JOINT DECLARATION OF JUDGES KEITH AND GREENWOOD

1. While, as our votes indicate, we agree with the Court's conclusions, we do not agree with one of the reasons the Court gives in support of its conclusion that the arrests and detentions of Mr. Diallo in 1995-1996 violated the Covenant and the African Charter (Judgment, para. 165 (3)). That reason is that the arrests and detentions preceding his expulsion were arbitrary and in breach of Article 9 (1) of the Covenant and Article 6 of the African Charter because the decision to expel Mr. Diallo was made without any defensible basis (*ibid.*, para. 82). While the Judgment reaches that conclusion when addressing the arbitrariness of the arrest and detention in terms of the provisions regulating those matters, that reasoning must be related to the Court's interpretation of the provisions concerned with expulsion.

2. According to that interpretation, the expulsion provisions, Article 13 of the Covenant and Article 12 (4) of the African Charter, prohibit expulsions which are "arbitrary in nature" (*ibid.*, para. 65), allowing review by a court of whether the "expulsion was justified on the merits" (*ibid.*, para. 73). In this declaration we consider the question whether those provisions impose a general *substantive* non-arbitrariness limit on the power of expulsion over and above the procedural guarantees which they contain. For the reasons which follow we conclude that they do not.

3. The immediately relevant provisions of the Covenant and the African Charter read as follows:

Article 12 of the Covenant

> "1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
> 2. Everyone shall be free to leave any country, including his own.
>
> 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order *(ordre public)*, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
> 4. No one shall be arbitrarily deprived of the right to enter his own country."

Article 13 of the Covenant

"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."

Article 12 of the African Charter

"1. Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.

2. Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.

3. Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions.

4. 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.

5. The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups."

4. Both Article 13 of the Covenant and Article 12 (4) of the African Charter require, in the first place, compliance with national law — a non-national may be expelled only under a decision reached in accordance with that law. Both require that a decision be taken relating to the *particular* non-national. Accordingly, mass expulsions are prohibited, as Article 12 (5) of the African Charter makes explicit and as the Human Rights Committee has stated in respect of Article 13 of the Covenant in its General Comment 15, paragraph 10 (see paragraph 10 below). National law will, in the normal course, determine who is to make the decision, the procedure the decision-maker is to follow and the grounds for expulsion; it may also provide for challenges to expulsion. Article 13 of the Covenant expressly requires two procedural protections: the right of the individual to submit reasons against expulsion and to have the case reviewed by, and be represented before, the competent authority or someone designated by it. These procedural requirements are not, of course, an end in themselves. They should help ensure the quality of the decision and should help protect the non-national against arbitrary expulsion.

5. What substantive limits do the provisions impose in addition to the prohibition on mass expulsions? No others are expressed in the two Articles but may arise from other provisions of the two treaties, notably the guarantee of equality before the law or the prohibition on discrimination, in Articles 2 (1) and 26 of the Covenant and Articles 2 and 3 of the African Charter, as again the Human Rights Committee has stated in respect of the Covenant in General Comment No. 15, paragraphs 9 and 10. To state the obvious, the expulsion Articles do not expressly prohibit arbitrary expulsions.

6. That absence of an express arbitrariness limit on the exercise of State power is the more striking when the particular provisions of the Covenant and Charter are read in context. Article 12 (3) and (4) of the Covenant and Article 12 (2) of the African Charter do allow substantive limits to be placed on the rights of movement and residence they state. Article 12 (4), the provision immediately preceding Article 13 of the Covenant, in allowing for a limit on the rights of nationals to return to their own country, uses non-arbitrariness as the test. Other provisions of both treaties, to go to a slightly wider context, expressly prohibit arbitrary action: the right to life (Article 6 of the Covenant and Article 4 of the African Charter); arrest and detention (Article 9 of the Covenant and Article 6 of the African Charter); and the right to privacy (Article 17 of the Covenant). Also to be contrasted are the provisions of Article 32 of the 1951 Convention on the Status of Refugees, on which the drafting of Article 13 of the Covenant drew in part (see paragraph 8 below). While paragraph 2 of that Article incorporates procedural protections comparable to those in Article 13 of the Covenant, paragraph 1 of Article 32, by contrast to Article 13, also circumscribes the State's power by allowing expulsion of a refugee only on grounds of national security or public order. The same contrast appears from Article 31 of the 1954 Convention relating to the Status of Stateless Persons.

7. The ordinary meaning of the terms of Articles 13 and 12 (4), read in context, does not appear to allow the implication of prohibition on arbitrary expulsion. But does the object and purpose of the provisions? Undoubtedly, the insistence on compliance with national law and with the specific procedural requirements of Article 13 has as purposes the making of better informed decisions and the protection of the individual's opportunities to present the case against expulsion. In that respect they provide, by way of due process, a safeguard against arbitrary decisions.

8. That emphasis on fair procedure as the primary (even the sole) means of preventing arbitrary expulsions is to be seen throughout the drafting history of Article 13. The United Nations Secretariat prepared

valuable Annotations on the Draft Covenants on Human Rights in 1955 (General Assembly, *Official Records, Tenth Session*, Ann., Agenda item 28, UN doc. A/2929). The annotation to draft Article 13, the text of which remained unchanged through its later drafting stages, began with this paragraph:

> "61. Discussion of Article 13 has centred on the nature and extent of the protection which should be accorded to aliens against expulsion, having regard to the desire of States to safeguard themselves against undesirable aliens in their territories."

And after a reference to asylum and extradition, it continued as follows:

> "Protection of Aliens against Arbitrary Expulsion
>
> 63. It was proposed that the Article should state that the grounds for expulsion of aliens lawfully in the territory of a State must have a legal basis; it should also provide that the procedure to be followed in cases of expulsion must be prescribed by law. The principle that the grounds for expulsion must be in accordance with the law was not questioned, but there was some objection that such a provision might be difficult to apply and might in some cases, even be inadvisable for reasons of national security. It was agreed that a decision to expel an alien was a most serious matter and should not be taken arbitrarily. Aliens must be afforded some protection against arbitrary action.
>
> 64. The nature of the safeguards which should be provided for the individual was discussed, and it was said that the Article should be so drafted as to make countries which did not already provide for appeal against a decision of expulsion, adopt legislation to that effect. Some were opposed to including any specific provisions in the Article, being of the view that States could in their own discretion expel aliens and decide on the procedures and safeguards they wished to establish. The majority, however, believed that the Article should strike a proper balance between the interests of the State and the protection of the individual. Article 32 of the Convention relating to the Status of Refugees of 28 July 1951 was considered to provide the proper basis for action by the authorities with the adequate and specific safeguards in respect of the exercise of such action. Article 13, as adopted, was based on this Article of the Convention."

9. That emphasis on procedural protections rather than on substantive limits as the protection against arbitrary expulsions also appears from various steps in the drafting process. While a proposal adopted by the

Human Rights Commission in 1947 would have prohibited "arbitrary expulsion" (UN doc. E/CN.4/SR.37), by the next year the draft required only that the expulsion be in "in accordance with procedure prescribed by law" (UN doc. E/CN.4/95, Art. 12; E/800, Ann. B, Art. 11). A proposal to include a reference to "established legal grounds" was not retained, and in 1952 the text took its final form, with the earlier reference to "procedure" being deleted (M. J. Bossuyt, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights*, 1987, pp. 267-269).

10. That it is primarily through procedural protections that arbitrary expulsions are to be prevented is also the position adopted by the Human Rights Committee, as it made clear in 1986 in its General Comment No. 15:

> "10. Article 13 directly regulates only the procedure and not the substantive grounds for expulsion. However, by allowing only those carried out 'in pursuance of a decision reached in accordance with law', its purpose is clearly to prevent arbitrary expulsions. On the other hand, it entitles each alien to a decision in his own case and, hence, Article 13 would not be satisfied with laws or decisions providing for collective or mass expulsions. This understanding, in the opinion of the Committee, is confirmed by further provisions concerning the right to submit reasons against expulsion and to have the decision reviewed by and to be represented before the competent authority or someone designated by it. An alien must be given full facilities for pursuing his remedy against expulsion so that his right will in all the circumstances of his case be an effective one. The principles of Article 13 relating to appeal against expulsion and the entitlement to review by a competent authority may only be departed from when 'compelling reasons of national security' so require. Discrimination may not be made between different categories of aliens in the application of Article 13."

11. The views of the Human Rights Committee in *Maroufidou* v. *Sweden*, mentioned by the Court in support of its conclusion (Judgment, para. 66), address only the question of compliance with national law and the extent to which the Committee can properly go in reviewing decisions of national authorities which have applied their national law. The Committee says nothing at all about a distinct arbitrariness limit imposed by international law, as this passage makes clear:

> "9.3 The reference to 'law' in . . . [Article 13] is to the domestic law of the State party concerned, which in the present case is Swedish

law, though of course the relevant provisions of domestic law must in themselves be compatible with the provisions of the Covenant. Article 13 requires compliance with both the substantive and the procedural requirements of the law.

10.1 Anna Maroufidou claims that the decision to expel her was in violation of Article 13 of the Covenant because it was not 'in accordance with the law'. In her submission it was based on an incorrect interpretation of the Swedish Aliens Act. The Committee takes the view that the interpretation of domestic law is essentially a matter for the courts and authorities of the State party concerned. It is not within the powers or functions of the Committee to evaluate whether the competent authorities of the State party in question have interpreted and applied the domestic law correctly in the case before it under the Optional Protocol, unless it is established that they have not interpreted and applied it in good faith or that it is evident that there has been an abuse of power.

10.2 In the light of all written information made available to it by the individual and the explanations and observations of the State party concerned, the Committee is satisfied that in reaching the decision to expel Anna Maroufidou the Swedish authorities did interpret and apply the relevant provisions of Swedish law in good faith and in a reasonable manner and consequently that the decision was made 'in accordance with law' as required by Article 13 of the Covenant." (CCPR/C/12/D/58/1979, 8 April 1981.)

12. The Court refers to two decisions of the African Commission on Human and Peoples' Rights. The first in time, *Organisation mondiale contre la torture et autres (World Organization against Torture and Others)* v. *Rwanda* (Judgment, para. 67), concerned in part the mass expulsion of Burundian refugees on the basis of their nationality. The Commission, in its brief ruling of October 1996, said that that expulsion constituted a clear violation of Article 12 (5) (paragraph 3 above). Its only other reference to Article 12 was as follows:

> "This provision should be read as including a general protection of all those who are subject to persecution, that they may seek refuge in another State. Article 12.4 prohibits the arbitrary expulsion of such persons from the country of asylum. The Burundian refugees in this situation were expelled in violation of Articles 2 and 12 of the African Charter."

The second African Commission decision, in *Kenneth Good* v. *Republic of Botswana*, No. 313/05 (May 2010) EX.CL/600 (XVII), so far as it relates to Article 12 (4) of the African Charter, is concerned essentially with compliance with the immigration law of Botswana:

> "203. In addressing this issue the first point that has to be dwelled on is, what does the phrase 'in accordance with the law' under Arti-

> cle 12 (4) of the Charter refer to? It refers to the domestic laws of State Parties to the African Charter. Under this provision, each and every State Party has the power to expel non-nationals who are legally admitted into their territory. However, in doing so the Charter imposes an obligation on State Parties to have laws which regulate such matters and expects them to follow it strictly. This contributes towards making the process predictable and also helps to avoid abuse of power.
>
> 204. Botswana accordingly has a law in place which regulates immigration matters including deportation of non-nationals who are legally admitted into its territory. To this extent therefore Botswana has met its obligations under Article 12 (4) of the Charter. But the mere existence of the law by itself is not sufficient; the law has to be in line with not only the other provisions of the Charter but also other international human rights agreements to which Botswana is a party. In other words, Botswana has the obligation to make sure that the law (in this case the Botswana Immigration Act) does not violate the rights and freedoms protected under the African Charter or any other international instrument to which Botswana is a signatory.
>
> 205. In this regard, the Commission in *Modise* v. *Botswana* ruled that 'while the decision as to who is permitted to remain in a country is a function of the competent authorities of that country, this decision should always be made according to careful and just legal procedures, and with due regard to the acceptable international norms and standards'. International human rights norms and standards require States to provide non-nationals with the necessary forum to exercise their right to be heard before deporting them."

The Commission, earlier in its decision, had determined that Botswana was in breach of Mr. Good's rights under Article 7 (1) *(a)* of the Charter to have access to a court to determine his rights. The Commission held Botswana to be in breach of its procedural obligations.

13. It follows that we do not see the interpretations given to the two treaties by their monitoring bodies as questioning in any way the ordinary meaning of the provisions which results from the reading of the texts in context and in the light of their purpose, a meaning confirmed by the drafting history of the Covenant. Their interpretations indeed support the meaning given above. So too do the commentaries on the Covenant (see M. Nowak, *United Nations Covenant on Civil and Political Rights: CCPR Commentary*, 2nd ed., 2005, pp. 290-291; S. Joseph, J. Schultz and M. Castan (eds.), *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 2nd ed., 2005, pp. 377-378).

14. The Court refers to jurisprudence of the European and Inter-American Human Rights Courts as supporting its conclusion relating to

the expulsion provisions of the Covenant and the African Charter (Judgment, para. 68). It does not however cite any relevant decisions from either Court and those which we have consulted and which have held respondent States in breach are cases where the State had failed to observe *procedural* guarantees, had not followed its own law, or where the expulsion was collective (e.g. *Bolat* v. *Russia*, Application No. 14139/03, Decision of 5 October 2006, paras. 81-83 and *Lupsa* v. *Romania*, Application No. 10337/04, Decision of 8 June 2006, paras. 54-61; "Situations of Haitians in the Dominican Republic", *Annual Report 1991*, Inter-American Commission on Human Rights, 14 February 1992, Chap. V). Commentaries to the European Convention confirm that the expulsion provision confers procedural protection but no protection on substance (see R. White and C. Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights*, 5th ed., 2010, pp. 544-545; D. J. Harris, M. O'Boyle, E. Bates and C. Buckley, *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights*, 2nd ed., 2009, pp. 747-748).

15. To conclude on this question of law, we emphasize again that by requiring that national law regulating expulsion be enacted and complied with and, in the case of the Covenant, that certain procedural rights be required, the treaties do provide important protections against arbitrary expulsion, as both the 1955 Secretariat annotations and the Human Rights Committee in its 1986 General Comment say (paras. 8 and 10 above). The history of freedom, it has been wisely said, is largely the history of the observance of procedural safeguards.

16. The facts in this case clearly demonstrate the force of that proposition. Here the DRC in making and carrying out the order to expel Mr. Diallo clearly breached the rights conferred on him by its own law:

1. by not consulting the National Immigration Board, receiving its recommendation and reciting that fact in the order;
2. by not providing Mr. Diallo with adequate reasons for the expulsion order;
3. by detaining Mr. Diallo pending the expulsion when it provides no evidence that that was necessary and for periods grossly in excess of those allowed by its law;

and also conferred on Mr. Diallo by the Covenant:

4. by not giving Mr. Diallo the opportunity to submit the reasons against his expulsion; and
5. by not allowing him to have his case reviewed by, and be represented for the purpose before, the competent authority or a person designated by that authority.

The egregious breaches by the DRC authorities of their law in making the arrests and detentions would in themselves, in our opinion, provide a

sufficient reason for holding those actions to be arbitrary under the arrest and detention provisions of the Covenant and African Charter, with no reference at all to the purpose of the expulsion.

17. Given the manifest illegality of the expulsion for those reasons, the Court, in our view, would have had no need to consider the merits of the expulsion and its substantive arbitrariness, even if that course were available to it.

18. Although we need not consider the facts in detail, we add that we are not persuaded that the limited evidence before the Court provides a sufficient basis for the Court's statement that the expulsion order had no defensible basis because of a possible link between the expulsion and Mr. Diallo's attempts to recover the debts which he believed were owed to his companies (Judgment, para. 82). Those features of the expulsion order lead the Court to the conclusion that the arrests and detentions aimed at allowing the expulsion to be effected can only be characterized as arbitrary.

19. We begin with the recovery of debts owed to Africom-Zaire. The record before the Court shows no action after 1989 by that company in respect of debts allegedly owed to it by the State. The other Africom-Zaire issue related to a dispute with its lessor, but so far as the record shows the company was a judgment debtor following the Court of Appeal judgment of 1994 and the company's appeal to the Supreme Court was still pending as late as 2002.

Africontainers-Zaire made claims against five bodies in the course of the 1980s. It will be recalled that its trading activities had ceased by 1990. Two of the claims were against State corporations, Onatra, which operated ports and other transport facilities, and Gécamines, a State mining company. The record shows a settlement of the Onatra claim in 1990, its repudiation by Africontainers-Zaire later in the year, a follow-up letter on that matter from the company's attorney in July 1991, the rejection by Onatra of the repudiation, a rejection it repeated in February and September 1991, and correspondence relating to two containers in the course of 1991. On 14 June 1991, the company wrote in more comprehensive terms relating to 211 containers and claimed a specific amount. The final relevant document appears to be a letter of 31 July 1992 from the company to Onatra about alleged misuse of 479 containers from 1986-1989. The company expressed its willingness to negotiate the claims, without specifying any amount, in order to spare Onatra legal costs.

In the early 1990s there were exchanges with Gécamines about the loss of, damage to, and immobilization of some containers — about 20 or 30 in total. The record is silent from March 1993 to 1 June 1995 when at a meeting the company produced a list of 32 containers to which should be added, it said, another two; it also asserted the continuing validity of the claim for US$30 million it had made in 1992. On 5 February 1996, a few days after Mr. Diallo was expelled, a bailiff served a formal demand on Gécamines, now for US$14 billion, or nearly 500 times as much as it had claimed just seven months earlier. There followed in 1996-1997 exchanges and negotiations between Gécamines and the company and the other freight forwarders in which Gécamines acknowledged that it was indebted and in which details were exchanged, as in the early 1990s, about the number of containers.

20. The company's claims against the three oil companies, Zaire Shell, Zaire Fina and Zaire Mobil, related to the alleged loss of, damage to, and non-use of, the company's containers and the oil companies' alleged breach of the exclusivity clauses in their agreements with the company. The record shows court proceedings against Zaire Shell and Zaire Fina. On 3 July 1995, Zaire Shell was ordered to pay in excess of US$13 million, in August the appeal court upheld the decision, in mid-September the Vice-Minister of Justice ordered the bailiff not to execute the judgment but 15 days later that order was in effect revoked. On the following day the company wrote to Shell Zaire forwarding a debit note, dated 9 September 1995, in respect of its activities between 1982 and 1990. The adjusted amount was now in excess of US$1.8 billion or well over 100 times larger than the judgment it had obtained in July. On 6 October 1995 the bailiff seized three vans and office equipment, but on 13 October another bailiff "Sur ordre de la hiérarchie [not identified]" returned the property. On 20 June 2002, the Court of Appeal allowed Shell's appeal and substituted a judgment against Shell for about US$1,500.

The limited evidence on the Zaire Fina case indicates that the company's claim was upheld in part but that judgment was reversed on appeal and the company's cross appeal was dismissed in February 1994. The record before this Court of that litigation ends with the April 1995 submissions of the public prosecutor recommending that the Appeal Court judgment should be quashed and that a ruling should be made in that Court on the company's cross appeal. On 2 November 1995, after the

making of the expulsion order, the company sent a debit note to Zaire Fina based on a recalculation of the claim which it said now amounted to US$2.6 billion.

No legal proceedings appear to have been brought against Zaire Mobil. Also on 2 November 1995, the company sent it a debit note including a recalculation of the invoices addressed to the oil company between 1983 and 1990. The adjusted amount was over US$1.6 billion.

It is true that on 15 November 1995, Zaire Mobil and Zaire Fina wrote to the Prime Minister of the DRC calling attention to the fact that in June 1995 "Mr. Diallo sued Zaire Shell and was awarded US$13 million" and to the "fictitious" claims (which totalled more than US$4 billion) he now threatened against them, expressing their fear that his greed may imperil their very existence, by endangering their commercial activities and the job security of their employees, and seeking government intervention to warn the courts and tribunals of Mr. Ahmadou Sadio Diallo's activities in his campaign to destabilize trading companies. But that letter can have had no part in the making of the expulsion order fully two weeks *earlier*.

21. To summarize in respect of the litigation, as at the time the DRC made the expulsion order against Mr. Diallo, Africontainers-Zaire did not have a judgment against Zaire Fina and, while it had a judgment against Zaire Shell in respect of which execution had been interrupted, it had issued it with a new debit note for a very much larger sum. Similar debit notes were issued to Zaire Fina and Zaire Mobil *after* the expulsion order was made.

22. The above account of the specific actions taken in respect of the companies' debts is to be put in the context of the huge challenges facing the Zairean Government in the mid-1990s. The evidence before the Court includes, in addition to the expulsion orders against another 194 non-nationals, an extract from the report of the Central Bank of the Congo on the Zairean economy in 1993. The profound disequilibria which had characterized the economy for more than a decade had persisted in 1993. These unfavourable developments were combined with the pillaging of January 1993, the weakness of the banking system, socio-political instability, and erratic changes in prices and rates of exchange. Production had continued to fall, by 8.4 per cent in 1991, 10.5 per cent in 1992 and 16.2 per cent in 1993. In the production of goods the negative performance was to be seen in several areas, including mining (-36.4 per cent in 1992 and -22.1 per cent in 1993). Gécamines faced significant difficulties. Those difficulties, along with the January pillaging, had reduced the level of internal production and with the excessive creation of liquidity the inflation rate of almost 3,000 per cent in 1992 had risen to 4,600 per cent by the end

of 1993. The drop in public receipts was explained notably by the absence of contributions by Gécamines, fraud and tax evasion and the granting of inopportune tax concessions. Exports of commodities in general continued to fall, by 12.5 per cent in 1993 by reason principally of the weakness of the level of production.

23. To repeat, against that record, we would be reluctant to find it established that the decision to expel Mr. Diallo had no defensible basis and in that sense was arbitrary.

24. To summarize, we consider that the Court's finding about the arbitrary character of the expulsion is unnecessary, wrong in law and difficult to support on the facts.

(Signed) Kenneth KEITH.
(Signed) Christopher GREENWOOD.