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Lundi 19 avril 2010 à 15 heures

Monday 19 April 2010 at 3 p.m.

8 The VICE-PRESIDENT, Acting President: Please be seated. The hearing is open. I first wish to announce that the President, for compelling reasons, is unable to sit in the case this afternoon. We shall now hear the continuation of the first round of oral argument of the Republic of Guinea. J'appelle à la barre M. Sam Wordsworth. Monsieur Wordsworth, vous avez la parole.

M. WORDSWORTH :

V. VIOLATION PAR LA RDC DES DROITS PROPRES DE M. DIALLO EN TANT QU'ACTIONNAIRE (ASSOCIÉ)

1. Monsieur le vice-président, Messieurs de la Cour, c'est un honneur pour moi que de plaider devant vous en la présente affaire. Celle-ci, en effet, met en jeu deux questions importantes concernant la nature et l'étendue de l'ingérence devant être constatées pour qu'un Etat soit jugé internationalement responsable des dommages subis par un étranger se trouvant, ou s'étant trouvé, sur son territoire.

2. La première de ces questions — dont il m'appartient de traiter — a été abordée par la Cour dans sa décision en l'affaire de la *Barcelona Traction* (*Barcelona Traction, Light and Power Company, Limited (Belgique c. Espagne), deuxième phase, arrêt, C.I.J. Recueil 1970*, p. 3)[1] ; elle a été examinée (bien que de manière quelque peu elliptique) par la Chambre constituée en l'affaire de l'*ELSI* (*Elettronica Sicula S.p.A. (ELSI) (Etats-Unis d'Amérique c. Italie), arrêt, C.I.J. Recueil 1989*, p. 15) et elle l'a également été par la Cour, aux fins d'établir sa compétence, dans son arrêt du 24 mai 2007. Il s'agit de la question de l'ingérence de l'Etat dans les droits d'un actionnaire ou, dans ce cas précis, dans les droits d'un *associé* — car il s'agit, en l'espèce, de droits afférents à une «société privée à responsabilité limitée» («SPRL»). La seconde question, qui sera examinée par M. Daniel Müller, concerne l'ingérence de l'Etat dans les droits de propriété d'un étranger et offre à la Cour une occasion rare, et l'on pourrait même dire précieuse, de sceller la question de la nature et de l'étendue de l'ingérence devant être constatées pour qu'il puisse être conclu qu'il y a eu expropriation en droit international.

[1] Voir également *Agrotexim et autres c. Grèce* (1996) 21, Cour européenne des droits de l'homme, p. 282, par. 62.

3. La position adoptée par la RDC est, dans les grandes lignes, la même pour ces deux questions : après son expulsion, nous dit-on, M. Diallo a conservé tous ses droits en tant qu'associé, tout comme il a conservé ses parts sociales elles-mêmes dans ses deux sociétés. S'il n'a pas exercé

9 ces droits après son expulsion, c'est là son choix, et non un motif d'engagement de la responsabilité internationale de la RDC. Dans les deux cas, notre réplique, dans ses grandes lignes, est elle aussi la même : les juridictions internationales ont invariablement abordé d'un point de vue pragmatique la question de savoir s'il y avait eu privation de droits et, de même que, s'agissant d'une réclamation concernant une expropriation, l'on ne saurait, dans cette optique, répondre que l'actionnaire reste le propriétaire effectif d'actions devenues sans valeur, l'on ne saurait, s'agissant d'une réclamation concernant les droits d'un actionnaire, répondre que cet actionnaire conserve des droits théoriques qui, en conséquence des faits illicites commis par l'Etat en cause (une conséquence voulue et anticipée), ne peuvent en réalité être exercés.

4. La RDC a aussi — tardivement — adopté une autre ligne de défense, consistant à arguer que l'une des deux sociétés de M. Diallo, Africom-Zaïre, n'existait plus au moment de l'arrestation et de l'expulsion de l'intéressé. Cet argument, qui a été présenté pour la première fois lors des audiences sur les exceptions préliminaires tenues en novembre 2006, va à l'encontre de ce que la RDC avait affirmé dans ses premières pièces de procédure, et même des décisions de ses propres tribunaux. C'est là un point dont M. Pellet traitera plus tard dans la journée — par la voix, bien sûr, de M. Thouvenin —, autre illustration, peut-être, du fait que c'est la réalité sous-jacente qui compte, et non l'apparence extérieure. Quoi qu'il en soit, dans ma plaidoirie, je partirai du principe que M. Diallo détenait des droits en tant qu'associé des deux sociétés à la date à laquelle il a été expulsé de RDC.

5. J'examinerai ensuite les trois droits spécifiques de l'associé en jeu en l'espèce :

a) le droit de prendre part et de voter aux assemblées générales des deux sociétés ;

b) le droit de nommer le gérant, responsable de la SPRL ; et

c) le droit de surveiller et de contrôler les actes du gérant et les opérations des sociétés.

6. La nature précise de ces droits est celle établie par le droit interne de la RDC. C'est ce qui ressort du paragraphe 64 de l'arrêt du 24 mai 2007, dans lequel la Cour a jugé que «l'acte internationalement illicite revient, dans le cas de l'associé ou de l'actionnaire, à la violation par

l'Etat défendeur des droits propres de celui-ci dans sa relation avec la personne morale, droits propres qui sont définis par le droit interne de cet Etat». Mais la Cour ne manquera pas de constater que les droits sur lesquels s'appuie la Guinée en l'espèce sont les droits de participation et de contrôle du fonctionnement de la société généralement (si ce n'est universellement) reconnus aux actionnaires par le droit interne des Etats[2]. En l'espèce, la principale source de droit interne est le décret du 27 février 1887 sur les sociétés commerciales dont j'ai reproduit les principales dispositions dans le plan de plaidoirie qui, je l'espère, se sera frayé un chemin jusqu'à votre table.

Articles 78-79 du décret de 1887

7. Je vais commencer par le droit de prendre part aux assemblées générales et de voter, droit revêtant une importance fondamentale et évidente et, bien sûr, l'un de ceux que la Cour a expressément mentionnés à titre d'exemple dans l'affaire de la *Barcelona Traction* (par. 47).

a) L'article 78 du décret de 1887, reproduit au paragraphe 2 *a)* de mon plan de plaidoirie, confère à l'assemblée générale «les pouvoirs les plus étendus pour faire … les actes qui intéressent la société». Ainsi, les associés — agissant de concert dans le cadre de l'assemblée générale de la société — jouissent des droits propres les plus étendus qui soient.

b) L'article 79, reproduit au paragraphe 2 *b)* du plan de plaidoirie, est essentiel en ce qui concerne l'exercice de ces droits propres et la protection de tout actionnaire — pas uniquement d'un associé de SPRL. Cet article dispose que, «[n]onobstant toute disposition contraire, tous les associés ont le droit de prendre part aux assemblées générales et jouissent d'une voix par part sociale».

c) Il y a là bien évidemment deux aspects : le droit de voter, mais également le droit de prendre part à l'assemblée générale. Dans un extrait tiré du commentaire du professeur Makela, figurant au paragraphe 2 *c)* de mon plan de plaidoirie, l'auteur commence par mentionner le droit de vote, mais il écrit ensuite ceci :

> «Attendance by *associés* at general meetings is of major importance, as the reports on the state of the company by the appropriate corporate organs (management, auditors) and the discussion of various plans are likely to enlighten *associés* about

[2] Voir, par exemple, *International Encyclopaedia of Comparative Law, Vol. XIII Business and Private Organizations,* Ch. 2, Limited Liability Companies and Private Companies (1998).

> corporate affairs. In these general meetings each *associé* has a number of votes proportionate to the number of *parts sociales* he holds (one vote per *part sociale*).» [3]

Il s'ensuit que M. Diallo avait le droit d'être présent et de prendre part à l'assemblée générale et, puisqu'il détenait ou contrôlait toutes les voix, d'exercer par le biais de cette assemblée les «pouvoirs les plus étendus pour faire … les actes qui intéress[aient] la société».

d) Tout cela importe en l'espèce car l'aptitude de M. Diallo à exercer les droits conférés par les articles 78 et 79 du décret de 1887 doit être examinée au regard, également, de l'article premier

11 de l'ordonnance-loi 66-341[4] de la RDC, reproduit au paragraphe 2 *d)* de mon plan de plaidoirie. Cette autre disposition avait pour effet d'obliger M. Diallo, qui souhaitait commercer en RDC par l'intermédiaire de sociétés congolaises, à établir ses sociétés et leur siège en RDC *et* à assurer la tenue des assemblées générales de ces sociétés en RDC.

e) En expulsant M. Diallo, la RDC a effectivement privé celui-ci de la jouissance de son droit de prendre part aux assemblées générales des sociétés et de voter. Les assemblées générales devaient se tenir en RDC ; M. Diallo en avait été expulsé ; l'expulsion était définitive et M. Diallo ne pouvait revenir sur le sol congolais sans risquer, et même sans avoir la quasi-certitude, d'être sévèrement sanctionné. L'ordonnance-loi de 1983 dispose en effet qu'un étranger expulsé qui revient en RDC sera condamné à une peine d'emprisonnement de un à six mois, assortie d'une amende ; et, pour faire bonne mesure, il sera en outre expulsé au terme de l'exécution de sa peine[5]. En pratique, il était ainsi devenu impossible à M. Diallo de participer effectivement et de voter aux assemblées générales de ses deux sociétés.

8. La RDC invoque à cet égard deux moyens de défense.

9. En ce qui concerne les faits, tout d'abord, elle affirme qu'aucune assemblée générale n'ayant été convoquée, l'expulsion de M. Diallo n'a entamé en rien son droit de participation[6]. Mais la RDC ne saurait assurément exciper du fait que M. Diallo n'a pas convoqué d'assemblée générale quand une telle assemblée ne pouvait pas, au regard du droit congolais, être tenue en Guinée.

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[3] Roger Makela Massamba, *Droit des affaires – Cadre juridique de la vie des affaires au Zaïre,* Cadicec/De Boecke Université, 1996, p. 303-304.

[4] Observations écrites de la Guinée (OEG), annexe 35.

[5] Voir l'ordonnance-loi de 1983, art. 21, Exceptions préliminaires de la RDC (EPRDC), annexe 73.

[6] Contre-mémoire de la République démocratique du Congo (CMRDC), par. 2.12-2.13.

a) en outre, ce n'est pas répondre que de dire que M. Diallo pouvait en théorie organiser la tenue d'une assemblée générale en RDC, où il aurait voté par le truchement d'un mandataire. Si, en règle générale, un associé peut en effet désigner un mandataire, la situation en l'espèce était différente en ce sens que, selon l'article 22 des statuts d'Africontainers[7], seul un autre associé pouvait ainsi être mandaté — or, à la date de son expulsion, M. Diallo était, comme chacun sait, le seul associé.

b) En tout état de cause, l'article 81 du décret de 1887 prévoit que l'associé *peut* désigner un mandataire[8]. Mais le droit d'être ainsi représenté est un droit complémentaire reconnu à
12 l'associé. Ce droit est réduit à néant s'il devient le seul moyen pour l'associé d'exercer son droit de vote, et se transforme ainsi de fait en obligation. De plus, comme je l'ai déjà noté, l'associé a le droit de prendre part — et non pas uniquement de voter — à l'assemblée générale et, pour exercer concrètement ce droit important, M. Diallo devait bien évidemment être présent en personne.

10. Ensuite, s'agissant du contenu du droit applicable, la RDC a avancé un nouvel argument dans sa duplique, à savoir que M. Diallo aurait pu tenir les assemblées générales des sociétés en Guinée, nonobstant l'article premier de l'ordonnance-loi 66-341[9]. La RDC affirme à présent que cette disposition a été introduite dans un contexte postcolonial donné et dans un but spécifique — imposer aux entreprises belges dont le principal centre d'exploitation était sis en RDC d'établir aussi en RDC — et non en Belgique — leur siège administratif. Ainsi, soutient-elle, la disposition en question ne s'appliquerait pas d'une manière générale à toutes les sociétés immatriculées en RDC[10]. Cette affirmation ne s'appuie sur aucun précédent ni sur aucune autre source faisant autorité. Elle va à l'encontre du préambule de l'ordonnance-loi 66-341, qui renvoie au décret 1887 en termes généraux. Elle va aussi à l'encontre du libellé de l'article premier de l'ordonnance-loi, dont l'application est bien de portée générale, et dont je vais vous donner lecture :

> «Les sociétés [et non pas uniquement les sociétés belges] dont le principal siège d'exploitation est situé au Congo doivent avoir au Congo leur siège administratif.

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[7] Mémoire de la Guinée (MG), annexe 1.

[8] OEG, annexe 35, p. 236.

[9] OEG, annexe 35, p. 244.

[10] Duplique de la République démocratique du Congo (DRDC), par. 2.19.

> On entend par «siège administratif» au sens de la présente ordonnance-loi, le lieu où est établie l'administration centrale de la société [et non pas uniquement les sociétés belges] et où se réunissent les assemblées générales et le conseil d'administration».

11. Et il est certainement impératif, pour assurer l'exécution de cette loi, qu'une société ne puisse, comme la RDC le prétend à présent, contourner celle-ci, en tenant dans l'Etat étranger une assemblée générale dont elle ferait authentifier le procès-verbal par les services consulaires congolais. Dans le cas contraire, les principaux cadre et moyens d'action dont disposeraient les actionnaires belges pour exercer le contrôle sur leurs sociétés congolaises demeureraient basés en dehors du territoire de la RDC, ce qui, nous semble-t-il, est précisément ce que l'ordonnance-loi 66-341 visait à éviter.

13 12. Je dois ajouter, dans un souci d'exhaustivité, que, dans son contre-mémoire, la RDC a soutenu que le droit de convoquer une assemblée générale était un droit de la société, et non de l'associé lui-même[11]. Nous supposons qu'elle a renoncé à faire valoir cet argument car, ainsi qu'indiqué dans notre réplique, le droit de réclamer la tenue d'une assemblée générale fait partie des droits fondamentaux de tout actionnaire en droit interne. En ce qui concerne l'ordre juridique de la RDC, ce droit est prévu à l'article 83 du décret de 1887, qui est reproduit au paragraphe 2 *e)* de mon plan de plaidoirie : les associés détenant au moins un cinquième du nombre total de parts sociales ont le droit d'exiger la convocation d'une assemblée générale, faute de quoi ils peuvent évidemment saisir la justice congolaise. Peu importe que, dans l'usage, l'acte de convocation émane, matériellement, de la gérance de la société.

Article 65 du décret de 1887

13. J'en viens maintenant à l'article 65, qui est reproduit au paragraphe 3 du plan de plaidoirie que je vous ai communiqué. Cet article énonce le droit qu'a une assemblée générale — autrement dit le droit des associés lorsqu'ils sont réunis dans un tel cadre — de nommer le gérant, c'est-à-dire, bien sûr, le responsable de la société. Là encore, il s'agit d'un important droit de participation au contrôle de la société. M. Diallo, qui, en définitive, se trouvait être l'unique associé des deux sociétés, avait le droit de nommer gérant la personne de son choix, lui-même compris. Et, comme c'est on ne peut plus souvent le cas pour les SPRL, M. Diallo s'est en effet

[11] CMRDC, par. 2.14.

nommé lui-même gérant, et ce, pour une durée illimitée[12], ainsi que l'y autorisait l'article 67 du décret de 1887[13], qui, d'ailleurs, énonce à cet effet des garanties.

14. La dernière fois qu'elle a plaidé devant vous, la RDC a reconnu que l'article 65 énonçait un droit propre de l'associé[14], et le paragraphe 53 de l'arrêt du 24 mai 2007 consigne la position qu'elle avait exprimée à l'audience de novembre 2006, à savoir que M. Diallo — en tant qu'associé — avait le droit d'être nommé gérant et le droit de ne pas être révoqué sans motif. Et néanmoins, dans son contre-mémoire, la RDC adopte la position inverse, affirmant que l'article 65 énonce le droit de la société de nommer le gérant[15], créant ainsi une confusion entre le droit de l'assemblée générale — autrement dit le droit des associés — et les droits de la société. Toutefois,

14 les droits de l'associé ne changent pas de nature du seul fait qu'ils sont exercés non pas individuellement mais collectivement, dans le cadre de l'assemblée générale, et rien, sur le plan des principes, ne peut venir fonder la nouvelle thèse de la RDC prétendant le contraire.

15. La RDC, dans sa duplique, met surtout en exergue le fait qu'un certain M. N'Kanza aurait été nommé gérant d'Africontainers après l'expulsion de M. Diallo[16]. Ainsi, soutient-elle dans un style assez pittoresque, M. Diallo pouvait exercer ses droits en vertu de l'article 65, et il l'a fait. Or, ce n'est pas là la question, et, en tout état de cause, cette assertion est fausse.

16. L'important, c'est que, à la suite de sa détention et de son expulsion, et en violation de l'article 65, M. Diallo a été privé du droit de nommer le gérant de son choix — à savoir lui-même. Concrètement, et conformément aux desseins de la RDC, il ne pouvait plus, depuis la Guinée, remplir les fonctions de gérant. Que M. Diallo ait, pour des raisons pratiques, été contraint de nommer gérant une tierce personne ne changerait rien en ce qui concerne la question de l'ingérence dans le droit énoncé par l'article 65 : l'associé n'en aurait pas moins été privé du droit de nommer le gérant de son choix — c'est-à-dire lui-même.

17. Toutefois, dans les faits, il n'y a pas eu de nomination d'un nouveau gérant.

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[12] MG, annexe 3.

[13] OEG, annexe 35, p. 235, seconde colonne.

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

[15] CMRDC, par. 2.08-2.09.

[16] DRDC, par. 2.7.

a) si, dans une lettre du 12 février 1996 reçue des avocats d'Africontainers, M. N'Kanza est présenté comme gérant[17], rien ne donne à entendre que se serait tenue avant cette date une assemblée générale extraordinaire, conformément aux prescriptions du décret de 1887[18], dont le procès-verbal aurait été authentifié. Cela, du reste, irait à l'encontre de la propre argumentation de la RDC, selon laquelle M. Diallo *n'*a *pas* convoqué, ni cherché à convoquer, d'assemblée générale[19].

b) en outre, dans des sources ultérieures, M. N'Kanza n'est pas présenté comme gérant, mais comme «directeur d'exploitation»[20] ; parallèlement, c'est M. Diallo — et non pas M. N'Kanza — qui signe les lettres envoyées en RDC depuis la Guinée en tant que PDG d'Africontainers, ou autrement dit, que gérant[21]. C'est M. Diallo que, dans sa décision du
15 20 juin 2002, la Cour d'appel de Kinshasa/Gombe présente comme l'associé-gérant d'Africontainers[22]. Et M. Diallo a expliqué, dans la déposition qu'il a faite dans le cadre de la présente espèce, qu'il n'avait pas nommé de nouveau gérant, et aurait été bien en peine de le faire, en raison, notamment, de son expulsion[23].

18. Au vu des éléments de preuve, il s'avère donc que M. N'Kanza n'a pas été nommé gérant d'Africontainers — et n'aurait de fait pu l'être ; l'eût-il été, toutefois, qu'il n'y en aurait pas moins eu violation des droits propres de M. Diallo en tant qu'associé — violation du droit de l'unique associé de nommer le gérant de son choix.

Articles 71 et 75 du décret de 1887

19. J'en viens au troisième et dernier droit propre de M. Diallo qu'invoque la Guinée en l'espèce, à savoir le droit qu'a l'associé de surveiller et de contrôler les actes de la SPRL, en application des articles 71 et 75 du décret de 1887.

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[17] MG, annexe 201.

[18] Voir art. 65, 67, 84 et 87 du décret de 1887. OEG, annexe 35.

[19] CMRDC, par. 2.12-2.13.

[20] MG, annexe 213, 4e page.

[21] MG, annexe 219.

[22] EPRDC, annexe 64, 4e page.

[23] RG, annexe 1, réponse à la question 32.

20. L'article 71, qui est reproduit au paragraphe 4 *a)* du plan de plaidoirie que je vous ai communiqué, confère aux associés un droit spécifique de surveillance dans des circonstances bien précises, à savoir dans le cas où leur nombre est inférieur ou égal à cinq. Etant l'unique actionnaire de ses deux sociétés, M. Diallo détenait, en application de l'article 71, tous les droits et pouvoirs conférés aux «commissaires». Ce droit de surveillance est également prévu à l'article 19 des statuts d'Africontainers : «La surveillance de la société est exercée par chacun des associés.»[24]

21. Le contenu de ce droit de surveillance est précisé à l'article 75 : «Le mandat des commissaires consiste à surveiller et à contrôler, sans aucune restriction, tous les actes accomplis par la gérance, toutes les opérations de la société et le registre des associés.» (Paragraphe 4 *b)* du plan de plaidoirie.)

22. En conséquence, M. Diallo avait le droit de surveiller et de contrôler, sans aucune restriction, la gérance et les opérations de ses deux sociétés. Une fois de plus, parce qu'il a été détenu et expulsé, M. Diallo a été mis dans l'incapacité d'exercer ces droits contractuels importants.

16 23. Je crois comprendre que si la RDC reconnaît que les articles 71 et 75 définissent en théorie des droits de l'associé, elle affirme néanmoins que, en l'espèce, M. Diallo n'était pas titulaire de ces droits, et ce, pour deux raisons.

24. Tout d'abord, la RDC soutient que la gérance et le contrôle de la gérance ne peuvent être exercés par la même personne, à savoir M. Diallo[25]. Je relèverai, bien entendu, que

a) cet argument est en contradiction avec la position de la RDC selon laquelle M. Diallo avait en réalité nommé un nouveau gérant, M. N'Kanza. Si cette position était exacte — et elle ne l'est pas pour les raisons que j'ai déjà indiquées —, cet argument tomberait immédiatement, du moins pour ce qui concerne Africontainers. Reste que, selon la RDC, il y avait un gérant, dont il relevait du droit propre de M. Diallo de surveiller et de contrôler les actes ;

b) en tout état de cause, et c'est là un point capital, la RDC invente une restriction qui ne figure nulle part dans le libellé du décret de 1887 de même qu'elle est absente de la jurisprudence et de la doctrine qu'elle a présentées à la Cour. Le libellé de l'article 71, l'emploi de l'expression

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[24] MG, annexe 1.

[25] CMRDC, par. 2.10-2.11

«chaque associé», suggère sans ambiguïté que dans une société dont le nombre d'associés est inférieur ou égal à cinq, un associé détient les pouvoirs de surveillance et de contrôle du commissaire, qu'il soit également le gérant de la société ou non. Cela est d'autant plus vrai que l'article 64 du décret de 1887 prévoit qu'un associé peut également être gérant[26], que l'article 67 met ensuite en place des protections spéciales pour le gérant-associé[27], et que l'exercice de cette double fonction est une pratique tout à fait courante au sein des SPRL, qui, comme la Cour s'en souvient peut-être, ont été définies comme des formes hybrides de sociétés, comparables à certains égards à de simples partenariats ou à des «sociétés de personnes[28]».

25. S'il peut sembler quelque peu artificiel de considérer que M. Diallo était un associé ayant le pouvoir de surveiller et de contrôler les actes qu'il accomplissait lui-même en tant que gérant, cela ne découle pas du droit congolais mais du fait que, dans le cadre de la protection diplomatique, il est nécessaire de faire la distinction entre les droits de l'actionnaire, qui consistent à surveiller et
17 à contrôler, et le pouvoir de gestion du gérant, qui agit en tant qu'organe de la société, comme la Cour l'a relevé au paragraphe 66 de son arrêt de mai 2007. Le fait que la Cour insiste sur la distinction entre i) les droits de l'associé et ii) les pouvoirs exercés par le gérant est d'une grande utilité, car il appert ainsi clairement que les droits propres de M. Diallo en vertu des articles 71 et 75 sont juridiquement distincts des droits de gestion exercés par lui en sa qualité de gérant, et donc d'organe de la société.

26. A cet égard, ce que la RDC ne dit pas — et ne peut dire —, c'est que les droits prévus aux articles 71 et 75 sont ceux de la société, et non de l'associé ; ce n'est manifestement pas le cas.

27. J'en viens brièvement au second argument invoqué par la RDC concernant les articles 71 et 75, argument connexe avancé dans sa duplique, selon lequel les droits de surveillance et de contrôle sont conférés uniquement à des experts financiers (appelés commissaires aux comptes). La RDC précise que le droit de l'associé se limite à participer à la désignation d'un ou de plusieurs

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[26] Voir OEG, annexe 35, p. 235, seconde colonne.

[27] *Ibid*.

[28] Voir Louis Frédéric, *Traité de droit commercial belge*, tome V, éd. Fecheyr, Gand, 1950, p. 877 ; voir aussi, s'agissant de l'équivalent français de la SPRL, la «société à responsabilité limitée» (SARL), Paul Le Cornu, *Droit des sociétés*, Montchrestien, Paris, 2003, p. 733 ; et Philippe Merle, *Droit commercial. Sociétés commerciales*, Dalloz, Paris, 2000, p. 189.

commissaire(s) aux comptes au cours de l'assemblée générale de la société[29]. Une fois de plus, ces affirmations ne sont étayées par aucune source faisant autorité, et peut-être n'y a-t-il pas lieu de s'en étonner puisqu'elles sont en contradiction avec les termes exprès de l'article 71, qui prévoit spécifiquement ce qui suit : «Si le nombre des associés ne dépasse pas cinq, la nomination de commissaires n'est pas obligatoire et *chaque associé a les pouvoirs des commissaires*.» Compte tenu du fait que les sociétés de M. Diallo comptaient moins de cinq associés et du libellé exprès des statuts d'Africontainers[30], M. Diallo, en sa qualité d'associé, jouissait de droits propres de surveillance et de contrôle.

Nature de la violation commise par la RDC

28. Tels sont donc les droits de l'associé aujourd'hui en jeu : les droits de participer à l'assemblée générale et de voter à cette occasion, le droit de désigner le gérant de son choix, et le droit de contrôle et de surveillance reconnu par les articles 71 et 75. Je souhaite à présent dire quelques mots de plus sur la nature de la violation de ces droits par la RDC. Lors des audiences consacrées aux exceptions préliminaires, celle-ci a en effet présenté l'affaire *El Triunfo* comme un exemple «typique» d'affaire ayant pour enjeu une atteinte aux droits des actionnaires[31], et fait

18 valoir que la Guinée devait démontrer l'existence d'une violation du même ordre que le remplacement arbitraire d'administrateurs de la société, la convocation d'assemblées générales sans notification des actionnaires ou le déni d'accès à certains documents de la société[32].

29. Or, de même que les droits pertinents des actionnaires dans chaque cas découlent du droit interne applicable, de même la question de la violation doit être tranchée par rapport aux faits de l'espèce : il n'y a pas de critère général applicable. En l'espèce, la tâche de la Cour est relativement simple, la Guinée invoquant une violation sur la base des deux éléments suivants :

a) l'intention sous-tendant les actes de l'Etat, qui était précisément d'empêcher M. Diallo d'exercer ses droits propres à l'égard de ses deux sociétés ;

b) les conséquences de ces actes, qui ont eu pour effet de réduire à néant les droits pertinents.

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[29] DRDC, par. 2.25.

[30] MG, annexe 1.

[31] *Recueil des sentences arbitrales (RSA)*, vol. XV, p. 474-475.

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

30. En ce qui concerne l'intention, je souhaiterais me référer à la propre jurisprudence de la Cour et, plus précisément, à l'affaire de l'*ELSI*. Dans cette dernière, la Chambre s'était concentrée sur la question de l'intention que sous-tendait les actes pertinents attribuables à l'Etat — en l'occurrence, la réquisition des biens de la société — afin de déterminer s'il y avait eu ou non violation des droits reconnus aux actionnaires par un traité bilatéral, à savoir le traité d'amitié, de commerce et de navigation conclu entre l'Italie et les Etats-Unis. J'ai reproduit la disposition pertinente de cet instrument — le paragraphe 2 de l'article III — au paragraphe 5 de mon plan de plaidoirie. Elle se lit comme suit :

> «les ressortissants, sociétés et associations de chacune des hautes parties contractantes seront autorisés, en conformité des lois et règlements applicables à l'intérieur des territoires de l'autre haute partie contractante, à constituer, contrôler et gérer des sociétés et associations de cette autre haute partie contractante», etc.

31. Ainsi que sir Arthur Watts et d'autres l'ont relevé[33], et comme cela ressort des commentaires de MM. Lowe[34] et F.A. Maan[35] relatifs à l'affaire, la Chambre a considéré que les droits propres des actionnaires étaient en jeu, le juge Oda ayant toutefois exprimé son opinion dissidente sur ce point.

19 32. La chambre a abordé de façon pragmatique la question de l'exercice du droit de contrôler et de gérer — le droit des actionnaires de contrôler et de gérer —, et a jugé qu'«[i]l [était] indéniable que la réquisition «de l'usine et des équipements connexes» d'une entreprise d[evait] normalement équivaloir à une privation, du moins pour une part importante, du droit de contrôler et de gérer» (*Elettronica Sicula S.p.A. (ELSI) (Etats-Unis d'Amérique c. Italie), arrêt, C.I.J. Recueil 1989,* p. 50*,* par. 70).

33. La Cour a ainsi jugé que la suppression, dans les faits, de l'objet sur lequel portaient le contrôle et la gestion entraînait une violation du droit de contrôler et de gérer. Contrairement à ce qu'avance la RDC, point n'est besoin qu'il y ait eu violation de droits «classiques» des

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[33] «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 et 435. Voir également «Claims of Shareholders in International Law», A. Cohen Smutny, *in* Binder (dir. publ.), *International Investment Law for the 21st Century*, 2009, p. 370 ; Z. Douglas, *The International Law of Investment Claims*, 2009, p. 410.

[34] Lowe, «Shareholders' Rights to Control and Manage: from *Barcelona Traction* to *ELSI»*, in *Liber Amicorum Judge Shigeru Oda,* N. Ando *et al*. (dir. publ.) (2002), p. 269.

[35] F. A. Mann, «Foreign Investment in the International Court of Justice : The ELSI Case», *AJIL*, vol. 86, p. 97-98.

actionnaires. Pour parvenir à cette conclusion, la Chambre s'est concentrée sur l'intention sous-tendant l'acte prétendument illicite, déclarant que :

> «Comme la réquisition *avait* donc *pour dessein* d'empêcher Raytheon d'exercer, pendant six mois décisifs, ce qui constituait à l'époque l'un des aspects les plus importants de son droit de contrôler et de gérer l'ELSI, la question se pose de savoir si la réquisition était conforme aux exigences du paragraphe 2 de l'article III du traité de 1948.» (*Ibid.* ; les italiques sont de nous.)

34. En l'occurrence, la Chambre n'a, il est vrai, pas conclu à la violation du paragraphe 2 de l'article III, mais c'est parce qu'elle a estimé que les actionnaires ne détenaient plus les droits en question à la date de la réquisition. Elle a cependant examiné, à juste titre, le «dessein» sous-tendant l'acte pertinent. La même approche a été adoptée en l'affaire *El Triunfo* — citée par la RDC à l'appui de sa thèse — dans laquelle le tribunal s'est concentré sur l'existence d'une «intrigue» visant notamment à «évincer la direction et prendre le contrôle des intérêts américains» *[traduction du Greffe]*[36].

35. Le contexte factuel est, dans le cas de M. Diallo, relativement plus simple que dans celui de l'*ELSI*, puisque les actes sous-jacents sur lesquels se fonde la Guinée — à savoir la détention et l'expulsion — étaient dirigés contre M. Diallo lui-même, c'est-à-dire contre l'actionnaire. En effet, M. Diallo — l'actionnaire — a été placé en détention puis expulsé précisément parce qu'il détenait et exerçait ses droits propres de contrôle sur ses deux sociétés. Il a été placé en détention et expulsé, une détention et une expulsion dont le but était, précisément, de l'empêcher de les exercer.

36. Les preuves de l'intention sous-tendant les actes de la RDC sont pour l'essentiel de deux ordres.

a) Tout d'abord, il ressort des éléments de preuve documentaires que l'on a cherché — avec succès — à faire intervenir l'exécutif pour qu'il prenne des mesures visant à empêcher M. Diallo de poursuivre les diverses instances introduites au nom de ses sociétés devant les juridictions de la RDC. La détention et l'expulsion de M. Diallo font directement suite à la

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lettre en date du 29 août 1995 adressée au ministre de la justice par Zaïre Shell[37], dans laquelle cette société demandait au ministre d'intervenir relativement à l'arrêt *Africontainers* — dont M. Vidal vous a parlé ce matin —, ainsi qu'à la lettre de Zaïre Fina et Zaïre Mobil Oil,

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

[37] MG, annexe 166.

en date du 15 novembre 1995[38]. Compte tenu de la chronologie des événements ayant conduit à l'expulsion, la conclusion selon laquelle l'Etat a agi pour se conformer aux souhaits des sociétés pétrolières semble s'imposer. Le fait que Zaïre Shell a ensuite réglé l'aller simple de M. Diallo afin que celui-ci quitte la RDC est, pour ainsi dire, la cerise sur le gâteau.

b) Viennent ensuite les éléments de preuve directs de la position adoptée au sein du Gouvernement de la RDC. M. Abdoulaye Sylla, alors ambassadeur de la Guinée en RDC, relate un entretien avec le représentant du premier ministre, au cours duquel on lui a fait clairement comprendre — rapporte-t-il — que si M. Diallo poursuivait ses réclamations, sa situation allait s'aggraver au-delà de tout ce qu'il pouvait imaginer[39]. Or, il est intéressant de noter que la RDC n'a fourni aucun élément de preuve tendant à réfuter cette déclaration.

37. Ce silence correspond d'ailleurs à la position que la RDC a adoptée devant la Cour. Ainsi que M. Forteau l'a indiqué ce matin, la RDC a soutenu, au moins un temps lors des dernières audiences, que M. Diallo avait été expulsé dans le contexte et en raison des réclamations de ses sociétés[40].

38. Voilà pour l'intention. En ce qui concerne les conséquences de la détention et, plus particulièrement, de l'expulsion, M. Diallo n'a, en fait, pas pris part aux assemblées générales de ses sociétés et n'a pas non plus voté, parce qu'il ne le pouvait pas. Il n'a pas exercé son droit de nommer le gérant de son choix — à savoir lui-même — parce qu'il ne pouvait pas exercer effectivement ce droit. Bien que les sociétés aient poursuivi une activité minimale après l'expulsion de M. Diallo, la réalité est, une fois encore, que celui-ci n'a pas supervisé ni contrôlé ces activités, parce qu'il ne le pouvait pas. Il est d'ailleurs révélateur que même les biens de ses sociétés — il existe un inventaire des biens d'Africontainers à la date de l'expulsion[41], dans lequel

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figurent plus de 100 des conteneurs qui étaient au centre de son activité — aient été laissés à l'abandon et aient disparu[42].

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[38] EPRDC, annexe 74.

[39] RG, annexe 2, p. 16

[40] CR 2006/50, p. 21, par. 25 ; CR 2006/52, p. 19, par. 8.

[41] MG, annexe 199.

[42] OEG, annexes 31-33.

39. Ainsi que l'a indiqué la Chambre du tribunal des réclamations Iran/Etats-Unis en l'affaire *Yeager*, «l'expulsion est par nature une mesure dirigée contre le demandeur lui-même. Elle peut néanmoins, dans le même temps, avoir une incidence directe sur ses biens et droits de propriété»[43] *[traduction du Greffe]*. Cette conclusion s'applique parfaitement à l'expulsion de l'associé et à la possibilité que celle-ci ait une incidence directe sur ses droits en tant qu'associé. Il ressort des faits de l'espèce que l'expulsion visait le demandeur en sa qualité d'associé, et qu'elle a directement, et inévitablement, porté atteinte à ses droits en tant que tel.

40. Monsieur le président, Messieurs de la Cour, ainsi s'achève mon intervention. Je vous remercie pour l'attention que vous aurez bien voulu accorder à ces questions relativement ésotériques du droit congolais des sociétés. Permettez-moi de vous demander de bien vouloir maintenant appeler à la barre M. Daniel Müller.

Le VICE-PRESIDENT, faisant fonction de président : Je vous remercie, Monsieur Wordsworth, pour votre exposé. I shall now give the floor to Mr. Müller. You have the floor, Sir.

Mr. MÜLLER :

VI. EXPROPRIATION

Mr. Vice-President, Members of the Court, it is a great privilege for me to represent the Republic of Guinea here before you.

1. My colleague Mr. Wordsworth has just shown that the Democratic Republic of the Congo violated rights held by Mr. Diallo as *associé* in Africom-Zaïre and Africontainers-Zaïre, his direct rights in relation to those legal persons[44]. But, what is more, the actions taken by the Congolese authorities against Mr. Diallo personally, and against the businesses of the two companies, were such that they resulted in the outright expropriation of the *parts sociales* owned by him.

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[43] *Kenneth P. Yeager* v. *Islamic Republic of Iran*, Iran-United States Claims Tribunal Reports (Iran-US CTR), vol. 17, p. 99, par. 30.

[44] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 606, para. 64.

22 2. The rights being asserted by Guinea are not rights belonging to the companies — not corporate rights which the Judgment on preliminary objections bars the Applicant from asserting before the Court[45]. What is involved here is purely and simply *Mr. Diallo's* right of ownership, *his* ownership, of the *parts sociales* in Africom and Africontainers. The question is therefore not whether the DRC interfered with Mr. Diallo's rights in relation to the legal entities — as the [Respondent] would seem to suggest in its Rejoinder[46]. Rather, it is showing that the DRC infringed Mr. Diallo's property rights in his *parts sociales*.

3. Mr. Vice-President, Members of the Court, the DRC is under a legal obligation, on a number of bases, to respect Mr. Diallo's ownership. First, the guarantee of private property is solidly established in its domestic law. The Transitional Constitutional Act of the Republic of Zaire in force when Mr. Diallo was expelled unequivocally acknowledges that "individual or collective property rights are guaranteed"[47]. In its written pleadings[48], Guinea has also cited other legislative enactments confirming this constitutional guarantee. There is clearly no reason to withhold such a guarantee from Mr. Diallo because he is a Guinean national. On the contrary, the Court made clear in its Judgment in 1970 in the *Barcelona Traction* case:

> "When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them." (*Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para. 33)[49].

The DRC is therefore required by international law to accord Mr. Diallo the guarantee provided for in its domestic law.

23 4. Secondly, the African Charter of Human and Peoples' Rights, adopted on 27 June 1981 at Nairobi, an international instrument to which the DRC has been a party since 1987, extends exactly

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[45] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 618, para. 98 (3) (*c*).

[46] Rejoinder of the DRC (RDRC), p. 23, para. 2.30.

[47] Art. 22, *Journal officiel de la République du Zaïre* [Official Journal of the Republic of Zaire], 35th year, special issue, Apr. 1994. See also Constitution of the Democratic Republic of the Congo, 1 Aug. 1964, Art. 43, *Moniteur congolais*, 5th year, special issue, 1 Aug. 1964; Transitional Constitution of the Democratic Republic of the Congo, Apr. 2003, *Journal officiel de le République démocratique du Congo*, 44th year, special issue, 5 Apr. 2003; and Constitution of the Democratic Republic of the Congo, Feb. 2006, Art. 34.

[48] Reply of Guinea (RG), p. 88, paras. 2.98 and 2.99.

[49] See also, Constitution of the Democratic Republic of the Congo, 1 Aug, 1964, Art. 46, *Moniteur congolais (5th year)*, special issue, 1 Aug. 1964 ("Every alien in the territory of the Republic shall enjoy the protection granted to persons and property under the present Constitution, except where otherwise provided by national law.").

the same guarantee, as do other regional human rights instruments[50]. Under Article 14 of the Charter: "The right to property shall be guaranteed."[51]

5. Finally, general international law also requires States to respect the property of aliens in their territory. Already in 1922 the Arbitral Tribunal established under the auspices of the Permanent Court of Arbitration in the *Norwegian Shipowners' Claims* case observed that "le droit de propriété de l'étranger ami doit toujours être pleinement respecté"[52]. Modern international law formulates this obligation in negative terms[53]: while recognizing a State's right to take measures affecting property rights of private individuals — this also being the case of human rights instruments —, international law subjects this to limits and conditions, to which I shall return a bit later. We need only cite United Nations General Assembly resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources[54], which reflects customary international law as it now stands[55], and resolution 3281 (XXIX)[56], the Charter of Economic Rights and Duties of States; both of these countenance some infringements of property rights through nationalization or expropriation while imposing conditions on them.

6. In light of these various sources of the obligation not to interfere with property rights, we cannot help but be taken aback by what Mr. Kalala said during the oral proceedings in 2006: he suggested that, "if the DRC had expelled Mr. Diallo to prevent his two companies from recovering the monies due to them[,] . . . the best solution would have been simply to expropriate the two companies concerned"[57]. As if it were as simple as that and the DRC were free to take property of

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[50]Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Paris 1952, Council of Europe, Treaty Series, No. 9, Art. 1; American Convention on Human Rights, San José, 1969, Art. 21, United Nations, *Treaty Series*, Vol. 1144, p. 150 (I-17955).

[51]African Charter on Human and Peoples' Rights, Art. 14, United Nations, *Treaty Series*, Vol. 1520, p. 271 (I-26363).

[52]*Norwegian Shipowners' Claims (Norway* v. *United States of America)*, *Arbitral Award, RIAA*, Vol. I, p. 332.

[53]*Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, p. 22. See also *Saluka Investments BV (The Netherlands)* v. *Czech Republic,* Partial Award, 17 Mar. 2006, paras. 255-262 (available on the PCA website, http://www.pca-cpa.org/upload/files/SAL-CZ%20Partial%20Award%20170306.pdf).

[54]United Nations, General Assembly, resolution 1803 (XVII), 14 Dec. 1962, point I, para. 4.

[55]*Texaco Overseas Petroleum Company and California Asiatic Oil Company (Texaco-Calasiatic)* v. *Government of the Libyan Arab Republic*, A*rbitral Award*, *Merits*, 27 Nov. 1975, International Law Reports, Vol. 53, p. 389, para. 87. See also, R. Higgins, "The Taking of Property by the State: Recent Developments in International Law", *RCADI* [The Hague Academy Collected Courses], Vol. 176, 1982-III, p. 293.

[56]United Nations, General Assembly, resolution 3281 (XXIX), 14 Dec. 1974, Art. 2, para. 2 (*c)*.

[57]CR 2006/52, p. 22, par. 20 (Kalala).

its nationals or aliens without restriction. This is especially surprising inasmuch as the DRC in its eighth, ninth and tenth periodic reports to the African Commission on Human and Peoples' Rights on implementation of the African Charter plainly affirmed its commitment to respect for property rights:

> "The Constitution, in its Article 34, re-affirms that private property is sacred. The State guarantees the right to individual or collective property acquired in conformity with the law or with custom."[58]

The DRC's commitment to respect for private property stands in clear contradiction to Mr. Kalala's assertion.

7. Although the DRC obviously did not openly and formally expropriate Africom and Africontainers, the measures it took against Mr. Diallo — which my colleagues discussed this morning — nevertheless infringed his property rights and resulted in the taking of his *parts sociales* in the companies (I). But the DRC failed to comply with the conditions imposed by international law on a State's right to expropriate and thereby incurred international responsibility for an internationally wrongful act (II). I shall elaborate on these two points in order.

I. The actions taken by the Congolese authorities amount to the expropriation of Mr. Diallo's *parts sociales*

8. So, the first question: do the actions taken by the Congolese authorities amount to the expropriation of Mr. Diallo's *parts sociales*?

Expropriation and property title

9. The [Respondent] says that they do not, relying on the fact that the property title belonging to Mr. Diallo was never taken from him. It asserts in its Counter-Memorial that, "by Guinea's own admission, Mr. Diallo to this day remains the owner of his *parts sociales*"[59]. Guinea

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does not deny this. But the fact that title remains proves only that the DRC did not formally expropriate Mr. Diallo's property by means of a compulsory conveyance of title. This does not however mean that there has been no taking.

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[58]Democratic Republic of the Congo, Ministry of Human Rights, Eighth, Ninth and Tenth Periodic Reports to the African Commission on Human and Peoples' Rights, Implementation of the African Charter on Human and Peoples' Rights (period from July 2003 to July 2007), Kinshasa, June 2007, p. 38, para. 151 (available on the African Commission on Human and Peoples' Rights website: http://www.achpr.org/english/state_reports/DRC/DRC_State%20Report.pdf).

[59]Counter-Memorial of the DRC (CMDRC), p. 21, para. 1.38 and p. 28, para. 2.07.

10. Indeed, ownership is much more than just the title creating and proving it. Ownership of property instead consists of a "bundle of rights"[60], to quote a former President of the Court, that a person may exercise in respect of a thing. Together, these rights establish the owner's power over his property or, as German legal scholars have called it, the "Herrschaftsgewalt"[61]. In other words, Mr. Vice-President, title to property is merely the wrapper enveloping the rights that define, and are the reason for, ownership, just as a glass merely contains the water in it. A taking, the deprivation of ownership, can thus just as easily consist of a conveyance of title — the entire glass is taken away — as of the siphoning off of the content of title, of the rights of ownership — once the glass has been emptied, it has lost its value.

11. International jurisprudence and the writers[62] clearly confirm that expropriation does not have to involve the transfer of title to property but can also occur even where title remains with the owner. The Court in Strasbourg, in its leading decision on expropriation, *Sporrong and Lönnroth*[63], thus stated, and I quote the 1982 judgment: "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
26 and investigate the realities of the situation complained of . . ."[64] The Court in San José took the same pragmatic approach when it stated in its judgment on the merits in the *Ivcher Bronstein* case that it could not restrict itself to determining whether a formal expropriation transferring title took place, but that it also had to look beyond appearances[65].

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[60]R. Higgins, "The Taking of Property by the State: Recent Developments in International Law", *RCADI*, Vol. 176, 1982-III, p. 270.

[61]R. Dolzer, *Eigentum, Enteignung und Entschädigung im geltenden Völkerrecht*, Springer, Berlin, Heidelberg, New York, Tokyo, 1995, p. 150.

[62]See, *inter alia*, G. C. Christie, "What Constitutes a Taking of Property Under International Law?", *BYBIL*, Vol. 38, 1952, pp. 307-338; B. H. Weston, "'Constructive Takings' Under International Law: A Modest Foray into 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", *RCADI*, Vol. 176, 1982-III, pp. 259-392; R. Dolzer, "Indirect Expropriation of Alien Property", *ICSID Review — Foreign Investment Law Journal*, Vol. 1, 1986, pp. 41 to 65; Y. Nouvel, "Les mesures équivalent à une expropriation dans la pratique récente des tribunaux arbitraux", *RGDIP*, Vol. 106, 2002, pp. 79-102.

[63]*Sporrong and Lönnroth* v. *Sweden,* Applications Nos. 7151/75 and 7152/75, 23 Sep. 1982, *Series A*, No. 52.

[64]*Ibid.*, para. 63, *Series A*, No 52, pp. 24-25. See also, *Străin and Others* v. *Romania*, Application No. 57001/00, *Reports of Judgments and Decisions*, 2005-VII, para. 42 ; *Brumărescu* v. *Romania* [GC], Application No. 28342/95, *ibid.*, 1999-VII, para. 76; *Vasilescu* v. *Romania*, Application No. 27053/95, *ibid.*, 1998-III, para. 51 and *Papamichalopoulos and Others* v. *Greece*, Application No. 14556/89, 24 June 1993, *Series A*, No. 260-B, para. 42.

[65]*Ivcher Bronstein* v. *Peru, Merits, Judgment,* 6 Feb. 2001, *Series C,* No. 74, para. 124.

12. A great many arbitral awards confirm this, such as the Award in the *TAMS* case made by the Iran-United States Claims Tribunal: "[e]n droit international, la privation ou la confiscation de biens peut s'opérer à travers l'ingérence d'un Etat dans l'utilisation desdits biens ou dans la jouissance des bénéfices qu'ils génèrent, même s'il n'est pas porté atteinte au titre juridique sur les biens"[66]. In the *Bayindir* case, an arbitral tribunal set up under ICSID auspices similarly noted that "il pourrait y avoir expropriation même s'il n'était pas porté atteinte au titre sur les biens"[67].

13. Thus, it does not matter that on paper Mr. Diallo is still the owner of the *parts sociales* in the companies he founded in the 1970s, because the only decisive considerations in determining whether there has been a taking are the actual effects which the acts and omissions attributable to the Congolese authorities had on Mr. Diallo's property rights.

Expropriation and intention of the State authorities

14. Even if the expulsion had not been aimed at depriving Mr. Diallo of his property but at "preventing him . . . from taking legal action to recover the debts due to his companies"[68], as the Respondent has claimed, quoting rather cavalierly from Guinea's Reply[69], the State authorities' intention is also without relevance for the determination of the existence of a taking. It is beyond doubt that the DRC wished to rid itself of Mr. Diallo and his companies for reasons having absolutely nothing to do with the public interest of the State and to do so through a completely arbitrary process, as my colleagues and friends showed this morning, but that has no bearing in determining whether or not Mr. Diallo was expropriated. It is the actual effects of the measures taken on the property rights, and those effects alone, which matter. And this is confirmed by the jurisprudence, from which I shall once again quote the TAMS award handed down by the

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

[67] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S.* v. *Pakistan*, ICSID, case No. ARB/03/29, Award, 27 August 2009, para. 443 (available at http://ita.law.uvic.ca/documents/Bayandiraward.pdf). See also, *Técnicas Medioambientales Tecmed, S.A.* v. *Mexique*, ICSID, case No. ARB(AF)/00/2, Arbitral Award of 23 May 2003, para. 116, in *ILM*, Vol. 43, 2004, p. 133 and *Telenor Mobile Communications AS* v. *Hungary*, ICSID, case No. ARB/04/15, Award, 13 Sep. 2006, para. 63 (available on the ICSID website: http://icsid.worldbank.org/).

[68] RDRC, p. 20, para. 2.30.

[69] *Ibid.*, para. 2.29.

Iran-United States Claims Tribunal: "[l]'intention du gouvernement est moins importante que l'effet des mesures sur le propriétaire, et la forme des mesures de contrôle ou de l'ingérence est moins importante que la réalité de leur impact"[70].

Expropriation and effects on property rights

15. We therefore need to take a closer look at the reality, rather than the mere semblance of a title of property, in order to determine whether the acts attributable to the Congo deprived Mr. Diallo of his rights of property, of the contents of the glass.

16. The concept of property is necessarily rooted in the domestic law of States and the general principles of law[71]. These contents consist of a number of legally protected rights which only the holder can exercise over his property to the exclusion of any third party[72].

— First, he may use his property as he sees fit or even not use it if he so wishes. To give an example, I can drive my car, I can even let someone else drive it with my permission of course and I can decide to rent out my car. This is the *usus*.

28 — Then, the owner alone is entitled to the fruits, if any, generated by his property. I can freely control the rent received for renting out my car. This is the *fructus*.

— And lastly, the holder may control his property, change it, transform it, even break and destroy it and, above all, may dispose of it. I can thus change the colour of my car, get rid of the roof in order to change it into a convertible — the weather in The Hague just now certainly speaks in favour of such a change — and I can also sell it. This is the *abusus*.

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[70] *Tippets, Abbet, McCarthy, Stratton (TAMS)* v. *TAMS-AFFA Consulting Engineers of Iran*, Award No. 141-7-2, 29 June 1984, *Iran-United States Claims Tribunal Reports*, Vol. 6, pp. 225-226. See also, *Phelps Dodge Corporation, et al.* v. *Islamic Republic of Iran*, Award No. 217-99-2, 19 Mar. 1986, *ibid.*, Vol. 10, p. 130; *Harold Birnbaum* v. *Islamic Republic of Iran*, Award No. 549-967-2, 6 July 1993, *ibid.*, Vol. 29, p. 270; *Shahin Shaine Ebrahimi, et al.* v. *Islamic Republic of Iran*, Award No. 560-44/46/47-3, 12 October 1994, *ibid.*, Vol. 30, p. 190; *George E. Davidson* v. *Islamic Republic of Iran*, Award No 585-457-1, 5 Mar. 1998, *ibid.*, Vol. 34, p. 3, para. 106. See as well, *A. Biloune and Marine Drive Complex Ltd.* v. *Ghana Investments Centre and the Government of Ghana, Jurisdiction and Liability,* Award of 27 Oct. 1989, *ILR*, Vol. 95, p. 209; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A.* v. *Argentina,* ICSID, case No. ARB/97/3, Award, 20 Aug. 2007, para 7.5.20 (available at http://www.investmentclaims.com/); *L.E.S.I. S.p.A. and ASTALDI S.p.A.* v. *People's Democratic Republic of Algeria,* ICSID, case No. ARB/05/3, Award, 12 Nov. 2008, para. 131 (available on the ICSID website: http://icsid.worldbank.org/). To the same effect, see G. C. Christie, "What Constitutes a Taking of Property Under International Law?", *BYBIL*, Vol. 38, 1952, p. 309.

[71] *Panevezys-Saldutiskis Railway, Judgment, 1939, P.C.I.J., Series A/B, No. 76*, p. 18. See also R. Higgins, "The Taking of Property by the State: Recent Developments in International Law", *RCADI*, Vol. 176, 1982-III, p. 270.

[72] *Ibid.* See also F.A. Mann, "Outlines of a History of Expropriation", *The Law Quarterly Review*, Vol. 75, 1959, pp. 190-191.

This, in very classical terms, is the meaning given to Articles 544 and 546 of the Belgian Civil Code, to Article 544 of the French Civil Code, or to paragraph 903 of the German *BGB* and I could go on[73]. All these rights — *usus*, *fructus* and *abusus* — together form ownership. It follows that, if the owner is deprived of the possibility of exercising his rights over his property, and even if he still formally possesses his title of property, his rights of property have been violated: he has been expropriated.

17. As early as 1961, in the draft convention on the international responsibility of States for injuries to aliens, the Harvard Law School laid down, in Article 10 (3) *(a)* of the draft, that:

> "A 'taking of the use of property' [the English expression 'taking of property' is certainly more accurate and rather poorly rendered in French as 'mainmise sur un bien'], includes not only an outright taking of property but also any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference."[74]

18. The jurisprudence of international arbitration, which forms an impressive *corpus* of decisions regarding expropriation, provides further support for this conclusion[75]. For the sake of the argument, one has only to refer, somewhat arbitrarily I must admit given the vastness of the

29 choice, to the award of the tribunal set up under the aegis of ICSID in the *E.L.S.I.* case. In its Award of November 2008, the Tribunal, examining general international law on the subject, recognized that

> "[t]he effect of the State measure is equivalent to expropriation as soon as it restricts the use which the beneficiary was intending to make of that right and/or reduces the benefit it was supposed to produce"[76]. *[Translation by the Registry.]*

19. In its Award concerning the claim lodged by Mr. Davidson, Chamber No. 1 of the Iran/US Claims Tribunal also declared itself convinced that the Islamic Republic of Iran "a privé le

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[73]For other references, see F.A. Mann, "Outlines of a History of Expropriation", *ibid.*

[74]Draft convention on the international responsibility of States for injuries to aliens, prepared by the Harvard Law School in 1961, reproduced in R. Ago, First report on State responsibility, A/CN.4/217 and Add. 1, Ann. VII, *Yearbook of the International Law Commission*, 1969, Vol. II, p. 142.

[75]See also *Telenor Mobile Communications AS* v. *Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 Sep. 2006, paras. 65-66 (available on the ICSID website at http://icsid.worldbank.org/).

[76]*LESI, S.p.A. and Astaldi, S.p.A.* v. *People's Democratic Republic of Algeria*, ICSID case No. ARB/05/3, Award, 12 Nov. 2008, para. 131 (available on the ICSID website at http://icsid.worldbank.org/). See also *Compañia del Desarrollo de Santa Elena, S.A.* v. *Costa Rica*, ICSID case No. ARB/96/1, final award, 17 Feb. 2000, para. 77, *ICSID Review — FILJ*, Vol. 15, 2000, p. 194; *Telenor Mobile Communications AS* v. *Hungary*, ICSID case No. ARB/04/15, Award, 13 Sep. 2006, paras. 65-66 (available on the ICSID website at http://icsid.worldbank.org/); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S.* v. *Pakistan*, ICSID case No. ARB/03/29, Award, 27 Aug. 2009, para. 443 (available at http://ita.law.uvic.ca/documents/Bayandiraward.pdf).

demandeur de ses droits fondamentaux de propriété, parce qu'il ne pouvait exercer aucun contrôle sur les bénéfices générés par ces biens, ni en avoir l'usage ou la jouissance"[77]. And the Tribunal went on: "[m]ême s'il n'y a pas eu transfert de titre juridique, le Tribunal conclut que l'ingérence du défendeur dans les droits de propriété du demandeur s'est muée en confiscation"[78].

20. Mr. President, Members of the Court, it is exactly the same in the present case; the Congo's interference in Mr. Diallo's property rights over his *parts sociales* can only be characterized as expropriation. Indeed, despite the fact that he still possesses the formal title to property, and although he remains the holder of legal title to all the *parts sociales* in his two companies, he is deprived of all the rights which are normally attached thereto and, consequently, of the value of his property.

21. In its written pleadings, the DRC is only interested in the end of the story when denying that one of the effects of Mr. Diallo's unlawful expulsion was to expropriate his *parts sociales* in the companies he had set up. However, the Respondent glosses over the fact that, on two

30 occasions, the Congolese authorities deprived Mr. Diallo of the use of his *parts sociales*. First, in 1988, when the Guinean businessman was apprehended then imprisoned for a year in a totally arbitrary fashion and without any legal basis[79], and then, again, just before his expulsion in 1995. Professor Thouvenin has already spoken about this this morning. Despite the fact that, in both cases, these measures were only temporary, although the imprisonment in 1988 lasted for a year after all, these interferences and the ensuing consequences had a negative effect on the value of Mr. Diallo's *parts sociales*. In fact, the result of his removal was that substantial debts could not be recovered and that highly promising investment projects could not be realized.

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

[78] *George E. Davidson* v. *The Government of the Islamic Republic of Iran*, Award No. 585-457-1, 5 Mar. 1998, *ibid.*, Vol. 34, p. 3, para. 111.

[79] RG, pp. 6-14, paras. 1.8-1.28.

22. In this connection, it is important to remember that, legally speaking, Mr. Diallo was the only *associé* of the two companies and their only *gérant* and, commercially speaking, their director, which made his presence indispensable for their running. As a result of the DRC's arbitrary measures, he could no longer use them, manage them and make them profitable as he intended. Probably because the unscrupulousness shown by the authorities in their action against Africom's legitimate claims for payment made such an impression on him, he was never able to recover the debts owed to that company, just as he was unable to have the judgment in favour of Africontainers enforced[80], its execution having been "stayed", following the intervention of the political authorities[81]. Although he regained the use of his property, its value was seriously impaired. These are certainly not consequences linked to "the chances and hazards resulting from general economic conditions"[82], as was the case in the *Oscar Chinn* case.

23. Mr. Diallo's expulsion in 1996 was the final blow, the *coup de grâce* dealt to his property rights. Admittedly, and Guinea has never denied this, this expulsion only concerned the person of its national without being directly aimed at his property rights. Yet as the African Commission on Human and Peoples' Rights has recognized, "the measures taken by the
31 Respondent State in the arrest, detention and subsequent deportation of the victims 'called into question a whole series of rights recognized and guaranteed in the Charter', *including the right to property*"[83]. Arbitration jurisprudence[84] has also considered that expulsion measures are liable to infringe property rights. This arbitrary measure, at odds with the DRC's obligations, deprived Mr. Diallo, owner of the *parts sociales* in Africom and Africontainers, of their effective use and of the control of his property, as Mr. Wordsworth explained a few moments ago. For, when the owner is removed from his property, he is inevitably deprived of its use, of its *usus*, of the

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[80]MG, Ann. 153.

[81]OG, pp. 19-23, paras. 1.45-1.55.

[82]*Oscar Chinn, Judgment, 1934, P.C.I.J., Series A/B, No. 63*, p. 88.

[83]African Commission on Human and Peoples' Rights, *Institute for Human Rights and Development in Africa/Republic of Angola*, Communication No. 292/2004, para. 73 (emphasis added), in African Union, *Twenty-fourth Activity Report of the African Commission on Human and Peoples' Rights*, 2008, p. 148.

[84]*Kenneth P. Yeager* v. *Islamic Republic of Iran*, Award No. 324-10199-1, 2 Nov. 1987, *Iran-United States Claims Tribunal Reports,* Vol. 17, p. 99, para. 30; *Jimmi B. Leach* v. *Islamic Republic of Iran*, Award No. 440-12183-1, 6 Oct. 1989, *ibid.*, Vol. 23, p. 237, para. 18; *A. Biloune and Marine Drive Complex Ltd.* v. *Ghana Investments Centre and the Government of Ghana, Jurisdiction and Liability*, Arbitral Award, 27 Oct. 1989, *ILR*, Vol. 95, p. 209.

possibility of making it yield a profit. The African Commission rightly remarked that "[t]he right to property necessarily includes a right to have access to property"[85].

24. Allow me to point out that, contrary to the DRC's allegations[86], it is neither juridically nor intellectually possible to treat the companies of which Mr. Diallo was *associé* and *gérant* on a par with major commercial companies quoted on the stock exchange. I readily admit that the value of the latter is influenced hardly at all or very little by the presence or absence of one of their shareholders or *gérants* in the State where they are established. But the situation of Africom and Africontainers was quite different: they were not major commercial companies quoted on the stock exchange, but SPRLs, private limited liability companies under Congolese law, whose legal status and régime are characterized by a very marked *intuitu personae* character. Mr. Diallo was at one and the same time the only *associé* (direct or indirect) and the only *gérant* of the two companies. It is he who ran and developed his companies' affairs. Without him, Africom and Africontainers were devoid of any usefulness and value. If the *parts sociales* had been freely negotiable, which is

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not the case[87], who would have wished to invest or purchase its *parts* and, by virtue of that, hold a stake in companies which were deprived of their principal asset, Mr. Diallo, and which, by virtue of the actions of the State authorities, no longer had any opportunity in a climate of hostility and constraint to pursue their normal commercial activities? In reality, the DRC therefore not only deprived Mr. Diallo of the use of his *parts sociales*, but also of every opportunity to exercise control over his possessions and to sell them at their real value.

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25. Mr. Vice-President, Members of the Court, even if the companies continued to exist formally — which the Congo appears to question — the *parts sociales* of which Mr. Diallo remained the formal owner are stripped of any real value owing to the actions of the Congolese authorities. To quote once again the Iran-United States Claims Tribunal, "ces droits sont rendus à

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[85]African Commission on Human and Peoples' Rights, *Media Rights Agenda and Constitutional Rights Project* v. *Nigeria*, Communications Nos. 15093, 128/94, 13094 and 152/96, para. 77, in Organization of African Unity, *Twelfth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1998-1999, p. 64.

[86]RDRC, p. 21, para. 2.31.

[87]See Article 36 of the Decree of 27 Feb. 1887 on Commercial Corporations, OG, Ann. 35.

ce point inutiles qu'ils doivent être réputés pour avoir été expropriés"[88]. Mr. Diallo's expulsion definitively deprived him of the control and use of his rights of property. There is thus no doubt that, this being so, Mr. Diallo's *parts sociales* must be regarded as having been expropriated.

II. The expropriation carried out constitutes an internationally wrongful act

26. This expropriation, albeit indirect, *de facto*, or creeping, or all of these at once, constitutes an internationally wrongful act attributable to the Democratic Republic — and, Mr. Vice-President, this is my second point. Although the Respondent has not found it necessary to dispute Guinea's analysis on this question, a few words on it are certainly needed; I shall nevertheless be brief.

27. As regards the question of attributing the expropriation to begin with, it has been demonstrated this morning that the various measures which, by their effects, ultimately expropriated Mr. Diallo of his *parts sociales* are attributable to the DRC. This is the case of his arbitrary, unlawful and unjustified arrest in 1988, as in 1995, and of his expulsion in 1996. All

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these measures are acts taken by the executive[89]. The expropriation of Mr. Diallo's *parts sociales* resulting from a combination of these acts attributable to the Congolese authorities can but be attributed to the same authorities. It is a composite act, "a series of actions or omissions defined in aggregate as wrongful"[90].

28. Turning now to the second element on which every internationally wrongful act is based, the violation of an obligation of a State under international law, I pointed out at the beginning of this oral argument that international law does not prohibit expropriation, the infringement of property, but places particular limitations and conditions upon it[91]. To comply with international law, an expropriation, regardless of how it is characterized, must be made in the public interest, in a

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[88] *Starrett Housing Corp. et al* v. *Government of the Islamic Republic of Iran et al*, Award No. ITL 32-24-1, 19 Dec. 1983, *Iran-United States Claims Tribunal Reports*, Vol. 4, p. 154. See also, G.C. Christie, "What Constitutes a Taking of Property Under International Law?", *BYBIL*, Vol. 38, 1952, p. 311.

[89] Art. 4 of the Articles on Responsibility of States for Internationally Wrongful Acts, United Nations General Assembly resolution 56/83, 12 Dec. 2001, Ann.

[90] Art. 15, para. 1, of the Articles on Responsibility of States for Internationally Wrongful Acts, *ibid.* See also *Telenor Mobile Communications AS* v. *Hungary,* ICSID case No. ARB/04/15, Award, 13 Sep. 2006, para. 63 (available on the ICSID website at http://icsid.worldbank.org/).

[91] See para. 5 above.

non-discriminatory fashion and in compliance with the law; it must also be accompanied by compensation[92]. Although under the current law of State responsibility "[t]he characterization of an act of a State as internationally wrongful is governed by international law" and is not affected by its characterization in internal law[93], let me say in passing that, in principle, Congolese law fixes the same conditions[94].

29. And yet, Mr. Vice-President, none of them has been respected in the present case:

34 — the DRC has never offered any compensation whatever for the financial loss suffered by Mr. Diallo. On this point alone, the DRC's expropriation does not comply with the requirements of international law, without it being necessary at this stage in the proceedings to determine whether such compensation must be "just and equitable", "appropriate", "adequate" or "full and entire" — in any event, it must exist, which is not the case here;

— the expropriation of Mr. Diallo was not made for any public use motive and was done without any respect for the rule of law. The expropriation and destruction of the economic value of Mr. Diallo's property were a result of his repeated imprisonment and expulsion, which were motivated, at best, by the requirements of certain private interests and remain wholly arbitrary. As Professors Thouvenin and Forteau demonstrated this morning, Mr. Diallo's periods of detention and his expulsion were themselves incompatible with the [Respondent's] international obligations and completely without justification.

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[92] *Norwegian Shipowners (Norway* v. *United States of America), Arbitral Award, RIAA*, Vol. I, p. 332; *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, p. 22; *Metalclad Corporation* v. *Mexico*, ICSID case No. ARB/(AF)/97/1, Award, 30 Aug. 2000, para. 99, *ICSID Review — FILJ*, Vol. 16, 2001, p. 194; *Methanex Corporation* v. *United States of America*, Award, 3 Aug. 2005, para. IV.D.7 (available on the website at http://www.state.gov/documents/organization/51052.pdf); *Saluka Investments BV (The Netherlands)* v. *Czech Republic*, Partial Award, 17 Mar. 2006, paras. 255-257 (available on PCA website at http://www.pca-cpa.org/showpage.asp?pag_id=1149); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S.* v. *Pakistan*, ICSID case No. ARB/03/29, Award, 27 Aug. 2009, para. 446 (available on the website at http://ita.law.uvic.ca/documents/Bayandiraward.pdf); United Nations General Assembly resolution 1803 (XVII), *Permanent Sovereignty over Natural Resources*, 14 Dec. 1962, para. 4.

[93] Articles on Responsibility of States for Internationally Wrongful Acts, Art. 3, United Nations General Assembly resolution 56/83, 12 Dec. 2001, Ann.

[94] Democratic Republic of Congo, Ministry of Human Rights, eighth, ninth and tenth periodic reports to the African Commission on Human and Peoples' Rights, implementation of the African Charter on Human and Peoples' Rights (July 2003 to July 2007), Kinshasa, June 2007, p. 37, para. 151 (available on the website of the African Commission on Human and Peoples' Rights at http://www.achpr.org/francais/state_reports/DRC/rapport_DRC.pdf).

30. The Democratic Republic of the Congo thus engaged its international responsibility and Guinea is entitled to receive reparation for the expropriation of the *parts sociales* of its national, Mr. Diallo, in Africom and Africontainers.

31. These remarks conclude my statement. Thank you Mr. Vice-President, Members of the Court, for your kind attention. At this point, I was supposed to ask you to give the floor to Professor Alain Pellet. But nature has interfered in our affairs. I am therefore going to suggest, Mr. Vice-President, that you should give the floor to Professor Jean-Marc Thouvenin so that he can read out the statement prepared by Mr. Pellet.

The VICE-PRESIDENT, Acting President: Thank you, Mr. Müller, for your statement. I think this is an appropriate time to take a ten-minute break, after which I shall give the floor to Professor Thouvenin. The session is adjourned.

The Court adjourned from 4.15 to 4.25 p.m.

35 The VICE-PRESIDENT, Acting President: Please be seated. The hearing is resumed. I give the floor to Professor Thouvenin to read the oral argument of Mr. Pellet. You have the floor, Professor.

Mr. THOUVENIN: Thank you, Mr. Vice-President.

VII. REPARATION AND ISSUES OF CAUSALITY

Mr. Vice-President, Members of the Court, my learned friend Alain Pellet, trapped in a distant land by the fury of the volcano Eyjafjöll — such a difficult name to pronounce — has asked me to read his submission and to ask the Court to excuse his truly involuntary desertion. It is therefore he who is speaking through me.

1. Mr. Vice-President, my learned friends have set out the internationally wrongful acts of the Democratic Republic of the Congo. It is for me to establish that those acts caused harm to Mr. Diallo and that reparation must be made for that injury. However, in common with the other members of our delegation who have spoken in turn before the Court since this morning, I am in an embarrassing position: pursuant to Article 60 of the Rules of Court, I am bound not simply to

repeat the facts and arguments already contained in the written pleadings; yet I cannot comply strictly with that requirement because the Respondent has not felt itself obliged to respond to what was said in our Reply on the subject of the damage suffered by Mr. Diallo and of the causal nexus between that damage and the violations, attributable to the DRC, of his rights under international law[95]. This is in fact an important aspect of the case which has brought us before the Court, one which cannot simply be made to disappear merely because the Respondent has avoided addressing it.

2. I shall revisit only very briefly the matter of the means of reparation, on which the DRC has maintained absolute silence, since the only real issue in that regard is that of putting a value on the injury. We have asked all along for this assessment to be deferred to a later phase of the case if the *quantum* cannot be set in the negotiations between the Parties[96], and the Respondent has not

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objected. Of course, one must not abuse the maxim "he who is silent consents" — or, more formally put, the adage "qui tacet consentire videtur si loqui debuisset ac potuisset". In the event, however, I struggle to see how otherwise one might interpret the DRC's silence on this point.

3. I must, on the other hand, despite the attempts by our opponents to circumvent the issue, say a few words about the substance and origin of the compensable damage, which is the direct consequence of the infringements of international law attributable to the DRC. It is therefore helpful to touch briefly on what comprises the damage for which reparation can (and must) be made in these proceedings before saying something about the means of reparation.

I. The compensable harm

4. In the operative part of its Judgment of 24 May 2007 on the preliminary objections, the Court unanimously declared "the Application of the Republic of Guinea to be admissible in so far as it concerns protection of Mr. Diallo's rights as an individual" and, by fourteen votes to one, that the Application was likewise "admissible in so far as it concerns protection of Mr. Diallo's direct rights as *associé* in Africom-Zaire and Africontainers-Zaire" (*Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007*,

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[95]See RG, Chap. 3, pp. 91-100.

[96]See MG, p. 7, paras. 1.17-1.18; pp. 73-74, para. 3.83 and Submissions, p. 108, para. 5.2, and RG, Submissions, p. 101, para. 4.2.

p. 618, paras. 98 (3) *(a)* and 98 (3) *(b)*). Conversely, by the same majority, it held "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" (*ibid.*, para. 98 (3) *(c)*).

5. Those decisions clearly have an effect in terms of the extent, or at least the subject-matter, of the right to reparation on which the Republic of Guinea can rely: compensation is only payable, in the present case, for the harm suffered by Mr. Diallo as an individual and as *associé* — the sole *associé* — in Africom-Zaire and Africontainers-Zaire. On the other hand, since the Court rejected the protection "by substitution" asserted by the Applicant, reparation cannot be made to that State for the damage incurred by those companies as such — on this account at least.

37 6. I do not think it necessary, Mr. Vice-President, to dwell on the various heads of compensable harm. There are three of them:

— reparation is sought first of all from the DRC for the damage resulting from the infringements of Mr. Diallo's human rights which are, patently, attributable to it;

— the DRC must also make good the damage caused by the expropriation of Mr. Diallo, the sole owner of Africom and Africontainers;

— and also the harm he suffered in consequence of numerous interferences, described just now by Mr. Sam Wordsworth, with his rights as *associé*.

A. The damage caused by the infringements of Mr. Diallo's human rights

7. First, then, the DRC has an obligation to make good the damage caused by the infringements of Mr. Diallo's most fundamental human rights at the hands of the Zairean authorities: his successive totally arbitrary arrests in 1988 and in 1995-1996, the partial solitary confinement imposed on him and his expulsion in circumstances which breached the requirements of the law and of human dignity. These are blatant violations for which Guinea is owed reparation to compensate for the material and moral injuries incurred by its national who, as Guinea's Agent pointed out this morning, had spent his entire adult life — more than 30 years — in Zaire. The same can be said of Mr. Diallo's rights pursuant to Article 36 (1) *(b)* of the Convention on Consular Relations which, by the same token, deprived the Republic of Guinea of any opportunity

to provide him in a timely manner with assistance under the Convention, to which both States are parties — the DRC since 1976 and Guinea since 1988[97].

8. A word nevertheless about the slightly mysterious approach of our Congolese friends to the personal possessions which Mr. Diallo had to leave behind, being giving no chance to organize their repatriation or sale before his abrupt expulsion. The DRC notes in its Rejoinder that Guinea

38 asserted, in relation to Mr. Diallo's personal effects, that "[t]his category does not raise any particular legal problems"[98], and then, with its unparalleled talent for feigned indignation, is surprised that we returned to this point in our Reply[99] — merely in fact to point out that the property thus abandoned as a result of the circumstances of the expulsion has never been recovered by its owner[100]. In any event, we note the DRC's comment that "[t]he matter was therefore settled in regard to this category of property"[101] and believe that we can read in it a promise of compensation.

9. I cannot fail to note, however, on the one hand that the irony displayed by the Respondent in this regard testifies to its indifference to Mr. Diallo's rights — however well-established they may have been — and the material and moral injuries their infringement caused him, and on the other that, as can be seen from the inventory of those effects, drawn up without him being present on 12 February 1996, the sums in question may be negligible to a State, but they are not to an individual who had no other property — no other household effects, it goes without saying, since he is the owner of significant securities interests — to which I shall return very shortly. What is more, it suffices to cast an eye over this list to see that Mr. Diallo did indeed, as he has said[102], have to leave his adopted country without being able to take any of his possessions. However, assuming that "[t]he matter [is] therefore settled in regard to this category of property", I shall

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[97]See *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 492, para. 74, and *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 39, para. 50 and p. 52, paras. 99-102. See also today's oral submission by Professor Jean-Marc Thouvenin, paras. 27-30.

[98]RDRC, p. 15, para. 1.48, citing MG, p. 55, para. 3.36.

[99]*Ibid.*, para. 1.49.

[100]RG, p. 54, para. 1.137.

[101]RDRC, p. 15, para. 1.48.

[102]RG, Ann. 1, p. 11.

dwell on it no further. We formally take note of the fact, and would ask you, Members of the Court, to take note of it also in your forthcoming judgment.

B. The injury caused by the infringements of Mr. Diallo's property rights

10. There is another kind of property, however, (likewise moveable property) of which Mr. Diallo was deprived by the de facto expropriation, *resulting from his expulsion*, which prevented him, the very same Mr. Diallo, from acting as the sole *associé* in Africom and Africontainers with a view to recovering the debts owed to both companies, the entire proceeds of which would have gone to him. It is moreover not, I would emphasize, the rights of the two

39 companies which are in issue here but, rather, as Mr. Daniel Müller has also shown from a different perspective, it is *Mr. Diallo's right of ownership* which has been rendered nugatory.

11. Because, Mr. Vice-President, the sole purpose of those arrests and those long periods of incarceration was to intimidate Mr. Diallo and to have him abandon his efforts to recover the amounts owed to his two companies, of which he was the sole *associé* and owner, and to manage those companies. The same is true of the ensuing "expulsion/refusal of entry". Those internationally wrongful acts have also, in a broader sense, deprived Mr. Diallo of his right of ownership, not only in his personal possessions but also, significantly, in his two companies. For that is indeed what is at stake. In contrast to the situation in the *Barcelona Traction* case (and to the usual situation in the contemporary world of business), both Africom-Zaire and Africontainers-Zaire had a sole shareholder, a sole *associé* — the name matters little: they had *a sole owner*.

12. The internationally wrongful acts of the DRC have deprived Mr. Diallo of his property. It seems to me rather pointless then to wonder which of the rights of the two companies in question Guinea is not entitled to protect. What is clear is that it is entitled to protect the rights of ownership of which Mr. Diallo was unlawfully deprived and that, accordingly, the only issue which arises is that of assessing the value which was attached to those companies, of which he was the sole proprietor and which, before the acts to which these proceedings relate, had no debts owing to

them, as Guinea, unrebutted, has stated[103]. That valuation must relate to the moment at which the internationally wrongful acts whose details we have been discussing throughout the day were committed.

C. The injury caused by the infringements of Mr. Diallo's rights as *associé*

13. Ascertaining which harm can be the subject of reparation on the basis of Mr. Diallo's direct rights as *associé* in Africom-Zaire and Africontainers-Zaire, on the other hand, involves distinguishing between the rights of the *associé* and the rights belonging to the companies themselves.

14. Unsurprisingly, the DRC expresses at the outset its resolve to be "extremely quick to resist any attempt by the Applicant to slip into the debate before the Court on the merits of the
40 dispute any matters which the Court already clearly barred in its Judgment of 24 May 2007"[104], and its indignation at Guinea's continuing "blur[ring of] the distinction between 'Diallo and his companies'" and at its attempt "to reintroduce into the debate the question of the debts due to these Congolese companies, an issue that the Court declared inadmissible in its Judgment of 24 May 2007"[105]. These remarks show that the Respondent has failed — or is refusing — to understand Guinea's line of argument on this point.

15. While wishing it were otherwise, we have, of course, taken good note of the Court's views on this matter — as I have just done once again, when I cited the last subparagraph of the 2007 Judgment. Yet that decision — which we naturally do not question — leads one, precisely, to wonder what are the respective rights of, on the one hand, the *associé* — the sole *associé*, I would again point out — and, on the other, his companies — bearing in mind, as the Court likewise emphasized in the Judgment on the preliminary objections, that both the relevant companies are *sociétés privées à responsabilité limitée* (private limited liability companies) — SPRLs — "incorporated under Congolese law, i.e., 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*, required to be uniform and in registered form, are not freely transferable'", as

[103]RDRC, p. 1, para. 05.

[104]*Ibid.*

[105]*Ibid.*, p. 17, para. 2.04.

stipulated by Article 36 of the Decree of 27 February 1887 on commercial corporations (*Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 594, para. 25). This clearly has consequences for the nature and substance of the recognized rights of *associés*, which Mr. Sam Wordsworth described a short time ago, as did Mr. Daniel Müller[106].

16. I therefore need to point out that those rights are:

— the right to take part in general meetings;

— the right to choose a new *gérant* (manager);

— the right to oversee and control the acts carried out by the management and all the operations of the companies; and

41 — the right to retain ownership in the *parts sociales* belonging to him — here all the *parts sociales*, since Mr. Diallo is the sole *associé* in Africom-Zaire and Africontainers.

17. For the Court to find that infringement of those rights requires full reparation in one or more appropriate forms[107], it is both necessary and sufficient for Guinea to establish that the rights in question (those of Mr. Diallo as the sole *associé* in the two companies) were violated by the DRC (this has been done by my colleagues), and that those violations gave rise to the damage which Mr. Diallo suffered in that regard.

II. The right to reparation

18. Before turning to the — rather simple — question of the forms to be taken by the reparation owed by the DRC for the various injuries I have just described, I must, Mr. Vice-President, address a preliminary issue dividing the Parties: do Africom and Africontainers exist or not?

A. The purported problem of the "existence" of Africom and Africontainers

19. Yet I must say, Mr. Vice-President, that I am only addressing the so-called problem of the existence of Africom and Africontainers out of a concern to respond to one of the few new

[106] See also, RG, Chap. 2, pp. 56-90.

[107] See Article 31 of the ILC Articles on "Responsibility of States for Internationally Wrongful Acts" annexed to United Nations General Assembly resolution 62/83 of 12 December 2001.

arguments raised (repeatedly) in the DRC's Rejoinder, for in my view, no matter how this question is resolved, Guinea, which is acting to protect Mr. Diallo's rights as *associé* in Africom-Zaire and Africontainers, must be given reparation for the two companies' lost assets. But the reasoning underlying that reparation will vary depending on whether the companies are considered still to "exist" or to have "disappeared" — and it is on purpose that for now I am using legally neutral terminology:

— if the companies still exist, then it is a matter of determining to what extent the DRC's wrongful acts have prevented and are preventing Mr. Diallo from exercising his rights as *associé* and the question is purely one of causation;

42 — if the companies have ceased to exist, if they have disappeared, then the situation is that considered by the Court in the *Barcelona Traction* case, which the Parties have cited in their written pleadings and which warrants brief attention here.

20. The Parties differ on this point, which the Court did not settle in its Judgment in 2007, wherein it notes

> "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." (*Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 605, para. 59; emphasis added.)

Thus, it is now at this stage that this question needs to be dealt with.

21. To make things as clear as possible, please allow me now at the outset, Mr. Vice-President, to state the Republic of Guinea's position on this point. We maintain — and these are two different but complementary things:

— that when Mr. Diallo was expelled (and in the years immediately following — at least until 1996) the two companies genuinely existed, *de jure* as well as de facto; and

— that, on the other hand, it has by now (it is neither necessary nor possible to say since when exactly) become unreasonable to argue that they have retained, in the words of the Court in its 1970 Judgment, their "capacity to take corporate action" (*Barcelona Traction, Light and Power*

Company, Limited (Belgium v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 41, para. 66).

22. The Respondent, for its part, clings to the notion that the companies have not ceased to exist — no doubt both to minimize its responsibility and to evade application of the principle, to which I shall return in a moment, reiterated by the Court in the *Barcelona Traction* case.

23. In paragraph 2.07 of its Rejoinder, the DRC "challenges Guinea to provide the slightest proof that: (1) the two companies have been dissolved by the Respondent; (2) there was a

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liquidation surplus after payment of taxes and any debts; and (3) Mr. Diallo was prevented by the Congolese authorities from receiving his share of that surplus"[108]. That "challenge", Mr. Vice-President, is not lacking in gall:

— the DRC expelled Mr. Diallo from its territory and forbade him to return, without allowing him any possibility of redress;

— that internationally wrongful act prevented Mr. Diallo, the sole *associé* and the *gérant* of the two companies, from being able to liquidate them and receive the benefits of liquidation;

— by its own admission, the DRC had the two companies struck off its Register of Companies (on the grounds that they were no longer conducting any business — and for good reason, their *gérant* and sole *associé* having been expelled and his property having been taken de facto . . .);

— and the DRC itself proved incapable of providing a copy of the companies' Articles of Incorporation (after having boasted that it would do so and then producing a document which was patently irrelevant) and ended up admitting that it was "highly possible that [the Africom-Zaire] file was removed from the files, lost or destroyed by the [Congolese] administrative staff" (*Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 593, para. 22)[109].

And what does the Respondent do in respect of the point which it is incapable of proving — or does not want to prove — even though it has in its possession all the necessary means to show whether its allegations are true? It challenges the Applicant (which has hardly any means for the

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[108]RDRC, p. 18, para. 2.07

[109]See also the document annexed to letter No. 132.52/01/00013/2007 from the Agent of the DRC, quoted in RG, p. 93, para. 3.7.

task) and Mr. Diallo, who (because of the Congolese authorities' wrongdoing) lives thousands of kilometres away and is utterly destitute, to prove their point.

24. It bears keeping in mind in this regard that the Kinshasa/Gombe Court of Appeal in its judgment of 20 June 2002 noted that Africontainers was "currently without known address in the Democratic Republic of the Congo"[110] and that the last action by a lawyer acting for the company in that case dated back to 3 October 1996. The judgment itself was rendered in default, the
44 appellee in that case having failed to appear at the hearing on 14 November 2001. Generally speaking, the last event evidencing participation by one of Mr. Diallo's companies (Africontainers in this case) in proceedings of any sort (whether in litigation or otherwise) occurred on 7 July 1997 (at a meeting with Gécamines representatives in the context of the Containers Disputes Commission[111]). After that, nothing. This, Mr. Vice-President, disproves two assertions ventured by Mr. Kalala in the hearings on the preliminary objections:

— it is untrue that "the two companies, . . . continued to operate *long after* Mr. Diallo's expulsion"[112], unless "long after" is taken to mean one year later — which nevertheless remains unconvincing when account is taken of how complex the case is and how slowly litigation proceeds in the DRC; and

— by the same token, it is also untrue that "Africom and Africontainers are not poor and do not lack the financial resources to pursue and exhaust local remedies to recover the money owed to them"[113]; those resources vanished shortly after Mr. Diallo's expulsion — and with them, in reality, the two companies, which then ceased to be involved in any activity whatsoever — whether business activity or litigation.

25. The argument is moreover totally at odds with the completely new argument advanced by the DRC in its Rejoinder when it claims that Africom and Africontainers were in "a state of undeclared bankruptcy even when Mr. Diallo was still living in the DRC" — a phrase which it is visibly quite proud of, repeating it, verbatim, no less than five times in this very brief pleading[114].

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[110]PODRC, Ann. 64.

[111]MG, Ann. 226.

[112]CR 2006/52, p. 22, para. 19.

[113]*Ibid.*, p. 24, para. 28.

[114]RDRC, p. 17, para. 2.06, p. 19, paras. 2.12 and 2.13, p. 23, para. 2.27, p. 24, para. 2.31.

The aim to be achieved by this new tactic is obvious: by denying that Mr. Diallo's investments were worth anything economically and commercially, the DRC seeks to escape having to comply with its obligation to make full reparation for the injuries caused by the breaches of its international obligations[115].

45 26. Mr. Vice-President, I do not think it productive to enter into the factitious debate fabricated by the Congo as to the existence of Africom-Zaire[116]. It is however worth pausing a moment on the DRC's twofold contention that the companies ceased to have any meaningful existence — in the mid-1980s in Africom's case and at an unspecified date but at any rate before Mr. Diallo's expulsion in 1995 in Africontainers' case.

27. Before proceeding further, Mr. Vice-President, Members of the Court, I would like, by way of a small digression, to present our apologies to you and to the Congo, which will be able to read the verbatim record of these hearings and which was gracious enough not to draw attention to our blunder, for a bit of carelessness in proofreading which has resulted in readers of page 94 of our Reply being able to follow an exchange between members of our team. One of us – myself, I fear! (may I remind you that this is Alain Pellet speaking) — thought that the subsistence of activity on the part of Africom-Zaire could be shown by reference to the 3 July 1995 judgment of the Kinshasa *Tribunal de grande instance*; however, that judgment was handed down in favour of Africontainers, not Africom[117]. After reading the draft, one of my excellent colleagues annotated it to point out that the example was ill-chosen — as paragraph 3.9 concerns Africom alone — and he suggested citing the *PLZ* v. *Africom* case instead. Unfortunately, this suggestion, one that was most apropos, escaped my notice and we printed the annotation rather than the correction which should have followed from it.

28. Contrite as I am in once again offering my apologies, this is only a half-bad thing, because the two episodes show that when Mr. Diallo was expelled the *two* companies had activities (at least "judicial" ones) and were not at all moribund, as the DRC now claims in its Rejoinder but has never before argued:

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[115]RDRC, p. 16-17, para. 2.13 and p. 20, para. 2.27.

[116]See also the letter dated 31 Jan. 2007 from the Agent of the Democratic Republic of the Congo to the Registrar of the International Court of Justice, Ann., para. 6.

[117]See MG, Ann. 153.

— the example given in the draft text and unfortunately retained in paragraph 3.9 of the Reply confirms that just a few weeks before his expulsion Mr. Diallo, in the capacity of *gérant* of Africontainers, had obtained confirmation from the court of the very sizeable debt owed to the

46 company by Zaire Shell; the full enforceability of that judgment was affirmed by the Court of Appeal on 13 September of that year[118] and nobody ever suggested that the plaintiff company might have been in a state of undeclared bankruptcy — and, moreover, the size (more than 13 million United States dollars at the time) of the debt thus twice upheld would have rendered any such notion absurd;

— as for the example which my attentive colleague suggested in replacement of this one, it concerns Africom and rebuts the Respondent's assertion that Africom was at that time "in a state of de facto bankruptcy".

29. In this connection, it need only be said that:

— on 11 January 1995, the *Ministère Public* before the highest court in the Congo, the Supreme Court of Justice, pointed out that the lease entered into between Africom-Zaire and PLZ had been renewed from year to year, with a new tenancy agreement each year until 1991;

— the date on which a dispute arose between these two companies, which was the subject of legal rulings from 1993 onwards; and that

— Africom-Zaire called upon the Supreme Court in 1994 to annul these decisions, which gave an opportunity, in 1995, for the *Ministère Public* to verify and vouch for the fact that *on that date* Africom-Zaire had been properly re-entered in the trade register in 1980[119].

30. This provides ample confirmation that Africom-Zaire did indeed continue to exist after the mid-1980s, and that it was still entered in the trade register in 1995, when the *Ministère Public* made its submissions. In other words, it is established and irrefutable that, at the time when Mr. Diallo was expelled, Africom and Africontainers existed juridically, were recognized as such by the highest legal authorities in Zaire and, far from being juridically and financially moribund as the DRC would have us believe, had, on the contrary, just won a victory before the courts of that country. If, subsequently, Mr. Diallo's companies did in fact experience problems, it was owing to

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[118] MG, Anns. 169 and 170.

[119] *Ibid.*

47 the interference by the Congolese authorities, in the form of imprisoning their *gérant* and creating a range of obstacles to stop them recovering their debts. The Respondent cannot now shelter behind its own unlawful acts in order to deny its obligation of reparation.

31. In paragraph 2.06 of its Rejoinder, the Respondent takes the trouble of "explaining to Guinea that there is a difference between striking a company off the Register of Companies on the one hand and a company's dissolution and subsequent liquidation on the other". Still according to the DRC,

> "The first is a purely administrative measure, simply placing on record that a company has ceased trading. The company continues to exist legally and may always resume trading at a later date by requesting a new registration number from the Registry of Companies. The second may ensue from a voluntary decision by the *associés* (voluntary dissolution) or from a decision handed down by a court (judicial dissolution). The dissolution (legal demise) leads to the liquidation (physical demise) of the company."

And the Respondent goes on:

> "The two companies concerned were in a state of undeclared bankruptcy even when Mr. Diallo was still living in the DRC. In the Respondent's view, these two private commercial companies have not yet been officially dissolved, as only the *associés* have the authority to take such a step, and legally they continue to exist."[120]

32. May I say, Mr. Vice-President, that I am not entirely convinced by these helpful "explanations"?

— to begin with, I have just shown that, far from being in the "comatose" state described by the DRC, the two companies showed signs of clear vitality under the impetus of their only *associé* just before Mr. Diallo's expulsion;

— secondly, it is after all strange — and this is an understatement — that the two companies could have been struck off without the Congo having found the slightest trace of them, whereas, under Article 29 of the Decree of 6 March 1951 establishing Zaire's trade register: "cancellation shall be pronounced by the court in the place of registration"[121]. This important text, which for your convenience has been reproduced in the plan of my oral argument, shows

48 that, while ceasing to trade may be a ground for cancellation, cancellation is only possible when pronounced by a court;

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[120] RDRC, p. 17, para. 2.06.

[121] Available on the website http://www.leganet.cd/Legislation/Droit%20economique/Registre/D.06.03.1951.htm.

— I would also point out that, in any event, even accepting that cancellation had occurred surreptitiously, without being notified to the representative of the SPRL concerned and without leaving the slightest trace, this would rather tend to confirm that, *since 1996*, these companies have actually ceased to exist: whether "cancelled" or not, no one can still prove their existence (including the Respondent, in whose territory they were registered[122]); even if Mr. Diallo (or a *gérant* appointed in his stead — but, according to the DRC itself, it was still, in 2002, Mr. Diallo[123]) — so, even if Mr. Diallo so wished, it would, therefore, clearly be impossible for him both to safeguard the rights of the companies and to dissolve them; and, moreover, there would be no point in dissolving them, since it is clear that *today* these companies have lost all value. I shall come back to this.

33. But I must first draw the conclusions this obvious fact points to: Africom and Africontainers do not exist at this moment — either in law or in fact. Contrary to *Barcelona Traction*, on which the Court ruled, in its Judgment of 1970, that it had neither "ceased to exist or . . . lost its capacity to take corporate action" (*Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 41, para. 66), Africom and Africontainers ceased to exist (the Respondent shows itself incapable of proving the contrary) and, consequently, lost all capacity to take corporate action. This being so, the assets of the companies can necessarily only fall to their sole *associé*. All the more so because their disappearance is the result of the DRC's own acts — the DRC, which cannot rely on its own unlawful acts in order to escape reparation for the prejudice they have caused. *Nemo auditur propriam turpitudinem allegans* . . .

34. As Guinea has shown in its Reply[124] — without being contradicted — the DRC cannot, in order to escape these consequences, shelter behind Article 114 of the 1887 Decree, under which:

49 "[a]fter being dissolved, commercial corporations are held to exist in order to be liquidated"[125], which is carried out by liquidators appointed under the control of the *associés* and acting under

[122]See para. 24 above.

[123]RDRC, p. 17, para. 2.06.

[124]RG, pp. 95-97, paras. 3.15-3.21.

[125]OG, Ann. 35.

their supervision. Only "[i]n the event of the nullity of the company" may "the courts . . . decide upon the method of liquidation and appoint liquidators"[126]; however, no judicial liquidation procedure has been initiated by the Congolese authorities. As for Mr. Diallo, it is clear that, having been prevented from exercising his rights as *associé*, he could not have appointed a liquidator — for the same reasons as those set out by Sam Wordsworth a few minutes ago.

35. By the same token, Mr. Diallo was deprived of the possibility of receiving the assets belonging to his companies. Two things need to be borne in mind here:

— first, that the very function of the liquidators, under the terms of Article 117 of the 1887 Decree, is to "initiate and pursue any legal proceedings on behalf of the company, receive any payments, grant releases with or without discharge, sell all the companies' securities, endorse any bills of exchange and settle or reach agreement on any dispute" — in other words, to realise the assets of the companies concerned, it being understood

— second, that neither Africom-Zaire nor Africontainers had any debts, with which, as I would again point out, the Congo agrees[127].

36. In accordance with Article 121 of the Decree, the sums thus recovered would have had to be distributed to the members — and here, therefore, fall to the sole *associé*, in other words, Mr. Diallo.

37. To summarize, Mr. Vice-President:

(1) until the day after Mr. Diallo's "refusal of entry", Africom and Africontainers — by acts (the very ones which caused Mr. Diallo to be unceremoniously expelled) and in particular by various legal actions — indicated their desire to recover the sizeable debts owed to them;

(2) following this "expulsion/refusal of entry", these activities ceased and, although the two companies were not declared bankrupt or put into liquidation, they ceased to exist and even the DRC itself is unable to establish their existence;

50 (3) this proof of the existence of the companies which the Respondent cannot provide, it cannot then demand of Guinea, and, of course, if Mr. Diallo had an opportunity to act on behalf of his

[126] Art. 115, *ibid.*

[127] See para. 16 above.

companies, he would indeed himself be completely unable to prove, before the Congolese courts (or authorities), the continued existence of the corporate entity of the companies;

(4) this being so, as I said a few moments ago, reparation is due to Mr. Diallo, the sole *associé* in the two SPRLs, not for the damages they have suffered, but for the losses he *himself* has suffered through the expropriation of which he has been the victim.

38. To be absolutely clear, Mr. Vice-President, it seems that the solution would hardly be different if it were accepted that these phantom companies had continued to enjoy legal existence since 1996. If that were so — which I do not believe — consideration would also have to be given to the fact that:

— Mr. Diallo must be compensated for the loss of the value of the two companies of which he was sole *associé* and therefore sole owner;

— that loss is the consequence of the internationally wrongful acts of the Congolese authorities, who *manu militari* removed Mr. Diallo from Congolese territory in order to prevent him from asserting the rights of the companies concerned;

— it must be assessed as at the date upon which the wrongful acts in question occurred.

And this prompts me, Mr. Vice-President, to say a few words, in conclusion, on the forms of reparation due to the Republic of Guinea as a result.

B. Forms of reparation

39. Just a few words, since while the very special circumstances of the case may lend themselves to detailed analysis, we are nonetheless on familiar ground here:

— because the internationally wrongful acts of the DRC have caused injury to Mr. Diallo (in respect of which Guinea is entitled to exercise its diplomatic protection), reparation is owed by the Respondent[128];

51 — this must be full reparation, in the sense that "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed"[129].

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[128]Cf. *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927*, *P.C.I.J., Series A, No. 9*, p. 21, or Art. 31 of the ILC Articles on responsibility of States for internationally wrongful acts.

40. Such is the traditional basis of the primacy accorded to *restitutio in integrum* as a means of reparation: "restitution most closely conforms to the general principle that the responsible State is bound to wipe out the legal and material consequences of its wrongful act by re-establishing the situation that would exist if that act had not been committed"[130]. It goes without saying, however, that in the present case, restoring the *status quo ante* in such a way is not practicable: it is simply not possible to go back in time and wipe out all the damage resulting from the disgraceful treatment inflicted on Mr. Diallo; it is not possible to enable him to resume his activities as *gérant* and sole *associé* of the companies Africom and Africontainers today, as if nothing had happened for more than 15 years; it is no longer possible to pick up the threads of the procedures which were set in motion to protect his investments and which are now lost in the archives of the DRC's courts; and it is not possible, if truth be told, to resuscitate the two companies of which he was the sole *associé*, in other words the sole proprietor. Whatever the moral or material damage suffered, the only realistic means of reparation is therefore compensation, because, as recalled in Article 36 of the ILC Articles on responsibility of States for internationally wrongful acts, "[t]he 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".

41. This applies with regard to reparation for the damage suffered by Mr. Diallo as an individual by virtue of his successive arbitrary arrests, the treatment he suffered in those situations and the expulsion/refusal of entry which deprived him of all his personal property and seriously prejudiced his dignity. And as I pointed out a few moments ago[131], the DRC acknowledges — albeit reluctantly, but it does so — that this kind of injury must be compensated for. Let that be duly noted.

52 42. As regards reparation for the damage suffered by Mr. Diallo because of the expropriation which deprived him of his right to full and complete ownership of Africom and Africontainers, this can of course only take the form of compensation, which raises the question of how those assets are to be assessed. But as I have pointed out, that does not form part of this stage of the proceedings

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[129] *Factory at Chorzów, Merits, Judgment No. 13, 1928*, *P.C.I.J., Series A, No. 17*, p. 47. See also Art. 31, para. 1, and Art. 34 of the ILC Articles.

[130] Para. (3) of the commentary on Art. 35 of the ILC Articles (*ILC Yearbook*, 2001, Vol. II, Part 2, p. 96).

[131] See para. 7 above.

and I shall not dwell on it now, except to say that, while Guinea readily acknowledges that its Application, produced with some degree of improvisation, certainly exaggerated that assessment[132], the minimizing of it by the DRC is of course out of place: the infringements of Mr. Diallo's various rights under international law are serious, and his moveable property was certainly of considerable value prior to 1988, which is probably the key date after which the acts of the Respondent wrongfully prejudiced the Applicant's rights. Again, it will be for the Court to determine that value in the reparation phase, if the Parties cannot agree on an amount within a reasonable time following delivery of the Judgment, a period which Guinea asks the Court to fix at six months.

43. That negotiation will also have to cover the compensation owed by the DRC for the infringements of Mr. Diallo's rights as *associé* in the two companies, breaches whose many aspects have just been described in detail by Sam Wordsworth. Here, it is sufficient to note once again that, in view of the special circumstances of the case, satisfaction in the form of recognition by the Court of the breaches committed by the DRC would certainly not be adequate: Mr. Diallo is a self-made man whose success and reason for living were bound up with the running — in a dynamic and even visionary way in some respects — of his two companies, which were his pride and joy, and which were taken away from him in particularly trying circumstances.

44. Mr. Vice-President, Members of the Court, thank you for listening with care to what has been a fairly dense day of oral argument, ending with that of Alain Pellet which I have just read out. I now become myself once more, Mr. Vice-President, in order to thank you most sincerely for your attention.

53 The VICE-PRESIDENT, Acting President: Our thanks to you, Mr. Thouvenin, and, through you, to Professor Pellet, for these arguments on behalf of the Republic of Guinea — presented in a slightly unusual way, but one that is certainly justified by the exceptional circumstances, which are beyond our control and outside even the highest international jurisdiction. That concludes the first round of oral argument of the Republic of Guinea. Before closing the hearing, I shall give the floor

[132]Cf. OG, pp. 2-3, para. 0.09 and CR 2006/51, p. 10, para. 10 (Camara).

to Judge Bennouna, who would like to put a question to the Republic of Guinea. You have the floor, Judge Bennouna.

Judge BENNOUNA: Thank you, Mr. Vice-President. As you have just said, my question is addressed to the Republic of Guinea, and is as follows.

The Republic of Guinea is asking the Court to declare that Mr. Diallo has been the victim of expropriation as a result of the decisions of the Democratic Republic of the Congo. How does the Republic of Guinea reconcile this claim with paragraph (3) *(c)* of the operative clause of the Judgment of 24 May 2007 on the preliminary objections, in which the Court declared "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"? Thank you, Mr. Vice-President.

The VICE-PRESIDENT, Acting President: Thank you, Judge Bennouna. The written version of this question will be transmitted to the Parties by the Registrar of the Court as soon as possible. You have the floor again, Judge Bennouna.

Judge BENNOUNA: There was a small omission in my citation. I said "declares the Republic of Guinea to be inadmissible . . .", but the text of the operative clause reads "declares *the Application* of the Republic of Guinea to be inadmissible". So that small correction needs to be made. Thank you again, Mr. Vice-President.

54 The VICE-PRESIDENT, Acting President: Thank you. The exact question will be transmitted in writing. The Republic of Guinea is invited to reply to this question in its second round of oral argument. The Court will meet again on Monday 26 April at 10 a.m. to hear the first round of oral argument of the Democratic Republic of the Congo. The hearing is closed.

The Court rose at 5.30 p.m.

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