CR 2006/52 (translation)

CR 2006/52 (traduction)

Wednesday 29 November 2006 at 3 p.m.

Mercredi 29 novembre 2006 à 15 heures

8 Le PRESIDENT : Veuillez vous asseoir. L'audience est ouverte. La Cour est réunie aujourd'hui pour entendre la République démocratique du Congo en son deuxième tour de plaidoiries. Il peut être utile de préciser que la Cour n'envisage pas d'observer une pause café. We will continue.

Je donne à présent la parole à Maître Tshibangu Kalala

Mr. KALALA: Madam President, Members of the Court, I am going to begin by answering the question asked yesterday by Judge Bennouna.

1. Madam President, Members of the Court, during the hearing of yesterday, 28 November 2006, Judge Bennouna asked both Parties a question seeking "clarification on whether the legislation of the Democratic Republic of the Congo or the jurisprudence of the courts of that country authorize the establishment of a private limited company" with just one individual.

2. The reply of the Democratic Republic of the Congo to this question is as follows.

3. According to Article 446, subdivision 1, of the Decree of 30 July 1888 on conventions and contractual obligations, the *société* (company) is defined as a "contract whereby two or more individuals agree to place something in common with a view to sharing such benefit as may result therefrom" *[translation by the Registry]*.

4. Under this legal provision in force, Madam President, Congolese law precludes the incorporation of a company consisting of just one individual. In other words, it is the contractual and not the institutional concept of company that prevails in Congolese law. This means that Congolese legislation in no way authorizes the incorporation of a private limited company with a single associate (shareholder) and by just one individual, since the aforesaid legal provision clearly refers to two or more individuals, and not just one, for the establishment of a commercial company.

5. For the sake of completeness, the DRC also cites Article 36 of the Decree of 23 June 1960 completing that of 27 February 1887, which provides that: "A private limited company . . . is a company formed by individuals undertaking only to provide resources, which makes no public appeal for funds, and the shares of which shall be uniform and issued in the name of the holder and
9 shall not be freely transferable." The DRC warmly thanks the Republic of Guinea for having produced this legal provision in its judges' folder of yesterday under tab 4.

6. As we can readily see, Article 36 of the Decree of 23 June 1960 defines a private limited liability company as a company formed by individuals, in the plural, and not by just one individual, in the singular. This is in keeping with the contractual concept of company to which I referred a moment ago.

7. Madam President, Members of the Court, the contractual concept is confirmed by Mr. Diallo himself under the articles of association of Africontainers appended to the Memorial of the Republic of Guinea as Annex 1 (see MG, Book II, Ann. 1). And, in accordance with those articles of association, when this company was incorporated on 18 September 1979 there were three associates: two individuals (Mr. Kibeti Zala and Mrs. Colette Dewast) and one legal entity (the company Africom-Zaire). Subsequently, and to this day, Africontainers has had two associates: Africom-Zaire (a legal entity holding 60 per cent of the capital stock) and Mr. Diallo (an individual holding 40 per cent of the capital) (see MG, Ann. 3).

8. In conclusion, Madam President, Members of the Court, the Congolese legislation in force does not permit the incorporation of a private limited liability company by just one individual. That is the answer of the Democratic Republic of the Congo to the question raised by Judge Bennouna.

9. I thank you, Madam President, and ask you to give the floor to Professor Mazyambo. Thank you.

Le PRESIDENT : Merci, Maître Tshibangu Kalala. Je donne la parole à présent au Professeur Mazyambo.

Mr. KISALA:

THE REPUBLIC OF GUINEA HAS NO *LOCUS STANDI* IN THE PRESENT CASE

1. Madam President, Members of the Court, after following the oral arguments of our opponents yesterday, I note that in spite of a number of areas of agreement there are still some points of disagreement between the Applicant and the Democratic Republic of the Congo.

10 2. Guinea affirms that international law affords it the possibility of protecting the rights of Mr. Diallo both as an individual and as a shareholder for the violation of his rights and by

substitution in respect of the damage suffered by the Congolese companies[1]. On the other hand, the Democratic Republic of the Congo notes that, essentially speaking, Guinea's arguments have failed to undermine the two objections it raised. So far as we are concerned, I should like here to meet Guinea's arguments on two essential points: *primo*, the non-violation of the rights granted to Mr. Diallo as an associate; *secundo*, the non-existence of an exception permitting protection by substitution.

I. The rights of Mr. Diallo as shareholder or associate have not been violated

3. Madam President, Members of the Court, I should like first to demonstrate that Guinea has not been convincing in its attempt to prove that its Application is consonant with the hypothesis of violation of the rights of the shareholder as such, provided for in paragraph 44 of the *Barcelona Traction* Judgment.

4. The Democratic Republic of the Congo accepts that international law gives the State the possibility of exercising its diplomatic protection in favour of a shareholder having its nationality when an internationally wrongful act by a State is directed against the rights of that shareholder as such. It is simply making it clear that, under the Court's relevant case law, what is involved is a very restrictive hypothesis since the rights in question are solely those granted to the shareholder in his relations with the company.

5. The DRC also agrees that the rights listed in the 1970 Judgment are no more than examples, and that the rights in question must be sought in the domestic legislation of the States concerned.

6. It nevertheless notes that Mr. Diallo has not been deprived of any of the rights that Guinea lists as personal rights of the "shareholder" or associate as such.

7. In his oral statement yesterday morning, Mr. Samuel Wordsworth stated that the personal rights of Mr. Diallo as an associate of the private limited liability companies Africom-Zaire and Africontainers-Zaire were listed in Articles 51, 65, 67, 68, 71, 75, 78 and 79 of the

[1]CR 2006/51, p. 50, para. 28.

11 27 February 1887 Decree on Commercial Corporations[2]. On close perusal, those provisions identify the following rights:

— the right to dividends and to the proceeds of liquidation (Art. 51);

— the right to be appointed *(gérant)* (Art. 65);

— the right of the *associé gérant* not to be removed without cause (Art. 67);

— the right of the *gérant* to represent the company (Art. 68);

— the right of oversight (Arts. 71 and 75);

— the right to participate in general meetings (Art. 79).

— I note that Article 78, though cited by Guinea, does not proclaim any right.

8. It is noteworthy here that, while in theory all these rights are granted to Mr. Diallo under Congolese law, he was unable to exercise one of those rights, namely the right of oversight of the two companies. For the articles pertaining to that right provide:

"*Article 71*

> Oversight of the management shall be entrusted to one or more administrators *[mandataires]*, who need not be members, called auditors *[commissaires]*.
>
> . . . . . .
>
> *Article 75*
>
> The mandate of the auditors shall be to supervise and oversee, without any restriction, all the acts performed by the management, all the operations of the company and the register of associates." *[Translation by the Registry.]*

This instrument shows that the statutory oversight is oversight of the management. Hence such oversight cannot be entrusted to an individual who is already *gérant*.

9. Madam President, Members of the Court, what I have just said about the right of oversight is of crucial importance because I hereby dispose of an important point of Guinea's arguments which seek a ruling by the Court that, by arresting and expelling Mr. Diallo from Congolese territory, the Congolese authorities deprived him of the possibility of exercising his right to oversee Africom and Africontainers[3]. As *gérant*, Mr. Diallo could no longer be an auditor within the meaning of the aforesaid Articles 71 and 75. Hence no act by the Congolese authorities could

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[2]CR 2006/51, pp. 29-34, paras. 14-19.

[3]CR 2006/51, pp. 32-33.

12 deprive him of a right which he did not exercise in those two companies in his particular circumstances.

10. The only property right cited by the articles of Congolese law, that of being paid dividends and liquidation bonuses, does not require as a condition of its enjoyment that the holder live in the Congo. An *associé* may receive dividends or share of liquidation proceeds anywhere in the world. Furthermore, the functional rights, namely the right to be appointed managing director *(gérant)*, the right of the associate manager *(associé gérant)* not to be dismissed without cause, the right of the managing director to represent the company, and the right to take part in general meetings, are not such as to be essentially affected by the physical absence of the holder from the headquarters of the company. These are all rights which may be exercised even from a distance through the delegation of powers. As I said in my oral statement the day before yesterday, modern communications and simply the possibility of delegating tasks to local administrators, including through the appointment of a new managing director *(gérant)*, are undeniably all facilities for managing a company in the DRC or elsewhere. The poverty of Mr. Diallo alleged by Guinea to explain the impossibility at such action has not been proven; it cannot therefore be accepted. On the other hand, it can plausibly be asserted here that Mr. Diallo made a fortune in the Congo. Did he not claim to have paid US$13 million in surplus rentals to PLZ?

11. It is therefore clear, Madam President, Members of the Court, that the arrest and expulsion of Mr. Diallo have not infringed his personal rights recognized by Congolese legislation. The acts which violate the personal rights of shareholders are acts of interference in relations between the company and its shareholders. Typical examples were given you in the *Salvador Commercial Co.* case. And in that case the acts concerned were the following: the arbitrary replacement of directors of the company, the calling of meetings of governing bodies of the company without warning the majority shareholders, refusal to allow shareholders to consult certain company documents, and so on[4].

[4] *RIAA*, Vol. XV, pp. 474-475.

13 **II. Guinea's protection of Mr. Diallo in his capacity as a shareholder of Congolese companies for the prejudice suffered by them is not possible as international law stands today**

12. Madam President, Members of the Court, Guinea claims that international law enables it to protect Mr. Diallo as a partner *(associé)* in Congolese companies for the prejudice suffered by those companies; that there is indeed an exception to the rule that shareholders are not protected, which enables a State to exercise diplomatic protection over the shareholder of a company which has the nationality of the Respondent; that this exception set forth in the *Barcelona Traction* Judgment has now become a customary norm. Guinea further argues that the particular circumstances of the current case support the application of equity.

13. The DRC will show that positive international law does not recognize an exception by which a State can exercise diplomatic protection, where the shareholder of a company has the nationality of the respondent State and also that there is no special circumstance permitting the application of equity in the present case.

1. International law does not recognize an exception enabling a State to exercise diplomatic protection where the shareholder of a company has the nationality of the respondent State

14. Madam President, contrary to what Guinea says, neither the Court's jurisprudence nor State practice recognizes the possibility of diplomatic protection by substitution.

15. In the *Barcelona Traction* case, the Court did not conclude that such a possibility existed under positive international law. This is clearly shown by the wording of the Judgment and the separate opinions of certain judges.

16. In paragraph 93 of the 1970 Judgment, the Court says:

> "On the other hand, the Court considers that, in the field of diplomatic protection as in all other fields of international law, it is necessary that the law be applied reasonably. *It has been suggested that* if in a given case it is not possible to apply the general rule that the right of diplomatic protection of a company belongs to its national State, considerations of equity might call for the possibility of protection of the shareholders in question by their own national State. This hypothesis does not correspond to the circumstances of the present case." (*I.C.J. Reports 1970*, p. 48; emphasis added.)

14 The wording of this paragraph clearly shows that the Court had not identified the exception suggested to it as an established norm in positive law. In his presentation yesterday,

Professor Alain Pellet acknowledged this when he said that the Court did not come out clearly in favour of the notion of protection by substitution in positive law[5].

17. Moreover, while certain Members of the Court, such as Sir Gerald Fitzmaurice, favoured the hypothesis of diplomatic protection by substitution, others were fiercely opposed to it. This was the case of Judges Padilla Nervo and Morelli. In his separate opinion, Judge Padilla Nervo wrote:

> "I do *not* concur with the view that the national State of the shareholders may exercise diplomatic protection when the act complained of was done by the national State of the company, for this would be equivalent to admitting that any State, on the pretext of protecting the interests of the shareholders of a foreign company, may deny the existence of the legal entity of companies organized in accordance with the laws of the national State of such companies.
>
> I have reservations about paragraph 92 of the Judgment. For the reasons stated above I am of the opinion that the so-called theory to which the paragraph refers does not have any validity. The fact that the Judgment ends the paragraph with the sentence: *'Whatever the validity of this theory may be, it is certainly not applicable to the present case, since Spain is not the national State of Barcelona Traction'* should not be interpreted as an admission that such 'theory' might be applicable in other cases where the State whose responsibility is invoked is the national State of the company." (*I.C.J. Reports 1970*, p. 257; emphasis in the original.)

Judge Morelli took a similar view, when he wrote:

> "On the other hand it must be recognized that diplomatic protection of a company really may be impossible when there is no foreign State to exercise it. This would be so in the case of a company which had the nationality of the very State whose international obligation was in question.
>
> Nevertheless, to say that in such a case the national States of the shareholders are entitled to protect the latter's interests because there is no possibility of their benefiting indirectly from any protection afforded the company would be to make havoc with the system of international rules regarding the treatment of foreigners. It would, furthermore, be a wholly illogical and arbitrary deduction." (*Ibid*., pp. 240-241.)

18. Nor is there any customary basis, Madam President, Members of the Court, for diplomatic protection by substitution for companies having the nationality of the respondent State.

15 19. In its written pleadings and oral arguments, Guinea vainly seeks acceptance of the notion of a customary basis for such protection by relying in turn on: arbitral awards; decisions of the European Commission on Human Rights; the requirements of Article 25 of the Washington

[5]CR 2006/51, p. 38, para. 5.

Convention; ICSID jurisprudence; and bilateral treaties for the promotion and protection of investments.

20. Faced with Guinea's persistence, the DRC is obliged to repeat what it has said in its written pleadings, which is that in each of the former arbitrations (the *Ruden, Delagoa Bay Railway Company, Salvador Commercial Company, Shufeldt, Alsop* cases), the arbitrators based themselves on an arbitral agreement which allowed them to adjudicate without limiting themselves to the application of positive international law and also, and this is very important, contained a clear waiver by the respondent State of any objection preventing the tribunal from ruling on the merits[6]. That is not the case here. So it is clear that the arbitral awards do not lay down a general régime of diplomatic protection. The same must be said of the *Biloune* and *ELSI* cases, also cited by Guinea. The DRC's argument is developed at length in its written pleadings[7]. I will not therefore return to it now.

21. Madam President, Members of the Court, the references to Article 25 of the World Bank Convention, signed in Washington in 1965 (the ICSID Convention), to bilateral and multilateral treaties for the promotion and protection of investments and to ICSID decisions lack relevance to the present case. Indeed, as Professor Alain Pellet himself acknowledged, "these treaty provisions and this jurisprudence . . . do not constitute the direct application of the principles and rules governing diplomatic protection, and the ICSID tribunals do not fail to recall this"[8]. Can it therefore be asserted that the sheer number of bilateral agreements for the promotion and protection of investments, agreements which moreover, do not regulate the question of diplomatic protection, is enough to modify the general régime of diplomatic protection? The DRC's answer is no. The fact that the ICSID tribunals, as the distinguished Professor so rightly noted yesterday, regularly recall that treaty provisions and jurisprudence relating to the promotion and protection of investments do not constitute the direct application of the principles and rules governing diplomatic protection reinforces the DRC's position.

[6]POC, para. 2.44.

[7]*Ibid.*, pp. 70-73.

[8]CR 2006/51, p. 42, para. 11.

2. No particular circumstance permits the application of equity in the present case

22. Madam President, Members of the Court, Guinea persists in its argument that it can protect Mr. Diallo for reasons of equity in view of the particular circumstances of this case. It explains that the sort of equity which should be applied is equity *infra legem*, the one which, far from contradicting the legal rules, underpins and justifies them. This solution of the evidence is said to be required by the particular circumstances surrounding the present case, namely, the fact that the Congolese companies concerned were supposedly subject to a discretionary régime, as a result of which they thus should be called "foreign national" companies; that they are private companies and not limited liability companies, in which *intuitu personae* has a fundamental role and of which the partners are sometimes liable for their companies' debts[9]; that as Mr. Diallo was the sole partner *(associé)* — according to Guinea — and the sole managing director *(gérant)* of the two companies concerned, there is confusion between his interests and those of the companies.

23. The Democratic Republic of the Congo emphasizes that its legislation makes no distinction between commercial companies of the same nature set up under its legislation. Nothing in Congolese law provides for such a distinction. Even if a company has foreign partners *(associés)* or shareholders, it is a Congolese company no different from one set up by solely Congolese nationals, providing it has been properly established under Congolese law. The "foreign national" company label attached to Africom and Africontainers to justify the request for the application of equity is quite simply nonsense.

24. Moreover, as Mr. Tshibangu Kalala has just said in his answer to Judge Bennouna's questions, in Congolese law, the legal identity of private limited liability companies is different from that of their *associés*. Their assets are distinct from those of their *associés*.

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25. The liability of the partners *(associés)* of private limited liability companies does not exceed the level of their capital contribution. Nothing in Congolese law indicates the contrary. I believe that Guinea, in asserting the contrary, has misread the law concerned.

26. There is thus no confusion between the identity and assets of Mr. Diallo and the companies of which he is manager *(gérant)* that would justify the application of equity in the present case.

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[9] *Ibid*., p. 48, para. 25 (Pellet).

27. Failing authorization by the Parties, the Court cannot apply any equity which would entail circumventing the rule of the exclusive protection by the State having the company's nationality.

28. Madam President, Members of the Court, I have thus reached the end of my presentation. Before taking my leave, however, I would like to tell you what a great pleasure and a honour it has been to plead before this venerable Court. I thank you for your kind attention.

Le PRESIDENT : Je vous remercie, M. Mazyambo. Qui devons-nous appeler maintenant à la barre ?

Mr. KISALA: May it please Madam President to call Maître Tshibangu Kalala.

Le PRESIDENT : Maître Tshibangu Kalala, vous avez la parole.

Mr. KALALA:

THE DEPORTATION OF MR. DIALLO FROM CONGOLESE TERRITORY AND THE NON-EXHAUSTION OF LOCAL REMEDIES

1. Madam President, Members of the Court, in my presentation, I shall confine myself to identifying the points of fact and of law on which the two States continue to differ and to refuting Guinea's arguments on each of those points. Guinea's representatives who appeared before the Court yesterday insisted on a number of occasions upon the fact that Mr. Diallo's deportation was illegal and was aimed at preventing him from acting to recover the monies owed to his companies. Mr. Thouvenin even declared that, as the DRC lacked an adequate system of legal protection,
18 Mr. Diallo could not be expected to exhaust the manifestly futile local remedies. All these assertions, Madam President, warrant an appropriate response.

2. I am going to demonstrate to the Court that firstly, Mr. Diallo's expulsion from Congolese territory was lawful; secondly, Mr. Diallo's expulsion could not prevent Africontainers and Africom from recovering monies due to them through the courts; thirdly, Mr. Diallo's alleged impoverishment could not prevent Africontainers and Africom from using local remedies to

recover their debts; and lastly, the DRC has an adequate system of legal protection. I shall therefore begin by showing that proceedings for the expulsion of Mr. Diallo were lawful.

I. Mr. Diallo's expulsion from Congolese territory was lawful

3. During his pleadings yesterday Mr. Forteau said that the requirements as to the statement of reasons, procedure and prior consultation imposed by the Congolese Law on immigration control were not respected by the authors of the expulsion decree and that the Congolese authorities acted in obvious haste, without troubling themselves to respect the applicable procedural and formal requirements[10].

4. Madam President, the DRC has already explained to the Court that Mr. Diallo was expelled from Congolese territory pursuant to the Congolese Law of 12 September 1983 on immigration control. The Congolese authorities did not act in haste. It should be noted that the expulsion order was made on 31 October 1995, whereas Mr. Diallo was not conducted to the frontier until 31 January 1996, three months later. So it cannot be said that there was undue haste on the part of the Congolese authorities.

5. It is true that the notice signed by the immigration officer unfortunately referred to "refusal of entry" *(refoulement)* instead of "expulsion" *(expulsion)*. Despite this error, however, it is indisputable under the order of 31 October 1995 that this was indeed an expulsion and not a refusal of entry.

6. Basically, Mr. Diallo was expelled on the grounds clearly stated in the expulsion order issued against him by the Congolese Prime Minister: Mr. Diallo's presence and conduct was

19 endangering Zairean public order, especially in economic, financial and monetary terms. Therefore the Congolese authorities could not in a legal document specify all the individual acts of which Mr. Diallo was accused. The DRC has explained to the Court that the expulsion order against Mr. Diallo was not an act of revenge or persecution directed against him personally, because several foreign nationals had been similarly affected during the same period. Guinea has not replied to this argument by the DRC.

[10]See CR 2006/51, paras. 28-29.

7. Madam President, Members of the Court, in his pleadings yesterday Mr. Forteau was sceptical as to whether a letter (sent by Mr. Diallo to foreign officials) could by itself create the slightest disturbance to public order[11]. On this subject I would remind Mr. Forteau about what happened recently in France, a country he knows well. An Algerian Muslim cleric had made statements indicating the places on a wife's body that her husband could strike in order to punish her. The French authorities regarded these statements as likely to cause a serious breach of public order in France and expelled the person concerned to Algeria. So it is easy to understand that in Algeria or other Muslim countries people might be sceptical, to use Mr. Forteau's word, about such statements causing a breach of public order in France.

8. This is to say that every country has its own idea of public order and of the values that it embodies. In the view of the DRC, a young African State that needs to attract foreign private investment in order to develop its many natural resources, the international publicity that Mr. Diallo was giving to his extravagant and exorbitant financial claims was destabilizing the economic operators affected and so was prejudicial to Congolese public order.

9. Mr. Forteau, in ironic mode, added that he could not see how a letter dated 30 November 1995 could have been the grounds for the expulsion order issued on 31 October 1995, a month before the said letter. He thus raises an issue of chronology.

10. Madam President, I wish to point out to the Court that, contrary to Mr. Forteau's allegations, the expulsion order bears the date of 31 October 1995 but was implemented only on 31 January 1996, three months later. But between the two dates Mr. Diallo, without knowing that

20 there was already an expulsion order against him based on serious grounds, made his position still worse by publicizing the letter in question, i.e., the chronology holds good, because the expulsion order was implemented two months after Mr. Diallo's letter, which by itself does not justify expulsion, even though it is an act prejudicial to Congolese public order. It should be said that DRC special services had had Mr. Diallo under surveillance for several months and were receiving regular reports on his general conduct and on his contacts. All this culminated in his expulsion on 31 January 1996.

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[11] See CR 2006/51, subpara. 6.

11. Guinea stresses that the DRC lacks evidence in support of its allegation that Mr. Diallo was a financial criminal and briber[12].

12. To take one example among so many, Mr. Diallo obtained and added to the papers filed with the Court a copy of the submissions of the Public Prosecutor *(Ministère public)* at the Supreme Court of Justice of the DRC supporting the argument of Africom and Africontainers in cases against PLZ and Zaire Fina[13]. Madam President, the public does not have access to these documents as long as the Supreme Court of Justice has not given judgment on the appeals brought before it[14]. How was Mr. Diallo able to obtain these secret documents except by corrupting a venal official?

13. In conclusion, Madam President, Members of the Court, Mr. Diallo's expulsion from Congolese territory was decided upon and put into practice in accordance with the legislation in force. Also, if Mr. Diallo had appealed to the Congolese authorities for permission to return to the DRC, that appeal would have had a genuine prospect of success, as witness the success of foreign nationals who did make such an appeal.

14. Madam President, Members of the Court, I now come to the second point in my oral pleadings, to show the Court that Mr. Diallo's expulsion could not prevent Africom and Africontainers from using the local remedies available within the Congolese legal order to recover monies due to them from third parties.

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II. Mr. Diallo's expulsion could not prevent Africom and Africontainers from exhausting the local remedies provided within the Congolese legal order

15. Madam President, Members of the Court, we now come to the heart of the dispute brought before the Court by Guinea. During yesterday's pleadings almost all the representatives of Guinea repeated the same refrain in chorus: Mr. Diallo's expulsion from Congolese territory prevented Africom and Africontainers from exhausting local remedies. We heard this refrain all day yesterday.

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[12]See CR 2006/51, p. 14, paras. 9-10.

[13]See MG, Anns. 146 and 149.

[14]See MG, Anns. 146 and 149.

16. On this point Mr. Thouvenin stated in his oral pleadings yesterday that the DRC could not avail itself of failure to exhaust local remedies because the injured parties were manifestly prevented from pursuing them[15].

17. I shall now explain to the Court that this allegation is completely without foundation and is based on a fundamental error.

18. Madam President, Members of the Court, as I have just explained in my answer to the question put by the Court, *Mr. Diallo is not to be confused with the two companies, Africom and Africontainers*. I understand that the Applicant cannot know Congolese law; that is normal, because the Congo cannot know Guinean law either. But in that case, one must show modesty and refrain from launching into dogmatic statements on an issue one does not fully grasp. Under Congolese law, Mr. Diallo has legal personality and property completely separate from the legal personality and property of each of the companies to which I have just referred. The Applicant's fundamental error in the present case is to assert that Africom and Africontainers are one-man companies, i.e., they have only one member *(associé)*, Mr. Diallo. On the basis of this assertion, which is totally erroneous as I pointed out in my answer to the question put by the Court, Guinea is merging the legal personality and property of Mr. Diallo with the legal personality and property of those two companies. That, Madam President, Members of the Court, is contrary to Congolese law.

19. In the light of what I have just said, it is quite wrong to maintain, as Mr. Thouvenin does, that Mr. Diallo's expulsion prevented the two companies concerned from exhausting the local remedies available in the DRC to recover monies owed them by third parties. Madam President,

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Members of the Court, the two companies, which still exist —— at the end I will return to Africom's situation — continued to operate long after Mr. Diallo's expulsion. Africontainers appointed Mr. Kanza ne Kongo as manager *(gérant)* in place of Mr. Diallo, as witness the letter dated 12 February 1996 — therefore after Diallo's expulsion — sent to him from the company's lawyer, Maître Bizimana Nsoro. Madam President, Members of the Court, you will not find this document in the judges' folder, because I have not filed it there, but in Annex 201 of the Memorial

[15] See CR 2006/51, paras. 9 and 11.

of Guinea, Volume II. Thus the new manager *(gérant)* was supposed to have full powers. I return to the point to say that the letter is indeed stated to be "for the attention of Mr. Kanza, manager *(gérant)*". The Court will examine this document. This new manager *(gérant)* was supposed to be fully empowered to take legal action or to appear before other bodies for and on behalf of Africontainers, as he did, for example, when representing Africontainers during negotiations with Gécamines in July 1997[16], nearly two years after Mr. Diallo's expulsion.

20. Madam President, Members of the Court, if the DRC had expelled Mr. Diallo to prevent his two companies from recovering the monies due to them — because this was said to be the motive — the best solution would have been simply to expropriate the two companies concerned or, for example, to prohibit the negotiations between Gécamines and Africontainers organized well after Mr. Diallo's expulsion. But this was not the policy of the Congolese Government towards the companies in question, which have continued to operate as in the past.

21. Mr. Thouvenin also stated in his oral pleadings yesterday that "the incapacity to act which is at issue here results directly from the threats weighing on the company manager and the denial of entry into the territory decreed against him"[17].

22. Once again, Madam President, Members of the Court, this statement is completely erroneous and based on a fundamental error, to which I have already referred in the course of these oral pleadings, namely: Diallo = Africontainers and Africom, and Africontainers and Africom = Diallo. This is completely wrong, in fact and in law.

23 23. In sum, Madam President, Members of the Court, Mr. Thouvenin's contention that Mr. Diallo's expulsion by the Congolese authorities could prevent Africom and Africontainers from exhausting local remedies is unfounded both in fact and law and must therefore be rejected outright by the Court. As I have said, that contention is based on a serious fundamental error, which is to merge into a single legal personality and into a single corpus of property *three* legal personalities and *three* corpora of property which are completely separate: those of Mr. Diallo, Africom and Africontainers. There lies the fundamental error which explains the confusion in which the Applicant has become bogged down in the present case.

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[16]See MG, Anns. 224 and 226.

[17]See CR 2006/51, p. 55, para. 17.

24. Madam President, Members of the Court, I shall now turn to the third point in my oral statement, showing that Mr. Diallo's alleged poverty could not prevent the two Congolese companies from pursuing and exhausting local remedies.

III. Mr. Diallo's alleged poverty could not prevent Africom and Africontainers from pursuing and exhausting local remedies

25. In his statement yesterday, Mr. Thouvenin told the Court: "Mr. Diallo's financial situation is, in itself, without relevance to the rule regarding the exhaustion of local remedies. Rich or poor, no matter: the rule is the same for all."[18] The Democratic Republic of the Congo is delighted at this spectacular 180-degree turn, and I hope that no mishap befell my friend Professor Thouvenin in executing this dangerous manoeuvre, a reversal of position by the Applicant, which I would ask the Court to note for the record. Guinea thus waives any reliance on its national Diallo's lack of financial resources, even though this was the *key point* in its attempt to justify his failure to exhaust the local remedies available in the DRC.

26. In other words, and Guinea admits this, from Guinea Diallo could easily have engaged Congolese lawyers — and still could — to take legal action in the name and on behalf of Africom and Africontainers to recover debts owed to them by third parties. Thus, his expulsion from the

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Congo is not a "factual denial of access to local remedies" or an obstacle preventing him from safeguarding his rights or those of his companies in the DRC, poverty no longer being an obstacle for him.

27. It follows that the entire legal and factual edifice erected on Mr. Diallo's expulsion as a major, insurmountable obstacle to the exhaustion of local remedies comes crashing down.

28. Moreover, Africom and Africontainers are not poor and do not lack the financial resources to pursue and exhaust local remedies to recover the money owed to them. These two companies are not poor. But, Madam President, the two companies were not expelled from the Congo. It is Diallo who was expelled. In this regard Mr. Diallo himself has said that his two companies are thriving — that is his term — in other words, rich. Thus, in his letter of 4 February 1998 to the President of the Democratic Republic of the Congo, Mr. Alpha O. Diallo,

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[18] See CR 2006/51, p. 55, para. 20.

Mr. Diallo's Guinean lawyer, wrote to President Kabila that his client Diallo "left behind him two thriving companies which he set up, together with claims which were certain, liquidated, and due . . ."[19].

29. It is undeniable from what I have just explained that Mr. Diallo's expulsion from Congolese territory cannot be a "factual denial of access to local remedies" existing in the DRC either for Mr. Diallo himself or for Africom and Africontainers, which are rich and have not been expelled from the Congo.

30. Madam President, Members of the Court, I shall now address the last point in my oral statement, which concerns the functioning of the Congolese judicial system and in which I shall show that it operates satisfactorily.

IV. The DRC has an adequate system of judicial protection

31. In his statement yesterday, Mr. Thouvenin criticized the Congolese judicial system — I am citing Mr. Thouvenin in friendship and not . . . because he is my main opponent in this part of my statement — claiming that: first, the Government had discretionary power to strike down court decisions and that any judicial redress which the companies or Mr. Diallo might have sought against the Government would necessarily have ended in a decision by that Government based strictly on political considerations; and, second, assuming that recourse seeking remedies could have been effectively initiated, the unreasonable delay in the domestic proceedings in which the companies had already been involved showed the futility of it. He argued from this that the DRC did not have an adequate system of judicial protection at the time and that the unreasonably protracted domestic proceedings made local remedies inapplicable[20].

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32. Madam President, Members of the Court, these uncalled-for assertions, which are clearly exaggerated and, I would say, verge on insults to the worthy judges in the Congo who dispense justice every day, sometimes at the risk of their own lives, call for serious rectification on my part.

33. First, Mr. Thouvenin said that, *on the Congo's own admission*, the enforcement of court decisions at the time of the events depended on the government's goodwill. He added that the

[19]See MG, Ann. 245.

[20]See CR 2006/51, pp. 59 and 60.

Congo's written pleadings state that, *whatever remedy might have been sought*, the final decision lay with the government, which enjoyed total discretionary power.

34. Madam President, Members of the Court, that assertion is *wrong through and through*. Mr. Thouvenin cited no page, no paragraph, from the DRC's pleadings where that statement can be found. The DRC therefore sees this as wholly inadmissible denigration of the Congolese judicial system and as a token of the Applicant's desperation.

35. Any reasonable person can easily see that the Congolese Government cannot intervene in all judicial decisions, handed down daily by lower and higher courts throughout the DRC's vast territory. The DRC is amazed that Mr. Thouvenin has failed to grasp such an elementary truth.

36. The DRC did however state in its written pleadings that in very, very rare cases the enforcement of a legal decision may be stayed where serious public disturbance might otherwise result. Mr. Thouvenin knows better than anyone that peace can sometimes take precedence over justice. In these cases, a group of senior judicial officials, not politicians, brought together within the Inspectorate-General of Judicial Services, is asked to determine the lawfulness of the decision.

26 This, Madam President, Members of the Court, affects a tiny number of decisions handed down by the lower and higher courts in the DRC.

37. In respect of the judgment against the Shell oil company won at first instance by Africontainers, the Ministry of Justice, after having ordered a stay of the execution and acting with the concurrence of senior judicial officials in the Inspectorate-General of Judicial Services, authorized the resumption of enforcement.

38. The Congolese Government does not have the power to command judges to decide cases one way or another; nor does it ever do so. The best proof of this, Madam President, Members of the Court, is that Africom and Africontainers won or lost cases without any interference by the Congolese Government.

39. In the light of the foregoing, the DRC finds Mr. Thouvenin's comments to be totally out of place and tantamount to malicious propaganda against the Congolese judicial system. His assertions are not appropriate legal arguments but merely caricature the Congolese judicial system. As caricature, they are wholly inadmissible by the Court.

40. Secondly, Guinea seeks to evade the exhaustion-of-local-remedies rule by claiming that any such remedies were futile, given the unreasonably long time they took in the present case. In this connection Mr. Thouvenin asserted that the two cases pending before the Supreme Court of Justice were still undecided after thirteen and fourteen years of proceedings[21]. He argues from this: "This provides a perfect demonstration of the futility of the remedies which Mr. Diallo's companies, or indeed he himself, might have done their utmost to seek."[22]

41. Madam President, Members of the Court, the DRC has already explained in its written pleadings the reasons why the Supreme Court of Justice generally takes time in handing down judgments. I shall therefore not go over them again here, and would ask the Court to refer to those pleadings.

27 42. But the DRC does wish to draw to the attention of the Court that, on 30 November 1995, when the two companies in question had only just lodged appeals to the Supreme Court of Justice, Mr. Diallo sent a copy of the letter setting out his companies' financial claims to the President of the International Court of Justice, that is to say to you yourself, to inform the President of the situation even then. It therefore comes as no surprise that Mr. Diallo later prevailed on the Applicant to seise the Court of an action in diplomatic protection to recover the debts involved.

43. So it is not because local remedies provided for in the Congolese judicial system are futile that Mr. Diallo has had a diplomatic protection claim brought in his favour. It is simply the implementation of a long-standing plan on Mr. Diallo's part, as evidenced by the letter to which I have just referred.

44. Madam President, Congolese justice is among the swiftest in the world. As proof of this, I cite the relatively short time, only two years, for the handing down of enforceable judgments in the Africom Zaire versus PLZ and Africontainers versus Zaire Fina cases[23]. Just two years — trial level, appellate level. And, as these are civil and commercial cases decided at the appellate level, the filing with the Supreme Court of an appeal for them to be quashed does not stay their

[21]See CR 2006/51, p. 61, para. 42.

[22]See CR 2006/51, p. 62, para. 43.

[23]See CR 2006/51, p. 61, para. 61.

execution. This means that Mr. Diallo and his companies cannot complain of any so-called unreasonable slowness of domestic proceedings in the DRC.

45. Madam President, Members of the Court, once again we are dealing with an assertion in support of which no serious argument has been made or irrebuttable proof adduced. What I have just said is very important. Madam President, Guinea is trying to take cover behind Mr. Tshibangu Kalala in an attempt to get itself out of a tight spot. No, Madam President, Members of the Court, I will not let Mr. Thouvenin use my letters from 2002 to mask the Republic of Guinea's weakness. No, my friend Thouvenin, no! You are not going to get out of it like that, by rhetoric and semantic tricks. No! One and all must assume their responsibilities before the Court, all their responsibilities.

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46. Madam President, Members of the Court, the Republic of Guinea, a brother people, as we say in Africa, dogmatically claims that the Supreme Court of Justice of the DRC has yet to hand down judgments in the two cases concerned. Thus, it accuses the Congolese judicial system of being too slow and argues from that that there was no point in exhausting local remedies.

47. According to the Latin maxim *accusatori incumbit probatio*, well known to lawyers, Guinea bears the burden of producing to the Court a written, and therefore irrefutable, document showing that the Supreme Court of Justice of the DRC has not yet, as we argue this case in November 2006, rendered its decisions in the two cases. The evidence to be produced to the Court, Madam President, with a view to persuading the Court, cannot consist, my dear Thouvenin, of a mere statement that the DRC's failure to prove the contrary shows that the Supreme Court of the DRC has not yet handed down those decisions. That, Mr. Thouvenin, is not how evidence is adduced before this distinguished Court.

48. To do so is tantamount to requiring the accused, the DRC, to prove a negative, that is to say to produce a *diabolicum probatio* if you will, while the accuser, the Applicant, offers no reliable evidence in support of its accusation. And Mr. Thouvenin is better placed than anyone to know that *diabolicum probatio* is rejected by all serious lawyers.

49. Thus, Madam President, Members of the Court — and this is important — the DRC asks the Court to find, to place on record, that there is no document, no piece of evidence, produced by Guinea in the record now before the Court showing that the Supreme Court of Justice of the Congo

has not yet handed down its judgments in the two cases in question. It follows that any assertion to the contrary by Mr. Thouvenin has no credible basis and must be rejected, for what would happen if the Court were to consider that the Supreme Court of Justice of the DRC had not yet rendered the judgments awaited in those two cases, when those judgments had in fact already been handed down several years ago?

50. Madam President, Members of the Court, I cannot conclude my statement without, as requested by the Congolese authorities, expressing the DRC's indignation and anger at the way the Court is being treated by Mr. Diallo and the Applicant. Throughout these proceedings the

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Applicant has over and over again described Africom-Zaire as a company belonging to Mr. Diallo as its sole *associé* and *gérant*.

51. However, Africom, incorporated on 15 January 1988, has three *associés*: Mr. Heirbaut Guido Jean-Henri Marie (a Belgian), Mununa Nyota (a Congolese) and Mr. Ronaldo Cazier (a Belgian). Mr. Diallo is not an *associé* in that company and is therefore not its sole *associé*. After long, painstaking research in old records in the Clerk's Office of the Trade and Companies Register of the city of Kinshasa, the Respondent (the DRC) succeeded, just a few days ago alas, in obtaining Africom-Zaire's articles *(statuts)*. But, under the Court's binding rules of procedure, the DRC could not, and cannot, submit this document without having first given a copy to Guinea. The DRC now expressly reserves the right to file this document in the later phase of the proceedings.

52. But, pending that, the DRC would point out to the Court that it is no accident that Guinea produced only Africontainers' articles in Annex 1 of its Memorial and nothing, absolutely nothing, in respect of Africom. And the Court will thus understand why the DRC has always treated Mr. Diallo as an extremely dangerous man, who ventures to try and manipulate even a court as prestigious as this one to enrich himself unjustly.

53. I am willing, purely as a gesture to a colleague, to provide Professor Alain Pellet, if he so requests and outside any formal proceeding, with a copy (of the articles) so that he can review them. In summary, Madam President, Members of the Court, Mr. Diallo's expulsion from Congolese territory in January 1996 could not prevent him or Africom or Africontainers from exhausting the effective local remedies available in the internal Congolese judicial order. Further,

the DRC has an adequate system of judicial protection which functions correctly and dispenses justice for all inhabitants. Mr. Diallo and his two companies were and are under an obligation to exhaust local remedies before bringing proceedings before the Court via diplomatic protection. Any arguments by the Applicant to the contrary are without merit and must be rejected by the Court. I thus conclude my statement today.

30 Madam President, Members of the Court, I thank you for your kind attention. Madam President, I now ask you to give the floor to Ambassador Masangu-a-Mwanza, as Agent, so that he may present the DRC's submissions.

Thank you.

Le PRESIDENT : Je vous remercie, Maître Tshibangu Kalala. Dois-je comprendre que la République de Guinée souhaiterait intervenir ? Avant de vous donner la parole, Excellence, M. Pellet, vous avez la parole. One moment please, Your Excellency.

Mr. PELLET: Merci beaucoup, Madame le président. In his statement Mr. Kalala referred to an important document, which he claims to have discovered a few days ago. I shall take the liberty of pointing out that this document could have been produced under Article 56 of the Rules of Court. He offered to provide the document to Guinea, which would be most grateful to him for transmitting it today through the Registry. Thank you, Madam President.

Le PRESIDENT : Je vous remercie, M. Pellet. Je donne maintenant la parole à S. Exc., l'ambassadeur Masangu-a-Mwanza.

Mr. MASANGU-A-MWANZA: Madam President, Members of the Court, throughout the course of these oral arguments you have heard the reasons which bring us here today. The Democratic Republic of the Congo would like to present its submissions to you.

The Democratic Republic of the Congo respectfully requests the Court to adjudge and declare that the Application of the Republic of Guinea is inadmissible,

(1) on the ground that the Republic of Guinea has no status to exercise diplomatic protection in the present proceedings, since its Application seeks essentially to secure reparation for injury suffered on account of the violation of rights of companies not possessing its nationality;

(2) on the ground that, in any event, neither the companies in question nor Mr. Diallo have exhausted the available and effective local remedies existing in the Democratic Republic of the Congo. Accordingly, as to us, the Application is without merit. Thus, we ask that you adjudicate.

31 Thank you, Madam.

Le PRESIDENT : Je vous remercie infiniment, ambassadeur Masangu-a-Mwanza. La Cour prend acte des conclusions finales dont vous venez de donner lecture au nom de la République démocratique du Congo.

Les audiences reprendront le vendredi 1er décembre à 10 heures pour entendre la République de Guinée en son second tour de plaidoiries.

L'audience est à présent levée.

L'audience est levée à 16 h 30

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