gécamines at the request of Africontainers-Zaire on 5 February 1996, MRG, Ann. 198.

[22] See EPDRC, Ann. 11, pp. 36-39.

[23] *Ibid.*, pp. 29-39.

26 US$30 million[24], in 1996 the estimate rose from 30 million to 14 billion dollars, i.e., more than the entire foreign debt of the DRC![25]

45. The validity of most of the claims was strongly contested by Gécamines during the 1997 negotiations. Madam President, I will return to 1997 later because it is a critical year. It is important for the continuation of the pleadings. Gécamines thus advanced sophisticated legal arguments, according to which Gécamines maintained that:

— the 1983 contract contained no exclusivity clause of benefit to Africontainers;

— the claim by Africontainers based on misuse of its containers was greatly overstated;

— the claim by Africontainers regarding updating of its invoices addressed to Gécamines was difficult to understand, since all these invoices had been paid by Gécamines when they were submitted;

— the time-limit for submitting a claim involving carriage was two years from the day of delivery of containers that were damaged or completely written off (Art. 27, Sect. 2, of the Commercial Code); the claim submitted ten years after the event was statute-barred.

As I said a moment ago, Mr. Diallo, faced with the discovery of his fraudulent operations and the substantial arguments presented by Gécamines, ordered his representatives to quit the negotiating table with Gécamines.

46. It must be stressed that Africontainers' rejection did not prevent Gécamines from recognizing that there were still undeniably a number of points in dispute between the two companies, in respect of which compensation was probably due to Africontainers. Thus today Gécamines is still fully prepared to resume negotiations with Africontainers on this basis, or even to submit this dispute to the Congolese courts if the parties could not agree on a satisfactory settlement.

27 47. Madam President, Members of the Court, once again an irrefutable fact emerges from what I have just set before the Court. Although in fact Mr. Diallo has played an extremely important part in the origin, development and continuity of these disputes, he has always — I

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[24]See the minutes of the meeting between the parties on 1 June 1995, MRG, Ann. 151, p. 2.

[25]See the summons served on Gecamines at the request of Africontainers-Zaire on 5 February 1996, MRG, Ann. 198.

stress, always — acted through a Congolese company having its own legal personality, Africontainers-Zaire. From the outset it has been the money owed to that company that he meant to recover, by virtue of contracts concluded by that company; again it is on behalf of Africontainers, not on his own behalf, that he has made exorbitant claims. In law, Madam President, the dispute has always been and continues to be between two companies of Congolese nationality on the basis of a contract of carriage between them — a contract governed by Congolese law. It is also beyond dispute, Madam President, that this commercial dispute is between two companies, and has never been brought before the courts and tribunals of the DRC. My friend and colleague Professor Mazyambo and I will revert later to the legal consequences of this situation concerning the admissibility of the Application by the Court.

48. Madam President, Members of the Court, let me now turn to the dispute between Africontainers and the second State undertaking, Onatra.

The *Africontainers-Zaire* v. *Onatra* case

49. In short, the dispute between Africontainers-Zaire and Onatra falls within the same context as the case between the carrier company and Gécamines. Here also the temporary closure of the port of Kinshasa in 1986 is the starting-point of the deterioration in relations between these two commercial partners.

50. Following Onatra's cargo-handling difficulties at the river port of Kinshasa and the redevelopment and modernization work in progress there, Gécamines called a meeting of the carrier companies affected by this situation. That meeting was held in Lumumbashi in July 1986 and brought together Ataf, Kincontainers, Flucoza and other companies.

The PRESIDENT: Maître Kalala, pourriez-vous parler un peu plus lentement? Merci.

28 Mr. KALALA: Gécamines called a meeting of the carrier companies affected by this situation. During this meeting Gécamines informed those present about the decision taken on 26 June 1986 by Gécamines, Onatra and the SNCZ (Zaire National Railway Company) to transfer from the river port of Kinshasa to the sea port of Matadi all discharging (i.e., opening) of local containers, because of the rebuilding works in the port of Kinshasa. All the carriers present,

including Africontainers-Zaire, understood and accepted that this was a good decision, the terms of which were set down in the minutes of the meeting on 5 July 1986[26]. The carrier companies had pointed out on this occasion that they would be obliged to charge Onatra for what they called "immobilisation or extended turnaround" of their containers in the port of Matadi. In the context of these temporary measures, therefore, Onatra had undertaken to send empty containers back to Kinshasa as quickly as possible after their discharge in the port of Matadi, to allay the fears expressed by the carriers on this point.

51. But only a year after the start of this operation, Madam President, Africontainers was the only company to make a claim on Onatra for the "immobilisation or extended turnaround of its containers in the port of Matadi"[27]. Africontainers having unilaterally assessed the damage suffered as a result and constantly updated the figures on the basis of a rate of interest of 20 per cent per month — I repeat, 20 per cent per month — for late payment, the amount claimed by the company from Onatra in compensation went from — say — 2 million zaires in July 1987 (equivalent to 34,000 dollars at the time) to over 248 million zaires in April 1990 (equivalent to 422,000 dollars)[28].

52. After considering the claim by Africontainers, Onatra suggested to the company that they should seek an amicable settlement of the dispute. It was agreed following negotiations between the parties that Onatra would grant Africontainers a lump sum in compensation of 150 million zaires (US$254,000), payable in three monthly instalments. This arrangement was set
29 down in a compromise agreement signed by both parties on 6 June 1990[29]. Madam President, Members of the Court, you will find this document in your judges' folder, tab No. 2. Onatra honoured its obligations, paying Africontainers the whole amount . . .

The PRESIDENT: Maître Kalala, may I interrupt you? Could it be confirmed that Guinea has the folders to which you are referring?

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[26]MRG, Ann. 32.

[27]See, for example, Anns. 16 and 17, EPRDC.

[28]Ann. 18, EPRDC.

[29]MRG, Ann. 69.

Mr. KALALA: Madam President, I see that in the proceedings, at this stage . . .

The PRESIDENT: I understand that the answer is in the negative.

Mr. KALALA: That is right.

The PRESIDENT: So naturally when one introduces a document into Court it must also be provided to your opponents. May I suggest that this be done at the coffee break but in the meantime you manage without reference to the folder? Please continue.

Mr. KALALA: Thank you very much, Madam President, but they have the documents in their annexes. This is not a document that is being annexed now, they have it in their file. It was sent a very long time ago, they have it in their annexes.

53. Madam President, Members of the Court, to the great surprise of the Onatra management this compromise settlement was rejected by Africontainers on 12 October 1990, that is four months afterwards, raising fresh claims amounting to 42 billion zaires, although all its claims had been taken into account in the said settlement[30]. These fresh claims by Africontainers were firmly rejected by the public undertaking as being without foundation.

54. Madam President, Members of the Court, here the DRC wishes to draw the Court's attention to Mr. Diallo's scandalous conduct in this dispute. After receiving the full amount of the final settlement between Onatra and Africontainers — and these documents, as I said a short time ago, are in their hands, signed by them, and communicated since — Mr. Diallo made no bones about subsequently questioning the agreement and making fresh claims. Mr. Diallo's attempt at unlawful enrichment at the expense of Onatra, with offers and kickbacks, was vigorously rejected by the management of this public undertaking. Madam President, Mr. Diallo's conduct in this specific case reveals his true nature.

55. A second dispute, of lesser magnitude, compounded the initial disagreement. It originated in the loss of two containers of Africontainers by Onatra, which fell into the River Congo in December 1988 when Onatra was transporting them. Onatra has never questioned the

[30]MRG, Ann. 72.

principle of its responsibility in the incident, but the two parties have been unable to agree on the amount due to Africontainers by way of compensation, the claims of the carrier company having been deemed excessive by Onatra. While the latter offered the replacement of the two containers, together with an indemnity of 18.9 million zaires to cover the loss of earnings for Africontainers as a result of the non-availability of the containers, Africontainers for its part claimed more than 2 billion zaires of indemnity in this respect[31]. The application of an annual commercial interest rate of 75 per cent — I repeat, 75 per cent — on the lay-up indemnity explained the size of the sum demanded[32]. Despite various subsequent approaches by Onatra, and the formulation by the latter of other settlement proposals[33], the dispute, Madam President, remains unsettled to date, Africontainers-Zaire having never responded to the latest proposals made by Onatra in December 1992.

56. In common with Gécamines, Onatra has always treated the claims put forward by Africontainers-Zaire seriously and professionally. This is reflected by the numerous attempts made by the public undertaking to reach a settlement of its disputes with Africontainers-Zaire. Likewise, Onatra has had no hesitation in carrying out internal assessments in order to check the soundness of

31 the claims by Africontainers. This testifies, Madam President, to management of these files in good faith by Onatra, and certainly not to a systematic policy of blockage or opposition regarding the claims by Africontainers. The best proof of this is that, when they were indeed sound, the claims gave rise not only to avowal of its responsibility by the public body but also to significant financial reparation.

57. In its awareness of the flimsy and irresponsible nature of its exorbitant claims, Madam President, Members of the Court, Africontainers has never dared to bring any legal proceedings against Onatra in the Congolese courts to this day. A period of five years elapsed, Madam President, between the time when Onatra confirmed its definitive rejection of the claims advanced by Africontainers in the first dispute and the day when Mr. Diallo was forced to leave

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[31]*Ibid.*

[32]POC, Ann. 23.

[33]See, for example, Anns. 25, 26, 27, 29 and 30.

Congolese territory in January 1996, without any legal proceedings being brought against Onatra by Africontainers, I repeat, to this day.

58. Madam President, Members of the Court, as the Court may readily appreciate, I repeat, this dispute was and still is between two economic operators of Congolese nationality, Africontainers and Onatra. Once more, the demands and claims are advanced in the name and on behalf of Africontainers, as a legal entity with its own contractual entitlements and rights, and not of Mr. Diallo as an individual of Guinean nationality. Furthermore, Africontainers has never brought any legal proceedings in the courts and tribunals of the DRC against Onatra, as I said a moment ago, with a view to recovering the alleged debts. Professor Mazyambo and I will be reverting to these matters later during our oral arguments on the consideration of the DRC's two preliminary objections.

59. Madam President, Members of the Court, I now come to the disputes between Africontainers and the oil companies.

The disputes between Africontainers-Zaire and the oil companies

60. There are three oil companies involved in the commercial disputes with Africontainers: Zaire-Fina, Zaire-Shell and Mobil Oil Zaire. I shall begin with the dispute between Africontainers and Zaire-Fina.

32 ***Africontainers* v. *Zaire-Fina***

61. In common with the litigation between Africontainers and Onatra, that between the company and Zaire-Fina covers two distinct disputes. The origin of these two disputes is, in the first case, the loss by the company Zaire-Fina of two containers belonging to Africontainers and, in the second, the application of the 1983 tripartite agreement.

62. On 14 March 1987, nearly 20 years ago, seven containers entrusted by the transport companies Trans-Tshikem and Africontainers-Zaire to Zaire-Fina fell into the River Congo on the Kinshasa-Lubumbashi route. Five of the containers belonged to Trans-Tshikem and two to Africontainers. Zaire-Fina acknowledged its responsibility in the incident and undertook to compensate the two transport companies for that loss. Under the insurance policy taken out by Zaire-Fina to cover that type of accident, the Société Nationale d'Assurance (SONAS) of the DRC

paid compensation in respect of the loss sustained by the two transport companies. Trans-Tshikem accepted the payment offered by SONAS and the dispute so ended.

63. On 30 June 1990, Zaire-Fina made available to Africontainers the sum of over 680,000 zaires paid to it by SONAS as compensation for the loss of the two containers. Africontainers initially judged the sum offered too small and refused to accept it as payment. But a year later, on 16 April 1991, Africontainers finally cashed the amount in the registry of the Kinshasa-Gombe Tribunal de Grande Instance, where Zaire-Fina had deposited it under the procedure of real offers applicable in such circumstances.

64. Madam President, true to its usual *modus operandi*, after cashing the sum offered as compensation, Africontainers, acting as ever through its associate director, Mr. Diallo, brought judicial proceedings against Zaire-Fina on 10 March 1993 before the Kinshasa-Gombe Tribunal de Grande Instance to claim payment of a sum equivalent to the replacement value of the two containers lost, together with damages for the prejudice suffered following that incident.

65. In its Judgment of 12 August 1993, the Tribunal sentenced Zaire-Fina to pay
33 Africontainers a sum totalling US$38 million, and I really did say 38 million United States dollars, as compensation for the loss of two empty containers[34]. Zaire-Fina appealed against the decision and the Kinshasa-Gombe Court of Appeal, by its order of 24 February 1994, overturned the first-instance judgment and declared the action brought by Africontainers inadmissible[35]. Africontainers in turn lodged an application for judicial review of the appeal decision, in February 1995. The *Ministère public* of the Supreme Court of Justice filed submissions in favour of quashing the appeal decision. The DRC has not been informed of the outcome of these proceedings between two private commercial companies.

66. The second dispute between Africontainers and Zaire-Fina originates in the application and interpretation of the 1983 tripartite agreement. Africontainers made a number of complaints against Zaire-Fina, in particular that it failed to respect the exclusivity clause which, according to the transport company, was part of the agreement. Africontainers-Zaire also sought to update the

[34]POC, Ann. 55.

[35]POC, Ann. 56.

rates applied for rental of its containers by Zaire-Fina. It put the losses suffered in this respect at over US$ 14 million.

67. Zaire-Fina rejected all the claims of Africontainers on the grounds that the 1983 contract contained no exclusivity clause and that there could be no question of an *ex post facto* updating of the rates charged by Africontainers, Fina having long since settled all the invoices that the transport company had submitted to it in connection with their business dealings.

68. Madam President, Members of the Court, true to its *modus operandi*, after more than two-and-a-half years' silence on the dispute, Africontainers, acting through Mr. Diallo, reiterated its claims against Fina in November 1995 sending it debit notes totalling over *two thousand six hundred million* (2.6 billion) US dollars[36]. It was, once more, by applying exorbitant bank interest rates (350 per cent for 1993 and 422 per cent for 1994)[37] that these sums were arrived at, while the
34 initial debt that Africontainers claimed was owed it by Fina was, according to the figures presented by the company itself, some $ 323,000[38]. Those claims, Madam President, were also rejected by Fina on 16 November 1995.

69. This second aspect of the dispute between Africontainers and Fina was never brought before the Congolese courts and there have so far been no further developments. Professor Mazyambo and I will be reverting to these facts later when we show the Court that local remedies have not been exhausted and that, once again, it is Africontainers as a distinct legal entity in Congolese law, possessing its own contractual rights, which has acted in this dispute, which only goes to confirm the factual basis denying the Republic of Guinea capacity to act in this case.

70. Madam President, Members of the Court, I shall now briefly set out the case of the dispute between Africontainers and Shell.

Africontainers-Zaire* v. *Company Shell

71. The dispute between Africontainers and Shell also originates, Madam President, in the contractual relations maintained by the two companies during the 1980s. The DRF has described in detail in its written pleadings the evolution of those relations and therefore requests the Court to

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[36]MRG, Ann. 182.

[37]*Ibid*., p. 2 of debit note.

[38]*Ibid*., pp. 1 and 7 of debit note.

refer thereto. It must nevertheless be observed that, in May 1992, Africontainers unexpectedly made various financial claims against Shell at a time when their business dealings were satisfactory. Africontainers accused Shell of unlawfully breaching the 1981 and 1983 contracts and claimed payment of the sums of US$ 10 million for breach of the contracts and US 1.7 million for unfair competition. These claims were firmly rejected by Shell, which argued that the 1983 tripartite agreement contained no exclusivity clause in favour of Africontainers.

72. Madam President, following the usual tactics of its managing director Mr Diallo, Africontainers maintained a long silence without reacting to Shell's refusal. It was only two and a
35 half years later, in early 1995, that Africontainers decided to bring the dispute before the Courts, its principal claim being that Shell be ordered to pay it just over US$13 million for the breaches of the 1981 and 1983 contracts, and $10 million in damages. In its judgment of 3 July 1995, the Kinshasa-Gombe *Tribunal de Grand Instance* upheld the claims of Africontainers; hence Africontainers won the case. It also ordered the immediate enforcement of the judgment in respect of the principal amount of over US$13 million.

73. Africontainers then sought to have the judgment enforced. However, Shell tried to oppose that action by applying to the Kinshasa-Gombe Court of Appeal for a stay of execution with a view to having the immediate enforcement decision set aside. At the same time, Shell lodged an appeal against the first-instance decision as a whole[39]. By its judgment of 24 August 1995 — a copy of which has been communicated to the opposing party — the Kinshasa-Gombe Appeal Court dismissed Shell's opposition to immediate enforcement because the Appellant had not produced "an original execution copy or a certified copy of the judgment appealed against"[40]. Africontainers once more won the case. Shell then appealed against that decision before the Supreme Court of Justice[41].

74. The appeal proceedings on the merits — which have never been affected by the passing difficulties of the first-instance judgment — have since seen a new development with the decision

[39]POC, Ann. 65.

[40]See POC, operative part of order, Ann. 67.

[41]POC, Ann. 68.

of the Kinshasa-Gombe Court of Appeal, dated 20 June 2002[42]. That decision, duly communicated to the opposing party, set aside the first-instance judgment and ordered Shell to pay Africontainers only US$540 by way of capital and US$1,000 in damages. The Court dismissed the claim by Africontainers regarding the alleged breaches by Shell of the 1983 contract, while recognizing the existence of minor debts owing by Shell to the transport company. Africontainers has not to date reacted to this judicial decision in its favour.

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75. Furthermore, Africontainers sent Shell a debit note, dated 29 September 1995, regarding the settlement of invoices addressed to the oil company between 1982 and 1990[43], namely 13 and five years previously. The procedure and the method of calculation of the sums that Africontainers considered itself to be owed by Shell are identical with those used in the note sent to Fina of which I was speaking a short while ago. Once again, the application of the same exorbitant interest rates led Africontainers to claim from Shell an amount exceeding US$1.8 billion, while the initial sum that Africontainers claims to be owing to it from Shell is, according to the figures presented by Africontainers itself, some US$277,000. The sum of US$277,000 has risen to US$1.8 billion. The latter claim, vigorously rejected by Shell, has never been brought before a court by Africontainers up to the time of my addressing the Court today.

76. In the light of the foregoing, Madam President, the Democratic Republic of the Congo requests the Court to find, on the one hand, that the dispute in question is between two commercial companies of Congolese nationality, Africontainers-Zaire and Zaire-Shell and, on the other, that local remedies in the DRC have not been exhausted.

77. Madam President, Members of the Court, I now come to the last dispute between Africontainers and Mobil Oil.

Africontainers-Zaïre* v. *Mobil Oil

78. The dispute between Africontainers and the petroleum company Mobil Oil is fully consistent with those I was discussing just a moment ago. In a letter addressed to Mobil Oil on 24 April 1992[44], Africontainers claims an amount of over US$13 million, as compensation for the

[42]POC, Ann. 66.

[43]MRG, Ann. 178.

[44]Ann. 38, PODRC.

damage suffered following the failure by the oil company to comply with its obligations arising from the agreements concluded by the two companies in 1980 and 1983.

37 79. Mobil Oil immediately rejected these claims, asserting that the 1980 Agreement had already been rescinded and replaced by the Tripartite Agreement of 1983, and that the first of those agreements could not therefore constitute the basis of any claim[45]. The petroleum company also pointed out that the failure to enforce the 1983 Agreement, which had been observed for some time, was due to the fact that Africontainers was no longer functioning properly[46].

80. Madam President, Africontainers never replied to the arguments put forward by Mobil Oil to counter them. However, at the beginning of November 1995, as it had done with the other two oil companies which were parties to the 1983 contract, Africontainers sent Mobil Oil an overall debit note for a total amount of some US$1.7 billion[47], whereas Africontainers itself put the initial claim at just over 25 million dollars[48]. Mobil Oil firmly rejected these extravagant and exorbitant claims by a letter of 23 November 1995.

81. Notwithstanding this firm and clear rejection, Madam President, Members of the Court, Africontainers never brought this dispute before the Congolese courts. This shows the failure to exhaust the available local remedies in the DRC. Also, it is once again the Congolese company Africontainers, and not Mr. Diallo as such, who is a party to this particular dispute, which will merely confirm Guinea's lack of the capacity to act. Professor Mazyambo will revert to this matter in a moment.

82. Madam President, Members of the Court, the moment has come for me to consider a conflict different from all those I have discussed so far. This is the detention and expulsion of Mr. Diallo from Congolese territory. I have now reached the third and last part of my oral argument.

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[45]See the letter of 12 May 1992, Ann. 40, PODRC.

[46]*Ibid*.

[47] MRG, Ann. 183.

[48]*Ibid*.

38 **III. The arrest and deportation of Mr. Ahmadou Sadio Diallo from Congolese territory**

83. Madam President, Members of the Court, I have explained in my presentation how Mr. Diallo, sheltering behind the two companies of which he was the managing partner, harassed the Congo's major economic actors with exaggerated and groundless financial claims. Even Guinea acknowledged the far-fetched and arbitrary nature of the financial claims made by its citizen in its written pleadings. Mr. Diallo did not confine himself to legal harassment, he confirmed his nuisance potential by unleashing a campaign of disinformation and defamation concerning the Congolese State targeted at foreign dignitaries.

84. Mr. Diallo wrote letters, dated 30 November 1995, to the Prime Minister, the Minister for Planning and the Minister for Finance in which he represented the financial claims at issue as established and undisputed amounts[49].

85. Madam President, Members of the Court, more importantly for the image of the DRC, copies of those letters were sent to, would you believe, the President of the International Court of Justice (that is say the person in your position, Madam President), to the President of the Republic of Guinea, to the President of ECOWAS, to the senior member of the Diplomatic Corps in the DRC and to the Ambassadors to the DRC of Guinea, the United States, the United Kingdom and Belgium[50]. A copy of that letter is in the judges' folder as tab No. 3 and was, of course, transmitted to the other Party many years ago. Madam President, Members of the Court, the DRC would observe that if, like Mr. Diallo, businessmen the world over were to send copies of their financial claims to the President of the International Court of Justice, the President would spend the whole of his or her tenure just reading that correspondence. And the Court itself would certainly have no room to store all such correspondence. What is noteworthy is that by this act Mr. Diallo revealed his true nature and the DRC asks the Court to take note thereof.

39 86. Mr. Diallo's unjustified claims and the wide publicity he gave to them were causing serious harm to the DRC by undermining the country's credibility and image, particularly with foreign businesses and potential investors.

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[49]MG, Anns. 187-189.

[50]*Ibid*., p. 5.

87. That was the backdrop to the deportation order against Mr. Diallo issued by the Congolese Government on 31 October 1995[51]. Madam President, Members of the Court, a copy of that order can be found as tab 4 in the judges' folder and, Madam President, a copy of this document was, of course, sent to the other Party many years ago. The grounds given for the deportation were based on the fact that "the presence and conduct [of Mr. Diallo] have breached and continue to breach Congolese public order, particularly in economic, business and monetary matters"[52]. In this respect, we might note, for example, the numerous attempts at bribery of Congolese judicial officials, executives of public bodies and politicians in which Mr. Diallo was involved with a view to obtaining payment of Africontainers's fictitious debts, an issue which I have addressed at great length in my statement. Some of the oil companies affected by such claims even made official representations to the Congolese authorities to denounce Mr. Diallo's reprehensible conduct[53]. Madam President, a copy of the letter addressed by the oil companies to the Congolese Government of the time has been included in the judges' folder as tab No. 4.

88. The legal basis for the expulsion order concerning Mr. Diallo thus lies in the Congolese Immigration Law of 12 September 1983. Article 15 of that Law provides that "the President of the Republic may, by a duly reasoned order, expel from [Congolese territory] any foreigner who, by his presence or conduct, breaches or threatens to breach the peace or public order"[54].

89. This was how Mr. Diallo was arrested and detained for the first time in December 1995 under the deportation procedure pursuant to the Congolese Immigration Law of 12 September 1983. Under Article 15 of that Law, foreigners against whom deportation

40 proceedings have been initiated, and who are liable to evade their enforcement, may be held at a detention centre by the Administrator-General of the CNRI (National Intelligence Centre), or by his representative, for a period of 48 hours. In cases of absolute necessity, that period may be extended by further periods of 48 hours, up to a maximum of eight days.

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[51]Decree No. 0043 dated 31 October 1995 expelling Mr. Diallo from the territory of the Republic of Zaire, POC, Ann. 75.

[52]*Ibid*.

[53]See joint letter from Mobil and Fina dated 15 November 1995, POC, Ann. 74.

[54]POC, Ann. 73.

90. That period of detention, Madam President, was never exceeded in the present case. In this respect, Guinea's assertion that Mr. Diallo was detained for no less than 75 days in all, from 5 November 1995 to 10 January1996 and then from 17 January to 31 January 1996, at the very least needs to be qualified. That claim is based exclusively on newspaper sources, which themselves repeated at a press release by the association *Avocats sans Frontières*[55] and that version of the facts is, in any case, contradicted by certain elements in the case file itself.

91. It is noteworthy in this respect that, during the period when Mr. Diallo was allegedly locked in a prison cell without any contact with the outside world, he sent the three letters, signed personally and *dated 30 November 1995*, to the Prime Minister of Zaire, to the Minister for Planning and to the Minister for Finance to which I have just referred[56]. It may legitimately be asked how Mr. Diallo was able to write those letters during a period when, according to the Republic of Guinea, he was incarcerated and being brutalized in a Congolese Immigration Department (SNIP) cell.

92. It is, moreover, particularly striking to note that Mr. Diallo, purportedly locked in a cell, deprived of his liberty and being subjected to brutal treatment, makes no reference in those letters to the ordeal allegedly being inflicted on him by that same Zairean [Congolese] Prime Minister at the request of the oil companies. At a time when he is said to have been imprisoned, mistreated and awaiting deportation from the DRC, Mr. Diallo curiously seems to have been more concerned about recovering the monies owed to Africontainers and says not a word, not a single word, about the Congolese authorities depriving him of his liberty. Finally, it is impossible to understand how Mr. Diallo could have spent weeks under lock and key with nothing to eat or drink, as Guinea

41 asserts. In conclusion, it is clear that the alleged mistreatment that Mr. Diallo is said to have undergone is not based on any evidence whatever, or even any credible reasoning.

93. Madam President, Members of the Court, the DRC would also like to point out here that the deportation order against Mr. Diallo was in no way exceptional. Numerous orders for expulsion from Congolese territory, no different from that concerning Mr. Diallo, were in fact issued on a number of occasions during the same period against foreign nationals for similar

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[55]See for example MG, Anns. 190, 191 and 193.

[56]See para. 86.

reasons pursuant to the 1983 Statute. To mention just one example, on 22 February 1995, six months before Mr. Diallo's deportation, the Congolese Government ordered the deportation of 86 foreign nationals on grounds related to the maintenance of public order in economic matters[57]. This shows that Mr. Diallo's removal from Congolese territory was not the only such case, and that such measures, far from constituting reprisals or the persecution of individuals, were, on the contrary, implemented as part of a campaign by the Congolese Government of the time against corruption and white-collar crime involving certain foreign nationals in the DRC. Mr. Diallo was unfortunately one of those foreign nationals who had chosen to turn the DRC into a place where they could flout the law with impunity and take unfair advantage of the hospitality which the Congolese people had extended to them.

94. Mr. Diallo was finally deported from the DRC on 31 January 1996. Since then, he has not — and this is a very important point — lodged any form of appeal against that measure. This shows that not all local remedies have been exhausted. As for the Applicant's capacity to act, which could theoretically have been entertained solely with respect to this point of the dispute, where Mr. Diallo's claim can be distinguished from those linked to the two Congolese companies of which he is managing director, it is not admissible because — and this is fundamental — Guinea's Application is essentially aimed at obtaining reparation for the damages suffered by the companies, Africom-Zaire and Africontainers-Zaire.

42 95. In the light of all I have said in my presentation, it is clear that the "Application for the purposes of diplomatic protection" filed with the Court by Guinea consists of an espousal of Mr. Diallo's claims with a view to — and this is very important — recovering monies totalling US$36 billion allegedly owed by the Congolese State, the public undertakings and the oil companies to Africom-Zaire and Africontainers-Zaire, of which Mr. Diallo is the managing partner. This is the essence of the Republic of Guinea's Application.

96. These points clearly show that Guinea's Application is seeking to help its national, Mr. Ahmadou Diallo, under the cover of two private registered companies, to recover exorbitant and excessive sums of money by way of this Court.

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[57] POC, Ann. 76.

97. Madam President, Members of the Court, the International Court of Justice was established by the nations of the world to contribute to the maintenance of international peace and security through international justice. The DRC therefore refuses to condone for one instant the action undertaken by Guinea, which effectively, and I stress, brings this prestigious organ down to the level of a mere commercial court or a private agency for the recovery of debts on behalf of its clients. *What Guinea has really requested the Court to do* — and this is extremely serious — is to settle some quarrels over money, arguments about billing, differences over interest rates between Congolese registered businesses and the DRC cannot condone that. It is almost a sign of disrespect to the Court and is certainly a manifest abuse of procedure. Madam President, Members of the Court, the DRC cannot really imagine how the Court, calculator in hand, would find its way through these disputes over breaches of contracts, statutes of limitation for certain financial claims, figures, updating of invoices, updating of prices and interest rates between a number of Congolese registered companies. We cannot imagine the Court embarking upon such a task.

98. In the DRC's view, Madam President, Members of the Court, its own competent national courts, and not this Court, are best placed to consider these essentially commercial and contractual disputes.

43 99. On the basis of all the points I have referred to in my presentation, Madam President, Members of the Court, the DRC raises two preliminary objections. With respect to the first preliminary objection, my friend Professor Mazyambo Makengo Kisala will shortly show the Court that Guinea lacks the capacity to act in the instant case as its Application seeks reparation for the violation of the rights of private companies that do not possess its nationality. This must render Guinea's Application inadmissible. With respect to the second preliminary objection, Madam President, Members of the Court, I will take the floor again to explain to the Court that, as the local remedies available in the DRC have not been exhausted by Mr. Diallo or by the companies of which he is the associate partner, Guinea's Application must be declared inadmissible.

100. Madam President, Members of the Court, I thank you for your attention. May I ask you, Madam President, to give the floor to Professor Mazyambo who will explain to the Court why

the Republic of Guinea's Application must be declared inadmissible, as the two companies, Africom and Africontainers, do not possess Guinean nationality.

101. Madam President, may I ask you, if you have no objection, to adjourn the hearing for a break, after which Professor Mazyambo will take the floor.

The PRESIDENT: Now would be a good time for a coffee break. Merci beaucoup, Maître Kalala.

The Court adjourned from 11.55 a.m. to 12.05 p.m.

Le PRESIDENT : Veuillez vous asseoir. Monsieur Mazyambo, vous avez la parole.

Mr. KALALA: Excuse me, Madam President, Members of the Court, this is just in regard to your request of a few minutes ago. At your request, I am providing to Guinea the five documents to which I referred during my statement, but I wish to have the Court officially note that since 2002, for more than 4 years, all the documents to which I refer have been communicated to Guinea. They have those documents and, at this stage in the proceedings, it would be out of the question, indeed inadmissible, for reference to be made to a document which had not been communicated to
44 the other Party. This is to say that I have complied with your request. Thank you.

Le PRESIDENT : Je vous remercie de l'information. Il ne s'agit pas de la question de savoir si cela est inadmissible, mais d'une question de courtoisie, afin que l'autre Partie puisse suivre aussi facilement que tout le monde. Je vous remercie de l'information. Nous pouvons poursuivre à présent.

Mr. KISALA:

THE REPUBLIC OF GUINEA'S APPLICATION MUST BE DECLARED INADMISSIBLE FOR GUINEA'S LACK OF STANDING

1. Madam President, Members of the Court, thank you for giving me the floor. As Maître Tshibangu Kalala has already said, the Democratic Republic of the Congo, basing itself on the facts which have just been presented, has raised two preliminary objections: the first concerns the Republic of Guinea's lack of standing in the present case; the second relates to Mr. Diallo's

failure to exhaust local remedies. With your leave, I shall devote myself to setting out the first of these objections, the one concerning Guinea's lack of standing.

2. Madam President, Members of the Court, Guinea's Application is aimed essentially at obtaining compensation for all injuries allegedly suffered by two companies, Africom-Zaire and Africontainers-Zaire, of which Mr. Diallo is managing director/shareholder. Since the two companies do not have the nationality of the Applicant, it is clear that the Applicant does not have standing to act in the present case.

3. In the field of diplomatic protection, standing means that the State asserting the claim must be the State of nationality of the injured party[58].

45 4. As Guinea's Application is aimed at obtaining compensation for a violation of the rights of persons not possessing Guinean nationality, namely the Congolese companies Africom-Zaire and Africontainers-Zaire, it must be declared inadmissible by the Court.

5. In its Memorial, Guinea seeks to avoid application of these well-established legal principles by putting forward a two-pronged argument. First, it argues that in the specific circumstances of the case it has standing to provide "shareholder's diplomatic protection"[59], to repeat the exact words used by the Applicant. Second, Guinea believes that it is entitled to provide "protection of shareholders' rights by substitution for the company"[60]. Those too are the words of the Applicant.

6. Madam President, Members of the Court, the Democratic Republic of the Congo will refute these arguments, showing: first, that Guinea cannot in the present case claim to provide "the shareholder's diplomatic protection" and, second, that the notion of "protection of shareholders' rights by substitution for the company" is unacceptable in international law, particularly in the present case.

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[58]See Article 44 of the International Law Commission's draft Articles on State Responsibility, of which the General Assembly has taken note, ILC, Fifty-third session, 23 April-1 June and 2 July-10 August 2001, *Official Records of the General Assembly, Fifty-sixth Session, Supp. No. 10* (A/56/10). See also Article 1 of the draft Articles on Diplomatic Protection adopted by the Drafting Committee of the International Law Commission, ILC, Fifty-Fourth Session, 29 April-7 June 2002, 22 July-16 August 2002, A/CN.4/L.613/Rev. 1, 7 June 2002.

[59]MRG, p. 80, Title 1.

[60]MRG, p. 93, Title 2.

I. Guinea cannot claim to exercise "shareholder's diplomatic protection" in favour of Mr. Diallo.

7. Madam President, Members of the Court, the Republic of Guinea claims to have standing to exercise its diplomatic protection for Mr. Diallo's benefit on the basis that, in the *Barcelona Traction* case, the Court recognized the right of the national State of a shareholder in a company to exercise its diplomatic protection "if the act complained of is aimed at the *direct* rights of the shareholder *as such*" (*Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Second Phase, I.C.J. Reports 1970*, p. 36, para. 47). In truth, contrary to what is said in the Judgment in that case, the Applicant identifies an attack on company rights, resulting in damage to shareholders, with the violation of their direct rights[61]. Indeed, in several passages in its written pleadings, Guinea considers claims held by Africom-Zaire and Africontainers-Zaire to be claims held by Mr. Diallo[62].

46 8. The Democratic Republic of the Congo will show the Court that a violation of the rights of the company is not equated under international law with a violation of the rights of the shareholder and that international law allows for the protection of the direct rights of shareholders as such only under very limited conditions which are not fulfilled in the present case.

9. Madam President, Members of the Court, Guinea's identification in the present case of an infringement of the rights of a company with a violation of the rights of its shareholders is contrary to positive international law. It is contrary to the logic itself of the institution of diplomatic protection; it was rejected by the Court in the *Barcelona Traction* case; most legal commentators reject such identification.

10. Madam President, Members of the Court, the institution of diplomatic protection is based on the fundamental notion that a "State is in reality asserting its own rights — its right to ensure, in the person of its subjects, respect for the rules of international law" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 12). "This right is . . . limited to intervention [by a State] on behalf of its own nationals because, in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection" (*Barcelona Traction, Light and Power Company,*

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[61]MRG, p. 83, paras. 4.24 and 4.25.

[62]MRG, p. 7, para. 1.16.

Limited (Belgium v. *Spain), Second Phase, I.C.J. Reports 1970,* p. 33, para. 36 and *Panevezys-Saldutiskis Railway, Judgment, 1939, P.C.I.J., Series A/B, No. 76,* p. 16). Conversely, this means that "[w]here the injury was done to the national of some other State, no claim to which such injury may give rise falls within the scope of the diplomatic protection which a State is entitled to afford nor can it give rise to a claim which that State is entitled to espouse" (*Panevezys-Saldutiskis Railway, Judgment, 1939, P.C.I.J., Series A/B, No. 76,* p. 16).

11. If these general principles are applied to the case of a violation of the rights of a company, only the national State of the company can suffer any violation of its rights, and hence only that State can claim reparation. Thus, an infringement of the rights of the company cannot be equated with a violation of the rights of its shareholders.

12. The refusal to identify the rights of the company with the rights of the shareholder also follows from the jurisprudence of the Court. In the *Barcelona Traction* case, the Court clearly and explicitly refused to equate the rights of the company with those of the shareholders. The Court stated in paragraph 44 of the 1970 Judgment:

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> "Notwithstanding the separate corporate personality, a wrong done to the company frequently causes prejudice to its shareholders. But the mere fact that damage is sustained by both company and shareholder does not imply that both are entitled to claim compensation. Thus no legal conclusion can be drawn from the fact that the same event caused damage simultaneously affecting several natural or juristic persons. Creditors do not have any right to claim compensation from a person who, by wronging their debtor, causes them loss. *In such cases, no doubt, the interests of the aggrieved are affected, but not their rights.* Thus whenever a shareholder's interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate action; for although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed." (*Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970,* p. 35, para. 44.).

13. The principle laid down by the Court runs directly counter to Guinea's argument. Even supposing that the Democratic Republic of the Congo is required to pay its debts to Africom-Zaire and Africontainers-Zaire, and that those companies are themselves in debt to Mr. Diallo, he does "not have any right to claim compensation from the Congolese State, which, by wronging his debtors, causes him a loss". In other words, Mr. Diallo's "interests . . . are [possibly] affected, but not [his] rights".

14. In this regard the Democratic Republic of the Congo notes that under Congolese law commercial companies, and therefore the companies Africom-Zaire and Africontainers-Zaire, have legal personality separate from that of their shareholders or *associés*[63]. I wish to draw the Court's attention to the fact that Congolese legislation, in dealing with private limited liability companies, speaks of *associés* and *parts sociales*, not *actionnaires* (shareholders) and *actions* (shares). To be more consistent with the legislation of the Court, we shall however use the generic terms *actionnaires* (shareholders) and *actions* (shares).

15. However close they may be in factual and economic terms, the links between a company and its shareholders do not prevent them from remaining separate entities in law, inasmuch as they possess distinct legal personalities.

16. The DRC wishes to indicate here that the argument now being advanced by Guinea is very similar to that put forward by Belgium in the *Barcelona Traction* case. In that case, the Belgian Government filed an Application, like the one in the present case, having as its object "reparation for damage claimed to have been caused to a number of Belgian nationals, said to be shareholders in the [company]" (*I.C.J. Reports 1964*, p. 9 and *I.C.J. Reports 1970*, p. 16).

48 17. In either case, this is "to identify an attack on company rights, resulting in damage to shareholders, with the violation of their direct rights". Thus, one need only in both cases apply the same reasoning as that adopted in the *Barcelona Traction* case to dismiss this argument. Guinea's Application must, accordingly, be given the same treatment as that which the Court gave Belgium's Application, that is to say it must be found inadmissible.

18. Further, the Court's decision in the *Barcelona Traction* case is the only jurisprudence of relevance to the present proceedings. Neither the older or more recent arbitral awards nor the decisions by the European Human Rights Commission relied on by Guinea can support its claim.

19. Madam President, Members of the Court, Guinea's argument, which expressly seeks to equate an attack on the company's rights with a violation of the shareholders' rights, is contradicted not only by the case law but also by a significant body of commentary. Professors Patrick Daillier and Alain Pellet have written that, in a case involving the possibility of diplomatic protection where

[63]See Article 1 of the Decree of 27 February 1887 on commercial companies, as amended to date.

the rights allegedly violated are those of a company, "it is in principle the personality — and the nationality — of the company, a legal person, which prevails, which takes precedence"[64]. In the course which he taught at the Academy of International Law in 1974, Professor Diez de Velasco noted that:

> "The admissibility of claims before international tribunals on account of wrongs done to companies depends on the nationalities of the companies. The company is the entity possessing a perfected right to the corporate property and the shareholder could only claim compensation based on equity."[65]

20. The DRC observes in this connection that, notwithstanding some disagreement, the most authoritative writers very clearly state that equating the company's rights with shareholders' rights must also be rejected when the measures complained of are attributable to the national State of the company. On this point, Professors Patrick Daillier and Alain Pellet rightly state:

> "Where there are only two States involved, the State of the corporate seat and the national State of the shareholders, the problem can be resolved by reference to the principles governing the nationality of companies . . .
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> **49** "If the company must have the nationality of the State on whose territory it has established its corporate seat, and if the measures injuring the shareholders have been taken by that State, *it is clear that a claim by the national State is inadmissible*."[66]

21. Madam President, Members of the Court, I have already pointed out that the Court in the *Barcelona Traction* case acknowledged, in *dictum*, the possibility in principle of a claim by the national State where the act complained of has been aimed at "the direct rights of the shareholder as such" (*I.C.J. Reports 1970*, p. 36, para. 47). The DRC has already shown here that such a situation can in no event result in "identify[ing] an attack on company rights, resulting in damage to shareholders, with the violation of their direct rights", as Guinea wishes to do[67]. It remains to be shown that, when properly construed, the circumstances in which the "direct rights of the shareholder as such" can be protected are very limited ones which do not correspond to the specific facts in the present case.

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[64]P. Daillier and A. Pellet (Nguyen Quoc Dinh), *Droit international public*, 6th ed., *LGDJ*, 1999, p. 733, para. 489 [translation by the Registry].

[65]Mr. Diez de Velasco "*La protection diplomatique des sociétés et des actionnaires*", Collected Courses of the Hague Academy of International Law *(RCADI)*, 1974, I, Vol. 141, p. 152 [translation by the Registry].

[66]P. Daillier and A. Pellet (Nguyen Quoc Dinh), *Droit international public*, 6th ed., *op. cit.*, p. 774, para. 489 [translation by the Registry]; emphasis added.

[67]MRG, p. 83, paras. 4.24 and 4.25.

22. The terms used by the Court in its benchmark Judgment make it possible to define very clearly the scope of the rule relied on by Guinea. In paragraph 47 of that Judgment the Court states in substance:

> "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." (*I.C.J. Reports 1970*, p. 36, para. 47.)

23. This *obiter dictum* thus begins by laying down a principle, then illustrates it with specific examples. In both cases, it is clear that what is referred to are rights which shareholders can hold only in the context of their relations with the company.

24. As regards the principle, I first note that the Court is not opening the door to diplomatic protection on behalf of shareholders' rights, without qualification. They must be "direct" *(propres)* rights of the shareholder considered "as such" *(en tant que tels)*, not merely "rights as shareholder"[68] or "direct rights of shareholders", as Guinea asserts in passing[69]. As for the word

50 "*propre*", its ordinary meaning is that "which pertains specifically to somebody or to something, characterizing it and distinguishing it in a special way"[70]. This simply confirms that the rights of the shareholder cannot be confused with those of the company, as Guinea seeks to do. The phrase "as such" adds a second condition: the rights concerned must belong to the party in question by virtue of *his status as shareholder* and not in any other capacity. Hence, by definition, what is envisaged here can only be the rights of shareholders in their relations with the company, since it is only from the company that they can claim to derive their shareholders' rights. Conversely, a shareholder cannot have any direct right, as such, in seeing that contracts entered into by the company with a third party are complied with, for in that case the right is not direct (it is the company's right which is involved), nor can it belong to the shareholder "as such" (any person, whether or not a shareholder, can have rights of this kind).

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[68]MRG, p. 67, para. 3.63.

[69]MRG, p. 91, para. 4.46.

[70]*Dictionnaire Larousse de la langue française*, see "*propre*" [note by the Registry: in the English version of *Barcelona Traction*, the word "*propre*" is rendered as "direct", to which this definition is clearly not applicable].

25. This interpretation is confirmed by the list of examples provided by the Court: the right to dividends, the right to attend and vote at general meetings, and the right to share in the residual assets of the company on liquidation are rights which, by definition, the shareholder can invoke only against the company, subject to certain conditions and in accordance with certain procedures laid down in the company's articles and in the commercial law of the legal order concerned.

26. Those writers who have considered this question have favoured the same view, either repeating the same examples or citing similar ones[71].

27. As will have been noted, no one cites as a "right of the shareholder as such" the right to see the company suffer no injury, whether as a result of non-performance of a contract to which it is a party or as a result of tort or other non-contractual liability. In other words, the admissibility of the claim is subject to the existence of what might be called "interference" in the relations between the company and its shareholders.

28. Madam President, Members of the Court, contrary to the Applicant's allegations, the present case does not involve a situation in which the direct rights of the shareholder as such can be

51 protected. Moreover, it is the Applicant's awareness of this that leads it to state explicitly in its written pleadings that it is adopting a broad definition of the term "direct rights of the shareholder". And indeed, in this expansive view which it takes, this broad notion of the rights of the shareholder, which fails to take account of the phrase "as such", which is nevertheless used by the Court, Guinea, in its own words, includes both Mr. Diallo's "functional rights" and his "property rights"[72].

29. The DRC will look in turn at the two types of rights referred to by Guinea to show that Mr. Diallo's direct rights as shareholder, that is to say as an *associé* under Congolese law, are not at issue in the present case, whether those rights be "functional rights" or "property rights".

30. Guinea claims that Mr. Diallo's expulsion constituted an infringement of his direct rights. The expulsion allegedly prevented him from exercising his rights and responsibilities as "owner and sole shareholder and managing director of the companies in question and from

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[71]M. Shaw, *International Law*, Cambridge, CAP, 4th ed., 1997, p. 566: J. Verhoeven, *Droit international public*, Brussels, Larcier, 200, 637.

[72]MRG, p. 91, para. 4.46.

pursuing collection of the monies owed him and seeking enforcement of the judicial decisions"[73]. Well, this argument is doubly wrong.

31. First, in purely factual terms, it is not a credible argument that the director of a company cannot exercise his power of management and control from foreign territory, even if situated thousands of kilometres from the places where the company carries on its business. Modern means of communication as well as, quite simply, the possibility of delegating executive tasks to local managers, including through the appointment of a new chief executive, undeniably represent means for running a company, whether in the DRC or elsewhere. On this point the Democratic Republic of the Congo notes that Mr. Diallo himself continued to run Africontainers and pursued recovery of the debts owed to that company well after his expulsion. All he needed to do to this end was to appoint representatives and lawyers to act on his behalf and on his instructions.

32. The DRC would next point out that neither Mr. Diallo's shares nor his dividends nor his specific rights as shareholder were at any time targeted. It is difficult to contend in these
52 proceedings that Mr. Diallo's removal from Congolese territory was "aimed at" any of his rights cited in the Court's Judgment or any other rights granted him by Congolese law.

33. In truth, Guinea does not even try to show that Mr. Diallo's rights as shareholder were aimed at as such. It confines itself to asserting that the effect of the measure complained of here, that is to say the expulsion, was to prevent him from fully exercising his rights. Stress must however be laid on the fact that there is absolutely nothing to suggest that Mr. Diallo's removal from Congolese territory was a measure aimed at his rights as shareholder. Thus, Guinea's argument concerning the "functional rights" of its national is unfounded both in fact and in law.

34. Madam President, Members of the Court, in respect of what it calls the "property rights" of its national, Guinea claims that Mr. Diallo saw the value of his property reduced to zero as a result of internationally wrongful conduct on the part of the Congolese authorities; and that this conduct prevented its national from pursuing recovery of the monies owed him by the Congolese State and various private companies, some of which claims had been reduced to judgment[74].

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[73]MRG, pp. 91-92, para. 4.48.

[74]MRG, p. 92, para. 4.49.

35. The DRC notes that this allegation is yet another illustration of the Applicant's deliberate, near-total merging of the rights, personalities and property of the two companies with those of their managing director. In this context, the notion of direct "property rights" of Mr. Diallo as shareholder clearly loses all meaning and proves in any event to be fundamentally incompatible with international law as it stands today.

36. Guinea asserts incidentally, and repeatedly, that Mr. Diallo is "owner" of Africom and Africontainers[75]. It is from this standpoint that it considers the companies in question to be part of

53 Mr. Diallo's property and that, in seeking to recover debts owed to them, he is simply attempting to recover "*his* own claims"[76], when these are in fact claims held by the companies.

37. Guinea thus expounds reasoning which, under cover of the notion of "direct rights of the shareholder as such", ends up denying any separation of legal personalities and, more fundamentally, running counter to a number of general principles of the general theory of law. It feigns ignorance of the fact that, in law, it would be more appropriate to consider Mr. Diallo merely as owner of the *shares* or, more accurately, the *parts sociales* in the two companies, and not of the companies themselves, and that, accordingly, the shareholder or *associé* does not himself own either the property or the debts owed to the companies in question. Moreover, Mr. Diallo cannot claim to be the only creditor of the two companies because, aside from the specific case of shareholders entitled to claim any dividends on their shares, there may obviously also be other persons to whom these companies are indebted.

38. In short, Mr. Diallo's strategy whereby he seeks to obtain in proceedings before the International Court of Justice the totality of the sums claimed by the two companies run by him, without any regard for other creditors of the companies or for the companies' debts or other liabilities, is totally incompatible with the most elementary general principles of commercial law. That law recognizes not only the separateness of the personalities and property of private

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[75]Right from the opening lines of the Application, the Republic of Guinea refers in very general terms in regard to Mr. Diallo to "the collection of substantial debts owed to *his businesses* by the State and by the oil companies established on its territory and of which the said State is a shareholder" (Application of Guinea, p. 3; emphasis added by the Democratic Republic of the Congo). See also, for example, MRG, pp. 101, para. 4.71, 103, para. 4.75, and the first point of the submissions by the Republic of Guinea, MRG, p. 108.

[76]MRG, p. 92, paras. 4.48 and 4.49; emphasis added by the Democratic Republic of the Congo.

companies but also the need to take account of both the assets and the total liabilities which that property comprises.

39. In conclusion, the identification and constant confusion of the person of the shareholder with that of the company is in total contradiction with positive international law. Guinea's Application must therefore be declared inadmissible and, as the DRC will explain in a moment, this conclusion cannot be overturned for the sake of "considerations of equity".

II. Guinea cannot in this case claim to be exercising a "protection of the rights of shareholders by substitution for the company owned" for considerations of equity

40. Madam President, Members of the Court, Guinea appeals to "considerations of equity" to justify "the right to exercise its diplomatic protection, independently of the violation of the shareholders' direct rights"[77]. This argument is based solely on the circumstance that, contrary to

54 the situation in the *Barcelona Traction* case, the State whose responsibility is at issue is also the State of nationality of the company or companies concerned. Here, because the two companies Africom-Zaire and Africontainers-Zaire have Congolese nationality, Guinea considers it would be equitable to admit the diplomatic protection of Mr. Diallo by "substitution" for the companies of which he is a shareholder[78].

41. The Democratic Republic of the Congo will show here that, in the first place, by way of principal argument, that the Guinean argument based on equity is simply inadmissible here and, secondly, in any event, that it would be in no way "equitable" to allow Mr. Diallo to be protected in this case "in substitution" for the companies whose shares he holds.

42. Madam President, Members of the Court, Guinea's principal argument cannot be upheld because it is based on equity *contra legem*. For Guinea is asking the Court to accept its claim whereas none of its rights has been violated.

43. The Court cannot allow itself to take such an extreme position. Under Article 38 of its Statute, its duty is to "apply the law as it finds it and not to create it" (*South-West Africa, Second Phase, I.C.J. Reports 1966*, p. 48, para. 89; see also *Fisheries Jurisdiction, I.C.J. Reports 1974*,

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[77]MRG, p. 93, para. 4.52.

[78]According to the heading of p. 93 of the MRG.

p. 33, para. 78). The Court will no doubt take the same precautions as those taken by the Chamber in the *Frontier Dispute* case, when it said:

> "It is clear that the Chamber cannot decide *ex aequo et bono*. Since the Parties have not entrusted it with the task of carrying out an adjustment of their respective interests, it must also dismiss any possibility of resorting to equity *contra legem*. Nor will the Chamber apply equity *prater legem*." (*I.C.J. Reports 1986*, p. 567, para. 28; see also *North Sea Continental Shelf* cases, *I.C.J. Reports 1969*, p. 47, para. 85 and p. 48, para. 88).

Likewise in the present case, the Parties have not had recourse to the option available under Article 38, paragraph 2, of the Court's Statute by asking it to decide the case *ex aequo et bono*.

44. Madam President, Members of the Court, even assuming that the Court were to agree to apply equity in the extremely broad sense Guinea ascribes to it, the result would not be fundamentally different. In the first place, the solution advocated by Guinea, which consists in

55 authorizing protection by the national State of the shareholders where the company has the nationality of the respondent State, is not, even in principle, equitable. Secondly, the application of that principle in this case would lead to an inequitable result.

45. In international law equity is defined as a "sure and spontaneous sense of what is just and unjust"[79]. For equity to be applied in law, and in particular if it is to be so applied with a view to making good deficiencies and even to circumventing positive law, it must be able to base itself on a spontaneous sentiment, one very widely shared. In other words, any attempt to circumvent a rule of law, particularly a rule of international law, can be envisaged only in relation to a universal conception of equity and not on the basis of any individual notion.

46. However, an analysis of doctrine and jurisprudence shows that, even in principle, the protection of a shareholder by the applicant State right in substitution for the company possessing the nationality of the respondent State is far from being unanimously accepted.

47. The possibility of protection by the national State of the shareholders where the company possesses the nationality of the respondent State is considered inequitable by many judges and writers[80], relevant passages of whose works are quoted in the DRC's written pleadings[81].

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[79] J. Salmon (ed.), *Dictionnaire de droit international public*, Brussels, Bruylant-AUPELF, 2001, p. 916.

[80] Jiménez de Aréchaga, "International Responsibility", *op. cit.*, p. 581; I. Brownlie, *Principles of Public International Law*, 5th ed., *op. cit.*, p. 495.

[81] POC, pp. 93-94.

48. Moreover, the possibility of protection by the national State of the shareholders where the company possesses the nationality of the respondent State is considered inequitable in a number of arbitral decisions. We will cite two cases to illustrate this, namely, the *Baasch & Römer* case and the *Jacob M. Henriquez* case[82]. In both cases, the Commission refused to admit a complaint by the shareholders against measures directed at a corporation possessing the nationality of the respondent State.

49. These precedents confirm that, in principle, a right of protection of foreign nationals in the case of acts affecting the company possessing the nationality of the respondent State, while it may on occasion have found favour with certain judges or writers, is far from being universally
56 accepted. Such a possibility cannot, therefore, be regarded as an equitable solution justifying a decision which circumvents or goes beyond positive law.

50. Madam President, Members of the Court, the Democratic Republic of the Congo will show, to conclude this first objection, that, even assuming that "protection by substitution" were accepted as justified, application of this principle to the case of Mr. Diallo would prove fundamentally inequitable. Indeed, on the one hand, taking account of Mr. Diallo's conduct must result in protection by substitution being characterized as inequitable and, on the other, Mr. Diallo's refusal to exhaust the remedies available in the Democratic Republic of the Congo would, in any event, render any protection by substitution inequitable.

51. Madam President, Members of the Court, the argument of "equitable protection by substitution" is principally based on the compassion supposedly aroused by the situation of a foreign shareholder who has purportedly been the victim of arbitrary action by the State. The DRC has however already shown that, notwithstanding the almost idyllic image which Guinea seeks to project in its written pleadings, Mr. Diallo's personality and the conduct adopted by him since the start of this case are far from irreproachable and that he, at the least, made arbitrary and unjustified claims, embodying financial claims totalling over 30 billion American dollars, that is to say almost three times the external debt of the Democratic Republic of the Congo! It was moreover these

[82] *RSA*, Vol. X, pp. 726-727.

fraudulent and anti-social activities which motivated his removal from Zairian territory by decision of the competent authorities in January 1996.

52. The Democratic Republic of the Congo considers that, if the Court should decide to base its judgment on considerations of equity, Mr. Diallo's improper conduct should be the yardstick. The DRC does not doubt for a moment that that conduct, described at length by my friend and colleague, Maître Tshibangu Kalala, constitutes a further reason for declaring inequitable Guinea's attempt to protect an individual who not only has suffered no violation of his rights but has also conducted himself in a manner which has shown itself to be highly abusive and improper.

53. Madam President, Members of the Court, the argument of the need to allow an "equitable right of protection by substitution" then relies on the fact that the shareholder in question, Mr. Diallo, allegedly has no further remedy available to him to enforce his rights.

57 54. However, the DRC will explain, in connection with the second objection, that Mr. Diallo is far from having exhausted all the internal remedies which were available to him.

55. Indeed, no author could reasonably claim that it is equitable to admit a diplomatic protection claim when not only have the rights of the protected person not been injured, but that person has not even exhausted the remedies available to him on the national territory of the company. For all these reasons, Guinea's argument of equity cannot be accepted; its Application is therefore inadmissible.

56. Madam President, Members of the Court, thank you for your kind attention.

57. May I ask you, Madam President, to give the floor to my friend and colleague Maître Tshibangu Kalala, who will explain to the Court that neither Mr. Diallo nor the companies of which he is managing director and associate have exhausted the existing local remedies, accessible and effective in the Congolese domestic legal order. Consequently, Guinea's Application must also be declared inadmissible.

Le PRESIDENT : Merci, M. Mazyambo. Je donne maintenant la parole à M. Kalala.

Mr. KALALA:

The Application of the Republic of Guinea is inadmissible as the existing local remedies in the Democratic Republic of the Congo have not been exhausted by Mr. Diallo or by his companies

1. Madam President, Members of the Court, the Application of the Republic of Guinea is a diplomatic protection claim. It must, accordingly, satisfy two classic requirements to be declared admissible by the Court. The first condition is that the Republic of Guinea must show before the Court that the person whose cause it has adopted in the international legal order does indeed possess its nationality. Professor Mazyambo explained to the Court a moment ago that this is not so in the present case. The second condition consists in Guinea's demonstrating before the Court that the person alleging injury by the Congolese State has exhausted local remedies. I will now show the Court that Guinea's Application did not satisfy the second condition.

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I. The exhaustion of local remedies is a well-established rule of international law

2. Madam President, Members of the Court, I do not really want to bore you this afternoon by attempting to explain the importance of the rule of the exhaustion of local remedies as a preliminary and indispensable condition for the admissibility of any application brought before the Court in the context of diplomatic protection.

3. I need only quote the Court itself, which, in the *Interhandel* case said that:

> "The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system." (*Interhandel (Switzerland* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1959*, p. 27.)

4. The Congo and Guinea both recognize the importance of this rule and its applicability to the present case. I shall therefore refrain from further comment on this point.

5. However, the applicant State stresses the fact that the exhaustion of local remedies is not an absolute rule and that a number of conditions which domestic remedies must meet to enable this rule to be applied have not been satisfied in this case. The Republic of Guinea considers that it was

impossible in practice for Mr. Diallo to have recourse to the various local remedies established by Congolese law and that, in any event, those remedies must be regarded as ineffective, for they had not enabled Mr. Diallo effectively to protect his rights[83].

6. In reality, Madam President, Members of the Court, international law shares the burden of proof between Guinea and the DRC. It is for the Congo to demonstrate the existence, within its legal order, of remedies which could be used by Mr. Diallo or his companies. On the other hand, it is for Guinea to show that such remedies do not satisfy the conditions laid down by international law in order for their exhaustion to be required before that State may espouse the claim of Mr. Diallo[84].

59 Doctrine also adopts this approach. In this connection, Professor Alain Pellet and others have written that:

> "The existence of a presumption [that a State's local remedies would enable an individual who claims he has been wronged to protect his rights] means that it is for the individual to bear the essential burden of proof; he will have to show that he has indeed attempted to make effective use of all of the internal procedures theoretically available."[85]

7. Madam President, as regards this apportionment of responsibilities as between the two States, which I have just indicated, I shall explain to the Court, on the one hand, that remedies enabling Mr. Diallo to safeguard his rights exist in the Congolese legal order and, secondly, that the Republic of Guinea has *not at all* demonstrated the contrary.

II. Local remedies exist in the Congolese legal order enabling Mr. Diallo and his companies to protect their rights.

8. Madam President, Members of the Court, during my oral argument this morning, I have painted a complete picture of the many disputes between the two Congolese companies directed by Mr. Diallo and their Congolese partners. I have also shown to the Court all the legal actions brought by those companies against some of their partners. Similarly, I have pointed out that, in certain cases, no remedy was sought either by the companies directed by Mr. Diallo or by

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[83]MRG, paras. 4.70-4.81.

[84]See, in this connection, the rule set out in Draft Article 15 of the Draft Articles on Diplomatic Protection proposed by the Special Rapporteur, John Dugard, in his Third Report 2002.

[85]Alain Pellet and Patrick Daillier (Nguyen Quoc Dinh), *Droit international public*, 6th ed., Paris, *LGDJ*, 1999, p. 776, No. 490.

Mr. Diallo in his own name. I do not therefore want to bore the Court by reiterating what the DRC has amply set out in its written pleadings and which I referred to in my previous oral argument. I would therefore ask the Court to kindly refer to them.

9. I would simply say that the Republic of Guinea does not dispute in its Memorial that there are procedures and machinery for redress, judicial or otherwise, within the legal order of the DRC which would have enabled the companies in question or Mr. Diallo himself to safeguard their rights. So in the opinion of Guinea itself local remedies exist in the DRC enabling Mr. Diallo and his companies to protect their rights. The DRC takes formal note of this and asks the Court to do likewise.

10. However, the Applicant maintains that the existing remedies should be regarded as ineffective, because they would not have enabled Mr. Diallo or the companies of which he is
60 manager and partner to win his case or were not accessible in reality, especially after Mr. Diallo was expelled from Congolese territory.

11. The Democratic Republic of the Congo will show the Court that, contrary to Guinea's assertions, the local remedies were entirely accessible and would have enabled Mr. Diallo and the companies that he directed to safeguard their rights effectively, even after Mr. Diallo's expulsion for Congolese territory in January 1996.

III. Existing local remedies within the Congolese legal order are available and accessible

12. Madam President, Members of the Court, the DRC agrees with the Applicant on the principle that only remedies that are actually available — and consequently accessible to the plaintiff — must be exhausted. This principle is firmly anchored in the international legal order and is a generally accepted limitation on the exhaustion-of-local-remedies rule[86]. In the circumstances of the present case, however, there is nothing, absolutely nothing to warrant the conclusion that it was impossible for Mr. Diallo to avail himself of the machinery and procedures offered by Congolese law which would have enabled him to safeguard his rights.

[86]C.F. Amerasinghe, *Local Remedies in International Law, op. cit.*, p. 191; see also the rule formulated in draft Article 14, f) of the Draft Articles on Diplomatic Protection proposed by John Dugard, the Special Rapporteur, in his third report on diplomatic protection, 2002.

13. The Republic of Guinea does not dispute that the remedies existing within the Congolese legal order were available or accessible for the period in which Mr. Diallo was lawfully residing on Congolese territory. It is only following Mr. Diallo's expulsion from Congolese territory that the Applicant considers that the existing remedies in the DRC were no longer available or accessible to its national.

14. The Democratic Republic of the Congo asks the Court to reject this allegation by Guinea, for two basic reasons.

15. Firstly, Mr. Diallo's absence from Congolese territory was not an obstacle to the proceedings already initiated when he was still in the Congo. It is indisputable that instituting or continuing with proceedings, judicial or otherwise, in no way requires the physical presence of an

61 individual on Congolese territory. The Congolese legal system contains no provision requiring the presence of the plaintiff in the territory for due legal process before the courts and tribunals. The 1960 Code of Civil Procedure provides in this regard that "the parties shall appear in person or through a duly authorized advocate"[87] and stipulates that "[t]he power of representation at law includes the right of appearance, the right to take all procedural steps and to plead for the party, and the right to speak on his behalf"[88]. So there was nothing in law to prevent Mr. Diallo from giving one or more representatives power of attorney to act in legal proceedings instituted on behalf of the companies of which he was the managing director, or even instituting fresh proceedings in other disputes, even after his expulsion from Congolese territory.

16. In this connection, Madam President, Members of the Court, the DRC points to the deep disappointment observed on this subject that the legal proceedings instituted in 1993 and 1995 by Africontainers-Zaire and Africom-Zaire against Fina, Shell and PLZ continued to follow their normal course long after Mr. Diallo's expulsion. It is therefore clear that the proceedings already set in motion by Mr. Diallo on behalf of the companies of which he was managing director were not interrupted because of his removal from the national territory.

17. Moreover, certain aspects of the case show that Mr. Diallo would have been in a position, even after his expulsion from Congolese territory, not only to have the companies of

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[87] Code of Civil Procedure of the Congo, Art. 14, para. 1.

[88] *Ibid*., para. 3.

which he was managing director represented in the ongoing proceedings but also to continue negotiations and, if necessary, to institute fresh proceedings before the competent Congolese courts in the other pending disputes.

18. The DRC notes in this respect, Madam President, Members of the Court — and this is fundamentally important and I emphasize — that the company Africontainers-Zaire continued to take part in negotiations with Gécamines until October 1997, more than a year and a half after the expulsion of Mr. Diallo. The status of the representatives of Africontainers at those meetings is of particular interest to us. It emerges from the minutes of the meetings held at the headquarters of Gécamines, on 2 and 7 July 1997, that Africontainers was represented there by two members of its

62 management (Messrs. Kanza Ne Kongo and Ibrahim Diallo), *and also by two Congolese lawyers* (Maître Musangu and Maître Kabasele)[89]. Negotiations between the same people again took place in September and October 1998, or nearly three years, note my words, nearly three years after the expulsion of Mr. Diallo from Congolese territory. In view of what I have just explained, the DRC requests the Court to ask itself why, if the interests of Africontainers-Zaire could be defended by two lawyers in the negotiations with Gécamines in the absence of Mr. Diallo who was in Guinea, those interests could not be defended before the Congolese courts and tribunals by the same lawyers. Why not?

19. Secondly, Mr. Diallo's financial situation did not prevent him from being represented before the Congolese courts. For Guinea states that

> "the state of extreme poverty into which the internationally wrongful acts *of the DRC* itself had plunged Mr. Diallo, who found it materially impossible to initiate further, evidently costly, proceedings or even to provide for his basic needs . . ."[90].

The applicant State concludes from this that it was impossible for Mr. Diallo to exhaust existing local remedies within the Congolese legal order[91].

20. Madam President, Members of the Court, in factual terms, the alleged "extreme poverty" of Mr. Diallo and his finding it "materially impossible to initiate further . . . proceedings" or even "to provide for his basic needs" are affirmations lacking in credibility and quite without evidential

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[89]MRG, Anns. 224 and 226.

[90]MRG, para. 4.77; the italics are in the original.

[91]MRG, para. 4.81, *in fine.*

value. On the contrary, Mr. Diallo's finances does not seem to have constituted an obstacle to the involvement of two Congolese lawyers in the negotiations with Gécamines, and of a third Guinean lawyer in the preparation of the arguments developed by Guinea with a view to endorsing Mr. Diallo's complaint.

21. In legal terms, Guinea does not refer to any rule of international law introducing a new exception to the fundamental principle of the prior exhaustion of local remedies on the basis of a state of poverty.

63 Quite the contrary, the principle that poverty cannot be pleaded in order to evade the obligation to exhaust local remedies is firmly established in international law. As stated in one of the principal reference works on the question of the exhaustion of local remedies,

> "[i]t has been confirmed on more than one occasion that lack of pecuniary means on the part of the alien claimant or individual does not constitute a valid reason for not pursuing local remedies . . . In the area of human rights protection the same rule has been applied."[92]

It is therefore well established, in general international law, that lack of financial means does not constitute a justification for failure to exhaust local remedies. It is therefore in vain that the Republic of Guinea attempts to rely on this plea in an attempt to evade the application of this rule in the present case.

IV. The existing local remedies in the Congolese legal order are effective

22. Madam President, Members of the Court, the Republic of Guinea has also disputed the effectiveness of the existing local remedies in the Congolese internal legal order. In this respect, the applicant State relies on the allegation that the Congolese political authorities unjustifiably and arbitrarily suspended the enforcement of the judgment of the Kinshasa-Gombe *Tribunal de grande instance* whereby Africontainers had obtained the sentencing of the company Shell to payment of damages[93]. That, according to Guinea, was an unlawful practice precluding application of the rule of the exhaustion of local remedies[94]. The Republic of Guinea also argues that ""[v]arious other judicial proceedings brought by Mr. Diallo on behalf of Africontainers or Africom produced no

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[92]C. F. Amerasinghe, *Local Remedies in International Law, op.cit.*, p. 212 and the references cited.

[93]MRG, paras. 4.71 and 4.72.

[94]MRG, para. 4.78.

result"[95]. The applicant State concludes from this that "even if the courts had found in his favour, Mr. Diallo had scant hope of achieving any satisfactory judicial settlement of his dispute with his trading partners"[96]. All in all, the Republic of Guinea considers that the condition of the
64 exhaustion of local remedies has been fulfilled since it does not require "recourse to a remedy which manifestly has no chance of success"[97].

23. Similarly, Guinea also refers to the various steps taken by Mr. Diallo with the Congolese political and administrative authorities to recover debts owing to the companies Africom and Africontainers. Noting that "[a]ll these initiatives failed to produce any result"[98], Guinea concludes that the existing or other remedies within the Congolese legal order are not effective, be they judicial or other.

24. The DRC will show the Court that, contrary to the allegations of the applicant State, the local remedies provided for in the Congolese legal order are effective for the purposes of international law and that, consequently, their exhaustion was obligatory in the present case.

25. In this respect, the DRC recalls that in international law . . . Madam President, Members of the Court, I request the Court's indulgence for this slight overrun; this morning's ceremony encroached on the time and I request your indulgence to enable us to make up some of it.

Le PRESIDENT : D'accord. Vous avez certainement le droit de poursuivre quelques minutes encore.

Mr. KABALA: Merci beaucoup. In this connection the DRC recalls that in international law a remedy is considered effective if it enables the plaintiff to preserve his rights without being deprived of all chance of success[99] and if it appears to be adequate with respect to the purposes pursued by the plaintiff's application[100]. It is also accepted, contrary to what Guinea suggests, that

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[95]MRG, para 4.73.

[96]*Ibid.*, para. 4.74.

[97]*Ibid.*

[98]MRG, para. 4.77.

[99]See, for example, the third report of J. Dugard on diplomatic protection, 2002, para. 20; A. Pellet and P. Daillier (Nguyen Quoc Dinh), *Droit international public*, 6e éd., *op.cit.*, p. 776, no. 490 ; I. Brownlie, *Principles of Public Intgernational Law*, 5e éd., *op.cit.*, p. 500.

[100]C. F. Amerasinghe, *Local Remedies in International Law*, *op. cit.*, p. 171 ("adequate for the object sought").

the "effectiveness" of a remedy in no way implies that the plaintiff wins the case, and certainly not for each of his claims. That is not what is meant by the effectiveness of a remedy. Madam President, Members of the Court, the point is not to ensure success but to give a chance of success to anyone having recourse to the available remedies.

65 26. Having made this point, the Democratic Republic of the Congo asks the Court to note the fact that: (1) the local remedies available within the Congolese legal system have been shown to be effective with respect to the disputes submitted to the ordinary Congolese courts by the companies Africontainers and Africom-Zaire with respect to Shell, Fina and PLZ discussed in my previous presentation — the first instance rulings went in the companies' favour; (2) the remedies available within the Congolese legal system could have proved effective for the disputes which Mr. Diallo or the companies managed by him decided not to submit to the local courts; and (3) the remedies available within the Congolese legal system could also have proved effective in challenging Mr. Diallo's deportation order.

27. Generally, there clearly appear to be within the Congolese legal order various existing remedies which would have enabled Mr. Diallo and the companies managed by him to assert their rights effectively. Such remedies were available both against the private companies with which Africontainers and Africom maintained business relationships and against State undertakings such as Gécamines and Onatra, and against the Congolese State itself. Numerous precedents show that these remedies offer plaintiffs real chances of success, and that they may accordingly be regarded as fully effective for the purposes of international law. The DRC has discussed these precedents in detail in its written pleadings. I will not therefore dwell on them now, but I kindly ask the Court to refer to the written pleadings on this point.

28. The DRC submits, in this respect, that the essence of the judicial function consists specifically in determining to what extent the claims of the parties to the proceedings are properly founded and in deciding the dispute accordingly. In other words, there can clearly be no question of contesting the effectiveness of local remedies simply because Mr. Diallo's initial claims were not upheld in full or were subsequently rejected. Madam President, Members of the Court, such an appreciation is highly perilous. Thus for Guinea, when the first instance courts find in favour of Africontainers and Africom, Congolese justice is fair and effective; however, when the claims of

those two companies are rejected by the higher courts, the remedies provided for by the Congolese
66 legal order become inaccessible and ineffective. The DRC kindly requests the Court not to entertain this type of tactics on the part of the Applicant.

29. Madam President, Members of the Court, the important thing to bear in mind in the present instance is that legal procedures are available in the DRC to enable Mr. Diallo and his companies to safeguard their rights and that they clearly provide plaintiffs with a chance of success.

30. To conclude, the DRC draws the Court's attention to the fact that there have always existed, and there still continue to exist, within the Congolese legal order, remedies which would have allowed Mr. Diallo and the companies in question to safeguard their rights. These remedies met, and continue to meet, all the requirements of international law in the matter. In particular, they were always accessible to Mr. Diallo, even after he was deported from the country. Moreover, those remedies are effective and, as has been illustrated in practice, are far from devoid of chances of success.

31. Madam President, Members of the Court, the rule regarding the exhaustion of local remedies takes on all of its meaning in the present case. The domestic courts of the DRC are the best suited and equipped for the disputes between Africontainers and Africom and their Congolese trading partners. As I stressed throughout my earlier presentation, the present proceedings derive primarily from perfectly straightforward commercial disputes, for which the "natural" and logical forum is of course the courts of the legal system from whence the disputes arose, that is to say the Congolese courts. It is only in the event that, following recourse to all of these local remedies, the plaintiff has been unable to safeguard his rights, that the Court could entertain such a claim. I have shown the Court that this condition has not been fulfilled in the current case, and that the Republic of Guinea has been unable to demonstrate convincingly that the remedies available within the Congolese legal order did not satisfy the requirements of international law in the matter. There is thus no reason justifying the non-exhaustion — and, in several cases, a refusal even to act — of the local remedies available to settle the disputes between Africontainers and Africom and their trading partners. It is for all of these reasons that the Application submitted by the Republic of Guinea on
67 behalf of Mr. Diallo must be declared inadmissible on the basis of non-exhaustion of the available, effective, local remedies provided for by the Congolese legal system.

32. Madam President, Members of the Court, I thank you for your kind attention. I am sure that Professor Alain Pellet, as a regular practitioner before the Court, will not contradict me, Madam President, if I say that you cannot conceive what an immense pleasure it has been for me to appear before such a prestigious institution. It is not an everyday occurrence. It is therefore with a certain regret that I end my presentation, as I would like to have remained before you for several more hours non-stop. However, my time is up and I must stop. Nevertheless, I ask you, Madam President, to give the floor to H.E. Mr. Masangu-a-Mwanza, the Ambassador Extraordinary and Plenitpotentiary to the Netherlands, as Agent for the DRC to formulate our final submissions. I thank you.

The PRESIDENT: Thank you very much, Maître Kalala. Of course, we're always delighted to hear the Agent but I wonder if he would like to reserve those submissions as would be more usual until the end of the second round. Thank you. But I think that it would be better to do so at the end of the second round.

So that brings us to the end of today's proceedings. The Court now rises and we will meet again at 10 o'clock tomorrow to hear Guinea.

The Court rose at 1.20 p.m.