CR 2006/53 (translation)

CR 2006/53 (traduction)

Friday 1 December 2006 at 10 a.m.

Vendredi 1er décembre 2006 à 10 heures

8 Le PRESIDENT : Veuillez vous asseoir. L'audience est ouverte. La Cour est réunie aujourd'hui pour entendre la République de Guinée en son second tour de plaidoiries.

Je crois que c'est à M. Forteau que je dois maintenant donner la parole.

Mr. FORTEAU: Thank you, Madam President.

I. THE FACTS

1. Madam President, Members of the Court, the Republic of Guinea will respond today to the second round of oral arguments of the Democratic Republic of the Congo in five stages: I shall begin by recalling the facts dividing the Parties before Mr. Jean-Marc Thouvenin reverts to the question of the exhaustion of local remedies, Mr. Sam Wordsworth to Mr. Diallo's rights, and Mr. Alain Pellet to the protection by substitution of Mr. Diallo's companies. Finally, the Agent for Guinea will present the Applicant's submissions.

2. Madam President, in my presentation of the facts I shall develop two points in turn: in response to Mr. Kalala, I shall first say a few words about Mr. Diallo's companies, which will enable me to react to the new document produced on Wednesday by the Congo and also to respond to the question asked on Tuesday by Judge Bennouna; I shall then go back over the circumstances in which Mr. Diallo was expelled from Zairean territory.

I. Mr. Diallo's companies

A. Africom and Africom-Zaire

3. Regarding the first point, Mr. Kalala kept us in suspense on Wednesday afternoon by affirming that he had proof that Mr. Diallo had, according to him, "tried to manipulate" the Court by making himself out to be an associate of Africom, which apparently he never was. Mr. Kalala stated that he had found the articles of association of that company[1], which were then transmitted to the applicant State via the Registry of the Court[2].

[1]CR 2006/52, pp. 28-29, paras. 50-51.

[2]Letter from the Registry dated 29 November 2006.

9 4. Mr. Diallo is indeed, according to the articles of association of the company "Africom" traced by the Congo, neither associate *(associé)* nor even managing director *(gérant)* of that company. But there is nothing very surprising about that, for the company, incorporated on 24 March 1988, has no link with that of Mr. Diallo:

— their names are admittedly very close, "Africom-Zaire" in one case and "Africom" in the other, which is liable to cause confusion;

— but the domiciles of the corporate headquarters of the two companies are not the same[3], any more than are their respective entry numbers in the Companies Registry[4], or again their managing directors *(gérants)*. Many official documents issued by the Zairean authorities recognize Mr. Diallo to be the Managing Director *(gérant)* of Africom-Zaire[5], while it was one Ronald Cazier who was appointed Managing Director *(gérant)* of the other company Africom[6];

— furthermore, the corporate objects of the two companies also differ. Pursuant to Article 3 of the articles of association of the company found by the respondent State, its "chief purpose shall be the sale of spare parts for vehicles, lifting material, machines" and "other mechanical equipment" *[translation by the Registry]*, which was never the commercial activity of Mr. Diallo's company;

— the date of incorporation of "Africom" found by the Respondent ought to have alerted our opponents to the fact that it could not be Africom-Zaire. On 24 March 1988, Africom-Zaire had already been long in existence and active. It was established in 1974. In 1979 it took part in the incorporation, in the presence of a notary, of Mr. Diallo's other company, Africontainers[7]. In 1983 it concluded its first contracts with the Zairean State, which was to give rise to the listing paper affair, of which I developed the (painful) intricacies last Tuesday[8];

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[3]MG, Book II, Ann. 1 (Articles of Association of Africontainers and Notarial Act, 18 September 1979, p. 1); document transmitted by the Registry on 29 November 2006, Articles of Association of "Africom, SPRL".

[4]*Ibid.*

[5]See, for example, MG, Book II, Ann. 130 (Judgment of the Kinshasa/Gombe *Tribunal de Grande Instance*, 24 August 1993, p. 1), or OG, Ann. 16 (Letter No. 431 of 28 January 1989 from the Procureur Général (Prosecutor General) at the Court of Appeal of Kinshasa to Mr. Diallo).

[6]Document transmitted by the Registry on 29 November, Articles of Association of "Africom, SPRL".

[7]MG, Book II, Ann. 1 (Articles of Association of Africontainers and Notarial Act, 18 September 1979).

[8]CR 2006/51, pp. 19-20, paras. 14-19.

10 by 1 November 1975, Africom-Zaire had also concluded its first lease agreement with the company PLZ[9]. All these particulars are in the folder;

— it is true that Guinea has so far been unable to find the articles of association of Africom-Zaire, for one thing because it is not Mr. Diallo but Guinea that is the applicant in the present case and, for another, because its national was expelled from Zairean territory, which is where, as it happens, the relevant documents are (according to some evidence on file, the Articles of Association of Africom-Zaire are in the Registry of the Kinshasa/Gombe *Tribunal de Grande Instance*)[10];

— yet the actual existence of the company and of its articles of association is beyond dispute: in its submissions delivered on 11 January 1995 in the *Africom-Zaire* v. *PLZ* case, the *Ministère Public* (Public Prosecutor) before the Supreme Court of Justice had occasion to observe that the articles of association of Africom-Zaire, represented by Mr. Diallo in the case "date[d] from 22 August 1974" *[translation by the Registry]* and had been the subject of a "re-registration" "dated 17 March 1980", having due regard, specified the *Ministère Public*, to "what the law prescribes"[11].

5. Africom-Zaire — Mr. Diallo's Africom — was therefore in existence well before 1988, and it existed quite lawfully. Another Africom company has, it is true, since come into being but that is completely beyond the scope of the case with which we are concerned.

B. The question of single-shareholder private limited companies

6. These comments on Mr. Diallo's companies give me an opportunity to reply to the question raised on Tuesday by Judge Bennouna about the possibility of incorporating, under Zairean law, a single-shareholder private limited company[12]. According to its current information — and Guinea will not fail, in keeping with the Court's comments[13], to amplify its

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[9]MG, Book II, Ann. 130 (Judgment of the Kinshasa/Gombe *Tribunal de Grande Instance*, 24 August 1993), p. 7 of the Judgment.

[10]MG, Book II, Ann. 146 (Submissions of the *Ministère Public* (Public Prosecutor) in the appeal on points of law against appeal court judgment RCA 17244, 11 January 1995), pp. 2-3.

[11]*Ibid.*

[12]CR 2006/51, p. 62.

[13]See letter from the Registry of 28 November 2006.

reply between now and 6 December should fresh particulars be meanwhile brought to its notice —

11 Guinea considers that Mr. Kalala is probably not wrong in saying that Congolese legislation does not authorize the incorporation of a private limited company by one single individual[14]. I must nevertheless add the following comments.

7. First of all, I would point out that in the *AMT* v. *Zaire* case brought before ICSID in 1993, the Zairean State expressly put forward the idea that a foreign investor could, on his own, set up a private limited company under Zairean law. The case involved a Zairean SPRL, SINZA, in which a foreign company, AMT, had a majority holding. In support of its allegation, which was rejected by the tribunal, that AMT had no legal standing in the case, the Zairean State considered that the fact of AMT's participation in the capital of SINZA did not suffice to give it that legal standing, a solution — the Zairean State explained — which would also have held good even had AMT incorporated the company while holding 100 per cent of its capital stock[15]. The very fact that the Zairean State put forward such a hypothesis without deeming it legally unworkable under its domestic law is noteworthy since it suggests that the impossibility affirmed by Mr. Kalala on Wednesday is not as absolute as all that.

8. As such, the fact of not being able to *create* a one-person company in no prevents a company from nevertheless *becoming* one-person subsequently. Those are two different issues. It all depends, regarding the second point, not on the rules of incorporation but on the rules applicable in the case of the dissolution and striking off of the company. Now the Decree of 6 March 1951 establishing Zaire's trade register does not mention the possibility of a company's becoming one-person as a case necessitating its removal from the trade register[16], when inclusion in the register, I emphasize, "holds a presumption of trader status"[17] *[translation by the Registry]*.

12 9. In the present case, Africontainers has in any event never been a one-person company, either at the time of its establishment or since, which does not prevent Mr. Diallo from holding,

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[14]CR 2006/52, p. 9, para. 8.

[15]ARB/93/1, award of 21 February 1997, *ILM*, 1997, p. 2, para. 1.05 (ii), and p. 19, para. 5.11.

[16]Reproduced in Kalongo Mbikayi, *Code civil et commercial congolais (mis à jour au 31 mars 1997)*, Centre de recherches et de diffusion juridiques, Kinshasa, 1997, pp. 378-379, Art. 29.

[17]*Ibid*., p. 371, Art. 3.

indirectly, 100 per cent of the capital stock. As to Africom-Zaire, while it became one-person in the late 1970s, it was set up in 1974 contractually.

10. I may add that the existence of these two companies, including the very special configuration of their capital, centralized in Mr. Diallo's hands, has never been disputed by the persons who might have had an interest in doing so, and particularly their contractual partners, the Zairean State included. The *Ministère Public* (Public Prosecutor) before the Supreme Court of Justice, called upon in 1995 to examine the articles of association of Africom and Africontainers, moreover expressly confirmed, on each occasion, the validity of the filing of the articles of association, and of that of their amending instruments[18].

11. This being so, suffice it to take note of this situation, which compels recognition as a fact in international law (*Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, p. 19). The Democratic Republic of the Congo has for that matter done no different. For it has acknowledged in its preliminary objections, without going back on this in its oral arguments, the existence of those two companies on the one hand and, on the other, the fact that, following the particular allocation of their capital since 1980, Mr. Diallo thus "became, *de facto*, the sole managing director of those two companies incorporated under the laws of Zaire"[19].

12. Let us suppose incidentally — but here I am only speculating — that the fact that Mr. Diallo is the only shareholder of his two companies is a ground for their dissolution under Congolese law, and let us further suppose that you have the power to dissolve both companies, what would happen? Their dissolution would entail the transmission of all their property to their sole associate, Mr. Diallo, a Guinean national. This would bring us back, via another route, to the solution of the *De Leon* case, referred to by Mr. Alain Pellet last Tuesday in support of protection by substitution[20]. Hence, whatever end of the issue we start from, the outcome is always the same.

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[18]MG, Book II, Ann. 146 (Submissions of the *Ministère Public* (Public Prosecutor) in the appeal on points of law against appeal court judgment RCA 17244, 11 January 1995), pp. 2-3; MG, Book II, Ann. 149 (Submissions of the *Ministère Public* (Public Prosecutor) in the appeal on points of law against appeal court judgment RCA 17229, 20 April 1995), pp. 2-3.

[19]POC, p. 11, para. 1.06.

[20]CR 2006/51, p. 49, para. 26.

13. Now that this has been clarified, Madam President, I come to the second point in my statement, on the conditions under which Mr. Diallo was expelled from Zairean territory.

II. The conditions under which Mr. Diallo was expelled from Zairean territory

14. Before I come to the actual expulsion I have to say by way of introduction that as Mr. Kalala began his pleadings on Wednesday he expressly stated that he would "confine himself to identifying the points of fact and law on which the two States continue to differ and to refuting Guinea's argument on each of those points"[21]. But Mr. Kalala has kept completely silent on two points of fact in particular that the Congo does not seem able to dispute:

— first of all, at no time has Mr. Kalala returned to the arguments that I had raised last Tuesday about the assessment by Mr. Diallo of his companies' claims;

— I searched in vain in the record of the hearings in the Congo's second round of pleadings: the word "detention" was not mentioned once by the Respondent. Nothing whatever was said, either about the arbitrary arrest and detention in 1988 or in 1995-1996, still less about their clearly excessive duration.

15. My opponent focused solely on the expulsion, which according to him was completely "lawful"[22]. Here we come to a substantive matter, which it is not yet for the Parties to discuss in all its aspects. However, Mr. Kalala's assertions cannot be left unanswered, and that is why I in turn will focus on this issue.

16. The lawfulness of the expulsion under Zairean law must be assessed from several angles.

17. First of all, were the conditions of competence, form and procedure respected? Obviously not:

14 — Article 15 of the 1983 Legislative Order concerning immigration control[23] requires an Order, signed by the President of the Republic; here we are dealing with a decree, signed by the Prime Minister[24];

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[21]CR 2006/52, p. 17, para. 1.

[22]CR 2006/52, p. 18, para. 2.

[23]POC, Ann. 73; judges' folder for the first round, tab No. 3 (Legislative Order No. 83-033 of 12 September 1983 concerning immigration control).

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

— Article 16 of the 1983 Legislative Order requires that the National Immigration Board be consulted prior to deportation and that this consultation be mentioned in the expulsion order; here we have an expulsion order which refers to no such consultation, unlike, for example, the expulsion orders of 22 February 1995 and 20 September 1996 served on a large number of foreign nationals (84 in one case, 24 in the other). Both these orders expressly state, and in relation to all the 108 persons concerned: "having regard to the favourable recommendation by the National Immigration Board"[25]. The fact that there is no such statement anywhere in the expulsion order on Mr. Diallo confirms that the Zairean authorities were suspiciously eager to penalize him;

— lastly, the 1983 Legislative Order makes a clear distinction between the concept, and the system, of deportation and of refusal of entry[26]; and yet Mr. Diallo was the subject of an expulsion order, implemented, curiously enough, by a refusal-of-entry order. Mr. Kalala conceded on Tuesday that there was a problem in this connection, referring to an "error" by the immigration officer[27]. An error perhaps, but an error that was perhaps intentional, because it was not without legal consequences, particularly with regard to the remedies available (or not available in this case) to Mr. Diallo. As my learned friend Mr. Jean-Marc Thouvenin observed last Tuesday, Article 13 of the 1983 Legislative Order expressly provides that refusals of entry "shall not be subject to appeal"[28].

15 18. Was the requirement that reasons be given for the expulsion order then met? Clearly not: the expulsion order contains only the bare fact, with no other information or reference to any specific document whatever: "Having regard to the personal file of the person identified in Article 1 below, whose presence and conduct have breached and continue to breach Zairean public order, particularly in economic, financial and monetary matters". This is what is commonly called standard grounds in administrative law, equivalent to no grounds at all, which is extremely awkward in view of the serious nature of the measures.

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[25]POC, Ann. 76 (Decrees providing for the deportation of aliens).

[26]POC, Ann. 73; judges' folder for the first round, tab No. 3 (Arts. 13 and 15).

[27]CR 2006/52, p. 18, para. 5.

[28]CR 2006/51, pp. 57-58, para. 28.

19. The explanation given by Mr. Kalala on this point is highly revealing, as regards the lack of any valid grounds for expulsion. In his view, "the Congolese authorities could not in a legal document specify all the individual acts of which Mr. Diallo was accused"[29]. Allow me to make two comments on this:

— in purely legal terms Mr. Kalala's argument comes down to this: when it is too easy to state the grounds because there is too much evidence, there is apparently no longer any need to state the grounds. This position is frankly absurd. In addition, it amounts to an admission, of which Guinea takes note, that there are no grounds whatever in the expulsion order;

— on the facts now, the idea that the Congo could rely in detail, on "individual acts" against Mr. Diallo is utterly without foundation, because the Congo has never produced the slightest evidence in support of its serious accusations against Mr. Diallo. The Respondent may well rely, for the first time please note, on the existence of "regular reports" from "DRC special services", which "had had Mr. Diallo under surveillance for several months"[30]; it would still be necessary to flesh out these accusations, which the Congo has never been in a position to do.

20. This lack of grounds for the order doubtless explains why Mr. Kalala again refers to the letter dated 30 November 1995 whereby Mr. Diallo alerted several important foreign figures to the fate of his companies. Mr. Kalala did admit that this letter post-dates the expulsion order of 31 October. However, essentially he said was that what counted was not the decree but its implementation by the refusal-of-entry order of 31 January 1996. But if I am not mistaken what set the whole procedure in motion was the expulsion order, which assuredly could not have been the reason for events which took place subsequent to it.

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21. Be this as it may, simple remarks like those made by Mr. Diallo in that letter cannot be regarded as "an act prejudicial to Congolese public order" justifying expulsion[31], as Mr. Kalala felt able to say last Wednesday. To substantiate his assertions, he took a recent case concerning France[32], where "an Algerian Muslim cleric" has recently been expelled. Yet the facts of the two

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[29]CR 2006/52, p. 19, para. 6.

[30]CR 2006/52, p. 20, para. 10.

[31]*Ibid.*

[32]CR 2006/52, p. 19, para. 7.

cases — and I will take good care not to pass legal judgment one way or the other on the conduct of the French State — are completely different. The person concerned was not expelled for mere "statements", as Mr. Kalala asserts, and he was not expelled without being able to avail himself of fundamental legal guarantees that Mr. Diallo has never enjoyed:

— the person concerned was able to request, as a matter of urgency, the postponement of his expulsion before the *(juge des référés)* (judge hearing urgent applications), then the Conseil d'Etat, ruled on his case;

— and in this case the expulsion order was confirmed by the judge on the basis of notes from the intelligence services establishing the individual's links with terrorist organisations, intelligence notes that "were discussed in connection with the written statement in the presence of both parties"[33]. In contrast Mr. Diallo has never had this opportunity, any more than Guinea has today, because the Congo has failed to produce any document, however insignificant, in support of its accusations or to put Mr. Diallo in a position to dispute them at the proper time.

22. Let me stress on the latter point that on Wednesday the Respondent admitted, through Mr. Kalala, that at the time of his detention following the approval of the order Mr. Diallo knew nothing of this "expulsion order against him"[34]. This confirms once more the arbitrary nature of
17 the detention and the impossibility of exhausting any remedy whatever against measures of which Mr. Diallo had not even been informed.

23. Lastly, on Wednesday Mr. Kalala welcomed the fact that the Zairean authorities had not acted in haste[35]. The refusal-of-entry measure only took effect three months after the expulsion order. Yet this does not mean that the Zairean authorities did nothing throughout this period. Where was Mr. Diallo between the approval of the expulsion and the refusal-of-entry orders? In prison, where he was rotting in a cell under conditions contrary to international standards and particularly in breach of the 1983 Order, which prohibited any detention beyond an absolute

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[33]Conseil d'Etat, 4 October 2004, No. 266948, *Ministre de l'intérieur, de la sécurité intérieure et des libertés locales c. M. Bouziane* (www.legifrance.gouv.fr).

[34]CR 2006/52, pp. 19-20, para. 10.

[35]CR 2006/52, p. 18, para. 4.

maximum of eight days[36]. I will close there, Madam President, because the Congo clearly does not wish to hear about that detention, or the one in 1988.

Madam President, Members of the Court, I have now reached the end of my statement, and thank you sincerely for your attention. Madam President, I would be grateful if you would now give the floor to Mr. Jean-Marc Thouvenin.

Le PRESIDENT : Je vous remercie, M. Forteau. J'appelle maintenant à la barre M. Thouvenin. Il peut être utile de préciser à ce stade que la Cour poursuivra la séance ce matin sans observer de pause.

M. THOUVENIN : Je vous remercie, Madame le président.

II. EXHAUSTION OF LOCAL REMEDIES

1. Madam President, Members of the Court, the arguments presented by the Congo in support of its second preliminary objection call for clarification on four points, which I will deal with in turn.

18 **I. Mr. Diallo's expulsion prevented his companies from pursuing local remedies**

2. The DRC has disputed Guinea's contention that Mr. Diallo's companies have been prevented from pursuing local remedies because of the expulsion of their manager *(gérant)*[37]. In the view of the Congo, Mr. Diallo's fate must certainly not be confused with that of his companies[38].

3. There is no fundamental disagreement between the Parties on the distinction between the legal personalities of Mr. Diallo and of his companies, but it will doubtless not have escaped the Congo that prevention from pursuing remedies is a matter of fact. On this ground it would be erroneous to think that the law necessarily governs the fact.

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[36]CR 2006/51, para. 28 (Forteau).

[37]CR 2006/52, pp. 21-22, paras. 15 and 19 (Kalala).

[38]CR 2006/52, p. 21, para. 18 (Kalala).

4. And yet in fact it is not Guinea but Zaire that has confused Mr. Diallo the *gérant associé* with his companies. Moreover, despite the rather embarrassed explanations by the Congo[39], the chronology of events from October 1995 to January 1996 shows that the sole cause of Mr. Diallo's expulsion lay in the legal actions he was bringing on behalf of his companies.

5. However, my opponent is trying to convince us that there was no confusion in the mind of the then government because, rather than expelling Mr. Diallo, Zaire could just as well have expropriated his companies or prohibited them from engaging in certain activities; that, in his view, would have been the "best solution"[40]. But it is too late for such advice: rightly or wrongly, but in any event unlawfully, the Zaire of 1995-1996 took the view that the best solution was to arrest, detain and subsequently expel Mr. Diallo.

6. Moreover, it is still a matter of fact that Mr. Diallo's companies were prevented from pursuing local remedies, having no manager on the spot to run their business in their interest. It can still be asserted that, in law, Mr. Diallo's companies could still do many things after the expulsion[41] of their manager *(gérant)*, but three facts show that this could not have been the case:

19 — firstly, and Mr. Wordsworth will return to this point shortly, no manager *(gérant)* other than Mr. Diallo was appointed merely by virtue of the letter dated 12 February 1996 by a lawyer to an employee of Africontainers[42]. But even if that had been the case, it would have changed nothing.

— because secondly, the manager *(gérant)* of Africontainers had been deprived of his freedom and expelled although he was bringing legal actions as part of his duties as manager. In such circumstances no-one could be called upon to take over so dangerous a managerial post. The possible successor might perhaps have bought supplies or traded; but he would have had good reason to think that he was "manifestly precluded from pursuing local remedies"[43] on behalf of

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[39]CR 2006/52, pp. 19-20, paras. 9-10 (Kalala).

[40]CR 2006/52, p. 22, para. 20 (Kalala).

[41]CR 2006/52, p. 21, para. 18 (Kalala).

[42]CR 2006/52, pp. 21-22, para. 19 (Kalala) and MG, Ann. 201.

[43]Report of the ILC, Fifty-eighth Session (2006), Supplement No. 10 (A.61/10), Art. 15, *d)*, p. 79.

the companies. Subsequently, "in all the circumstances of the case it would be manifestly unreasonable to expect compliance with the rule"[44].

— moreover and thirdly, it is significant that no fresh legal action had been brought by Mr. Diallo's companies after his expulsion, although the exercise, by Guinea, of its diplomatic protection before the Court dates from the end of 1998. As I have already stated[45], although between 1996 and 1998 negotiations with representatives of Africontainers were conducted on Gécamines' initiative, they were under the control of the Guinean Embassy in Zaire. I was not contradicted on this point during the hearings last Wednesday, and I conclude from this that after his expulsion, the manager *(gérant)* of Africontainers was certainly prevented from exhausting local remedies on behalf of his companies

II. The absence of reasonably available local remedies against arbitrary arrest and expulsion

7. After eight years of proceedings the DRC has shown itself to be incapable of instancing so much as a single real remedy that would have been available to Mr. Diallo. Guinea has noted that at Wednesday's hearing:

20 — firstly, Congo did not dispute that the "remedy" against expulsion on which it had first thought that it could base its argument is not a remedy within the meaning of the exhaustion-of-local remedies rule; what it is is an extra-legal procedure that may be characterized as an appeal to the indulgence of the governmental authorities;

— secondly, the Congo has also not alleged that there is another type of remedy against refusal of entry: on the contrary, it has admitted, by its silence, that under Article 13 of Legislative Order No. 83-033 dated 12 September 1983 concerning immigration "[such] *refusal of entry shall not be subject to appeal*"[46];

— thirdly, nothing was said either on possible remedies that would have enabled Mr. Diallo to claim compensation for the damage he had suffered in 1988 and 1996 as a result of his arbitrary detention.

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[44]Report of the ILC, Fifty-eighth Session (2006), Supplement No. 10 (A.61/10), Art. 15, p. 83, para. 11.

[45]CR 2006/51, pp. 56-57, para. 24 (Thouvenin).

[46]Ann. EP 73; emphasis added.

8. Guinea deduces from this that there were no reasonably available local remedies enabling Mr. Diallo to assert his rights.

III. The absence of reasonably available remedies against government interference in legal proceedings brought by Mr. Diallo's companies

9. Yet Mr. Diallo's fate does not much interest the DRC, which prefers to focus on his companies and their claims[47] and to gloss over the government interference raised by Guinea during Tuesday's hearing[48]. I will briefly restate the facts:

— On 3 July 1995 the Kinshasa *Tribunal de grande instance* ordered Shell to pay Africontainers 13 million dollars[49]. In August the enforceability of this judgment was confirmed on appeal[50]. I will return to this.

— On 13 September, following Zaire Shell's application to the government[51], execution of the judgment was stayed, on the orders of the Vice-Minister of Justice and Keeper of the Seals.

21 The order was given on the Zaire Shell cell-phone, i.e. by way of its portable telephone, as reported by the bailiff who was in the process of seizing Zaire Shell's property[52].

— On 28 September, however, the Minister of Justice, this time by letter, asked the First President of the Court of Appeal to make arrangements for the enforcement of the decision, regarded as free from "any manifest error of judgment"[53]. On 6 October, then 9 October, a bailiff therefore proceeded to seize property belonging to Shell, in particular company accounts and office equipment. Africontainers was going to recover the rights recognized by the court.

— But on 13 October, the First President of the Kinshasa-Gombe Appeal Court wrote to the Minister of Justice stating that he had "the honour to inform [him] that pursuant to [his] verbal instructions received this morning, he ha[d] immediately revoked the seizure of the property of Zaire Shell in the case between it and Africontainers . . ."[54].

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[47]CR 2006/52, pp. 21-22, para. 19 (Kalala).

[48]CR 2006/51, pp. 22-23, paras. 24-27 (Forteau).

[49]MG, Ann. 153.

[50]POC, Ann. 65.

[51]MG, Ann. 166.

[52]MG, Ann. 171.

[53]MG, Ann. 170 *[sic]*; should be Ann. 177.

[54]MG, Ann. 177 *[sic]*.

10. Madam President, it has been said in this Court that: "The Congolese Government does not have the power to command judges to decide cases one way or another; nor does it ever do so."[55] I note for my part that a letter from the First President of the Kinshasa/Gombe Appeal Court shows that, in the *Africontainers* v. *Zaire Shell* case, that is exactly what happened.

11. All in all, this case is characterized by:

(i) twofold interference, first in the form of an order issued by telephone by the Deputy Minister of Justice to cease the seizure of property and second, in the form of verbal instructions given to the First President of the Kinshasa/Gombe Appeal Court; it also reveals

(ii) a total lack of legal supervision of action by the Government, its orders having always been issued verbally without any legal basis or justification in the former instance and, in the latter, in flagrant contradiction with the ministerial letter of 28 September recognizing the absence of any clear miscarriage of justice against Zaire Shell.

12. Above all, the instances of government interference had the effect of completely contradicting the decision of the Kinshasa/Gombe Appeal Court, which, on 24 August 1995[56], had dismissed the application for suspension of execution of the judgment filed by Zaire Shell and, on 13 September 1995[57], upheld the immediate enforceability of the judgment of the Tribunal de Grande Instance favourable to Africontainers.

13. Guinea notes that, on the question whether Mr. Diallo's companies could have appealed against the State and challenged such interference with a reasonable chance of success, the Congo provides no answer. Hence, here again, there were "no reasonably available local remedies", to echo the wording of draft Article 15 *(a)* of the ILC draft Articles on Diplomatic Protection[58].

IV. Inadequate judicial protection of Mr. Diallo and his companies

14. The final point it falls to me to address concerns the inadequacy of the Zairean judicial protection system with respect to Mr. Diallo and his companies.

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[55]CR 2006/52, p. 26, para. 38 (Kalala).

[56]POC, Vol. II, Ann. 65.

[57]MG, Book II, Ann. 170.

[58]ILC Report, Fifty-eighth Session, 2006, Supplement No. 10 (A/61/10), Art. 15 *(a)*, p. 78.

15. Regarding the problem of the excessive length of the proceedings, the Parties are agreed on one fact: two proceedings instituted by Mr. Diallo's companies were following their "normal course"[59] — that is the expression to be found in an exchange of letters dated 2002 — nearly ten years after they had been brought.

16. That is an excessively long period, but my opponent explained during Wednesday's hearing that: "as [they] 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 execution"[60], which, according to him, would mean that "Mr. Diallo and his companies cannot complain of any so-called unreasonable slowness of domestic proceedings in the DRC"[61]. But, apart from the fact that the suspensive or other character of a power in no way justifies the unreasonable length of proceedings, the reality is quite different from that depicted by my opponent: while it is true that the filing of appeals against the appeal judgments that have been unfavourable to Africontainers and Africom-Zaire were not suspensive, the effects of the only appeal judgment favourable to Africontainers were arbitrarily suspended by government interference.

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17. However that may be, the question has arisen before the Court of what stage the appeal proceedings instituted in the *Africom-Zaire* v. *PLZ* and *Africontainers* v. *Fina* cases are at. Somewhat surrealistically, the Congo claims to know nothing of this, saying that: "[t]he DRC has not been informed of the outcome of these proceedings between two private commercial companies"[62]. But it is clear that if the DRC was not informed of the outcome of the lawsuit, it is quite simply because there has been no outcome. All the same, we are not talking about decisions of some district court but of those of the Supreme Court of Justice, whose decisions, which are obviously public and few in number, form — in common with those of all supreme courts — the country's most observed and commented case law. It is clearly inconceivable that a State like the DRC could be unaware of the judicial decisions handed down by its highest court.

18. In any event, it is noteworthy that:

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[59]POC, Vol. II, Ann. 47.

[60]CR 2006/52, p. 27, para. 44 (Kalala).

[61]*Ibid*.

[62]CR 2006/50, p. 32-33, para. 65 (Kalala); see also p. 21, para. 24 (Kalala).

— first, the file submitted to the Court by the Congo contains material showing that, in 2002, the appeals were still pending;

— second, the material in question was obtained in only two days by the Congo;

— third, the Congolese State did not see fit to update the file that it itself submitted to the Court.

19. In this context, it seems reasonable to consider that the failure by the Congo to produce documentation equivalent to that it produced in 2002, in the annexes to its preliminary objections, according to which the proceedings were following their "normal course"[63], must be taken to mean

24 that the situation is still the same today: matters are still following their "normal course" and are still pending.

20. I now come to my final argument, Madam President: even supposing that, as has been said here, the Congolese courts are among the world's swiftest, Guinea has shown the vanity of the remedies which, the DRC asserts, should have been exhausted. It has furthermore been acknowledged, on Wednesday, that while the Congolese Government does not intervene in all judicial decisions[64], it does intervene nevertheless[65]. Most certainly. And that happened in a completely arbitrary manner to Mr. Diallo's companies, as I have just said and as Mr. Mathias Forteau said on Tuesday[66], without being challenged on this by the Congo. I find it hard to see, Madam President, how the rarity of the occurrence, if such it proved to be, could have the slightest consequence in our case since, as it happens, this case is one of those in which the Government's interference is established. Peace may sometimes take precedence over justice, it has been said in this Court, as though to suggest that interference in the Africontainers cases is grounded in this notion. But, apart from the seeming absurdity of the suggestion that Africontainers could have threatened peace, this in any event shows that for that company, as for Africom-Zaire and Mr. Diallo, no justice could be dispensed in Zaire.

21. I thank you, Madam President, Members of the Court, for your attention and I would ask you, Madam President, to give the floor to Mr. Wordsworth.

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[63]POC, Vol. II, Ann. 47.

[64]CR 2006/52, p. 25, para. 35 (Kalala).

[65]CR 2006/52, pp. 25-26, para. 36 (Kalala).

[66]CR 2006/51, pp. 19-20, paras. 16-18, and pp. 22-25, paras. 26-29.

Le PRESIDENT : Je vous remercie, M. Thouvenin. Je donne maintenant la parole à M. Wordsworth.

25 M. WORDSWORTH :

III. LE DROIT DE LA GUINÉE D'EXERCER SA PROTECTION DIPLOMATIQUE AU SUJET DE LA DÉTENTION ET DE L'EXPULSION ARBITRAIRES DE M. DIALLO, AINSI QUE DE SES DROITS EN TANT QU'ACTIONNAIRE

1. Madame le président, Messieurs de la Cour, il m'incombe d'examiner brièvement les conclusions formulées au second tour par M. Mazyambo concernant l'existence ou non de droits d'actionnaires pertinents en la présente affaire.

2. Une remarque préliminaire évidente s'impose cependant :

a) Au paragraphe 3.30 2) de son mémoire, la Guinée a déclaré :

> «l'emprisonnement sans procès, sans interrogatoire, sans formalité, sans accès ni aux avocats ni au personnel de l'ambassade de la République de Guinée était illicite et engage dès lors la responsabilité de la RDC — que ce soit en ce qui concerne les mauvais traitements infligés à M. Diallo, sans égard à ses droits les plus fondamentaux, ou pour ce qui est de la violation du paragraphe 1 de l'article 36 de la convention de Vienne sur les relations consulaires».

b) Dans les paragraphes suivants, la Guinée a mis l'accent sur l'expulsion, soutenant que celle-ci avait été «arbitraire et illicite», que les prescriptions de l'article 13 du pacte international relatif aux droits civils et politiques, auxquels les deux Etats sont Parties, n'avaient pas été respectées, que «M. Diallo a[vait] dû quitter le Zaïre … sans aucun effet personnel, abandonnant sur place tous ses biens, mobiliers ou immobiliers», que «M. Diallo a[vait] été traité en criminel», et que «la façon dont l'expulsion a[vait] été conduite, tout comme l'expulsion elle-même, était illicite»[67].

3. Il n'aura pas échappé à la Cour que, lors de son second tour de plaidoirie, la RDC n'a, une fois encore, rien dit sur le droit de la Guinée à exercer sa protection diplomatique au sujet de la détention et de l'expulsion illicites dont aurait été victime M. Diallo, ni sur les droits que la Guinée tient de l'alinéa *b)* du paragraphe 1 de l'article 36 de la convention de Vienne sur les relations consulaires[68] (voir les affaires *LaGrand (Allemagne c. Etats-Unis d'Amérique), arrêt,*

[67] MG, par. 3.32-3.34.

[68] *Recueil des traités des Nations Unies*, vol. 596, p. 261. La convention est entrée en vigueur pour la RDC le 14 août 1976, et pour la Guinée le 30 juin 1988.

C.I.J. Recueil 2001, p. 492 par. 74 ; *Avena et autres ressortissants mexicains (Mexique c. Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 2004*, par. 49 et suiv.). Dans l'un et l'autre cas, le

26 fait que soit invoquée une violation du droit en question suffit, en soi, à indiquer que la présente affaire doit se poursuivre et être jugée au fond. Et ce point n'est contesté d'aucune manière.

4. J'en viens aux conclusions de M. Mazyambo concernant les droits des actionnaires. Commençons par les points de convergence, lesquels sont nombreux. M. Mazyambo n'a pas contesté ce que j'ai dit au sujet de la nature très particulière et hybride de la «société privée à responsabilité limitée», la SPRL ; il convient que les droits de M. Diallo en tant qu'actionnaire sont bien ceux établis par la législation de la RDC[69] et que ses droits pertinents en tant qu'actionnaire sont énumérés aux articles 51, 65, 67, 68, 71, 75 et 79 du décret de 1887 sur les sociétés commerciales, texte sur lequel j'ai appelé l'attention de la Cour lors du premier tour[70]. Il en résulte qu'il n'y a dès lors que deux points de désaccord pour ce qui concerne la nature et l'étendue des droits pertinents :

a) premièrement, M. Mazyambo considère que l'article 78 du décret de 1887, auquel j'ai également fait référence lors du premier tour, ne crée pas de droit pour les actionnaires[71] ;

b) deuxièmement, il a également défendu la thèse selon laquelle le droit de surveillance prévu aux articles 71 et 75 n'était pas applicable, dans la mesure où ces articles visent la surveillance de la gérance de la société et que M. Diallo était déjà le gérant de ses deux SPRL[72].

5. Je vais traiter ces deux points l'un après l'autre.

6. Tout d'abord, l'article 78, lequel dispose : «The general meeting of shareholders shall have the widest powers to perform or ratify acts concerning the company...» M. Mazyambo n'a pas expliqué pourquoi ce texte ne créerait pas de droits pour les actionnaires. Ainsi que M. Makela — dont il n'a pas été contesté qu'il faisait autorité dans le domaine du droit de la RDC — l'explique, au sujet de l'article 78 :

> «Shareholders function as a collective body in the general meeting, which is the supreme organ of the company. It takes decisions lying outside the scope of

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[69] CR 2006/52, p. 10, par. 5.

[70] CR 2006/52, p. 10-11, par. 7.

[71] CR 2006/51, p. 33, point i).

[72] CR 2006/52, p. 11.

> day-to-day management of company affairs. It has the authority, *inter alia*, to pass judgment on management of company affairs and to grant a *quitus* (discharge) to the managers and auditors.»[73]

27 7. Cette «compétence» indique l'existence d'un droit et, en l'occurrence, d'un droit très important. Il est vrai, et cela ressort également du commentaire de M. Makela, qu'il s'agit là d'un droit pour les actionnaires qui agissent collectivement au sein d'une assemblée générale, mais c'est néanmoins un droit dont chaque actionnaire tire un bénéfice proportionnel à sa participation dans la société. Aux termes de l'article 51 du décret de 1887 : «Each share confers an equal entitlement in the exercise of members' prerogatives…» Chaque actionnaire bénéficie d'«an equal right» dans l'exercice d'un droit tel que celui qui est prévu à l'article 78, mais celui-ci est proportionnel au pourcentage de parts qu'il détient dans la société. Dans le cas de M. Diallo, il s'agissait bien sûr d'une participation, directe ou indirecte, de 100 %.

8. J'en viens ensuite au droit de surveillance et de contrôle régi par les articles 71 et 75 du décret de 1887, au sujet duquel M. Mazyambo a déclaré : M. Diallo «was unable to exercise … the right of oversight of the two companies»; «[t]his instrument shows that the … oversight is oversight of the management. [S]uch oversight cannot be entrusted to an individual who is already *gérant*.»[74] Ceci appelle quatre réponses :

a) premièrement, cela revient à ignorer le libellé de l'article 75. Cet article définit le contenu du droit de surveillance de l'actionnaire prévu à l'article 71, et dispose : «The auditors' job is to oversee and check, without any limitation, all actions taken by management, all corporate operations and the register of *associés*.» La surveillance des actes accomplis par la gérance est certes évoquée, mais qu'en est-il du droit de surveiller et de contrôler toutes les opérations de la société et le registre des associés ? Ces droits sont beaucoup, beaucoup plus étendus que ne le dit M. Mazyambo — ils ne coïncident pas strictement avec ceux d'un associé agissant en tant qu'associé gérant ;

b) deuxièmement, par principe, pourquoi le gérant ne pourrait-il pas également exercer la fonction de surveillance ? Le décret de 1887 prévoit expressément des situations dans lesquelles une personne — de toute évidence le gérant associé, dont le statut est non seulement *reconnu* mais

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[73] Roger Makela Massamba, *Droit des affaires — Cadre juridique de la vie des affaires au Zaïre*, Cadicec/De Boecke Université, 1996, p. 303.

[74] CR 2006/52, p. 11, par. 8.

protégé par l'article 67 —, peut remplir deux fonctions en même temps. J'insiste sur le fait que je parle là d'une SPRL, société qui présente des caractéristiques très particulières. Le gérant gère la société ; l'associé, qui est l'actionnaire majoritaire, dispose, quant à lui, de tous les

28 pouvoirs de l'assemblée générale, y compris ceux d'effectuer ou de ratifier des actes relatifs à la société, et même de révoquer le gérant pour juste motif. Cependant, rien de tout cela ne signifie qu'il serait interdit de détenir le droit d'exercer en même temps ces différentes fonctions ;

c) troisièmement, il y a également un point d'ordre formel, puisque M. Mazyambo a semblé donner à entendre que la Guinée soutenait que M. Diallo était en fait «commissaire», au sens des articles 71 et 75. Ce n'est pas ce que nous soutenons ; ce que nous disons, conformément à l'article 71 et également à l'article 19 du statut d'Africontainers[75], c'est que M. Diallo s'est vu conférer tous les droits et pouvoirs de surveillance et de contrôle qui auraient été ceux du «commissaire» au sein d'une société plus importante. Dès lors que ses sociétés comptaient moins de cinq «associés», et aux termes du statut d'Africontainers, M. Diallo, en tant qu'«associé», et non en tant qu'«actionnaire», jouissait des droits de surveillance et de contrôle — il s'agit là de droits d'actionnaires ;

d) enfin, s'agissant des faits avancés par la RDC, M. Diallo n'était plus, dans la réalité, le «gérant» d'Africontainers après son expulsion. M. Kalala a indiqué que, dans les deux semaines qui ont suivi cette expulsion, comme l'atteste une lettre du 12 février 1996 des avocats d'Africontainers, un nouveau «gérant» avait été désigné en la personne de M. Kanza[76]. Par conséquent, s'agissant des faits avancés par la RDC, l'argument de M. Mazyambo ne tient tout simplement pas.

9. Quoi qu'il en soit, la version des faits que donne M[e] Kalala ne résiste tout simplement pas à l'examen :

a) Si, dans la lettre du 12 février, M. Kanza est bel et bien qualifié de «gérant»[77], absolument rien ne donne à penser qu'une assemblée générale extraordinaire, conforme aux prescriptions de l'article 65, de même qu'à celles, particulières, de l'article 67, ait d'une manière ou d'une autre

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[75] MG, annexe 1.

[76] CR 2006/52, p. 22, par. 19.

[77] MG, annexe 201.

été tenue et ait fait l'objet d'un procès-verbal notarié avant le 12 février — rappelons, bien sûr, que M. Diallo venait alors tout juste d'être expulsé et rappelons aussi que l'assemblée générale devrait s'être tenue en RDC, un point sur lequel les deux Parties s'accordent. Il ne s'agissait pas juste pour M. Diallo de signer un bout de papier, comme la RDC affecte de le croire, de manière inexplicable. Il convient en outre de se pencher sur l'annexe à la lettre du 12 février : il s'agit d'une sommation en paiement, datée du 5 février 1996, dans laquelle c'est bien M. Diallo qui est désigné comme l'«administrateur-gérant»[78], et, dans les documents ultérieurs, M. Kanza n'est plus jamais présenté comme «gérant» mais comme «directeur d'exploitation»[79] — terme qui pourrait se traduire par «production manager», en anglais, et qui, en tout état de cause, recouvre des fonctions très différentes de celles de «gérant».

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b) Par ailleurs, M. Diallo, dans les lettres qu'il envoyait en RDC depuis la Guinée, faisait suivre sa signature de la mention «PDG» (président-directeur général) d'Africontainers — autrement dit, bien entendu, «gérant» de cette société[80]. Et — s'il est encore besoin de preuves à cet égard — dans la décision en date du 20 juin 2002 rendue par la cour d'appel de Kinshasa-Gombe, M. Diallo est désigné en tant qu'«associé-gérant» d'Africontainers[81]. M. Diallo était donc, et est resté, à tous les moments pertinents, le «gérant» d'Africontainers.

10. J'en viens maintenant au dernier argument de M. Mazyambo sur les droits des actionnaires — un argument qui porte sur les faits. M. Mazyambo soutient que M. Diallo n'a en tout état de cause subi aucune atteinte à ses droits du fait de son expulsion. En bref, il affirme que les droits des actionnaires pouvaient être exercés par délégation de pouvoirs, que M. Diallo pouvait continuer d'exercer ses droits depuis l'étranger grâce aux moyens de communication modernes, et que l'état de dénuement de M. Diallo n'a pas été prouvé[82].

11. Ces affirmations ne répondent à aucun des points que j'ai traités lors du premier tour. Certes, M. Diallo aurait pu désigner un autre «gérant», mais il avait le droit de nommer le «gérant» de son choix, autrement dit lui-même, et il avait droit aux protections spéciales garanties par

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[78] MG, annexe 201, deuxième page.

[79] MG, annexe 213, quatrième page.

[80] MG, annexe 219.

[81] EPC, annexe 64, quatrième page.

[82] CR 2006/52, p. 12, par. 10.

l'article 67. Et, quoi qu'il en soit, comment aurait-il alors, depuis la Guinée, exercé en particulier les droits de surveillance et de contrôle que lui conféraient les articles 71 et 75 ? Soyons réalistes : comment pouvait-il convoquer (voir article 83 du décret de 1887) les assemblées générales de ses sociétés, y prendre part et voter depuis la Guinée ? Rappelons de nouveau qu'il n'est pas contesté que les assemblées devaient se tenir en RDC. Comment pouvait-il s'occuper de la procédure judiciaire qui se déroulait, de ses conteneurs, du recouvrement de créances, reconnues, sur des entités publiques qui refusaient de s'acquitter de leurs dettes et ne l'ont du reste jamais fait ? Si toutes ces tâches pouvaient aisément être menées à bien depuis la Guinée, pourquoi ne l'ont-elles pas été ? Un inventaire des avoirs de la société Africontainers à la date de l'expulsion a été joint au

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mémoire de la Guinée[83]. Pourquoi a-t-on purement et simplement laissé ces biens, dont plus de cent conteneurs, se détériorer[84] ?

12. En réalité, la position dans laquelle M. Diallo s'est soudainement trouvé est très similaire de celle de M. Biloune dans l'affaire *Biloune v. Ghana*. M. Biloune a lui aussi été arrêté, détenu et expulsé, ce qui a placé sa société, la MDCL, dans l'incapacité de mener à terme la construction d'un complexe hôtelier, le projet ayant échoué du fait d'une ingérence du conseil municipal local. Dans cette affaire, le tribunal — et il s'agit d'un important tribunal, puisqu'il était présidé par le juge Schwebel — n'a pas estimé que, pour résoudre ses problèmes, M. Biloune n'avait qu'à céder la place à un gérant local, tenter de mener le projet à son terme et éviter ainsi une expropriation. Le tribunal a, bien évidemment, plutôt mis l'accent sur les conséquences effectives de l'expulsion du personnage principal de la société, et dit ceci :

> «Par leurs effets conjugués, l'ordre d'arrêter les travaux, la démolition, l'assignation à comparaître, l'arrestation, la détention, l'obligation de faire des déclarations de biens et l'expulsion de M. Biloune du pays, avec interdiction d'y revenir, ont eu pour résultat la cessation irrémédiable des travaux. Compte tenu du rôle central joué par M. Biloune dans la promotion, le financement et la gestion de la MDCL, son expulsion du pays a de fait empêché celle-ci de poursuivre l'exécution de son projet.»[85] *[Traduction du Greffe.]*

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[83] MG, annexe 199.

[84] OG, annexes 31-33.

[85] *Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana*, 95 ILR 183, 209.

13. Or, il en va précisément de même ici : compte tenu du rôle central joué par M. Diallo dans la promotion, le financement et la gestion de ses deux sociétés, son expulsion de RDC a de fait empêché celles-ci de poursuivre leurs activités, y compris celle consistant à recouvrer des créances alléguées ou reconnues. Dans les circonstances de l'espèce, cela revenait à violer les droits de M. Diallo en tant qu'actionnaire. Et j'ai mis l'accent sur les droits de M. Diallo, mais que dire de ses obligations en tant que gérant et que surveillant, aux termes des articles 71 et 75 ? Comment était-il supposé s'acquitter de ces obligations depuis la Guinée ? Outre la gestion des affaires courantes, il lui fallait établir des rapports annuels, des inventaires annuels, des états financiers annuels — toutes tâches ne pouvant être menées à bien depuis la Guinée, notamment si l'on tient compte de l'état de dénuement de M. Diallo.

14. Se référant à l'affaire *El Triunfo*[86], M. Mazyambo a soutenu qu'il était nécessaire d'établir du point de vue des faits l'existence d'une violation telle que le remplacement d'administrateurs, la convocation d'assemblées générales sans que les actionnaires majoritaires en

31 soient avertis, ou le refus de laisser consulter certains documents de la société[87]. Cette affirmation appelle trois observations :

a) Premièrement, ce n'est pas là, bien entendu, l'avis exprimé par la Chambre en l'affaire *ELSI* : ainsi que je l'ai relevé mardi, celle-ci a en effet estimé qu'il pouvait y avoir violation des droits de contrôler et de gérer, droits qui sont très semblables aux droits des actionnaires admis en l'espèce, lorsque l'acte incriminé était une réquisition des avoirs de l'entreprise (*Elettronica Sicula S.p.A. (ELSI), arrêt, C.I.J. Recueil 1989*, p. 15, par. 70). Dans cette affaire, il n'était, par exemple, nullement question de remplacement d'administrateurs.

b) Deuxièmement, se pose la question de savoir si, dans les exemples que M. Mazyambo emprunte à l'affaire *El Triunfo*, il existe une différence de nature ou si la différence est simplement question d'échelle. M. Diallo a de fait été empêché d'exercer ses droits de surveillance, de contrôle et de gestion — qu'il n'ait pas été effectivement remplacé par un nouvel administrateur désigné par l'Etat ne change rien au fond. La différence réside simplement en ce que, lorsque l'Etat intervient et nomme bel et bien un nouvel administrateur — un remplaçant —, l'atteinte

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[86] *RSA*, vol. XV, p. 474-475.

[87] CR 2006/52, p. 12, par. 11.

causée aux droits des actionnaires n'en est que plus flagrante du point de vue des *faits*. De même, que M. Diallo n'ait pu consulter les documents de la société parce qu'il ne lui était plus du tout possible d'entrer sur le territoire du pays, et non parce que, bien que toujours sur celui-ci, il était tenu à l'écart des bureaux de la société, ne change rien, fondamentalement.

c) Troisièmement, M. Mazyambo n'a rien dit de l'intention, bien que celle-ci soit mentionnée dans les motivations de la décision rendue en l'affaire *El Triunfo*, le tribunal ayant mis l'accent sur l'existence d'une «intrigue» visant notamment à «évincer la direction et prendre le contrôle des intérêts américains»[88] *[traduction du Greffe]* — on se croirait dans du Shakespeare ! Si une mesure en particulier est motivée par l'intention d'entraver les droits de contrôle et de gestion des actionnaires, il y aura à l'évidence nécessairement atteinte aux droits des actionnaires, et c'est précisément ce que soutient la Guinée. Si ce qu'elle dit est exact, et si l'intention était bel et bien d'empêcher M. Diallo d'exercer ses droits de contrôle, de surveillance et de gestion des deux sociétés, il y a au moins autant atteinte aux droits des actionnaires que dans les exemples évoqués par la RDC.

32 15. Mais ces questions, une fois de plus, relèvent toutes du fond. M. Mazyambo a affirmé : "The poverty of Mr. Diallo alleged by Guinea to explain the impossibility at such action [et il fait ici référence à l'impossibilité pour M. Diallo de continuer de contrôler ses sociétés depuis la Guinée] has not been proven; it cannot therefore be accepted."[89] Elle n'a pas été prouvée, et doit donc être écartée, nous dit-on. Mais cette manière de voir ne saurait être la bonne. Il n'appartient pas à la Guinée de prouver ses arguments sur le fond au stade des exceptions préliminaires ; si tel était le cas, cette phase, bien entendu, ne serait en rien préliminaire ; de plus, la procédure serait très différente et nous ne pourrions envisager d'être de retour chez nous avant l'heure du déjeuner dès le premier vendredi.

16. Par ailleurs, je note que M. Mazyambo cherche à gagner sur les deux tableaux, car il poursuit : "[o]n the other hand, it can plausibly — 'plausibly' — be asserted that Mr. Diallo made a fortune", avant de conclure : "[i]t is therefore clear that the arrest and expulsion of Mr. Diallo have

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[88] *RSA*, vol. XV, p. 474.

[89] CR 2006/52, p. 12, par. 10.

not infringed his personal rights recognized by Congolese legislation."[90] Ainsi, il est allégué que la Guinée doit prouver ses affirmations, tandis que la RDC pourrait s'en tenir au seuil du plausible. Bien évidemment, cette manière de voir ne saurait être sanctionnée par la Cour. Si je peux me permettre de recourir à une formulation familière, il va de soi que «ce qui vaut pour l'un doit évidemment valoir pour l'autre».

17. Comme je l'ai indiqué lors du premier tour, tout ce qu'il faut démontrer, c'est l'existence de droits des actionnaires, et que ces droits n'ont pas été respectés[91]. Mais du moins existe-t-il un autre terrain d'entente entre les Parties. La RDC admet à présent l'existence des droits des actionnaires affirmés par la Guinée, hormis ceux énoncés à l'article 78 ; il subsistait une divergence de vues quant à l'application des articles 71 et 75, mais j'espère l'avoir aplanie. La véritable question restant à régler porte sur les faits — il s'agit de savoir si les droits invoqués ont été violés. Mais c'est là une question que la Cour ne peut bien évidemment trancher à ce stade.

Madame le président, Messieurs de la Cour, voici qui clôt ma plaidoirie et je vous remercie de votre attention. Madame le président — et je dois dire que ce «le» heurte mon oreille —, puis-je vous prier d'appeler à la barre M. Pellet ?

33 Le PRESIDENT : Merci, Monsieur Wordsworth. Monsieur Pellet, vous avez la parole.

M. PELLET : Je vous remercie, Madame le président. La prudence imposerait peut-être aux conseils francophones de vous appeler «Madam President» même en français !

IV. PROTECTION BY GUINEA OF MR. DIALLO IN HIS CAPACITY AS SHAREHOLDER IN CONGOLESE COMPANIES FOR THE INJURY SUFFERED BY THOSE COMPANIES

1. Madam President, Members of the Court, before the Agent of the Republic of Guinea reads out his country's final submissions, I propose to reply to the arguments put forward by Mr. Mazyambo at Wednesday's hearing regarding the diplomatic protection of Mr. Diallo in his capacity as a shareholder of officially Congolese companies for the injury suffered by them.

2. On this point — "protection by substitution" — Mr. Mazyambo, in a very clear and sober presentation, followed the outline that I had adopted myself on Tuesday and endeavoured to show

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[90] CR 2006/52, p. 12, par. 10-11.

[91] CR 2006/51, p. 36, par. 29 *b).*

that, on the one hand, such protection was not admitted by positive international law and, on the other — and I quote the words he used since I do not recognize our argument in his formulation — "[n]o particular circumstance permits the application of equity in the present case"[92]. I will now follow this approach myself, while making clear at the outset that, although it could, it is probably not essential for the Court to take an overall position on the scope of the rule of protection by substitution (in law and not simply in equity); rather, it need only note that, in view of the particular circumstances of the present case, this form of protection can be applied in its narrowest sense.

I. The exception of protection by substitution

3. Madam President, having made these points, I will again start by asking whether or not the national State of the sole shareholder of a company having the nationality of the Respondent can exercise its protection over that person with respect to the injury suffered by his company. According to the Congo, which took particular care not to mention Article 11 *(b)* of the ILC's draft

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Articles, although it addresses this issue, "neither the Court's jurisprudence nor State practice [would appear to] recognize[] the possibility of diplomatic protection by substitution"[93].

4. First, the Court's jurisprudence. To support his assertion, Mr. Mazyambo quoted paragraph 93 of the 1970 *Barcelona Traction* Judgment — but this paragraph cannot be taken in isolation (in any case, not without the one immediately before it — paragraph 92; *I.C.J. Reports 1970*, p. 48, para. 92). My opponent also mentioned extracts from the positions taken by two judges in their separate opinions (CR 2006/52, paras. 16-17).

5. There can be no doubt:

— first, that the judges in 1970 were divided over the place in positive law of protection by substitution; and

— second, that the "theory" elaborated in paragraph 92, "to the effect that the State of the shareholders has a right of diplomatic protection when the State whose responsibility is

[92]CR 2006/52, p. 16, Head 2.

[93]*Ibid.*, p. 13, para. 14 (Mazyambo).

invoked is the national State of the company" (*I.C.J. Reports 1970*, p. 48, para. 92), reflected the opinion of the majority of the Members of the Court[94].

6. While it is true that two judges, Morelli and Padilla Nervo (*ibid*., pp. 240-241; pp. 257-259) appended separate opinions in which they criticized, *de lege ferenda*, the exception made by the Court, the views of Judge Ammoun (*ibid*., p. 318), which Guinea generously included in this school of thought in its Written Observations of 7 July 2003[95], appear on closer reading to be more akin to the opposite view, like the opinions of Judges Fitzmaurice, Jessup and Tanaka (*I.C.J. Reports 1970*, pp. 71-75, paras. 13-20; pp. 191-193, paras. 51-52; and p. 134; see also the separate opinion of Judge Wellington Koo appended to the 1964 Judgment, *Barcelona Traction (Preliminary Objections), I.C.J. Reports 1964*, p. 58, para. 20)[96], which, moreover, were similar to the Spanish Government's position on this point (see the above-mentioned separate opinion of Judge Tanaka, *I.C.J. Reports 1970*, p. 134). In addition, the silence of the other judges on a point which had visibly given rise to lengthy deliberation must probably be construed as tacit agreement with the position reflected in the Judgment.

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7. In any case, the question is not so much how many judges supported one or other of the interpretations as assessing the validity of the arguments advanced in support of the respective positions. Judge Padilla Nervo's approach was purely ideological and was based upon an exposé of the supposed infringements of sovereignty which would ensue from the exception to the rule on the lack of legal standing of the shareholders' national State, portrayed as an instrument of subordination "to the private interests of foreign corporations" (*ibid.*, p. 259) — a view which hardly tallies with the circumstances of our case: Guinea cannot really be suspected of acting as the instrument of international capital, etc.; and it is hard to see why the protection of shareholders (which, as everyone agrees, can only be exercised in extremely exceptional cases) would be more of an infringement of sovereignty that the protection of the foreign companies themselves. I would add that Judge Padilla Nervo acknowledged that, although first following similar lines, the practice of the United States of America and the United Kingdom — important figures in this respect —

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[94]Sir Robert Jennings and Sir Arthur Watts, *Oppenheim's International Law*, 9th ed., Vol. I, Longman, London/New York, 1996, p. 520 (note 14).

[95]WObsG, p. 47, para. 2.03,

[96]See MG, pp. 93-96, paras. 4.53-4.96 or WObsG, p. 47, paras. 2.45-2.46.

then contradicted his position (*ibid*., p. 258) and that he even queried whether there really was "a predominant Belgian interest" among the shareholders of Barcelona Traction (*ibid*., p. 265). Meanwhile, Judge Morelli used rather circular reasoning, arguing as he did essentially that accepting the exception would amount to acknowledging direct protection of shareholders . . . which is prohibited by international law (see in particular *ibid*., p. 241, para. 12): this is precisely what needs to be shown.

8. The majority-opinion judges, meanwhile, insisted on the recognition of this rule by custom (which was particularly striking in the case of Judge Jessup, who criticized the rule while nevertheless considering that it was "widely accepted" (*ibid*., pp. 191-193, para. 51-52 and the abundant scholarly opinion cited)). As Paul de Visscher wrote in his course at the 1961 Hague Academy (thus well before the two *Barcelona Traction* Judgments were delivered), expressing an opinion which Judge Fitzmaurice adopted and quoted in full (*ibid*., p. 73, para. 14 and p. 75, para. 19): when a company is of the same nationality as the State committing an internationally wrongful act,

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> "its personality is no longer anything but a fiction void of all meaning, in which there can be seen nothing but a bundle of individual rights."[97]
>
> "In that case, an international tribunal, not being bound by internal law criteria, 'pierces the corporate veil', as it is said, [but] it would be more accurate to say that it registers the absence of all effective personality, of any effectual intermediary between the shareholders and the rights infringed."[98]

As stated by Judge Gros in the separate opinion which he appended to the *Barcelona Traction* Judgment: "In the present matter one must seek to ascertain what is reasonable both on the legal plane and on the plane of economic realities." (*I.C.J. Reports 1970*, separate opinion of Judge Gros, p. 279, para. 20).

9. These, Madam President, are the considerations that inspire arbitral jurisprudence in the nineteenth century and in the first part of the twentieth, to which Mr. Mazyambo subsequently referred[99]. Since on this point our opponent simply referred to the DRC's Preliminary Objections,

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[97] "La protection diplomatique des personnes morales", *Collected Courses of the Hague Academy 1961*, Vol. 102, p. 465.

[98] *Ibid*., p. 477. See also J. Mervyn Jones, "Claims on Behalf of Nationals Who Are Shareholders in Foreign Companies", *BYBIL*, Vol. 26, 1949, p. 236.

[99] CR 2006/52, p. 15, para. 20.

may I in turn, Madam President, Members of the Court, draw your attention to the passages in the Memorial[100] and Observations[101] of Guinea, in which we have demonstrated the relevance and scope of this jurisprudence, which indisputably accepts protection by substitution.

10. Just one more word on an aspect to which the Congo seems to attach some importance: it is not correct that in these cases[102] "the arbitrators based themselves on an arbitral agreement which allowed them to adjudicate without limiting themselves to the application of positive . . . law and also . . . contained a clear waiver by the respondent State of any objection preventing the tribunal from ruling on the merits"[103]. Last Tuesday I gave the example of the *Shufeldt* case, in which the arbitral tribunal very clearly gave its ruling in law, and although the arbitration agreement conferring jurisdiction on it was silent on the question of the representation of the shareholders of a national company[104]. The same is apparent, for example, on reading the agreement setting up the tribunal which gave its ruling in the case concerning the *Salvador Commercial Company*[105].

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11. Madam President, it must be acknowledged that in the jurisprudence the old decisions are relatively as plentiful as the crop of recent decisions (after 1970) is meagre. But there is a reason for this: more and more today, shareholders not only have rights recognized that are substantial but also rights of direct action at the international level: the issue that concerns us is resolved in this way. Clearly this substantially reduces the frequency of the application of diplomatic protection in cases of this kind; as to protection by legal proceedings before the Court, in situations where there is no ICSID clause or equivalent, the Court would still have to be seised on the basis of Article 36 of its Statute; this is not very frequent. The aim of bilateral investment treaties and ICSID cases also explains why this practice is relevant to us: the same basic

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

[101]OG, pp. 48-52, paras. 2.49-2.56.

[102]See also the Judgment of the Chamber of the ICJ in the *ELSI* case, in the light of the interpretation given in the dissenting opinion by Judge Schwebel (*I.C.J. Reports 1989*, p. 94) and, on the same lines, the commentary by the ILC on Art. 11 of the draft Articles on diplomatic protection, United Nations, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), Report of the International Law Commission, Fifty-eighth Session (2006), para. 11 of the commentary.

[103]CR 2006/52, p. 15, para. 20 (Mazyambo).

[104]CR 2006/51, p. 40, para. 7.

[105]Protocol dated 19 December 1901 between the United States of America and the Republic of Salvador, *RIIA*, Vol. II, pp. 459-461.

consideration underpins both institutions (diplomatic protection and direct action by shareholders): foreign shareholders in a national company of a State that has committed an internationally wrongful act cannot be left without any hope of protection. The justification for protection by substitution disappears in all cases in which they enjoy a right of action; by contrast, the necessity for it appears even more pressing when there is no such right.

12. It would be regrettable and paradoxical for the World Court to go against a trend that is so clearly established and to make the principle of non-protection more rigid by going back, a third of a century later, on the "theory" of substitution favourably received by the majority in 1970. I would add that the exception to the general principle (which no one challenges) that it is impossible to protect shareholders is still more acceptable in the context of diplomatic protection than in the context of a bilateral investment treaty, because in the former case (diplomatic protection) one can

38 rely on the "filter" of the State which, in the exercise of its discretionary power, will be able to decide whether protection of the shareholder is lawful or not in the light of the facts of the case, whereas in the case of BITs (bilateral investment treaties) the shareholder is the sole judge of whether seising a court is appropriate.

13. Quite naturally, Madam President, this prompts me to say a few words on the particular circumstances of the case, which compellingly call for the exception, i.e., protection by substitution, to be applied.

II. The particular circumstances of the case compellingly call for application of the rule of protection by substitution

14. However, I wish to state very firmly at the outset that Guinea is not asking the Court "to apply equity", as Mr. Mazyambo would have us believe[106], but to declare its Application admissible on the basis of a legal rule that itself accords with equitable considerations, which is quite different. Further, contrary to the allegations by the Congo, which itself is invoking equity in an attempt to prevent the protection by substitution rule from being applied[107], there is no reason, equitable or other, why this rule should not be applied in the present case — quite the contrary.

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[106]CR 2006/52, p. 16, paras. 22 or 23.

[107]Cf. POC, pp. 90-101, paras. 2.85-2.105.

15. My kind opponent displays consummate elliptical skill when broaching this subject. True, he summarizes the arguments of Guinea[108], but his only response to them is three brief assertions, which he does not seek to support further and on each of which in turn I am going to say a few words:

1. "the legal identity of private limited liability companies is different from that of their *(associés)*"[109]; I have never claimed the contrary — besides, if that were not so, the question of diplomatic protection by substitution would not arise; on the other hand, I have emphasized that they are companies of a very special kind, different from the limited companies, which are the only ones involved in the *BT* case, and characterized by a considerable *intuitu personae* element[110]; this is reflected, for example, in a crucial element that I emphasized on Tuesday[111] and of which Mr. Mazyambo takes no account: the fact that the shares are not transferable, which considerably accentuates the *intuitu personae* character of these companies, very different in this respect from limited companies; in this case, the "personalization" of the company is even invasive because of the dual status of sole managing director *(gérant)* and sole associate *(associé)* (directly or indirectly) of Mr. Diallo — it being understood that if Congolese law should really be interpreted as ruling out the transformation of a company incorporated between two or more individuals into a one-person company, the corporative veil would disappear and, as a result, the total confusion of assets and personalities between Mr. Diallo and Africom-Zaire would be established. And then there would be no further need for protection by substitution;

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2. "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", Mr. Mazyambo told us[112]; that is not quite accurate: for Congolese law contemplates the

[108]CR 2006/52, p. 16, para. 22.

[109]CR 2006/52, p. 16, para. 24.

[110]CR 2006/51, p. 48, paras. 24-25.

[111]*Ibid*., para. 25.

[112]CR 2006/52, p. 17, para. 25.

unlimited liability of the founders of a private limited liability company in some special cases[113]; and now, last but not least;

3. It is asserted that Congolese legislation makes no distinction between commercial companies of the same kind incorporated under Congolese law by nationals and those set up by foreigners[114]; I showed on Tuesday that this is not so[115] and I refer in particular to the *Ordonnance-loi* of 24 April 1966, which makes entry in the trade register for foreigners, foreign companies *and certain Zairean companies* subject to financial guarantees[116]; I am also referring to Article 3 of the special law on commerce of 5 January 1973[117]; whether they be called "foreign national" or "national foreign", companies controlled by foreigners do not enjoy in Zaire, and now in the Congo, the same treatment as those whose capital is in the hands of Congolese.

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16. Furthermore, I recall that Mr. Diallo had no choice: he *had* to incorporate his companies in Zaire and submit them to Zairean law, however disadvantageous and discriminatory it was, since otherwise he would purely and simply have been unable to do business in that country[118]. Mr. Mazyambo has in no way disputed this but has drawn no conclusions from this point of agreement between the Parties. Yet there is one inescapable one: the principle of protection by substitution must be applied *a fortiori* since the incorporation of the companies in question in Zaire "was required by it as a precondition for doing business there[119]. That is the hardest core of the rule, of the case in which its implementation is the most unquestionable — and unquestioned, since even the International Law Commission acknowledges this, while it has with much hesitation[120] adopted a particularly restrictive conception of it. Madam President, not only is diplomatic protection by substitution of the foreign shareholders of a company having the nationality of the

[113]See Articles 103 and 106 of the Decree of 27 February 1887, judges' folder, tab 4.

[114]CR 2006/52, p. 16, para. 23.

[115]See CR 2006/51, pp. 47-48, para. 23.

[116]See judges' folder, tab 5.

[117]See judges' folder, tab 6.

[118]See CR 2006/51, pp. 46-47, paras. 20-21.

[119]Article 11 of the ILC draft Articles on Diplomatic Protection.

[120]Cf. CR 2006/51, p. 46, para. 20 (Pellet).

responsible State possible in all cases, but this possibility must materialize in particular when the incorporation of the company in that State is required by it[121] — as in the present case.

17. Once more, Madam President, Guinea is not calling for equity against the law; it is merely asking you that the law be "applied reasonably" (*Barcelona Traction, Light and Power company, Limited, Judgment, I.C.J. Reports 1970*, p. 49, para. 93). This is because, as Jessup wrote, the possibility of protection by substitution

> "seems to be based largely on equitable considerations and the result is so reasonable [that] it has been accepted in State practice . . . The equities [those underlying the rule of positive law which permits such protection, not those contradicting or correcting a contrary practice] are particularly striking when the respondent State admits foreign investment only on condition that the investors form a corporation under its law." (*Ibid*., separate opinion of Judge Jessup, pp. 191-192.)[122]

41 Everything, Madam President, Members of the Court, the law and equity, the requirements of justice and the particular circumstances of the case, everything conspires to your acceptance that Guinea is acting to protect the rights of Mr. Diallo for the damage he has suffered directly, as a person and as shareholder, but also, in the latter capacity, for the damage suffered by Africom-Zaire and Africontainers.

18. Madam President, I do not believe it useful to summarize all of the Republic of Guinea's arguments. You have listened to them, Madam President, Members of the Court, patiently and attentively, and it is for you to weigh them against the arguments presented to you by the Democratic Republic of the Congo. I would simply like in a few sentences to underline, one last time, what we think is crucial.

19. First of all: the Congo has repeatedly "acted as if" the protection of Mr. Diallo's "property rights" was Guinea's sole concern and eclipsed or subsumed, as it were, any concern for Mr. Diallo's human, consular or other rights[123] — to such an extent that Guinea's claims are described in the submissions read out the day before yesterday by the Agent of the Democratic Republic of the Congo as seeking "*essentially* to secure reparation for injury suffered on account of

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[121] See the ILC commentary on Article 11 of the draft Articles on Diplomatic Protection, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), Report of the International Law Commission, Fifty-eighth Session (2006), para. 12 of commentary.

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[123] See, for example, POC, p. 44, paras. 1.59-1.60, CR 2006/50, pp. 42-43, paras. 96-99 (Kalala); p. 52, para. 33 (Mazyambo), CR 2006/52, p. 12, para. 11 (Mazyambo); see also the DRC's submissions, CR 2006/52, p. 30, (1) (Masangu-Mwanza).

the violation of rights" of Mr. Diallo's companies[124]. Self-evidently, that is not true: Guinea is requesting first and foremost that the mistreatment suffered by Mr. Diallo, as a human being — his arrests and arbitrary expulsion, in all instances pursuant to unreasoned decisions — be judicially acknowledged and give rise, as such, to reparation. It is simply because the Congo has not contested the admissibility of the Application on this point that we have not thought it worthwhile to focus on this in our oral argument. Insofar as there is any need to do so, I shall formally repeat that condemnation by the Court, with all the ensuing legal consequences, of the arbitrary arrest and the expulsion of Guinea's national, of the conditions under which he was detained and expelled and of the refusal to afford Mr. Diallo the benefit of the provisions of the 1963 Vienna Convention on

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Consular Relations — all of that remains one of the essential objectives of the Republic of Guinea, as seen in the first paragraph of the submissions at the end of the Memorial[125].

20. It is true as well — but one in no way precludes the other — that these serious incidents were also the source of the injuries suffered by Mr. Diallo and his companies: it was *because* he had been arrested and expelled that he was prevented from enjoying his rights as *associé* and that those companies were unable to exercise their rights and in turn suffered grave injuries justifying the protection by substitution which I have just discussed. And it is also — at any rate in part, there being other reasons as well — *because* he had been arrested and expelled under conditions known to us all that Mr. Diallo was unable completely to exhaust local remedies, for which the DRC, with very bad grace, now criticizes him.

21. Madam President, this concludes the oral argument of the Republic of Guinea, whose submissions will now be presented by its Agent, Mr. Mohamed Camara, pursuant to Article 60, paragraph 2, of the Rules of Court. For my part, it remains for me to thank you, Madam President, Members of the Court, most sincerely for your attention.

Le PRESIDENT : Je vous remercie, M. Pellet. Je donne à présent la parole à l'agent de la République de Guinée, M. Mohamed Camara, pour présenter les conclusions finales.

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[124]CR 2006/52, p. 30, (1); emphasis added.

[125]MG, p. 108, para. 5.1, (1).

Mr. CAMARA: Thank you.

V. SUBMISSIONS OF THE REPUBLIC OF GUINEA

1. Madam President, Members of the Court, before I read out the formal submissions of the Republic of Guinea, please allow me to give voice to the confidence felt by my country as it awaits the judgment you will render on the preliminary objections which the Democratic Republic of the Congo has seen fit to raise in an attempt to hinder the exercise of your jurisdiction. We are convinced that you will reject them for the reasons — legal reasons — which our counsel and advocates have explained here before you and for those which are set out in our Observations. In doing so, not only will you have adjudicated the case but you will have done justice by allowing

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my country, in the merits phase, to set out the serious abuses and iniquities which Mr. Diallo was arbitrarily made to suffer in violation of international law.

2. I take this opportunity to thank Guinea's courtroom team, including Messrs. Daniel Müller and Luke Vidal, who have not taken the floor before you but who have devoted themselves behind the scenes to tasks which have on occasion been thankless. My sincere thanks also go to the interpreters, to the Registrar and to the entire Registry staff and, of course, to yourselves, Madam President, Members of the Court, who have lent us a patient and attentive ear.

3. I shall now read out the submissions of the Republic of Guinea:

For the reasons set out in its Observations of 7 July 2003 and in oral argument, the Republic of Guinea kindly requests the Court:

(1) to reject the Preliminary Objections raised by the Democratic Republic of the Congo;

(2) to declare the Application of the Republic of Guinea admissible; and

(3) to fix time-limits for the further proceedings.

Thank you very much, Madam President.

Le PRESIDENT : Je vous remercie, M. Camara. La Cour prend acte des conclusions finales dont vous venez de donner lecture au nom de la République de Guinée, tout comme elle a pris acte le mercredi des conclusions finales de la République démocratique du Congo.

Ceci nous amène à la fin de cette semaine d'audiences consacrées aux plaidoiries orales des Parties. Je tiens à adresser mes remerciements aux représentants des deux Parties pour l'assistance qu'ils ont apportée à la Cour par leurs exposés oraux au cours de ces audiences.

Je leur souhaite un bon retour dans leurs pays respectifs et, conformément à la pratique, je prierai les agents de bien vouloir rester à la disposition de la Cour. Sous cette réserve, je déclare close la présente procédure orale.

La Cour va maintenant se retirer pour délibérer. Les agents des Parties seront avisés en temps utile de la date à laquelle la Cour rendra son arrêt.

La Cour n'étant saisie d'aucune autre question aujourd'hui, la séance est levée.

L'audience est levée à 11 h 40.

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