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**INTERNATIONAL COURT OF JUSTICE**

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

**COUNTER-MEMORIAL  
OF THE DEMOCRATIC REPUBLIC OF THE CONGO**

**PART I and PART II (Annexes)**

**27 March 2008**

*[Translation by the Registry]*

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## INTRODUCTION

0.01. On 23 December 1998, the Ministry of Foreign Affairs of the Republic of Guinea (hereinafter “Guinea”) transmitted to the Registrar of the International Court of Justice an Application instituting proceedings against the Democratic Republic of the Congo (hereinafter “the DRC”). The Application was entitled “Application for Purposes of Diplomatic Protection”. It was accompanied by a document entitled “Memorial of the Republic of Guinea”, which expounded the claims set out in the Application and will in the present Counter-Memorial therefore be considered an integral part of the Application. In it the Republic of Guinea expressed its intention to exercise diplomatic protection of one of its nationals, Mr. Ahmadou Sadio Diallo (hereinafter “Mr. Diallo”), a businessman having settled in the Congo in the early 1960s, with a view to obtaining reparation for the injuries resulting from internationally wrongful acts allegedly committed by the Congolese authorities not only against his person and his property but also, and more importantly, against two Congolese companies he runs. At the outset the Republic of Guinea claimed no less than US\$36 billion, plus bank and moratory interest at rates of 15 per cent and 26 per cent per annum from the end of 1995<sup>1</sup>. This sum, equalling the Democratic Republic of the Congo’s entire external debt several times over, is surely one of the highest amounts — if not the highest — ever claimed before an international court.

0.02. The Application was filed in the Registry of the Court on 28 December 1998 and the case was entered in the General List of the Court under No. 103. By Order of 25 November 1999, the Court fixed 11 September 2000 as the time-limit for the filing of a Memorial by the Republic of Guinea and 11 September 2001 as the time-limit for the filing of a Counter-Memorial by the Democratic Republic of the Congo. At the request of the Republic of Guinea, these time-limits were extended by an Order of 8 September 2000. By that Order, the President of the Court extended the time-limit for the Republic of Guinea to file a Memorial to 23 March 2001 and the time-limit for the Democratic Republic of the Congo to file a Counter-Memorial to 4 October 2002. The Republic of Guinea filed its Memorial on 23 March 2001, in accordance with that Order. While it did not formally abandon the claim of nearly forty billion United States dollars advanced in the Application, it asked the Court to determine the reparation at a later stage in the proceedings.

0.03. In a pleading dated 1 October 2002, the Democratic Republic of the Congo raised two preliminary objections to the admissibility of the Application filed by Guinea. The Republic of Guinea filed its observations on 7 July 2003.

On 24 May 2007, the Court delivered its Judgment on the preliminary objections, the operative clause of which reads in substance as follows:

“[THE COURT . . .]

(1) As regards the preliminary objection to admissibility raised by the Democratic Republic of the Congo for lack of standing by the Republic of Guinea to exercise diplomatic protection in the present case:

(a) unanimously,

*Rejects* the objection in so far as it concerns protection of Mr. Diallo’s direct rights as *associé* in Africom-Zaire and Africontainers-Zaire;

(b) by fourteen votes to one,

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<sup>1</sup>Application, p. 37.

*Upholds* the objection in so far as it concerns protection of Mr. Diallo in respect of alleged violations of rights of Africom-Zaire and Africontainers-Zaire;

.....

(2) As regards the preliminary objection to admissibility raised by the Democratic Republic of the Congo on account of non-exhaustion by Mr. Diallo of local remedies:

(a) unanimously,

*Rejects* the objection in so far as it concerns protection of Mr. Diallo’s rights as an individual;

(b) by fourteen votes to one,

*Rejects* the objection in so far as it concerns protection of Mr. Diallo’s direct rights as *associé* in Africom-Zaire and Africontainers-Zaire;

.....

(3) In consequence,

(a) unanimously,

*Declares* the Application of the Republic of Guinea to be admissible in so far as it concerns protection of Mr. Diallo’s rights as an individual;

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(b) by fourteen votes to one,

*Declares* the Application of the Republic of Guinea to be admissible in so far as it concerns protection of Mr. Diallo’s direct rights as *associé* in Africom-Zaire and Africontainers-Zaire;

.....

(c) by fourteen votes to one,

*Declares* the Application of the Republic of Guinea to be inadmissible in so far as it concerns protection of Mr. Diallo in respect of alleged violations of rights of Africom-Zaire and Africontainers-Zaire.”

0.04. By an Order dated 27 June 2007, the Court fixed 27 March 2008 as the time-limit for the filing by the DRC of the Counter-Memorial on the merits of the dispute, as they were delimited in the Judgment of 24 May 2007.

0.05. The Democratic Republic of the Congo will endeavour to show in the present Counter-Memorial that it has not incurred its international responsibility in the present case.

To this end, the DRC will follow the outline deriving from the operative clause in the Court’s Judgment on the preliminary objections. Thus, the DRC will address in turn Guinea’s allegations concerning protection of Mr. Diallo’s rights as an individual (Chap. I) and those concerning protection of his rights as *associé* in Africom-Zaire and Africontainers-Zaire (Chap. II),

before presenting its submissions, in accordance with Article 49, paragraph 1, of the Rules of Court, asking the Court to reject Guinea's Application as without merit (Chap. III).

Documents filed by the DRC together with the present Counter-Memorial will be identified by the reference "CMC, Part II", as this Counter-Memorial and its Annexes are being submitted in a single volume. Documents filed by Guinea together with its Memorial of 23 March 2001 will be identified by the reference "MG".

1.01. In its Application instituting proceedings of 23 December 1998, the Applicant accused the DRC of having violated international law by, in particular, inflicting inhuman and degrading treatment on Guinea’s national Mr. Diallo. Guinea asserted in this regard that Mr. Diallo’s arrest, detention and expulsion constituted, among other things, violations of “the principle that aliens should be treated in accordance with ‘a minimum standard of civilization’, [of] the obligation to respect the freedom and property of aliens, [and of] the right of aliens accused of an offence to a fair trial on adversarial principles by an impartial court”. In its Memorial of 23 March 2001, Guinea described in detail the acts of which it accuses the Respondent in respect of Mr. Diallo’s arrest and expulsion<sup>2</sup>.

1.02. In order fully to refute Guinea’s accusations against it, the DRC will address in turn Mr. Diallo’s arrest, detention and expulsion from the Congo (Sec. 1), the question of the deprivation of Mr. Diallo’s property right (Sec. 2), the denial of justice allegedly suffered by Mr. Diallo at the hands of the Congolese authorities (Sec. 3) and the contract breaches vis-à-vis Mr. Diallo for which Guinea holds the DRC responsible (Sec. 4).

### **Section 1. Mr. Diallo’s arrest, detention and expulsion from the Congo**

1.03. The DRC will first review the background to Mr. Diallo’s arrest, detention and expulsion (A) before describing the actions taken against him (B). The Respondent will then address, and demonstrate the lack of merit in, Guinea’s contentions that the DRC: (1) mistreated Mr. Diallo (C); (2) in violation of Article 36 of the Vienna Convention on Consular Relations, neglected to inform Guinea’s consular officers of Mr. Diallo’s detention (D), (3) arbitrarily and in breach of good faith expelled Mr. Diallo and committed an abuse of authority (E), (4) took the decision to expel in violation of Congolese law and the International Covenant on Civil and Political Rights (F) and (5) brutalized Mr. Diallo, treating him like a criminal (G).

#### **A. The background: the fight against economic crime and destabilization**

1.04. On 24 April 1990, Marshal Mobutu decided to restore pluralist democracy and to abolish the single-party régime which had ruled the country for nearly 25 years. But he and leading figures in his régime subsequently refused to put in place an open democratic system acceptable to the people and all the democratic opposition forces, leading to a social environment characterized by economic collapse, impoverishment of the population and widespread political protest against the ruling régime. Mismanagement of the economy and public finances, together with the régime’s corruption, forced the Bretton Woods institutions and the DRC’s bilateral partners to cease all co-operation with the Congolese Government of the time.

1.05. It was against this backdrop of political, economic, social and moral crisis that mass rioting, featuring and facilitated by the mutiny of the Congolese army, broke out in September 1991 in Kinshasa, the capital of the DRC (formerly Zaire). This rioting on an unprecedented scale sparked off massive looting of private businesses throughout the city of Kinshasa and exacerbated the damage to the country’s economic fabric. In January 1993, further mass rioting, in which the French Ambassador to the DRC was killed, erupted in Kinshasa and gave rise to wide-scale looting of public and private property in the city. Most of the expatriates

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<sup>2</sup>Memorial of the Republic of Guinea (MG), pp. 29-34.

controlling the Congolese economy fled the country. Africontainers, of which Mr. Diallo was *gérant* and *associé*, moreover suffered the disastrous effects of these riots and, like other private economic players, was unable to avoid serious difficulties.

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1.06. In a speech given on 14 August 2003 at the Kinshasa International Fair (Foire internationale de Kinshasa (FIKIN)), the Governor of the Central Bank of the Congo described the Congolese economy over the decade from 1990 to 2000<sup>3</sup>. He referred to the deterioration of basic infrastructures, the pillaging of production plant, the accumulation of arrears of foreign debt and the breakdown of structural co-operation with the international community. The Central Bank of the Congo, in its annual report in 1994 on the state of the Zairian (DRC) economy in 1993, noted that the inflation rate had been 2989.6 per cent in 1992 and 4651.7 per cent in 1993. The report also pointed out the harm caused to the Congolese economy by the looting in January 1993<sup>4</sup>.

1.07. In this general context of decline and disintegration of the Congolese State, of accelerating deterioration of the Congolese economy and widespread moral degeneration, set against a backdrop of political struggle for control over the country and access to privileges, certain aliens who had remained in the DRC took up economic crime in the pursuit of riches by any and all means. To deal with this alarming state of affairs — in which organized crime groups sought to take advantage of the weakness and instability of State authorities, seized control of the economy of the country, counterfeited the currency, trafficked in foreign currency, and destroyed the public finances — the Congolese Government resolved in early 1995 to launch a vigorous campaign against rampant economic crime and destabilization.

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1.08. As part of that campaign, the Congolese Government took a number of steps to deport certain aliens involved in the acts referred to above. Thus, the Congolese Government issued Decree No. 0004 of 22 February 1995 deporting 86 aliens “whose presence and conduct [on Congolese soil] have breached Zairian public order, especially in the economic, financial and monetary areas, and continue to do so”<sup>5</sup>. Five days later, on 27 February 1995, the Congolese Government issued another Decree, No. 0006, deporting 84 aliens for the same reasons<sup>6</sup>. Eight months later, on 31 October 1995, the Congolese Government issued Decree No. 0043 deporting Mr. Diallo from the Congo on the same grounds<sup>7</sup>. A number of months after Mr. Diallo’s expulsion, the DRC issued Decree No. 0031 of 20 September 1996 deporting 24 aliens implicated in economic crimes from the Congo<sup>8</sup>. Thus, it was as part of the Congolese Government’s fight against economic corruption and crime that Mr. Diallo was ordered removed from the Congo in the Decree of 31 October 1995. Accordingly, this was not an isolated action aimed at arbitrarily harming Mr. Diallo’s interests and taken against him out of vengeance.

## **B. Mr. Diallo’s arrest, detention and expulsion**

1.09. These were the circumstances surrounding the issuance of the Decree of 31 October 1995 deporting Mr. Diallo<sup>9</sup>. The ground given for the expulsion was that his “presence

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<sup>3</sup>CMC, Part II, Ann. 1.

<sup>4</sup>CMC, Part II, Ann. 2.

<sup>5</sup>CMC, Part II, Ann. 3.

<sup>6</sup>CMC, Part II, Ann. 4.

<sup>7</sup>CMC, Part II, Ann. 5.

<sup>8</sup>CMC, Part II, Ann. 6.

<sup>9</sup>CMC, Part II, Ann. 5.

and conduct [in Zaire] have breached [Congolese] public order, especially in the economic, financial and monetary areas”<sup>10</sup>. The Decree was issued pursuant to Article 15 of the Congolese Legislative Order of 12 September 1983 relating to immigration control, stating:

“The President of . . . the Republic may, by a duly reasoned Order, deport from Zaire any alien who, by his presence or conduct, breaches or threatens to breach the peace or public order.”<sup>11</sup>

1.10. On 5 November 1995, Mr. Diallo was placed under arrest with a view to his deportation and was detained at premises of the DRC immigration authorities, only to be released two days later<sup>12</sup>.

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After his release, Mr. Diallo, under close surveillance by the special services of the Congolese State, resumed his criminal activities. It was in this connection that the oil companies Mobil Oil and Zaire Fina sent a letter to the Congolese Prime Minister on 15 November 1995 to draw his attention to the illegal conduct of Mr. Diallo, who was bribing officers of the court to obtain grossly unjust judicial decisions in favour of Africontainers-Zaire with a view to enriching himself from assets belonging to those companies<sup>13</sup>. Two weeks later, on 30 November 1995, Mr. Diallo sent a letter to the Congolese Prime Minister, Minister of Finance and Planning Minister, transmitting to them files concerning debts allegedly owed to Africontainers by Gécamines, Zaire Shell, Mobil Oil and Zaire Fina. In that letter he also explained the source of the debts and asked the authorities to take action to settle these disputes<sup>14</sup>. Mr. Diallo saw to the wide dissemination of this letter internationally, sending copies to: the President of the Republic of Guinea; the President of the International Court of Justice in The Hague; the President of ECOWAS (Economic Community of West African States); the Dean of the Diplomatic Corps in Kinshasa; Guinea’s Ministers of Finance, for State Investments, of Energy, and of Economy, Trade and Industry; and the United States, Belgian and United Kingdom Ambassadors in Kinshasa, etc.

1.11. It was under these circumstances that Mr. Diallo was rearrested with a view to his expulsion from the Congo. On 10 January 1996, the Administrator-Director-General of the Immigration Service ordered his release, since the Government had been unable to find an aircraft leaving for Conakry within the statutory period of no more than eight days of detention pending expulsion from the Congo. A solution to the problem of conveying Mr. Diallo to Conakry was found several days later and he was taken into custody by the police and deported on 31 January 1996 from the Congo to Guinea.

### 13 C. Alleged mistreatment suffered by Mr. Diallo

1.12. In its Memorial<sup>15</sup>, Guinea first claims that Mr. Diallo was mistreated during his imprisonment and expulsion. Guinea asserts on this subject that, in carrying out the deportation order, the law enforcement authorities took Mr. Diallo away on 5 November 1995 and secretly placed him in detention in an Immigration Service lock-up without any form of judicial process or even examination, and that he remained imprisoned there without receiving any visit from his

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<sup>10</sup>*Ibid.*

<sup>11</sup>CMC, Part II, Ann. 10.

<sup>12</sup>CMC, Part II, Ann. 7 (committal note).

<sup>13</sup>CMC, Part II, Ann. 8.

<sup>14</sup>CMC, Part II, Ann. 9.

<sup>15</sup>MG, pp. 30-31 and 51 *et seq.*

lawyers or officials from the Guinean Embassy until 10 January 1996, i.e., for 75 days. He is alleged to have been incarcerated under dire conditions and to have received no food from the Congolese authorities.

1.13. The DRC rejects these wholly unsubstantiated claims by the Applicant. Mr. Diallo was held in a well-appointed facility through which pass all aliens undergoing deportation. Guinea offers no evidence of any discrimination in the way in which Mr. Diallo was treated as compared to other aliens or even Congolese held in DRC prisons.

Further, during the period in which Mr. Diallo is described as having been locked up in a cell incommunicado with the outside world, that is to say from 5 November 1995 to 10 January 1996, he sent the three personally signed letters *dated 30 November 1995* to the Prime Minister of Zaire, the Minister of Finance and the Planning Minister, to which the Democratic Republic of the Congo has referred above<sup>16</sup>. It may be asked how Mr. Diallo could have managed to write these letters during a period in which the Republic of Guinea describes him as having been locked up and mistreated in a facility maintained by the Congolese Immigration Service. Moreover, Mr. Diallo mentions nothing in these letters about the ordeal which the selfsame Congolese Prime Minister was allegedly causing him to suffer. While Mr. Diallo is described as having been imprisoned, mistreated and in the process of deportation from Zaire, it would seem, oddly enough, that he attached more importance to recovering debts owed to Africontainers-Zaire than to any concerns for his freedom or his status as a lawful resident of Zaire. Finally, it is hard to believe that Mr. Diallo could have spent a number of fortnights in confinement without food or drink, as Guinea would appear to claim. This is to say that the version of the facts proffered by the Republic of Guinea is not only unsupported by the slightest evidence but contradicted by the material in the record and utterly lacking in credibility.

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1.14. Accordingly, there is cause to reject as groundless Guinea's allegations that the DRC mistreated Mr. Diallo during his detention and expulsion, including the allegations as to the duration of his detention.

#### **D. The DRC's alleged failure to examine and try Mr. Diallo before his expulsion**

1.15. In its pleadings, Guinea then criticizes the DRC for failing to examine or try Mr. Diallo or arrange access to counsel for him. It argues from this that his detention and expulsion were arbitrary.

1.16. In this instance Guinea is confusing two completely separate types of proceedings. Mr. Diallo was not arrested and held pursuant to a judicial investigation by the State Prosecutor's Office for the purpose of determining whether to arraign an individual before a trial court after completion of the pre-trial investigation. It is in that type of proceeding that individuals under investigation are examined and defence statements heard with a view to trying the accused. Mr. Diallo, by contrast, was the subject of an administrative decision removing him from the territory as a result of a course of conduct which the Congolese authorities deemed to be inimical to public order. Article 15, second paragraph, of the Congolese Law of 12 September 1983 on immigration control provides for a renewable period of 48 hours between the date of arrest of an alien whose presence in the Congo has been determined to be undesirable and the date of his deportation<sup>17</sup>. As would be expected in such accelerated administrative proceedings, the

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<sup>16</sup>CMC, Part II, Ann. 9, and para. 1.10, *supra*.

<sup>17</sup>CMC, Part II, Ann. 10. This period may be extended by 48 hours at a time but the total duration may not exceed eight days.

15 Congolese law prescribes neither any examination nor any defence statement with a view to trying the individual concerned. But, as the DRC will explain below, this does not mean that the process is arbitrary or that the alien is without recourse against the deportation order against him.

1.17. Whatever the case, Guinea offers no evidence of a refusal by the Congolese authorities to allow Mr. Diallo's lawyers to visit him during his detention pending deportation from the Congo. For this reason alone, [Guinea's] allegations must be rejected.

#### **E. Alleged violation of the Vienna Convention on Consular Relations**

1.18. The Applicant also claims in its Memorial that the DRC violated the Vienna Convention on Consular Relations of 24 April 1963 by failing to allow Mr. Diallo contact with Guinean consular officers in Kinshasa<sup>18</sup>. This assertion is unfounded, as the Respondent will show below.

1.19. Article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations states:

*“if he<sup>19</sup> (an alien who has been arrested, committed to prison or to custody pending trial, or detained in any other manner) so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner . . .”.*

Guinea however has not shown that Mr. Diallo requested the Congolese authorities to inform Guinea's consular officers in Kinshasa of his situation and that those authorities refused to advise the consular post of any such request.

16 1.20. Moreover, Guinea's Ambassador in Kinshasa was aware of Mr. Diallo's arrest and detention in anticipation of his deportation to Conakry. Guinea itself adduces a letter dated 21 December 1995 from its Ambassador in Kinshasa at the time, Maître Abdoulaye Sylla, a lawyer by profession, to Guinea's Minister for Foreign Affairs, with a copy for information to the President of the Republic of Guinea. In this letter concerning Mr. Diallo's situation, Guinea's Ambassador in Kinshasa stated:

*“In any case, the Embassy, for its part, will proceed with the cautious and measured diplomatic action that it has already initiated at all levels to ensure a felicitous outcome to the case.”<sup>20</sup>*

Guinea's Ambassador also forwarded to the Minister for Foreign Affairs in Conakry clippings from the Congolese press reporting on Mr. Diallo's situation.

1.21. On 25 January 1996, when Mr. Diallo was still in detention in Kinshasa six days before being expelled, the Guinean Embassy instructed Africontainers-Zaire's senior managers to prepare an inventory of all the containers belonging to the company<sup>21</sup>. On 15 April 1996, Guinea's

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<sup>18</sup>MG, p. 52, para. 3.30 (2).

<sup>19</sup>Emphasis added.

<sup>20</sup>CMC, Part II, Ann. 11, and MG, Vol. II, Ann. 192.

<sup>21</sup>CMC, Part II, Ann. 12, and MG, Vol. II, Ann. 199.

Minister for Foreign Affairs even wrote to the Secretary-General of the Presidency of the Republic of Guinea to report to him on Mr. Diallo's situation<sup>22</sup>.

1.22. It is thus demonstrated that Mr. Diallo's case was known not only to the Guinean consulate in Kinshasa but also to the President of the Republic and the Minister for Foreign Affairs of Guinea and, what is more, that Guinea's Ambassador in Kinshasa had made diplomatic approaches on Mr. Diallo's behalf to the Government of the Democratic Republic of the Congo.

1.23. On these grounds Guinea's claim that the Democratic Republic of the Congo breached Article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations should be rejected as unfounded.

## 17 F. Alleged violation of the International Covenant on Civil and Political Rights

1.24. In its Memorial, the Applicant also accuses the DRC of having expelled Mr. Diallo further to a decision which had not been reached in accordance with the law. In so doing, the DRC is alleged to have violated Article 9 of the International Covenant on Civil and Political Rights, together with Article 13 thereof, providing that an alien having lawfully settled in the territory of a State may be expelled therefrom only in pursuance of a decision reached in accordance with law. As the DRC will explain below, this assertion by the Applicant is unfounded.

1.25. In fact, the Congolese Prime Minister issued Decree No. 0043 of 31 October 1995, ordering Mr. Diallo deported from Congolese territory, in accordance with Article 15 of the Congolese Legislative Order of 12 September 1983 on immigration control.

The stated grounds for the decree expelling Mr. Diallo were that his "presence and conduct [in Zaire] have breached [Congolese] public order, especially in the economic, financial and monetary areas, and continue to do so"<sup>23</sup>. The statutory basis for the decree is found in the Congolese Legislative Order of 12 September 1983 on immigration control, Article 15 of which states: "The President of the . . . Republic may, by a duly reasoned Order, deport from Zaire any alien who, by his presence or conduct, breaches or threatens to breach the peace or public order."<sup>24</sup>

Thus, for purposes of Article 13 of the International Covenant on Civil and Political Rights, this was a decision reached in accordance with law.

1.26. Further, under Article 15 of the Legislative Order of 12 September 1983 on immigration control:

"An alien against whom deportation proceedings have been initiated and who is likely to evade implementation of this measure may be imprisoned by the General Administrator of the CNRI [Centre National des Renseignements et d'Intelligence] or his representative for a period of 48 hours. In cases of absolute necessity this period may be extended by 48 hours at a time, but shall not exceed eight days."<sup>25</sup>

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<sup>22</sup>CMC, Part II, Ann. 13, and MG, Vol. II, Ann. 203.

<sup>23</sup>*Ibid.*

<sup>24</sup>CMC, Part II, Ann. 5.

<sup>25</sup>*Ibid.*

Mr. Diallo's detention never exceeded the statutory period. In this regard, the Republic of Guinea's claim that Mr. Diallo was detained for no less than a total of 75 days (from 5 November 1995 to 10 January 1996 and then from 17 January to 31 January 1996) is unfounded. It is based entirely on sources from the press, and these echo a release issued by the organization "Avocats sans frontières"<sup>26</sup>. It has however been shown above that this version of the events is contradicted by the material in the file, because, during the period when Guinea claims Mr. Diallo was being held incommunicado with the outside world, he composed and personally signed a number of letters to the Congolese Government, without by the way complaining about his detention<sup>27</sup>.

1.27. The Applicant also accuses the DRC of having failed to afford Mr. Diallo an opportunity to submit the reasons against his expulsion and to have his case reviewed by the competent authority. Guinea argues that this conduct by the Applicant amounts to a further violation of Article 13 of the International Covenant on Civil and Political Rights.

Article 13 of the International Covenant on Civil and Political Rights provides:

"except where compelling reasons of national security otherwise require, [an alien shall] be allowed to submit the reasons against his expulsion and to have his case reviewed by . . . the competent authority . . .".

1.28. States are the final arbiters of what are compelling reasons of national security. Deciding to expel an alien lawfully in its territory is not a step lightly taken by any State. In Mr. Diallo's case, his daily scheming had become so serious that the Congolese Government, in the exercise of its discretion, determined there to be urgent, compelling reasons of national security and of maintaining public order to remove him from the territory. Pursuant to the above-quoted provisions of Article 13 of the International Covenant on Civil and Political Rights, there was no requirement under these circumstances that Mr. Diallo be allowed during the expulsion process to submit the reasons against his expulsion or to have his case reviewed by the competent authority.

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1.29. In all events, the Congolese legal system offers a mechanism for recourse against any decision taken by an administrative authority and infringing a person's rights. The Congolese Constitution of 9 April 1994, which was in force in 1996, provided in Article 102: "The Supreme Court of Justice has jurisdiction over . . . applications for nullification of acts and decisions of the central authorities of the Republic." Articles 87 to 90 of Legislative Order No. 82-017 of 31 March 1982 concerning procedure before the Supreme Court of Justice specifically lay down the procedure in respect of requests for nullification of acts, decisions and regulations of the central authorities<sup>28</sup>, which may be submitted by any aggrieved individual.

1.30. Even after expulsion, Mr. Diallo therefore had available to him an administrative remedy whereby he could request the Administrative Division of the Supreme Court of Justice to nullify Decree 0043 of 31 October 1995 issued against him by the Congolese Prime Minister. But we cannot help observing that Mr. Diallo, who had engaged Congolese lawyers to protect his financial interests, failed to instruct those same lawyers to submit an application for the nullification of the expulsion decree.

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<sup>26</sup>See, e.g., MG, Anns. 190, 191 and 193.

<sup>27</sup>*Supra*, para. 1.10.

<sup>28</sup>CMC, Part II, Ann. 14.

1.31. In the light of the foregoing arguments, the DRC requests the Court to find that the decision to expel Mr. Diallo was taken in accordance with Congolese law and that the provisions of Article 13 of the International Covenant on Civil and Political Rights were not breached by the Respondent.

**20 G. Violation of the international minimum standard and the alleged harshness of treatment received by Mr. Diallo**

1.32. According to Guinea, Mr. Diallo was forced to quit the DRC without any personal effects, leaving behind all his movable and real property, as well as the companies he had founded and developed. Thus, it is claimed, he was harshly treated like a criminal.

1.33. However, as already shown<sup>29</sup>, Guinea's allegations that Mr. Diallo was treated brutally and his dignity humiliated by the Congolese authorities are not credible. Moreover, the Applicant itself has made known the alleged personal intervention at the time by the President of the Republic of Zaire (DRC), Mobutu Sese Seko, to demand Mr. Diallo's release. It is not every day that a President of the Republic intervenes to seek the release of an alien being held pending deportation. If this did happen, Mr. Diallo cannot be said to have been treated like a criminal.

In addition, at no time did Guinea's Ambassador in Kinshasa, who followed Mr. Diallo's case very closely, complain to the Congolese authorities about any mistreatment of, or lack of consideration for, him.

1.34. Finally, Mr. Diallo recovered all of the property belonging to him personally, which he received in Conakry. That is why Guinea's Ambassador in Kinshasa, who looked after not only the containers and other property belonging to Africontainers-Zaire but also Mr. Diallo's own property, never approached the Congolese authorities to protest against the confiscation or disappearance of property belonging to Mr. Diallo. When a State expels an alien under the circumstances and for the reasons described above, international law does not oblige it to charter an aircraft or other means of transport for the alien's benefit for purposes of arranging his removal together with all his movable property. There is no precedent to this effect in State practice.

**21** 1.35. In the light of the foregoing, the DRC requests the Court to find that the DRC did not commit any internationally wrongful act in connection with Mr. Diallo's arrest, detention or expulsion from Congolese territory. Mr. Diallo's person and property have been respected by the Congolese authorities in accordance with the applicable rules of international law.

**Section 2. Deprivation of Mr. Diallo's property right**

1.36. The Applicant has also contended that Mr. Diallo's detention and expulsion from Congolese territory resulted in the DRC depriving him of the right to use, enjoy and dispose of his *parts sociales* (shares) in Africom-Zaire and Africontainers-Zaire, as well as of the companies' property.

1.37. As regards Mr. Diallo's *parts sociales* in the two commercial companies, Guinea itself acknowledges that they have not been confiscated by the Congolese State and that they remain

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<sup>29</sup>*Supra*, para. 1.10.

Mr. Diallo's property to this day. It nevertheless adds that the DRC has deprived Mr. Diallo of the right to use, enjoy and dispose of his *parts sociales*.

1.38. In respect of Mr. Diallo's rights as an individual, which is what the present Chapter is about, one need only observe that, by Guinea's own admission, Mr. Diallo to this day remains the owner of his *parts sociales* and that Guinea has produced no evidence that the DRC has prevented Mr. Diallo from selling his *parts sociales* to third parties. As an individual, Mr. Diallo cannot claim any other rights attaching to his right of ownership in the *parts sociales*. The other rights attaching to ownership of the *parts sociales*, such as the right to dividends, are rights as against the company and as such are rights held by Mr. Diallo as *associé*. These rights will be dealt with in Chapter II of this Counter-Memorial.

1.39. On the subject of the property belonging to Africom-Zaire and Africontainers-Zaire, the DRC will quote the Court's comment in its Judgment of 24 May 2007:

“Congolese law accords an SPRL independent legal personality distinct from that of its *associés*, particularly in that the property of the *associés* is completely separate from that of the company, and in that the *associés* are responsible for the debts of the company only to the extent of the resources they have subscribed.”

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The Court adds and reaffirms: “‘So long as the company is in existence the shareholder has no right to the corporate assets.’ . . . This remains the fundamental rule in this respect, whether for a SPRL or for a public limited company.”<sup>30</sup>

1.40. In the light of this position taken by the Court, Guinea cannot argue that Mr. Diallo's expulsion from Congolese territory resulted in the DRC depriving him of the use, enjoyment or right to dispose of the property belonging to the two companies, since it was not his private property.

1.41. In conclusion, the Respondent requests the Court to find that Guinea's allegation that the Respondent deprived Mr. Diallo of his right of ownership in his *parts sociales* and in the companies' property is unfounded.

### **Section 3. Denial of justice in regard to Mr. Diallo**

1.42. The Republic of Guinea further claims that Mr. Diallo suffered two types of denial of justice by the Congolese authorities: one in respect of enforcement of the judgment of 3 July 1995 ordering Shell to pay US\$13,156,704 to Africontainers; and a more general one consisting of the fact that his detention and expulsion made it impossible for him to pursue settlement of the disputes involving his dealings in the DRC<sup>31</sup>.

1.43. Guinea's argument must be rejected, leading as it would to the exercise by Guinea of its diplomatic protection in respect of rights belonging to Africontainers and Africom-Zaire, and this would be at variance with the Court's Judgment on preliminary objections handed down in the present case on 24 May 2007, in which Guinea's Application was declared inadmissible in this regard. In effect, these two types of denial of justice, if found to have occurred, would have been

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<sup>30</sup>See Judgment of 24 May 2007, para. 63.

<sup>31</sup>See MG, pp. 67-68.

23 committed against Africontainers-Zaire and Africom-Zaire, the creditors to which the claimed debts are allegedly owed, not against Mr. Diallo.

1.44. Indeed, the Court already observed in its Judgment of 24 May 2007 that it was uncontroverted that the financial claims (commercial and other disputes) cited by Guinea all concern rights belonging to the two commercial companies as legal entities, not rights held by Mr. Diallo as a natural person<sup>32</sup>. This is so for all the commercial disputes, including the one cited by Guinea between Africontainers-Zaire and the oil company Zaire Shell.

1.45. In conclusion, Guinea's allegations in respect of denials of justice claimed to have been suffered by Mr. Diallo actually concern rights of, and disputes involving, Africom-Zaire or Africontainers-Zaire, not Mr. Diallo as an individual; the Court has held Guinea's Application to be inadmissible in respect of these.

#### Section 4. Breaches of contract towards Mr. Diallo

1.46. The Republic of Guinea further argues that a State's breach of contractual commitments to an alien may constitute an internationally wrongful act if the breach is accompanied by other internationally wrongful acts. Guinea claims this to be the case of the breaches by Gécamines of the contract of carriage of 13 July 1983 and the refusal by the Department of Finance to pay the debts owed to Africom-Zaire in the amount of 178,700,000 zaires, which are alleged to have been accompanied by other internationally wrongful acts, specifically unlawful detention and expulsion, arbitrary interference and denial of justice<sup>33</sup>.

24 1.47. Again, Guinea's argument must be rejected, since it would lead to the exercise by Guinea of its diplomatic protection on behalf of Africontainers and Africom-Zaire, in contravention of the Court's Judgment on preliminary objections handed down in the present case on 24 May 2007. The contract of 13 July 1983 was entered into by Africontainers-Zaire<sup>34</sup>, and the accepted bills of exchange were payable to Africom-Zaire<sup>35</sup>. Thus, if proved, any purported breaches of contract would have been committed against those companies as legal entities, not against Mr. Diallo as a natural person. This is the same state of affairs as that examined above in respect of denial of justice. Accordingly, the DRC committed no breach of contract against Mr. Diallo as an individual.

1.48. To conclude this Chapter, the DRC requests the Court to find that the DRC did not violate any individual right of Mr. Diallo as a natural person by arresting, detaining and expelling him from Congolese territory. The DRC will show in the next Chapter that it has also not violated Mr. Diallo's direct rights as *associé* in Africom-Zaire and Africontainers-Zaire.

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<sup>32</sup>See Judgment of 24 May 2007, para. 14.

<sup>33</sup>MG, p. 69, paras. 3.66 and 3.67.

<sup>34</sup>POC, Ann. 41.

<sup>35</sup>MG, Ann. 51.

CHAPTER II — MR. DIALLO'S DIRECT RIGHTS AS ASSOCIÉ IN  
AFRICONTAINERS-ZAIRE AND AFRICOM-ZAIRE

2.01. Before Guinea's arguments on Mr. Diallo's direct rights as *associé* in Africom-Zaire and Africontainers are addressed, it bears recalling what the Court said in its Judgment of 24 May 2007 on the preliminary objections in the present case:

“61. As the Court recalled in the *Barcelona Traction* case, ‘[t]here is . . . no need to investigate the many different forms of legal entity provided for by the municipal laws of States’ (*I.C.J. Reports 1970*, p. 34, para. 40). What matters, from the point of view of international law, is to determine whether or not these have a legal personality independent of their members. *Conferring independent corporate personality on a company implies granting it rights over its own property, rights which it alone is capable of protecting.* As a result, only the State of nationality may exercise diplomatic protection on behalf of the company when its rights are injured by a wrongful act of another State. In determining whether a company possesses independent and distinct legal personality, international law looks to the rules of the relevant domestic law.

62. The Court, in order to establish the precise legal nature of Africom-Zaire and Africontainers-Zaire, must refer to the domestic law of the DRC and, in particular, to the Decree of 27 February 1887 on commercial corporations. This text states, in Article 1, that ‘commercial corporations recognized by law in accordance with this Decree shall constitute legal persons having a personality distinct from that of their members’.

63. Congolese law accords an SPRL independent legal personality distinct from that of its *associés*, particularly in that the property of the *associés* is completely separate from that of the company, and in that the *associés* are responsible for the debts of the company only to the extent of the resources they have subscribed. *Consequently, the company's debts receivable from and owing to third parties relate to its respective rights and obligations.* As the Court pointed out in the *Barcelona Traction* case: ‘So long as the company is in existence the shareholder has no right to the corporate assets.’ (*I.C.J. Reports 1970*, p. 34, para. 41.) This remains the fundamental rule in this respect, whether for a SPRL or for a public limited company.”

In consequence, Guinea cannot take up any claims which Africom-Zaire and Africontainers might have against the DRC. It cannot therefore rely on any infringement of ownership rights in the property or debts held not by Mr. Diallo but by the companies as legal entities.

2.02. The present discussion will thus be confined to the question of whether Mr. Diallo's expulsion from the Congo resulted in a violation of his direct rights as *associé* in Africom-Zaire and Africontainers.

Within that framework the DRC will deal one after the other with the direct rights purportedly held by Mr. Diallo as *associé* — as Congolese municipal law defines them<sup>36</sup> — which Guinea alleges to have been violated<sup>37</sup>, namely: the right to a share of the profits of the companies (Sec. 1); a “right of ownership in the companies, in particular in respect of his *parts sociales* [shares]” (Sec. 2); the right to appoint the *gérant* [manager] of the companies (Sec. 3); the right of

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<sup>36</sup>See CMC, Part II, Ann. 15 (Decree of 27 February 1887 on commercial corporations).

<sup>37</sup>Observations of the Republic of Guinea on the Preliminary Objections of the Democratic Republic of the Congo, 7 July 2003, Vol. I, pp. 40-41.

oversight and control in respect of all acts performed by the management and of all operations of the companies (Sec. 4); and the right to take part in general meetings (Sec. 5).

### **Section 1. The right to a share of the profits of the companies**

2.03. Among Mr. Diallo's rights as *associé* in Africom-Zaire and Africontainers-Zaire, Guinea first cites his right to a share of the companies' profits.

On the subject of dividend distributions, Article 27 of the Articles of Incorporation of Africontainers-Zaire states:

“Any balance sheet surplus, after deduction of charges, general administrative expenses and necessary amortization allowances, shall constitute the company's net profit. It shall be divided among the *associés* in proportion to their respective *parts* [shares], each *part* conferring an equal right.

The general meeting may however decide that all or part of the profits shall be used to set up a special reserve fund or share amortization fund, or be carried forward. Dividends shall be payable each year on the dates and in the manner fixed by the general meeting.”<sup>38</sup>

27 It therefore follows that, in order for the Republic of Guinea to be able to claim any infringement of Mr. Diallo's right to a share of Africontainers' profits, it must first be shown that the company actually distributed dividends. Guinea fails however to produce any accounting records from Africontainers (or, for that matter, from Africom-Zaire, which remained commercially dormant for nearly ten years) or any decision by the general meeting evidencing a dividend distribution to the *associés*.

2.04. Furthermore, even if it were shown that Africontainers and Africom-Zaire did distribute dividends, Guinea would still have to demonstrate that the decision to deport Mr. Diallo from Congolese territory or some other wrongful act by the DRC had made it impossible for him to receive them. Guinea fails however to show that Mr. Diallo could not directly receive his dividends abroad or that he was prevented from receiving them by any other act imputable to the DRC.

For each of these reasons alone, the Republic of Guinea's contention on this point is without merit.

2.05. It will be observed *ex abundanti cautela* that Guinea can in no event maintain that the value of the right to the companies' profits should be calculated from the amount of the debt payments claimed by the companies. As the debts are rights and assets belonging to the companies, to which an *associé* is not entitled so long as the companies are in existence, this would in fact be tantamount to indirectly exercising diplomatic protection on behalf of Africom-Zaire and Africontainers, which the Court rejected in its Judgment of 24 May 2007 on the preliminary objections.

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<sup>38</sup>MG, Ann. 1.

## Section 2. A “right of ownership in the companies, in particular in respect of his *parts sociales* [shares]”

28 2.06. Guinea next seeks to protect Mr. Diallo’s right of ownership in the companies and in this connection specifically cites Article 5 of the Investment Code, stating: “Individual or collective property rights acquired by the investor in accordance with [Congolese] law are guaranteed by the Constitution of the Republic of Zaire.” It adds that Mr. Diallo must be regarded “as the lawful owner of the shares in the companies set up by him in order to realize his investments”<sup>39</sup>.

2.07. Mr. Diallo is still the owner of his *parts sociales* in Africontainers and, as has already been shown in Chapter I, the property rights he holds as an individual have in no way been impaired by the DRC<sup>40</sup>. Further, insofar as Guinea is claiming that Mr. Diallo was deprived, de facto, of the possibility of exercising his rights as owner of those *parts sociales*, its contention based on the Congolese Investment Code adds nothing to the claims of violations of other rights of an *associé* cited by Guinea.

## Section 3. The right to appoint the *gérant* [manager] of the companies

2.08. Guinea cannot claim in these proceedings that there has been any violation of the right to appoint the *gérant* of Africom-Zaire and Africontainers, since the right to appoint the *gérant* is not a right of the *associé* but of the company.

In this regard, Article 65 of the 1887 Decree on commercial corporations provides: “*Gérants* shall be appointed either in the instrument of incorporation or by the general meeting, for a period which may be fixed or indeterminate.”<sup>41</sup>

As for Africontainers, Article 14 of its Articles of Incorporation states: “The company shall be managed by one or more managers (*gérants*), who may or may not be *associés*, appointed by the general meeting.”<sup>42</sup> Accordingly, the right to appoint a *gérant* belongs to Africontainers’ general meeting, which is an organ of the company. Thus, this is a right of the company, not of Mr. Diallo as *associé*.

29 Guinea is therefore mistaken when it asserts that Article 65 of the 1887 Decree “gives shareholders the right to appoint the company’s *gérant*, either by naming him in the instrument of incorporation or by participating in the general meeting”<sup>43</sup>. The first possibility is irrelevant in the present case because Africontainers’ instrument of incorporation entrusts the appointment of the *gérant* to the general meeting. As for the second, as Guinea itself says, the *associé*’s right which is in question is the right “to participate in the general meeting” which appoints the *gérant*. As thus claimed, the right invoked by Guinea is indistinguishable from the right of the *associé* to take part in general meetings, which will be dealt with below (*infra*, Sec. 5).

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<sup>39</sup>Observations of the Republic of Guinea on the Preliminary Objections of the Democratic Republic of the Congo, 7 July 2003, Vol. I, paras. 2.28, 2.29 and 2.37.

<sup>40</sup>*Supra*, paras. 1.36 *et seq.*

<sup>41</sup>CMC, Part II, Ann. 15.

<sup>42</sup>MG, Ann. 1.

<sup>43</sup>Observations of the Republic of Guinea on the Preliminary Objections of the Democratic Republic of the Congo, 7 July 2003, Vol. I, p. 39, para. 2.26.

2.09. As for Africom-Zaire, Guinea has not produced its Articles of Incorporation and they are not available to the DRC. Thus, it is not known whether Mr. Diallo is an *associé* in this company. Nevertheless, assuming that the Articles of Incorporation are silent on the question of the appointment of the *gérant* — Article 65 of the Decree therefore being applicable — or that the Articles provide for the *gérant* to be appointed by the general meeting, the same conclusion as that in respect of Africontainers must be drawn: this is a right belonging to the company. Assuming that Africom-Zaire's *gérant* was appointed in the company's Articles of Incorporation, it would still be a matter of a collective right belonging to all *associés* acting as a group, not an individual right of Mr. Diallo (let it be noted for the record: Guinea admits that Congolese legislation does not allow for the incorporation of an SPRL by one person; see paragraph 23 of the Court's Judgment of 24 May 2007 on the preliminary objections). At any rate, Guinea fails to show that the appointment of Africom-Zaire's *gérant* involved an individual right belonging to Mr. Diallo.

#### **Section 4. The right of oversight and control in respect of all acts performed by the management and of all operations of the companies**

2.10. Guinea is also mistaken in asserting a violation of the right of oversight and control in respect of all acts performed by the management. While Mr. Diallo is indeed the *associé-gérant* of Africom-Zaire and Africontainers, one individual cannot both manage and oversee management.

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In this connection Guinea argued at the hearings on the preliminary objections that Congolese law allowed for management by an *associé*<sup>44</sup>. The DRC does not deny this, but it does not follow that such an *associé* is entitled to exercise oversight over acts which he himself performed as *gérant*. By its very nature, oversight of management is independent of management itself. Congolese law provides any necessary further confirmation of this in stating that oversight of management shall in principle be effected by an auditor. Thus, Article 71 of the 1887 Decree provides:

“Oversight of the management shall be entrusted to one or more administrators, who need not be *associés*, called ‘auditors’ . . .

If the number of *associés* does not exceed five, the appointment of auditors is not compulsory, and each *associé* shall have the powers of an auditor.”<sup>45</sup>

Article 75 of that Decree provides:

“The auditors’ task shall be to oversee and monitor, without restriction, all the actions performed by the management, all the company’s transactions and the register of *associés*.”<sup>46</sup>

Article 25, third paragraph, of Africontainers’ Articles of Incorporation confirms the foregoing, stating that oversight of management shall be provided by an auditor:

“The management must provide *associés*, at least 40 days before the general meeting, with the statement of assets and liabilities, balance sheet, profit and loss account and management report, together with supporting documentation. The auditor shall, within 15 days at the latest following the management report, draw up a report on the fulfilment of his/her terms of reference, on the keeping of the accounts and on

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<sup>44</sup>CR 2006/53, 1 December 2006, p. 27, citing Art. 67 of the 1887 Decree on commercial corporations concerning protection of *gérants-associés*.

<sup>45</sup>CMC, Part II, Ann. 15.

<sup>46</sup>*Ibid.*

the documents forwarded to him/her by the management. That report must contain observations and proposals.”<sup>47</sup>

2.11. It follows from these provisions, as from the very concept of oversight, that the same person cannot provide both management and oversight of management. Accordingly, Mr. Diallo did not have the right to oversee and control all acts performed by the management and all operations of the companies of which he himself was the *gérant*.

31 Guinea therefore cannot claim any violation by the DRC of Mr. Diallo’s rights in this respect.

### Section 5. The right to take part in general meetings

2.12. In order for Guinea to assert an infringement of the *associé’s* right to take part in general meetings, it needs to show that a general meeting was convened and that Mr. Diallo was unable to attend it because of his deportation from the DRC. The [Applicant] would also have to show, at the very least, that the DRC ordered Africontainers to disregard any proxy which Mr. Diallo might have given to a third party to represent him at a general meeting<sup>48</sup>.

Failing the convening of a general meeting, Mr. Diallo’s right to take part in one is not at issue.

2.13. The same holds true in terms of the reality of the impact of the action taken by the Congolese Government, which Guinea describes as one of the conditions to be met for there to be an expropriation<sup>49</sup>. If no general meeting was convened, then Mr. Diallo’s deportation had no impact on his right to participate in general meetings. And consequently there cannot have been any expropriation. Guinea’s argument is therefore without merit.

2.14. Guinea cannot respond with the contention that the DRC deprived Mr. Diallo, as *gérant*, of the right to convene general meetings. Convening general meetings is a functional act performed by the *gérant* as an organ of the company; thus, it is the company which convenes general meetings. Since the Court held in its Judgment of 24 May 2007 on the preliminary objections that Guinea could not exercise its diplomatic protection on behalf of Africontainers and Africom-Zaire, this right of the *gérant* cannot be protected in the present proceedings.

32 Moreover, Guinea has not alleged any deprivation of Mr. Diallo’s rights as *gérant* and has confined its arguments to Mr. Diallo’s personal rights and his rights as *associé*. Likewise, in its Judgment of 24 May 2007 on the preliminary objections, the Court

“Declares the Application of the Republic of Guinea to be admissible in so far as it concerns protection of Mr. Diallo’s direct rights as *associé* in Africom-Zaire and Africontainers-Zaire.”<sup>50</sup>

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<sup>47</sup>MG, Ann. 1.

<sup>48</sup>Under Art. 81 of the Decree of 27 February 1887 (Ann. 15), an *associé* may be represented at general meetings by a third-party proxy holder.

<sup>49</sup>MG, paras. 3.17, 3.22 and 3.23.

<sup>50</sup>Emphasis added.

In no event therefore can any rights held by Mr. Diallo as *gérant* be the subject of the present proceedings.

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CHAPTER III — SUBMISSIONS

In the light of the arguments set out above and of the Court's Judgment of 24 May 2007 on the preliminary objections, in which the Court declared Guinea's Application to be inadmissible in so far as it concerned protection of Mr. Diallo in respect of alleged violations of rights belonging to Africom-Zaire and Africontainers-Zaire, the Respondent respectfully requests the Court to adjudge and declare that:

1. the Democratic Republic of the Congo has not committed any internationally wrongful acts towards Guinea in respect of Mr. Diallo's individual personal rights;
2. the Democratic Republic of the Congo has not committed any internationally wrongful acts towards Guinea in respect of Mr. Diallo's direct rights as *associé* in Africom-Zaire and Africontainers-Zaire;
3. accordingly, the Application of the Republic of Guinea is unfounded in fact and in law.

27 March 2008,

Professor Tshibangu KALALA,  
Co-Agent of the Democratic  
Republic of the Congo.

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