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INTERNATIONAL COURT OF JUSTICE

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

**REPLY
OF THE REPUBLIC OF GUINEA**

VOLUME I

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INTRODUCTION

1

1. This Reply is being filed by the Republic of Guinea in accordance with the Court's Order of 5 May 2008 authorizing the submission of a Reply by the Applicant and a Rejoinder by the Respondent, 19 November 2008 having been set as the time-limit for the filing of the former.

2. After the Republic of Guinea filed its Memorial on 23 March 2001, the Democratic Republic of the Congo on 3 October 2002 raised preliminary objections in respect of the admissibility of the Application; as a result, the proceedings on the merits were suspended until the handing down of the Judgment on the Preliminary Objections. That was delivered on 24 May 2007 and the Court, in its Order of 27 June 2007, fixed 27 March 2008 as the time-limit for the filing of the Counter-Memorial. The Democratic Republic of the Congo submitted the Counter-Memorial within the time-limit set. The purpose of the present Reply is to respond to the Counter-Memorial and to do so in keeping with the requirement laid down in Article 49, paragraph 3, of the Rules of Court¹.

3. While the admissibility and merits phases are by nature separate, Guinea wishes to make clear in this Introduction the degree to which the Judgment rendered by the Court on 24 May 2007 affects the examination of the claim on the merits.

2

4. First of all, it is self-evident that henceforth Guinea's claim can only concern the two aspects of the Application held admissible by the Court: the infringement of "Mr. Diallo's rights as an individual"; and the infringement of "Mr. Diallo's direct rights as *associé* in Africom-Zaire and Africontainers-Zaire"². On the other hand, the claims concerning "alleged violations of rights of" those two companies, having been judged inadmissible³, cannot be considered on the merits⁴. As to the elements of the Application held admissible, Guinea maintains the claim for reparation, as the consequence of the internationally wrongful acts committed by the Congo, set out in its Memorial, just as it maintains its request to the Court for leave to refrain from stating any position at this stage on the procedure to be followed to determine the amount owed by the Respondent by way of compensation⁵. Guinea further wishes to reiterate that, for the reasons already stated in its Observations on the preliminary objections⁶, it has no intention of re-presenting unchanged the assessments which were annexed to the Application and concern the amount of the loss it has suffered in the person of its national.

5. Guinea believes it helpful next to observe that, pursuant to the principle of *res judicata*, the Parties are bound by the Court's determinations of points of fact and of law in its Judgment of 24 May 2007. Some of these are liable to be of significance in considering the merits of the case.

¹"The Reply and Rejoinder . . . shall not merely repeat the parties' contentions, but shall be directed to bringing out the issues that still divide them."

²Judgment of 24 May 2007, para. 98 (3).

³*Id.*

⁴Subject however to the comment made in passing in paragraph 59 of the Judgment.

⁵See Memorial of Guinea (MG), p. 7, paras. 1.17-1.18, and p. 108, para. 5.2.

⁶See Observations of the Republic of Guinea on the Preliminary Objections of the Democratic Republic of the Congo (OG), pp. 2-3, para. 0.09; see also CR 2006/51, p. 10, para. 10 (Agent of Guinea) and Counter-Memorial of the Democratic Republic of the Congo (CMC), p. 6, para. 0.02.

This is true, for example, of the facts which the Court considers to have been agreed on by the Parties⁷.

6. Lastly, Guinea wishes to make clear that the inadmissibility of the claim in respect of violations of the rights of Africom-Zaire and Africontainers-Zaire does not mean that these violations have no impact or bearing on the examination of the merits of the case, as that examination has been framed by the Judgment of 24 May 2007:

- (i) firstly, the actions taken by the Respondent against these two companies help to show the factual context in which Mr. Diallo was arrested, detained and then expelled in violation of international law; they are thus still an integral part of the record;
- (ii) secondly, in light of the very close ties between Mr. Diallo and the two *sociétés privées à responsabilité limitée*, of which he was the sole *gérant* and *associé* at the time in question in these proceedings, the determination of the infringement of Mr. Diallo's rights and the assessment of the prejudice suffered as a result will necessarily have to be made by taking full account of the interdependence of their legal interests. It is first and foremost in the context of Mr. Diallo's rights as *associé* that these legally protected interests coincide. Specifically, it is clear that any violation of the companies' rights could not help but have an effect on the rights of the sole *associé*, and vice versa. The Respondent, by the way, understood as much, since it chose to take action against Mr. Diallo in person solely with a view to striking at his companies.

3

7. In the light of these remarks, the Republic of Guinea will respond to the allegations of fact and arguments of law set out in the Counter-Memorial in support of the contention that the Democratic Republic of the Congo "has not incurred its international responsibility in the present case"⁸; Guinea will do so by dealing in turn with the violations of Mr. Diallo's rights as an individual (Chap. 1) and the violations of his direct rights as *associé* (Chap. 2). It will then describe the right to the reparation to which it is consequently entitled (Chap. 3) and will present its submissions.

⁷Judgment of 24 May 2007, para. 14.

⁸CMC, p. 7, para. 0.05.

**VIOLATION BY THE DEMOCRATIC REPUBLIC OF THE CONGO
OF MR. DIALLO'S RIGHTS AS AN INDIVIDUAL**

1.1 The Republic of Guinea made the effort in its earlier pleadings of providing a detailed account of its national's story from the time he arrived in Zaire. Specifically, those pleadings describe the magnitude of his investment in the country and the quality of the services he rendered, through his companies, to the Zairean business community and public authorities⁹. As not a single line is devoted to this in the DRC's Counter-Memorial, the present Reply will not revisit the subject.

1.2 These facts do however remain material in that they shed light on Mr. Diallo's personality and the nature of the businesses he developed in Zaire through his companies before the Zairean authorities resorted to illegal and arbitrary methods to remove him. The resulting picture of Mr. Diallo is obviously very different from what the DRC seeks to portray by its insistent repetition that what befell him was nothing more than the normal consequence of what is claimed to have been his near-obsessive participation in illegal activities, in the form of "economic corruption and crime"¹⁰, "criminal activities"¹¹ and "bribing officers of the court"¹², in Zaire. But this litany, already included in the preliminary objections¹³, is nothing but a smokescreen, and a careful reading of the DRC's pleadings shows that none of these accusations is fleshed out or supported by the slightest evidence.

1.3 This practice by the Congo, wrongly accusing Mr. Diallo of illegal activities, is moreover nothing new; it is in keeping with a habit adopted by the Respondent in 1988, when the Guinean businessman was arbitrarily taken into custody and then incarcerated for a year for invented acts of fraud trumped up for the sole purpose of keeping one of his companies from collecting debts indisputably owed by the public treasury of Zaire. Twenty years later, the accusations levelled against Mr. Diallo in the Counter-Memorial of 27 March 2008 reflect the same approach: they are aimed at providing a semblance of justification for his expulsion in January 1996 but are every bit as indefinite, vague and, most importantly, unfounded — moreover, never, not in its Counter-Memorial nor, *a fortiori*, at the time of the events in question, has the DRC put forward the slightest evidence to support them.

1.4 Further, as the only evidence to prove its insinuations, the DRC does no more than describe the Zaire of the 1990's, when the country was characterized by a "general context of decline and disintegration . . . , 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"¹⁴. This is well known and the Commission on Human Rights already drew like conclusions in December 1994, stating in a report: "In Zaire, the rules of due process have not been respected for decades"¹⁵. But, even if true, these observations provide no

⁹MG, pp. 10-31, paras. 2.22-2.65; OG, pp. 9-24, paras. 1.14-1.60.

¹⁰*Ibid.*

¹¹*Ibid.*

¹²CMC, p. 12, para. 1.10.

¹³On this point, see OG, p. 5, para. 1.03, and pp. 7-8, paras. 1.09-1.12.

¹⁴CMC, p. 10, para. 1.07.

¹⁵Report on the situation of human rights in Zaire, 19 Dec. 1994, para. 183 (E/CN.4/1995/67).

support for the insinuations and accusations in the Counter-Memorial aimed at turning Mr. Diallo into a suspect in multiple crimes. On the contrary, they make clear that the context in which Mr. Diallo was the victim of summary, arbitrary procedures put into effect by Congolese authorities was one of a country in which power was exploited and the law flouted by the authorities. Moreover, the documentary record leaves no doubt on this point: Mr. Diallo was the victim of a State which, both at the time of his arrests and detentions (Sec. 1) and in connection with his “expulsion” (Sec. 2), committed serious violations of rights which he, as a natural person, enjoys under international law.

SECTION 1

THE ARRESTS AND DETENTIONS

6 1.5 The DRC acknowledges that Guinea’s Memorial describes “in detail the acts of which [Guinea] accuses the Respondent in respect of Mr. Diallo’s arrest and expulsion”¹⁶, but it is very offhand in its treatment of the question of the violation of Mr. Diallo’s rights resulting from his arrests, the occurrence of which is not denied by the DRC. All told, it devotes to this issue:

- three short lines in paragraph 1.10, p. 11;
- one line in paragraph 1.12, p. 12;
- pages 13 to 16.

1.6 Not one word is said about the arrest and detention suffered by Mr. Diallo in 1988. Yet these are no secret and inarguably figure among the wrongful acts for which Guinea is seeking to have the Respondent held internationally responsible. The Court itself moreover acknowledged this in its Judgment on the preliminary objections in observing that, in its Memorial on the merits, Guinea “described in detail the violations of international law allegedly committed by the DRC against Mr. Diallo. Among those cited is the claim that Mr. Diallo was arbitrarily arrested and detained on two occasions, first in 1988 and then in 1995”¹⁷. The DRC has the right to remain silent on this episode. But this approach cannot obscure the fact that Mr. Diallo’s arrest and incarceration in 1988 were completely unlawful and give rise to the DRC’s international responsibility (§1).

1.7 Essentially, the DRC confines itself to dealing with the period 1995-1996 and maintaining that there were legitimate grounds for arresting and imprisoning Mr. Diallo, and that the arrests and detentions were carried out within the terms of the law, did not involve any mistreatment and did not amount to any violation of the Vienna Convention on Consular Relations. None of this is true. The DRC’s allegations on the subject of the events in 1995 and 1996 are unfounded and the product of sheer conjecture (§2). As for the facts establishing the elements of the violation of the 1963 Vienna Convention, they are unquestionable (§3).

¹⁶CMC, p. 8, para. 1.01.

¹⁷*Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007, p. 582*

§1. The arrest and detention in 1988-1989 were unlawful

1.8 Mr. Diallo's arrest and detention are established facts (A). The DRC's violation at that time of many of its obligations leaves no room for doubt as to the wrongfulness of the arrest and detention (B).

7

A. Mr. Diallo's arrest and detention

1.9 The sole motive for Mr. Diallo's imprisonment in January 1988 lay in the fact that the Zairean State was greatly in debt to his company Africom-Zaire. To escape having to pay those debts, the governing authorities chose to accuse their creditor of fraud and to have its *gérant* jailed. That was the sum total of the "listing paper affair", which Guinea described in its observations¹⁸ and oral argument¹⁹ on the preliminary objections and which merits further close consideration.

1.10. In the 1980's Africom-Zaire, an import-export company, grew to be the regular supplier to the Zairean civil service of various items, including listing paper. Though fully satisfied with the company's services, the Zairean authorities were remiss in paying for them. A number of payments, some of which had been delinquent for nearly five years, were authorized on 13 November 1987 by the State Commissioner for Finance, who signed five bills of exchange totalling 178,700,000 zaires²⁰ to settle debts dating from 1983, 1985 and 1986²¹.

1.11 Actual payment of the amounts owed Africom-Zaire was to be made by debit to the Treasury general account, to be effected by the Governor of the Bank of Zaire after having been duly requested, by letter of 22 December 1987²², to do so by the State Commissioner for Finance. But the First State Commissioner sent a letter on 14 January 1988 to his Commissioner for Finance instructing him immediately to halt payment on the bills of exchange payable to Africom-Zaire. The primary reason for this decision was that:

"there are substantial commitments that we must meet in the immediate future.

8

I need mention only the local elections, expenditure on which is estimated to be over half a billion zaires, and the Summit Conference of the ECCAS, not forgetting transfers to our Embassies abroad, which are nearly two months late."²³

1.12 The State Commissioner did not stop at blocking the payments. In the days following his stop-payment order, he orchestrated an intense media campaign questioning whether these debts were bona fide and asserting that Mr. Diallo, acting on behalf of his company, had committed fraud. The fact that the executive controlled all centres of power, including the press, radio and

¹⁸OG, pp. 15-18, paras. 1.35-1.44.

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

²⁰The exchange rate in 1988 was 187 zaires for one United States dollar. The total debt acknowledged by the Zairean State was therefore US\$955,614 in 1988. On the subject of the exchange rate for Zaire's currency in 1988, see Reply of Guinea (RG), Ann. 3.

²¹OG, p. 16, para. 1.38.

²²MG, Ann. 51.

²³MG, Ann. 53.

television²⁴, at the time made it that much easier to carry out the smear campaign. A letter from Mr. Kouyate, Counsellor at the Guinean Embassy, makes clear just how fast and intense the media campaign was:

“Mr. Diallo Amadou Sadio, commonly known as ‘Diallo Cravate’, has been accused of defrauding the State of Zaire of a sum of 170,700,000 zaires for the benefit of Africom-Zaire, a company of which Mr. Diallo is the CEO.

This charge was discussed at length in an extended radio and television broadcast on 20 January 1988 and was also front-page news in all newspapers published in the Zairean capital.

I am enclosing an excerpt from the article published in *AZAP (Agence Zaïre Presse)* in its issue No. 2300 of 22 January 1988 concerning this serious situation.”²⁵

1.13 These accusations, aimed at preventing payment of Africom-Zaire’s invoices, formed the basis for Mr. Diallo’s arrest and his imprisonment, without trial, for a year. He was arrested on 25 January 1988 by three individuals, including one police officer. He was immediately brought before the Kinshasa Public Prosecution Department and was locked up there for two days without being allowed any contact or given any food; on 27 January 1988 he was placed in detention in Makala prison²⁶.

9

1.14 Six months after his arrest Mr. Diallo was still in custody, as shown by an official letter dated 4 July 1988 signed by Mr. Sambwa Pida Nbagui, Zaire’s First State Commissioner, and sent to the President of the Judicial Council of the Republic of Zaire:

“Sir,

By letter No. CAB/SGA/MPR/051/EL/88 of 1 April 1988, of which you received a copy, the Deputy First Secretary General of the MPR presented me with the file relating to Mr. Diallo Amadou, who is at present in detention.

As the case is currently being investigated by the Judicial Council, I should be grateful if you would examine the file in the light of the evidence furnished by the Deputy First Secretary General.

I wish to make clear that the order given by my predecessor to bring Mr. Diallo before a court cannot be interpreted as a directive or as guidance to the Judicial Council on how it should deal with the file.”²⁷

²⁴At the time the press agency Zaire Presse was supervised by the executive, as was public television. According to the publication *Plaquette du Ministère de l’Information et de la Presse, Vingt ans du MPR, réalisation et Perspectives, radio, télévision, presse écrite*, Kinshasa, 1987, p. 4, the media policy of the Zairean Governments was to use them as a propaganda tool and it centred on “the way information was to be used, on the content of the information and the goals to be achieved” (quoted by Kasongo-Mwema Y’Ambayamba, *Enjeux publics de la télévision en République démocratique du Congo (1990-2005)*, L’Harmattan, 2007, p. 31. This is why “the opposition was constantly protesting against the State’s stranglehold on the official media (radio, television, press agency)”, *ibid.*, p. 31. On the subject of the authorities’ control over the media, see also G. Tshionza Mata T, *Les médias au Zaïre: S’aligner, ou, se libérer*, L’Harmattan, 1996.

²⁵OG, Ann. 14.

²⁶RG, Ann. 1, Answer to Question 7; see also OG, Ann. 14.

²⁷OG, Ann. 15.

1.15 Aside from confirming that Mr. Diallo was in detention in July 1988, this revealing letter shows that the *order* to bring Mr. Diallo before a court had been given directly by the First State Commissioner to the President of the Judicial Council; thus, in an example of the most complete commingling of powers, the head of the executive branch, the source of the accusations made against Mr. Diallo six months earlier, alone was the force behind and gave the order for Mr. Diallo's arrests and incarcerations. The successor of that First State Commissioner might very well try to re-write history by offering a new interpretation but, in informing the President of the Judicial Council that the *order* given six months previously by his predecessor "cannot be interpreted as a directive or as guidance to the Judicial Council on how it should deal with the file", the First State Commissioner implicitly but necessarily admitted that the order as initially given had indeed been an act of interference in judicial matters and that the judicial authorities had so understood it and carried it out over six months²⁸.

10

1.16 Mr. Diallo was still in detention in August 1988 when Mr. Abdoulaye Sylla assumed his post as the Republic of Guinea's ambassador in Kinshasa²⁹. Guinea's national was not to be released until 3 January 1989 — nearly a year after having first set foot in Makala prison — thanks to a Presidential pardon granted after intervention by Guinea's ambassador³⁰. Following this pardon, the *Procureur Général* at the Prosecutor's Office in Kinshasa closed the case on 28 January 198[9] for "inexpediency of prosecution"³¹.

B. The wrongfulness of Mr. Diallo's arrest and detention

1.17 Mr. Diallo's arrest and detention in 1988-1989 are comparable to those described by the Human Rights Committee in 1983 in the case *Luyeye Magana ex-Philibert v. Zaire*:

"Luyeye Magana ex-Philibert was arrested on 24 March 1977 when three agents of the *Centre National de Documentation* furnished with a search warrant, came to his house to carry out a search for no apparent reason. . . . His detention continued until 9 January 1978 when he was released following an amnesty pronounced by the President of the Republic, without ever having been interrogated or given any document relating to the detention, though a decree of 22 April 1961 (*l'arrêté ministériel* No. 05/22) provided that the agents of the *Sûreté Nationale* can detain people for inquiry for five days only, after which they must be served with an internment order."³²

The Human Rights Committee concluded in that case that Zaire had violated the Covenant on Civil and Political Rights, specifically: Article 9 (1), owing to the arbitrary arrest; Article 9 (2), owing to the failure to inform the victim of the reasons for his arrest and of any charges against him; and Article 9 (3) and (4), because the complainant had not been brought before a judge and no court had decided within a reasonable time on the lawfulness of his detention. The same findings are inescapable in the *Diallo* case.

1.18. Article 9 of the Covenant on Civil and Political Rights states:

²⁸See also para. 1.24, below.

²⁹RG, Ann. 2.

³⁰RG, Ann. 2.

³¹OG, Ann. 16.

³²HRC, No. 90/1981, *Luyeye Magana ex-Philibert v. Zaire*, 21 July 1983.

“1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”

11

The basic point which follows from this first paragraph is that arrest and detention must not be “arbitrary” lest they be wrongful under international law. Clearly, “arbitrary” must not be understood to mean “against the law” but interpreted more broadly to mean inappropriate, unjust, unpredictable and inconsistent with legality³³. More generally, arbitrariness must be understood as covering “unreasonable action”³⁴. Otherwise put:

“Cases of deprivation of liberty provided for by law must not be manifestly disproportional in view of the circumstances of the case.”³⁵

1.19 It is also worthwhile to consider the efforts of the Working Group on Arbitrary Detention, which was established by the Commission on Human Rights in its resolution 1991/42 and whose mandate was confirmed in General Assembly Resolution 60/251 and decision 1/102 of the Human Rights Council. According to the Working Group, deprivation of liberty is to be regarded as arbitrary “[w]hen it manifestly cannot be justified on any legal basis (such as continued detention after the sentence has been served or despite an applicable amnesty act)”³⁶.

12

1.20 When these criteria are applied to Mr. Diallo’s arrest and detention in 1988-1989, it can be seen that these were arbitrary. They were attributable to the will of a single man, Zaire’s First State Commissioner, the Head of Government, and carried out for the sole purpose of preventing payment of debts owed to Africom-Zaire; there was never any legal basis for them. Clearly, the serious accusations of fraud made against Mr. Diallo through the press were nothing but a fabrication intended to serve as the pretext for his imprisonment. Moreover, if the Zairean State had really had evidence of fraud in its possession, as claimed by its First State Commissioner, there would necessarily have been judicial follow-up of a case of such gravity, initially in the form of an investigation to ascertain the facts with a view to determining whether there was a basis for prosecution. That was not the case because Mr. Diallo was released after a year in detention without any further judicial proceedings or investigation. Given this, the decision to close the case for “inexpediency of prosecution” shows the awkward position the authorities were in and was clearly aimed at allowing doubt to subsist as to the accusations against Mr. Diallo, so as to justify his lengthy detention after the fact. The detention was all the more pointless since, as the Respondent has consistently maintained: “The Democratic Republic of the Congo has never denied owing”³⁷ the debts in connection with which Mr. Diallo was accused of fraud. But, if the debts have *never* been denied (on the contrary, they have been expressly acknowledged by the Congolese State), it necessarily follows that Mr. Diallo was *never* really suspected of fraud and that the Congolese authorities had no intention of charging him with any lesser or greater criminal offense. The detention clearly served another purpose and, by the same token, the other safeguards guaranteed by international law to all detainees were not respected.

³³HRC, No. 458/1991, *Mukong v. Cameroon*, 21 July 1994, para. 9.8; see also *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment, I.C.J. Reports 1989, p. 76, para. 128; ICSID, *Azurix Corp. v. Argentina*, ARB/01/12, Award of 14 July 2006, para. 393 (available at <http://ita.law.uvic.ca/>); *LG&E Energy Corp. v. Argentina*, ARB/02/1, Award of 3 Oct. 2006, para. 157 (available at <http://ita.law.uvic.ca/>).

³⁴HRC, No. 794/1998, *Jalloh v. The Netherlands*, 26 March 2002, A/57/40, Vol. II, p. 132, para. 8.2.

³⁵M. Nowak, *United Nations Covenant on Civil and Political Rights*, CCPR Commentary, Nijhoff, The Hague, 2005, p. 225, and bibliography in footnote 86.

³⁶United Nations General Assembly document A/HRC/7/4/Add.1, 16 January 2008, p. 3, Opinion No. 32/2006 (Qatar), communication of 10 March 2006, concerning Mr. Amar Ali Ahmed Al Kurdi.

³⁷CR 2006/50, p. 19, para. 15.

1.21 Paragraph 1 of Article 9 of the Covenant was violated, but so in fact was paragraph 2, which provides:

“Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.”

1.22 The resulting obligation is obviously not merely one of form: not only must the individual in question be informed at the time of arrest, but the information given must also be sufficiently specific³⁸ that he knows exactly what the arrest is about. Mr. Diallo’s arrest was a clear violation of this provision, since the authorities never informed the Guinean national of the acts of which he stood accused. And, while he might have been able to guess which authority was behind his detention from vague references to the accusations made against him via the press, he was never specifically informed either of the purported acts constituting the alleged offence or of the provisions under which the accusation was brought³⁹.

1.23 The Congolese authorities also breached the obligations arising under the first sentence of Article 9, paragraph 3, of the Covenant:

13

“Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.”

That a detained individual must be brought promptly before a judge or other officer authorized by law to exercise judicial power means that:

“such a judicial officer must be independent of the executive, personally hear the person concerned and be empowered to direct pre-trial detention or to release the person arrested”⁴⁰.

1.24 Mr. Diallo was indeed brought to the office of the Judicial Inspector, where he was told by the Inspector that his arrest was related to the First State Commissioner’s press release. Mr. Diallo then “produced documentary evidence” but to no avail, as, in his words, “the judicial officials in question were unable to release me because they were under strict instructions to detain me until further notice”⁴¹. The officials’ attitude clearly had to do with the First State Commissioner’s famous *order* to bring Mr. Diallo before a court, which is referred to above⁴², and, by the way, confirms that they had understood that order as an act of intervention by the executive in the workings of justice. This indisputably shows that the officials before whom Mr. Diallo was brought were neither independent of the executive nor empowered to release him. The first obligation under Article 9 (3) of the Covenant was therefore clearly breached.

1.25 But the second obligation laid down by this provision was also breached. The second sentence of Article 9 (3) states:

³⁸HRC No. °43/1979, *Adolfo Drescher Cadas v. Uruguay*, 21 July 1983, paras. 13.2 and 14.

³⁹RG, Ann. 1, Answer to Question 3.

⁴⁰M. Nowak, *op. cit.*, p. 232.

⁴¹RG, Ann. 1, Answer to Question 8.

⁴²See paras. 1.14-1.15, above.

“It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.”

And, according to the interpretation which should be given this sentence:

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“pretrial detention should be the exception and . . . bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the State party . . . continued pretrial detention following legal arrest must not only be lawful, but also reasonable in all respects”⁴³.

1.26 But in the present case Mr. Diallo was neither tried nor promptly released and there was no justification for a one-year period in detention. First, there was absolutely no judicial reason to place Mr. Diallo in detention. Second, there was nothing complicated about the case, because quite simply there was no case, and, what is more, the documents in the record show that the only reason for continuing to hold Mr. Diallo was that the executive had so decided “until further notice” and the judicial authorities therefore felt they had no choice but to keep him in prison. Finally, no risk could possibly have arisen from Mr. Diallo’s immediate release, since there was absolutely nothing that could be held against him anyhow, as the Respondent consistently recognizes by its unqualified acknowledgement of the debts which prompted Mr. Diallo’s arrest⁴⁴. Given this, it is obvious that there is nothing in this case to justify the amount of time taken by the authorities before they released Mr. Diallo.

1.27 Nor were the other obligations under Article 9 of the Covenant on Civil and Political Rights fulfilled. Pursuant to Article 9 (4) of the Covenant: “Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful”. Mr. Diallo was not given the opportunity to take any proceedings to obtain a ruling on the lawfulness of his detention. Finally, Article 9 (5) states: “Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation”; here as well, it is a fact that Mr. Diallo has received no compensation for his unlawful arrest and detention.

1.28 Consideration of the listing-paper matter, which the DRC chose to refrain from addressing in its Counter-Memorial, therefore leads to the conclusion that the events in 1988-1989 not only are fully proved but also plainly represent blatant violations by the Respondent of its international obligations. This is also true of the events which were to occur several years later, in 1995-1996.

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§2. The arrests and detentions in 1995-1996 were unlawful

1.29 The DRC admits that Mr. Diallo was arrested and detained more than once in late 1995 and early 1996⁴⁵, but that is as far as the Parties agree. They dispute three crucial points: the number and duration of the periods in detention (A), the motives for the detentions (B), and their lawfulness (C).

⁴³HRC, No.1085/2002, Algeria, 16 May 2006, CCPR/C/86/D/1085/2002, para. 8.3.

⁴⁴See, *inter alia*, CR 2006/50, p. 19, para. 15.

⁴⁵CMC, pp. 11-12, paras. 1.09-1.11; see also CR 2006/50, pp. 39-40, paras. 89-92.

A. The duration of the periods in detention

1.30 Mr. Diallo was detained twice, first for 66 days and then for two weeks. This can be ascertained from the record⁴⁶. In an effort to show that the 8-day statutory limit on detention imposed by the Legislative Order of 12 September 1983 was never exceeded, the DRC offers an account in which there were three periods of detention: one for 48 hours between 5 and 7 November 1995, the second for less than eight days in early January 1996⁴⁷ and the third for an unspecified duration of at least six days in late January 1996⁴⁸. It should be noted that, to take the Respondent's word for it, the total length of time during which Mr. Diallo was held in detention before his expulsion was:

- 48 hours in November;
- a number of days, which we can assume to have been eight⁴⁹, at the beginning of 1996;
- at least from 25 January to 31 January⁵⁰, or six days;

which comes to a total of 16 days.

1.31 Thus, the first period of detention conveniently lasted only 48 hours, claims the Respondent, which writes: "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."⁵¹ The only evidence offered to back up this assertion is the committal note dated 5 November, stating: "Mr. Diallo is to be held at [illegible, but 'the duty office' would be a reasonable guess] until his deportation from Zaire".⁵² Obviously, while this document confirms that Mr. Diallo was taken in and imprisoned on 5 November 1995, a point which is common ground between the two Parties⁵³, it most certainly does not establish that he was released two days later.

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1.32 This is moreover strictly false. The fact is that Mr. Diallo was not to be released until 10 January 1996, as shown by the release document bearing that date which is included in the annexes to Guinea's Memorial⁵⁴. This is also shown by Mr. Diallo's statement annexed to the present Reply⁵⁵. Furthermore, in a release dated 13 December 1995 published in the newspaper *Le Phare*⁵⁶, the association "Avocats sans Frontières" confirmed that Mr. Diallo was still in detention in mid-December, stating that it

⁴⁶MG, pp. 29-30, paras. 2.63-2.64 and pp. 49-53, paras. 3.29-3.32.

⁴⁷CMC, p. 12, para. 1.11.

⁴⁸CMC, p. 16, para. 1.21.

⁴⁹See para. 1.37, below.

⁵⁰See para. 1.39, below.

⁵¹CMC, p. 11, para. 1.10.

⁵²CMC, Ann. 7, and OG, Ann. 27.

⁵³This is shown by the Counter-Memorial. It should be noted however that the DRC maintained in its Preliminary Objections that: "in December 1995, Mr. Diallo was arrested and detained for the first time", POC, p. 41, para. 1.56.

⁵⁴MG, Ann. 194.

⁵⁵RG, Ann. 1.

⁵⁶MG, Ann. 191.

“has just discovered that Mr. Diallo Amadou Sadio, a Guinean businessman and investor, who settled in Zaire 31 years ago, has been imprisoned since 5 November 1995 in the Immigration Department’s lock-up in Place Kin-Mazière on [a] false ground . . .”⁵⁷.

1.33 The Respondent denies the probative value of these concurring pieces of evidence, limiting itself to expressing surprise that on 30 November, when Mr. Diallo was supposed to be in prison, he personally signed a number of letters which were subsequently sent to their addressees, and finding it odd that the letters refer only to the payments claimed by Africontainers from various companies and let pass the opportunity to raise any protest against Mr. Diallo’s detention⁵⁸.

17 1.34 The Respondent’s surprise is the product of a three-step reasoning process: (i) individuals held in detention in Zaire in the mid-1990’s were prevented from having any contact with the outside world; hence (ii) the letters of 30 November could only have been signed by someone at liberty; therefore (iii) because Mr. Diallo signed them, he could not have been in detention on 30 November. Seemingly sensible, the reasoning is in fact specious, for its underlying premise is completely wrong: at the time in Zaire, contacts between prisoners and people outside were frequent, proper and even officially provided for in some ways, since the authorities typically relied on such contacts to keep the prisoners fed. “As a rule, the prisoners are fed by non-governmental organizations, church associations and their own families”, in the words of a report on the situation of human rights in Zaire dated 19 December 1994⁵⁹. As a matter of fact, during Mr. Diallo’s whole time in detention it was thanks exclusively to help provided by his family that he was able to eat⁶⁰. And it was also because he had contact with those outside the prison that he was able to give instructions to write the 30 November letters and able to sign them.

1.35 As for the comment that it was odd that Mr. Diallo should fail to seize upon these letters as an opportunity to protest against his incarceration, the fact is that employing them for that purpose would have been inconceivable. That is because the aim of these letters was absolutely not to challenge the public authorities; on the contrary, they were addressed to those authorities with a view to gaining their support. It would therefore have been out of place to use them to protest against his incarceration; in addition, it would have been reckless directly to challenge the very authorities who were holding him arbitrarily and without any prospect of release or trial. Furthermore, it was plainly unnecessary to do so, as other channels were available to alert the public: on 13 December “Avocats sans Frontières” requested an audience with the Prime Minister to protest against the Guinean national’s imprisonment⁶¹; and on 21 December Guinea’s ambassador in Kinshasa reported to his superiors on the situation⁶².

1.36 What the DRC alleges to have been the second period of incarceration falls within the first period of detention which has just been established. The DRC’s contention is a complete fabrication. The DRC is forced to resort to it because, after having concocted Mr. Diallo’s release

⁵⁷See also the 13 December 1995 letter signed by the Chairman of “Avocats sans Frontières” requesting an audience with the Prime Minister, MG, Ann. 190; see as well the newspaper Business and News, MG, Ann. 193.

⁵⁸CMC, p. 13, para. 1.13, and p. 18, para. 1.26. See also CR 2006/50, p. 40, paras. 91-92, and POC, pp. 41-42, para. 1.56.

⁵⁹Commission on Human Rights, Fifty-first session, doc. E/CN.4/1995/67, para. 173.

⁶⁰RG, Ann. 1.

⁶¹MG, Ann. 190.

⁶²MG, Ann. 192, and CMC, Ann. 11.

on 7 November, it has to be able to show that he was returned to detention; otherwise, it would be unable to explain the point of the release document dated 10 January 1996.

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1.37 It therefore comes as no surprise that the Respondent's argument in this respect is very vague and that the Counter-Memorial does not even give the date of this made-up arrest. It refers to 30 November 1995, when Mr. Diallo signed a number of letters, and then states: "It was under these circumstances that Mr. Diallo was rearrested with a view to his expulsion from the Congo."⁶³ One might however guess that the Respondent would place the date of incarceration at 2 January at the earliest, since, according to it:

"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."⁶⁴

1.38. Besides being very nebulous, these explanations are utterly baseless. First, there is nothing to indicate that Mr. Diallo enjoyed freedom of movement before 2 January; nor is there any indication that he was taken in at or around that date. Had he been, the DRC would have produced a committal note, but there is nothing of the sort in its documents. As for the only release document produced, dated 10 January, it states that Mr. Diallo was released "for enquiries"⁶⁵; and that definitely does not support the DRC's account, in which Mr. Diallo was released owing to the alleged inability "to find an aircraft leaving for Conakry".

1.39 Mr. Diallo's second (third, according to the Respondent) incarceration, after 10 January 1996, also began at an unspecified date, as the DRC recounts it in its Counter-Memorial. It merely gives two clues: the first being reference to "several days" after 10 January⁶⁶ and the second the DRC's statement that on 25 January Mr. Diallo was "still in detention in Kinshasa six days before being expelled"⁶⁷.

1.40. In fact, just a few days after being released on 10 January by order of President Mobutu⁶⁸, he was imprisoned again, on 17 January⁶⁹. He was again to be deprived of his freedom, this time for 14 days, before his deportation from the country.

19

B. The motive for the arrests and detentions

1.41. The sole reason for Mr. Diallo's arrest on 5 November 1995 and his subsequent periods in detention emerges very clearly from the chronology of events in 1995.

— On 3 July 1995 the Kinshasa *Tribunal de grande instance* upheld the claims of one of Mr. Diallo's companies, Africontainers, in its dispute with Zaire Shell and ordered the latter to

⁶³CMC, p. 12, para. 1.11.

⁶⁴CMC, p. 12, para. 1.11.

⁶⁵MG, Ann. 194.

⁶⁶CMC, p. 12, para. 1.11.

⁶⁷CMC, p. 16, para. 1.21.

⁶⁸On this subject see the witness statement by Guinea's Ambassador in Kinshasa at the time in question, RG, Ann. 2, p. 3. It should be noted that the DRC does not deny that these events occurred (CMC, p. 20, para. 1.33).

⁶⁹RG, Ann. 1, p. 7, Answer to Question 22. See also MG, p. 30, paras. 2.63-2.64.

pay US\$13,106,704 in principal, and US\$50,000 in damages⁷⁰. Provisional enforcement of the decision was also ordered in that judgment, but only in respect of the order to pay US\$13,106,704 in principal⁷¹.

- By petition of 24 July 1995, Zaire Shell sought a stay of execution of the judgment. The Kinshasa Gombe Court of Appeal held a hearing on 26 July on the question⁷² and on 24 August 1995 rejected the petition as being without merit⁷³.
- On 29 August, Zaire Shell filed a further petition for a stay of execution of the judgment⁷⁴. The same day, and without even awaiting the decision by the Court of Appeal, to which it was again turning, Zaire Shell sent a letter to the Minister of Justice asking him to take a decision to “save the property” of the company, specifically in the face of the court decision handed down in favour of Africontainers⁷⁵.
- On 13 September, the First President of the Kinshasa Gombe Court of Appeal reminded the registrar that the judgment of 13 July remained fully enforceable pending the second decision by the Court of Appeal on the second petition for a stay of execution of that judgment⁷⁶. But on the same day execution of the judgment was stayed by direct order of the Vice-Minister of Justice and Garde des Sceaux, that order having been given over Zaire Shell’s “telecel”, i.e., its cellular telephone, as reported by the bailiff who was then in the process of seizing property belonging to Zaire Shell⁷⁷.
- Yet on 28 September the Minister of Justice, by properly signed letter, asked the First President of the Court of Appeal to make the necessary arrangements to execute the decision; the Minister was of the view that, as it turned out, there had been no “manifest error of judgment”⁷⁸;
- on 6 October⁷⁹ and then again on 9 October a bailiff levied attachments, in particular on Zaire-Shell’s accounts and on office equipment. Africontainers was about to recover the rights which the trial court had upheld⁸⁰;
- but on 13 October the First President of the Kinshasa Gombe Court of Appeal wrote to the Minister of Justice, stating that he had “the honour to confirm [to him] that, pursuant to [his] oral instructions received this morning, the attachments of the property belonging to Zaire Shell had immediately been released in the case between it and Africontainers . . .”⁸¹. A report by a bailiff dated the same day confirms that, “by order of [his] superiors”, he had “released the

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⁷⁰MG, Ann. 153.

⁷¹*Ibid.*

⁷²POC, Ann. 65, pp. 4-5.

⁷³*Ibid.*, p.6.

⁷⁴POC, Ann. 66.

⁷⁵MG, Ann. 166.

⁷⁶MG, Ann. 170.

⁷⁷MG, Ann. 171.

⁷⁸MG, Ann. 177.

⁷⁹MG, Ann. 179.

⁸⁰OG, Ann. 26.

⁸¹OG, Ann. 26, p. 194.

attachments and returned the property which had been seized by [another] bailiff . . . and [had] unblocked all the accounts in the various garnishee banks”⁸²;

- on 31 October 1995, a few days later, the First State Commissioner, Kengo Wa Dondo, put an end once and for all to the litigation by signing a decree ordering Mr. Diallo’s deportation⁸³;
- on 5 November 1995, Mr. Diallo was taken into custody and remained in detention until 10 January. He was to be imprisoned again on 17 January before being “refused entry” [*“refoulé”*] on 31 January.

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C. The unlawfulness of the arrests and detentions

1.42 This statement of facts could be left to speak for itself. It is a glaring illustration of the various unlawful acts of interference in the course of justice on the part of the Zairean authorities⁸⁴, characteristic moreover of a denial of justice⁸⁵. Most importantly, it clearly shows that the one and only motive for Mr. Diallo’s arrests, and then his deportation, was to prevent him from pursuing enforcement of a court decision in favour of Africontainers. The incident of Mr. Diallo’s brief return to freedom on 10 January confirms this. As described by Guinea’s ambassador to [Kinshasa] in his statement annexed to the present Reply, Mr. Diallo’s release at that time was concomitant with an action taken by the Minister of Justice, who had an announcement broadcast on radio and television saying that the debts owed to Mr. Diallo’s companies were due and should be paid to them⁸⁶. This was all it took for Mr. Diallo to find himself back in prison before being removed from the country.

1.43 The entire process was patently arbitrary, but the DRC seeks refuge in two arguments in support of its position: first, the procedure was legally valid as it was carried out in implementation of a deportation decree issued against Mr. Diallo on 31 October 1995; and, second, the detention of Mr. Diallo at various times was in compliance with the requirements of the Legislative Order of 12 September 1983, as no single period was longer than eight days.

1.44 In respect of the alleged procedural legality of the process, the DRC asks the Court to accept the following reasoning:

- under the Legislative Order of 12 September 1983 relating to immigration control, the President of the Republic may, by reasoned order, decide to deport an alien;
- the Congolese Prime Minister issued Decree No. 0043 of 31 October 1995 ordering Mr. Diallo’s deportation;
- under the Legislative Order of 12 September 1983, the alien against whom deportation proceedings have been initiated may be placed in prison;

⁸²*Ibid.*, p. 193.

⁸³CMC, Ann. 5.

⁸⁴On this point see also MG, pp. 44-48, paras. 3.13-3.23.

⁸⁵On this point see also MG, pp. 48-50, paras. 3.24-3.26.

⁸⁶RG, Ann. 2.

— the incarceration of Mr. Diallo was therefore in compliance with the law⁸⁷.

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1.45 The illogic of this reasoning is obvious on its face: the Legislative Order of 1983 grants the authority to decide on deportation to the President of the Republic alone; the measure which the DRC relies on to establish the lawfulness of its actions is a deportation decree issued by the Prime Minister. This patently unlawful⁸⁸ decree, dated 31 October 1995, is incapable of providing a legal basis for Mr. Diallo's arrests, which were totally arbitrary and a violation of Article 9, paragraph 1, of the Covenant on Civil and Political Rights, providing that "[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law", and of Article 6 of the African Charter on Human and Peoples' Rights as well.

1.46 The DRC also claims that "Mr. Diallo's detention never exceeded the statutory period"⁸⁹, which, according to it, is capped at eight days under the Legislative Order of 12 September 1983. In fact, the Order is much stricter than the DRC says. Pursuant to Article 15:

"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 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."

It follows that, to be lawful, the detention of an alien subject to deportation proceedings must meet four cumulative requirements, none of which was satisfied in the present case:

— first, detention can be lawful only if the alien detained is "likely to evade implementation" of the decision to expel; however, nowhere in the present case — not in its Counter-Memorial, not in any document in the record — has the DRC maintained that Mr. Diallo on 5 November 1995, 2 January 1995 and 25 January 1996⁹⁰ was likely to evade Zairean authority. Moreover, the mere fact that, as recounted by the Respondent, he was apprehended three times in the space of a few weeks shows that there was no risk whatsoever of his fleeing: if Mr. Diallo had been one to evade decisions taken by the Zairean authorities, he would have gone into hiding after his first release and would have been even more careful after the second. But he did nothing of the sort and, what is more, the authorities never had the slightest trouble laying their hands on him whenever they wished;

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— secondly, the statutory period of detention is 48 hours. This means that it must normally end after 48 hours; thus, if the period of detention is to be extended in further 48-hour increments, then, at the very least, reasoned decisions to this effect must be adopted⁹¹. And there never were any in this case: as for the second and third periods of incarceration (as the DRC tells it), each of which exceeded 48 hours, the Respondent is unable to specify their exact dates, let alone produce the decisions extending the detention beyond the first 48 hours;

⁸⁷CMC, p. 17, paras. 1.24-1.26.

⁸⁸The unlawfulness of the Decree is demonstrated in greater detail below, paras. 1.92-1.95, 1.109-1.113.

⁸⁹CMC, p. 18, para. 1.26.

⁹⁰In the DRC's account, Mr. Diallo is treated as having been imprisoned on these dates.

⁹¹On this point, the DRC argues that the Legislative Order allows for the period to be "*prolongé* ['prolonged' or extended] by 48 hours at a time but the total duration may not exceed eight days" (CMC, p. 14, note 17; emphasis added), whereas, to be more precise, the Order states that the period may be *prorogé* ['prorogated' or extended] by 48 hours at a time.

- thirdly, detention cannot be extended beyond the first 48 hours, or afterwards, *except in cases of absolute necessity*. But the only reason to be inferred from the Counter-Memorial for holding Mr. Diallo for more than 48 hours at a time was the difficulty the Zairean authorities had in finding an “aircraft leaving for Conakry”⁹². But any such difficulty, assuming it to have been real, would undoubtedly show just how little preparation had gone into Mr. Diallo’s arrests and how hastily they had been carried out, but could not establish the existence of any “absolute necessity” to keep him in custody;
- fourthly, and lastly, assuming each of Mr. Diallo’s detentions to have been in accordance with the requirements of Article 15 of the Legislative Order of 1983, it would still be inescapable that, *taken together*, they nevertheless resulted in a total time in prison well in excess of eight days, having added up to 16 days in all. Plainly, the authorities cannot get round the eight-day limit by splitting the total time in detention in deportation proceedings into a number of separate periods — each, for example, of seven days.

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1.47 As demonstrated above, Mr. Diallo was incarcerated for 66 days the first time and two weeks the second; this indicates that he was kept in detention arbitrarily and in conditions contrary to Zairean law. But even if the DRC’s version of the facts is believed, the detentions which it admits to constitute arbitrary conduct in contravention of the requirements of Zairean law. This is a further violation of Article 9, paragraph 1, of the Covenant on Civil and Political Rights and Article 6 of the African Charter on Human and Peoples’ Rights.

1.48 Finally, it should be noted that Mr. Diallo’s arrests were also in violation of Article 9, paragraph 2, of the Covenant, quoted above⁹³, since Mr. Diallo was neither informed of the reasons for the arrests nor promptly informed of the charges against him; he was not even informed of the adoption of the 31 October 1995 decree for his deportation⁹⁴.

§3. Violation of Article 36, paragraph 1 (b), of the 1963 Vienna Convention

1.49 At no time in either 1988-1989 or 1995-1996 was Mr. Diallo, a Guinean national, informed of his rights under Article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations⁹⁵. The DRC nevertheless claims not to have breached its obligations under this provision on the ground that “Guinea . . . 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”⁹⁶. The DRC further asserts that various documents demonstrate 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”⁹⁷.

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1.50 Guinea observes that the DRC betrays its interpretation of Article 36, paragraph 1 (b), of the Convention on Consular Relations in confining itself to the contention that it has not been proved that Mr. Diallo requested the Congolese authorities to inform Guinea’s consular officers,

⁹²CMC, p. 12, para. 1.11.

⁹³See para. 1.21, above.

⁹⁴On this point, see para. 1.112, below.

⁹⁵MG, pp. 43-44, paras. 3.11-3.12.

⁹⁶CMC, p. 15, para. 1.19.

⁹⁷CMC, p. 16, para. 1.22.

and in quoting part of Article 36, paragraph 1 (*b*), underscoring the words “if he” to stress that the impetus for any such request lies with the imprisoned alien: in the Respondent’s view, the only obligation it bore under that provision was to assent to any such request by Mr. Diallo when he was arrested, imprisoned or in detention⁹⁸. The DRC’s position must therefore be understood to be that it was proper, and in accordance with the DRC’s international obligations, for its officials to have failed to inform Mr. Diallo of the existence and nature of his rights, which failure is an uncontested fact. According to the Respondent, it was for Mr. Diallo, and for him alone, to assert his rights.

1.51 But the DRC should have read all three sentences in Article 36, paragraph 1 (*b*), of the 1963 Convention. As stated in the third sentence, the competent authorities of the receiving State:

“shall inform the person concerned without delay of his rights under this subparagraph”.

1.52 This third element cannot be ignored. In fact, in the *Avena and Other Mexican Nationals* Judgment the Court noted that:

“Article 36, paragraph 1 (*b*), contains three separate but interrelated elements: the right of the individual concerned to be informed without delay of his rights under Article 36, paragraph 1 (*b*); the right of the consular post to be notified without delay of the individual’s detention, if he so requests; and the obligation of the receiving State to forward without delay any communication addressed to the consular post by the detained person.”⁹⁹

The Court further pointed out:

“the clear duty to provide consular information under Article 36, paragraph 1 (*b*), does not invite assumptions as to what the arrested person might prefer, as a ground for not informing him. It rather gives the arrested person, once informed, the right to say he nonetheless does not wish his consular post to be notified.”¹⁰⁰

26 1.53 In the present case Zaire therefore bore an obligation under the 1963 Convention to “inform the person concerned without delay of his rights”¹⁰¹ at the time of his arrest in 1988, and his arrests in 1995 and 1996. This was not done, and it constitutes a further violation of Mr. Diallo’s rights.

SECTION 2

THE EXPULSION

1.54 The circumstances surrounding Mr. Diallo’s arrest, detention and deportation from Congolese territory, as previously recounted by Guinea, suffice to prove that his removal from the territory by the Congolese authorities on 31 January 1996 was patently arbitrary¹⁰². Newspapers

⁹⁸*Ibid.*

⁹⁹*Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004*, p. 43, para. 61.

¹⁰⁰*Ibid.*, p. 46, para. 76.

¹⁰¹*Ibid.*, p. 49, para. 87.

¹⁰²See Sec. 1, §2, above.

made no mistake about this at the time: they denounced the actions taken as arbitrary — and their criticism was all the more convincing in that they dared to accuse the authorities in power¹⁰³. It is a known fact that the organization “Avocats sans Frontières” took the same position, which it expressed to Zaire’s Prime Minister¹⁰⁴. And the newspaper *L’Ouragan* revealed in its 6 February 1996 edition that the ticket for the flight by which Mr. Diallo was deported had been purchased by Zaire-Shell, “showing to what extent that company pulls the strings in this scandalous affair”¹⁰⁵.

1.55 Aside from the fact that it was completely arbitrary, and therefore in violation of the minimum standard of protection owed to aliens, Mr. Diallo’s expulsion was a violation of international law from various angles and on various bases. To show this, the Republic of Guinea will revisit the subject of the limits placed on the power to expel by the various international rules applicable as between the Parties (§1) before weighing the circumstances of the deportation against those rules (§2). This will provide a response to the — rather slapdash — argument propounded by the Congo in its Counter-Memorial in an attempt to disprove that its international responsibility has been engaged¹⁰⁶.

27

§1. Limits placed on the power to expel by the rules of international law applicable as between the Parties

1.56 Well before the emergence of “international human rights law”, international law already significantly limited a State’s power to expel aliens from its territory¹⁰⁷. In 1892, the Institut de droit international thus found it appropriate in its *International Rules on the Admission and Expulsion of Aliens* to reiterate the settled principle that:

¹⁰³See MG, Anns. 191, 193 and 196.

¹⁰⁴See MG, Ann. 190.

¹⁰⁵MG, Ann. 196. As to Zaire Shell’s role in the actions taken by the Zairean State against Mr. Diallo, see Sec. 1, §2 B, para. 1.41, above.

¹⁰⁶See CMC, pp. 9-12, paras. 1.04-1.11; pp. 14-15, paras. 1.15-1.17; p. 17, paras. 1.24-1.25; and pp. 18-20, paras. 1.27-1.34.

¹⁰⁷As early as 1927, Charles De Boeck noted:

“A State which has recourse to the extreme measure of expulsion is acting not by virtue of full discretion conferred by sovereignty subject to no control, but pursuant to its incontrovertible right to preserve and protect itself; it removes from its territory an alien whose presence poses a threat to its internal or external security: The demands of international life, the arbitral decisions and the most up-to-date scholarly thinking have gradually led to the abandonment of the traditional notion that the option of expulsion is a discretionary power to be used as a State wishes and that the State enjoys unfettered freedom to determine the conditions under which that power is to be exercised, without the expelled alien or the State of his nationality in principle having any claim in that regard. On this point, international practice has moved faster than the scholars and it has been accepted *for nearly one hundred years and in increasingly clear terms* that the freedom to expel is not absolute, that it is subject to limits and the failure to observe those limits gives rise to diplomatic protection by the aliens’ national State and to the international responsibility of the expelling State.” [*Translation by the Registry.*] (“L’expulsion et les difficultés internationales qu’en soulève la pratique”, *Recueil des cours de l’Académie de droit international*, 1927-III, Vol. 18, p. 473; emphasis added.)

“Expulsion must never be ordered to serve a private interest, to prevent lawful competition or to check rightful claims or actions or applications duly brought before the courts or the competent authorities”¹⁰⁸ [Translation by the Registry],

as well as the following rule:

“the document in which expulsion is ordered must be served on the expellee. It must be reasoned in fact and in law”¹⁰⁹ [Translation by the Registry].

1.57 As observed by the Italian-Venezuelan Commission in 1903 in the *Boffolo* case, the fact is that in matters of expulsion (as elsewhere) there is “a broad difference between the right to exercise a power and the rightful exercise of that power”¹¹⁰.

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1.58 The limits thus placed on the power to expel, including in particular the prohibition on its use for improper purposes, were imposed very early on, given the particular harshness of the act of expulsion. Expulsion results in each instance in the savage cutting of ties of various kinds established by the alien with the territory of the host State and it is moreover liable to impair the enjoyment of other individual rights guaranteed by international law, be it customary or conventional¹¹¹. All of this has contributed to the ever more stringent requirement under international law that the guarantees surrounding the expulsion process actually be respected¹¹².

1.59 In the present case, the scope of the protection owed to Mr. Diallo obviously included the protection afforded pursuant to the minimum standard of treatment of aliens¹¹³. But beyond that it also included the protection guaranteed by the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples’ Rights, to which the Congo and Guinea were parties at the time of Mr. Diallo’s deportation. These place significant limits on the exercise of the power to expel, by subjecting it to compliance with a number of international rules (A) and by calling for compliance with the provisions of domestic law (B).

¹⁰⁸Article 14 of the *Rules*, adopted at the Geneva session on 9 September 1892 (www.idi-ii.org). See an equally clear statement in the *Paquet Case*, Belgian-Venezuelan Mixed Claims Commission, 1903. *Reports of International Arbitral Awards*, Vol. IX, p. 325:

“the right to expel foreigners from or prohibit their entry into the national territory is generally recognized; . . . each State reserves to itself the exercise of this right with respect to the person of a foreigner if it considers him dangerous to public order, or for considerations of a high political character, but . . . its application can not be invoked except to that end” (emphasis added).

¹⁰⁹*Ibid.*, Art. 30.

¹¹⁰*Reports of International Arbitral Awards*, Vol. X, pp. 532-534.

¹¹¹It must be recalled that an alien who has been allowed to enter the territory of a State is entitled in the host State for as long as he resides there to the protection afforded by the rules protecting the human person (see, *inter alia*, the reiteration of this point in *General Comment No. 15* of the Human Rights Committee, adopted on 11 April 1986, paras. 6 *et seq.*).

¹¹²On the subject of the jurisprudence of the African Commission on Human and Peoples’ Rights, F. Ouguergouz states:

“[t]he Commission considered that ‘[b]y expelling the two victims from Zambia, the State has violated their right to enjoyment of all the rights enshrined in the African Charter’, thereby recognizing that expulsion is a radical measure which can jeopardize the enjoyment of all the rights guaranteed to an individual under the African Charter; whence the necessity to scrupulously ensure that the procedural guarantees which must accompany such a measure are complied with” (*The African Charter on Human and Peoples’ Rights*, Martinus Nijhoff Publishers, The Hague/London/New York, 2003, p. 132).

¹¹³See MG, pp. 39-41, paras. 3.2-3.5, and pp. 42-43, paras. 3.8-3.10.

A. Limits imposed by international law

1.60 Pursuant to Article 12, paragraph 4, of the African Charter:

“A non-national legally admitted in a territory of a State Party to the present Charter may only be expelled from it by virtue of a decision taken in accordance with the law.”

1.61 Article 13 of the Covenant is even more exacting:

“An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.”¹¹⁴

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1.62 These provisions indisputably apply in the present case, because: Mr. Diallo’s entry into Congolese territory was completely lawful; while there he held a “settlement visa of unspecified duration”¹¹⁵; and the Congolese authorities never contended (not at the time of the events, not in their written pleadings, not during the public hearings in 2006) that Mr. Diallo illegally resided in their territory. On the contrary, they themselves have made clear that his presence was lawful¹¹⁶.

1.63 These provisions apply *without qualification* in the present case, since the Democratic Republic of the Congo, unlike other parties to these Conventions who grasped how strict these obligations were, entered no reservation in respect of them.

1.64 These two provisions break down into a number of obligations which had already been clarified and fleshed out by international practice and jurisprudence at the time of adoption, or have been since.

1.65 First of all, the decision to expel must be “reached in accordance with law”, which means that the expelling State must comply with its own legislation, or at least apply the law in good faith and without abusing its authority¹¹⁷.

1.66 Next, the individual subject to expulsion must be, to quote the Covenant, “allowed to submit the reasons against his expulsion”, and must be afforded, to quote the African Commission on Human and Peoples’ Rights, “the possibility to plead [his] case before the competent national

¹¹⁴See also to the same effect Article 7 of the 13 December 1985 Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live (A/RES/40/144), quoted in MG, p. 42, para. 3.7.

¹¹⁵See MG, Ann. 7.

¹¹⁶See, most recently, CMC, pp. 18-19, para. 1.28.

¹¹⁷For a description of the applicable rules under Congolese domestic law, see B, below.

30 courts”¹¹⁸. If this right is to be effectively safeguarded, it is obviously essential that due notice of the decision to expel be given to the individual concerned before it is carried out¹¹⁹.

1.67 The subject of a decision to expel must “be allowed . . . to have his case reviewed by . . . the competent authority”. And the Human Rights Committee has specified in its General Comment No. 15 that, to this end, “[a]n alien must *be given full facilities* for pursuing his remedy against expulsion so that this right will *in all the circumstances of his case* be an *effective one*”¹²⁰.

1.68. As part of that remedy, the individual must be afforded the possibility of “be[ing] represented for the purpose”. The Human Rights Committee has taken the position that the right to legal assistance in the context of Article 13 of the Covenant requires, among other things, that “[t]he State party should provide information as to the stages of the application procedures at which legal assistance may be had, and whether the assistance is free of charge at all stages for those who cannot afford it”¹²¹.

1.69 These last three rights (those described above in paragraphs 12, 13 and 14), *and they alone*, are subject to the exception for “compelling reasons of national security” under the Covenant. Clearly however, this exception cannot be relied upon as a blank cheque: it is subject to judicial review and that scrutiny is particularly close given that the clause is not worded as a “self-judging” clause. In this connection Guinea will note that in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, the Court recently decided in respect of a provision which *did* take the form of a “self-judging” clause:

31 “while it is correct, as France claims, that the terms of Article 2 provide a State to which a request for assistance has been made with a very considerable discretion, this exercise of discretion is still subject to the obligation of good faith codified in Article 26 of the 1969 Vienna Convention on the Law of Treaties. . . . This requires it to be *shown* that the reasons for refusal to execute the letter rogatory *fell within those allowed for* in Article 2.”¹²²

¹¹⁸*Union Inter Africaine des Droits de l’Homme and Others v. Angola*, No. 159/96, 11 November 1997, para. 20. See also the *Chevreau* case, 9 June 1931; French original: Reports of International Arbitral Awards, Vol. II, p. 1131; [English translation: American Journal of International Law, Vol. 27 (1933), p. 169]: “as the evidence does not justify the statement that a hearing with the proper safeguards took place . . ., the Arbitrator finds that the deportation of M. Chevreau to Bagdad . . . is sufficient upon which to base a claim in international law” (see also p. 1137 [French original], p. 175 [English translation]).

¹¹⁹On the obligation to give notice of the expulsion decision, see Article 30 of the 1892 *Rules* formulated by the *Institut de droit international*, quoted in paragraph 1.56 above; see also African Commission on Human and Peoples’ Rights, *Amnesty International v. Zambia*, No. 212/98, 5 May 1999, end of paragraph 41: “To the extent that neither Banda nor Chinula were [*sic*] supplied with reasons for the action taken against them [deportation] means that the right to receive information was denied to them”.

¹²⁰Emphasis added. In the *Hammel v. Madagascar* case (Communication No. 155/83, 3 April 1987), for example, the Human Rights Committee decided against the respondent State because the expellee had not been “indicted nor brought before a magistrate on any charge” and because “[h]e was not afforded an opportunity to challenge the expulsion order prior to his expulsion”(para. 18.2).

¹²¹Concluding Observations of the Human Rights Committee: Denmark; 31 Oct. 2000, CCPR/CO/70/DNK, para. 17.

¹²²Judgment of 4 June 2008, para. 145; emphasis added. This is true *a fortiori* when, as is the case here, the clause is not a “self-judging” one: see the Judgment of 27 June 1986 in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits, Judgment, I.C.J. Reports 1986*, p. 116, para. 222.

1.70 When dealing with Article 13 of the Covenant, an international court must therefore ascertain whether there is a real threat to national security¹²³ and whether the measures taken to ward off that threat are necessary and proportionate¹²⁴. These determinations must be made taking into account that protection of national security “is aimed at protecting the nation as a whole from grave and heavy political or military threats”¹²⁵, which significantly limits the possibilities of actually invoking it¹²⁶. In any case, Article 13 covers solely “*compelling* reasons of national security”.

1.71 The expelling State must then state the reasons for the decision to expel and must do so in sufficiently specific terms; mere suspicions do not suffice. For example, the African Commission on Human and Peoples’ Rights has taken the view that “the suggestion that [the deportees] were ‘likely’ to be a danger was vague and not proved” (the reason given in that case was simply that the “presence [of these individuals] . . . endanger[ed] peace and good order in Zambia”)¹²⁷. In the absence of a sufficient reason, the expelling State must of course bear the consequences, as the Italian-Venezuelan Commission found in the *Boffolo Case*:

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“The country exercising the power must, when occasion demands, state the reason of such expulsion before an international tribunal, and an inefficient reason or none being advanced, accepts the consequences.”¹²⁸

¹²³For example, the Human Rights Committee refuses to uphold a claimed national security exception where it is raised in terms that are too general and the respondent State “has failed to specify the precise nature of the [claimed] threat” (see, for example, *Sohn v. Korea*, No. 518/1992, 3 Aug. 1995, para. 10.4).

¹²⁴See, *mutatis mutandis*, International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion*, I.C.J. Reports 2004, pp. 192-193, para. 136.

¹²⁵L. Hennebel, *La jurisprudence du Comité des droits de l’homme des Nations Unies*, Bruylant, Brussels, 2007, p. 72, note 193 [Translation by the Registry].

¹²⁶See The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, E/CN.4/1985/4, Ann., 28 Sep. 1984:

“29. National security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation, its territorial integrity or political independence against force or threat of force.

30. National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order.

31. National security cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exist adequate safeguards and effective remedies against abuse.”

¹²⁷*Amnesty International v. Zambia*, No. 212/98, 5 May 1999, paras. 5, 41 and 50. See also *Loubriel’s Case*, in which the United States deemed “motives of internal order”, “reasons of gravity” and “facts well known to the Government” to be too vague to justify Venezuela’s expulsion of a United States national (see G.H. Hackworth, *Digest of International Law*, Vol. III, pp. 699-700).

¹²⁸*Reports of International Arbitral Awards*, Vol. X, p. 537. In support of its statement the Commission quotes the award in the case of *Zerman v. Mexico* rendered by the American and Mexican Commission (*ibid.*, p. 534):

“The umpire is of opinion that, strictly speaking, the President of the Republic of Mexico had the right to expel a foreigner from its territory who might be considered dangerous, and that during war or disturbances it may be necessary to exercise this right even upon bare suspicion; but in the present instance there was no war, and reasons of safety could not be put forward as a ground for the expulsion of the claimant without charges preferred against him or trial; but if the Mexican Government had grounds for such expulsion it was at least *under the obligation of proving* charges before this Commission. Its mere assertion, however, or that of the United States consul, in a dispatch to his Government, that the claimant was employed by the imperialist authorities, does not appear to the umpire to be sufficient proof that he was so employed or sufficient ground for his expulsion.”

1.72 Among other things, this means that the burden of proof lies with the expelling State, not the national State of the expellee. The Italian-Venezuelan Commission clearly pointed out in the *Oliva Case*:

“The Venezuelan Commissioner finds that Mr. Oliva has not proved his innocence. It is not his place to prove this innocence. Every man is considered innocent until the proof of the contrary is produced. It was therefore the Venezuelan Government that should have proved that the claimant was guilty and this is just what it has not done.

When expulsion is resorted to in France or Italy the proofs are at hand. Mere suspicions may justify measures of surveillance, but never a measure so severe as that of forbidding the residence in a country of a man who has important interests therein.”¹²⁹

1.73 Finally, but this follows from the foregoing, there must be a valid ground for the expulsion¹³⁰. In all instances that ground must at least be one which can justify expulsion under the domestic law. If such a ground is lacking, it is self-evident that the tests of necessity and proportionality do not even come into play, because these presuppose that the expulsion is otherwise legally valid.

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B. The limits imposed by the domestic law of the Congo¹³¹

1.74 Since the applicable international rules refer to compliance with domestic law (in particular, by requiring that the decision to expel be reached “in accordance with law”), it is important for the sake of completeness to describe the limits which Congolese law placed on the power to expel at the time of the events. Legislative Order No. 83-033 of 12 September 1983 concerning immigration control¹³² (which is still in force) imposes a number of constraints in this regard.

1.75 First of all, Article 2 of the Legislative Order expressly provides that the Order applies “unless [otherwise provided by] any international agreements” by which the Democratic Republic of the Congo is bound. In other words, it recognizes the applicability under Congolese law of the safeguards provided by said agreements, including in those cases where the agreements are not formally incorporated into domestic law.

1.76 Further, the Legislative Order very clearly establishes different rules for decisions “to refuse entry” [*refoulement*] (covered by Article 13) and decisions “to expel” (governed by Articles 15 to 17), these two kinds of decisions applying to situations which are by definition

¹²⁹*Reports of International Arbitral Awards*, Vol. X, p. 607 (1903). See also CR 2006/53, p. 61, para. 21 (Forteau).

¹³⁰See *Lacoste v. Mexico* (Mexican Commission), Award of 4 September 1975, in John Bassett Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party*, Vol. IV, pp. 3347: “With regard to the expulsion of the claimant from the country, it must be remembered that, owing to the French invasion, the President of Mexico was invested with great and extraordinary powers . . . such powers ought not generally to be exercised for the expulsion of foreigners without *good cause shown* . . .” (emphasis added).

¹³¹The Republic of Guinea wishes to point out that, generally speaking, it has had great difficulty in unearthing Congolese law: that law is subject to frequent amendment and is difficult to find on the internet and in special-purpose European libraries. The Republic of Guinea’s available resources did not allow it the possibility of travelling to Kinshasa to gather the information.

¹³²POC, Ann. 73.

contrasting (a refusal of entry may occur when an individual “arrives at a frontier post in order to enter Zaire”, whereas expulsion takes place when an individual *already in* the national territory is removed¹³³). Since there can be no overlap between these two types of situation, which are subject to these two different procedures, it follows that there is no way that one procedure can be employed in lieu of the other¹³⁴.

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1.77 Next, an expulsion order [*ordonnance*] may be adopted only by the President of the Republic (Art. 15), after consultation with the National Immigration Board if the individual in question holds a residence permit (Art. 16).

1.78 The expulsion order must be “reasoned” (Art. 15) and must “mention the fact that the Board was consulted” (Art. 16).

1.79 Notification of the order must be given to the party in question and a copy must also be “sent to the National Immigration Board and to the Department for Foreign Affairs and International Co-operation” (Art. 17).

1.80 Under the Legislative Order, there is only one valid ground for expulsion: the fact that the alien, “by his presence or conduct, breaches or threatens to breach the peace or public order” (Art. 15).

1.81 Finally, an expelled alien’s residence permit is “automatically” revoked (Art. 9); his name is “automatically” placed on “a list of undesirables” (Art. 20); and he may not re-enter Congolese territory without subjecting himself to heavy criminal sanctions as well as removal (Art. 21).

1.82 In its third periodic report to the Human Rights Committee, submitted on 30 March 2005, the Respondent confirmed that these various elements were actually reflected in the content of its legislation on expulsion¹³⁵. It added:

“Article 2 of Ordinance [Order (*Ordonnance*)] No. 67-483 *bis* of [30] November 1967 on the consultation procedure of the aliens consultative committees provides that: ‘When proceedings are brought against an alien holding a category B residence card or a refugee, the Minist[er] of the Interior or his

¹³³This distinction, made in other domestic bodies of law as well, has been summed up as follows in the *Dictionnaire de droit international public*, edited by Jean Salmon (Bruylant, Brussels, 2001): expulsion is a “measure taken in exercise of the police power ordering an individual to leave the territory of the State where he is” (p. 488), while refusal of entry is, strictly speaking, an “act by which a State prevents an alien’s entry into the territory and sends him back to the country whence he arrived” (p. 956). In support of this, the *Dictionnaire* quotes (*id.*) the *Répertoire de droit international* by A. de Lapradelle and J.-P. Niboyet, Vol. VIII, p. 109: “Expulsion is distinguished from refusal of entry in that expulsion applies to an alien who has been allowed to enter a country and who has actually stayed there for some significant amount of time, while refusal of entry applies to an alien who is not allowed in and is considered undesirable when he attempts to cross the border.”

¹³⁴Congolese law interposes a third possibility between these two procedures: the procedure for “removal” [*renvoi*] (Art. 14). This concerns individuals who have illegally entered the Congo. It too is mutually exclusive of the other two procedures. Individuals subject to removal [*renvoi*] cannot be subject to the expulsion rules (which apply solely to individuals *legally in* the Congo) or to the refusal-of-entry rules (which apply only to individuals attempting to *enter* the Congo).

¹³⁵See CCPR/C/COD/2005/3, 3 May 2005, paras. 128-140.

representative, at the proposal of the Director of the Security Service or his deputy[,] shall immediately inform the Aliens Consultative Committee.”¹³⁶

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1.83 This reinforces the obligation of prior consultation with such Committee, which must be “immediately” informed at the time “when proceedings are brought”.

1.84 In addition, the 1967 Order provides specifically:

“The matter is referred to the Committee upon notification to its Chairman: . . . (2) of a certified copy of the draft expulsion order accompanied by the statement of grounds” (Art. 3);

“The Chairman shall convene a meeting of the Committee within 72 hours of receiving the notification referred to in the preceding article” and “Members shall be called to the meeting by a written notice stating the date and time of the meeting and the meeting agenda” (Art. 4);

“Committee proceedings shall not be public. The Committee may however invite the alien concerned to the meeting, as well as any person(s) who the Committee believes will be in a position to throw light upon the subject. The Director of the Security Service or his deputy may require the alien concerned to attend . . .” (Art. 7);

“The alien shall have the right to be assisted during the meeting or to be represented thereat by any person of his choosing” (Art. 8);

“The Committee shall deliberate in private. The Chairman shall submit the draft opinion(s) to a vote. The voting shall be by secret ballot. Decisions shall be adopted by absolute-majority vote” (Art. 11);

“The Chairman of the Committee shall draw up the report [*procès-verbal*] of the deliberation. The Committee’s duly reasoned opinion shall be set out therein. The report shall be countersigned by the other two members” (Art. 12);

“The Chairman of the Committee shall immediately transmit the summary record of the proceedings [*compte rendu*] and the report in a sealed envelope to the Minister of the Interior, who shall forward them to the President of the Republic if they concern an alien against whom expulsion proceedings have been commenced” (Art. 13)¹³⁷.

1.85 This last provision confirms that the President of the Republic has exclusive jurisdiction in matters of expulsion.

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§2. Violation by the Democratic Republic of the Congo of the rules governing expulsion

1.86 In deporting Mr. Diallo from the territory on 31 January 1996, the authorities of the Democratic Republic of the Congo violated international obligations (and domestic obligations to

¹³⁶*Ibid.*, para. 140.

¹³⁷RG, Ann. 4.

which these refer) in many regards. In so doing, they savagely cut the deep and lasting ties with the country that Mr. Diallo had developed over a great many years.

1.87 The Democratic Republic of the Congo in these proceedings has itself drawn attention, in the most forceful of terms, to the strength of the ties between Mr. Diallo, a Guinean national, and his country of residence. During the public hearings on the preliminary objections, the Minister of Justice and Garde des Sceaux of the Democratic Republic of the Congo solemnly affirmed:

“Mr. Ahmadou Sadio Diallo is a son of Africa who had chosen the Democratic Republic of the Congo *as his second country*. He lived in our country for over 30 years. *That is quite considerable.*”¹³⁸

1.88 Indeed, Mr. Diallo resided in Congolese territory in all legality from the day he settled there until he was expelled, and did so for no less than 32 years. This stands in stark contrast to the unlawful expulsion cases which have been submitted — successfully — to international courts in the past; in those the expellee’s period of residence generally did not exceed a few years. As the Court has noted, Mr. Diallo settled in Zaire in 1964 at the age of 17 and was “deported from Zaire” [*renvoyé du territoire zaïrois*] ¹³⁹ just after his 49th birthday¹⁴⁰. Thus, at the date of his expulsion Mr. Diallo had spent *his whole adult life*, and *his whole working life*, in the Congo and there alone. In all ways, this is an exceptional situation.

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1.89 Mr. Diallo was moreover a resident of *great value* to the economy of his host country, as attested to by his success as an entrepreneur, thanks to which jobs were created for many Congolese and the Congo’s industrial development was fostered. This entrepreneur inspired great confidence, on the part of the State authorities among others. Evidence of this is to be found in the many contracts his companies entered into with the Congolese State or public concerns. The Republic of Guinea has already provided a detailed explanation elsewhere of the significant contribution Mr. Diallo made to the economy of his country of residence¹⁴¹.

1.90 Given the strength of Mr. Diallo’s ties with that country, it may reasonably be asked whether Article 12, paragraph 4, of the Covenant and Article 2, paragraph 2, of the African Charter were not violated. In recognizing the right of every individual to “return to his country”, these provisions prohibit *any* expulsion of individuals entitled to the benefit of this clause. Now, as pointed out by the Human Rights Committee in its *General Comment 27 (Freedom of movement, Article (12))*, the drafters of the Covenant deliberately chose the expression “his own country” over “country of his nationality” in this provision so as to extend the absolute protection against expulsion to individuals, including those of foreign nationality, who have established close and enduring connections with their country of residence. This was undoubtedly true of Mr. Diallo.

1.91 Yet there is no need to invoke this provision to establish that the Congo’s international responsibility has been engaged. Mr. Diallo’s expulsion in all events patently contravenes various international and domestic rules framing the power to expel: the Respondent did not fulfil the obligation to state reasons for the expulsion (A); the jurisdictional, formal and procedural rules

¹³⁸CR 2006/50, p. 14; emphasis added.

¹³⁹Judgment of 24 May 2007, paras. 14-15. Strictly speaking, Mr. Diallo was not “renvoyé”, because he was not, and could not have been, the subject of a “renvoi”, but only of expulsion, as those terms are understood under domestic Congolese law (see para. 1.76, above).

¹⁴⁰Mr. Diallo was born on 3 January 1947. See MG, Ann. 7.

¹⁴¹See OG, pp. 9-13, paras. 1.14-1.25.

were deliberately evaded (B); the refusal-of-entry procedure was intentionally and arbitrarily misused to effect an expulsion (C); and, finally, Mr. Diallo was at no time afforded the opportunity to submit the reasons against his expulsion and to have his case reviewed by the competent authority (D). Any one of these elements alone is enough to give rise to the Congo's international responsibility. Together, they show that the measure taken against Mr. Diallo was totally arbitrary.

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**A. The Respondent did not fulfil the obligation
to state reasons for the expulsion**

1.92 The breach of the obligation to state reasons for the expulsion is two-fold in the present case.

1.93 *First of all, from the formal perspective*, there is no statement of reasons in the expulsion decree of 31 October 1995¹⁴², or in the notice of refusal of entry of 31 January 1996¹⁴³.

1.94 The first does no more than refer to Mr. Diallo's "personal file" to justify the contention that his presence and conduct "have breached Zairean law and order, especially in the economic, financial and monetary areas, and continue to do so". This last assertion in no way qualifies as a statement of reasons but is simply a reference to the *legal basis* for the expulsion measure, which indeed, pursuant to the 1983 Legislative Order, can be taken only in *situations falling into this abstract category*¹⁴⁴. The reference to the "personal file", purporting to show that the case does involve a situation justifying expulsion, is a blatant instance of *non-reasoning*, since it does no more than refer to the container (the "file") without giving any information as to the contents (what facts justified the expulsion?). The Democratic Republic of the Congo has yet to annex this "personal file" to any of its written pleadings, the result being that we are still ignorant of the grounds for expulsion. Had it done so, moreover, would that not have raised questions as to why there was no statement of reasons in the expulsion decree at the critical date¹⁴⁵? Furthermore, the Democratic Republic of the Congo stated during the public hearings in November 2006 that its authorities had not "in [this] legal document [*sc.*, the expulsion decree] specif[ied] all the individual acts of which Mr. Diallo was accused"¹⁴⁶. In fact, *no* individual act is specified.

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1.95 In this respect, the situation is exactly like that of Mr. Oliva in the case of that name, wherein Mr. Agnoli, a Commissioner, underlined the arbitrariness of the expulsion, noting that "[t]he decree of expulsion in nowise explains, nor does it even fasten upon the claimant, the vague and indefinite stain of being 'notoriously injurious to public order'", and leading Mr. Ralston, the Umpire, to find that the expulsion had been unlawful on the ground that "the expulsion of Oliva appears to have taken place without legal right . . . The mere idle suspicion of a consul should not . . . in an international commission be received as a sufficient justification for the infraction of an international right."¹⁴⁷

¹⁴²POC, Ann. 75.

¹⁴³MG, Ann. 197.

¹⁴⁴See para. 1.80, above.

¹⁴⁵See, *mutatis mutandis*, the Court's statement in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment of 4 June 2008, para. 151: "A legal obligation to notify reasons for refusing to execute a letter rogatory is not fulfilled through the requesting State learning of the relevant documents only in the course of litigation, some long months later."

¹⁴⁶CR 2006/52, p. 19, para. 6 (Kalala).

¹⁴⁷*Reports of International Arbitral Awards*, Vol. X, pp. 600 and 608.

1.96 The notice of refusal of entry does no more than state “illegal residence” [*“séjour irrégulier”*] as the justification for expulsion. Here again, this is not a statement of reasons in the legal sense of the term, since the “statement” is confined to referring to an abstract category of situation, without setting out any of the facts from Mr. Diallo’s specific case. In all events, “illegal residence” did not afford a sufficient legal basis, because under the law the only measure that such residence could justify was one of *removal [renvoi]*¹⁴⁸.

1.97 *From the substantive perspective*, the after-the-fact *explanations* offered by the Respondent to justify the expulsion are unconvincing and actually confirm that the grounds for the expulsion were arbitrary. What is more, the Respondent has wavered between various versions of the grounds justifying its act, and this at the very least shows how flimsy its case is. Furthermore, none of the accusations levelled against Mr. Diallo to support the expulsion has yet to be substantiated. The standard of mere “suspicion” has not even been met. These are actually no more than question-begging arguments, aimed at camouflaging, and inexcusably so, the real — shameful — motives for the expulsion.

1.98 In its Preliminary Objections, the Respondent initially cited *two* justifications for the expulsion: the claims Mr. Diallo made on behalf of his two companies; together with his alleged involvement “in currency trafficking” and his having made “numerous attempts to bribe Zairean judicial and political officials”¹⁴⁹.

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1.99 The first explanation hardly warrants any attention. The mere fact that Mr. Diallo sought payment of debts which he thought were owed to his companies — and there was much evidence to show that these were valid¹⁵⁰ — certainly cannot serve as a valid ground for expulsion. Admittedly, the amounts claimed might have appeared excessive, but the reasons for that were the very high bank interest rates at the time and runaway inflation peaking at a rate of 23,000 per cent in 1992. These factors of course made it very difficult to put a price on the injuries suffered by Mr. Diallo’s companies and could have caused him to overvalue the debt claims; the economic circumstances at the time account for this¹⁵¹.

1.100 The Congo also contends more specifically that it was only the “publicity” surrounding these claims that justified the action taken. But the only “evidence” put forward by the Respondent lies in the letters Mr. Diallo sent on 30 *November* 1995, one month after the expulsion decree was signed; thus, his letters cannot provide any justification for the decree. That the Congo found it wise, already in its Preliminary Objections, to offer a second set of explanations to justify its acts shows moreover that the Respondent itself found the argument just refuted to be unconvincing.

¹⁴⁸See para. 1.76, above.

¹⁴⁹POC, pp. 39-40, paras. 1.53-1.55.

¹⁵⁰See CR 2006/51, pp. 15-18, para. 12 (1)-(4) (Forteau).

¹⁵¹*Ibid.*, para. 12 (5).

1.101 This second set of explanations, involving alleged criminal activity on Mr. Diallo's part, is no more convincing. It is supported by *no evidence*¹⁵² and amounts to a totally groundless accusation highly prejudicial to Mr. Diallo's reputation and honour.

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1.102 The Respondent relies solely on a letter sent by Mobil and Fina on 15 November 1995. By means of this letter, they purportedly "made official representations to the Zairean authorities to denounce Mr. Diallo's reprehensible conduct".¹⁵³ But this letter, likewise post-dating the Decree of 31 October 1995, is also devoid of any evidence establishing the alleged "reprehensible conduct". It does no more than recount that Mr. Diallo had won the *trial* in the case against Zaire-Shell; in a State governed by the rule of law this obviously cannot qualify as "reprehensible conduct". This letter also confirms the merit of Guinea's claim, by revealing the true motive for the expulsion: the oil companies were seeking "*Government intervention* to warn the courts and tribunals of Mr. Diallo Amadou Sadio's activities." They were thus asking the executive authorities to meddle in ongoing judicial proceedings for the sole purpose of putting an end to Mr. Diallo's attempts to recover, through agreement or litigation (that is to say, by *public and lawful* means), debts he believed were owed to his companies (on the subject of interference by the executive in judicial proceedings brought by Mr. Diallo on behalf of his companies, see Sec. 1, para. 1.41, above).

1.103 The Democratic Republic of the Congo has not always offered this second set of explanations (the criminal acts purportedly committed by Mr. Diallo). In the public hearings in late 2006, the only consideration justifying the expulsion was nothing more than "the wide publicity" Mr. Diallo gave to his companies' claims in the letters of 30 November 1995; these alone were said to have been the basis for "the deportation order against Mr. Diallo issued by the Congolese Government on 31 November [*sic*] 1995"¹⁵⁴. But this is quite simply *impossible* as an explanation: the decree could not have been adopted the day after the letters were sent, since — according to the information in them — they were received by the addressees several days later, in early December 1995¹⁵⁵. Whatever the case, the deportation decree was adopted on 31 *October*, not "31 November". Such gross errors in stating the facts speak volumes about the Respondent's tendency to rewrite history so that it can now assert a minimally plausible argument to justify its acts.

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1.104 Faced with these misstatements of fact, counsel for the Congo tried to change tack in the second round of oral argument, claiming that the letters in question were not the only justification for the expulsion and offering a new explanation — one worthy of a (bad) spy novel — for it. According to the Congo, "[i]t should be said that DRC special services had had Mr. Diallo under surveillance for several months and were receiving regular reports on his general conduct and on his contacts. All this culminated in his expulsion on 31 January 1996"¹⁵⁶. Yet again, rather than taking responsibility and admitting its acts, the Congo takes refuge behind an accusation that is baseless, injurious and evasive (just who might these "contacts" be?) as its only defence.

¹⁵²See *ibid.*, pp. 14-15, paras. 9-10, where it is pointed out that these accusations were never raised against Mr. Diallo in the Congolese domestic system, and in particular never raised by those who would have had the greatest interest in doing so (those owing money to Mr. Diallo's companies).

¹⁵³POC, p. 39, para. 1.53 and Ann. 74.

¹⁵⁴CR 2006/50, p. 39, paras. 86-87.

¹⁵⁵See MG, Ann. 187 (letter received on 7 Dec. 1995) or MG, Ann. 188 (letter received on 6 Dec.).

¹⁵⁶CR 2006/52, pp. 19-20, para. 10 (Kalala).

1.105 The justification for the expulsion changed again, becoming more serious, in the Counter-Memorial. No longer was the alleged reason for Mr. Diallo's expulsion actions which were strictly individual — as the Congo had hitherto argued — and whose criminal nature had, what is more, been played down in the Preliminary Objections¹⁵⁷. Mr. Diallo was expelled for his involvement “in economic crimes” as part of a “vigorous campaign” launched “in early 1995” “against rampant economic crime and destabilization” attributable to “organized crime groups [seeking] to take advantage of the weakness and instability of State authorities” and which “seized control of the economy of the country, counterfeited the currency, trafficked in foreign currency, and destroyed the public finances”¹⁵⁸. It is plain to see here that the legal characterization has changed, growing more serious (from individual crimes to organized crime), once again without the slightest evidence being offered in support of these gravest of accusations.

1.106 Guinea cannot but observe in this connection that, if there was any substance at all to these accusations, the leniency which the Congolese Minister of Justice retroactively claimed his State had been willing to show Mr. Diallo *immediately after* his deportation¹⁵⁹ raises doubt as to whether the Respondent is acting in good faith today when it tries to justify the deportation on the pretext of accusations as serious as they are trumped up. It strains belief that the Congo would have consented, just a few months after his expulsion, to the return to the Congo of an individual who it now claims was implicated in organized crime on such an enormous scale as to be apt to destabilize the whole Congolese State.

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1.107 The mounting severity of the legal characterizations employed moreover does not stop there, because the Respondent states, also in the Counter-Memorial, that the letters Mr. Diallo sent on 30 November 1995 themselves amounted to “criminal activities”¹⁶⁰. Guinea fails to see how a “criminal” act could consist of sending a letter — one which was in no way offensive but rather was couched in the most respectful and least threatening of terms — to the Prime Minister, the Minister of Finance and the President of the International Court of Justice to inform them of debts which Mr. Diallo believed were owed to his companies, some of which had been acknowledged by the debtors, the Congolese authorities and Congolese domestic courts¹⁶¹. There is obviously absolutely nothing either “criminal” or even detrimental to public order about this. If it were necessary to show this, it would be enough to cite the *Boffolo case a contrario*; in that case the publication of an article in the press criticising the authorities of the State and recommending the reading of subversive newspapers at a time of political instability was not considered proper justification for the expulsion of the author¹⁶². In the light of comparison, it is impossible to see how such could be the consequence of mere letters that were in no way subversive or disrespectful.

¹⁵⁷It was claimed that the Congolese authorities had deported Mr. Diallo because they “*had had* enough of [his] behaviour” (pp. 37-38, para. 1.52) and of his “*nuisance* potential” (p. 40, para. 1.55). It is surprising that such expressions should be used in respect of an individual deported for having committed crimes as serious as those the Congo ascribes to Mr. Diallo in the Counter-Memorial. “Nuisance” is hardly the right term to employ in talking about organized crime and those engaged in it are not deported simply because one has “had enough” of their behaviour.

¹⁵⁸CMC, pp. 10-11, paras. 1.07-1.08.

¹⁵⁹See CR 2006/50, p. 15:

“If Mr. Diallo had wished to return to the Democratic Republic of the Congo to resume his activities, the Congolese authorities would have given favourable consideration to his request. Alas, he did not take this route. He opted for the international stage, levelling accusations at my country. The Government of the Democratic Republic of the Congo regrets that the Republic of Guinea encouraged Mr. Diallo in this action instead of opening bilateral diplomatic negotiations to settle the problem.”

¹⁶⁰CMC, pp. 11-12, para. 1.10.

¹⁶¹See para. 1.99, above.

¹⁶²*Reports of International Arbitral Awards*, Vol. X, pp. 536-538.

1.108 However that may be, since *not even one* of the very serious accusations raised against Mr. Diallo has ever been (or ever could be) supported by any *prima facie evidence* at all, it is clear that the statement of reasons and the justifications subsequently advanced are fictitious and that the grounds for the expulsion were inarguably arbitrary.

B. The jurisdictional, formal and procedural rules were deliberately evaded

1.109 The jurisdictional, formal and procedural rules under international law and Congolese domestic law were moreover manifestly violated by the Congolese authorities, who deliberately flouted the obligations those rules imposed on them.

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1.110 First of all, although the 1983 Legislative Order empowers the President of the Republic and him alone to adopt a deportation “Order” [*“Ordonnance”*]¹⁶³, Mr. Diallo was the subject of a deportation “decree” [*“décret”*]¹⁶⁴ adopted by the Prime Minister and then of a notice of refusal of entry signed just by the “immigration officer”¹⁶⁵. Thus, at no time was the action taken by the competent authority. True, the Respondent has produced three expulsion decrees for other individuals, also signed by the Prime Minister instead of the President of the Republic¹⁶⁶, but this cannot wipe away the violation of the statutory jurisdictional rules. Moreover, there is a major difference between these three decrees and the one issued against Mr. Diallo. The former expressly state in their recitals: “having regard to the decision by the Council of Ministers at its meeting on [date]”; this shows that the decision was taken collectively and under the supervision of the President of the Republic¹⁶⁷. Nothing to such effect is found in the decree issued against Mr. Diallo.

1.111 Furthermore, although the National Immigration Board was required to be consulted and a reference to such consultation appears in, for example, the other expulsion decrees annexed by the Congo to its written pleadings¹⁶⁸, that Board was not notified of Mr. Diallo’s case and the expulsion decree accordingly does not state in its recitals that the Board was duly notified (which constitutes a dual violation of the domestic legislative rules¹⁶⁹). As a result, none of the many safeguards available under the 1967 Order to an individual subject to deportation proceedings was, or could have been, respected¹⁷⁰.

1.112 Finally, and once again in violation of express requirements of Congolese law¹⁷¹ and international law¹⁷², Mr. Diallo was not given any notice of the expulsion decree¹⁷³. The

¹⁶³See para. 1.77, above.

¹⁶⁴POC, Ann. 75.

¹⁶⁵MG, Ann. 197.

¹⁶⁶POC, Anns. 69 and 76.

¹⁶⁷Same statement in the Decree of 16 March 1996 cancelling a designation of undesirability, annexed as Ann. 68 to the Preliminary Objections.

¹⁶⁸See the documents cited in the two preceding footnotes, all of which state: “Having regard to the favourable recommendation by the National Immigration Board.”

¹⁶⁹See paras. 1.77-1.78, above.

¹⁷⁰See paras. 1.82-1.83, above.

¹⁷¹See para. 1.79, above.

¹⁷²See para. 1.66, above.

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Respondent admits this in no uncertain terms: “between the two dates” — two far apart dates — of 31 October 1995, when the expulsion decree was adopted, and 31 January 1996, when Mr. Diallo was actually deported, he did not “know . . . that there was already an expulsion order against him . . .”¹⁷⁴. By contrast, on 6 March 1995, Mr. Yaghi, who was the subject of an expulsion decree dated 27 February 1995, was served with a “record of notice of expulsion” [*“procès-verbal de notification d’expulsion”*] for him to sign after “having reviewed” it [*en eût “pris connaissance”*]¹⁷⁵. Moreover the failure to give notice long continued. The Applicant still had not received a copy of the 31 October 1995 Decree at the time it was drafting its Memorial and it was not until the Respondent annexed the Decree to its Preliminary Objections (1 Oct. 2002) that the Applicant learned of its existence¹⁷⁶.

1.113 On this last point, the Democratic Republic of the Congo cannot rely for protection on the notice of refusal of entry of 31 January 1996, of which Mr. Diallo did actually receive notification, for the reasons to be expounded under the next heading.

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C. The procedure for refusing entry was intentionally and arbitrarily misused to expel

1.114 Mr. Diallo’s expulsion took concrete form when the notice of refusal of entry was signed on 31 January 1996¹⁷⁷. Just like the expulsion decree, the notice is in conflict with the Congo’s domestic and international obligations from many perspectives.

¹⁷³See RG, Ann. 1, Answers to Questions 15, 20 and 26.

¹⁷⁴CR 2006/52, pp. 19-20, para. 10 (Kalala).

¹⁷⁵POC, Ann. 69.

¹⁷⁶The description of the days of 28, 29 and 31 October 1995 appearing in the memorial annexed to Guinea’s Application (Application, pp. 9-10) is particularly noteworthy in this connection in that it was written at a time when the Republic of Guinea did not know of the Decree of 31 October 1995. From what is recounted there it is possible to understand, after the fact, why and under what circumstances the Decree was adopted on 31 October and not on another date; conversely, the knowledge subsequently gained that an expulsion decree had been adopted on 31 October 1995 confirms the version of the facts related in the Application. It is explained in the Application that the Prime Minister, after having received confirmation and having stated on 28 October 1995 that there had been no patent miscarriage of justice in the Zaire Shell case — the immediate enforceability of the judgment handed down in favour of Mr. Diallo’s company thereby being confirmed (see Sec. 1, para. 1.41, above) —, “ordered the Minister of Justice to call a meeting between the two parties and their lawyers in order to agree a schedule for the payment of the debt, so that the seizure order might be discharged.” The first such meeting took place on Saturday 29 October; at it the Zaire-Shell executives “stated that they were willing to pay the debt due to Africontainers. The Minister of Justice took formal note of this statement and ordered the parties to hold a further meeting on the following Monday [31 October] at 9.00 a.m. at the Office of the Inspector General of Courts in order to establish a schedule of payments prior to the seizure order being discharged”. The executives of the oil companies then “proposed that they should pay to the Prime Minister, who had just founded a new political party, of which his Head of Cabinet was a member, an amount equal to that awarded against Zaire-Shell, in return for which he would expel Mr. Diallo from the country”. As a result, at the meeting on Monday 31 October “Zaire-Shell refused to propose any kind of schedule for the settlement of its debt” and “[t]he Prime Minister . . . ordered the Minister of Justice to discharge the seizure order, which he did. At the same time a letter signed by the Prime Minister’s Head of Cabinet was sent to the Minister of Justice and to the Minister of the Interior, instructing them to issue an order for the expulsion of Mr. Diallo. In accordance with this instruction, on Saturday 5 November 1995 at 1 p.m. the security forces secretly arrested the said gentleman and placed him in custody, without any form of judicial process or even questioning him”. As we now know, the “instruction” in question took the form of the Decree signed on 31 October, which bears three signatures: those of the Prime Minister, the Minister of Justice, and the Minister of the Interior (significantly, the other expulsion decrees annexed to the Respondent’s pleadings as examples for the sake of comparison do not bear the Minister of Justice’s signature but rather, more understandably, that of the Minister for National Defence, which is missing from the decree expelling Mr. Diallo (see POC, Ann. 76)).

¹⁷⁷MG, Ann. 197.

1.115 Since, as Guinea has already explained, the refusal-of-entry and expulsion procedures are completely separate in respect of the situations to which they apply and the rules by which they are governed¹⁷⁸, the expulsion decree could not be served and then carried out by means of a notice of refusal of entry. It is therefore clear beyond all doubt that the refusal-of-entry procedure was misused in a way inconsistent with its purpose.

1.116 The notice of refusal of entry bears physical evidence of this misuse; these seriously impair its lawfulness and even its internal coherence:

(i) Mr. Diallo was said to be “[a]rriving from Kinshasa”; while true, that automatically ruled out use of the refusal-of-entry procedure, which is limited to individuals not yet on Congolese soil;

(ii) Article 13 of the 1983 Legislative Order authorizes refusal of entry solely where the individual seeking to enter the territory is not “in possession of the documents prescribed in Article 3” (“documents and visas prescribed by the President . . . of the Republic”). This is why the standard form refusal-of-entry notice has two printed indented entries (“immigration without visa” and “immigration without vaccination record”); the immigration officer must choose between these by crossing out the inapplicable one, or he may retain both. Since these of course could not serve as valid grounds for Mr. Diallo’s *expulsion*, the immigration officer crossed out both and replaced them with a third, *handwritten*, ground: “illegal residence”. But even this was wrong (as Mr. Diallo had legal-resident status) and, what is more, preposterous from the legal perspective: first, because anyone illegally *residing* in the Congo has by definition *already* entered the territory and therefore cannot be refused entry; and, second, because situations of “illegal residence” are covered by the “removal” [*renvoi*] procedure¹⁷⁹, a different procedure from those of refusal-of-entry and expulsion.

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1.117 As the Court pointed out in its Judgment of 24 May 2007, the immigration officer’s “error” was undoubtedly not inadvertent, seeing that “Article 13 of Legislative Order No. 83-033 of 12 September 1983 . . . expressly states that the ‘measure [refusing entry] shall not be subject to appeal’”¹⁸⁰. In the view of the Court, “the DRC cannot now rely on” that alleged error and Mr. Diallo was “justified in relying on the consequences of the legal characterization thus given by the Zairean authorities . . . ”¹⁸¹. By virtue of the decision to make use of the refusal-of-entry procedure, Mr. Diallo was deliberately deprived of the opportunity to contest his expulsion.

1.118 The other “benefit” gained by the Congolese authorities under their municipal law from use of the refusal-of-entry procedure lay in the speed with which it could be carried out. Under Article 13 of the 1983 Legislative Order, not only is the measure refusing entry not subject to appeal, but “the alien shall immediately be taken back to the other side of the frontier for repatriation¹⁸²], any costs being met by the carrier”. In the present case there was no “carrier” to bear these costs, as Mr. Diallo had not just arrived in the country. This undoubtedly explains why

¹⁷⁸See para. 1.76, above.

¹⁷⁹See *ibid.*

¹⁸⁰Judgment of 24 May 2007, para. 46.

¹⁸¹*Id.*

¹⁸²The notice of refusal of entry accordingly states that Mr. Diallo was “immediately removed from Zaire”.

the plane ticket was paid for by the person most interested in Mr. Diallo's expulsion (Zaire-Shell), providing yet more evidence of the patent abuse of the power to deny entry¹⁸³.

1.119 The circumstances surrounding the expulsion confirm that the Congolese authorities wanted to catch Mr. Diallo off guard and to wait as long as possible (until it was too late) before presenting him with a *fait accompli*. The Respondent describes the facts in this connection as follows in its Counter-Memorial:

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“On 10 January 1996, the Administrator-Director-General of the Immigration Service ordered his [Mr. Diallo's] 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.”¹⁸⁴

1.120 If it had really happened this way, three inferences would have to be drawn at a minimum:

- (i) By 10 January 1996 at the latest, Mr. Diallo knew why he had been imprisoned and was aware of how precarious his release was (as it was intended to last only until a Conakry-bound aircraft could be found to carry out the expulsion); this should have given him the necessary time to prepare to leave;
- (ii) once the “solution to the problem of conveying” him had been found, there was nothing to prevent the Congolese authorities from acting in compliance with the rules applicable to a bona fide expulsion, which they had the time to decide upon and to arrange by issuing the requisite documents and legal decisions;
- (iii) while the expulsion process would have taken some time, because the authorities were trying to send Mr. Diallo back to his country of nationality, ultimately he would have been “deported on 31 January 1996 from the Congo to Guinea”.

1.121 But *not one* of these three inferences is true:

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- (i) Mr. Diallo was indeed released on 10 January 1996, but the only reason he was given, as stated on the release document¹⁸⁵, was that “Mr. Amadou Sadio Diallo is hereby released”, not “for the time necessary to find a Conakry-bound aircraft for use in carrying out the expulsion order” but rather “*for enquiries*”. This shows that Mr. Diallo had still not been told at that date that he was the subject of a decision to expel; it also indicates that, in relying on this false, vague pretext, the Congolese authorities sought to *hide* from Mr. Diallo the action they were preparing to take against him;
- (ii) nor is there any greater truth in the reason given by the Respondent (the “problem of conveying” Mr. Diallo supposedly arose out of the difficulty in finding a Conakry-bound

¹⁸³See para. 1.54, above. For its part, Guinea's Application states that “the airline, Camair, refused to allow [Mr. Diallo] on board, since he had no travel documents and no official expulsion order had been produced”, and that it was only when threatened with the closure of its offices in Kinshasa that Camair agreed to allow Mr. Diallo to board on the basis of a notice of refusal of entry (Application, pp. 11 and 13). See also RG, Ann. 1, Answer to Question 28.

¹⁸⁴CMC, p. 12, para. 1.11.

¹⁸⁵MG, Ann. 194.

aircraft, a problem ultimately solved, since Mr. Diallo was deported “to Guinea”). Contrary to what the Congo has written, the notice of refusal of entry states that Mr. Diallo is being removed from Zaire, “destination: Abidjan via Douala”, “following the itinerary: Kinshasa-Douala-Abidjan”. In other words, Mr. Diallo was not removed to Guinea but to Côte d’Ivoire, more than 500 km from the Guinean border as the crow flies.

1.122 In sum, Mr. Diallo only learned at the very last moment that he was going to be expelled; the expulsion was deliberately effected by means of a legally groundless notice of refusal of entry, against which no recourse was available under the law; and Mr. Diallo, taking with him only the clothes he was wearing, was *at the very same time* removed to a country which was not only totally foreign to him but also situated several hundred kilometres away from his country of nationality, where moreover he had not lived for more than 30 years. Given these conditions, “arbitrary” would seem a weak qualifier to describe the Respondent’s conduct.

D. At no time was Mr. Diallo afforded the opportunity to submit the reasons against his expulsion and to have his case reviewed by the competent authority

1.123 As Guinea has just made clear and as the Court itself found, no recourse was available against the measure which the Congolese authorities characterized as a refusal of entry. The Court further observed in its Judgment on the preliminary objections: “even if this was a case of expulsion and not refusal of entry, as the DRC maintains [the Court having rejected this argument in the preceding paragraph of the Judgment], the DRC has also failed to show that means of redress against expulsion decisions are available under its domestic law”¹⁸⁶. Thus, it is established that the Respondent failed to respect the expellee’s right to submit the reasons against his expulsion and to have his case reviewed by the competent authority¹⁸⁷.

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1.124 Citing the Congolese Constitution of 9 April 1994 and Legislative Order No. 82-017 of 31 March 1982 in support, the Democratic Republic of the Congo has however argued in its Counter-Memorial that means of redress were available against the expulsion decision. The 1994 Congolese Constitution, which entered into force in 1996 — several months, it might be added, after Mr. Diallo had been expelled — does no more than affirm the very broad principle that the Supreme Court of Justice “has jurisdiction over applications for nullification of acts and decisions of the central authorities of the Republic”¹⁸⁸, without explaining the practicalities or precise scope of application of the principle. The Constitution is thus devoid of direct effect and the only operative texts are those laying down the terms of implementation. This is why the Congo simultaneously cites Legislative Order No. 82-017 of 31 March 1982, which, according to the Counter-Memorial, defines “the procedure in respect of requests for nullification of acts, decisions and regulations of the central authorities, which may be submitted by any aggrieved individual”¹⁸⁹. However:

- (i) the 1983 Legislative Order concerning immigration control, which occupies the same rank in the hierarchy of domestic rules as the 1982 Order and, besides, came after it, expressly provides that a refusal of entry “shall not be subject to appeal”. And, since, as the Court observed in its Judgment of 24 May 2007, the legal sanction imposed on Mr. Diallo was characterized solely as a “refusal of entry”, the 1983 Order in this instance prevailed over

¹⁸⁶Judgment of 24 May 2007, para. 47.

¹⁸⁷See paras. 1.66-1.68, above.

¹⁸⁸CMC, p. 19, para. 1.29.

¹⁸⁹CMC, p. 19, paras. 1.29-1.30.

the 1982 Order in accordance with the principles *lex posterior derogat priori* and *lex specialis derogat generali*;

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- (ii) whatever the case, and though the point is supererogatory, even if it were the expulsion decree, not the refusal of entry, which concerned us here, nullification of the decree could not have been sought from the Supreme Court of Justice, as the decree was never notified to Mr. Diallo and Article 88 of the Zairean Judicial Code provides that “[a]pplications for nullification shall not be admissible unless the applicant has previously filed, within three months from *the date when the act was personally notified to him*, a complaint with the relevant authority requesting the postponement or amendment of that act”¹⁹⁰;
- (iii) there can in any event be no certainty that the Supreme Court of Justice would have found jurisdiction in respect of an expulsion decree: Article 87 of the Judicial Code provides that the Court “shall determine at its sole discretion which acts by the Executive Council lie beyond its powers” to review¹⁹¹.

1.125 What is more, this whole debate is pointless, because the Congo from the outset in its Counter-Memorial has argued from the perspective of *exceptions* to Mr. Diallo’s right to challenge the expulsion. From this standpoint, the position is no different from Hungary’s in the *Gabčíkovo-Nagymaros Project* case, in respect of which the Court observed: “when [Hungary] invoked the state of necessity in an effort to justify [its] conduct, [it] chose to place itself . . . within the ambit of the law of State responsibility, *thereby implying that, in the absence of such a circumstance, its conduct would have been unlawful*”¹⁹².

1.126 In the present case, Article 13 of the 1966 Covenant exonerates States from the obligation to afford an avenue of recourse against a decision to expel where “compelling reasons of national security [so] require”. The Respondent expressly relies on this in its Counter-Memorial in a way which leaves no doubt that its intention at the time was to deprive Mr. Diallo of any such recourse, but which is also out of keeping with the requirements of Article 13 and the international jurisprudence cited above¹⁹³.

1.127 In the words of the Democratic Republic of the Congo,

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“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 . . . 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.”¹⁹⁴

¹⁹⁰CMC, Ann. 14; emphasis added.

¹⁹¹*Ibid.*

¹⁹²*Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 39, para. 48; emphasis added.

¹⁹³See para. 1.69, above.

¹⁹⁴CMC, pp. 18-19, para. 1.28.

1.128 Contrary to the assertion made in that passage, Article 13 of the Covenant does not give the final say to a State invoking the exception for compelling reasons of national security¹⁹⁵. Thus, as the Court stated in the *Nicaragua* case and more recently in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*, it is for the Court to determine whether this exception could be invoked in the case. Clearly, it could not be.

1.129 The Republic of Guinea will first point out how odd, to say the least, the Respondent's notion of urgency is. Mr. Diallo's miscreant behaviour, says the Respondent, had "become so serious" that it was "urgent [and] compelling . . . to remove him from the [national] territory". Yet the Congolese authorities let more than 90 days go by before carrying out the expulsion decree of 31 October 1995 — in the manner already described. Furthermore, in the meantime they released Mr. Diallo (without supervision) on 10 January 1996. That shows, to say the least, a lack of precaution on the part of a State claiming at the time to be confronted with "compelling reasons of national security" having to do, according to that State, with the conduct of the very individual being released. The defence grows even less credible when it is kept in mind that the Respondent further claims that Mr. Diallo was never held for more than eight days during this same 90-day period¹⁹⁶.

1.130 Whatever the case may be, the Congo fails to explain why it was impossible to allow Mr. Diallo to contest his expulsion during this 90-day period.

1.131 Lastly, there is nothing in the record or in the Respondent's arguments to substantiate the existence of these alleged "compelling reasons of national security". Such reasons, as we know, involve something other than the disturbance to public order which supposedly justified the expulsion¹⁹⁷. However, there is nothing in the conduct of which the *Respondent itself* — wrongly — accuses Mr. Diallo that amounts to anything that might be considered a violation of national security¹⁹⁸. In fact, at no time have the Congolese authorities claimed — let alone proved — that Mr. Diallo engaged in military activities or sedition; they have confined themselves to concluding, without any evidence to back this up, that his conduct infringed public order. Thus, not only is the Congo's position unsubstantiated, there is not even any *formal* basis for it.

1.132 Ultimately then, all that is left is the Respondent's own *avertment* that its authorities "determined" "that there was no requirement that Mr. Diallo be allowed . . . to submit the reasons against his expulsion or to have his case reviewed by the competent authority". In fact, not only did those authorities refrain, without good cause, from taking the steps required to ensure respect for that right, they went so far as to violate their own domestic rules so as to make certain that Mr. Diallo would derive no benefit from them. They never served the expulsion decree on him; on the contrary, they kept it from him, before deliberately removing him by means of a refusal of entry, which they knew to be a measure "without appeal".

¹⁹⁵See para. 1.69, above.

¹⁹⁶See Section 1, §2, A.

¹⁹⁷See para. 1.69, above.

¹⁹⁸See, e.g., what is included under Article XXI (b) of GATT within the national-security exception: action: "(i) relating to fissionable materials or the materials from which they are derived; (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; (iii) taken in time of war or other emergency in international relations".

*

1.133 In the end, the way in which Mr. Diallo was expelled from Congolese territory clearly evidences a “wilful disregard of due process of law”, which “shocks, or at least surprises, a sense of juridical propriety”¹⁹⁹. Mr. Diallo’s blatantly arbitrary expulsion also constitutes a flagrant breach of various customary and treaty obligations borne by the Respondent. Accordingly, the Respondent has incurred international responsibility to Guinea on these various points.

1.134 Wrongful *per se*, the expulsion was also wrongful by way of its effects on other rights enjoyed by Mr. Diallo.

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1.135 Such is the case for the right to work enshrined in Article 6 of the International Covenant on Economic, Social and Cultural Rights (which right includes “the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts”). In wrongfully expelling Mr. Diallo, the Democratic Republic of the Congo prevented him from continuing to engage in his occupation as *gérant* of his two companies, and in particular to receive the salary for it. This impediment to the exercise of the right to work is reminiscent of the one found in the last century in the *Chevreau* case:

“There is no doubt but that the detention of M. Chevreau and his deportation, so far as the Arbitrator has recognized that these acts give rise to a claim in international law, caused M. Chevreau not only moral injury but also material injury; among other things, said acts made it impossible for him to continue or resume his activity as a professor of languages in Persia.”²⁰⁰

1.136 Its consequences are even more serious in the present case, given the scope of Mr. Diallo’s commercial activities in the Congo over some 30 years.

1.137 The expulsion also violated Mr. Diallo’s right to property. This right, which is covered by the minimum standard of protection²⁰¹ and is expressly guaranteed by Article 14 of the African Charter on Human Rights²⁰², was violated in regard to Mr. Diallo’s personal possessions, which he had to leave behind without being given any chance to arrange for them to be repatriated or sold before he was abruptly expelled (an inventory of that property was not prepared until 12 February 1996, and then without him being present²⁰³). Contrary to the Respondent’s assertion — unsupported by any evidence by the way — in paragraph 1.34 of its Counter-Memorial, Mr. Diallo has not “recovered all of the property belonging to him personally, which he received in Conakry”²⁰⁴.

¹⁹⁹*Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment, *I.C.J. Reports 1989*, p. 76, para. 128.

²⁰⁰*Reports of International Arbitral Awards*, Vol. II, p. 1138 [English translation at 27 Am. J. Int’l L. 153, 176 (1933)]. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, *I.C.J. Reports 2004*, pp. 191-192, para. 134.

²⁰¹See MG, pp. 44-48, paras. 3.13-3.23.

²⁰²“The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.”

²⁰³See MG, Ann. 200.

²⁰⁴See RG, Ann. 1, Answer to Question 29.

1.138 Mr. Diallo's right to property was infringed as well in respect to the *parts sociales* he held in Africom-Zaire and Africontainers-Zaire. Insofar as the protection of these lies within the ambit of Mr. Diallo's direct rights as *associé*, Guinea will address it in Chapter 2 of this Reply.

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CONCLUSION TO CHAPTER 1

1.139 In conclusion to Chapter 1 of this Reply, the Republic of Guinea maintains that the rights granted under international law to Mr. Diallo as an individual have been violated by the Democratic Republic of the Congo as a result of:

- (i) his arrest and imprisonment in 1988-1999;
- (ii) his arrests and repeated imprisonment in 1995-1996; and
- (iii) his expulsion in 1996.

1.140 But this is not all, because, contrary to what the Respondent argues, the measures taken by the Democratic Republic of the Congo also constitute violations of rights held by Mr. Diallo as *associé* in Africom-Zaire and Africontainers-Zaire, as will be shown in Chapter 2 of the present Reply.

**VIOLATION BY THE DRC OF MR. DIALLO'S DIRECT RIGHTS AS ASSOCIÉ
IN AFRICOM-ZAIRE AND AFRICONTAINERS-ZAIRE**

2.1 In paragraph 65 of its Judgment of 24 May 2007, the Court held that:

“Guinea does indeed have standing in this case in so far as its action involves a person of its nationality, Mr. Diallo, and is directed against the allegedly unlawful acts of the DRC which are said to have infringed his rights, particularly his direct rights as *associé* of the two companies Africom-Zaire and Africontainers-Zaire.”

2.2 This suggests obviously that the discussions on the merits should address three fundamental issues, relating to: (i) the exact nature of Mr. Diallo's rights as *associé*; (ii) whether those rights were violated by actions of the DRC, and (iii) the nature of the injury caused by those actions. The first two issues are examined in this Chapter, which responds to the brief exploration of shareholders' rights at pages 25-32 of the DRC's Counter-Memorial, while the issue of reparation is looked at in Chapter 3 below.

2.3 As paragraph 62 of the Judgment of 24 May 2007 indicates, in this case the rights of *associés* are based on the domestic law of the DRC, in particular the 1887 Decree on commercial corporations, as amended²⁰⁵. In paragraph 64, the Court also established that:

“what amounts to the internationally wrongful act, in the case of *associés* or shareholders, is the violation by the respondent State of their direct rights in relation to a legal person, direct rights that are defined by the domestic law of that State, as accepted by both Parties, moreover”.

2.4 As the Court is aware, Mr. Diallo's two companies were not *sociétés anonymes* (public limited companies) but were in the very particular form of *sociétés privées à responsabilité limitée* (private limited liability companies, “SPRLs”). The Court has pointed out that SPRLs are

“companies ‘which are formed by persons whose liability is limited to their capital contributions; which are not publicly held companies; and in which the *parts sociales* (shares), required to be uniform and in registered form, are not freely transferable (Article 36 of the Decree of 27 February 1887 on commercial companies)’. Under Congolese law, holders of *parts sociales* . . . in SPRLs, like Mr. Diallo, are termed ‘associés’ (see, e.g., Articles 43, 44, 45, and 51 of the Decree of 27 February 1887).”²⁰⁶

2.5 As observed in the preamble to the 1960 Decree amending the 1887 Decree in respect of SPRLs, this form of company met “a real need for family concerns, for small enterprises or businesses comprising a small number of *associés*”²⁰⁷. SPRLs, in which the *intuitu personae* aspect is crucial, have been described as a hybrid form of undertaking, in certain regards close to a

²⁰⁵OG, Ann. 35.

²⁰⁶Judgment of 24 May 2007, para. 25.

²⁰⁷Roger Makela Massamba, *Droit des affaires — Cadre juridique de la vie des affaires au Zaïre*, Cadicec/De Boeck Université, 1996, p. 295.

simple *partenariat* or to a formalized partnership (*société de personnes*)²⁰⁸, with specific rights and protection for *associés* in terms of transfers of *parts sociales* and of rights of control.

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2.6 In its Counter-Memorial, the DRC sought to raise the issue of whether Mr. Diallo was indeed an *associé* in Africom-Zaire (although without claiming that he was not): “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.”²⁰⁹ The DRC (not Guinea) is in fact well placed to help the Court here. Mr. Diallo was expelled from the territory of Zaire, which is precisely where the relevant documents are to be found; and, according to certain documents in the record, the Articles of Incorporation of Africom-Zaire are at the registry of the Kinshasa *Tribunal de grande instance*²¹⁰. It was therefore easy for the Respondent to produce those Articles. Although requested to do so by the Court, it has not produced them²¹¹.

2.7 The Court, for its part, did not share the DRC’s doubts, as can be seen from paragraph 66 of the Judgment of 24 May 2007, which draws the obvious conclusions from the record as a whole: “The Court notes that Mr. Diallo, who was *associé* in Africom-Zaire and Africontainers-Zaire, also held the position of *gérant* in each of them.” In any event, had this issue appeared to be remotely relevant, the DRC would have argued it strenuously at the time of the Preliminary Objections. The Respondent in fact did quite the reverse: in its Preliminary Objections, the DRC states several times, correctly, that Mr. Diallo was an *associé* in Africom-Zaire²¹². What is more, the DRC acknowledges the fact afresh in other passages of its Counter-Memorial, which is eloquent of, at the very least, the shallowness of the debate which the Respondent is attempting to initiate²¹³.

2.8 Another question arose during the hearings on the Preliminary Objections held at the Peace Palace in November and December 2006. Judge Bennouna asked whether, under Zairean law, it was possible to create a *société privée à responsabilité limitée* with a single shareholder²¹⁴.

2.9 At the hearing Guinea stated that, although Congolese legislation possibly did not authorize a *société privée à responsabilité limitée* to be created by a single person, the fact that a unipersonal company cannot be *created* in no way prevents a company from *becoming* unipersonal subsequently. In the present case, Africontainers has never been unipersonal, either at the time it was formed or since, which does not prevent Mr. Diallo from holding, directly and indirectly, 100 per cent of its capital. As regards Africom-Zaire, while it did become a unipersonal company, its configuration was never disputed by anyone concerned, the Zairean State included. In fact, in 1995 when asked to examine the Articles of Incorporation of Africom and Africontainers, the

²⁰⁸Louis Fredericq, *Traité de droit commercial belge*, Vol. V, Ed. Fechey, Ghent, 1950, p. 877; Roger Makela Massamba, *Droit des affaires — Cadre juridique de la vie des affaires au Zaïre*, Cadicec/De Boeck Université, 1996, p. 339: “An SPRL is in fact a medium-sized, family company, one which is to a greater or lesser extent closed.” See, also, in relation to the French equivalent of an SPRL, the *société à responsabilité limitée* (SARL), Paul Le Cornu, *Droit des sociétés*, Montchrestien, Paris, 2003, p. 733 and Philippe Merle, *Droit commercial. Sociétés commerciales*, Dalloz, Paris, 2000, p. 189.

²⁰⁹CMC, para. 2.09. See also CR 2006/52, 29 Nov. 2006, p. 29, paras. 51-52 (Mr. Kalala), and the Judgment of 24 May 2007, paras. 22 and 24.

²¹⁰MG, Ann. 146 (Submissions of the Ministère Public (Public Prosecutor) in the appeal on points of law against Appeal Court judgment RCA 17244, 11 Jan. 1995), pp. 2-3.

²¹¹Judgment of 24 May 2007, paras. 21, 23.

²¹²POC, paras. 1.06, 2.03, 2.76.

²¹³CMC, para. 2.10: “Mr. Diallo is indeed the *associé-gérant* of Africom-Zaire and Africontainers . . .”

²¹⁴Judgment of 24 May 2007, para. [21].

59 *Ministère Public* before the Supreme Court of Justice expressly confirmed that those Articles, and their amending instruments²¹⁵, were validly filed. This is also probably why the DRC saw fit not to pursue discussion of this point at the merits stage.

2.10 In Sections 1 and 2 below, Guinea will first take pains to demonstrate the violation by the DRC of Mr. Diallo's right to participate in general meetings and to choose a new *gérant* (Sec. 1), and will then turn to his right, as *associé*, to oversee and control the acts of management and the operations of the companies (Sec. 2). In Section 3, Guinea will address the indirect expropriation of Mr. Diallo's *parts sociales* in Africom-Zaire and Africontainers. It is in these three respects that the DRC has incurred international responsibility to Guinea in this case.

SECTION 1

THE RIGHT TO PARTICIPATE IN GENERAL MEETINGS AND TO CHOOSE A NEW GÉRANT

2.11 Under Article 79 of the 1887 Decree:

“Notwithstanding any provision to the contrary, all *associés* shall have the right to take part in general meetings and shall be entitled to one vote per share.”

2.12 This is, of course, one of the generally acknowledged rights of shareholders, to which the Court refers expressly in its Judgment in the *Barcelona Traction* case²¹⁶.

2.13 This right has been violated in the case at hand. Article 1 of Legislative Order [*Ordonnance-loi*] 66-341 states:

“Companies whose main centre of operations is situated in the Congo must have their administrative seat in the Congo.

60 ‘Administrative seat’ means the place where the company has its central administration and where general meetings and board meetings are held.”²¹⁷

2.14 Once Mr. Diallo wished to do business in Zaire and had to do so via a Zairean company, an obligation to hold general meetings in Zaire necessarily ensued. By expelling Mr. Diallo, the DRC impeded the effective exercise of that right to the detriment of Mr. Diallo:

²¹⁵See CR 2006/53, pp. 10-13, paras. 6-13; MG, Ann. 146 (Submissions of the *Ministère Public* in the appeal on points of law against Appeal Court judgment RCA 17244, 11 Jan. 1995), pp. 2-3; MG, Ann. 149 (Submissions of the *Ministère Public* in the appeal on points of law against Appeal Court judgment RCA 17 229, 20 Apr. 1995), pp. 2-3.

²¹⁶*Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Second Phase, Judgment, I.C.J. Reports 1970, p. 3, para. 47:

“The situation is different if the act complained of is aimed at the direct rights of the shareholder as such. It is well known that there are rights which municipal law confers upon the latter distinct from those of the company, including the right to any declared dividend, the right to attend and vote at general meetings, the right to share in the residual assets of the company on liquidation. Whenever one of his direct rights is infringed, the shareholder has an independent right of action.”

See also the Judgment of 24 May 2007, para. 53.

²¹⁷OG, Ann. 35.

general meetings had to be held in the DRC; Mr. Diallo had been expelled; in a very real way, therefore, it became impossible for him to attend, and vote at, general meetings of his companies.

2.15 The existence and nature of this individual shareholder right is in actual fact common ground between the Parties. The DRC contends, nevertheless, that:

- (a) No general meeting was convened, which in its view meant that “Mr. Diallo’s deportation had no impact on his right to participate in general meetings.”
- (b) As regards the convening of meetings, it is a functional act by the *gérant*, and “thus, it is the company which convenes general meetings . . . this right of the *gérant* cannot be protected in the present proceedings”²¹⁸.

2.16 This is both extremely contrived and wrong. The question before the Court is whether conduct by the DRC amounted to real interference with exercise of the rights of the *associé*. The Respondent cannot be allowed to assert here that the expulsion of the *associé* prevented the convening of general meetings and, accordingly, the *holding* of general meetings, but that this must be disregarded because the right to convene meetings is not strictly speaking a right belonging to the *associé*. As for the second argument, the right to convene general meetings is in fact, necessarily, a right of an *associé*: otherwise, the rights of *associés* under Article 79 could easily be overridden by management. Under Article 83 of the 1887 Decree:

“The management and the auditors, if any, may convene a general meeting at any time.

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They *must* convene a general meeting at the request of *associés* holding one fifth of the total number of shares.

If the management takes no action on this request within a reasonable time, the meeting may be ordered by the court.”

2.17 During examination of the Preliminary Objections, the DRC argued that Mr. Diallo could very well have exercised his rights as *associé* from abroad and that he had every opportunity to delegate executive tasks to local administrators, including by appointing a new *gérant*²¹⁹. Guinea does not dispute that Article 81 of the Decree of 27 February 1887, on the representation of *associés* at general meetings, provides that “[a]ssociés may always be represented by a proxy of their choice”. It is apparent from a reading of the Article, however, that appointing a proxy is merely an *option* available to the *associé*, whose recognized right is clearly to have a choice whether to appoint a representative or to attend in person. The DRC’s conduct put Mr. Diallo in a position in which he was deprived of that right, since, as a result of his expulsion, he was *obliged* to appoint a proxy if he was to hope to retain any influence over his companies. Furthermore, since he was the only *associé*, it made very little sense to appoint a proxy for the general meeting rather than to participate in it directly. The duress was all the greater since Mr. Diallo, the sole *associé* and the sole *gérant*, because he was abroad and without resources, was unable to appoint a

²¹⁸CMC, paras. 2.12-2.14.

²¹⁹Judgment of 24 May 2007, para. 53.

proxy²²⁰. Since no right to choose was available to him, he was therefore prevented by the DRC from exercising his rights as *associé* in the ordinary course.

2.18 In relation to the rights, or powers, of the general meeting, Article 78 of the 1887 Decree provides that “[t]he general meeting of *associés* shall have the widest powers to perform or ratify acts concerning the company”. The *associés* in general meeting thus enjoy “the widest powers to perform . . . acts concerning the company”. This right of *associés* is therefore very broad in scope.

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2.19 Article 65 of the 1887 Decree makes express mention of one of the rights of *associés* in general meeting, that of appointing the *gérant*. In the DRC’s Counter-Memorial this is described as a right of the company, not a right of the *associés*²²¹, whereas at the Preliminary Objections stage the Court pointed out:

“The DRC also agrees with Guinea on the fact that, in terms of Congolese law, the direct rights of *associés* are determined by the Decree of the Independent State of Congo of 27 February 1887 on commercial corporations. The rights of Mr. Diallo as *associé* of the companies Africom-Zaire and Africontainers-Zaire are therefore theoretically as follows: ‘the right to dividends and to the proceeds of liquidation’, ‘the right to be appointed manager (*gérant*)’, ‘the right of the *associé* manager (*gérant*) not to be removed without cause’, ‘the right of the manager to represent the company’, ‘the right of oversight [of the management]’ and ‘the right to participate in general meetings’.”²²²

Mr. Diallo, as *associé*, was in fact entitled to be appointed *gérant*.

2.20 Nor do shareholder rights change nature on the grounds that they are exercised collectively, in the context of the general meeting, as opposed to those exercised individually. There is no legal basis for the DRC’s assertions to the contrary, which also conflict with the wording of Articles 51 and 78 of the 1887 Decree (and with the DRC’s position at the Preliminary Objections stage)²²³. The collective exercise of rights (here, the right to appoint the *gérant*) may at the very most give rise to a question of fact: did Mr. Diallo hold sufficient *parts sociales* in his companies to be able to control voting at the general meeting on the appointment of the *gérant*. Since he was the sole shareholder in both companies, he was plainly able to do so.

2.21 Furthermore, under Article 65, the *gérant* can always be appointed in the company’s instrument of incorporation, that is to say, by the founders at the time of incorporation of the company. This cannot, by definition, be an act of the company, which is only in the process of

²²⁰RG, Ann. 1:

“Question 33: Could you have convened or organized a general meeting and had yourself represented at it? If so, what has prevented you from doing so?”

Answer: I ought to have convened or organized general meetings of both companies, Africom-Zaire and Africontainers, and had myself represented at them. However, my expulsion, which reduced me to penury, has prevented me from doing so because of the costs involved, but then again I am the sole *associé* and *gérant* of these companies, and therefore supposed to know what position they are in, to the exclusion of anyone else.”

²²¹CMC, paras. 2.08-2.09; see CR 2006/52, pp. 10-11, para. 7.

²²²Judgment of 24 May 2007, para. 53.

²²³Art. 51 provides: “Each share confers an equal entitlement in the exercise of *associés*’ prerogatives as well as in the distribution of profits and the products of liquidation.”

being formed. This merely highlights the fact that the appointment of the *gérant* is an act (and a right) of the *associés*, not of the company.

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2.22 Under Article 65, Mr. Diallo therefore had a right — the right of an *associé* — to appoint himself as “*gérant*”. As is perfectly normal in SPRLs and consistent with their strongly *intuitu personae* nature, he appointed himself, for an unlimited period²²⁴. However, following his detention and expulsion by the Zairean authorities, it became impossible for him, in practical terms, to perform the role of “*gérant*” from Guinea, because he was outside the country. He was thereby deprived of the right to appoint the “*gérant*” of his choice, that is to say, himself. He was also deprived of his right not to be removed, enshrined in Article 67:

“Unless the statutes provide otherwise, *associé-gérants* appointed for the life of the company can be removed only for good cause, by a general meeting deliberating under the conditions required for amendments to the statutes. Other *gérants* can be removed at any time.”

2.23 One must not forget that the sole reason for Mr. Diallo’s expulsion was to prevent him from benefiting from the enforcement of judicial decisions handed down in favour of his companies²²⁵. Thus, even had it transpired that a new *gérant* could have been appointed, it nonetheless seems extremely unlikely that, under the circumstances, the new *gérant* would have been able to pursue legal proceedings and to bring new proceedings to recover the debts owed to Africontainers and Africom²²⁶. As pointed out above, the DRC tried to suggest, at the Preliminary Objections stage²²⁷, that Mr. Diallo could very well have exercised his rights as *associé* from abroad, by means of delegation. This argument completely fails to take into account certain irrefutable facts: the rights in question could not be exercised, and this was detrimental to Mr. Diallo’s companies and to the value of his *parts sociales*. It led, for example, to the loss at the date of expulsion of assets belonging to Africontainers (including over a hundred containers)²²⁸. The fact that Mr. Diallo was powerless to run his companies from Guinea is explained partly by his lack of financial resources, but also because it was quite simply impossible for him to check on any agent from abroad²²⁹.

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2.24 The position in which Mr. Diallo found himself when he was expelled is therefore similar to that of Mr. Biloune in *Biloune v. Ghana*. Mr. Biloune too was arrested, detained and expelled, which left his company, MDCL, unable to complete construction of a hotel complex, the project having failed as the result of interference by the local municipal council. In this case the

²²⁴MG, Ann. 3.

²²⁵See para. 1.41, above.

²²⁶At the Preliminary Objections stage, the DRC asserted that a new *gérant* of Africontainers had been appointed, in the person of one Mr. Kanza (CR 2006/52, p. 22, para. 19 and MG, Ann. 201). That argument has not in fact been pursued, nor could it have been given the relevant facts: CR 2006/53, p. 21, para. 9 and MG, Anns. 213 and 219.

²²⁷Judgment of 24 May 2007, para. 53.

²²⁸MG, Ann. 199; OG, Anns. 31-33.

²²⁹RG, Ann. 1:

“Question 32: Have you or could you have appointed another *gérant* for your companies? What has prevented you from doing so?

Answer: I have not appointed another *gérant* for my companies and I have not been able to do so, given that the companies were already encountering difficulties as a result of the deliberate misconduct of their business partners, but also the fact that I am far away with no chance of one day going there in person to see how the companies’ businesses are faring; what is more, I am penniless and have no means of checking on what an agent would do.”

arbitral tribunal, far from finding that Mr. Biloune could have continued to assert his rights by means of delegation, laid emphasis (correctly) on the actual consequences of the expulsion of the key figure in operation of the company, and found that the expulsion had effectively prevented continued execution of the project²³⁰.

2.25 What is more, by expelling Mr. Diallo from its territory, the DRC prevented him not only from pursuing his activities through his companies, but also from seeing them through under normal conditions, from liquidating his companies and from realizing the remaining assets. Under the relevant provisions of the Decree of 27 February 1887 on commercial corporations²³¹, the dissolution of an SPRL figures among the rights of *associés*. Article 99 of the Decree provides that:

“The dissolution or continuance of the company can only be decided by a general meeting deliberating under the conditions required for amendments to the statutes.”²³²

2.26 The internationally wrongful acts of the DRC deprived the sole *associé* of these two companies of his right to participate in general meetings and of his right to control and oversee their activities. By the same token, they nullified Mr. Diallo’s right as *associé* to dissolve and liquidate the companies²³³.

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2.27 If, furthermore, as the DRC contends, the companies were compulsorily dissolved by decision of the Congolese authorities²³⁴, they were dissolved without any consultation whatsoever with their *gérant* and sole *associé*.

2.28 His rights as an *associé* have, as such, been violated by the DRC.

SECTION 2

THE RIGHT TO OVERSEE AND CONTROL ACTS BY THE MANAGEMENT AND THE OPERATIONS OF THE COMPANIES

2.29 In its Judgment of 24 May 2007 the Court drew a distinction between the rights of *associés* and the rights of a *gérant*:

“An *associé* of an SPRL holds *parts sociales* in its capital, while the *gérant* is an organ of the company acting on its behalf.”²³⁵

²³⁰*Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana*, 95 I.L.R. 183, 209. See *infra*, paras. 2.93-2.94.

²³¹OG, Ann. 35.

²³²*Ibid.*

²³³Under Art. 114 of the 1887 Decree, “[a]fter being dissolved, commercial corporations are held to exist in order to be liquidated” (*ibid.*). This liquidation procedure is as a rule under the control of the *associés*: “Unless an agreement to the contrary exists, the method of liquidation and the liquidators shall be decided by the general meeting of *associés*.” (Art. 115 of the 1887 Decree, *ibid.*)

²³⁴See paras. 3.6 to 3.9, below.

²³⁵See para. 66 of the Judgment.

2.30 On the basis of that distinction, the Court implicitly rejected Guinea’s claim that it had standing in relation to Mr. Diallo’s rights of control as *gérant*, under Article 68 of the 1887 Decree, for example. The Court went on, however:

“It is not for the Court to determine, at this stage in the proceedings, which specific rights appertain to the status of *associé* and which to the position of *gérant* of an SPRL under Congolese law. It is at the merits stage, as appropriate, that the Court will have to define the precise nature, content and limits of these rights.”²³⁶

2.31 Guinea maintains its argument that the rights of oversight and control under Articles 71 and 75 of the 1887 Decree attach to the status of *associé*.

2.32 The relevant passages of Article 71 state:

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“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.”²³⁷

2.33 Article 71 therefore gives the *associé* a right of control, where the number of *associés* is no more than five. Since Mr. Diallo was the only shareholder in both his companies, under Article 71 all the rights and powers of an “auditor” were conferred on him, and this right is likewise established in Article 19 of the Articles of Incorporation of Africontainers: “Each of the *associés* shall exercise supervision over the company.”²³⁸

2.34 The content of the right referred to in Article 71 is then set out in Article 75:

“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*.”

2.35 It follows from Articles 71 and 75 that Mr. Diallo was entitled, free of all restriction, to oversee and control the management and operation of his two companies — something quite understandable in a *société privée à responsabilité limitée*. In this respect too, as a result of his detention and expulsion, Mr. Diallo lost the benefit of these significant rights²³⁹.

2.36 Pursuant to Articles 71 and 75, these rights are in fact, in the context of both Mr. Diallo’s companies, rights attaching to the status of *associé* and, in principle, the DRC accepts

²³⁶*Ibid.*

²³⁷Similarly, Art. 19 of the Articles of Incorporation of Africontainers, MG, Ann. 1.

²³⁸MG, Ann. 1.

²³⁹According to one commentator: “The auditors play a key role in companies. They see to the smooth running of company affairs and compliance with statutory and corporate provisions relating to the company accounts.” (Roger Makela Massamba, *Droit des affaires — Cadre juridique de la vie des affaires au Zaïre*, Cadicec/De Boecke Université, 1996, p. 313.)

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that premise²⁴⁰. What is more, it follows from the *ELSI* case that, depending on the terms of the relevant instrument or, on that occasion, the treaty, rights of control can be direct shareholder rights²⁴¹. On the subject of the provision relevant in that case (Art. III (2) of the FCN Treaty between Italy and the United States), one commentator, Professor Lowe, has observed that the right to organize, control and manage

“is plainly a right of the shareholders. There is no room for argument that this is a right of the company; and it is hard to see that there is any intelligible sense in which such a right could belong to the company that shareholders organise, control and manage.”²⁴²

2.37 F.A. Mann commented likewise: “Even the strictest adherent of verbalism must admit that the right to ‘control and manage’ can only be guaranteed to the (sole) shareholder rather than the corporation itself.”²⁴³

2.38 Exactly the same can be said here of the rights of oversight and control set out in Articles 71 and 75 of the 1887 Decree. The fact that these rights derive from domestic law rather than a treaty does not in any way alter their nature and turn them into rights of the company rather than of the shareholder.

2.39 At the same time, the *ELSI* case established that an act directed at a company is capable of violating a shareholder’s right to control and manage. Drawing attention to the repercussions of the requisition, the Chamber of the Court found that: “It is undeniable that the requisition of a firm’s ‘plant and relative equipment’ must normally amount to a deprivation, at least in important part, of the right to control and manage.”²⁴⁴ The Chamber of the Court examined pragmatically what control and management in fact are in order to rule on whether, where the thing controlled and managed is eliminated as a matter of fact, it follows that there is an infringement of the right to control and manage.

2.40 In the present case, in relation to the facts alleged by Guinea, the situation is even plainer still. It is the *associé*, who has power under the applicable law to oversee and control, who has, effectively, been taken out of the picture:

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- (i) By detaining, and then expelling Mr. Diallo, the DRC sought to prevent him, and indeed did prevent him, from exercising his rights of control and oversight. He could not, actively and effectively, control or oversee his companies from Guinea. Even had he been

²⁴⁰Judgment of 24 May 2007, para. 53.

²⁴¹*Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment, *I.C.J. Reports 1989*, p. 15.

²⁴²Lowe, “Shareholders’ Rights to Control and Manage: from *Barcelona Traction* to *ELSI*”, in *Liber Amicorum Judge Shigeru Oda*, N. Ando et al. eds. 2002, p. 269.

²⁴³F. A. Mann, “Foreign Investment in the International Court of Justice: The *ELSI* Case”, 86 *AJIL*, 92, at 97-98. See also, Sir Arthur Watts, “Nationality of Claims: Some Relevant Concepts”, in V. Lowe and M. Fitzmaurice, *Fifty Years of the International Court of Justice*, Grotius, Cambridge, 1996, p. 424, p. 435:

“The Court proceeded on this basis [that the direct rights of shareholders were affected] in *Elettronica Sicula S.p.A. (ELSI)*, *ICJ Reports 1989*, p. 15: the USA claimed against Italy for loss and damage allegedly suffered by two US companies as a result of action taken by the Italian authorities against an Italian company the shares of which were owned by the US companies, whose direct rights as shareholders were thereby affected.”

²⁴⁴*Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment, *I.C.J. Reports 1989*, p. 50, para. 70.

in a position to appoint a new “gérant” and an “auditor” (which he was not, because he was at a distance and lacked financial resources), he was still deprived of the right to appoint one of his choice, in violation of Articles 65 and 67 of the 1887 Decree, since he could not be expected to hand over or abandon management of his companies to some third party, particularly given the nature of the companies as SPRLs.

- (ii) The specific intention behind Mr. Diallo’s detention and expulsion was to prevent him from exercising his rights of control and oversight. The detention and expulsion were the direct outcome of the letter sent by Zaire Shell to the Minister of Justice on 29 August 1995, in which Zaire Shell asked for steps to be taken in relation to the Africontainers judgment²⁴⁵. It was because he had exercised, and was exercising, the rights to control and oversee his two companies that Mr. Diallo was expelled. As the Zairean authorities intended, the expulsion had a dramatic effect on both companies, which were prevented once and for all from carrying on their activities, including recovering their debts.
- (iii) The *ELSI* case is a helpful precedent, since one of the clarifications the decision makes lies in the emphasis which the Chamber placed on the intention behind the alleged wrongful act. Emphasizing the intention behind the requisitioning of the *ELSI* plant, the Chamber found:

“Since the requisition thus had the design of preventing Raytheon from exercising, for six critical months, what was at that time a most important part of its right to control and manage *ELSI*, there exists a question whether the requisition was in conformity with the requirements of Article III, paragraph 2, of the FCN Treaty.”²⁴⁶

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2.41 In paragraph 66 of its Judgment of 24 May 2007 the Court pointed out that “[a]n *associé* of an SPRL holds *parts sociales* in its capital, while the *gérant* is an organ of the company acting on its behalf”. If one applies this distinction to the *associé*’s right to oversee management, it is quite obvious that it is not a right of the company. Furthermore, where auditors are appointed (see Art. 72 of the 1887 Decree), they are appointed by the general meeting of *associés*, which also sets the auditors’ emoluments (Art. 77), and it is to the general meeting that the auditors must report on their work (Art. 76). In short, the auditor, if there is one, acts on behalf of the *associés*, not of the company.

2.42 The DRC has but a single response to give Guinea in relation to Mr. Diallo’s rights under Articles 71 and 75 of the 1887 Decree. It is to remark that “Mr. Diallo is indeed the *associé-gérant* of Africom-Zaire and Africontainers”, and then state that: “the same person cannot provide both management and oversight of management”²⁴⁷.

2.43 This is an unfounded assertion, nothing more. There is nothing in the 1887 Decree to suggest that one person cannot concurrently hold the rights to perform those different functions²⁴⁸.

²⁴⁵MG, Ann. 166.

²⁴⁶*Eletronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment, *I.C.J. Reports 1989*, p. 50, para. 70. Since the facts were not such as to allow the case to proceed to decision on this point, there was, in the event, no finding of a violation of para. 2 of Art. III.

²⁴⁷CMC, paras. 2.10-2.11; see CR 2006/52, pp. 10-11, para. 7.

²⁴⁸Whereas Art. 77 of the 1887 Decree provides that the auditors “may not perform any other function within the company”, one should bear in mind that Mr. Diallo was not an auditor in the strict sense. He had only, under Art. 71, the *powers* of auditors. Art. 77 is therefore of no relevance and the DRC does not refer to it.

The Decree (Art. 67, for example) in fact makes express provision for situations in which one person can perform two functions at the same time.

SECTION 3

INDIRECT EXPROPRIATION OF MR. DIALLO'S *PARTS SOCIALES* IN AFRICOM-ZAIRE AND AFRICONTAINERS

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2.44 The DRC asserts in its Counter-Memorial, as it had already applied itself to doing, albeit in a rather vague way²⁴⁹, during the oral proceedings on its Preliminary Objections²⁵⁰, that Mr. Diallo “is still the owner of his *parts sociales* in Africontainers”²⁵¹. The Republic of Guinea does not dispute, nor has ever disputed, that, on paper, Mr. Diallo is still the sole holder of the *parts sociales* in Africom-Zaire and, via that company, in Africontainers-Zaire²⁵² — at least, that is, if they still exist in legal terms, which according to the DRC they do not²⁵³.

2.45 The fact that Mr. Diallo has remained the record owner of the *parts sociales* in the two companies does not in any way imply, however, as the DRC seeks to suggest, that “the property rights he holds as an individual have in no way been impaired by the DRC”²⁵⁴ or that “Guinea’s allegation that the [DRC] deprived Mr. Diallo of his right of ownership in his *parts sociales* and in the companies’ property is unfounded”²⁵⁵. This purely circular reasoning is but a hastily drawn conclusion that fails to respond to Guinea’s line of argument.

2.46 In its Memorial Guinea does not claim that the DRC *formally* expropriated Mr. Diallo’s holdings in the companies of which he is the sole *associé*. The actions carried out by the Congolese authorities targeting both Mr. Diallo in person and the businesses of Africom-Zaire and Africontainers-Zaire have nevertheless resulted in the *de facto* expropriation of the *parts sociales* of which Mr. Diallo has been left only the formal holder (§2). It is the case that, even in situations where formal title has not been encroached upon by the State, it is apparent from positive law that interference with rights of ownership can give rise to *de facto* or indirect expropriation (§1).

2.47 It is pointed out that this line of argument advanced by Guinea is in no way intended to circumvent the Court’s Judgment on Preliminary Objections delivered on 24 May 2007. It is not a question of taking up cudgels for the companies Africom-Zaire and Africontainers-Zaire per se. Guinea is seeking only to protect Mr. Diallo’s direct rights as *associé* in those two companies, here the right of ownership in his *parts sociales*, in the context of the claims which the Court did declare admissible²⁵⁶.

²⁴⁹CR 2006/52, 29 Nov. 2006, p. 29, paras. 51-52 (Kalala).

²⁵⁰CR 2006/50, 27 Nov. 2006, p. 15 (Ilunga); p. 21, para. 25 (Kalala); p. 53, para. 37 (Kisala).

²⁵¹CMC, p. 28, para. 2.07, p. 21, para. 1.38.

²⁵²MG, p. 65, para. 3.61.

²⁵³See Chap. 3, Sec. 1 below.

²⁵⁴CMC, p. 28, para. 2.07.

²⁵⁵*Ibid.*, p. 22, para. 1.41.

²⁵⁶See the Judgment of 24 May 2007, paras. 98 (1) (a) and 98 (3) (b).

§1. Indirect expropriation in international law

2.48 Both international case law and academic thinking are today unanimous in recognizing that a State can be held responsible for expropriation even where there is no overt formal measure transferring or annulling the legal title (A). Arbitral case law has extracted the generally accepted criteria for establishing whether State interference amounts to indirect or creeping expropriation of this kind — “*expropriation indirecte ou déguisée* [disguised]”, in French (B).

A. Indirect expropriation is recognized in positive international law

2.49 The obligation on States to pay compensation for injury to property caused by acts or omissions in the absence of a formal act of expropriation was recognized by the Court’s forerunner in 1926 in the case concerning *Certain German Interests in Polish Upper Silesia*²⁵⁷. The Permanent Court had no difficulty in finding that, by the direct and overt expropriation of the Chorzów factory, which had previously belonged to Oberschlesische Stickstoffwerke, a German company, and by its subsequent operation, Poland had also *de facto* expropriated experiments, patents, licences, etc., belonging to Bayerische Stickstoffwerke, a German company which had previously managed and operated the Chorzów factory, even though the corresponding legal titles had been neither annulled nor transferred by Poland²⁵⁸.

2.50 In the *Elettronica Sicula S.p.A. (ELSI)* case, today’s Court likewise accepted, in principle, that there could be disguised expropriation, although it did not find there to be any in that case²⁵⁹.

2.51 In arbitral case law, the principle itself of indirect or *de facto* expropriation has also been recognized. In the *Norwegian Shipowners* case, at the outbreak of the First World War, the United States Government had requisitioned steamers and other ships being built in United States shipyards. Several Norwegian shipowners, shortly before the requisitioning measures, had entered into shipbuilding contracts with the American shipyards; given the dearth of ships, these contracts had considerable value. The arbitral tribunal found that the United States Government had confiscated not only the steamers and the material necessary to complete their construction, as the United States contended, but also the shipbuilding contracts, even though these had not been formally “expropriated” in the orders issued by the American authorities in 1917²⁶⁰.

2.52 Nowadays most instruments relating to the promotion and protection of investments make express provision for measures tantamount to expropriations on the same basis as *de jure* expropriations or nationalizations²⁶¹. This occurs in, *inter alia*, Article 1110 of NAFTA, according to which: “No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment (‘expropriation’), except . . .”

²⁵⁷ *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7.*

²⁵⁸ *Ibid.*, p. 44.

²⁵⁹ *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy), Judgment, I.C.J. Reports 1989, p. 69, para. 116.*

²⁶⁰ Award of 13 October 1922, *Norwegian Shipowners’ Claims (Norway v. United States of America), R.I.A.A., Vol. I, p. 325.*

²⁶¹ See UNCTAD, *Taking of property*, United Nations, New York/ Geneva, 2000, doc. UNCTAD/ITE/IIT/15, pp. 19-23; G. Sacerdoti, “Bilateral Treaties and Multilateral Instruments on Investment Protection”, *R.C.A.D.I.*, Vol. 269, 1997, pp. 385-386; Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties*, Nijhoff, The Hague, 1995, p. 99.

2.53 Similarly, Article 13(1) of the 1994 Energy Charter Treaty provides that:

“Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as ‘Expropriation’) except . . .”

2.54 In the recent *ADM* case, an ICSID tribunal upheld the proposition that expropriation, within the meaning of Article 1110 of NAFTA, could arise from acts or omissions which did not affect the title to property as such. Applying NAFTA it held:

“Expropriation may take place through State measures other than direct taking of tangible property, such as taxation. When such interference occurs, the legal title to the property remains in the owner . . .”²⁶²

2.55 In the same vein, an arbitral tribunal constituted under the ICSID Additional Facility Mechanism held in the *Tecmed* case²⁶³ that:

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“Although formally an expropriation means a forcible taking by the Government of tangible or intangible property owned by private persons by means of administrative or legislative action to that effect, the term also covers a number of situations defined as *de facto* expropriation, where such actions or laws transfer assets to third parties different from the expropriating State or where such laws or actions deprive persons of their ownership over such assets, without allocating such assets to third parties or to the Government.”²⁶⁴

2.56 On the basis of Article III of the 1993 bilateral treaty between the United States and Ecuador concerning the encouragement and protection of investment, which is very similar to the corresponding provision of NAFTA, the tribunal in the *Occidental v. Ecuador* case agreed

“with the Claimant in that expropriation need not involve the transfer of title to a given property, which was the distinctive feature of traditional expropriation under international law. It may of course affect the economic value of an investment.”²⁶⁵

2.57 A comparable approach was taken by the arbitral tribunal called upon to rule on the basis of the bilateral treaty for the promotion and protection of investments between the Netherlands and the Czech Republic (as successor to Czechoslovakia) in the case *CME Czech Republic BV v. Czech Republic*²⁶⁶. Although the treaty contains no definition of the term

²⁶²Award of 21 November 2007, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, Case No. ARB(AF)/04/5, para. 238, available at: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC782_En&caseId=C43.

²⁶³Award of 29 May 2003, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, Case No. ARB(AF)/00/2), available at: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC602_En&caseId=C186.

²⁶⁴*Ibid.*, para. 113.

²⁶⁵Award of 1 July 2004, *Occidental Exploration and Production Co. v. Ecuador*, LCIA Case No. UN3467, para. 85, available at: <http://www.investmentclaims.com/ViewPdf/ic/Awards/law-iic-202-2004.pdf>.

²⁶⁶Partial Award of 13 September 2001, available at: <http://ita.law.uvic.ca/documents/CME-2001PartialAward.pdf>.

“expropriation” which might include express reference to measures equivalent to expropriation, as NAFTA and the Energy Charter Treaty do, the arbitral tribunal found that:

“*De facto* expropriations or indirect expropriations, i.e. measures that do not involve an overt taking but that effectively neutralise the benefit of the property of the foreign owner, are subject to expropriation claims. This is undisputed under international law.”²⁶⁷

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2.58 This very broad concept of expropriation is in fact in no way peculiar to either investment disputes or arbitral tribunals ruling under bilateral treaties for the promotion and protection of investment, which often contain specific expropriation provisions. Rather, the case law of those tribunals has been informed by that of the Iran-United States Claims Tribunal set up in 1981²⁶⁸. The Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran of 19 January 1981 — the founding instrument establishing the jurisdiction of the Tribunal — contains no definition of expropriation, and merely provides that

“[a]n international arbitral tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national’s claim, if such claims and counterclaims are outstanding on the date of this Agreement, whether or not filed with any court, and arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights . . .”²⁶⁹.

2.59 Despite the lack of any specific wording in this regard, the Tribunal has not hesitated to hold that,

“[i]n the absence of a formal act of expropriation, the possibility of the occurrence of a deprivation or taking is not excluded”²⁷⁰.

2.60 This principle of itself refutes the argument advanced by the DRC²⁷¹: the fact that Mr. Diallo is still the formal title-holder of the *parts sociales* in Africom-Zaire and Africontainers-Zaire does not mean that there was no indirect expropriation of those *parts sociales*. Quite the reverse: as the Iran-United States Tribunal expressly indicated,

²⁶⁷*Ibid.* para. 604.

²⁶⁸See Andrea J. Menaker, “The Enduring Relevance of the Expropriation Jurisprudence of the Iran-U.S. Claims Tribunal for Investor-State Arbitrations”, in Christopher R. Drahozal and Christopher S. Gibson, *The Iran-U.S. Claims Tribunal at 25*, Oxford University Press, 2007, p. 336.

²⁶⁹Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Art. II, para. 1, in *Iran-United States Claims Tribunal Reports*, Vol. 1, p. 9.

²⁷⁰Award No. 569-419-2, 6 Mar. 1996, *Rouhollah Karubian v. Government of the Islamic Republic of Iran*, *Iran-United States Claims Tribunal Reports*, Vol. 32, p. 35, para. 105; Award No. 549-967-2, 6 July 1993, *ibid.*, Vol. 29, p. 260, para. 28; and Award No. 566-316-2, 14 July 1995, *Edgar Protiva, et al. v. Government of the Islamic Republic of Iran*, *ibid.*, Vol. 31, p. 89, para. 53.

²⁷¹See para. 2.45, above.

“[a] deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected”²⁷².

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2.61 The Protocol of 20 March 1952 to the Convention for the Protection of Human Rights and Fundamental Freedoms, which protects property rights in terms similar to the African Charter on Human and Peoples’ Rights of 27 June 1981, does not define the concept of expropriation. According to the settled jurisprudence of the European Court of Human Rights, nevertheless, expropriation can result from acts or omissions other than the transfer or formal annulment of title as such. In *Sporrong and Lönnroth v. Sweden*²⁷³, the Court accordingly held:

“In the absence of a formal expropriation, that is to say a transfer of ownership, the Court considers that it must look behind the appearances and investigate the realities of the situation complained of . . . Since the Convention is intended to guarantee rights that are ‘practical and effective’ . . ., it has to be ascertained whether that situation amounted to a *de facto* expropriation, as was argued by the applicants.”²⁷⁴

2.62 It is therefore generally accepted in the international and arbitral jurisprudence, and by the scholars²⁷⁵, that expropriation can arise not only from the annulment or transfer of the title to property, but also from other acts by State authorities which, while taking care not to modify the legal title in formal terms, encroach in a similar way on rights of ownership. As summarized by Messrs. Reisman and Sloane:

“In short, international tribunals, jurists, and scholars have consistently appreciated that states may accomplish expropriation in ways other than by formal decree; indeed, often in ways that may seek to cloak expropriatory conduct with a veneer of legitimacy. For this reason, tribunals have increasingly accepted that expropriation must be analyzed in consequential rather than formal terms . . . For purposes of state responsibility and the obligation to make adequate reparation, international law does not distinguish indirect from direct expropriations.”²⁷⁶

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2.63 Accordingly, the fact that Mr. Diallo has remained, formally speaking, the record holder of his *parts sociales* in Africontainers-Zaire and Africom-Zaire does not relieve the DRC of its

²⁷²Award No. 141-7-2, 29 June 1984, *Tippets, Abbet, McCarthy, Stratton (TAMS) v. TAMS-AFFA Consulting Engineers of Iran*, *ibid.*, Vol. 6, p. 225. See also Award No. 19-98-2, 30 Dec. 1982, *Harza Engineering Co. v. Islamic Republic of Iran*, *ibid.*, Vol. 1, p. 504; Award No. 97-54-3, 20 Dec. 1983, *Dames and Moore v. Islamic Republic of Iran et al.*, *ibid.*, Vol. 4, p. 223; Award No. 245-335-2, 8 Aug. 1986, *Thomas Earl Payne v. Government of the Islamic Republic of Iran*, *ibid.*, Vol. 12, p. 9, para. 20.

²⁷³ECHR, Judgment of 23 September 1982, *Sporrong and Lönnroth v. Sweden*, *Series A*, No. 52.

²⁷⁴*Ibid.*, pp. 24-25, para. 63. See also the Judgments of 24 June 1993, *Papamichalopoulos and Others v. Greece*, *Series A*, No. 260-B, para. 42; 22 May 1998, *Vasilescu v. Romania*, *Reports of Judgments and Decisions* 1998-III, para. 51; 28 Oct. 1999, *Brumărescu v. Romania* [GC], *ibid.*, 1999-VII, para. 76; 21 July 2005, *Străin and Others v. Romania*, *ibid.*, 2005-VII, para. 42

²⁷⁵See in particular, G. C. Christie, “What Constitutes a Taking of Property Under International Law?”, *B.Y.B.I.L.*, Vol. 38, 1952, pp. 307-338; B. H. Weston, “‘Constructive Takings’ Under International Law: A Modest Foray into the Problem of ‘Creeping Expropriation’”, *Virginia Journal of International Law*, Vol. 16, 1975, No. 1, pp. 103-175; R. Higgins, “The Taking of Property by the State: Recent Developments in International Law”, *R.C.A.D.I.*, Vol. 176, 1982-III, pp. 259-391; R. Dolzer, “Indirect Expropriation of Alien Property”, *ICSID Review — Foreign Investment Law Journal*, Vol. 1, 1986, pp. 41-65; Y. Nouvel, “Les mesures équivalent à une expropriation dans la pratique récente des tribunaux arbitraux”, *R.G.D.I.P.*, Vol. 106, 2002, pp. 79-102.

²⁷⁶“Indirect Expropriation and its Valuation in the BIT Generation”, *B.Y.B.I.L.*, Vol. 74, 2003, p. 121.

responsibility for the *de facto* expropriation of those *parts sociales*. It is the reality of the circumstances rather than the legal steps taken (or not taken) which should be the focus of attention²⁷⁷.

B. The characteristics of State interference amounting to indirect expropriation

2.64 The principle itself of indirect or *de facto* expropriation now clarified, the requirements to be fulfilled for such expropriation to exist should be described. Unlike *de jure* expropriations or nationalizations, which, owing to their formality, are fairly easy to detect, *de facto* expropriations can take various forms and depend to an appreciable extent on the circumstances of each case:

“It is generally accepted that a wide variety of measures are susceptible to lead to indirect expropriation, and each case is therefore to be decided on the basis of its attending circumstances.”²⁷⁸

2.65 Case law — in particular that of the Iran-United States Claims Tribunal and that of the arbitral tribunals which have heard investment protection disputes — has nevertheless outlined a number of principles which assist in identifying indirect or *de facto* expropriations.

77 2.66 First it should be noted that only the actual effects of the interference with property rights are decisive in identifying indirect or *de facto* expropriation. It does not matter whether or not the State authorities intended to deprive an individual of his property. Nor is it significant that the measures impairing property rights may have been aimed specifically at causing injury, which was, moreover, quite undoubtedly true of the measure expelling Mr. Diallo, which was taken specifically to prevent the smooth operation of Mr. Diallo’s activities and companies and which, without the slightest doubt, was expropriatory in intention. As clearly elucidated by the Iran-United States Tribunal,

“[t]he intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact”²⁷⁹.

2.67 The tribunals ruling on investment disputes have likewise given very considerable weight to the effects of the measures taken by States on the lawful owner, independently of any

²⁷⁷Iran-United States Claims Tribunal, Award No. 141-7-2, 29 June 1984, *Tippets, Abbet, McCarthy, Stratton (TAMS) v. TAMS-AFFA Consulting Engineers of Iran*, *ibid.*, Vol. 6, p. 226: “the form of the measure of control or interference is less important than the reality of their impact”.

²⁷⁸Award of 3 September 2001, *Ronald S. Lauder v. Czech Republic*, para. 200, available at: <http://www.investmentclaims.com/ViewPdf/ic/Awards/law-iic-205-2001.pdf>. See also Award of 16 December 2002, *Marvin Roy Feldman Karpa v. Mexico*, Case No. ARB(AF)/99/1, *ICSID Reports*, Vol. 7, p. 367, para. 102; Iran-United States Claims Tribunal Award No. 196-302-3, 24 October 1985, *International Technical Products Corporations et al. v. Government of the Islamic Republic of Iran*, *Iran-United States Claims Tribunal Reports*, Vol. 9, p. 241; Award No. 585-457-1, 5 March 1998, *George E. Davidson v. Islamic Republic of Iran*, *ibid.*, Vol. 34, p. 3, para. 106.

²⁷⁹Award No. 141-7-2, 29 June 1984, *Tippets, Abbet, McCarthy, Stratton (TAMS) v. TAMS-AFFA Consulting Engineers of Iran*, *Iran-United States Claims Tribunal Reports*, Vol. 6, pp. 225-226. See also Award No. 217-99-2, 19 March 1986, *Phelps Dodge Corporation, et al. v. Islamic Republic of Iran*, *ibid.*, Vol. 10, p. 130; Award No. 549-967-2, 6 July 1993, *Harold Birnbaum v. Islamic Republic of Iran*, *ibid.*, Vol. 29, p. 270; Award No. 560-44/46/47-3, 12 October 1994, *Shahin Shaine Ebrahimi, et al. v. Islamic Republic of Iran*, *ibid.*, Vol. 30, p. 190.

consideration of the wishes or intention of the States. In the *S. D. Myers* case²⁸⁰, the tribunal ruling on the claim relating to application of NAFTA Article 1110 stated that

“A tribunal should not be deterred by technical or facial considerations from reaching a conclusion that an expropriation or conduct tantamount to an expropriation has occurred. It must look at the real interests involved and the purpose and effect of the government measure.”²⁸¹

2.68 In its recent award in *Sempre Energy International*²⁸², an arbitral tribunal expressed the view that

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“[t]he question of indirect or creeping expropriation requires a more complex assessment. The Tribunal has no doubt about the fact that such expropriation can arise from many kinds of measures, and *that these have to be assessed by their cumulative effects.*”²⁸³

2.69 It follows directly from this that the Government does not need to have been enriched as a result of the measure impairing the property of the injured party or otherwise. The effect on that injured party, and that effect alone, must be taken into account in determining whether or not there has been indirect expropriation. The tribunal in *Metalclad* accordingly stated that the relevant NAFTA provisions also cover

“covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be expected economic benefit of property *even if not necessarily to the obvious benefit of the host State*”²⁸⁴.

2.70 Chamber Two of the Iran-United States Claims Tribunal shared the same concerns when it indicated that it

²⁸⁰Partial Award of 12 November 2000, *S.D. Myers Inc. v. Government of Canada, I.L.M.*, Vol. 40, 2001, p. 1408.

²⁸¹*Ibid.*, para. 285. See also Award of 29 May 2003, *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, Case No. ARB(AF)/00/2), paras. 114 and 116, available at: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC602_En&caseId=C186; Award of 30 Aug. 2000, *Metalclad Corp. v. United Mexican States*, Case No. ARB(AF)/97/1, *ICSID Reports*, Vol. 5, p. 231, para. 111 (also available at: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC542_En&caseId=C155); Award on Jurisdiction and Liability of 27 Oct. 1989, *A. Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana, I.L.R.*, Vol. 95, p. 209.

²⁸²Award of 28 Sep. 2007, *Sempre Energy International v. Argentine Republic*, Case No. ARB/02/16, available at: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC694_En&caseId=C8.

²⁸³*Ibid.*, para. 283; emphasis added.

²⁸⁴Award of 30 August 2000, *Metalclad Corp. v. United Mexican States*, Case No. ARB(AF)/97/1, *ICSID Reports*, Vol. 5, p. 203, para. 103, also available at: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH &actionVal=showDoc&docId=DC542_En&caseId=C155; emphasis added.

“prefers the term ‘deprivation’ to the term ‘taking’, although they are largely synonymous, because the latter may be understood to imply that the Government has acquired something of value, *which is not required*”²⁸⁵.

2.71 This leads to the question of the effects the measure or measures in question must have on the property of the injured party in order for there to be indirect expropriation.

2.72 The arbitral tribunal in the *ADM* case summarized very clearly the arbitral case law on the relevant criteria for identifying indirect or *de facto* expropriation:

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“The test on which other Tribunals and doctrine have agreed — and on which the Claimants rely — is the ‘effects test’. Judicial practice indicates that the severity of the economic impact is the decisive criterion in deciding whether an indirect expropriation or a measure tantamount to expropriation has taken place. *An expropriation occurs if the interference is substantial and deprives the investor of all or most of the benefits of the investment.* There is a broad consensus in academic writings that the intensity and duration of the economic deprivation is the crucial factor in identifying an indirect expropriation or equivalent measure.”²⁸⁶

The Tribunal continued:

“Notwithstanding the fact that previous cases are not identical, and that certain considerations and decisions have not been uniform, a common principle may be extracted: *only loss of control over the investment or substantial loss of its economic value may amount to an indirect expropriation.*”²⁸⁷

2.73 A similar approach has indeed been taken by other arbitral tribunals ruling on whether or not there has been creeping, indirect or *de facto* expropriation. This is true of, for example, the tribunals in *Sempra Energy International*²⁸⁸, *ADC Affiliate Limited and ADC & ADMC*

²⁸⁵Award No. 141-7-2, 29 June 1984, *Tippets, Abbet, McCarthy, Stratton (TAMS) v. TAMS-AFFA Consulting Engineers of Iran, Iran-United States Claims Tribunal Reports*, Vol. 6, p. 225; emphasis added. See also the dissenting opinion of Judge Brower, in Award No. 373-481-3, 28 June 1988, *Motorola, Inc. v. Iran National Airlines Corp. et al.*, *ibid.*, Vol. 19, p. 95.

²⁸⁶Award of 21 November 2007, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, Case No. ARB(AF)/04/5, para. 240 (emphasis added), available at: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC782_En&caseId=C43.

²⁸⁷*Ibid.*, para. 242; emphasis added.

²⁸⁸Award of 28 September 2007, *Sempra Energy International v. Argentine Republic*, Case No. ARB/02/16, para. 285: “A finding of indirect expropriation would require more than adverse effects. It would require that the investor no longer be in control of its business operation, or that the value of the business have been virtually annihilated.” (Available at: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC694_En&caseId=C8.)

*Management Limited*²⁸⁹, *Tokios Tokelès*²⁹⁰, *Middle East Cement*²⁹¹, *CME*²⁹², *Metalclad*²⁹³, *Pope and Talbot*²⁹⁴ and *Antoine Goetz*²⁹⁵.

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2.74 The same test has been developed and consistently applied by the Iran-United States Claims Tribunal in its wealth of case law on *de facto* expropriation. In order to identify measures equivalent to expropriation taken by the Iranian authorities during and after the Islamic Revolution, and targeting United States nationals or businesses, the Tribunal has considered that

“a taking of property may occur under international law . . . if a government has interfered *unreasonably* with the use of property”²⁹⁶.

²⁸⁹Award of 2 October 2006, *ADC Affiliate Limited and ADC & ADMC Management Limited v. Hungary*, Case No. ARB/03/16, para. 304:

“There can be no doubt whatsoever that the legislation passed by the Hungarian Parliament and the Decree had the effect of causing the rights of the Project Company to disappear and/or become worthless. The Claimants lost whatever rights they had in the Project and their legitimate expectations were thereby thwarted.” (Available at: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionValshowDoc&ocId=C648_En&aseId=231.)

²⁹⁰Decision on Jurisdiction of 29 Apr. 2004, *Tokios Tokelès v. Ukraine*, Case No. ARB/02/18, ICSID Review — *LJ*, Vol. 20, 2005, p. 205, para. 92.

²⁹¹Award of 12 April 2002, *Middle East Cement Shipping and Handling Co. S.A. v. Egypt*, Case No. ARB/99/6, *ICSID Reports*, Vol. 7, p. 195, para. 107: “When measures are taken by a State *the effect of which is to deprive the investor of the use and benefit of his investment* even though he may retain nominal ownership of the respective rights being the investment, the measures are often referred to as a ‘creeping’ or ‘indirect’ expropriation.” (Emphasis added.)

²⁹²Partial Award of 13 September 2001, *CME Czech Republic BV v. Czech Republic*, para. 604: “*De facto* expropriations or indirect expropriations, i.e. measures that do not involve an overt taking but that *effectively neutralize the benefit of the property of the foreign owner*, are subject to expropriation claims.” (Emphasis added, available at: <http://ita.law.uvic.ca/documents/CME-2001PartialAward.pdf>.)

²⁹³Award of 30 August 2000, *Metalclad Corp. v. The United Mexican States*, Case No. ARB(AF)/97/1, *ICSID Reports*, Vol. 5, p. 231, para. 103: “incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be expected economic benefit of property”.

²⁹⁴Interim Award of 26 June 2000 (Phase 1), *Pope and Talbot, Inc. v. Canada*, *ICSID Reports*, Vol. 7, p. 87, para. 102:

“While it may sometimes be uncertain whether a particular interference with business activities amounts to an expropriation, the test is whether that interference is sufficiently restrictive to support a conclusion that the property has been ‘taken’ from the owner. Thus, the *Harvard Draft* defines the standard as requiring interference that would ‘justify an inference that the owner * * * will not be able to use, enjoy, or dispose of the property . . .’. The *Restatement*, in addressing the question whether regulation may be considered expropriation, speaks of ‘action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien’s property’. Indeed, at the hearing, the Investor’s Counsel conceded, correctly, that under international law, expropriation requires a ‘substantial deprivation’.” (Footnotes omitted.)

²⁹⁵Award of 10 February 1999, *Antoine Goetz and Others v. Republic of Burundi*, Case No. ARB/95/3, 6 *ICSID Rep.* 5, 2004, p. 42, para. 124:

“[A]ccording to the information furnished to the Tribunal by the claimants, the revocation of the free trade zone certificate forced them to halt all activities beginning on 13 August 1996, the date of their final exportation, *which deprived their investments of all utility and deprived the claimant investors of the benefit which they could have expected from their investments*, the disputed decision can be regarded as a ‘measure having similar effect’ to a measure depriving of or restricting property within the meaning of Article 4 of the Investment Treaty.” (Emphasis added.)

²⁹⁶Award No. 19-98-2, 30 December 1982, *Harza Engineering Company v. Islamic Republic of Iran*, *Iran-United States Claims Tribunal Reports*, Vol. 1, p. 504; emphasis added; Award No. 32-211-2, 29 March 1983, *Ataollah Golpira v. Government of the Islamic Republic of Iran*, *ibid.*, Vol. 2, p. 177; Award No. 196-302-3, 28 October 1985, *International Technical Products Corporation, et al., v. Government of the Islamic Republic of Iran*, *ibid.*, Vol. 9, p. 238.

2.75 In his concurring opinion in *ITT Industries, Inc.*, Judge Aldrich clarified what amounts to unreasonable or arbitrary interference. He suggested that expropriation should be found: “whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral”.

2.76 The Tribunal adopted this test in its subsequent awards while at the same time defining what is meant by “fundamental rights of ownership”. In the *George E. Davidson* case, Chamber One of the Tribunal upheld the view that

“the Respondent [the Islamic Republic of Iran] deprived the Claimant of his fundamental rights of ownership, because he could not control, use or enjoy the benefits of these properties”²⁹⁷.

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2.77 Unreasonable or arbitrary interference is also characterized by its effect in rendering property rights useless. The Award in *Starrett Housing Corporation* stated on this point:

“It is recognized under international law that measures taken by a State can interfere with property rights *to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated*, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner.”²⁹⁸

2.78 Such “uselessness” of property rights has also been equated with the loss of effective control and use of property by the legitimate owner²⁹⁹.

2.79 The case law of the Iran-United States Tribunal, which is particularly coherent in this field³⁰⁰, has clearly been a source of inspiration for arbitral case law on indirect or *de facto* expropriation³⁰¹.

²⁹⁷Award No. 585-457-1, 5 March 1998, *George E. Davidson v. Government of the Islamic Republic of Iran*, *ibid.*, Vol. 34, p. 3, para. 111. See also Award No. 518-131-2, 14 August 1991, *Petrolane, Inc., et al., v. Government of the Islamic Republic of Iran, et al., ibid.*, Vol. 27, p. 93; Award No. 420-443-3, 31 March 1989, *Seismograph Service Corporation, et al. v. The National Iranian Oil Company, et al., ibid.*, Vol. 22, pp. 78 *et seq.* For other applications of the test, see Award No. 141-7-2, 29 June 1984, *Tippets, Abbet, McCarthy, Stratton (TAMS) v. TAMS-AFFA Consulting Engineers of Iran, ibid.*, Vol. 6, p. 225; Award No. 220-37/231-1, 10 April 1986, *Foremost Tehran, Inc., et al., v. Government of the Islamic Republic of Iran, ibid.*, Vol. 10, p. 243; Award No. 217-99-2, 19 March 1986, *Phelps Dodge Corporation, et al. v. Islamic Republic of Iran, ibid.*, Vol. 10, p. 130; Award No. 298-317-1, 22 April 1987, *Sola Tiles, Inc. v. Government of the Islamic Republic of Iran, ibid.*, Vol. 14, p. 231.

²⁹⁸Interlocutory Award No. ITL 32-24-1, 19 December 1983, *Starrett Housing Corporation, et al., v. Islamic Republic of Iran, ibid.*, Vol. 4, p. 154; emphasis added.

²⁹⁹*Ibid.*; Award No. 528-941-3, 6 March 1992, *W. Jack Buckamier v. Islamic Republic of Iran, et al., ibid.*, Vol. 28, p. 71; Award No. 519-394-1, 19 August 1991, *Merrill Lynch & Co. Inc., et al., v. Government of the Islamic Republic of Iran, et al., ibid.*, Vol. 27, pp. 142 *et seq.*; Award No. 220-37/231-1, 10 April 1986, *Foremost Tehran, Inc., et al., v. Government of the Islamic Republic of Iran, ibid.*, Vol. 10, pp. 248 *et seq.*; Award No. 360-10514-1, 20 April 1988, *Leonard and Mavis Daley v. Islamic Republic of Iran, ibid.*, Vol. 3, pp. 232 *et seq.*

³⁰⁰P. Daillier, A. Moutier-Lopet, A. Robert, D. Müller, “Tribunal irano-américain de réclamations”, *A.F.D.I.*, Vol. XLVIII, 2002, p. 417.

³⁰¹Andrea J. Menaker, “The Enduring Relevance of the Expropriation Jurisprudence of the Iran-U.S. Claims Tribunal for Investor-State Arbitrations”, in Christopher R. Drahozal and Christopher S. Gibson, *The Iran-U.S. Claims Tribunal at 25*, Oxford University Press, 2007, p. 336; C. N. Brower and J. D. Brueschke, *The Iran-United States Claims Tribunal*, Martinus Nijhoff Publishers, The Hague/Boston/London, 1998, p. 369.

2.80 It emerges from this body of case law that there has been an expropriation if the property rights of the person concerned have been interfered with to such an extent that he has been lastingly deprived of effective control over, or actual use of, or the value of those rights, even if he still holds formal title. It is the substance of the ownership which serves as the test, not the legal title. Where the legal title subsists, but has become a mere useless shell, there has been an expropriation for which the State may, under certain conditions, be held responsible.

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2.81 The existence of an expropriating measure obviously does not of itself alone engage the international responsibility of the State. Under Article 2 (a) of the Articles on the Responsibility of States for Internationally Wrongful Acts³⁰², the measure has to be attributable to the State, that is to say, the expropriation must have been effected by means of actions or omissions, considered alone or in combination, by the State. In addition, under Article 2 (b) of the Articles, the expropriation measure must be wrongful, that is to say, in breach of relevant international obligations of the State³⁰³.

§2. The DRC's interference with Mr. Diallo's rights of ownership constitutes a wrongful disguised expropriation

2.82 According to the rules and principles developed and recognized in international jurisprudence, it is clearly apparent that Mr. Diallo has been the victim of an indirect expropriation of his *parts sociales* in Africom-Zaire and Africontainers-Zaire. He no longer enjoys either control or effective use of his holding, whose economic value, moreover, has been wiped out (A). Mr. Diallo has suffered a wrongful expropriation as a result of his arbitrary expulsion in breach of the international obligations of the Congo. The DRC has, through the acts of its own State authorities, violated international law. The requirements for an expropriation to be lawful have not in any way been satisfied (B).

A. Mr. Diallo has been deprived of the control, use and value of his *parts sociales*

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2.83 Let it be recalled that in the 1970s Mr. Diallo invested significantly in Zaire by setting up the two companies Africom-Zaire, specializing in import-export business, and Africontainers-Zaire, specializing in the containerized transport of goods³⁰⁴, in which, from 1980, he also took on the role of *gérant*³⁰⁵. Following conclusion of lucrative contracts between the two companies and the Zairean State, ONATRA (Office National des Transports), Zaire Mobil Oil, Zaire Shell, Zaire Fina, and Gécamines (Générale des Carrières et des Mines), Mr. Diallo's initial investment prospered and thanks to this it was possible significantly to expand the business of both companies, of which he was the sole *associé*³⁰⁶. Mr. Diallo was regarded as an active investor who made a major contribution to the economic development of Zaire³⁰⁷.

2.84 As a result of commercial difficulties encountered by Africom-Zaire and Africontainers-Zaire caused by breaches of contract and an accumulation of unpaid receivables

³⁰²United Nations General Assembly, resolution 56/83, 12 Dec. 2001, doc. A/RES/56/83, Ann.

³⁰³*Ibid.*

³⁰⁴MG, p. 10, paras. 2.2-2.3.

³⁰⁵*Ibid.*, p. 11, para. 2.5.

³⁰⁶*Ibid.*, pp. 12-15, paras. 2.7-2.18; OG, pp. 9-11, paras. 1.14-1.19.

³⁰⁷OG, p. 9, para. 1.13.

owed by their contractual partners³⁰⁸, in order to counter the risk of the value of his investments declining, Mr. Diallo attempted to settle those differences both amicably and by litigation³⁰⁹, doing so through the corporate organs of the companies of which he was the *associé*, with a view to preventing any potential loss. This was the conduct of a diligent investor concerned for the viability of his investment. The arbitral tribunal in the *Generation Ukraine* case stated on this point that

“an international tribunal may deem that the failure to seek redress from national authorities disqualifies the international claim, not because there is a requirement of exhaustion of local remedies, but because the very reality of conduct tantamount to expropriation is doubtful in the absence of a reasonable — not necessarily exhaustive — effort by the investor to obtain correction”³¹⁰.

2.85 It would of course be unreasonable to liken mere commercial difficulties to measures of expropriation, even indirect ones. However, it is clear that Mr. Diallo, through the medium of the corporate organs of Africom-Zaire and Africontainers-Zaire, was simply seeking to recover what he regarded as owing to him in order to guard against the progressive erosion of his investments. This is moreover why he was detained and then expelled.

2.86 The interference with Mr. Diallo’s property rights and the progressive destruction of his *parts sociales* began in 1988 when he was imprisoned for the sole purpose of preventing him from recovering the debts, acknowledged though they were, owed by the Zairean State³¹¹. Not only was that measure entirely arbitrary and without any basis in law³¹², but the outcome was not only that the financial obligations of the State were forgotten, after a few final attempts at settlement initiated by Mr. Diallo after his release, but that a promising investment project could not go ahead³¹³. The fall in value of Mr. Diallo’s investment and the consequences of these wrongful acts on his property rights are quite clear. Admittedly, while Mr. Diallo was deprived only temporarily, albeit for quite a considerable time (a year³¹⁴), of control over his activities as a result of his incarceration, and while he was then able to regain control over his investment, it had suffered markedly as a result.

2.87 This decline continued in 1995 when, once again, the Congolese authorities interfered with the normal course of business of Africontainers by, first provisionally and then, shortly afterwards, permanently, staying execution of the judgment handed down in favour of the plaintiff³¹⁵ in the *Africontainers v. Zaire Shell* case³¹⁶. That action, although not directly targeting Mr. Diallo’s *parts sociales* in Africontainers-Zaire, did significantly reduce their value.

³⁰⁸See MG, pp. 16-21, paras. 2.19-2.35; OG, pp. 11-12, paras. 1.22-1.24.

³⁰⁹MG, pp. 22-29, paras. 2.36-2.62.

³¹⁰Award of 16 September 2003, *Generation Ukraine Inc. v. Ukraine*, Case ARB/00/9, *ILM*, Vol. 44, 2005, p. 404, para. 20.30; Award of 3 July 2008, *Helnan International Hotels A/S v. Egypt*, Case ARB/05/19, para. 148, available at: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC772_En&caseId=C64; Award of 11 September 2007, *Parkerings-Compagniet AS v. Lithuania*, Case ARB/05/8, para. 452, available at: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC682_En&caseId=C252.

³¹¹OG, pp. 15-18, paras. 1.35-1.44.

³¹²See OG, Ann. 16 and *supra*, Chap. 1, Sec. 1, §1.

³¹³OG, p. 11, para. 1.21.

³¹⁴See Chap. 1, Sec. 1, §1, above.

³¹⁵OG, pp. 19-23, paras. 1.45-1.55.

2.88 Culmination of the interference with the rights of ownership in Mr. Diallo's *parts sociales* came with his arrest and subsequent expulsion from the country³¹⁷. This death blow for the investment of Mr. Diallo, now prevented from managing his companies and from any participation in the activities of their corporate organs, and deprived of any possibility of doing what was necessary, put an end once and for all to the economic value of the *parts sociales* in both Africom-Zaire and Africontainers-Zaire. The measures deprived Mr. Diallo, permanently, of any ability to control³¹⁸ and of any use of his *parts sociales*.

2.89 The expulsion, as the culmination of the Congo's interference with Mr. Diallo's business and property, is an act which

“interfere[s] with property rights *to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated*, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner”³¹⁹.

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The pressure exerted by the Congolese State on the company and its claims rendered possession of *parts sociales* in the company completely valueless. Had the *parts sociales* been freely negotiable, which they were not³²⁰, one wonders who would have wanted to invest or to take over *parts sociales* and, thereby, a stake in a company which had just been destroyed by the machinations of the State and which, manifestly, in that climate of hostility and duress, no longer had any possibility of carrying on its business normally, especially in the absence of its sole executive officer and driving force, Mr. Diallo.

2.90 It is totally unrealistic to criticize Mr. Diallo for not trying to sell his *parts sociales*, as the DRC does, not without a certain irony³²¹. Even though the DRC did not prevent Mr. Diallo from selling his *parts sociales*, no such opportunity ever arose nor could have arisen. In commercial terms, Mr. Diallo's *parts sociales* no longer had any real economic value whatsoever. One must not forget, on the one hand, the very marked *intuitu personae* element prevailing throughout the articles of, and legal form taken by, Africom-Zaire and Africontainers-Zaire, both incorporated as SPRLs under Congolese law, in which the “*parts sociales* are not freely transferable”³²². Furthermore, Mr. Diallo was, at one and the same time, both the only *gérant* of the two companies — in which, directly or indirectly, he held 100 per cent of the capital — and, by the same token, their sole *associé*. As a result of this close overlapping, it was virtually impossible to distinguish Mr. Diallo from his companies, which, without him, were stripped of any value for a potential purchaser. The expulsion moreover confirms this identity between Mr. Diallo and the companies: he was expelled for the sole purpose of eliminating the companies and their activities. “As a result of the host State measure, the investor's rights to use of the property are rendered

³¹⁶MG, Ann. 153.

³¹⁷See Chap. 1, Sec. 2, above.

³¹⁸See Chap. 2, Sec. 2, above.

³¹⁹Interlocutory Award No. ITL 32-24-1, 19 Dec. 1983, *Starrett Housing Corporation, et al., v. Islamic Republic of Iran*, op cit., Vol. 4, p. 154; emphasis added.

³²⁰See para. 2.90, below.

³²¹CMC, p. 21, para. 1.38.

³²²See Art. 36 of the 27 Feb. 1887 Decree on commercial corporations, OG, Ann. 35. See also the Judgment of 24 May 2007, para. 25.

nugatory, or lack the economic value they previously had.”³²³ “The value of the business ha[s] been virtually annihilated.”³²⁴ To paraphrase the dissenting opinion of Judge Holtzmann in *Foremost Tehran, Inc.*, Mr. Diallo’s *parts sociales*

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“have become mere pieces of paper, of interest only to scripphologists — the hobbyists who collect financially worthless share certificates for their historical or decorative value”³²⁵.

2.91 Nor is there any doubt that the expulsion, even if not directly concerning Mr. Diallo’s rights of ownership and his *parts sociales*, is liable to impair them appreciably and, in the present case, to render them completely and permanently nugatory. The Iran-United States Tribunal has stated very clearly that “expulsion is a measure by nature directed against the Claimant himself. Yet, it may, at the same time, directly affect his property or property rights”³²⁶.

2.92 The measures taken by the DRC against Mr. Diallo and the effects of his expulsion on his *parts sociales* are surprisingly similar to the actions taken by the Ghanaian authorities against Mr. Biloune and to the consequent infringements of his rights. Mr. Biloune, a Syrian national, had lived in Ghana for twenty-two years before being expelled in 1987. He had founded a company there (MDCL) in which he held 60 per cent of the shares. The company had entered into agreements with Ghanaian entities for the construction of a hotel complex at Accra. On the pretext that there was no building permit, the Accra city authorities halted the building work and demolished part of the structures. Mr. Biloune was later arrested, detained for 13 days, and expelled.

2.93 In the arbitration proceedings between Antoine Biloune, a Syrian national, and the Ghanaian authorities, the arbitral tribunal also found that Mr. Biloune’s imprisonment and expulsion, together with other acts, amounted to an expropriation of his rights in MDCL, of which he was *associé* and *gérant*. The tribunal held in particular that it

“must determine whether the above facts constitute, as the claimants charge, a constructive expropriation of MDCL’s assets and Mr. Biloune’s interest in MDCL. The motivations for the actions and omissions of Ghanaian governmental authorities are not clear. But the Tribunal need not establish those motivations to come to a conclusion in the case. What is clear is that the conjunction of the stop work order, the demolition, the summons, the arrest, the detention, the requirement of filing assets declaration forms, and the deportation of Mr. Biloune without possibility of re-entry had the effect of causing the irreparable cessation of work on the project. Given the central role of Mr. Biloune in promoting, financing and managing MDCL, his

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³²³Award of 21 November 2007, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States* Case No. ARB(AF)/04/5, para. 238, available at: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC782_En&caseId=C43.

³²⁴Award of 28 September 2007, *Sempra Energy International v. Argentine Republic*, Case No. ARB/02/16, para. 285, available at: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC694_En&caseId=C8.

³²⁵*Iran-United States Claims Tribunal Reports*, Vol. 10, p. 259.

³²⁶Award No. 324-10199-1, 2 November 1987, *Kenneth P. Yeager v. Islamic Republic of Iran*, *ibid.*, Vol. 17, p. 99, para. 30; Award No. 440-12183-1, 6 October 1989, *Jimmi B. Leach v. Islamic Republic of Iran*, *ibid.*, Vol. 23, p. 237, para. 18.

expulsion from the country effectively prevented MDCL from further pursuing the project.”³²⁷

2.94 The tribunal was not persuaded by the “explanations” given by the respondent, and found:

“The Tribunal therefore holds that the Government of Ghana, by its actions and omissions culminating with Mr. Biloune’s deportation, constructively expropriated MDCL’s assets, and Mr. Biloune’s interest therein, not later than 24 December 1987. The claimants are therefore entitled to compensation.”³²⁸

2.95 It is beyond doubt that, even if the companies continue to exist on paper — which the Respondent denies³²⁹ — the *parts sociales* for which Mr. Diallo has remained the holder of title are by now stripped of any real economic value and that Mr. Diallo, as a result of his expulsion, permanently lost control and use of his investments. That being so, according to the rules and principles of international law identified by international jurisprudence, there has been an indirect or *de facto* expropriation of Mr. Diallo’s *parts sociales*.

B. The indirect expropriation of Mr. Diallo engages the international responsibility of the DRC

2.96 The indirect expropriation of Mr. Diallo constitutes an internationally wrongful act by the DRC under Article 2 of the Articles on the Responsibility of States for Internationally Wrongful Acts. The acts giving rise to the destruction of Mr. Diallo’s property rights are violations of international law and are attributable to the DRC.

2.97 It is well established in international law that an expropriation, whether direct or indirect, must be in the public interest, carried out in a non-discriminatory manner and must be accompanied by prompt and appropriate compensation³³⁰.

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2.98 What is more, the DRC enshrines these rules in its own domestic law. According to Article 5 of the 1986 Investment Code:

“Individual or collective property rights acquired by the investor in accordance with Zairean law are guaranteed by the Constitution of the Republic of Zaire.

³²⁷Award on Jurisdiction and Liability of 27 October 1989, *A. Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre the Government of Ghana*, I.L.R., Vol. 95, p. 209.

³²⁸*Ibid.*; see also Awards of 8 August 1980, *S.A.R.L. Benvenuti & Bonfant v. People’s Republic of the Congo*, I.L.M., Vol. 21, 1982, p. 758, para. 4.62, and of 24 July 2008, *Biwater Gauff (Tanzania) Limited v. Tanzania*, Case No. ARB/05/22, paras. 511-517, available on http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC770_En&caseId=C67.

³²⁹See para. 3.7, below.

³³⁰See Award of 31 Mar. 1986, *Liberian Eastern Timber Corporation (LETCO) v. Liberia*, I.L.M., Vol. 26, 1987, p. 665. See also Award of 10 Feb. 1999, *Antoine Goetz et al. v. Republic of Burundi*, Case No. ARB/95/3, 6 *ICSID Rep.* 5, 2004, p. 42, paras. 124-129; Award of 2 October 2006, *ADC Affiliate Limited and ADC & ADMC Management Limited v. Hungary*, Case No. ARB/03/16, paras. 428 *et seq.*, available at: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC648_En_&caseId=C231; and United Nations General Assembly, resolution 1803 (XVII), Permanent sovereignty over natural resources, 14 Dec. 1962, para. 4.

Such rights cannot be impugned save on grounds of the public interest and pursuant to a statutory enactment, *and subject to payment of fair and equitable compensation to the person whose rights have been infringed.*³³¹

2.99 Article 26 of the Investment Code, which replaced the foregoing wording in 2002, likewise establishes:

“No investment may be nationalized or expropriated, directly or indirectly, in full or in part, by a new statutory enactment, and/or decision by a local authority having the same effect, unless: on the grounds of public benefit and on payment of fair and equitable compensation.

Compensation shall be considered fair if it is based on the market value of the asset which has been nationalized or expropriated. That value shall be determined by an adversarial procedure immediately prior to the expropriation or the nationalization, or before the decision to expropriate or nationalize has come into the public domain.”³³²

2.100 The expropriation of Mr. Diallo does not satisfy those conditions:

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- Mr. Diallo’s expropriation is not consistent with the requirements in respect of the public interest. He was not expropriated on the grounds of a public benefit, but for the sole purpose of getting rid of a foreign investor who was making the mistake of demanding payment of debts of the State (or acknowledged by it) and debts of undertakings in which that same State had an interest. The *parts sociales* were expropriated by means of the wrongful expulsion of Mr. Diallo, the only motive for which was, quite plainly, no longer merely to deter him but more broadly, in the same vein as the measures already taken, to prevent him from pursuing, on behalf of his companies, the various sets of legal proceedings which had been brought. When it imprisoned and then expelled the sole *gérant* and *associé* of the SPRLs Africom-Zaire and Africontainers, the Congo knew very well that it would impede the activity of both those companies and would prevent any future recovery of what they were owed. There can be no better example of an arbitrary act³³³ than this expropriation by dint of an expulsion which was of itself in breach of the requirements of international law and was itself completely arbitrary.
 - It is quite apparent that no compensation has been offered or paid by the Congolese authorities for the expropriation of Mr. Diallo’s *parts sociales*, even though both international law and Congolese law provide for such³³⁴.

2.101 Mr. Diallo’s expropriation is therefore a breach of international law within the meaning of Article 12 of the Articles on the Responsibility of States for Internationally Wrongful Acts.

2.102 That breach is also attributable to the DRC. The Respondent has not disputed that the interference with Mr. Diallo’s business and property rights, and his expulsion, which represents the

³³¹Art. 5 of Legislative Order [*Ordonnance-loi*] No. 86-028 of 5 April 1986 establishing the Investment Code, OG, Ann. 35; emphasis added.

³³²Law No. 004/2002 of 21 February 2002 establishing the Investment Code, RG, Ann. 5; emphasis added.

³³³*Eletronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment, I.C.J. Reports 1989, p. 76, para. 128; Award of 3 October 2006, *LG&E Energy Corp. v. Argentina*, Case No. ARB/02/1, para. 157, *ICSID Review — FILJ*, Vol. 21, 2006, p. 203.

³³⁴See para. 2.98, above.

culmination of the disguised expropriation, were committed by the executive. Under Article 4 of the Articles on the Responsibility of States for Internationally Wrongful Acts³³⁵, the conduct of State organs is attributable to the State.

2.103 It is therefore established that by its acts of interference with the business of Africom-Zaire and Africontainers-Zaire and by expelling Mr. Diallo at the beginning of 1996, the DRC wrongfully expropriated Mr. Diallo's *parts sociales* in those companies and as a result incurred international responsibility.

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CONCLUSION TO CHAPTER 2

2.104 To conclude Chapter 2 of its Reply, the Republic of Guinea contends that Mr. Diallo's direct rights as an *associé* in Africom-Zaire and Africontainers-Zaire were violated by the Democratic Republic of the Congo as a result of

- (i) the violation of his right to participate in general meetings and to choose a new *gérant*;
- (ii) the violation of his right to oversee and control the actions of management and the operations of the companies;
- (iii) the indirect expropriation of his *parts sociales* in the companies of which he was the *associé*.

2.105 The DRC's violation of Mr. Diallo's rights in both his capacities, his personal capacity on the one hand and as an *associé* on the other, engages its international responsibility. In consequence, the DRC is obliged to make full reparation for the injury suffered by the Republic of Guinea in the person of its national, as demonstrated in Chapter 3 of this Reply.

³³⁵ *Ibid.*

RIGHT TO REPARATION

3.1 In its brief Counter-Memorial, the Democratic Republic of the Congo did not see fit to respond to the arguments in Guinea's Memorial concerning the obligation incumbent upon the Respondent to make reparation³³⁶. The Republic of Guinea is not sure how to interpret this omission; it could be seen as an acceptance of its arguments in the event — an eventuality which, incidentally, the DRC rejects — the Respondent is found to have incurred responsibility. However, it could also be that the DRC considered that there was no reason to respond on this point as it is of the opinion that it has not committed any materially wrongful act — which is quite manifestly not the case, as is clear from the previous chapters of the present Reply.

3.2 Whatever the case may be, Guinea maintains its entire core argument. As, however, the Court in its 24 May 2007 Judgment on the DRC's Preliminary Objections declared "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"³³⁷, it is necessary to revise the argument accordingly. That is the sole purpose of the present chapter, which can therefore be short.

3.3 In its submissions in the Memorial, Guinea asked the Court

"to adjudge and declare as follows:

1. that, in arbitrarily arresting and expelling its national, Mr. Ahmadou Sadio Diallo; in not at that time respecting his right to the benefit of the provisions of the 1961 Vienna Convention on Consular Relations; in submitting him to humiliating and degrading treatment; in depriving him of the exercise of his rights of ownership and management in respect of the companies founded by him in the DRC; in preventing him from pursuing recovery of the numerous debts owed to him — to himself personally and to the said companies — both by the DRC itself and by other contractual partners; in not paying its own debts to him and to his companies,

the Democratic Republic of the Congo has committed internationally wrongful acts which engage its responsibility to the Republic of Guinea;

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2. that the Democratic Republic of the Congo is accordingly bound to make full reparation on account of the injury suffered by the Republic of Guinea in the person of its national;
3. that such reparation shall take the form of compensation covering the totality of the injuries caused by the internationally wrongful acts of the Democratic Republic of the Congo including loss of earnings, and shall also include interest."³³⁸

³³⁶MG, pp. 68-74, paras. 3.68-3.83.

³³⁷Operative part, para. 98 (3) (c).

³³⁸MG, p. 108, para. 5.1.

3.4 In view of the aforementioned decision of the International Court of Justice, those submissions must necessarily be amended. Pursuant to that decision, Guinea cannot ask the Court to order reparation for the losses resulting from the impossibility of recovering the debts owed to Mr. Diallo's companies, Africom-Zaire and Africontainers-Zaire, whether by the DRC itself or by other contractual partners. It will therefore amend its submissions accordingly below.

3.5 Nonetheless, as significant as the impact of the Court's decision is from a "theoretical" standpoint regarding the rules applying to reparation, this restriction has only limited practical importance in Guinea's view. First, while the injuries suffered by Mr. Diallo cannot be fully equated with those which his companies sustained, they do largely cover the same ground, insofar as the acts carried out against the person of Mr. Diallo, and in particular, his wrongful expulsion, had as a direct consequence the difficulties the companies experienced and the subsequent cessation of their activities, which in turn resulted in a considerable and very direct prejudice to Mr. Diallo (Sec. 2); second, as, *according to the DRC*, the two companies have been struck off the register of companies and have thus ceased to exist, the reparation which the Court is requested to order indeed must cover the whole of their assets and receivable claims (Sec. 1). Otherwise, the Republic of Guinea stands by the submissions made in its Memorial (Sec. 3).

SECTION 1

THE QUESTION OF DAMAGE SUFFERED BY AFRICOM-ZAIRE AND AFRICONTAINERS-ZAIRE

3.6 In paragraph 59 of its Judgment of 24 May 2007, the Court notes

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"the existence of a disagreement between the Parties on the circumstances surrounding the establishment of Africom-Zaire and the conduct of its activities, on the continuation of those activities after the 1980s, and on the consequences these questions may have under Congolese law. It nonetheless takes the view that this disagreement essentially relates to the merits and that it has no bearing on the question of the admissibility of Guinea's Application as challenged in the Congo's objections."

3.7 Yet, in the present case, it follows from the statements of the respondent State itself that:

6. In fact, Africom-Zaire ceased all activity from the mid-1980s. It no longer held any Annual General Meetings of *associés*. It also ceased filing its annual financial statements with the Registry of Companies, the basis of the tax it was to pay to the Congolese State. Under Congolese law, a commercial company in such a situation is automatically struck off the Register of Companies as having ceased trading. That explains the statement by the Divisional Registrar of the Kinshasa *Tribunal de commerce* that Africom-Zaire was not registered in the Register of Companies within his jurisdiction.
7. The situation just described also explains why, despite all the inquiries carried out by the competent officials, they were unable to trace the physical file for Africom-Zaire, which might have contained a copy of the company's Articles of Incorporation.
8. As already indicated, when Mr. Diallo left *[sic]* the Democratic Republic of the Congo in January 1996, Africom-Zaire had no longer traded for some ten years. So it is now more than 20 years since that company engaged in any activity in the

DRC. It is thus highly possible that the file concerned was misfiled, lost or destroyed by the administrative staff . . .”³³⁹

3.8 For its part, Guinea, which is much less well placed than the DRC to carry out such research, also made every possible effort to obtain the Articles of Incorporation of Africom-Zaire, as was indeed noted in the same document by the DRC:

“The Companies Registry officials also reported that a Guinean diplomat stationed in Kinshasa had visited their offices looking for the Articles of Incorporation concerned.”³⁴⁰

3.9 Those measures did not lead to the tracing of Africom-Zaire’s Articles of Incorporation either, which would appear to lend weight to the notion that they have gone missing, although the following points should be noted:

- 94 — first, we do not know by what procedure and under what rule of Congolese law the file disappeared, and the DRC has remained silent on those issues; and
- in any event, that “disappearing” process could not have begun until 1995 *at the earliest*: that was the year when a court decision was issued in favour of Africontainers-Zaire* (against Shell-Zaire) and Mr. Diallo sent a large number of friendly reminders with a view to securing payment of the other debts owed to those companies, which brought about his arrest and expulsion precisely in order to stifle his claims and prevent him from pursuing proceedings to obtain payment³⁴¹.

3.10 Subject to those observations, the reasoning applicable to Africom-Zaire can be transposed in full to Africontainers-Zaire: since Mr. Diallo’s expulsion, this company has also not held annual general meetings or filed annual financial statements with the Registry of Companies, on the basis of which it should have paid its taxes to the Congolese State. Since, “[u]nder Congolese law”, as it is interpreted by the DRC, “a commercial company in such a situation is automatically struck off the Register of Companies as having ceased trading”, it must, like Africom-Zaire, be deemed to have ceased to exist.

3.11 In these circumstances, the situation is comparable to one of those envisaged by the Court in paragraph 64 of its 1970 Judgment in the *Barcelona Traction* case: “the case of the company having ceased to exist”³⁴². Although that was not the case in that instance, it follows from that ruling, by converse implication, that in a situation of that nature, where the company no longer benefits from legal protection, its rights are transferred to its shareholders:

³³⁹Document annexed to Letter No. 132.52/01/00013/2007 dated 31 Jan. 2007 from the Agent of the DRC (transmitted to Guinea by Letter No. 129621 from the Registrar dated 2 Feb. 2007).

³⁴⁰*Ibid.*, para. 4.

*Translator’s note: The following text appears here: “[AFC not AZ, but 3.9 only concerns AZ. Reference should be made instead to the PLZ/AZ case, which dates from 1993 if my memory serves me correctly; and it should be recalled that AZ ceased trading consequent upon the non-payment of debts owed to it (listing paper case of 1988 and consequences)]”.

³⁴¹Regarding the sequence of events in 1995 see para. 1.41, above.

³⁴²*Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Second Phase, Judgment, I.C.J. Reports 1970, p. 40.*

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“It cannot however be contended that the corporate entity of the company has ceased to exist, or that it has lost its capacity to take corporate action. It was free to exercise such capacity in the Spanish courts and did in fact do so. It has not become incapable in law of defending its own rights and the interests of the shareholders. In particular, a precarious financial situation cannot be equated with the demise of the corporate entity, which is the hypothesis under consideration: the company’s status in law is alone relevant, and not its economic condition, nor even the possibility of its being ‘practically defunct’ — a description on which argument has been based but which lacks all legal precision. Only in the event of the legal demise of the company are the shareholders deprived of the possibility of a remedy available through the company; it is only if they became deprived of all such possibility that an independent right of action for them and their government could arise.”³⁴³

3.12 In the present case, we are thus in the same situation, since, according to the assertions of the DRC, which is best placed to interpret its own domestic law, the two companies no longer have any legal existence.

3.13 This information was made available to the Court very belatedly and that is probably the reason why, in paragraph 59 of the aforementioned Judgment of 2007³⁴⁴, the Court asked the Parties to argue the consequences of this situation from the standpoint of the merits, not the admissibility of the Application.

3.14 In any event, the consequences of this situation for the merits are both inevitable and very clear: since Mr. Diallo’s companies have ceased to exist, he, as sole *associé*, is entitled to all of their residual assets, including the amounts owed to them for the damage suffered by them. Consequently, although the Republic of Guinea cannot extend its diplomatic protection to the dissolved companies, it can claim, on behalf of its national, reparation for the injury caused to him by the internationally wrongful acts of the Respondent, as those are described in Chapter II of the present Reply.

3.15 The dissolution of a company does not entail its immediate demise. Its property still has to be disposed of. That is also the case in the DRC. Article 114 of the 1887 Decree provides that:

“After being dissolved, commercial companies are deemed to exist for the purposes of their liquidation.”³⁴⁵

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3.16 Generally, such liquidation is carried out under the supervision of the *associés*, and Mr. Diallo lost any such supervisory capability as a result of his expulsion³⁴⁶. It is only in specific circumstances that a liquidator or liquidators is or are appointed by a court ruling. Article 115 of the 1887 Decree stipulates:

“Unless an agreement to the contrary exists, the method of liquidation and the liquidators shall be decided by the general meeting of *associés*. For general

³⁴³*Ibid.*, para. 66, p. 41.

³⁴⁴See para. 3.6, above.

³⁴⁵OG, Ann. 35.

³⁴⁶See Chap. 2, Sec. 2, above.

partnerships and limited partnerships, such decisions shall not be valid unless approved by half the *associés* possessing three quarters of the assets; in the absence of such a majority, liquidation shall be decided by the courts.

In the event of the nullity of the company, the courts can decide upon the method of liquidation and appoint liquidators.”³⁴⁷

However, no judicial liquidation procedure has been initiated by the Congolese authorities.

3.17 This interference in the right to liquidate his companies is not trivial. The powers of the liquidator, indeed his core duty, involve not only paying the debts of the company (although the DRC does not claim that Mr. Diallo’s companies were in debt), but also collecting amounts owed to it. Article 117 of the 1887 Decree stipulates:

“Unless the articles of association or the instrument of appointment provide otherwise, the liquidators may initiate and pursue any legal proceedings on behalf of the company, receive any payments, grant releases with or without discharge, sell all the company’s securities, endorse any bills of exchange and settle or reach agreement on any dispute. They can dispose of the company’s premises by public sale, if they regard the sale as necessary in order to pay the company’s debts or if the number of *associés* is seven or more.”³⁴⁸

3.18 Consequently, a responsible liquidator should, in discharging his duties, have pursued recovery of the debts owed to Africom and Africontainers once and for all. That is precisely what the DRC sought to prevent by expelling Mr. Diallo at the beginning of 1996. It is probably also the reason why no compulsory liquidation procedure has been openly initiated by the Congolese authorities.

3.19 That does not change the fact that by surreptitiously proceeding with the *de facto* dissolution of Mr. Diallo’s companies, the DRC deprived him of his right to their remaining assets on liquidation. That right was recognized by the Court in the *Barcelona Traction* case³⁴⁹ and in the Judgment of 24 May 2007³⁵⁰. It is moreover expressly recognized under Congolese law. According to Article 121 of the 1887 Decree:

“[a]fter the payment or depositing of monies necessary for the repayment of debts, the liquidators shall distribute to members the cash or securities which can be divided into equal parts; they shall pass on to company members any assets that should have been retained for distribution”³⁵¹.

3.20 As a result of the arbitrary action of the Congolese authorities and of his wrongful expulsion, Mr. Diallo, a Guinean citizen, thus sustained significant injury. Deprived of his right to the residual assets of his companies, Africom-Zaire and Africontainers-Zaire (which still had

³⁴⁷OG, Ann. 35.

³⁴⁸*Ibid.*

³⁴⁹*Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Second Phase, Judgment, I.C.J. Reports 1970, p. 36, para. 47.*

³⁵⁰See para. 63 of the Judgment — by converse implication.

³⁵¹OG, Ann. 35.

around 100 containers in 1995³⁵²), Mr. Diallo has had to resign himself to watching his investment, the fruit of his labours, dwindle away to worthlessness, unless the debts owed by the DRC and the companies controlled (Gécamines) or protected (Shell and the other oil companies) by the DRC are recovered.

3.21 In practical terms, the situation is the following: if the liquidation of the companies in question had been decided in normal conditions, the assets and receivables of the two companies would have passed to their sole *associé*, Mr. Diallo. The latter, who was unlawfully deprived of his right to carry out the dissolution of his companies³⁵³, should have retained, and should necessarily be deemed to have retained, their assets.

SECTION 2

CHAIN OF CAUSATION

3.22 More generally, the chain of causation in the present case should be borne in mind:

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- in the 1980s-1990s, Mr. Diallo is owed monies by the Zairean State, Gécamines and various oil companies; certain of these debts are expressly acknowledged by the government authorities³⁵⁴ and others upheld by the Zairean courts³⁵⁵;
- in 1988, Mr. Diallo is arbitrarily and entirely wrongfully imprisoned for a year in order to prevent him from claiming the payment of the debts owed to him³⁵⁶;
- after his release, he endeavours once again to obtain payment of certain debts, but despite — or rather *because of* — a court ruling in his favour³⁵⁷, he is just as wrongfully arrested twice more and then summarily expelled at the request of the debtor company (Shell Zaire).

3.23 These facts, which are set out in more detail in Chapter 1 of the present Reply, demonstrate not only that Mr. Diallo was a victim of acts committed by Zaire in violation of his human rights, for which reparation is due, but also that the aim of those acts — and their effect — was to deprive him of any possibility of recovering the debts owed to his companies and that they thus amounted to wrongful expropriation of his investments.

3.24 Guinea would like to emphasize the fact that there is no break in the chain connecting the various elements of the case:

- it was *because* he was claiming payment of debts owed to his companies that Mr. Diallo was the target and victim of measures seriously violating his human rights;

³⁵²MG, Ann. 199; OG, Anns. 31-33.

³⁵³See paras. 2.25-2.27, above.

³⁵⁴See paras. 1.10 and 1.20, above.

³⁵⁵See para. 1.41, above.

³⁵⁶See paras. 1.9-1.15, above.

³⁵⁷MG, Ann. 153.

- it was *because* he was summarily expelled that he was unable to continue to enjoy his rights as sole *associé* and, in particular, to pursue the recovery of his claims or to carry out any liquidation of his companies, whose residual assets should have passed to him; and
- it was *because* those measures were taken that his assets disappeared and that he found it impossible to pursue the recovery of the debts owed to his companies, that he was the victim of a disguised expropriation.

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3.25 In terms of reparation, since “[t]he responsible State is under an obligation to make *full* reparation for the injury *caused by the internationally wrongful act*”³⁵⁸, it follows that reparation is due for all material and moral injuries resulting from the internationally wrongful acts of the Respondent:

- suffering resulting from the arbitrary arrests and wrongful expulsion of Mr. Diallo;
- loss of profits resulting from those acts;
- prevention from exercising his rights as sole *associé* in Africom-Zaire and Africontainers-Zaire, as those rights are more specifically described in Chapter 2 of the present Reply; and
- the loss of assets and rights to payment which would have accrued to his benefit had the two companies been lawfully liquidated.

SECTION 3

MEANS OF REPARATION

3.26 As it indicated in its Memorial³⁵⁹, the Republic of Guinea is not asking the Court to order restitution. In the present case, it is both physically and psychologically impossible to re-establish the situation as it existed prior to Mr. Diallo’s expulsion. In addition, certain injuries he suffered cannot readily be made good by *restitutio in integrum*; this is the case for the numerous, serious human rights violations of which he was a victim.

3.27 In a case of this nature it is acknowledged that:

“1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.”³⁶⁰

3.28 Nonetheless, as it stated in its Memorial³⁶¹, and in accordance with customary practice in cases of this type³⁶², the Republic of Guinea requests the Court at this stage to confine itself to

³⁵⁸Art. 31 of the ILC’s *Articles on Responsibility of States for Internationally Wrongful Acts*.

³⁵⁹MG, p. 70, para. 3.70.

³⁶⁰Art. 36 of the ILC’s *Articles on Responsibility of States for Internationally Wrongful Acts*.

³⁶¹MG, p. 7, paras. 1.17-1.18, and pp. 73-74, para. 3.83.

100 finding that the internationally wrongful acts of the [Democratic] Republic of the Congo engage its responsibility and that Guinea is entitled to full reparation for the injury sustained therefrom by, or “in the person of”, its national.

3.29 In its view, once these findings have been made, it would be appropriate to allow the sister republics of Guinea and the Democratic Republic of the Congo to conduct negotiations with a view to establishing the amount of the reparation, on the understanding, nonetheless, that if the two States do not succeed in reaching agreement on that amount within a reasonable period of time³⁶³, it would be for Guinea to submit to the Court the information necessary for it to set the amount of reparation. Such an assessment seems especially called for in that, as the Agent of Guinea recalled during the hearings on the preliminary objections raised by the DRC:

“the Republic of Guinea has already stated, and I wish to expressly confirm this, that in any event it does not intend to restate the assessments presented in the Annex to its Application as they stand. And on this point we would ask the Court and the opposing Party to excuse those initial estimates, whose approximation and manifest exaggeration — which we readily acknowledge, as, moreover, we indicated in our Observations³⁶⁴ — stemmed from our inexperience of this type of case.”³⁶⁵

3.30 The submissions which Guinea makes below are based on all of the observations made in the present chapter and indeed in the Memorial and the present Reply.

³⁶²See for example *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, Judgment, I.C.J. Reports 1974, pp. 204-206, paras. 76-77; *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)* Judgment, I.C.J. Reports 1980, p. 45, (para. 6 of the operative part); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) Merits*, Judgment, I.C.J. Reports 1986, p. 142, para. 284; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 257, para. 260 and p. 282, para. 345 (14).

³⁶³Guinea suggests that the period in question could be one of six months.

³⁶⁴OG, pp. 2-3, para. 0.09.

³⁶⁵CR 2006/51, p. 10, para. 10 (Camara).

SUBMISSIONS

4.1 ON THE GROUNDS set out in its Memorial and in the present Reply, the Republic of Guinea requests the International Court of Justice to adjudge and declare:

- (1) that, in carrying out arbitrary arrests of its national, Mr. Ahmadou Sadio Diallo, and expelling him; in not at that time respecting his right to the benefit of the provisions of the 1963 Vienna Convention on Consular Relations; in submitting him to humiliating and degrading treatment; in depriving him of the exercise of his rights of ownership, oversight and management in respect of the companies which he founded in the DRC and in which he was the sole *associé*; in preventing him in that capacity from pursuing recovery of the numerous debts owed to the said companies both by the DRC itself and by other contractual partners; in expropriating de facto Mr. Diallo's property,

the Democratic Republic of the Congo has committed internationally wrongful acts which engage its responsibility to the Republic of Guinea;

- (2) that the Democratic Republic of the Congo is accordingly bound to make full reparation on account of the injury suffered by Mr. Diallo or by the Republic of Guinea in the person of its national;
- (3) that such reparation shall take the form of compensation covering the totality of the injuries caused by the internationally wrongful acts of the Democratic Republic of the Congo, including loss of earnings, and shall also include interest.

4.2 The Republic of Guinea further requests the Court kindly to authorize it to submit an assessment of the amount of the compensation due to it on this account from the Democratic Republic of the Congo in a subsequent phase of the proceedings in the event that the two Parties should be unable to agree on the amount thereof within a period of six months following delivery of the Judgment.

19 November 2008,

Agent of the Republic of Guinea
By the Deputy Agent, Alain Pellet.
