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Mercredi 28 avril 2010 à 16 heures

Wednesday 28 April 2010 at 4 p.m.

8 The VICE-PRESIDENT, Acting President: Please be seated. The sitting is open. The Court meets today to hear the second round of oral argument by the Republic of Guinea. I shall now give the floor to Professor Alain Pellet, Counsel and Advocate, Deputy Agent of the Republic of Guinea. You have the floor, Sir.

Mr. PELLET:

1. Mr. President, Members of the Court, like Sam Worthington in the James Cameron film, I have left my avatar — in the person of Jean-Marc Thouvenin, whom I thank for lending me his voice — to resume my normal form after my unintended stay on a distant Pandora. I would again ask you to excuse that completely involuntary dereliction.

2. Mr. President, in accordance with your recommendation to the Parties on conclusion of the first round[1], we shall not use the whole of the time allotted to us.

3. In his oral arguments last Monday, Professor Kalala read out long passages from the Congo's written pleadings. I shall not follow that example: in accordance with Article 60 (1) of the Rules of Court and with your recommendations on conclusion of the first round last Monday, I think it is inappropriate, Mr. President, to restate what we have already written or said. For the Court's ease of reference, we have prepared a table comprising three columns:

— the first column is a list of the passages from Professor Kalala's oral arguments which reiterate (sometimes with only minute changes) whole swathes of the DRC's written pleadings, which the DRC's Co-Agent merely read out at the hearing and to which we had responded earlier;

— the second gives the references of those lengthy extracts;

— the third column refers to our own pleadings — both oral and written — and indicates precisely the passage or passages in them which respond to the arguments in the Rejoinder and, more frequently, in the Counter-Memorial.

9 4. The stipulations of Article 60 (1) of the Rules of Court prompt me to make a second general observation: since that provision requires the parties not to repeat the arguments already adduced, we refrained, last week, from going over in every detail all the points elaborated in our

[1]CR 2010/4, p. 22.

pleadings. None the less, save where were have expressly dropped them (as we have with the figures to be put on the damage caused), we maintain those arguments in full.

5. In the light of these comments, I shall, in a first section, respond to the question posed the day before yesterday by Judge Cançado Trindade (A). Then, before replying, at the end, to Judge Bennouna's question of last Monday (F), I shall address a number of points in turn — hardly new points but points which, unlike those set out in the table we have provided to you, are not, Members of the Court, completely the same as the arguments of the Congo to which we have replied previously. So, the arguments I am going to address are:

— the 1983 episode (B);

— the issue of the mistreatment which Mr. Diallo suffered at the time of his arrest and his expulsion in 1995-1996 (C);

— the legal basis for that expulsion under the 1994 Constitution (D); and

— the legal value in Mr. Diallo's *parts sociales* in Africom-Zaire and Africontainers-Zaire (E).

I would like to say that, although this is my presentation, it is the product of teamwork in which all Guinea's counsel have participated, including Professors Forteau and Thouvenin, who are, to their great regret, kept from this courtroom today by pressing commitments made prior to the wrath of the Icelandic Vulcan.

A. Violation of Mr. Diallo's consular rights (reply to the question by Judge Cançado Trindade)

6. Mr. President, at the end of Monday morning's hearing, Judge Cançado Trindade asked the Parties whether, in their opinion,

> "the provisions of Article 36, paragraph 1 *(b)*, of the 1963 Vienna Convention on Consular Relations apply solely to relations between the sending State or State of nationality and the receiving State?
>
> Was Mr. Diallo himself informed about consular assistance immediately after his detention? Who is the holder of the right to information regarding consular assistance: the sending State or State of nationality, or the individual?"[2]

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7. According to the DRC, "while the right to information is an '*individual*' right, it is nevertheless inextricably linked to the sending State's right to communicate with its nationals"[3].

[2]CR 2010/3, p. 37.

[3]The DRC's reply to the question of Judge Cançado Trindade, 27 Apr. 2010; emphasis added by the DRC.

Furthermore, "these rights do not apply solely to relations between the sending State or State of nationality and the receiving State, nor do they apply solely to relations between the individual and the receiving State"[4]. It follows, again according to the Respondent's reply transmitted to the Court yesterday afternoon, that the mere fact that Guinea had "made diplomatic approaches to the Congolese authorities on behalf of its national . . . is sufficient to establish that the purpose of the right to information was achieved"[5]. I confess, Mr. President, that this response leaves me rather puzzled.

8. Under Article 36 (1) (*b*) of the 1963 Vienna Convention — which I think it is helpful to read in its entirety:

> "if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. *The said authorities shall inform the person concerned without delay of his rights* under this subparagraph."

9. This last sentence leaves no room for doubt: the authorities of the receiving State have a duty to inform the *person concerned* of his rights to consular assistance and *that person* has a right to be informed of them. This is in actual fact sufficient to give a definitive reply to the first of the two "theoretical" strands of Judge Cançado Trindade's question: no, Article 36 (1) (*b*) of the 1963 Vienna Convention on Consular Relations does not apply solely to relations between the sending State or State of nationality and the receiving State. The Court has indeed expressly

11 acknowledged this in *LaGrand*: "Article 36, paragraph 1, creates individual rights [for the national concerned], which . . . may be invoked in this Court by the national State of the detained person" (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 494, para. 77), and this wording was repeated in *Avena*[6].

10. Conversely, this does not mean that Article 36 applies solely to that latter relationship. Using the terminological distinction drawn by the Court in its 2004 Judgment, the last sentence of

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[4]The DRC's reply to the question of Judge Cançado Trindade, 27 Apr. 2010; emphasis added by the DRC.

[5]*Ibid.*

[6]*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 36, para. 40.

Article 36 (1) *(b)* confers on the person concerned a right to be informed of his rights to consular assistance; and the beginning of the subparagraph gives the consular authorities of the State of nationality the right to be notified (that is to say, given notice) that its national has been arrested by the authorities of the receiving State[7]. Accordingly, to answer the second "theoretical" component of the question posed by Judge Cançado Trindade, the individual is the holder of the right to be informed about consular assistance in the strict sense of the term, and the sending State or the State of nationality is, for its part, the holder of the "right to notification" which the provision establishes. There is undeniably a certain "interdependence of the rights of the State and of individual rights", as the Court also found in *Avena*[8], and, here, we are in agreement with the Respondent. They are none the less separate rights and there is even reason to regard the right of the State of nationality as subordinate to that of its national since, according to Article 36 (1) *(b)*, "the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State" "if [the person concerned] so requests". The obligations of the receiving State and the corresponding rights of the individual and of the State of nationality are therefore dependent on that request. Whatever the DRC may seem to think, the opposite is not, on the other hand, true: a State party to the 1963 Convention does not discharge its duties *to the foreign*

12 *national* by giving notice of the arrest to the consular authorities of the State of nationality — if only because the person concerned is entitled to refuse consular assistance[9] — a fact which confirms that it is indeed a right *of the individual*.

11. In any event, in the present case — I am now coming to the factual aspect of Judge Cançado Trindade's question — not only was Mr. Diallo not informed of his rights to consular assistance but also, while Guinea was, beyond any doubt, aware of his detention, it was only from hearsay. No notification to that effect had been given by the DRC. What is more, the only matter in issue here is Mr. Diallo's right to be informed. Here again, our reply is clear and

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[7] *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 26, para. 18; see also, p. 43, para. 61.

[8] *Ibid.*, p. 36, para. 40; see also *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 492, para. 74.

[9] See *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 50, para. 91.

unambiguous: no, Mr. Diallo himself was not informed about consular assistance either immediately after he was placed in detention or later.

12. The DRC's reply to the contrary is disturbing: not only is it not based on the slightest shred of evidence but also, if it did reflect the truth, it would be hard to understand why the Respondent's Counter-Memorial and then its counsel, in his presentation on Monday morning, remained *utterly* silent about the information supposedly given to Mr. Diallo "immediately after his detention" to the effect that he had "the possibility of seeking consular assistance from his State"[10] whereas, in both instances — oral arguments and written pleadings — the DRC was at pains to show at length that — I am quoting Mr. Kalala's presentation — "Mr. Diallo's case was known not only to the Guinean consulate [counsel is in fact talking only about the diplomatic service — but be that as it may! — not only, I was saying, to the Guinean consulate] in Kinshasa but also to the President of the Republic and the Minister for Foreign Affairs of Guinea"[11]. My opponent also laid "great emphasis" (those are his words)

> "on the fact that the aim to be achieved through Article 36 (1) *(b)* in question here is to ensure that the consular officers of the sending State are informed whenever a national of that State living in the receiving State is being held in detention, so that they can see to it that his individual rights are respected and can provide consular assistance to him under proper conditions"[12].

13 13. This is looking at the wrong right, however, Mr. President: the right about which Professor Kalala has argued so vigorously (and which is also the subject of the reply given by the Respondent yesterday afternoon) is the right of Guinea *itself* to be notified — a right which is not in issue here — and not Mr. Diallo's right to be informed of his rights. It is not the same thing at all, since, as the Court noted in *LaGrand*,

> "[i]t is immaterial for the purposes of the present case whether the LaGrands would have sought consular assistance from Germany, whether Germany would have rendered such assistance, or whether a different verdict would have been rendered. It is sufficient that the Convention conferred these rights, and that Germany and the LaGrands were in effect prevented by the breach of the United States from exercising them, had they so chosen." (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 492, para. 74; see also *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 52, para. 102.)

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[10]The DRC's reply to Judge Cançado Trindade's question, 27 Apr. 2010.

[11]CR 2010/3, p. 29, para. 51. See also the DRC's Counter-Memorial (CMDRC), pp. 15-16, paras. 1.20-1.22.

[12]CR 2010/3, p. 30, para. 53.

Here too, the fact is that Mr. Diallo, as he expressly confirmed in his statement which the Respondent has never disputed[13], was not informed of his rights. This is where the DRC's internationally wrongful act lies and there is no reason to speculate about what would have happened had he been informed. To drive this point home, I would add that the Court held, in *Avena*, that even if the authorities of the sending State had learned by other means that certain of their nationals had been detained, the lack of notification "did nonetheless constitute a violation of the obligations incumbent upon [it] under Article 36, paragraph 1 *(b)*" (*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 51, para. 95), even assuming that the lack of notification by the competent authorities did not have serious consequences for the individuals concerned.

14. This is, Mr. President, what we wished to say in reply to Judge Cançado Trindade's question. As regards more generally the Respondent's violation of Article 36 of the Vienna Convention on Consular Relations, I take the liberty, Members of the Court, to refer you to what we said on the subject in our Reply[14] and to Professor Thouvenin's statements last week[15]. I thus come to my second point: the 1983 episode.

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B. The 1983 episode

15. Mr. President, Professor Kalala's virtual journey in Mr. Diallo's Citroën began with the 1983 episode, which he criticizes us for concealing from the Court. He based his arguments about the episode on two newspaper articles, annexed to Guinea's Memorial, in which sees proof that it was "established . . . that Mr. Diallo was arrested and detained in Kinshasa for a month in 1983 for attempted bribery of an official"[16]. I do not think it helpful for me to dwell on the problems Mr. Diallo's cook had with the Zairean justice system because his papers were not in order, nor on his employer's attempt to "buy him a plane ticket for Ouagadougou by signing a cheque for 10,000 zaires at the request of the Zairean prison warden"[17], an attempt which led to Mr. Diallo's

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[13]Guinea's Reply (RG), Ann. 1.

[14]RG, pp. 24-26, paras. 1.49-1.53.

[15]CR 2010/1, pp. 35-36, paras. 27-30.

[16]CR 2010/3, p.14, para. 6.

[17]Guinea's Memorial (MG), Ann. 18.

imprisonment — without trial — for a month. I note, however, that my opponent refrained from reading out the next sentence in that article published in the *Réussite* column in the newspaper *Jeune Afrique* on 16 February 1984, which I shall now read: "Since his release, with the apologies of the security services, Diallo has been complaining of the insult to his honour." Similarly, Professor Kalala took care to omit the following paragraph, in which one reads: "a high-ranking official of the Zairean security services, commenting on Amadou Sadio Diallo's short stay in prison, told us: 'We released him because we had no case against him. It was a purely Guinean affair.'" The statement by Mr. Diallo reproduced in Annex 1 to Guinea's Reply bears out the facts reported in *Jeune Afrique*.

16. Under those circumstances, Mr. President, without wishing to attach to this episode greater importance than it has for the purposes of this case, I cannot resist pointing out with a degree of surprise Professor Kalala's robust affirmation that "[i]f there was a country which was giving Diallo a hard time, it was Guinea and not the DRC"[18] — it was after all Zaire which imprisoned him and detained him without trial back in 1983 . . . However, unlike the 1988 episode, this one has no direct bearing on the case which brings us here — which is why we had not aired it previously (without however concealing it: as the Congo commented, it was

15 Guinea which filed the two documents and Mr. Diallo's statement referring to it is appended to Guinea's Reply[19]. The DRC, for its part, had never mentioned it until this week.).

17. In fact, we submitted the *Jeune Afrique* article[20] on which the DRC is relying, not because the episode in question is relevant to the case — it is not relevant at all — but because it gives an accurate account of Mr. Diallo's exceptional success in the mid-1980s and of his personality. On the first point, Professor Kalala makes fun of our Mr. Diallo's "splendid Citroën CX" which, "like many cars in Kinshasa [had] no brake pads or exhaust pipe", but he is careful not to refer to the "brilliant idea" which the newspaper describes, the idea which made Mr. Diallo "a prosperous man" at the head of "a team of 120 including nine executives" and which enabled him

[18]CR 2010/3, p.14, para. 6.

[19]RG, Ann. 1.

[20]MG, Ann. 18.

to secure "a colossal market: the container transport of copper from the wealthy Gécamines which produces Zaire's cobalt and copper".

18. And the paper — *Jeune Afrique* is a highly respected publication — depicts an engaging portrait of Mr. Diallo, which, naturally, Mr. Kalala forgets to mention (and the article does supplement and counterbalance the description of the Citroën):

> "Yet he is sincere and his everyday life matches the man. He invites his guests to the best restaurants in Kinshasa and offers them the finest champagne, without touching a drop himself. His apartment, in an elegant tower on the Boulevard du 30 Juin, is like his suits: clean and plain. It is tastefully furnished, with no gadgets and nothing flashy."

My opponent's highly selective reading of this paper and the names he calls Mr. Diallo[21] reflect very inaccurately the truth, which is much more flattering.

19. Once again, Mr. President, the 1983 episode has no connection whatsoever with the present case: it is impossible to discern in it any conscious intention on the part of the highest State authorities to harm Mr. Diallo and to damage his reputation; the competent authorities acknowledged that they were wrong and apologized to him; his arrest and imprisonment, which were not ordered by the executive, were totally unrelated to the conduct of his business and had no
16 effect on its prosperity, as the *Jeune Afrique* article, amongst others, shows. This is not at all so as regards the events of 1988, on the one hand, and the — decisive — events of 1995-1996, on the other: the successive arrests and detentions of Mr. Diallo, culminating in his expulsion *manu militari* on 31 January 1996, not only represented much more serious infringements of his human rights, but also dealt a decisive blow to his business by rendering him unable to run and control his companies — which is what they were intended to do.

C. The mistreatment Mr. Diallo suffered on his arrest and his expulsion in 1995-1996

20. Mr. President, I shall not go over these serious incidents in detail; we have already analysed them fully in our written and oral pleadings. The relevant references are contained in the table we have produced — and I would draw your attention most particularly, Members of the Court, to the references to paragraphs 8 to 10 and 11 to 13 of the hearing of the morning of

[21] CR 2010/4, p. 21, para. 32.

26 April, which concern the serious episode in 1988, passages in which Professor Kalala repeated paragraphs 1.13 and 1.15 to 1.17 of the Rejoinder, reading them out during his speech. Professor Thouvenin had replied to them in paragraphs 5 to 17 of his oral pleadings of 19 April[22]. I shall not revisit the matter.

21. I cannot however pass in complete silence over the accusations of "deafening silences" which Professor Kalala aimed at us at length in his statement on Monday morning — at least as regards the first two accusations, which have led our opponent to assert that Guinea has abandoned its claims based on the mistreatment inflicted on Mr. Diallo in 1995-1996. I shall refer also in a moment to our two other silences — although these, for their part, are indeed deliberate silences.

22. A few words first on our silence last week on the accusation of mistreatment inflicted on
17 Mr. Diallo when he was detained in 1995-1996[23]. The criticism is somewhat curious. The fact that Guinea did not revisit that mistreatment was quite simply because the DRC had not seen fit to reply on the merits, in its Rejoinder, to the arguments in the Reply.

23. Guinea's Reply added three clarifications to what it had said in its Memorial:

— first, we stated that although Mr. Diallo had been fed in prison, it was only thanks to the help of his family and non-governmental organizations[24]. The DRC did not dispute this either in its Rejoinder or during its first round of oral argument[25]. Quite the reverse: it drew the conclusion that Mr. Diallo had been "properly fed during his detention"[26] and that it therefore could not be said that Mr. Diallo was "held under perilous conditions and . . . received no food from the Congolese authorities"[27]. The reasoning is interesting: the DRC is inventing compliance with international law by proxy. The fact that Mr. Diallo's fate may have been improved thanks to his family and charitable organizations is one thing. That is not the point, however. The point is whether the DRC complied with its obligations to give him the minimum treatment to which any person in prison is entitled. It did not. "The detention centre

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[22]CR 2010/1, pp. 27-31.

[23]CR 2010/3, pp. 18-20, paras. 16-20.

[24]RG, pp. 16-17, para.1.34.

[25]DRC's Rejoinder (RDRC), p. 4, paras. 1.04-1.05; CR 2010/3, pp. 19-20, paras. 18-19.

[26]RDRC, p. 4, para.1.05.

[27]CR 2010/3, p.18, para. 16.

did not give [Mr. Diallo] anything to eat" and when his family stepped into the breach, it had "to pay a bribe in zaires amounting to the equivalent of US$20 or 25"[28]; similarly, the family also managed to have Mr. Diallo examined by a doctor, but this was at its own expense[29]. This constituted, quite clearly, treatment in breach of the minimum standard and, specifically, of the

18 minimum rules for the treatment of prisoners adopted by ECOSOC in 1955[30], whose great value and influence were reaffirmed by the United Nations General Assembly in 1990[31];

— secondly, Guinea set out in its Reply how and why Mr. Diallo had managed to have some contact with the outside world[32]. Here again, however, those contacts were possible only despite the Zairean authorities or, in any event, without their permitting or facilitating them and, I would point out, without those authorities discharging their duties in respect of consular assistance[33];

— thirdly, and lastly, the DRC has not, to date, asserted anything to refute the statement by Mr. Diallo appended to the Reply, in which he reports that, although he was not "beaten" — which he admits —, the fact is even so that during "the first four days of [his] detention [he] was kept secretly in a mosquito-infested cell that was permanently illuminated by a very bright light and . . . was deprived of food"[34]; being kept in a cell under those conditions is completely incompatible with Article 10 of the 1966 Covenant, according to which "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person"[35].

24. The second "deafening silence" which counsel for the Respondent accuses us of concerns the fact that Guinea did not, at last week's hearings, revisit the circumstance that the

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[28]RG, Ann. 1, p. 6.

[29]*Ibid*.

[30]See the *Standard Minimum Rules for the Treatment of Prisoners*, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955 and approved by the Economic and Social Council in resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, in particular Principles 20, 22-26 and 87.

[31]United Nations General Assembly resolution 45/111, 14 Dec. 1990, "Basic Principles for the Treatment of Prisoners".

[32]RG, pp. 16-17, paras. 1.34-1.35.

[33]See above, paras. 6-14.

[34]RG, Ann. 1, pp. 6-7.

[35]See also General Comment No. 21 of the Human Rights Committee of 10 Apr. 1992 on Art. 10 of the Covenant (*Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40* (A/47/40), pp. 242-244).

Congolese authorities did not question Mr. Diallo or bring him before a court when he was arrested in 1995 and before he was expelled[36]. Here too, I shall confine myself to three brief comments on the topic:

19 — first, we take note of the fact that, as the DRC itself admits, Mr. Diallo "was not accused of any particular criminal offence justifying pre-trial detention" — the detention was, according to the DRC, merely part of the "administrative" expulsion procedure[37]; this confirms that, plainly, the very serious accusations made by the DRC against Mr. Diallo throughout the proceedings before the Court are completely without foundation, as Guinea pointed out last Monday[38];

— secondly, as a corollary, Mr. Diallo's detention prior to his expulsion, which exceeded the maximum period of eight days established by the 1983 Legislative Order, was therefore totally groundless and, indisputably, infringed Article 9 of the 1966 Covenant, which prohibits arbitrary detention;

— thirdly and lastly, in the procedural sphere, I am bound to point out that the authorities concerned have a duty, in the case of pre-expulsion detention, to allow the person subject to that administrative measure, before his expulsion (and therefore during his detention), "to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority . . .", as indicated by Article 13 of the 1966 Covenant. Mathias Forteau observed in our first round of oral arguments that none of those procedural rights was respected by the DRC, and referred, in particular, to the Views adopted by the Human Rights Committee in *Hammel*[39]; Mr. Diallo was at no time informed of the legal basis for his detention and his expulsion, the reason for which was never notified to him and whose lawfulness, in consequence, he was unable to challenge before his enforced removal from Congolese territory[40].

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[36]CR 2010/3, pp. 20-22, paras. 21-26.

[37]CR 2010/3, p. 21, para. 23.

[38]CR 2010/1, pp. 45-48, paras. 20-33 (Forteau).

[39]CR 2010/1, p. 51, para. 41 (v).

[40]CR 2010/1, p. 51, para. 41 (iii), (vi) and (vii).

D. The legal basis of the expulsion

25. "Expulsion" or "refusal of entry"[41]? That is not the question. Or rather, the question was answered by the Court in its 2007 Judgment: "the expulsion was characterized as a 'refusal of entry' when it was carried out" and "Mr. Diallo, as the subject of the refusal of entry, was justified in relying on the consequences of the legal characterization thus given by the Zairean authorities" (*Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007,* p. 601, para. 46). Guinea adhered to this approach in its Reply[42] and last Monday explained unequivocally how the two concepts relate to each other in this case and the consequences of that for the unlawfulness of Mr. Diallo's expulsion[43].

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26. The DRC returned on Monday, however, to a related argument, touched upon in its Rejoinder, according to which the decree expelling Mr. Diallo was not defective for lack of authority. To support the notion that the decree was validly signed by the Prime Minster, rather than by the President of the Republic as none the less established in the 1983 Legislative Order concerning immigration control, Professor Kalala again relied on the entry into force, in 1994 (indeed, we have never had any problem with that date, Mr. President) — as I was saying, on the entry into force in 1994 of a new constitution which purportedly transferred the power to expel from the President to the Prime Minister[44].

27. The Respondent's line of argument consisted, however, merely of citing a number of provisions from that new constitution. Two brief comments on those passages, if you will allow me, Mr. President:

1. Article 80 (2) of the 1994 Constitution provides that "[t]he Prime Minister shall exercise regulatory power by means of decrees voted on by the Council of Ministers"[45]; I would note that, despite Professor Kalala's assertion that this provision replaced the clear wording of Article 15 of the 1983 Legislative Order, what happens in practice has remained true to the Legislative Order: in contrast to other decrees adopted by the Prime Minister which the DRC

[41]See CR 2010/3, p. 33, para. 61.

[42]RG, p. 33, para. 1.17 and pp. 46-49, paras. 1.114-1.122.

[43]CR 2010/1, pp. 40-41, paras. 3-5 (Forteau).

[44]CR 2010/3, pp. 36-37, paras. 71-73 and CR 2010/4, pp. 8-9.

[45]CR 2010/3, p. 36, para. 72.

has appended to its written pleadings and has again reproduced at tab 1 in its judges' folder for Monday morning, the decree expelling Mr. Diallo does not contain the recital referring to a decision by the Council of Ministers[46]; and,

21 2. in any event, the explanations advanced by the Respondent on Monday patently do not answer in any respect whatsoever the arguments presented by Mathias Forteau last Monday, 19 April, when he demonstrated that the Respondent had always, until this week, asserted that the power to expel remained the prerogative of the President of the Republic notwithstanding the grant of regulatory power to the Prime Minister. The DRC's reports of 2005 to the Human Rights Committee and in 2007 to the African Commission on Human and Peoples' Rights clearly bear this out[47].

28. Those reports, which are quite unambiguous, show beyond any doubt that the new constitution did not amend the 1983 Legislative Order in the way claimed by the DRC, to suit its purposes, at this stage of the proceedings. Mr. Diallo's expulsion, therefore, had to be based on a reasoned order issued by the President, and under no circumstances on a decree of the Prime Minister.

E. The value of Mr. Diallo's *parts sociales* in Africom-Zaire and Africontainers-Zaire

29. Mr. President, I now turn to a completely separate issue, that of the "value of Mr. Diallo's *parts sociales*" in Africom-Zaire and Africontainers-Zaire, to use Professor Kalala's phrase[48], even though, as I shall now endeavour to show, this is actually a premature question that the Court is not required to decide at this stage in the proceedings.

30. It is common ground between the Parties that the two companies were still in existence in 1995-1996: each obviously considers this to have been the case[49]. On the other hand, we cannot accept the contention put forward anew by the DRC in its oral argument on Monday that Africom-Zaire and Africontainers-Zaire were "in undeclared bankruptcy" at the time of

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[46]RG, p. 44, para. 1.110.

[47]CR 2010/1, pp. 52-53 (Forteau).

[48]CR 2010/4, p. 17, B.

[49]See *ibid.*, pp. 16-17, para. 20 (Kalala) and CR 2010/2, pp. 45-48, paras. 26-32 (Pellet).

22 Mr. Diallo's expulsion from the Congo. The Respondent has fabricated this contrived argument solely with a view to denying that the *parts sociales* held by the Guinean national had any economic value whatsoever[50]; that is both untrue and based on sloppy reasoning on two counts.

31. The first lies in the mistaken equating of a company's lack of commercial activity with its entry into bankruptcy. In the present case, the DRC has not denied that Mr. Diallo's two companies at the time of his expulsion were debt-free[51], had assets and continued to employ staff[52]; these circumstances alone preclude the possibility of their bankruptcy, declared or not. The second error vitiating the DRC's reasoning arises from its forgetting that a debt claim, even if disputed, remains an asset until such time as it has been definitively rejected.

32. Now, Africom-Zaire, described as a "phantom" company, without "commercial activity", having registered "no orders since the mid-1980s"[53], nevertheless was owed a debt, *one that was never disputed*, of nearly 1 million United States dollars of the time, by the Congolese State arising out of sales of listing paper in 1983 and 1986[54]. And steps were actively taken, by Mr. Diallo's companies and at his instigation, to collect other debts, until Mr. Diallo was forced to leave the Congo. I am referring to:

— negotiations which Africontainers had been engaged in since 1992 with Gécamines, bringing the parties together for the last time on 8 June 1995[55], with a view to reaching a settlement concerning the compensation owed by the national company for the 32 containers which it admitted to having abandoned;

23 — the dispute with Zaire Fina, which had been referred to the Congolese courts for a determination of the value of the direct and indirect consequences of the undenied loss by the oil company of two containers which Africontainers had leased to it[56];

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[50]CR 2010/4, pp. 17-21, paras. 21-33.

[51]CR 2010/2, p. 39, para. 12.

[52]See RG, Ann. 1, Mr. Diallo's response to question 35.

[53]CR 2010/4, p. 17, para. 23 (Kalala).

[54]CR 2010/1, pp. 19-21, paras. 14-17 (Wordsworth).

[55]MG, Ann. 151.

[56]Preliminary Objections of the DRC (PODRC), Anns. 53 and 54 and MG, Ann. 149.

— the "PLZ" lawsuit, in which the Kinshasa *Tribunal de grande instance* found a number of breaches by PLZ under the lease it had granted to Africom-Zaire[57]; and

— the dispute with Zaire Shell, ultimately the cause of Mr. Diallo's expulsion after Africontainers obtained a provisionally enforceable decision by the Congolese courts ordering the oil company to pay it more than 13 million dollars[58].

33. These claims all gave rise, at one stage or another in their treatment, to decisions in favour of Mr. Diallo's companies and none of those I have cited — *not one* — had been finally settled by 31 January 1996, when the DRC expelled him. Thus, the view has to be taken that these claims, some substantial in amount — the "listing paper" case alone is proof enough of this[59] —, were part of the property belonging to Mr. Diallo's companies at that date and, in the absence of any liabilities, the *parts sociales* in the companies, all of which he owned, were not worthless, far from it.

34. What were they worth? This is not the time to argue the question, Mr. President, because that would amount to fixing the quantum of the reparation and Guinea has asked the Court to defer consideration of this to a later stage — which will become necessary only if the Parties fail to reach a negotiated agreement on this point. It suffices at this stage to find that the Respondent's internationally wrongful acts have infringed Mr. Diallo's property rights in the *parts sociales* he owned in the two companies. Determining the amount of the compensation the DRC owes in reparation is another problem.

24 35. With your leave, Mr. President, I would nevertheless like to say a word about the "divine truth" represented, to Professor Kalala's mind, by the Permanent Court's Judgment in the *Oscar Chinn* case[60]. I would be loath, Members of the Court, to call into question this "Bible verse where nothing can be added or subtracted"[61] — to be sure, more satanic verses do exist. But I

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[57]MG, Anns. 130 and 146.

[58]MG, Ann. 153.

[59]MG, Anns. 46 to 51.

[60]CR 2010/4, p. 20, para. 30.

[61]*Ibid.*

cannot go along with our opponent when he claims that the conclusions reached by the Court in 1934 "are wholly transposable to the present case"[62].

36. They are absolutely not: aside from the facts that the Congo is the setting and that the two cases each involve a transport company, there is simply no similarity between the legally relevant circumstances of them: the PCIJ found in *Oscar Chinn* that the British investor's economic troubles had been caused by the economic crisis — the "great crisis" of the 1930s; what is more, and more important, the measure complained of by the applicant was general and impersonal[63], whereas in our case the DRC's internationally wrongful acts precisely targeted Mr. Diallo individually and were performed pursuant to decisions taken at the highest levels of the Congolese Government.

F. The distinction between the rights of the companies and the rights of Mr. Diallo (answer to Judge Bennouna's question)

37. Mr. President, Judge Bennouna asked the following question at the end of the second hearing in our first round:

> "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 '*[d]eclares* 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' ?"[64]

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38. This question, Mr. President, affords me the opportunity to bring together what Daniel Müller and I (speaking through Jean-Marc Thouvenin) said last week and, at the same time, to recapitulate the essential points in our argument.

39. But first of all I wish to reassure Professor Kalala[65]: of course, we have read the Court's Judgment from 2007; we even think that we understand it and have paid it the greatest heed!

40. In it the Court 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

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[62]CR 2010/4, p. 20, para. 30.

[63]See *Oscar Chinn, Judgment, 1934, P.C.I.J., Series A/B, No. 63*, p. 65.

[64]See CR 2010/2, p. 53.

[65]CR 2010/4, p. 17, para. 20; see also RDRC, pp. 1-2, para. 05.

Africom-Zaire and Africontainers-Zaire" and also held it to be admissible "in so far as it concerns protection of Mr. Diallo's rights as an individual" and "of Mr. Diallo's direct rights as *associé* in Africom-Zaire and Africontainers-Zaire" (*Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007*, pp. 617-618, para. 98 (3) of the operative clause).

41. Since the Republic of Guinea was unable to exercise its diplomatic protection on behalf of Mr. Diallo's companies "by way of substitution", it is clearly impossible for it to claim reparation for injuries caused *to the two companies themselves*. Moreover, a number of arguments are unavailable to us and we have indeed refrained from raising them. This, for example, explains why we have said nothing — another deafening silence — about the denials of justice suffered not by "Mr. Diallo" directly (contrary to how Professor Kalala has described it[66]) but by Africom-Zaire and Africontainers. Likewise, as our opponent has noticed, we have avoided any reliance, in the form of freestanding claims, on the "breaches of contract" resulting from the non-performance attributable to the Respondent of certain undertakings not to Mr. Diallo directly but to one or the other of his companies[67].

42. *But*, and this is an important "but", the fact that it is not possible for Guinea to act to
26 protect these companies in no way negates Mr. Diallo's direct rights, including of course those tied to the existence and success of his companies and to his ownership of the *parts sociales*. These internationally protected rights subsist: Mr. Diallo's rights in his *parts sociales* in the two companies and the right to oversee and control their management, rights belonging to him as *associé*. I shall not go back over this second aspect, the rights of the *associé*, which was the subject of Sam Wordsworth's thorough presentation last week[68], a presentation to which there has yet to be any response. By contrast, I propose, with your leave, Mr. President, to return briefly to the right of ownership in his *parts sociales*, which *Mr. Diallo* was deprived of by virtue of the DRC's internationally wrongful acts. And I shall point out in passing that this right of ownership held by *associés* in the *parts sociales* is expressly recognized under Congolese law, pursuant to Article 52

[66]CR 2010/3, p. 22 *(c)*; see pp. 22-23, paras. 27-30.

[67]*Ibid.*, pp. 23-24, paras. 31-33.

[68]CR 2010/2, pp. 8-21.

of the Decree of 27 February 1887 on commercial corporations: "The *parts sociales* are indivisible. In the event of *several persons owning a single part sociale*, the company is entitled to suspend the exercise of rights deriving from that share until such time as one person is designated as, for the company's purposes, *the owner of that part sociale*."[69] There can be no doubt that the *right of ownership* in the *parts sociales* is recognized to be vested in the *associé* or shareholder *[actionnaire]*, not in the company itself.

43. In order to show that this right *of Mr. Diallo's* can be protected by the Applicant and that a violation of it gives rise to the Respondent's responsibility, it is necessary, and sufficient, to look to the general scheme of State responsibility for internationally wrongful acts and to ask the following two questions:

1. Has an internationally protected right been violated?
2. Is this violation attributable to the DRC?

44. First question: has an internationally protected right been violated? As I just said, quite apart from the rights of the companies themselves, Mr. Diallo's right in his *parts sociales* in the companies was violated and this is, most definitely, an internationally protected right: it is a human
27 right guaranteed by Article 14 of the African Charter on Human and Peoples' Rights and by customary international law, as Mr. Müller explained last week[70].

45. Second question: is this violation of Mr. Diallo's right of ownership attributable to the Respondent? Here too the answer is inarguable: beginning in the late 1980s, the DRC endeavoured by every possible means — including the most unlawful — to prevent Mr. Diallo from enjoying his right of ownership in his *parts sociales* and his right, as sole *associé* in the two companies, to control and supervise their management:

— in 1988 authorities of the Respondent threw Mr. Diallo in jail and kept him there for a year to prevent him from looking after his companies' interests — the effect of which was to rein in their business significantly (let us not forget that Mr. Diallo is the "jack of all trades" of the two companies: sole *associé*, sole *gérant* and sole *executive*) and to force him to be more circumspect in his actions afterwards;

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[69] See also Art. 54.

[70] See *ibid.*, pp. 22-23, paras. 3-5 (Müller).

— notwithstanding this circumspection, the same authorities, acting at the request of powerful oil companies — led by Zaire Shell — in debt to Mr. Diallo's companies, again deprived him of his freedom in disregard of fundamental human rights principles in 1995-1996 after his victories in litigation;

— it was the Prime Minister of Zaire himself who signed the "decree of expulsion" of 31 October 1995, which was to culminate in Mr. Diallo being "refused entry" on 31 January 1996; in practical terms that decision deprived him once and for all of any possibility of taking action and led to the idling and then disappearance of his companies — I shall reiterate on this point that the default judgment rendered by the Kinshasa/Gombe Court of Appeal on 20 June 2002 notes that Africontainers is "[c]urrently without known address in the Democratic Republic of the Congo"[71].

46. Mr. President, it could hardly be clearer that this chain of breaches by the Respondent of obligations it bears under international law — whether we see this as a conjunction of internationally wrongful acts or as a complex or continuing act, but which in all events was aimed at Mr. Diallo's brutal expulsion — that these breaches deprived him of his right of ownership in his

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parts sociales in the two companies, Africom-Zaire and Africontainers-Zaire. As we showed last Monday, whether the companies are considered to be extant (which we do not believe) or to have disappeared *de jure* as well as *de facto*, the result is the same: Mr. Diallo has been expropriated of the *parts sociales* he held in the two companies: he no longer has the *usus*, or the *fructus*, or the *abusus*, and that is indeed the consequence of the Respondent's unlawful conduct[72].

47. Mr. President, one might at first glance think this argument an attempt to circumvent paragraph 3 of the operative clause in the 2007 Judgment. But that is not at all so: this feeling arises from a factual element specific to this case: the fact that Mr. Diallo is the sole *associé* in the two companies, that is to say, the only owner of the *parts sociales* in Africom and Africontainers. As a consequence, even though officially they have separate legal personalities, the very special characteristics of the relationship between Mr. Diallo and his companies means that, from the *factual perspective*, which is the perspective of expropriation (expropriation is a question of fact),

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[71]PODRC, Ann. 64.

[72]CR 2010/2, pp. 49-50, para. 37 (Pellet); see also *ibid.*, pp. 29-32, paras. 20-25 (Müller).

the property of the two companies merges with his. Thus, in expropriating his companies, the DRC infringed Mr. Diallo's ownership right in his *parts sociales*.

48. Once again, this is entirely a product of the particular circumstances and follows from the unipersonal nature of the companies in question — and I shall point out in passing that it is in cases of this type that the European Court of Human Rights, for example, has accepted that the sole owner of a company may claim to be a "victim" within the meaning of Article 34 of the 1950 Rome Convention of measures taken against his company, because in the case of a single-shareholder company there can be no risk of differences of opinion among shareholders or between shareholders and the board of directors as to the fact of infringements of the rights protected under the Convention (the European Convention on Human Rights) or concerning the most appropriate way of reacting to such infringements[73].

49. *If* the companies had had other *associés* besides Mr. Diallo, it would be a different matter: let us assume there to be not one but four *associés*, each — including Mr. Diallo — holding one fourth of the capital. In this case Mr. Diallo would be entitled to compensation only for the infringement of his personal right of ownership, that is to say 25 per cent of the value of the
29 company, and the legally unassailable distinction made by the Court between the rights of the company and the rights of Mr. Diallo would be apparent and its consequences plain. Here, the consequences of the distinction are obscured by a factual circumstance, but this in no way involves a challenge to the Court's decision in paragraph 3 of the operative part of its 2007 Judgment: it is because the internationally wrongful acts committed by the Respondent amount to an infringement of *Mr. Diallo's* right of ownership in the *parts sociales* in the two companies — of which he was (or is) the sole owner — that the DRC's responsibility has been engaged and that it owes reparation under the heading of diplomatic protection of Mr. Diallo's right of ownership.

50. Once an internationally unlawful act has caused damage, that damage must be repaired in full. That is one of the consequences — undoubtedly the main one — of the international responsibility of a State. And, as we showed during the first round of this oral argument, reparation for the material injury caused to Mr. Diallo in the present case by the actions of the DRC must

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[73]See *Ankarcrona* v. *Sweden* (dec.), No. 35178/97, 27 June 2000; *Dyrwold* v. *Sweden*, No. 12259/86, Commission decision, 7 Sep. 1990; and, more recently, *Nosov* v. *Russia* (dec.), No. 30877/02, 20 Oct. 2005.

necessarily take the form of compensation[74]. But determining the amount of that compensation is not within the scope of the present phase of the proceedings. It will have to be set by the Court later, if the Parties are unable to reach a negotiated agreement on it within a reasonable period of time.

51. Mr. President, throughout the proceedings the DRC has emphasized the financial aspects of this case, which Professor Kalala has described as "a case involving large sums of money", as "a base trap set by Mr. Diallo"[75]. It is certainly true that economic and financial interests are at stake — and there is no shame in that: there is no reason why a small, poor country like Guinea cannot come to the defence of its nationals' material interests; this is plainly one of the functions of the institution of diplomatic protection. But our case cannot be reduced to merely that: besides these economic rights which the RDC has scoffed at, it also involves a Guinean national's human rights and it is much to the credit of the Applicant to defend these.

52. Mr. President, Members of the Court, I thank you for having listened so patiently to this somewhat long statement. But your patience will be rewarded because, without using up the
30 speaking time available to the Republic of Guinea, its Agent will now offer a few concluding remarks before reading its final submissions, if you would be so good, Mr. President, to call him to the lectern.

The VICE-PRESIDENT, Acting President: Thank you, Professor. I shall now give the floor to the Agent of the Republic of Guinea. You have the floor, Sir.

MR. CAMARA:

1. Mr. President, Members of the Court, it falls to me, in my capacity as Agent of the Republic of Guinea, to conclude this oral argument, and I shall thus shortly have the honour of reading the submissions of my Government.

2. First, however, I wish to draw your attention, Members of the Court, to a particular aspect of this case which concerns the factual evidence. By expelling Mr. Diallo overnight from the country where he had lived for the previous 32 years, without allowing him to recover any of his

[74]See CR 2010/2, pp. 50-52, para. 42 (Pellet).

[75]CR 2010/4, pp. 20-21, par. 32.

property, the Respondent has made defending the rights of Mr. Diallo, who was then completely dispossessed, much more complicated. We have done all that we could in presenting the evidence available to us, but I cannot say that the attitude of our Congolese brothers has helped in discovering the truth: they have shown themselves to be unable (or unwilling) to supply the Court with documents which it is difficult to believe they would have not been able to produce, had they carried out an even vaguely systematic search.

3. Instead of submitting the evidence which would have allowed the record to be completed, they have done no more than make sweeping accusations, as if they adhere to the principle, however disgraceful, that I am told is attributed to Beaumarchais: "Throw dirt enough, and some will stick." However, we are in no doubt that you, Members of the Court, will be able to distinguish the true from the false, what has been established from what remains uncertain, and it is with great confidence that my country awaits your verdict in this case, in which, as Professor Pellet has just reminded us, there are not just financial interests at stake, but also principles — principles which must offer the same protection to small countries such as mine and to their nationals as they do to the bigger, richer and more powerful countries.

31 4. The presence in this hall today of Colonel Siba Lohalamou, Minister of Justice and Keeper of the Seals, and of a substantial delegation from Conakry reflects the exemplary importance that we attach to this case.

5. Before I conclude, both on my own behalf and on behalf of the Government I represent, I should like to express my thanks for your attention over these two days of hearings, as well as for your patience throughout these proceedings. My sincere thanks also go to the Registrar, the interpreters and the entire Registry staff: it is their receptiveness and assistance in particular which have allowed these hearings to be held, in spite of the furies of the Icelandic volcano. I also wish to reiterate our thanks to Guinea's Counsel, who have shown great dedication over the past nine years, and who have ensured that my country's arguments are based on a sound analysis of the facts and of the applicable law.

6. In accordance with Article 60, paragraph 2, of the Rules of Court, I shall now read the final submissions of the Republic of Guinea:

1. On the grounds set out in its Memorial, its Reply and the oral argument now being concluded, the Republic of Guinea requests the International Court of Justice to adjudge and declare:

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

(b) that the Democratic Republic of the Congo is accordingly bound to make full reparation on account of the injury suffered by Mr. Diallo or by the Republic of Guinea in the person of its national;

32 *(c)* that such reparation shall take the form of compensation covering the totality of the injuries caused by the internationally wrongful acts of the Democratic Republic of the Congo, including loss of earnings, and shall also include interest.

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

Thank you, Mr. President.

The VICE-PRESIDENT, Acting President: Thank you very much, Mr. Camara. The Court takes note of the final submissions which you have just read out on behalf of the Republic of

Guinea. The Democratic Republic of the Congo will present its second round of oral argument tomorrow, Thursday 29 April, from 4 p.m. to 6 p.m. The hearing is closed.

The Court rose at 5.15 p.m.

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