COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

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AHMADOU SADIO DIALLO

(RÉPUBLIQUE DE GUINÉE c. RÉPUBLIQUE
DÉMOCRATIQUE DU CONGO)

ARRÊT DU 30 NOVEMBRE 2010

2010

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING
AHMADOU SADIO DIALLO

(REPUBLIC OF GUINEA *v.* DEMOCRATIC
REPUBLIC OF THE CONGO)

JUDGMENT OF 30 NOVEMBER 2010

Mode officiel de citation :
Ahmadou Sadio Diallo
(République de Guinée c. République démocratique du Congo),
fond, arrêt, C.I.J. Recueil 2010, p. 639

Official citation :
Ahmadou Sadio Diallo
(Republic of Guinea v. *Democratic Republic of the Congo),*
Merits, Judgment, I.C.J. Reports 2010, p. 639

ISSN 0074-4441
ISBN 978-92-1-071111-1

N° de vente :
Sales number **1001**

30 NOVEMBRE 2010

ARRÊT

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JUDGMENT

Present: *President* OWADA; *Vice-President* TOMKA; *Judges* AL-KHASAWNEH, SIMMA, ABRAHAM, KEITH, SEPÚLVEDA-AMOR, BENNOUNA, SKOTNIKOV, CANÇADO TRINDADE, YUSUF, GREENWOOD; *Judges* ad hoc MAHIOU, MAMPUYA; *Registrar* COUVREUR.

In the case concerning Ahmadou Sadio Diallo,

between

the Republic of Guinea,

represented by

Colonel Siba Lohalamou, Minister of Justice, Keeper of the Seals,

as Head of Delegation;

Ms Djénabou Saïfon Diallo, Minister of Co-operation;

Mr. Mohamed Camara, First Counsellor for Political Affairs, Embassy of Guinea in the Benelux countries and in the European Union,

as Agent;

Mr. Alain Pellet, Professor at the University of Paris Ouest, Nanterre-La Défense, member and former Chairman of the International Law Commission, Associate of the Institut de droit international,

as Deputy Agent, Counsel and Advocate;

Mr. Mathias Forteau, Professor at the University of Paris Ouest, Nanterre-La Défense, Secretary-General of the Société française pour le droit international,

Mr. Daniel Müller, Researcher at the Centre de droit international de Nanterre (CEDIN), University of Paris Ouest, Nanterre-La Défense,

Mr. Jean-Marc Thouvenin, Professor at the University of Paris Ouest, Nanterre-La Défense, Director of the Centre de droit international de Nanterre (CEDIN), member of the Paris Bar, Cabinet Sygna Partners,

Mr. Luke Vidal, member of the Paris Bar, Cabinet Sygna Partners,

Mr. Samuel Wordsworth, member of the English and Paris Bars, Essex Court Chambers,

as Counsel and Advocates;

H.E. Mr. Ahmed Tidiane Sakho, Ambassador of the Republic of Guinea to the Benelux countries and to the European Union,

Mr. Alfred Mathos, Judicial Agent of the State,

Mr. Hassan II Diallo, Legal Adviser to the Prime Minister of the Republic of Guinea,

Mr. Ousmane Diao Balde, Director of the Legal and Consular Division of the Ministry of Foreign Affairs,

Mr. André Saféla Leno, President of the Indictments Division of the Court of Appeal of Conakry,
H.E. Mr. Abdoulaye Sylla, former Ambassador,

as Advisers;

Mr. Ahmadou Sadio Diallo,

and

the Democratic Republic of the Congo,

represented by

H.E. Mr. Henri Mova Sakanyi, Ambassador of the Democratic Republic of the Congo to the Kingdom of Belgium, the Kingdom of the Netherlands and the Grand Duchy of Luxembourg,

as Agent and Head of Delegation;

Mr. Tshibangu Kalala, Professor of International Law at the University of Kinshasa, member of the Kinshasa and Brussels Bars, and Deputy, Congolese Parliament,

as Co-Agent, Counsel and Advocate;

Mr. Lwamba Katansi, Professor at the University of Kinshasa, Legal Adviser, Office of the Minister of Justice and Human Rights,
Ms Corinne Clavé, member of the Brussels Bar, Cabinet Liedekerke-Wolters-Waelbroeck-Kirkpatrick,
Mr. Kadima Mukadi, member of the Kinshasa Bar, Cabinet Tshibangu and Associés,
Mr. Bukasa Kabeya, member of the Kinshasa Bar, Cabinet Tshibangu and Associés,
Mr. Kikangala Ngoie, member of the Brussels Bar,
Mr. Moma Kazimbwa Kalumba, member of the Brussels Bar, Lawyer-Counsel, Embassy of the Democratic Republic of the Congo in Brussels,
Mr. Tshimpangila Lufuluabo, member of the Brussels Bar,
Ms Mwenze Kisonga Pierrette, Head of the Legal and Litigation Department, Embassy of the Democratic Republic of the Congo in Brussels,
Mr. Kalume Mabingo, Legal Adviser, Embassy of the Democratic Republic of the Congo in Brussels,

as Advisers;

Mr. Mukendi Tshibangu, Researcher, Cabinet Tshibangu and Associés,

Ms Ali Feza, Researcher, Office of the Minister of Justice and Human Rights,
Mr. Makaya Kiela, Researcher, Office of the Minister of Justice and Human Rights,

as Assistants,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 28 December 1998, the Government of the Republic of Guinea (hereinafter "Guinea") filed in the Registry of the Court an Application instituting proceedings against the Democratic Republic of the Congo (hereinafter the "DRC", named Zaire between 1971 and 1997) in respect of a dispute concerning "serious violations of international law" alleged to have been committed "upon the person of a Guinean national". The Application consisted of two parts, each signed by Guinea's Minister for Foreign Affairs. The first part, entitled "Application" (hereinafter the "Application (Part One)"), contained a succinct statement of the subject of the dispute, the basis of the Court's jurisdiction and the legal grounds relied on. The second part, entitled "Memorial of the Republic of Guinea" (hereinafter the "Application (Part Two)"), set out the facts underlying the dispute, expanded on the legal grounds put forward by Guinea and stated Guinea's claims.

In the Application (Part One), Guinea maintained that:

> "Mr. Ahmadou Sadio Diallo, a businessman of Guinean nationality, was unjustly imprisoned by the authorities of the Democratic Republic of the Congo, after being resident in that State for thirty-two (32) years, despoiled of his sizable investments, businesses, movable and immovable property and bank accounts, and then expelled".

Guinea added: "[t]his expulsion came at a time when Mr. Ahmadou Sadio Diallo was pursuing recovery of substantial debts owed to his businesses by the State and by oil companies established in its territory and of which the State is a shareholder". Mr. Diallo's arrest, detention and expulsion constituted, *inter alia*, according to Guinea, violations of

> "the principle that aliens should be treated in accordance with 'a minimum standard of civilization' [of] the obligation to respect the freedom and property of aliens, [and of] the right of aliens accused of an offence to a fair trial on adversarial principles by an impartial court".

To found the jurisdiction of the Court, Guinea invoked in the Application (Part One) the declarations whereby the two States have recognized the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute of the Court.

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was immediately communicated to the Government of the DRC by the Registrar; and, in accordance with paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

3. By an Order of 25 November 1999, the Court fixed 11 September 2000 as the time-limit for the filing of a Memorial by Guinea and 11 September 2001 as the time-limit for the filing of a Counter-Memorial by the DRC. By an Order of 8 September 2000, the President of the Court, at Guinea's request, extended the time-limit for the filing of the Memorial to 23 March 2001; in the same Order, the time-limit for the filing of the Counter-Memorial was extended to 4 October 2002. Guinea duly filed its Memorial within the time-limit as thus extended.

4. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each of them availed itself of its right under Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case. Guinea chose Mr. Mohammed Bedjaoui and the DRC Mr. Auguste Mampuya Kanunk'a-

Tshiabo. Following Mr. Bedjaoui's resignation on 10 September 2002, Guinea chose Mr. Ahmed Mahiou.

5. On 3 October 2002, within the time-limit set in Article 79, paragraph 1, of the Rules of Court as adopted on 14 April 1978, the DRC raised preliminary objections in respect of the admissibility of Guinea's Application. In accordance with Article 79, paragraph 3, of the Rules of Court, the proceedings on the merits were then suspended. By an Order of 7 November 2002, the Court, taking account of the particular circumstances of the case and the agreement of the Parties, fixed 7 July 2003 as the time-limit for the presentation by Guinea of a written statement of its observations and submissions on the preliminary objections raised by the DRC. Guinea filed such a statement within the time-limit fixed, and the case thus became ready for hearing on the preliminary objections.

6. The Court held hearings on the preliminary objections raised by the DRC from 27 November to 1 December 2006. In its Judgment of 24 May 2007, the Court 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 "in so far as it concerns protection of [his] direct rights as *associé* in Africom-Zaire and Africontainers-Zaire". On the other hand, the Court declared the Application of the Republic of Guinea to be inadmissible "in so far as it concerns protection of Mr. Diallo in respect of alleged violations of rights of Africom-Zaire and Africontainers-Zaire".

7. By an Order of 27 June 2007, the Court fixed 27 March 2008 as the time-limit for the filing of the Counter-Memorial of the DRC. That pleading was duly filed within the time-limit thus prescribed.

8. By an Order of 5 May 2008, the Court authorized the submission of a Reply by Guinea and a Rejoinder by the DRC, and fixed 19 November 2008 and 5 June 2009 as the respective time-limits for the filing of those pleadings. The Reply of Guinea and the Rejoinder of the DRC were duly filed within the time-limits thus prescribed.

9. In accordance with Article 53, paragraph 2, of the Rules of Court, the Court decided that, after ascertaining the views of the Parties, copies of the pleadings and documents annexed would be made accessible to the public on the opening of the oral proceedings.

10. Owing to the difficulties in the air transport sector following the volcanic eruption in Iceland during April 2010, the public hearings which, according to the schedule originally adopted, were due to be held from 19 to 23 April 2010 took place on 19, 26, 28 and 29 April 2010. At those hearings, the Court heard the oral arguments and replies of:

For Guinea: Mr. Mohamed Camara,
Mr. Luke Vidal,
Mr. Jean-Marc Thouvenin,
Mr. Mathias Forteau,
Mr. Samuel Wordsworth,
Mr. Daniel Müller,
Mr. Alain Pellet.

For the DRC: Mr. Tshibangu Kalala.

11. At the hearings, Members of the Court put questions to the Parties, to

which replies were given orally and in writing, in accordance with Article 61, paragraph 4, of the Rules of Court.

*

12. In the Application (Part Two), the following requests were made by Guinea:

"*As to the merits:* To order the authorities of the Democratic Republic of the Congo to make an official public apology to the State of Guinea for the numerous wrongs done to it in the person of its national Ahmadou Sadio Diallo;

To find that the sums claimed are certain, liquidated and legally due;

To find that the Congolese State must assume responsibility for the payment of these debts, in accordance with the principles of State responsibility and civil liability;

To order that the Congolese State pay to the State of Guinea on behalf of its national Ahmadou Sadio Diallo the sums of US$31,334,685,888.45 and Z 14,207,082,872.7 in respect of the financial loss suffered by him;

To pay also to the State of Guinea damages equal to 15 per cent of the principal award, that is to say US$4,700,202,883.26 and Z 2,131,062,430.9;

To award to the applicant State bank and moratory interest at respective annual rates of 15 per cent and 26 per cent from the end of the year 1995 until the date of payment in full;

To order the said State to return to the Applicant all the unvalued assets set out in the list of miscellaneous claims;

To order the Democratic Republic of the Congo to submit within one month an acceptable schedule for the repayment of the above sums;

In the event that the said schedule is not produced by the date indicated, or is not respected, authorize the State of Guinea to seize the assets of the Congolese State wherever they may be found, up to an amount equal to the principal sum due and such further amounts as the Court shall have ordered.

To order that the costs of the present proceedings be borne by the Congolese State." (Emphasis in the original.)

13. In the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Guinea,

in the Memorial:

"The Republic of Guinea has the honour to request that it may please the International Court of Justice to adjudge and declare:

(1) that, in arbitrarily arresting and expelling its national, Mr. Ahmadou Sadio Diallo; in not at that time respecting his right to the benefit of the provisions of the [1963] Vienna Convention on Consular Relations; in subjecting him to humiliating and degrading treatment; in

depriving him of the exercise of his rights of ownership and management in respect of the companies founded by him in the DRC; in preventing him from pursuing recovery of the numerous debts owed to him — to himself personally and to the said companies — both by the DRC itself and by other contractual partners; in not paying its own debts to him and to his companies, the Democratic Republic of the Congo has committed internationally wrongful acts which engage its responsibility to the Republic of Guinea;

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

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

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."

in the Reply:

"On the grounds set out in its Memorial and in the present Reply, the Republic of Guinea requests the International Court of Justice to adjudge and declare:

1. that, in carrying out arbitrary arrests of its national, Mr. Ahmadou Sadio Diallo, and expelling him; in not at that time respecting his right to the benefit of the provisions of the 1963 Vienna Convention on Consular Relations; in submitting him to humiliating and degrading treatment; in depriving him of the exercise of his rights of ownership, oversight and management in respect of the companies which he founded in the DRC and in which he was the sole *associé*; in preventing him in that capacity from pursuing recovery of the numerous debts owed to the said companies both by the DRC itself and by other contractual partners; in expropriating *de facto* Mr. Diallo's property, the Democratic Republic of the Congo has committed internationally wrongful acts which engage its responsibility to the Republic of Guinea;
2. that the Democratic Republic of the Congo is accordingly bound to make full reparation on account of the injury suffered by Mr. Diallo or by the Republic of Guinea in the person of its national;
3. that such reparation shall take the form of compensation covering the totality of the injuries caused by the internationally wrongful acts of the Democratic Republic of the Congo, including loss of earnings, and shall also include interest.

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."

On behalf of the Government of the DRC,

in the Counter-Memorial:

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

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

in the Rejoinder:

"While expressly reserving the right to supplement and expand on its grounds in fact and in law and without admitting any statement that might be prejudicial to it, the Respondent requests the Court to adjudge and declare that:

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

14. At the oral proceedings, the following final submissions were presented by the Parties:

On behalf of the Government of Guinea,

at the hearing of 28 April 2010:

"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;

(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."

On behalf of the Government of the DRC,

at the hearing of 29 April 2010:

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

1. the Democratic Republic of the Congo has not committed any internationally wrongful acts towards Guinea in respect of Mr. Diallo's individual personal rights;
2. the Democratic Republic of the Congo has not committed any internationally wrongful acts towards Guinea in respect of Mr. Diallo's direct rights as *associé* in Africom-Zaire and Africontainers-Zaire;
3. accordingly, the Application of the Republic of Guinea is unfounded in fact and in law and no reparation is due."

* * *

I. General Factual Background

15. The Court will begin with a brief description of the factual background to the present case, as previously recalled in its Judgment on preliminary objections of 24 May 2007 (*Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, pp. 590-591, paras. 13-15). It will return to each of the relevant facts in greater detail when it comes to examine the legal claims relating to them.

16. Mr. Ahmadou Sadio Diallo, a Guinean citizen, settled in the DRC in 1964. There, in 1974, he founded an import-export company, Africom-

Zaire, a *société privée à responsabilité limitée* (private limited liability company, hereinafter "SPRL") incorporated under Zairean law and entered in the Trade Register of the city of Kinshasa. In 1979 Mr. Diallo took part, as *gérant* (manager) of Africom-Zaire, in the founding of a Zairean SPRL specializing in the containerized transport of goods, Africontainers-Zaire. This company was entered in the Trade Register of the city of Kinshasa and Mr. Diallo became its *gérant* (see paragraphs 105-113 below).

17. At the end of the 1980s, Africom-Zaire and Africontainers-Zaire, acting through their *gérant*, Mr. Diallo, instituted proceedings against their business partners in an attempt to recover various debts. The various disputes between Africom-Zaire or Africontainers-Zaire, on the one hand, and their business partners, on the other, continued throughout the 1990s and for the most part remain unresolved today (see paragraphs 109, 114, 136 and 150 below).

18. On 25 January 1988, Mr. Diallo was arrested and imprisoned. On 28 January 1989, the public prosecutor in Kinshasa ordered the release of Mr. Diallo after the case was closed for "inexpediency of prosecution".

19. On 31 October 1995, the Zairean Prime Minister issued an expulsion decree against Mr. Diallo. On 5 November 1995, Mr. Diallo was arrested and placed in detention with a view to his expulsion. After having been released and rearrested, he was finally expelled from Congolese territory on 31 January 1996 (see paragraphs 50-60 below).

20. Having, in its Judgment of 24 May 2007, 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 "in so far as it concerns protection of [his] direct rights as *associé* in Africom-Zaire and Africontainers-Zaire" (see paragraph 6 above), the Court will in turn consider below the questions of the protection of Mr. Diallo's rights as an individual (see paragraphs 21-98) and of the protection of his direct rights as *associé* in Africom-Zaire and Africontainers-Zaire (see paragraphs 99-159). In the light of the conclusions it comes to on these questions, it will then examine the claims for reparation made by Guinea in its final submissions (see paragraphs 160-164).

II. Protection of Mr. Diallo's Rights as an Individual

21. In its arguments as finally stated, Guinea maintains that Mr. Diallo was the victim in 1988-1989 of arrest and detention measures taken by the DRC authorities in violation of international law and in 1995-1996 of arrest, detention and expulsion measures also in violation of international law. Guinea reasons from this that it is entitled to exercise diplomatic protection of its national in this connection.

22. The DRC maintains that the claim relating to the events in 1988-1989 was presented belatedly and must therefore be rejected as inadmissible. In the alternative, the DRC maintains that the said claim must be rejected because of failure to exhaust local remedies, or, otherwise, rejected on the merits. The DRC denies that Mr. Diallo's treatment in 1995-1996 breached its obligations under international law.

23. The Court must therefore first rule on the DRC's argument contesting the admissibility of the claim concerning the events in 1988-1989 before it can, if necessary, consider the merits of that claim. It will then need to consider the merits of the grievances relied upon by Guinea in support of its claim concerning the events in 1995-1996, the admissibility of which is no longer at issue in this phase of the proceedings.

A. The Claim concerning the Arrest and Detention Measures Taken against Mr. Diallo in 1988-1989

24. After asserting that it was only in the Reply that Guinea first set out arguments in respect of the events in 1988-1989, the DRC in the Rejoinder challenged the admissibility of the claim in question as follows:

> "The Applicant is clearly seeking to put forward a new claim by means of the Reply and consequently to amend the Application at an inappropriate stage of the proceedings. This new claim, which is not in any way linked to the main claim concerning the events of 1995 to 1996 forming the basis of this dispute, entitles the [Respondent] to raise the objection of failure to exhaust the local remedies available in the Congolese legal system with respect to the arrest and detention of 1988-1989."

The DRC reiterated this objection in like terms during the oral proceedings.

25. Thus enunciated, the Respondent's objection amounts to a challenge to the admissibility of the claim concerning the events of 1988-1989 on two separate grounds: first, Guinea is alleged to have raised the claim at a stage in the proceedings such that it was late, in view of the lack of a sufficient connection between it and the claim advanced in the Application instituting proceedings; second, this claim is alleged to be barred in any case by an objection based on Mr. Diallo's failure first to exhaust the remedies available in the Congolese legal system.

26. The Court must commence by considering the first of these two grounds of inadmissibility. If it concludes that the claim was in fact late and must therefore be rejected without any consideration on the merits, there will be no need for the Court to proceed any further. If, on the other hand, it concludes that the claim was not asserted belatedly, it will need to consider whether the DRC is entitled to raise, at this stage of the

proceedings, the objection of non-exhaustion of local remedies and, if so, whether that objection is warranted.

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27. In order to decide whether the claim relating to the events in 1988-1989 was raised late, the Court must first ascertain exactly when the claim was first asserted in the present proceedings.

28. To begin, note should be taken that there is nothing in the Application instituting proceedings of 28 December 1998 referring to the events in 1988-1989.

Granted, it is stated under the heading "Subject of the Dispute" as defined in the Application that Mr. Diallo was "unjustly imprisoned . . . despoiled . . . and then expelled". But it is clear from the document annexed to the Application (the Application (Part Two), see paragraph 1 above) that the "imprisonment" in question began on 5 November 1995 and, according to Guinea, ended after a brief interruption with Mr. Diallo's physical expulsion on 31 January 1996 at Kinshasa airport. Nowhere in the Application proper or in the annex to it is there any reference to Mr. Diallo's arrest and detention in 1988-1989.

29. Nor are these facts mentioned in the Memorial Guinea filed pursuant to Article 49, paragraph 1, of the Rules of Court on 23 March 2001. That Memorial contains an extensive discussion of the facts which have given rise to the dispute. In respect of those corresponding to "arrest" and "detention", the events of 1995-1996 are described in detail, in the section "the salient facts", whereas no mention is made of any detention suffered by Mr. Diallo in 1988-1989. True, the Court is requested in the final "submissions" in the Memorial to declare that, "in arbitrarily arresting and expelling . . . Mr. Diallo" ["en procédant à l'arrestation arbitraire et à l'expulsion de . . . M. Diallo"], the DRC committed acts engaging its international responsibility, without any further specification as to the date and nature of the "arbitrary arrest" ["l'arrestation arbitraire"] in question. But it is usual for the facts not to be treated in any detail in the "submissions" which a Memorial is required to contain pursuant to Article 49, paragraph 1, of the Rules of Court, because the submissions follow the statement of facts, which the same provision of the Rules of Court also requires, and they must be read in the light of that statement. In the case at hand, the "arbitrary arrest" referred to in the submissions in Guinea's Memorial can only be the arrest Mr. Diallo suffered, according to the Applicant, in 1995-1996 in view of the carrying out of the expulsion decree issued against him in October 1995, not Mr. Diallo's alleged arrest in 1988-1989, of which there is no mention.

30. It was not until the Applicant filed its Written Observations on the preliminary objections raised by the Respondent on 7 July 2003 that

Mr. Diallo's arrest and detention in 1988-1989 were referred to for the first time. But it is to be observed that the reference appears only in the first chapter, entitled "The salient facts", solely in the context of the refusal of the Zairean authorities to pay sums to Africom-Zaire, and no further mention is made of these events in the later chapters devoted to the discussion from the legal perspective of the DRC's objections to admissibility.

31. In the opinion of the Court, the claim in respect of the events in 1988-1989 cannot be deemed to have been presented by Guinea in its "Written Observations" of 7 July 2003. The purpose of those observations was to respond to the DRC's objections in respect of admissibility, in accordance with the requirements of Article 79, paragraph 5, of the Rules of Court, in the 1978 version applicable to these proceedings. As these were preliminary objections, having been raised by the DRC within the time-limit for the filing of its Counter-Memorial, the proceedings on the merits had been suspended upon receipt by the Registry of the document setting them out, in accordance with Article 79, paragraph 3, of the Rules of Court, in the version applicable to the present proceedings. That is why Guinea confined itself in its Written Observations of 7 July 2003 to submitting at the end that the Court should "[r]eject the Preliminary Objections" and "[d]eclare the Application . . . admissible". As those were incidental proceedings opened by virtue of the DRC's preliminary objections, Guinea could not present any submission other than those concerning the merit of the objections and how the Court should deal with them. Accordingly, the "Written Observations" of 7 July 2003 cannot be interpreted as having introduced an additional claim by the Applicant into the proceedings. And it would have been especially difficult for the Respondent to have so interpreted them, given the object of the incidental proceedings. It is hardly surprising then that the DRC did not refer, either in the oral proceedings on the preliminary objections or in its Counter-Memorial, to the facts alleged by Guinea in respect of 1988-1989.

32. Guinea first presented its claim in respect of the events in 1988-1989 in its Reply, filed on 19 November 2008, after the Court had handed down its Judgment on the preliminary objections. The Reply describes in detail the circumstances surrounding Mr. Diallo's arrest and detention in 1988-1989, states that these "inarguably figure among the wrongful acts for which Guinea is seeking to have the Respondent held internationally responsible" and indicates for the first time what, from the Applicant's point of view, were the international obligations, notably treaty-based ones, breached by the Respondent in connection with the acts in question. Tellingly, whereas in the final submissions in the Memorial Guinea asked the Court to adjudge "that, in arbitrarily arresting and expelling . . . Mr. Ahmadou Sadio Diallo . . . the Democratic Republic of the Congo has committed . . . acts which engage its responsibility" [in the original French: "qu'en procédant *à l'arrestation arbitraire* et à l'expul-

sion de . . . M. Ahmadou Sadio Diallo . . . la RDC a commis des faits . . . qui engagent sa responsabilité" (emphasis added)], the submissions in the Reply are worded identically with the sole exception that the singular term emphasized above is replaced by the plural: "arbitrary arrests" ["des arrestations arbitraires"].

33. In response to the DRC's objection based on the belated assertion of the claim in question, Guinea gave no explanation as to why this claim was introduced at such an advanced stage of the proceedings. It pointed out however that the Court stated in paragraph 45 of its Judgment of 24 May 2007 on the Respondent's preliminary objections in the present case:

> "in its Memorial on the merits, Guinea described in detail the violations of international law allegedly committed by the DRC against Mr. Diallo. Among those cited is the claim that Mr. Diallo was arbitrarily arrested and detained on two occasions, first in 1988 and then in 1995." (*I.C.J. Reports 2007 (II)*, p. 600, para. 45.)

34. The quoted passage erroneously refers to the arrest and detention in 1988 as included among the facts set out in the Memorial. This error of fact had no effect on the conclusion reached by the Court in 2007, namely, that Guinea's Application was admissible in so far as it was aimed at exercising diplomatic protection of Mr. Diallo in respect of alleged violations of his rights as an individual. Guinea has not argued that the reference to the year 1988 in paragraph 45 of the 2007 Judgment has any binding effect on the Court at the present stage of the proceedings, and it clearly has no such effect, since the operative part of the Judgment would have been no different even if the error had not appeared in the quoted paragraph.

35. Having determined exactly when the claim concerning the events in 1988-1989 was introduced into the proceedings, the Court can now decide whether that claim should be considered late and inadmissible as a result. The Judgment handed down on 24 May 2007 on the DRC's preliminary objections does not prevent the Respondent from now raising the objection that the additional claim was presented belatedly, since the claim was introduced, as just stated, after delivery of the 2007 Judgment.

36. On the subject of additional claims introduced — by an Applicant — in the course of proceedings, the Court has developed a jurisprudence which is now well settled and is based on the relevant provisions of the Statute and the Rules of Court, specifically Article 40, paragraph 1, of the former and Article 38, paragraph 2, and Article 49, paragraph 1, of the latter.

37. Article 40, paragraph 1, of the Statute of the Court provides:

"1. Cases are brought before the Court, as the case may be, either by the notification of the special agreement or by a written application addressed to the Registrar. In either case *the subject of the dispute and the parties shall be indicated*." (Emphasis added.)

Article 38, paragraph 2, of the Rules of Court states:

"2. The application shall specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based; *it shall also specify the precise nature of the claim, together with a succinct statement of the facts and grounds on which the claim is based*." (Emphasis added.)

Article 49, paragraph 1, of the Rules of Court reads:

"1. A Memorial shall contain a statement of the relevant facts, a statement of law, *and the submissions*." (Emphasis added.)

38. The Court has deemed these provisions "essential from the point of view of legal security and the good administration of justice" (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 267, para. 69). It has further observed that they were already, in substance, part of the text of the Statute of the Permanent Court of International Justice, adopted in 1920, and of the text of the first Rules of that Court, adopted in 1922 *(ibid.)*.

39. From these provisions, the Court has concluded that additional claims formulated in the course of proceedings are inadmissible if they would result, were they to be entertained, in transforming "the subject of the dispute originally brought before [the Court] under the terms of the Application" (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 695, para. 108). In this respect, it is the Application which is relevant and the Memorial, "though it may elucidate the terms of the Application, must not go beyond the limits of the claim as set out therein" (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 267, para. 69, citing the Order of the Permanent Court of 4 February 1933 in the case concerning *Prince von Pless Administration* (*Order of 4 February 1933, P.C.I.J., Series A/B, No. 52*, p. 14)). *A fortiori*, a claim formulated subsequent to the Memorial, as is the case here, cannot transform the subject of the dispute as delimited by the terms of the Application.

40. The Court has however also made clear that "the mere fact that a claim is new is not in itself decisive for the issue of admissibility" and that:

"In order to determine whether a new claim introduced during the course of the proceedings is admissible [it] will need to consider whether, 'although formally a new claim, the claim in question can

be considered as included in the original claim in substance'" (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 695, para. 110, in part quoting *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 265-266, para. 65).

41. In other words, a new claim is not inadmissible *ipso facto*; the decisive consideration is the nature of the connection between that claim and the one formulated in the Application instituting proceedings.

In this regard the Court has also had the occasion to point out that, to find that a new claim, as a matter of substance, has been included in the original claim, "it is not sufficient that there should be links between them of a general nature" (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 695, para. 110).

Drawing upon earlier cases, the Judgment handed down in the case concerning *Certain Phosphate Lands in Nauru (Nauru* v. *Australia) (Preliminary Objections, Judgment, I.C.J. Reports 1992)* formulated two alternative tests.

Either the additional claim must be implicit in the Application (as was the case of one of the Applicant's final submissions in the case concerning *Temple of Preah Vihear (Cambodia* v. *Thailand)* (see the Judgment on the merits, *I.C.J. Reports 1962*, p. 36)) or it must arise directly out of the question which is the subject-matter of the Application (as was the case of one of Nicaragua's final submissions in the case concerning *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)* cited above, paragraph 114).

42. These are the tests the Court now has to apply in the present case to determine whether Guinea's claim in respect of the events in 1988-1989, which is "formally new" vis-à-vis the initial claim, is admissible.

43. The Court finds itself unable to consider this claim as being "implicit" in the original claim as set forth in the Application. Leaving aside the alleged violations of rights belonging to the companies owned by Mr. Diallo, in respect of which the Application was held inadmissible in the Judgment rendered on the preliminary objections, and the violations of Mr. Diallo's direct rights as *associé*, to be dealt with below, the initial claim concerned violations of Mr. Diallo's individual rights alleged by Guinea to have resulted from the arrest, detention and expulsion measures taken against him in 1995-1996. It is hard to see how allegations concerning other arrest and detention measures, taken at a different time and in different circumstances, could be regarded as "implicit" in the Application concerned with the events in 1995-1996. This is especially so given that the legal bases for Mr. Diallo's arrests in 1988-1989, on the one hand, and 1995-1996, on the other, were completely different. His

first detention was carried out as part of a criminal investigation into fraud opened by the Prosecutor's Office in Kinshasa. The second was ordered with a view to implementing an expulsion decree, that is to say, as part of an administrative procedure. Among other consequences, it follows that the applicable international rules — which the DRC is accused of having violated — are different in part, and that the domestic remedies on whose prior exhaustion the exercise of diplomatic protection is as a rule contingent are also different in nature.

44. The last point deserves particular attention. Since, as noted above, the new claim was introduced only at the Reply stage, the Respondent was no longer able to assert preliminary objections to it, since such objections have to be submitted, under Article 79 of the Rules of Court as applicable to these proceedings, within the time-limit fixed for the delivery of the Counter-Memorial (and, under that Article as in force since 1 February 2001, within three months following delivery of the Memorial). A Respondent's right to raise preliminary objections, that is to say, objections which the Court is required to rule on before the debate on the merits begins (see *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 26, para. 47), is a fundamental procedural right. This right is infringed if the Applicant asserts a substantively new claim after the Counter-Memorial, which is to say at a time when the Respondent can still raise objections to admissibility and jurisdiction, but not preliminary objections. This is especially so in a case involving diplomatic protection if, as in the present instance, the new claim concerns facts in respect of which the remedies available in the domestic system are different from those which could be pursued in respect of the facts underlying the initial claim.

45. Thus, it cannot be said that the additional claim in respect of the events in 1988-1989 was "implicit" in the initial Application.

46. For similar reasons, the Court sees no possibility of finding that the new claim "arises directly out of the question which is the subject-matter of the Application". Obviously, the mere fact that two questions are closely related in subject-matter, in that they concern more or less comparable facts and similar rights, does not mean that one arises out of the other. Moreover, as already observed, the facts involved in Mr. Diallo's detentions in 1988-1989 and in 1995-1996 are dissimilar in nature, the domestic legal framework is different in each case and the rights guaranteed by international law are far from perfectly coincident. It would be particularly odd to regard the claim concerning the events in 1988-1989 as "arising directly" out of the issue forming the subject-matter of the Application in that the claim concerns facts, perfectly well known to

Guinea on the date the Application was filed, which long pre-date those in respect of which the Application (in that part of it concerning the alleged violation of Mr. Diallo's individual rights) was presented.

47. For all of the reasons set out above, the Court finds that the claim concerning the arrest and detention measures to which Mr. Diallo was subject in 1988-1989 is inadmissible.

48. In light of the above finding, there is no need for the Court to consider whether the DRC is entitled to raise, at this stage in the proceedings, an objection to the claim in question based on the failure to exhaust local remedies, or, if so, whether the objection would be warranted.

B. The Claim concerning the Arrest, Detention and Expulsion Measures Taken against Mr. Diallo in 1995-1996

1. The facts

49. Some of the facts relating to the arrest, detention and expulsion measures taken against Mr. Diallo between October 1995 and January 1996 are acknowledged by both Parties; others, in contrast, are in dispute.

50. The facts on which the Parties are in agreement are as follows.

An expulsion decree was issued against Mr. Diallo on 31 October 1995. This decree, signed by the Prime Minister of Zaire, stated that: "[the] presence and personal conduct [of Mr. Diallo] have breached Zairean public order, especially in the economic, financial and monetary areas, and continue to do so".

On 5 November 1995, further to the above-mentioned decision and with a view to its implementation, Mr. Diallo was arrested and placed in detention in the premises of the immigration service.

On 10 January 1996, Mr. Diallo was released.

On 31 January 1996, Mr. Diallo was expelled to Abidjan, on a flight from Kinshasa airport. He was served with a notice, drawn up that day, indicating that he was the subject of a "*refoulement* on account of unauthorized residence".

51. However, the Parties disagree markedly concerning, on the one hand, Mr. Diallo's situation between 5 November 1995, when he was first arrested, and his release on 10 January 1996, and, on the other hand, his situation during the period between this latter date and his actual expulsion on 31 January 1996.

As regards the first of these periods, Guinea maintains that Mr. Diallo remained continuously in detention: he is thus said to have been detained for 66 consecutive days. In contrast, the DRC contends that Mr. Diallo was released on 7 November 1995 — two days after his arrest — and

placed under surveillance. According to the DRC, having resumed his activities in breach of public order, he was rearrested on an unspecified date, but in any event not earlier than 2 January 1996. He is then said to have been released for a second time on 10 January 1996, because the immigration service could not find a flight leaving for Conakry within the eight-day legal time-limit following his latest arrest. During the first period in question, therefore, according to the DRC, Mr. Diallo was only detained for two days in the first instance and subsequently for no longer than eight days.

With regard to the period from 10 January to 31 January 1996, Guinea maintains that Mr. Diallo was rearrested on 14 January 1996, on the order of the Congolese Prime Minister for the purpose of effecting the expulsion decree, and kept in detention until he was deported from Kinshasa airport on 31 January, i.e., for another 17 days. On the other hand, the DRC asserts that Mr. Diallo remained at liberty from 10 January to 25 January 1996, on which date he was arrested prior to being expelled a few days later, on 31 January.

52. The Parties also differ as to how Mr. Diallo was treated during the periods when he was deprived of his liberty, although on this aspect of the dispute the disagreement relates less to the facts themselves than to their characterization. According to Guinea, Mr. Diallo was held in dire and difficult conditions; he was only able to receive food because of the visits from his next of kin; and he was subjected to death threats from the persons responsible for guarding him. The DRC contests this final point; for the rest, it maintains that the conditions of Mr. Diallo's detention did not amount to inhuman and degrading treatment in breach of international law.

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53. Faced with a disagreement between the Parties as to the existence of the facts relevant to the decision of the case, the Court must first address the question of the burden of proof.

54. As a general rule, it is for the party which alleges a fact in support of its claims to prove the existence of that fact (see, most recently, the Judgment delivered in the case concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), I.C.J. Reports 2010 (I)*, p. 71, para. 162).

However, it would be wrong to regard this rule, based on the maxim *onus probandi incumbit actori*, as an absolute one, to be applied in all circumstances. The determination of the burden of proof is in reality dependent on the subject-matter and the nature of each dispute brought before the Court; it varies according to the type of facts which it is necessary to establish for the purposes of the decision of the case.

55. In particular, where, as in these proceedings, it is alleged that a person has not been afforded, by a public authority, certain procedural guarantees to which he was entitled, it cannot as a general rule be dem-

anded of the Applicant that it prove the negative fact which it is asserting. A public authority is generally able to demonstrate that it has followed the appropriate procedures and applied the guarantees required by law — if such was the case — by producing documentary evidence of the actions that were carried out. However, it cannot be inferred in every case where the Respondent is unable to prove the performance of a procedural obligation that it has disregarded it: that depends to a large extent on the precise nature of the obligation in question; some obligations normally imply that written documents are drawn up, while others do not. The time which has elapsed since the events must also be taken into account.

56. It is for the Court to evaluate all the evidence produced by the two Parties and duly subjected to adversarial scrutiny, with a view to forming its conclusions. In short, when it comes to establishing facts such as those which are at issue in the present case, neither party is alone in bearing the burden of proof.

57. It is on the basis of the considerations set out above that the Court will now pronounce on the facts which remain in dispute between the Parties.

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58. The Court is not convinced by the DRC's allegation that Mr. Diallo was released as early as 7 November 1995 and then only rearrested at the beginning of January 1996, before being freed again on 10 January. The Court's assessment is based on the following reasons.

There are two documents in the case file which prove that Mr. Diallo was imprisoned on 5 November 1995 and freed again on 10 January 1996: these are the committal note *(billet d'écrou)* bearing the first of these two dates and the release document *(billet de mise en liberté)* which bears the second. If it were true, as the DRC claims, that between these two dates Mr. Diallo was released for the first time and then rearrested, it is hardly comprehensible that the Respondent has been unable to produce any administrative documents — or any other piece of evidence — to establish the reality of those events. It is true that on 30 November 1995 — a date when Mr. Diallo was at liberty according to the DRC's version of the facts, whereas according to Guinea's allegations, he was in prison — he wrote a letter to the Zairean Prime Minister and Minister of Finance transmitting to them the files concerning the debts claimed by his companies, in which he makes no reference to his detention. But the existence of this correspondence far from proves, contrary to the assertions of the DRC, that Mr. Diallo was at liberty on that date. It is a fact that, during the periods when he was deprived of his liberty, Mr. Diallo was largely able to communicate with the outside world, and

that he was not prevented from engaging in written correspondence. The letter of 30 November 1995 is therefore in no way conclusive.

59. Accordingly, the Court concludes that Mr. Diallo remained in continuous detention for 66 days, from 5 November 1995 to 10 January 1996.

60. On the other hand, the Court does not accept the Applicant's assertion that Mr. Diallo was rearrested on 14 January 1996 and remained in detention until he was expelled on 31 January. This claim, which is contested by the Respondent, is not supported by any evidence at all; the Court also observes that, in the written proceedings, Guinea stated the date of this alleged arrest to be 17 and not 14 January. The Court therefore cannot regard the second period of detention claimed by the Applicant, lasting 17 days, as having been established. However, since the DRC has acknowledged that Mr. Diallo was detained, at the latest, on 25 January 1996, the Court will take it as established that he was in detention between 25 and 31 January 1996.

61. Nor can the Court accept the allegations of death threats said to have been made against Mr. Diallo by his guards, in the absence of any evidence in support of these allegations.

62. As regards the question of compliance of the authorities of the DRC with their obligations under Article 36 (1) *(b)* of the Vienna Convention on Consular Relations, the relevant facts will be examined at a later stage, when the Court deals with that question (see paragraphs 90-97 below).

2. Consideration of the facts in the light of the applicable international law

63. Guinea maintains that the circumstances in which Mr. Diallo was arrested, detained and expelled in 1995-1996 constitute in several respects a breach by the DRC of its international obligations.

First, the expulsion of Mr. Diallo is said to have breached Article 13 of the International Covenant on Civil and Political Rights (hereinafter the "Covenant") of 16 December 1966, to which Guinea and the DRC became parties on 24 April 1978 and 1 February 1977 respectively, as well as Article 12, paragraph 4, of the African Charter on Human and Peoples' Rights (hereinafter the "African Charter") of 27 June 1981, which entered into force for Guinea on 21 October 1986, and for the DRC on 28 October 1987.

Second, Mr. Diallo's arrest and detention are said to have violated Article 9, paragraphs 1 and 2, of the Covenant, and Article 6 of the African Charter.

Third, Mr. Diallo is said to have suffered conditions in detention comparable to forms of inhuman or degrading treatment that are prohibited by international law.

Fourth and last, Mr. Diallo is said not to have been informed, when he

was arrested, of his right to request consular assistance from his country, in violation of Article 36 (1) *(b)* of the Vienna Convention on Consular Relations of 24 April 1963, which entered into force for Guinea on 30 July 1988 and for the DRC on 14 August 1976.

The Court will examine in turn whether each of these assertions is well-founded.

(a) *The alleged violation of Article 13 of the Covenant and Article 12, paragraph 4, of the African Charter*

64. Article 13 of the Covenant reads as follows:

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

Likewise, Article 12, paragraph 4, of the African Charter provides that:

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

65. It follows from the terms of the two provisions cited above that the expulsion of an alien lawfully in the territory of a State which is a party to these instruments can only be compatible with the international obligations of that State if it is decided in accordance with "the law", in other words the domestic law applicable in that respect. Compliance with international law is to some extent dependent here on compliance with internal law. However, it is clear that while "accordance with law" as thus defined is a necessary condition for compliance with the above-mentioned provisions, it is not the sufficient condition. First, the applicable domestic law must itself be compatible with the other requirements of the Covenant and the African Charter; second, an expulsion must not be arbitrary in nature, since protection against arbitrary treatment lies at the heart of the rights guaranteed by the international norms protecting human rights, in particular those set out in the two treaties applicable in this case.

66. The interpretation above is fully corroborated by the jurisprudence of the Human Rights Committee established by the Covenant to ensure compliance with that instrument by the States parties (see for example, in this respect, *Maroufidou* v. *Sweden*, No. 58/1979, para. 9.3; *Human Rights*

Committee, General Comment No. 15: The Position of Aliens under the Covenant).

Since it was created, the Human Rights Committee has built up a considerable body of interpretative case law, in particular through its findings in response to the individual communications which may be submitted to it in respect of States parties to the first Optional Protocol, and in the form of its "General Comments".

Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled.

67. Likewise, when the Court is called upon, as in these proceedings, to apply a regional instrument for the protection of human rights, it must take due account of the interpretation of that instrument adopted by the independent bodies which have been specifically created, if such has been the case, to monitor the sound application of the treaty in question. In the present case, the interpretation given above of Article 12, paragraph 4, of the African Charter is consonant with the case law of the African Commission on Human and Peoples' Rights established by Article 30 of the said Charter (see, for example, *Kenneth Good* v. *Republic of Botswana*, No. 313/05, para. 204; *World Organization against Torture and International Association of Democratic Lawyers, International Commission of Jurists, Inter-African Union for Human Rights* v. *Rwanda*, No. 27/89, 46/91, 49/91, 99/93).

68. The Court also notes that the interpretation by the European Court of Human Rights and the Inter-American Court of Human Rights, respectively, of Article 1 of Protocol No. 7 to the (European) Convention for the Protection of Human Rights and Fundamental Freedoms and Article 22, paragraph 6, of the American Convention on Human Rights — the said provisions being close in substance to those of the Covenant and the African Charter which the Court is applying in the present case — is consistent with what has been found in respect of the latter provisions in paragraph 65 above.

69. According to Guinea, the decision to expel Mr. Diallo first breached Article 13 of the Covenant and Article 12, paragraph 4, of the African Charter because it was not taken in accordance with Congolese domestic law, for three reasons: it should have been signed by the President of the Republic and not by the Prime Minister; it should have been preceded by consultation of the National Immigration Board; and it should have indicated the grounds for the expulsion, which it failed to do.

70. The Court is not convinced by the first of these arguments. It is true that Article 15 of the Zairean Legislative Order of 12 September 1983 concerning immigration control, in the version in force at the time, conferred on the President of the Republic, and not the Prime Minister, the power to expel an alien. However, the DRC explains that since the entry into force of the Constitutional Act of 9 April 1994, the powers conferred by particular legislative provisions on the President of the Republic are deemed to have been transferred to the Prime Minister — even though such provisions have not been formally amended — under Article 80 (2) of the new Constitution, which provides that "the Prime Minister shall exercise regulatory power by means of decrees deliberated upon in the Council of Ministers".

The Court recalls that it is for each State, in the first instance, to interpret its own domestic law. The Court does not, in principle, have the power to substitute its own interpretation for that of the national authorities, especially when that interpretation is given by the highest national courts (see, for this latter case, *Serbian Loans, Judgment No. 14, 1929, P.C.I.J., Series A, No. 20*, p. 46 and *Brazilian Loans, Judgment No. 15, 1929, P.C.I.J., Series A, No. 21*, p. 124). Exceptionally, where a State puts forward a manifestly incorrect interpretation of its domestic law, particularly for the purpose of gaining an advantage in a pending case, it is for the Court to adopt what it finds to be the proper interpretation.

71. That is not the situation here. The DRC's interpretation of its Constitution, from which it follows that Article 80 (2) produces certain effects on the laws already in force on the date when that Constitution was adopted, does not seem manifestly incorrect. It has not been contested that this interpretation corresponded, at the time in question, to the general practice of the constitutional authorities. The DRC has included in the case file, in this connection, a number of other expulsion decrees issued at the same time and all signed by the Prime Minister. Consequently, although it would be possible in theory to discuss the validity of that interpretation, it is certainly not for the Court to adopt a different interpretation of Congolese domestic law for the purposes of the decision of this case. It therefore cannot be concluded that the decree expelling Mr. Diallo was not issued "in accordance with law" by virtue of the fact that it was signed by the Prime Minister.

72. However, the Court is of the opinion that this decree did not comply with the provisions of Congolese law for two other reasons.

First, it was not preceded by consultation of the National Immigration Board, whose opinion is required by Article 16 of the above-mentioned Legislative Order concerning immigration control before any expulsion measure is taken against an alien holding a residence permit. The DRC has not contested either that Mr. Diallo's situation placed him within the scope of this provision, or that consultation of the Board was neglected. This omission is confirmed by the absence in the decree of a citation mentioning the Board's opinion, whereas all the other expulsion decrees included in the case file specifically cite such an opinion, in accordance

with Article 16 of the Legislative Order, moreover, which concludes by stipulating that the decision "shall mention the fact that the Board was consulted".

Second, the expulsion decree should have been "reasoned" pursuant to Article 15 of the 1983 Legislative Order; in other words, it should have indicated the grounds for the decision taken. The fact is that the general, stereotyped reasoning included in the decree cannot in any way be regarded as meeting the requirements of the legislation. The decree confines itself to stating that the "presence and conduct [of Mr. Diallo] have breached Zairean public order, especially in the economic, financial and monetary areas, and continue to do so". The first part of this sentence simply paraphrases the legal basis for any expulsion measure according to Congolese law, since Article 15 of the 1983 Legislative Order permits the expulsion of any alien "who, by his presence or conduct, breaches or threatens to breach the peace or public order". As for the second part, while it represents an addition, this is so vague that it is impossible to know on the basis of which activities the presence of Mr. Diallo was deemed to be a threat to public order (in the same sense, *mutatis mutandis*, see *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 231, para. 152).

The formulation used by the author of the decree therefore amounts to an absence of reasoning for the expulsion measure.

73. The Court thus concludes that in two important respects, concerning procedural guarantees conferred on aliens by Congolese law and aimed at protecting the persons in question against the risk of arbitrary treatment, the expulsion of Mr. Diallo was not decided "in accordance with law".

Consequently, regardless of whether that expulsion was justified on the merits, a question to which the Court will return later in this Judgment, the disputed measure violated Article 13 of the Covenant and Article 12, paragraph 4, of the African Charter.

74. Furthermore, the Court considers that Guinea is justified in contending that the right afforded by Article 13 to an alien who is subject to an expulsion measure to "submit the reasons against his expulsion and to have his case reviewed by . . . the competent authority" was not respected in the case of Mr. Diallo.

It is indeed certain that, neither before the expulsion decree was signed on 31 October 1995, nor subsequently but before the said decree was implemented on 31 January 1996, was Mr. Diallo allowed to submit his defence to a competent authority in order to have his arguments taken into consideration and a decision made on the appropriate response to be given to them.

It is true, as the DRC has pointed out, that Article 13 of the Covenant provides for an exception to the right of an alien to submit his reasons where "compelling reasons of national security" require otherwise. The Respondent maintains that this was precisely the case here. However, it

has not provided the Court with any tangible information that might establish the existence of such "compelling reasons". In principle, it is doubtless for the national authorities to consider the reasons of public order that may justify the adoption of one police measure or another. But when this involves setting aside an important procedural guarantee provided for by an international treaty, it cannot simply be left in the hands of the State in question to determine the circumstances which, exceptionally, allow that guarantee to be set aside. It is for the State to demonstrate that the "compelling reasons" required by the Covenant existed, or at the very least could reasonably have been concluded to have existed, taking account of the circumstances which surrounded the expulsion measure.

In the present case, no such demonstration has been provided by the Respondent.

On these grounds too, the Court concludes that Article 13 of the Covenant was violated in respect of the circumstances in which Mr. Diallo was expelled.

(b) *The alleged violation of Article 9, paragraphs 1 and 2, of the Covenant and Article 6 of the African Charter*

75. Article 9, paragraphs 1 and 2, of the Covenant provides that:

> "1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
>
> 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him."

Article 6 of the African Charter provides that:

> "Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained."

76. According to Guinea, the above-mentioned provisions were violated when Mr. Diallo was arrested and detained in 1995-1996 for the purpose of implementing the expulsion decree, for a number of reasons.

First, the deprivations of liberty which he suffered did not take place "in accordance with such procedure as [is] established by law" within the meaning of Article 9, paragraph 1, of the Covenant, or on the basis of "conditions previously laid down by law" within the meaning of Article 6 of the African Charter.

Second, they were "arbitrary" within the meaning of these provisions.

Third, Mr. Diallo was not informed, at the time of his arrests, of the

reasons for those arrests, nor was he informed of the charges against him, which constituted a violation of Article 9, paragraph 2, of the Covenant.

The Court will examine in turn whether each of these assertions is well-founded.

77. First of all, it is necessary to make a general remark. The provisions of Article 9, paragraphs 1 and 2, of the Covenant, and those of Article 6 of the African Charter, apply in principle to any form of arrest or detention decided upon and carried out by a public authority, whatever its legal basis and the objective being pursued (see in this respect, with regard to the Covenant, the Human Rights Committee's General Comment No. 8 of 30 June 1982 concerning the right to liberty and security of person *(Human Rights Committee, CCPR General Comment No. 8: Article 9 (Right to Liberty and Security of Person))*). The scope of these provisions is not, therefore, confined to criminal proceedings; they also apply, in principle, to measures which deprive individuals of their liberty that are taken in the context of an administrative procedure, such as those which may be necessary in order to effect the forcible removal of an alien from the national territory. In this latter case, it is of little importance whether the measure in question is characterized by domestic law as an "expulsion" or a *"refoulement"*. The position is only different as regards the requirement in Article 9, paragraph 2, of the Covenant that the arrested person be "informed of any charges" against him, a requirement which is only meaningful in the context of criminal proceedings.

78. The Court now turns to the first of Guinea's three allegations, namely, that Mr. Diallo's arrest and detention were not in accordance with the requirements of the law of the DRC. It should first be noted that Mr. Diallo's arrest on 5 November 1995 and his detention until 10 January 1996 (see paragraph 58 above) were for the purpose of enabling the expulsion decree issued against him on 31 October 1995 to be effected. The second arrest, on 25 January 1996 at the latest, was also for the purpose of implementing that decree: the mention of a *"refoulement"* on account of "illegal residence" in the notice served on Mr. Diallo on 31 January 1996, the day when he was actually expelled, was clearly erroneous, as the DRC acknowledges.

79. Article 15 of the Legislative Order of 12 September 1983 concerning immigration control, as in force at the time of Mr. Diallo's arrest and detention, provided that an alien "who is likely to evade implementation" of an expulsion measure may be imprisoned for an initial period of 48 hours, which may be "extended by 48 hours at a time, but shall not exceed eight days". The Court finds that Mr. Diallo's arrest and detention were not in accordance with these provisions. There is no evidence that the authorities of the DRC sought to determine whether Mr. Diallo was "likely to evade implementation" of the expulsion decree and, therefore, whether it was necessary to detain him. The fact that he made no attempt to evade expulsion after he was released on 10 January 1996 sug-

gests that there was no need for his detention. The overall length of time for which he was detained — 66 days following his initial arrest and at least six more days following the second arrest — greatly exceeded the maximum period permitted by Article 15. In addition, the DRC has produced no evidence to show that the detention was reviewed every 48 hours, as required by that provision.

80. The Court further finds, in response to the second allegation set out above (see paragraph 76 above), that Mr. Diallo's arrest and detention were arbitrary within the meaning of Article 9, paragraph 1, of the Covenant and Article 6 of the African Charter.

81. Admittedly, in principle an arrest or detention aimed at effecting an expulsion decision taken by the competent authority cannot be characterized as "arbitrary" within the meaning of the above-mentioned provisions, even if the lawfulness of the expulsion decision might be open to question. Consequently, the fact that the decree of 31 October 1995 was not issued, in some respects, "in accordance with law", as the Court has noted above in relation to Article 13 of the Covenant and Article 12, paragraph 4, of the African Charter, is not sufficient to render the arrest and detention aimed at implementing that decree "arbitrary" within the meaning of Article 9, paragraph 1, of the Covenant and Article 6 of the African Charter.

82. However, account should be taken here of the number and seriousness of the irregularities tainting Mr. Diallo's detentions. As noted above, he was held for a particularly long time and it would appear that the authorities made no attempt to ascertain whether his detention was necessary.

Moreover, the Court can but find not only that the decree itself was not reasoned in a sufficiently precise way, as was pointed out above (see paragraph 72), but that throughout the proceedings, the DRC has never been able to provide grounds which might constitute a convincing basis for Mr. Diallo's expulsion. Allegations of "corruption" and other offences have been made against Mr. Diallo, but no concrete evidence has been presented to the Court to support these claims. These accusations did not give rise to any proceedings before the courts or, *a fortiori*, to any conviction. Furthermore, it is difficult not to discern a link between Mr. Diallo's expulsion and the fact that he had attempted to recover debts which he believed were owed to his companies by, amongst others, the Zairean State or companies in which the State holds a substantial portion of the capital, bringing cases for this purpose before the civil courts. Under these circumstances, the arrest and detention aimed at allowing such an expulsion measure, one without any defensible basis, to be effected can only be characterized as arbitrary within the meaning of Article 9, paragraph 1, of the Covenant and Article 6 of the African Charter.

83. Finally, the Court turns to the allegation relating to Article 9, paragraph 2, of the Covenant.

For the reasons discussed above (see paragraph 77), Guinea cannot effectively argue that at the time of each of his arrests (in November 1995 and January 1996), Mr. Diallo was not informed of the "charges against him", as the Applicant contends is required by Article 9, paragraph 2, of the Covenant. This particular provision of Article 9 is applicable only when a person is arrested in the context of criminal proceedings; that was not the case for Mr. Diallo.

84. On the other hand, Guinea is justified in arguing that Mr. Diallo's right to be "informed, at the time of arrest, of the reasons for his arrest" — a right guaranteed in all cases, irrespective of the grounds for the arrest — was breached.

The DRC has failed to produce a single document or any other form of evidence to prove that Mr. Diallo was notified of the expulsion decree at the time of his arrest on 5 November 1995, or that he was in some way informed, at that time, of the reason for his arrest. Although the expulsion decree itself did not give specific reasons, as pointed out above (see paragraph 72), the notification of this decree at the time of Mr. Diallo's arrest would have informed him sufficiently of the reasons for that arrest for the purposes of Article 9, paragraph 2, since it would have indicated to Mr. Diallo that he had been arrested for the purpose of an expulsion procedure and would have allowed him, if necessary, to take the appropriate steps to challenge the lawfulness of the decree. However, no information of this kind was provided to him; the DRC, which should be in a position to prove the date on which Mr. Diallo was notified of the decree, has presented no evidence to that effect.

85. The same applies to Mr. Diallo's arrest in January 1996. On that date, it has also not been established that Mr. Diallo was informed that he was being forcibly removed from Congolese territory in execution of an expulsion decree. Moreover, on the day when he was actually expelled, he was given the incorrect information that he was the subject of a *"refoulement"* on account of his "illegal residence" (see paragraph 50 above). This being so, the requirement for him to be informed, laid down by Article 9, paragraph 2, of the Covenant, was not complied with on that occasion either.

(c) *The alleged violation of the prohibition on subjecting a detainee to mistreatment*

86. Guinea maintains that Mr. Diallo was subjected to mistreatment during his detention, because of the particularly tough conditions thereof, because he was deprived of his right to communicate with his lawyers and with the Guinean Embassy, and because he received death threats from the guards.

87. The Applicant invokes in this connection Article 10, paragraph 1, of the Covenant, according to which: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

Article 7 of the Covenant, providing that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment", and Article 5 of the African Charter, stating that "[e]very individual shall have the right to the respect of the dignity inherent in a human being", are also pertinent in this area.

There is no doubt, moreover, that the prohibition of inhuman and degrading treatment is among the rules of general international law which are binding on States in all circumstances, even apart from any treaty commitments.

88. The Court notes, however, that Guinea has failed to demonstrate convincingly that Mr. Diallo was subjected to such treatment during his detention. There is no evidence to substantiate the allegation that he received death threats. It seems that Mr. Diallo was able to communicate with his relatives and his lawyers without any great difficulty and, even if this had not been the case, such constraints would not per se have constituted treatment prohibited by Article 10, paragraph 1, of the Covenant and by general international law. The question of Mr. Diallo's communications with the Guinean authorities is distinct from that of compliance with the provisions currently under examination and will be addressed under the next heading, in relation to Article 36, paragraph 1 *(b)*, of the Vienna Convention on Consular Relations. Finally, that Mr. Diallo was fed thanks to the provisions his relatives brought to his place of detention — which the DRC does not contest — is insufficient in itself to prove mistreatment, since access by the relatives to the individual deprived of his liberty was not hindered.

89. In conclusion, the Court finds that it has not been demonstrated that Mr. Diallo was subjected to treatment prohibited by Article 10, paragraph 1, of the Covenant.

(d) *The alleged violation of the provisions of Article 36, paragraph 1* (b)*, of the Vienna Convention on Consular Relations*

90. Article 36, paragraph 1 *(b)*, of the Vienna Convention on Consular Relations provides that:

> "[I]f 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."

91. These provisions, as is clear from their very wording, are applicable to any deprivation of liberty of whatever kind, even outside the context of pursuing perpetrators of criminal offences. They therefore apply in the present case, which the DRC does not contest.

92. According to Guinea, these provisions were violated when Mr. Diallo was arrested in November 1995 and January 1996, because he was not informed "without delay" at those times of his right to seek assistance from the consular authorities of his country.

93. At no point in the written proceedings or the first round of oral argument did the DRC contest the accuracy of Guinea's allegations in this respect; it did not attempt to establish, or even claim, that the information called for by the last sentence of the quoted provision was supplied to Mr. Diallo, or that it was supplied "without delay", as the text requires.

The Respondent replied to the Applicant's allegation with two arguments: that Guinea had failed to prove that Mr. Diallo requested the Congolese authorities to notify the Guinean consular post without delay of his situation; and that the Guinean Ambassador in Kinshasa was aware of Mr. Diallo's arrest and detention, as evidenced by the steps he took on his behalf.

94. It was only in replying to a question put by a judge during the hearing of 26 April 2010 that the DRC asserted for the first time that it had "orally informed Mr. Diallo immediately after his detention of the possibility of seeking consular assistance from his State" (written reply by the DRC handed in to the Registry on 27 April 2010 and confirmed orally at the hearing of 29 April, during the second round of oral argument).

95. The Court notes that the two arguments put forward by the DRC before the second round of oral pleadings lack any relevance. It is for the authorities of the State which proceeded with the arrest to inform on their own initiative the arrested person of his right to ask for his consulate to be notified; the fact that the person did not make such a request not only fails to justify non-compliance with the obligation to inform which is incumbent on the arresting State, but could also be explained in some cases precisely by the fact that the person had not been informed of his rights in that respect (*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 46, para. 76). Moreover, the fact that the consular authorities of the national State of the arrested person have learned of the arrest through other channels does not remove any violation that may have been committed of the obligation to inform that person of his rights "without delay".

96. As for the DRC's assertion, made in the conditions described above, that Mr. Diallo was "orally informed" of his rights upon his arrest, the Court can but note that it was made very late in the proceedings, whereas the point was at issue from the beginning, and that there is not the slightest piece of evidence to corroborate it. The Court is therefore unable to give it any credit.

97. Consequently, the Court finds that there was a violation by the DRC of Article 36, paragraph 1 *(b)*, of the Vienna Convention on Consular Relations.

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98. Guinea has further contended that Mr. Diallo's expulsion, given the circumstances in which it was carried out, violated his right to property, guaranteed by Article 14 of the African Charter, because he had to leave behind most of his assets when he was forced to leave the Congo.

In the Court's view, this aspect of the dispute has less to do with the lawfulness of Mr. Diallo's expulsion in the light of the DRC's international obligations and more to do with the damage Mr. Diallo suffered as a result of the internationally wrongful acts of which he was a victim. The Court will therefore examine it later in this Judgment, within the context of the question of reparation owed by the Respondent (see paragraphs 160-164 below).

III. Protection of Mr. Diallo's Direct Rights as *Associé* in Africom-Zaire and Africontainers-Zaire

99. Africom-Zaire and Africontainers-Zaire are two corporate entities incorporated under Zairean law in the form of *sociétés privées à responsabilité limitée* (SPRLs) and entered in the Trade Register of the city of Kinshasa. Because the SPRL, as a form of commercial company, is specific to civil-law systems and has no precise equivalent in common-law systems, the Court will use certain French terms of DRC law in the English version of the present Judgment, namely, *parts sociales*, *associé*, *gérant*, *gérance* and *gérant associé*. The capital of an SPRL is divided into equal *parts sociales*. Under Article 36 of the Decree of the Independent State of Congo of 27 February 1887 on commercial corporations, as amended by the Decree of 23 June 1960 (hereinafter: "the 1887 Decree"), the *parts* are nominative and not freely transferable. They are also "uniform", i.e., they confer identical rights upon their holders (called *associés*: see, e.g., Articles 43, 44, 45 and 51 of the 1887 Decree). Management (the *gérance*) of an SPRL is entrusted to an agent, called the *gérant*, who may also be an *associé* (in which case there is a *gérant associé*).

100. In its Judgment of 24 May 2007, the Court stated that it did not have "to determine, at [the preliminary objections] stage . . ., which specific rights appertain to the status of *associé* and which to the position of *gérant* of an SPRL under Congolese law", but that it was

> "at the merits stage, as appropriate, that [it] will have to define the precise nature, content and limits of these rights. It is also at that stage of the proceedings that it will be for the Court, if need be, to assess the effects on these various rights of the action against Mr. Diallo." (*I.C.J. Reports 2007 (II)*, p. 606, para. 66.)

101. In its final submissions, Guinea asked the Court to find that, on the issue of Mr. Diallo's direct rights as *associé*, the DRC had committed several internationally wrongful acts which engage its responsibility towards Guinea. Specifically, Guinea contended that the DRC had breached its international obligations by:

> "depriving [Mr. Diallo] 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*; [by] 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 [by] expropriating *de facto* Mr. Diallo's property".

102. In contrast, the DRC reiterated in its final submissions that it had committed no internationally wrongful acts towards Guinea in respect of Mr. Diallo's direct rights as *associé* in Africom-Zaire and Africontainers-Zaire.

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103. Before addressing the various claims made by the Parties in this regard, it is necessary for the Court to clarify matters relating to the legal existence of the two companies and to Mr. Diallo's role and participation in them. Indeed, as the Court found in its Judgment of 24 May 2007, the rights of *associés* are "their direct rights *in relation to a legal person*" (*I.C.J. Reports 2007 (II)*, p. 606, para. 64; emphasis added). In other words, direct rights as *associé* exist because companies have "juridical personalities distinct from those of the *associés*" (as stated in Article 1 of the Congolese Decree of 27 February 1887 on commercial corporations), and they are rights of the *associés* in their relationship with the company whose *parts* they hold. In the present case, it is especially important to clarify the issues of the legal existence of the companies and of Mr. Diallo's participation and role in them, since Guinea claims that he was the sole *gérant* and also, directly or indirectly, the sole *associé* of the two companies. As mentioned by the Court in its Judgment of 24 May 2007,

Guinea maintains that "in fact and in law it was virtually impossible to distinguish Mr. Diallo from his companies" (*I.C.J. Reports 2007 (II)*, p. 604, para. 56). The DRC, for its part, considers that the number of *parts* held by Mr. Diallo in Africom-Zaire has never been indisputably established; it adds that the two companies are still formally in existence and are therefore to be distinguished from Mr. Diallo as *associé*. Moreover, the DRC contends that, for lack of any commercial activity, the two SPRLs were in a state of "undeclared bankruptcy" for many years before Mr. Diallo's expulsion.

104. In order to determine Mr. Diallo's legal rights as *associé* in Africom-Zaire and Africontainers-Zaire, and whether those rights have been infringed, the Court will have to examine in the first instance the existence and structure of those companies under DRC law. As the Court stated in the *Barcelona Traction* case:

> "In this field international law is called upon to recognize institutions of municipal law that have an important and extensive role in the international field . . . All it means is that international law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. This in turn requires that, whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law." (*Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, pp. 33-34, para. 38.)

In the Judgment of 24 May 2007, the Court has already found that Mr. Diallo's direct rights as *associé* "are defined by the domestic law" of the DRC, being the State of incorporation of the companies (*I.C.J. Reports 2007 (II)*, p. 606, para. 64), and that the Congolese Decree of 27 February 1887 on commercial corporations must in particular be referred to "in order to establish the precise legal nature of Africom-Zaire and Africontainers-Zaire" (*ibid.*, p. 605, para. 62).

105. In its Judgment of 24 May 2007, the Court observed that, under the Decree of 27 February 1887, SPRLs are companies "which are formed by persons whose liability is limited to their capital contributions; which are not publicly held companies; and in which the *parts sociales*, required to be uniform and nominative, are not freely transferable" (Article 36 of the Decree of 27 February 1887 on commercial corporations; *I.C.J. Reports 2007 (II)*, p. 594, para. 25; see paragraph 99 above). The Court also stated that

> "Congolese law accords an SPRL independent legal personality

> distinct from that of its *associés*, particularly in that the property of the *associés* is completely separate from that of the company, and in that the *associés* are responsible for the debts of the company only to the extent of the resources they have subscribed. Consequently, the company's debts receivable from and owing to third parties relate to its respective rights and obligations. As the Court pointed out in the *Barcelona Traction* case: 'So long as the company is in existence the shareholder has no right to the corporate assets.' (*I.C.J. Reports 1970*, p. 34, para. 41.) This remains the fundamental rule in this respect, whether for an SPRL or for a public limited company." (*I.C.J. Reports 2007 (II)*, p. 606, para. 63.)

106. It is not disputed that Africom-Zaire, an import-export company, was founded in 1974 by Mr. Diallo, and that he has been the *gérant* of that company for many years. As mentioned below (see paragraph 110), it was in that capacity that Mr. Diallo took part in the creation of Africontainers-Zaire. Guinea contends that he was also the sole *associé* of Africom-Zaire. This has however been questioned by the DRC in the course of the proceedings. In particular, the DRC contends that the number of *parts* held by Mr. Diallo in Africom-Zaire has never been duly documented and that Guinea has not established that he was still an *associé* of that company at the time of his expulsion.

107. Because the record before the Court does not include Africom-Zaire's Articles of Incorporation, the Court is unable to determine precisely the nature and extent of Mr. Diallo's holding in that company at the time it was formed. Nevertheless, as DRC law requires that an SPRL be formed by more than one *associé* — as seen in the relevant Articles of the 1887 Decree, including Article 36, cited above ("[a]n [SPRL] is a company formed by *persons*" (emphasis added)) and Article 78, which refers to the general meeting "of the *associés*" — and since neither of the Parties has contested the fact that Africom-Zaire was duly formed as an SPRL under the 1887 Decree, the conclusion is inescapable that, at the very first stage of its existence, Africom-Zaire must have had, besides Mr. Diallo, at least one other *associé*.

108. As the Court has not been provided with minutes of general meetings of Africom-Zaire, it is unable to conclude whether Mr. Diallo has become the sole *associé* of that SPRL and, if so, when this occurred. In the opinion of the Court, that factual issue is however of no legal consequence to the issue under consideration here, since it has not been established that, under DRC law, an SPRL automatically ceases to exist as a legal person when all its *parts sociales* come to be owned by a single person. Moreover, it is clear that in practice, the business activities of Africom-Zaire in the DRC were not in any way impaired by the fact that it may have become a unipersonal SPRL. This is shown by the commercial relationship established by Africom-Zaire with the authorities of Zaire (and later the DRC), in which no questions or objections were

advanced as to the legal nature of Africom-Zaire and the fact that it may have become a company with a sole *associé*. The DRC has stated that by the mid-1980s, Africom-Zaire had ceased all commercial activity and for that reason had been struck off the Trade Register. However, the DRC did not argue that that administrative measure amounted to the ending of the distinct legal personality of the SPRL. The Court thus concludes that, notwithstanding the fact that Mr. Diallo may have become its sole *associé*, Africom-Zaire kept its distinct legal personality. This SPRL thus remains governed by the 1887 Decree, in the absence of Congolese legislation specifically regulating companies whose *parts sociales* are owned by a single *associé*, or which, *de facto*, are fully controlled by the *gérant associé*.

109. On the question of the number of shares held by Mr. Diallo in Africom-Zaire, the Court notes that the DRC has not contested that he was an *associé* in the company, as it has conceded that he was the *gérant associé*, within the meaning of Article 67 of the Decree of 27 February 1887 (see paragraph 138 below), of Africontainers-Zaire and of Africom-Zaire. Moreover, and even if it is impossible to quantify precisely the extent of his holding in Africom-Zaire, the Court considers that all the evidence submitted to it suggests that Mr. Diallo held such a significant part of the *parts sociales* in the company that he controlled it and could have prevented any other *associés* acting in a general meeting (see paragraph 120 below on the DRC law relating to the right of the *associés* to request that a general meeting be convened) from challenging his management, including in particular his decision to contract with the public authorities and to initiate and pursue proceedings against the State of Zaire in domestic courts (see paragraph 114 below). Having thus concluded that Mr. Diallo was a major *associé* in Africom-Zaire, the Court considers that it is for the DRC to prove that Mr. Diallo might have ceased to be an *associé* in Africom-Zaire at the time of his expulsion, as it suggests (see paragraph 106 above). In the opinion of the Court, this has not however been established. The Court considers therefore that a very large part of the *parts sociales* of Africom-Zaire, if not all of them, were owned by Mr. Diallo throughout the years over which the current dispute extends, allowing him to be fully in charge and in control of that company, both as *gérant* and as *associé*. Establishing the precise holding of Mr. Diallo in Africom-Zaire as *associé* would only be necessary if the company were liquidated, so as to transfer to Mr. Diallo, in due proportion to his capital ownership, the net value of the company's assets.

110. On 18 September 1979, as *gérant* of Africom-Zaire, Mr. Diallo took part in the creation of another SPRL, Africontainers-Zaire, which specialized in transporting goods in containers. The notarial act of 18 September 1979 constituting Africontainers-Zaire's Articles of Incorporation was submitted by Guinea as part of the documents included with its

Memorial. The capital in the new company was held as follows: 40 per cent by Mr. Kibeti Zala, a Zairean national; 30 per cent by Ms Colette Dewast, a French national, and 30 per cent by Africom-Zaire. Mr. Zala and Ms Dewast withdrew from Africontainers-Zaire in 1980. From that time onwards, the capital in Africontainers-Zaire was held as follows: 60 per cent by Africom-Zaire and 40 per cent by Mr. Diallo. At the same time Mr. Diallo became *gérant* of Africontainers-Zaire for an indefinite period, thus replacing Mr. Alain David, who had been appointed the first *gérant* in the Articles of Incorporation. The Court concludes that since Mr. Diallo was, as established above (see paragraph 109), fully in charge and in control of Africom-Zaire, he was also, directly or indirectly, fully in charge and in control of Africontainers-Zaire.

111. Relying on documents submitted to the Court, the DRC alleges that, following his expulsion, Mr. Diallo appointed a new *gérant* for Africontainers-Zaire, Mr. N'Kanza. The DRC notes in this regard that it was Mr. N'Kanza who made the inventory of Africontainers' property and represented the company in the negotiations with Gécamines in 1997, over one year after Mr. Diallo's expulsion. Guinea argues that, contrary to the assertion by the DRC, Mr. Diallo did not appoint Mr. N'Kanza as a new *gérant* for Africontainers-Zaire. First, it draws attention to the lack of evidence establishing that an extraordinary general meeting was ever held at which Mr. N'Kanza might have been appointed *gérant* of Africontainers-Zaire. Secondly, Guinea cites the decision of the *Cour d'Appel* of Kinshasa/Gombe of 20 June 2002, in which Mr. Diallo is referred to as the *gérant associé* of Africontainers-Zaire. Finally, Guinea observes that in documents relating to Africontainers-Zaire submitted to the Court, Mr. N'Kanza is not referred to as *gérant*, but rather as *"Directeur d'exploitation"*, and that Mr. Diallo signed his letters to the DRC as "*gérant* of Africontainers-Zaire".

112. The Court observes that the DRC has failed to establish, by means of relevant corporate documents, that Mr. N'Kanza was appointed *gérant* of Africontainers-Zaire. In particular, no general meeting appointing Mr. N'Kanza as *gérant* took place (see paragraphs 129 and 133 below on the appointment of the *gérant* under Article 65 of the 1887 Decree). The Court therefore concludes that the only *gérant* acting for either of the companies, both at the time of Mr. Diallo's detentions and after his expulsion, was Mr. Diallo himself.

113. The Court is moreover of the view that Africom-Zaire and Africontainers-Zaire have not ceased to exist. In the absence of a judicial liquidation, the dissolution of a company, according to the 1887 Decree, "can only be decided by a general meeting" (Art. 99). Once the dissolution has been decided upon, the company goes into a process of liquidation. The Court notes that there is however no evidence before it indicating that a judicial liquidation took place or that a general meeting

of either of the two companies was held for the purposes of their dissolution or liquidation.

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114. Having reached the conclusion that Mr. Diallo was, both as *gérant* and *associé* of the two companies, fully in charge and in control of them, but that they nevertheless remained legal entities distinct from him, the Court will now address the various claims of Guinea pertaining to the direct rights of Mr. Diallo as *associé*. In doing so, the Court will have to assess whether, under DRC law, the claimed rights are indeed direct rights of the *associé*, or whether they are rather rights or obligations of the companies. As the Court has already pointed out, claims relating to rights which are not direct rights held by Mr. Diallo as *associé* have been declared inadmissible by the Judgment of 24 May 2007; they can therefore no longer be entertained. In particular, this is the case of the claims relating to the contractual rights of Africom-Zaire against the State of Zaire (DRC), and of Africontainers-Zaire against the Gécamines, Onatra, Fina and Shell companies.

115. In the following paragraphs, the Court is careful to maintain the strict distinction between the alleged infringements of the rights of the two SPRLs at issue and the alleged infringements of Mr. Diallo's direct rights as *associé* of these latter (see *I.C.J. Reports 2007 (II)*, pp. 605-606, paras. 62-63). The Court understands that such a distinction could appear artificial in the case of an SPRL in which the *parts sociales* are held in practice by a single *associé*. It is nonetheless well-founded juridically, and it is essential to rigorously observe it in the present case. Guinea itself accepts this distinction in the present stage of the proceedings, and most of its arguments are indeed based on it. The Court has to deal with the claims as they were presented by the Applicant.

116. Guinea's claims relating to Mr. Diallo's direct rights as *associé* pertain to the right to participate and vote in general meetings of the two SPRLs, the right to appoint a *gérant*, and the right to oversee and monitor the management of the companies. Guinea also presents a claim in relation to the right to property concerning Mr. Diallo's *parts sociales* in Africom-Zaire and Africontainers-Zaire. The Court will now address those different claims.

A. The Right to Take Part and Vote in General Meetings

117. Guinea maintains that the DRC, in expelling Mr. Diallo, deprived him of his right, guaranteed by Article 79 of the Congolese Decree of 27 February 1887 on commercial corporations, to take part in general meetings and to vote. It claims that under DRC law general meetings of

Africom-Zaire and Africontainers-Zaire could not be held outside the territory of the DRC. Guinea admits that Mr. Diallo could of course have exercised his rights as *associé* from another country by appointing a proxy of his choice, in accordance with Article 81 of the 1887 Decree, but argues that appointing a proxy is merely an option available to the *associé*, whose recognized right is clearly to have a choice whether to appoint a representative or to attend in person. Guinea adds that, in the case of Africontainers-Zaire, it would have been impossible for Mr. Diallo to be represented by a proxy, since Article 22 of the Articles of Incorporation of the SPRL stipulates that only an *associé* may be appointed proxy of another, whereas he had become its sole *associé* at the time of his expulsion.

118. The DRC maintains that there cannot have been any violation of Mr. Diallo's right to take part in general meetings, as there has been no evidence that any general meetings were convened and that Mr. Diallo was unable to attend owing to his removal from DRC territory. The DRC asserts that in any case Congolese commercial law places no obligation on commercial companies in respect of where general meetings are to be held.

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119. Article 79 of the Congolese Decree of 27 February 1887 on commercial corporations stipulates that: "[n]otwithstanding any provision to the contrary, all *associés* shall have the right to take part in general meetings and shall be entitled to one vote per share". The Court observes that it follows from the terms of this provision that the right to participate and vote in general meetings belongs to the *associés* and not to the company. This is consistent with the Court's conclusion in the *Barcelona Traction* case, where it pointed out that "[i]t is well known" that the right to participate and vote in general meetings is a right "which municipal law confers upon the [shareholders] distinct from those of the company" (*Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 36, para. 47).

120. The Court now turns to the question of whether the DRC, in expelling Mr. Diallo, deprived him of his right to take part in general meetings and to vote, as guaranteed by Article 79 of the Congolese Decree of 27 February 1887 on commercial corporations.

121. According to Article 83 of the Congolese Decree of 27 February 1887, while the decision to convene a general meeting is incumbent upon the *gérant* or the auditors (para. 1), *associés* also have the right to request that a general meeting be convened if they hold a fifth of the total number of shares (para. 2). In view of the evidence submitted to it by the Parties, the Court finds that there is no proof that Mr. Diallo, acting either as *gérant* or as *associé* holding at least one-fifth of the total number of shares, has taken any action to convene a general meeting, either after

having been expelled from the DRC, or at any time when he was a resident in the DRC after 1980, not even for the purposes of annually "consider[ing] and decid[ing] on the balance sheet and profit and loss account and on the allocation of profits", as required by the 1887 Decree (see Article 96). In the opinion of the Court, the right of Mr. Diallo to take part in general meetings and to vote could only have been breached if general meetings had actually been convened after his expulsion from the DRC. The Court notes in this respect that, even assuming that Article 1 of Legislative Order No. 66-341 of 7 June 1966 were to oblige corporations having their administrative seat in the DRC to hold their general meetings on Congolese territory, no evidence has been provided that Mr. Diallo would have been precluded from taking any action to convene general meetings from abroad, either as *gérant* or as *associé*.

122. The Court will now turn to the question of whether Mr. Diallo has been deprived of his right to take part and vote in any general meetings because, as Guinea argues, after his expulsion he could only have exercised that right through a proxy, whereas Congolese law afforded him the right to choose between appointing a representative or attending in person.

123. According to Article 81 of the Congolese Decree of 27 February 1887, "*[a]ssociés* may always be represented by a proxy of their choice, subject to compliance with the conditions set forth in the statutes". According to Article 80 of the Congolese Decree, "[u]nless the statutes provide otherwise, *associés* may express their votes in writing or by any other means that guarantees the authenticity of the will expressed". The Court has noted that the Parties have provided it with the Articles of Incorporation of Africontainers-Zaire, but have not communicated to it those of Africom-Zaire (see paragraphs 107 and 110 above). Article 22, paragraph 2, of the Articles of Incorporation of Africontainers-Zaire reads as follows: "*Associés* may arrange to be represented either by a proxy chosen from amongst the *associés*, or by a representative or agent of any *associé* that is a legal person, if such is the case." Article 21 of the Articles of Incorporation of Africontainers-Zaire states that "[r]esolutions of the general meeting shall be passed by a majority of three quarters of the votes irrespective of the number of shares owned by the members present or *represented at the meeting*" (emphasis added).

124. It follows from these provisions that an *associé*'s right to take part and vote in general meetings may be exercised by the *associé* in person or through a proxy of his choosing. There is no doubt in this connection that a vote expressed through a proxy at a general meeting has the same legal effect as a vote expressed by the *associé* himself. On the other hand, it is more difficult to infer with certainty from the above-mentioned provisions that they establish the right, as Guinea maintains, for the *associé* to attend general meetings in person. In the opinion of the Court, the primary purpose of these provisions is to ensure that the general meetings

of companies can take place effectively. Guinea's interpretation of Congolese law might frustrate that objective, by allowing an *associé* to prevent the organs of the company from operating normally. It is questionable whether the Congolese legislators could have desired such an outcome, which is far removed from the *affectio societatis*. Moreover, in respect of Africom-Zaire and Africontainers-Zaire, the Court does not see how the appointment of a representative by Mr. Diallo could in any way have breached in practical terms his right to take part and vote in general meetings of the two SPRLs, since he had complete control over them.

125. Furthermore, with regard to Africontainers-Zaire, the Court cannot accept Guinea's argument that it would have been impossible for Mr. Diallo to be represented at a general meeting by a proxy other than himself because he was the sole *associé* of that SPRL and Article 22 of Africontainers-Zaire's Articles of Incorporation stipulates that an *associé* may only appoint another *associé* as proxy. As the Court has observed above (see paragraph 110), that company has two *associés*, namely, Mr. Diallo and Africom-Zaire. Therefore, pursuant to the above-mentioned Article 22, Mr. Diallo, acting as *associé* of Africontainers-Zaire, could appoint the "representative or agent" of Africom-Zaire as his proxy for a general meeting of Africontainers-Zaire. Prior to the appointment of that proxy, and acting as *gérant* of Africom-Zaire pursuant to Article 69 of the 1887 Decree (see paragraph 135 below), Mr. Diallo could have appointed such a "representative or agent" of the latter company.

126. Therefore, the Court cannot sustain Guinea's claim that the DRC has violated Mr. Diallo's right to take part and vote in general meetings. The DRC, in expelling Mr. Diallo, has probably impeded him from taking part in person in any general meeting, but, in the opinion of the Court, such hindrance does not amount to a deprivation of his right to take part and vote in general meetings.

B. The Rights relating to the Gérance

127. The Court observes that, at various points in the proceedings, Guinea has made four slightly different assertions which it has grouped under the general claim of a violation of Mr. Diallo's right to "appoint a *gérant*". It has contended that, by unlawfully expelling Mr. Diallo, the DRC has committed: a violation of his alleged right to appoint a *gérant*, a violation of his alleged right to be appointed as *gérant*, a violation of his alleged right to exercise the functions of a *gérant*, and a violation of his alleged right not to be removed as *gérant*.

128. The DRC contends that the right to appoint the *gérant* of an SPRL is a right of the company, not of the *associé*, as it lies with the general meeting, which is an organ of the company. Furthermore, the

DRC affirms that because, under the 1887 Decree, a *gérant* who has not been appointed in the Articles of Incorporation is appointed by the general meeting, the right invoked by Guinea to appoint a *gérant* is indistinguishable from the right of the *associé* to take part in the general meetings. According to the DRC, Guinea has failed to show that a general meeting was convened and that the DRC intervened with the other *associés* to prevent Mr. Diallo from participating in the appointment of a new *gérant*, or from being represented by another person of his choice. The DRC submits that Mr. Diallo did appoint Mr. N'Kanza as *gérant* of Africontainers-Zaire following his expulsion.

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129. The Court observes that the appointment and functions of *gérants* are governed, in Congolese law, by the 1887 Decree on commercial corporations, and by the Articles of Incorporation of the company in question.

130. Under Article 64 of the 1887 Decree:

> "A private limited company shall be managed by one or more persons, who may or may not be *associés*, called *gérants*."

The appointment of *gérants* is governed by Article 65 of the 1887 Decree, which provides:

> "*Gérants* shall be appointed either in the instrument of incorporation or by the general meeting, for a period which may be fixed or indeterminate."

In addition, Article 69 of the 1887 Decree provides that:

> "The statutes, the general meeting or the *gérance* may entrust the day-to-day management of the company and special powers to agents or other proxies, whether *associés* or not."

131. Furthermore, Article 14 of Africontainers-Zaire's Articles of Incorporation provides, *inter alia*, that:

> "The company shall be managed by one or more *gérants*, who may or may not be *associés*, appointed by the general meeting.
>
> Where more than one *gérant* is appointed, the general meeting shall decide whether they shall exercise their powers separately or jointly."

Article 17, for its part, is couched in the following terms:

> "The *gérance* may delegate to one of the *associés* or to third parties or confer on one of its managers any powers necessary for the performance of daily managerial duties. It shall determine the powers to be conferred and, where necessary, the remuneration of such agents; delegated powers may be revoked at any time."

132. The Court will begin by dismissing the DRC's argument that

Mr. Diallo's right to appoint a *gérant* could not have been violated because he in fact appointed a *gérant* for Africontainers-Zaire in the person of Mr. N'Kanza. It has already concluded that this allegation has not been proved (see paragraphs 111 and 112 above).

133. As regards the first assertion put forth by Guinea that the DRC has violated Mr. Diallo's right to appoint a *gérant*, the Court recalls Article 65 of the 1887 Decree, which provides that "*[g]érants* shall be appointed either in the instrument of incorporation or by the general meeting". The Court observes that, under this provision, every SPRL is required to be managed by at least one *gérant*. In principle, the appointment of the *gérant* takes place at the point when the SPRL is founded. It can also take place at a later stage, by decision of the general meeting. In that case, one organ of the company (the general meeting) exercises its power in respect of another (the *gérance*). The appointment of the *gérant* therefore falls under the responsibility of the company itself, without constituting a right of the *associé*. Accordingly, the Court concludes that Guinea's claim that the DRC has violated Mr. Diallo's right to appoint a *gérant* must fail.

134. As regards the second assertion put forward by Guinea that the DRC has violated Mr. Diallo's right to be appointed *gérant*, the Court notes that, in its 2007 Judgment on preliminary objections, it observed that:

> "The DRC . . . agrees with Guinea on the fact that, in terms of Congolese law, the direct rights of *associés* are determined by the Decree of the Independent State of Congo of 27 February 1887 on commercial corporations. The rights of Mr. Diallo as *associé* of the companies Africom-Zaire and Africontainers-Zaire are therefore theoretically as follows: 'the right to dividends and to the proceeds of liquidation', 'the right to be appointed manager *(gérant)*', 'the right of the *associé* manager *(gérant)* not to be removed without cause', 'the right of the manager to represent the company', 'the right of oversight [of the management]' and 'the right to participate in general meetings'." (*I.C.J. Reports 2007 (II)*, p. 603, para. 53.)

It is clear that an *associé* has a right to be appointed *gérant*. However, this right cannot have been violated in this instance because Mr. Diallo has in fact been appointed as *gérant*, and still is the *gérant* of both companies in question. In this regard, the Court recalls its finding in its 2007 Judgment "that Mr. Diallo, who was *associé* in Africom-Zaire and Africontainers-Zaire, also held the position of *gérant* in each of them" (*ibid.*, p. 606, para. 66). This finding is confirmed in evidence put before the Court by the Parties in the present stage of the proceedings, in particular by evidence submitted by Guinea itself. Accordingly, the Court concludes that there is no violation of Mr. Diallo's right to be appointed *gérant*.

135. The Court notes that, thirdly, Guinea has claimed that a right of Mr. Diallo to exercise his functions as *gérant* was violated. In this regard, Guinea has argued in its Reply that:

> "following [Mr. Diallo's] detention and expulsion by the Zairean authorities, it became impossible for him, in practical terms, to perform the role of 'gérant' from Guinea, because he was outside the country".

The Court cannot accept this line of reasoning, and refers in this regard to Article 69 of the 1887 Decree, which provides that "the *gérance* may entrust the day-to-day management of the company and special powers to agents or other proxies, whether *associés* or not". Moreover, with respect to Africontainers-Zaire, the Court also refers to Article 16 of its Articles of Incorporation, which provides that the "*gérance* is entitled to establish administrative bases in the Republic of Zaire and branches, offices, agencies, depots or trading outlets in any location whatsoever, whether in the Republic of Zaire or abroad". While the performance of Mr. Diallo's duties as *gérant* may have been rendered more difficult by his presence outside the country, Guinea has failed to demonstrate that it was impossible to carry out those duties. In addition, Guinea has not shown that Mr. Diallo attempted to appoint a proxy, who could have acted within the DRC on his instructions.

136. In fact, it is clear from various documents submitted to the Court that, even after Mr. Diallo's expulsion, representatives of Africontainers-Zaire have continued to act on behalf of the company in the DRC and to negotiate contractual claims with the Gécamines company.

137. The Court accordingly concludes that Guinea's claim that the DRC has violated a right of Mr. Diallo to exercise his functions as *gérant* must fail.

138. Finally, the Court observes that, fourthly, Guinea has claimed that the DRC has violated Mr. Diallo's right not to be removed as *gérant*, referring to Article 67 of the 1887 Decree, which provides that:

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

With reference to this provision, Guinea argues that Mr. Diallo was deprived of his right not to be removed as a *gérant* as long as the company was in existence. The Court observes, however, that no evidence has been provided to it that Mr. Diallo was deprived of his right to remain *gérant*, since no general meeting was ever convened for the purpose of removing him, or for any other purpose. There was therefore no possibility of having him removed "for good cause". Although it may have

become more difficult for Mr. Diallo to carry out his duties as *gérant* from outside the DRC following his expulsion, as discussed above, he remained, from a legal standpoint, the *gérant* of both Africom-Zaire and Africontainers-Zaire. Accordingly, the Court concludes that Guinea's claim that the DRC has violated Mr. Diallo's right not to be removed as *gérant* must fail.

139. The Court may add that, even if it were established that Mr. Diallo had been appointed *gérant associé* as long as the company was in existence and that he had been removed as *gérant* without good cause, the claim of Guinea would still stand on very weak ground. The right established by Article 67 of the 1887 Decree is a right of a combined *gérant associé*, not a simple right of an *associé*. To the extent that it is a right of the *gérant*, who is an organ of the company, the claim would be precluded by paragraph 98 (3) *(c)* of the Court's 2007 Judgment.

140. In light of all the above, the Court concludes that the various assertions put forward by Guinea, grouped under the general claim of a violation of Mr. Diallo's rights relating to the *gérance*, must be rejected.

C. The Right to Oversee and Monitor the Management

141. Guinea submits that, in detaining and expelling Mr. Diallo, the DRC deprived him of his right to oversee and monitor the actions of management and the operations of Africom-Zaire and Africontainers-Zaire, in violation of Articles 71 and 75 of the 1887 Decree. Referring to those provisions, Guinea contends that the right to oversee and monitor the actions of management is a right attaching to the status of *associé*, not a right of the company, especially where there are five or fewer *associés*. It argues that because Mr. Diallo was the sole *associé* of both companies, he enjoyed all the rights and powers of the *commissaire* or auditor under Article 75 of the 1887 Decree. It adds that those rights are also recognized by Article 19 of Africontainers-Zaire's Articles of Incorporation.

142. The DRC submits that under Articles 71 and 75 of the 1887 Decree, as well as Article 19 and Article 25, paragraph 3, of Africontainers-Zaire's Articles of Incorporation, the task of overseeing and monitoring the *gérance* of an SPRL is entrusted not to an *associé* individually, but to financial experts known as "statutory auditors" *[commissaires aux comptes]*. In the view of the DRC, the right of the *associé* is limited to participating in the appointment of one or more such auditors at the general meeting. The DRC acknowledges that, under certain conditions, Congolese law accords *associés* the right to oversee and monitor the management of the company, but it argues that Guinea has failed to

demonstrate that the DRC had ordered Africontainers-Zaire not to permit Mr. Diallo to monitor its operations.

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143. Article 71 of the 1887 Decree provides as follows:

"*Article 71*

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

If there are more than one of these, the statutes or the general meeting may require them to act on a collegiate basis.

If the number of *associés* does not exceed five, the appointment of auditors is not compulsory, and each *associé* shall have the powers of an auditor."

144. Article 75 of that Decree is couched in the following terms:

"*Article 75*

The auditors' task shall be to oversee and monitor, without restriction, all the actions performed by the management, all the company's transactions and the register of *associés*."

145. Article 19 of Africontainers-Zaire's Articles of Incorporation provides:

"Each of the *associés* shall exercise supervision over the company. Should the company consist of more than five *associés*, supervision shall be exercised by at least one auditor appointed by the general meeting, which shall fix his/her term of office and remuneration."

146. The Court concludes from the wording of Article 71, third paragraph, as cited above, that since both Africom-Zaire and Africontainers-Zaire had fewer than five *associés*, Mr. Diallo was permitted to act as auditor. However, the question arises of whether, under Congolese law, this provision applies in the case of a company where there is only one *associé* who is fully in charge and in control of it.

147. The Court considers that, even if a right to oversee and monitor the management exists in companies where only one *associé* is fully in charge and in control, Mr. Diallo could not have been deprived of the right to oversee and monitor the *gérance* of the two companies. While it may have been the case that Mr. Diallo's detentions and expulsion from the DRC rendered the business activity of the companies more difficult, they simply could not have interfered with his ability to oversee and monitor the *gérance*, wherever he may have been.

148. Accordingly, the Court concludes that Guinea's claim that the DRC has violated Mr. Diallo's right to oversee and monitor the management fails.

D. The Right to Property of Mr. Diallo over his Parts Sociales *in Africom-Zaire and Africontainers-Zaire*

149. Guinea claims that Mr. Diallo, no longer enjoying control over, or effective use of, his rights as *associé*, has suffered the indirect expropriation of his *parts sociales* in Africom-Zaire and Africontainers-Zaire because his property rights have been interfered with to such an extent that he has been lastingly deprived of effective control over, or actual use of, or the value of those rights.

150. Guinea states that the acts of interference by the DRC with Mr. Diallo's property rights in the *parts sociales* date back to 1988, when he was first placed in detention. Those acts allegedly resulted in the debts owed to the companies not being recovered and, by way of consequence, Mr. Diallo's investment in the companies falling in value. According to Guinea, the interference by the DRC continued consequent to the Congolese authorities' decision in 1995 to stay enforcement of the judgment for the plaintiff handed down in *Africontainers* v. *Zaire Shell,* which resulted in reducing the value of Mr. Diallo's *parts sociales* in the company. Guinea claims that the interference by the DRC culminated in the re-arrest and expulsion of Mr. Diallo who, as a result, was prevented from managing his companies and from participating in any way in the activities of their corporate organs and was deprived of any possibility of controlling and using his *parts sociales*. Guinea asserts that the indirect expropriation of Mr. Diallo's rights constitutes an internationally wrongful act giving rise to the DRC's international responsibility.

151. The essence of Guinea's argument is that there is a factual element specific to this case, namely:

> "that Mr. Diallo is the sole *associé* in the two companies, that is to say, the only owner of the *parts sociales* in Africom[-Zaire] and Africontainers[-Zaire]. 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), the property of the two companies merges with his. Thus, in expropriating his companies, the DRC infringed Mr. Diallo's ownership rights in his *parts sociales*."

152. For its part, the DRC claims that there cannot have been any violation of any rights attaching to ownership of the *parts sociales*. In particular, as regards the right to dividends, it alleges that, even on the assumption that any have actually been distributed by the companies, Guinea would still have to show that Mr. Diallo was unable to receive them on account of the decision to remove him from Congolese territory or of another wrongful act attributable to the DRC. The DRC argues in this respect that Guinea has not established that Mr. Diallo could not

directly receive his dividends abroad or that he was prevented from doing so by an act attributable to the DRC.

153. The DRC contends as well that it cannot be accused of having impeded the exercise of rights held by Mr. Diallo as owner of his *parts sociales*. Specifically, the DRC at no time ordered Africontainers-Zaire not to make payments in respect of Mr. Diallo's *parts sociales* in the annual dividend allocation. With regard to Africom-Zaire, the DRC notes that Guinea has failed to provide evidence showing that Mr. Diallo was still an *associé* in this company at the time of his expulsion and, if so, how many *parts sociales* he held (see paragraph 106 above).

154. The DRC finally asserts that the value of Mr. Diallo's *parts sociales* is unrelated to his presence in its territory. It rejects Guinea's arguments that acts attributable to the DRC were at the origin of the loss of value of his *parts sociales* and, in general, the economic demise of his companies. On this subject, the DRC claims that both Africom-Zaire and Africontainers-Zaire had been in a state of "undeclared bankruptcy" for several years before Mr. Diallo's expulsion, not having engaged in any commercial activity since, at least, 1991.

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155. The Court observes that international law has repeatedly acknowledged the principle of domestic law that a company has a legal personality distinct from that of its shareholders. This remains true even in the case of an SPRL which may have become unipersonal in the present case. Therefore, the rights and assets of a company must be distinguished from the rights and assets of an *associé*. In this respect, it is legally untenable to consider, as Guinea argues, that the property of the corporation merges with the property of the shareholder. Furthermore, it must be recognized that the liabilities of the company are not the liabilities of the shareholder. In the case of Africontainers-Zaire, as an SPRL, it is specifically indicated in its Articles of Incorporation that the "liability of each *associé* in respect of corporate obligations shall be limited to the amount of his/her *parts sociales* in the company" (Article 7; see also paragraphs 105 and 115 above).

156. The Court, in the *Barcelona Traction* case, recognized that "a wrong done to the company frequently causes prejudice to its shareholders" (*Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 35, para. 44). But, it added, damage affecting both company and shareholder will not mean that both are entitled to claim compensation:

> "whenever a shareholder's interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate

> action; for although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed" (*I.C.J. Reports 1970*, p. 35, para. 44).

This principle was reaffirmed when the Court, responding to a Belgian contention, established a

> "distinction between injury in respect of a right and injury to a simple interest . . . Not a mere interest affected, but solely a right infringed involves responsibility, so that an act directed against and infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected." (*Ibid.*, p. 36, para. 46.)

157. The Court has already indicated that the DRC has not violated Mr. Diallo's direct right as *associé* to take part and vote in general meetings of the companies, nor his right to be appointed or to remain *gérant*, nor his right to oversee and monitor the management (see paragraphs 117-148 above). As the Court has just reaffirmed, Mr. Diallo's other direct rights, in respect of his *parts sociales*, must be clearly distinguished from the rights of the SPRLs, in particular in respect of the property rights belonging to the companies. The Court recalls in this connection that, together with its other assets, including debts receivable from third parties, the capital is part of the company's property, whereas the *parts sociales* are owned by the *associés*. The *parts sociales* represent the capital but are distinct from it, and confer on their holders rights in the operation of the company and also a right to receive any dividends or any monies payable in the event of the company being liquidated. The only direct rights of Mr. Diallo which remain to be considered are in respect of these last two matters, namely, the receipt of dividends or any monies payable on a winding-up of the companies. There is, however, no evidence that any dividends were ever declared or that any action was ever taken to wind up the companies, even less that any action attributable to the DRC has infringed Mr. Diallo's rights in respect of those matters.

158. Finally, the Court considers there to be no need to determine the extent of the business activities of Africom-Zaire and Africontainers-Zaire at the time Mr. Diallo was expelled, or to make any finding as to whether they were in a state of "undeclared bankruptcy", as alleged by the DRC. As the Court has already found in the *Barcelona Traction* case:

> "a precarious financial situation cannot be equated with the demise of the corporate entity . . .: the company's status in law is alone relevant, and not its economic condition, nor even the possibility of its being 'practically defunct'" (*ibid.*, p. 41, para. 66).

159. The Court concludes from the above that Guinea's allegations of

infringement of Mr. Diallo's right to property over his *parts sociales* in Africom-Zaire and Africontainers-Zaire have not been established.

IV. Reparation

160. Having concluded that the Democratic Republic of the Congo has breached its obligations under Articles 9 and 13 of the International Covenant on Civil and Political Rights, Articles 6 and 12 of the African Charter on Human and Peoples' Rights, and Article 36, paragraph 1 *(b)*, of the Vienna Convention on Consular Relations (see paragraphs 73, 74, 85 and 97 above), it is for the Court now to determine, in light of Guinea's final submissions, what consequences flow from these internationally wrongful acts giving rise to the DRC's international responsibility.

161. The Court recalls that "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed" (*Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 47). Where this is not possible, reparation may take "the form of compensation or satisfaction, or even both" (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 103, para. 273). In the light of the circumstances of the case, in particular the fundamental character of the human rights obligations breached and Guinea's claim for reparation in the form of compensation, the Court is of the opinion that, in addition to a judicial finding of the violations, reparation due to Guinea for the injury suffered by Mr. Diallo must take the form of compensation.

162. In this respect, Guinea requested in its final submissions that the Court defer its Judgment on the amount of compensation, in order for the Parties to reach an agreed settlement on that matter. Should the Parties be unable to do so "within a period of six months following [the] delivery of the [present] Judgment", Guinea also requested the Court to authorize it to submit an assessment of the amount of compensation due to it, in order for the Court to decide on this issue "in a subsequent phase of the proceedings" (see paragraph 14 above).

163. The Court is of the opinion that the Parties should indeed engage in negotiation in order to agree on the amount of compensation to be paid by the DRC to Guinea for the injury flowing from the wrongful detentions and expulsion of Mr. Diallo in 1995-1996, including the resulting loss of his personal belongings.

164. In light of the fact that the Application instituting proceedings in the present case was filed in December 1998, the Court considers that the sound administration of justice requires that those proceedings soon be

brought to a final conclusion, and thus that the period for negotiating an agreement on compensation should be limited. Therefore, failing agreement between the Parties within six months following the delivery of the present Judgment on the amount of compensation to be paid by the DRC, the matter shall be settled by the Court in a subsequent phase of the proceedings. Having been sufficiently informed of the facts of the present case, the Court finds that a single exchange of written pleadings by the Parties would then be sufficient in order for it to decide on the amount of compensation.

* * *

165. For these reasons,

THE COURT,

(1) By eight votes to six,

Finds that the claim of the Republic of Guinea concerning the arrest and detention of Mr. Diallo in 1988-1989 is inadmissible;

IN FAVOUR: *President* Owada; *Vice-President* Tomka; *Judges* Abraham, Keith, Sepúlveda-Amor, Skotnikov, Greenwood; *Judge* ad hoc Mampuya;

AGAINST: *Judges* Al-Khasawneh, Simma, Bennouna, Cançado Trindade, Yusuf; *Judge* ad hoc Mahiou;

(2) Unanimously,

Finds that, in respect of the circumstances in which Mr. Diallo was expelled from Congolese territory on 31 January 1996, the Democratic Republic of the Congo violated Article 13 of the International Covenant on Civil and Political Rights and Article 12, paragraph 4, of the African Charter on Human and Peoples' Rights;

(3) Unanimously,

Finds that, in respect of the circumstances in which Mr. Diallo was arrested and detained in 1995-1996 with a view to his expulsion, the Democratic Republic of the Congo violated Article 9, paragraphs 1 and 2, of the International Covenant on Civil and Political Rights and Article 6 of the African Charter on Human and Peoples' Rights;

(4) By thirteen votes to one,

Finds that, by not informing Mr. Diallo without delay, upon his detention in 1995-1996, of his rights under Article 36, paragraph 1 *(b)*, of the Vienna Convention on Consular Relations, the Democratic Republic of the Congo violated the obligations incumbent upon it under that subparagraph;

IN FAVOUR: *President* Owada; *Vice-President* Tomka; *Judges* Al-Khasawneh, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood; *Judge* ad hoc Mahiou;

AGAINST: *Judge* ad hoc Mampuya;

(5) By twelve votes to two,

Rejects all other submissions by the Republic of Guinea relating to the circumstances in which Mr. Diallo was arrested and detained in 1995-1996 with a view to his expulsion;

IN FAVOUR: *President* Owada; *Vice-President* Tomka; *Judges* Al-Khasawneh, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Yusuf, Greenwood; *Judge* ad hoc Mampuya;

AGAINST: *Judge* Cançado Trindade; *Judge* ad hoc Mahiou;

(6) By nine votes to five,

Finds that the Democratic Republic of the Congo has not violated Mr. Diallo's direct rights as *associé* in Africom-Zaire and Africontainers-Zaire;

IN FAVOUR: *President* Owada; *Vice-President* Tomka; *Judges* Simma, Abraham, Keith, Sepúlveda-Amor, Skotnikov, Greenwood; *Judge* ad hoc Mampuya;

AGAINST: *Judges* Al-Khasawneh, Bennouna, Cançado Trindade, Yusuf; *Judge* ad hoc Mahiou;

(7) Unanimously,

Finds that the Democratic Republic of the Congo is under obligation to make appropriate reparation, in the form of compensation, to the Republic of Guinea for the injurious consequences of the violations of international obligations referred to in subparagraphs (2) and (3) above;

(8) Unanimously,

Decides that, failing agreement between the Parties on this matter within six months from the date of this Judgment, the question of compensation due to the Republic of Guinea shall be settled by the Court, and reserves for this purpose the subsequent procedure in the case.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this thirtieth day of November, two thousand and ten, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Guinea and the Government of the Democratic Republic of the Congo, respectively.

(*Signed*) Hisashi OWADA,
President.

(*Signed*) Philippe COUVREUR,
Registrar.

Judges AL-KHASAWNEH, SIMMA, BENNOUNA, CANÇADO TRINDADE and YUSUF append a joint declaration to the Judgment of the Court; Judges AL-KHASAWNEH and YUSUF append a joint dissenting opinion to the Judgment of the Court; Judges KEITH and GREENWOOD append a joint declaration to the Judgment of the Court; Judge BENNOUNA appends a dissenting opinion to the Judgment of the Court; Judge CANÇADO TRINDADE appends a separate opinion to the Judgment of the Court; Judge *ad hoc* MAHIOU appends a dissenting opinion to the Judgment of the Court; Judge *ad hoc* MAMPUYA appends a separate opinion to the Judgment of the Court.

(Initialled) H.O.

(Initialled) Ph.C.