INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING

AHMADOU SADIO DIALLO

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

COUNTER-MEMORIAL OF THE DEMOCRATIC REPUBLIC OF THE CONGO

(QUESTION OF COMPENSATION OWED TO GUINEA BY THE DRC)

PART I (TEXT) AND PART II (ANNEXES)

21 February 2012

[Translation by the Registry]

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PART I

TEXT OF THE COUNTER-MEMORIAL

INTRODUCTION

1 01. Under the terms of its Judgment of 30 November 2010 on the merits of the present dispute, the International Court of Justice ordered the Democratic Republic of the Congo (hereinafter "the DRC") to pay compensation to the Republic of Guinea (hereinafter "Guinea") as reparation for the injury suffered by the latter because of the wrongful detentions and expulsion of Mr. Ahmadou Sadio Diallo in 1995-1996[1].

02. In this connection, the Court found as follows:

> "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 . . ., 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.
>
> 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 of 20 April 2010, para. 273). In the light of the circumstances of the case, in particular the fundamental
2 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.
>
> 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'.
>
> 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."

03. In the operative part of its Judgment, the Court unanimously[2]:

> "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;

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[1] Case concerning *Ahmadou Sadio Diallo*, Judgment of 30 November 2010, paras. 160-163.

[2] ICJ, Judgment of 30 November 2010, para. 165 (2), (3), (7) and (8).

Finds that, in respect of the circumstances in which Mr. Diallo was arrested and
3 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;

[. . .]

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;

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."

04. It is therefore clear, according to the Judgment of the Court, that the compensation which the DRC must pay to Guinea concerns reparation for the injury flowing from the wrongful detentions and expulsion of Mr. Diallo in 1995-1996, including the resulting loss of his personal belongings.

05. Since the two Parties had not succeeded, within the six-month time-limit fixed by the Court, in reaching an agreement on the amount of compensation owed by the DRC to Guinea, the President of the Court invited them to meet him in The Hague on 14 September 2011 in order to hear their views on the subsequent procedure. During that meeting, the DRC expressed its firm willingness to pay compensation to Guinea, in compliance with the Judgment of the Court. It nonetheless regretted that the difficulties of communication between the two governments and reasons of domestic policy had prevented the necessary contacts from being made in order to reach an agreement on the amount of compensation within the time-limit fixed by the Court.

4 06. To demonstrate its good faith, the DRC proposed to Guinea at that same meeting, chaired by the President of the Court, that negotiations should be opened in Brussels as from Tuesday 20 September 2011 with a view to reaching an agreement on compensation and thereby saving the Court from devoting valuable time to ruling on such a straightforward matter, which could easily be settled through diplomatic channels.

07. Responding to the DRC's proposal, the President of the Court pointed out to the Parties that the fixing of time-limits for the filing of a Memorial by Guinea and a Counter-Memorial by the DRC under the relevant terms of its Judgment of 30 November 2010, which was the object of the meeting with the Parties, in no way hindered the diplomatic negotiations between them aimed at reaching an agreement on the amount of compensation. If the Parties arrived at such an agreement before the end of the procedure, he added, the Court would not fail to take account of it.

08. In Brussels, the Embassy of the DRC contacted that of Guinea to ascertain its position on the opening of negotiations, following the proposal made at the meeting held in The Hague with the President of the Court. The reply was that the Guinean Embassy was obliged to await the instructions of the Government of Guinea before embarking on the proposed negotiations.

09. While it was waiting for Guinea's response to its proposal for negotiations between the two States through their embassies in Brussels, the DRC received instead Guinea's Memorial, filed on 6 December 2011 pursuant to the Court's Order of 20 September 2011. The DRC therefore presumed that the instructions awaited from Conakry on the opening of negotiations between the two States in Brussels had not been given by the competent Guinean authorities.

0.10. It takes at least two to negotiate, and one needs a discussion partner across the table. **5** However, Guinea did not accept the hand extended to it by the DRC, as described above, and evidently preferred to leave to the Court the possibility of fixing the amount of compensation. In these circumstances, the Respondent is therefore obliged to submit this Counter-Memorial to the Court, in order to rebut the claims put forward by the Applicant regarding the amount of compensation owed to it under the terms of the Court's Judgment of 30 November 2010.

0.11. In its Memorial of 6 December 2011, Guinea claims from the DRC the payment of precise sums of money as reparation for very specific injuries said to have been suffered by Mr. Diallo. The sums which Guinea is claiming from the DRC are set out as follows: (1) the sum of US$250,000 as reparation for the mental harm and moral damage resulting from the wrongful detentions and expulsion of Mr. Diallo in 1995-1996[3]; (2) the sum of US$6,430,148 as reparation for the injury resulting from the loss of Mr. Diallo's professional income during his detention for 72 days and after his expulsion from the DRC[4]; (3) the sum of US$550,000 as reparation for other material damage, corresponding to the value of the assets lost by Mr. Diallo, including his bank assets[5]; (4) the sum of US$4,360,000 as reparation for the injury caused to Mr. Diallo in respect of potential loss of earnings[6]; and (5) the sum of US$500,000 to reimburse the costs incurred by Guinea in connection with this dispute brought before the Court[7]. It should be added that Guinea is claiming payment of statutory interest on the above-mentioned sums.

0.12 The DRC will demonstrate in the following sections that the various sums of money claimed by Guinea as compensation owed by the DRC in respect of reparation for the **6** non-pecuniary damage (Section I) and the various material damage alleged by Mr. Diallo (Section II), as well as for the reimbursement of costs (Section III), are either excessive and disproportionate or unfounded in relation to the injuries purportedly suffered. The same will apply to Guinea's claim regarding the payment of statutory default interest, which lacks any legal basis (Section IV).

SECTION I

THE NON-PECUNIARY DAMAGE SUFFERED BY MR. DIALLO

1.01. In this Counter-Memorial, the Respondent will use the concept of "non-pecuniary damage"[8], which is rather more explicit by contrast with material damage, instead of the term "mental and moral damage" used by the Applicant in its Memorial. According to the doctrine of the international responsibility of the State, non-pecuniary (or moral) damage can reside either in a violation of the right of a State or in an injury to its dignity, honour or prestige. It can also reside in

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[3] See the Memorial of Guinea (MG), p. 12, para. 28.

[4] *Ibid.*, p. 16, para. 48.

[5] *Ibid.*, p. 19, para. 57.

[6] *Ibid.*, p. 20, para. 65.

[7] *Ibid.*, p. 22, para. 69.

[8] This footnote does not concern the English text.

an injury to the reputation, feelings or esteem of a person on whose behalf diplomatic protection or a jurisdictional remedy is being exercised[9].

1.02. In its Memorial of 6 December 2011, the Applicant asserts that Mr. Diallo suffered moral and mental harm, including emotional pain, suffering and shock, as well as the loss of his position in society and injury to his reputation as a result of his arrests, detentions and expulsion by the DRC[10]. As reparation for this non-pecuniary injury, Guinea is claiming from the DRC the payment of a lump sum of US$250,000 by way of compensation[11].

7 1.03. The DRC will first comment on the basis for the non-pecuniary damage alleged by Guinea (I), before turning to the question of fixing the amount of compensation to make reparation for the said damage.

I. The basis for the non-pecuniary damage

1.04. It is an established fact that the Court, in its Judgment of 30 November 2010 on the merits of this dispute, found that the DRC had breached its international obligations under 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, following the wrongful detentions and expulsion of Mr. Diallo in 1995-1996. As a result of this finding, the Court ordered the DRC to pay compensation to Guinea in reparation for the injury caused to Mr. Diallo as a consequence of these internationally wrongful acts.

1.05. The DRC respects this decision of the Court. It recognizes that the wrongful detentions and expulsion of Mr. Diallo in 1995-1996 certainly caused him non-pecuniary damage which deserves a suitable form of reparation. It therefore agrees to make "appropriate reparation" — in the words of the Court — to Guinea in respect of the non-pecuniary injury caused to Mr. Diallo and, as a result, to Guinea itself.

1.06. The question here, therefore, is that of determining the amount of compensation to be paid to Guinea by the DRC in reparation for the non-pecuniary damage suffered by Mr. Diallo.

II. Fixing the amount of compensation to make reparation for the non-pecuniary damage suffered by Mr. Diallo

1.07 As the DRC has noted above, the Applicant is claiming payment of a sum of US$250,000 in compensation to make reparation for the non-pecuniary damage suffered by
8 Mr. Diallo. The Respondent contests and rejects this amount, which is manifestly excessive and disproportionate in relation to the injury actually suffered. The consistent practice of certain regional international courts which rule regularly on this type of damage shows that the sums awarded to compensate the victims of wrongful detentions or expulsions are markedly lower than the amount claimed by Guinea in the present case. In this context, the DRC will refer to the practice of the Inter-American Court of Human Rights (A) and that of the European Court of Human Rights (hereinafter "the ECHR") (B), two regional systems of human rights protection which are the oldest and best developed in the world and which have abundant practice in fixing

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[9] See *Dictionnaire de droit international public*, Brussels, Bruylant, 2001, p. 361.

[10] See MG, p. 8, para. 24.

[11] *Ibid.*, para. 28.

compensation to make good the non-pecuniary damage resulting from wrongful and prolonged detentions of physical persons by certain States. In the light of the jurisprudence of these two international courts, the Respondent will submit its own proposal to the Court regarding the amount of compensation which it considers reasonable and proportionate in relation to the non-pecuniary damage suffered by Mr. Diallo (C).

A. The Inter-American Court of Human Rights

1.08. In the context of the Inter-American Court of Human Rights, the Respondent would cite the proceedings between Mr. Yvon Neptune, former President of the Senate and former Prime Minister of Haiti, and the Republic of Haiti, a case which was settled by that court in its Judgment of 6 May 2008[12].

1.09. In that case, Mr. Yvon Neptune brought proceedings before the Inter-American Court of Human Rights against his own country for having been unlawfully and arbitrarily detained in two Haitian prisons for 25 months (around 760 days) following the end of his mandate as Prime Minister, i.e., from 27 June 2004 to 27 July 2006.

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1.10. Regarding reparation for the non-pecuniary damage which he claimed to have sustained during this long period of detention, Mr. Neptune asked the Court to take into account the numerous medical problems he had suffered during his detention and hunger strike, such as hypertension, hypotension, inflammation, arrhythmia and a weak heart. He also asked it to take account of the medical problems which he continued to suffer after his release, such as fatigue, indigestion, dizziness, weakness and reduced muscle mass; and also the psychological trauma related to the uncertainty about his life and physical safety, together with the stigma that he suffered during the 25 months that his detention lasted, the unfounded charges against him, and the separation from his family[13].

1.11. In its decision, the Court began by finding that Mr. Neptune "was subjected to inhuman detention conditions, that he was detained unlawfully and arbitrarily, and that he was not provided with due judicial protection and guarantees, all of which caused him physical and mental suffering"[14].

1.12. As regards the fixing of the amount of compensation owed by Haiti as reparation for the non-pecuniary damage suffered by the victim, the Court took into account the different aspects of that damage and fixed the reparation, based on the equity principle, as the sum of **US$30,000** (thirty thousand United States dollars)[15].

1.13. As will be seen, this case is representative. It involved a former Prime Minister who had barely left office and who had been detained unlawfully and arbitrarily for 25 months in conditions described by the Court as inhumane, i.e., for some 760 days. The Court fixed the amount of compensation to make good the non-pecuniary damage suffered by the victim as

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US$30,000. That is a long way from the sum of US$250,000 claimed by Guinea as reparation for

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[12]See Inter-American Court of Human Rights, *Yvon Neptune* v. *Haiti* (Merits, Reparations and Costs), Judgment of 6 May 2008.

[13]*Ibid.*, para. 167.

[14]*Ibid.*, para. 168.

[15]*Ibid.*

non-pecuniary damage resulting from a detention — certainly unlawful and arbitrary, but of only 72 days — during which no ill-treatment was inflicted on Mr. Diallo, even if one adds to it the element of wrongful expulsion.

B. The European Court of Human Rights

1.14. The DRC would cite here a number of decisions rendered by the ECHR on the fixing of compensation to make good the non-pecuniary damage resulting from wrongful detentions and expulsions, in breach of the relevant provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

B.1. Case of *A. and Others* v. *United Kingdom*

1.15. On 21 January 2005, an application against the United Kingdom was lodged with the ECHR by eleven non-United Kingdom nationals who had been arrested and detained on British territory in connection with the anti-terrorism campaign launched following the terrorist attacks of 11 September 2001 against the United States of America. The applicants alleged that their long detention was unlawful and violated several relevant provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms, in particular the lack of effective remedies enabling them to have their complaints examined.

The Court found that nine of the eleven applicants had indeed been victims of prolonged unlawful detention on the part of the British authorities.

1.16. The nine successful applicants had been detained in British prisons for the following periods of time: (1) the first applicant: from 19 December 2001 to 11 March 2005, i.e., for three years and 83 days; (2) the third applicant: from 19 December 2001 to 11 March 2005, i.e., for three years and 83 days; (3) the fifth applicant: from 19 December 2001 to 22 April 2004 and under house arrest until 11 March 2005, i.e., for three years and 83 days; (4) the sixth applicant: from 19 December 2001 to 11 March 2005, i.e., for three years and 83 days; (5) the seventh applicant: from 8 February 2002 to 11 March 2005, i.e., for three years and 33 days; (6) the eighth applicant: from 23 October 2002 to 11 March 2005, i.e., for two years and 141 days; (7) the ninth applicant: from 22 April 2002 to 11 March 2005, i.e., for two years and 324 days; (8) the tenth applicant: from 14 January 2003 to 11 March 2005, i.e., for two years and 57 days; and (9) the eleventh applicant: from 2 October 2003 to 11 March 2005, i.e., for one year and 159 days[16].

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1.17. As reparation for the non-pecuniary damage which they purportedly suffered during these long periods of detention, the applicants claimed the following sums: the first applicant claimed compensation of **£234,000** for loss of liberty, mental suffering, mental illness and the suffering experienced by his wife and family as a result of the separation and the negative publicity; the third applicant claimed compensation of **£230,000** for loss of liberty and the consequent mental suffering, including mental illness, together with the distress caused to his wife and children; the fifth applicant claimed compensation of **£240,000** for the mental suffering, including mental illness, caused by his imprisonment, together with the distress caused to his wife and children; the sixth applicant claimed compensation of **£217,000** for the mental suffering resulting from his detention, together with the distress caused to his wife and children; the seventh applicant claimed compensation of **£197,000** for his detention and the consequent mental suffering, including mental illness; the eighth applicant claimed compensation of **£170,000** for loss of liberty and mental suffering, together with the distress caused to his wife and children; the ninth applicant

[16]See ECHR, Case of *A. and Others* v. *United Kingdom*, Judgment of 19 February 2009, paras. 236-244.

claimed compensation of **£215,000** for unlawful detention and the consequent mental suffering, including mental illness, together with the distress caused to his wife and children; the tenth
12 applicant claimed compensation of **£144,000** for loss of liberty and the consequent mental suffering, including mental illness; and the eleventh applicant claimed compensation of **£95,000** for unlawful detention and the consequent mental suffering[17].

1.18. Exercising its discretion, and having regard to all the circumstances of the case, including the nature of the violations found as well as the particular context of the case, the Court decided to award the sum of **€3,900** to the first, third and fifth applicants (instead of the £234,000, £230,000 and £240,000 which they had respectively claimed); **€3,400** to the sixth applicant (instead of the £217,000 which he had claimed); **€3,800** to the seventh applicant (instead of the £197,000 which he had claimed); **€2,800** to the eighth applicant (instead of the £170,000 which he had claimed); **€3,400** to the ninth applicant (instead of the £215,000 which he had claimed); **€2,500** to the tenth applicant (instead of the £144,000 which he had claimed); and **€1,700** to the eleventh applicant (instead of the £95,000 which he had claimed)[18].

1.19. The DRC observes here, given the sums awarded to the victims by the ECHR in relation to their monetary claims and the damaging effects of their detention, that none of them received so much as 2 per cent of the amount claimed in compensation, even though they suffered a longer and harsher detention than that of Mr. Diallo, who is claiming the sum of US$250,000 for a detention which lasted 72 days.

B.2. Case of *M.S.S.* v. *Belgium and Greece*

1.20. This case originated in an application against Belgium and Greece lodged with the ECHR on 11 June 2009 by M.S.S., an Afghan asylum-seeker, alleging that he had suffered violation of certain provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

13 1.21. In his application, the applicant claimed that his expulsion by the Belgian authorities to Greece had violated Articles 2 and 3 of the Convention, and that he had been subjected in Greece to treatment prohibited by Article 3. He also complained of the lack of a remedy under Article 13 of the Convention that would enable him to have these complaints examined[19].

1.22. Regarding the responsibility of Belgium, the applicant claimed payment from the latter of compensation of **€24,900** as reparation for the non-pecuniary damage he had suffered because of the decision of the Belgian authorities to transfer him to Greece.

1.23. In its Judgment, the Court considered that the applicant had experienced certain distress and, having regard to the nature of the violations found, awarded him the sum of **€24,900** as reparation for the non-pecuniary damage he had suffered[20].

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[17] *Ibid.*

[18] *Ibid.*, paras. 250-253.

[19] See ECHR, Case of *M.S.S.* v. *Belgium and Greece*, Judgment of 21 January 2011, para. 3.

[20] *Ibid.*, paras. 406 and 411.

1.24. As regards the responsibility of Greece, the applicant claimed payment from that country of the sum of **€1,000** as compensation to make good the non-pecuniary damage sustained during his detention.

1.25. The Court, after finding that the applicant's conditions of detention violated the provisions of Article 3 of the Convention, considered that he had experienced certain distress and awarded him the sum of **€1,000** as reparation for the non-pecuniary damage he had suffered[21].

B.3. Case of *Assanidze* v. *Georgia*

1.26. In this case, Mr. Assanidze brought a complaint against Georgia alleging prolonged illegal and arbitrary detention in breach of the provisions of the European Convention for the
14 Protection of Human Rights and Fundamental Freedoms, and of Georgian domestic law. Having been arrested and detained on 11 December 1999, the applicant was acquitted on 29 January 2001 by a decision of the Supreme Court of Georgia, which at the same time ordered his immediate release. However, following and in spite of his acquittal and the decision of the Supreme Court of Georgia of 29 January 2001 ordering his immediate release, the applicant remained in custody for more than three years. This detention for an indefinite and unforeseeable period was therefore not based on any law or judicial decision[22].

1.27. The central Georgian State itself repeatedly pointed out that there was no basis for the detention of Mr. Assanidze. But the Ajarian provincial authorities which were holding him in custody refused to release him[23].

1.28. Given this state of affairs, the Court began by observing, firstly, that "it is inconceivable that in a State subject to the rule of law a person should continue to be deprived of his liberty despite the existence of a court order for his release" and, secondly, that "to detain a person for an indefinite and unforeseeable period, without such detention being based on a specific statutory provision or judicial decision, is incompatible with the principle of legal certainty . . . and arbitrary, and runs counter to the fundamental aspects of the rule of law"[24].

1.29. In justifying and fixing the amount of compensation to make good the non-pecuniary damage suffered by Mr. Assanidze, the Court began by declaring that

> "as regards the non-pecuniary damage already sustained, the Court finds that the violation of the Convention has indisputably caused the applicant substantial damage. Held arbitrarily in breach of the founding principles of the rule of law, the applicant is in a frustrating position that he is powerless to rectify. He has had to contend with both the Ajarian authorities' refusal to comply with the judgment acquitting him
> **15** handed down some three years ago and the failure of the central government's attempts to compel those authorities to comply."[25]

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[21] *Ibid.*, paras. 404 and 406.

[22] See ECHR, Case of *Assanidze* v. *Georgia*, Judgment of 8 April 2004, para. 172.

[23] *Ibid.*, para. 174.

[24] *Ibid.*, paras. 173 and 175.

[25] *Ibid.*, para. 199.

1.30. In these circumstances, and in view of the seriousness of the applicant's continuing situation in detention, the Court awarded him the sum of **€150,000** in compensation to make good all the damages he had sustained, whereas the applicant had claimed the amount of €3,000,000 as compensation for non-pecuniary damage alone[26].

B.4. Case of *Ilaşcu and Others* v. *Moldova and Russia*

1.31. The applicants brought proceedings before the ECHR against Moldova and Russia, complaining of their conditions of detention and of the treatment that had been inflicted on them while they were detained.

1.32. Mr. Ilaşcu complained in particular of his conditions of detention for eight years while under threat of execution, from his sentencing to death on 9 December 1993 until his release on 5 May 2001[27]. During his long detention, Mr. Ilaşcu was savagely beaten by the warders at Tiraspol Prison, who threatened to kill him, and denied food and light by way of punishment; he was subject to mock executions and kept in strict isolation, without contact with other prisoners or any news from the outside; he had no right to contact his lawyer or receive visits from his family, and was held in a cell that was unheated, even in winter, and had no natural light or ventilation. He could take showers only rarely, often at intervals of several months.

1.33. The Court concluded that the death sentence imposed on the applicant by an illegal court, the conditions he was living in during this long period of detention and the treatment he suffered were particularly serious and cruel and must accordingly be considered acts of torture[28].

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1.34. Regarding Mr. Ivanţoc, the Court established that during his detention the applicant had received a large number of blows, persecution and other ill-treatment. He was denied food and medical assistance and not permitted to see a lawyer. He was detained in an unheated, badly ventilated cell without natural light. In the Court's opinion, such treatment was such as to engender pain or suffering, both physical and mental, which could only be exacerbated by the applicant's total isolation and were calculated to arouse in him feelings of fear, anxiety and vulnerability likely to humiliate and debase him and break his resistance and will.

1.35. The Court concluded that, taken as a whole and regard being had to its seriousness, its repetitive nature and its purpose, the treatment inflicted on Mr. Ivanţoc had caused severe pain and suffering and was particularly serious and cruel. It added that all these acts must be considered acts of torture[29].

1.36. As regards Mr. Leşco and Mr. Petrov-Popa, the Court considered that they had experienced extremely harsh conditions of detention: visits and parcels from their families were subject to the discretionary authorization of the prison administration; at times they were denied food, or given food unfit for consumption, and most of the time they were denied all forms of appropriate medical assistance despite their state of health, which had been weakened by these

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[26] *Ibid.*, paras. 196 and 201.

[27] See ECHR, Case of *Ilaşcu and Others* v. *Moldova and Russia*, Judgment of 8 July 2004, para. 419.

[28] *Ibid.*, paras. 435-441.

[29] *Ibid.*, paras. 443-447.

conditions of detention; and they were not given the dietetically appropriate meals prescribed by their doctors.

17 1.37. The Court also established that Mr. Petrov-Popa had been held in solitary confinement since 1993, having no contact with other prisoners or access to newspapers in his own language. The two applicants were denied access to a lawyer until June 2003.

1.38. In view of the foregoing, the Court considered that such treatment was such as to engender pain or suffering, both physical and mental. Taken as a whole and regard being had to its seriousness, the treatment inflicted on Mr. Leşco and Mr. Petrov-Popa could be qualified as inhuman and degrading treatment[30].

1.39. Regarding the amount of compensation to make good the non-pecuniary damage they had sustained because of their long unlawful detention and the ill-treatment they had suffered, the four victims claimed payment of the following sums from Moldova and Russia: Mr. Ilaşcu, **€7,395,000**; Mr. Ivanţoc, **€7,842,000**; Mr. Petrov-Popa, **€7,441,000**; and Mr. Leşco, **€7,830,000**[31]. They claimed these very large sums taking into account the seriousness of the violations complained of, the circumstances of the case, the attitude of the respondent Governments, the lasting effects on their health and the trauma they had suffered during their long unlawful detention.

1.40. Fixing in turn the amount of the compensation sought by the complainants, the Court began by reiterating that Mr. Ilaşcu and Mr. Ivanţoc had been subjected to acts of torture, that the other two applicants had been subjected to inhuman and degrading treatment, that all the applicants had been detained arbitrarily, and that Mr. Ivanţoc, Mr. Leşco and Mr. Petrov-Popa were still being detained in breach of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It then took the view that as a result of the violations found the applicants had undeniably suffered non-pecuniary damage. Finally, the Court awarded each of the applicants
18 the sum of **€180,000** for pecuniary and non-pecuniary damage arising from the violations of Articles 3 and 5 of the Convention (acts of torture, inhuman and degrading treatment and unlawful detention), and each applicant the sum of **€10,000** for non-pecuniary damage arising from the breach of Article 34 by Russia and Moldova (lack of individual remedy)[32]. As will be seen, the sums awarded to the victims by the Court in this case represent less than 1 per cent of the sums claimed by the victims as reparation for the non-pecuniary damage they had suffered.

1.41. It may therefore be concluded from all the judicial decisions described above, concerning the amounts of compensation to make good non-pecuniary damage resulting from an unlawful and arbitrary detention or a wrongful expulsion, that the sums awarded by the international courts dealing with such matters are often reasonable and modest in relation to the initial claims made by the victims, which tend to exaggerate these amounts.

1.42. The only cases in which the compensation awarded to make good non-pecuniary damage is quite substantial are where the detentions are not only found to be unlawful and particularly long, but are accompanied by acts of torture or cruel, inhuman and degrading treatment. The courts in question have then ordered the States held responsible for the

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[30] *Ibid.*, paras. 450-452.

[31] *Ibid.*, para. 485.

[32] *Ibid.*, para. 489.

internationally wrongful acts to pay what might be called "punitive or exemplary" damages to the victims of those acts.

1.43. In the light of these details, the DRC will set out below its views on the amount of compensation that would be reasonable and appropriate to make reparation for the non-pecuniary damage suffered by Mr. Diallo.

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C. The amount of compensation owed to Guinea to make good the non-pecuniary damage suffered by Mr. Diallo

1.44. There is no question that Mr. Diallo suffered non-pecuniary damage as a result of his unlawful 72 days of detention and expulsion in 1995-1996. It is clear that he suffered a psychological and emotional shock following his removal from the DRC, where he had spent 32 years of his life. This non-pecuniary damage thus merits compensation by the DRC.

1.45. There is equally no doubt that, during his brief detention, Mr. Diallo did not suffer any mistreatment at the hands of the Congolese authorities. On that subject, the Court stated in its Judgment of 30 November 2010 on the merits of this dispute that

> "Guinea has failed to demonstrate convincingly that Mr. Diallo was subjected to [inhuman and degrading] 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 [inhuman and degrading] treatment prohibited by Article 10, paragraph 1, of the Covenant and by general international law. . . 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. . . In conclusion, the Court finds that it has not been demonstrated that Mr. Diallo was subjected to [inhuman and degrading treatment]."[33]

1.46. In view of the above, the DRC draws the Court's attention to the fact that the present
20 case is markedly different to some of those mentioned earlier, in which the victims were illegally detained for more than 10 years and subjected to acts of torture and cruel, inhuman or degrading treatment. In the case under consideration, Mr. Diallo was detained for only 72 days — a period which was broken up by several days' release on the orders of the President of the Republic —, during which time he suffered no cruel, inhuman or degrading treatment at the hands of the Congolese authorities. It should also be added that his detention was ordered with a view to his expulsion from Congolese territory, and not as part of regular judicial proceedings. This explains the disregard shown by the Congolese authorities for the legal time-limit of eight days, which was exceeded in this case. The failure to respect that time-limit was not the consequence of a deliberate determination to punish the individual concerned, but rather of the difficulties of arranging the flight to his country of origin.

1.47. In the light of the foregoing, the DRC requests that the Court take into account the specific circumstances of this case, the brevity of the detention complained of, the absence of any

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[33]See ICJ, case concerning *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)*, Judgment of 30 November 2010, paras. 88-89.

mistreatment of Mr. Diallo, the fact that Mr. Diallo was expelled to his country of origin, with which he had been able to maintain ongoing and high-level contacts throughout his lengthy stay in the Congo — and not to a country where he was going to suffer mistreatment — as is confirmed by the present diplomatic protection proceedings initiated on his behalf by the Guinean Government, as well as the practice of other international courts which regularly deliver judicial decisions on the matter of compensation for non-pecuniary damage suffered by individuals at the hands of States, even though the Court is not bound by those decisions.

1.48. The Respondent recalls that the purpose of compensation for the non-pecuniary damage suffered by Mr. Diallo is neither to enrich him, enabling him to invest in commercial activities in Guinea, nor to enrich Guinea. Rather, it is a form of financial relief, intended to
21 compensate the said injury. It is important not to lose sight of the fact that Guinea has already obtained satisfaction simply from the Court's judicial finding that the DRC had violated international law. Guinea will thus have received twofold satisfaction in this case.

1.49. In view of this, the DRC considers that the amount of US$250,000, claimed by Guinea as compensation for the non-pecuniary damage suffered by Mr. Diallo, is excessive and disproportionate to the non-pecuniary damage suffered by the latter as a result of his unlawful detentions and expulsion in 1995-1996. It is simply a lump sum amount, with no objective or credible basis. Guinea does not make reference to any precedent in international judicial or arbitral jurisprudence in arriving at that amount. Moreover, it is the constant practice of Mr. Diallo and Guinea to exaggerate the amounts they claim from the DRC — as, for example, the sum of US$36 billion claimed in respect of debts owed to Africom-Zaire and Africontainers-Zaire.

1.50. Since the Parties have not asked the Court to determine *ex aequo et bono*, pursuant to Article 38, paragraph 2, of the Statute of the Court, the amount of compensation in the present case, the DRC believes that a global amount of between US$25,000 and US$30,000, and no higher, is reasonable and proportionate to the non-pecuniary damage suffered by Mr. Diallo. The DRC is therefore willing to pay such an amount to Guinea.

1.51. To conclude, the DRC asks that the Court award Guinea a sum between a minimum of US$25,000 and a maximum of US$30,000, as reparation for the non-pecuniary damage suffered by Mr. Diallo as a result of his unlawful detentions and expulsion in 1995-1996.

1.52. In the following section, the DRC will consider the question of compensation for the material damage alleged by Guinea.

SECTION II

22

THE MATERIAL DAMAGE SUFFERED BY MR. DIALLO

2.01. Material damage is defined by doctrine as an "infringement of an economic or proprietary interest, that is to say, an interest which can be measured directly in monetary terms"[34].

2.02. In its pleadings, Guinea claims that Mr. Diallo has suffered several forms of material damage, which it sets out as follows: (1) the loss of professional income since his expulsion from

[34]See the *Dictionnaire de droit international public*, *op. cit.*, p. 361.

the DRC[35]; (2) the loss of the value of assets, including his bank assets[36]; and (3) the loss of potential earnings[37]. The matter of the reimbursement of costs of the proceedings will be examined later, in Section III of this Counter-Memorial.

2.03. For the sake of clarity, the Respondent will address each of Guinea's claims for material damage in turn and in the following order: the loss of professional income (I); the loss of the value of assets, including bank assets (II); the loss of potential earnings (III).

I. The loss of professional income

2.04. In its Memorial of 6 December 2011, Guinea states that, prior to his expulsion from the DRC, Mr. Diallo's monthly salary, in his capacity as *gérant* of Africom-Zaire and Africontainers-Zaire, was equivalent to US$25,000, amounting to US$10,000 for the first company and US$15,000 for the second. The Applicant adds that, taking account of inflation — the rate of which it fails to indicate —, it estimates at US$80,000 the immediate loss suffered by Mr. Diallo as a result of the non-receipt of his professional income during the 72 days of his detention[38].

23 2.05. Furthermore, the Applicant contends that, taking account of the period which has elapsed since his expulsion and of inflation, the rate of which it once again fails to indicate, the total loss suffered by Mr. Diallo as a result of the loss of his professional income over that period can be assessed at US$6,430,148[39].

2.06. The DRC will consider below the claim for US$80,000 relating to the direct and immediate material loss (A) and for US$6,430,148 relating to the loss of earnings (B) which are said to have been suffered by Mr. Diallo in connection with the loss of his professional income.

A. The loss of US$80,000 in professional income

2.07. As stated in paragraph 2.04 above, Guinea is requesting that the DRC pay a sum of US$80,000, which represents the immediate material loss suffered by Mr. Diallo as a result of the non-receipt of his professional income during the 72 days of his detention.

2.08. In the following paragraphs, the DRC will show that this request is unfounded, and that this is so for several reasons.

2.09. It should first be noted that, in the Judgment of 30 November 2010 delivered by the Court in this case, the latter recalled its established jurisprudence on evidence, stating that "[a]s a general rule, it is for the party which alleges a fact in support of its claims to prove the existence of that fact"[40].

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[35]See MG, p. 16, para. 48.

[36]*Ibid*., p. 19, para. 57.

[37]*Ibid*., p. 20, para. 65.

[38]See MG, paras. 34 and 35.

[39]*Ibid*., para. 48.

[40]See ICJ, case concerning *Ahmadou Sadio Diallo*, Judgment of 30 November 2010, para. 54.

2.10. In the present case, Guinea claims that, prior to his expulsion from the DRC,
24 Mr. Diallo received a monthly salary of US$25,000 in his capacity as *gérant* of Africom-Zaire and Africontainers-Zaire. However, the fact is that the Applicant offers no written evidence in support of that claim. There is also no evidence of payment of taxes on such high earnings by Mr. Diallo to the Congolese revenue authorities.

2.11. Furthermore, throughout these entire proceedings, including the current stage, Guinea has repeatedly argued that Mr. Diallo was the sole *gérant* and *associé* of Africom-Zaire and Africontainers-Zaire. According to Guinea, and as recalled by the Court in its Judgment of 24 May 2007 on the Preliminary Objections, "in fact and in law it was virtually impossible to distinguish Mr. Diallo from his companies"[41].

Further, the Court stated in its own words in its Judgment on the merits 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"[42].

2.12. In view of this, it is inconceivable that two companies which were purportedly in operation at the time of the events, and over which Mr. Diallo, as their sole *gérant* and *associé*, had full charge and control, could refuse to pay Mr. Diallo his monthly salary during the 72 days of his detention. If this were the case then, according to Guinea's reasoning, it would have been Mr. Diallo himself who refused to pay his own monthly salary, because only he had the authority to make a decision which would seriously impair his means of survival while in detention. Under such circumstances, the DRC cannot, therefore, be held accountable for this purported loss of professional income.

25 2.13. Moreover, Mr. Diallo was not simply an employee, bound to these two companies by an employment contract which could be terminated following a lengthy detention. He was an organ and one of the owners — if not, and as Guinea contends, the sole owner — of Africom-Zaire and Africontainers-Zaire, in his dual capacity as *gérant* and *associé* of those two companies. It is important, therefore, not to confuse Mr. Diallo's situation with the situation of regular employees of a commercial company, who might lose their jobs, and therefore their salaries, as a result of a lengthy period of judicial detention.

2.14. Finally, Guinea has failed to demonstrate that the two companies in question found themselves suddenly short of financial resources over the two months of Mr. Diallo's detention; that they did so because of that detention; and that they were therefore unable to pay Mr. Diallo his monthly salary.

2.15. In conclusion, the Respondent contends that the Applicant has failed (1) to produce any evidence to show that Mr. Diallo had a monthly income of US$25,000; (2) to provide evidence of payment of taxes to the Congolese revenue authorities on those earnings; and (3) to offer any credible or convincing explanation as to why Mr. Diallo, the sole *gérant* and *associé* of the companies in question, could not pay himself his monthly salary during his two months of detention, despite having the authority and means to do so. In addition, Guinea has not indicated either the rate of inflation, or the country of that rate of inflation, relied on in this case in order to pass from US$50,000 to US$80,000.

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[41]See ICJ, case concerning *Ahmadou Sadio Diallo*, Judgment of 24 May 2007 (Preliminary Objections), para. 56.

[42]See ICJ, case concerning *Ahmadou Sadio Diallo*, Judgment of 30 November 2010 (Merits), para. 112.

2.16. Since Guinea's claim relating to the payment by the DRC of a total of US$80,000 for loss of professional income during Mr. Diallo's 72 days of detention is neither credible nor justified, it follows that it should be dismissed out of hand by the Court.

B. The loss of US$6,430,148 in earnings

26 2.17. Guinea, without expressly using the term *manque à gagner*[*], seeks the payment of an amount of US$6,430,148 in compensation for the material loss alleged to have been suffered by Mr. Diallo as a result of the loss of his professional income, i.e., his monthly salary, over the period following his expulsion from the DRC on 31 January 1996. In other words, the Applicant is requesting payment of the earnings lost by Mr. Diallo, because he was unable to receive his monthly salary of US$25,000 after his expulsion from the DRC, and has been unable to receive it since.

2.18. In order to justify the alleged loss of professional earnings suffered by Mr. Diallo in the period following his expulsion from the DRC, the Applicant states that Mr. Diallo's expulsion had the following injurious consequences:

> "(i) it was made impossible or, at least, considerably more difficult for him to perform his functions as managing director and *gérant*, given that he could no longer go back;
>
> (ii) in being expelled before he could entrust his functions as *gérant* to a third party, in accordance with proper procedures, he was deprived of his usual professional income, even if he retained the right to appoint a third party to replace him in performing his functions;
>
> (iii) the expulsion of the sole *associé* and *gérant*, reducing him to penury, has driven his companies to the brink of bankruptcy"[43].

2.19. As the DRC will explain below, the reasoning advanced by Guinea as justification for the payment to it on account of a purported loss of professional earnings is untenable. Given that Guinea's claim for loss of earnings is linked to the loss of Mr. Diallo's professional income, the arguments previously set forth by the DRC to refute that claim of loss of income can also be applied in respect of the alleged loss of earnings related to that income.

27 2.20. As stated above, Guinea has failed to produce any documentary evidence that Mr. Diallo was in receipt of a monthly salary of US$25,000. In that regard, the Applicant seeks to be believed by the Court on the basis of its word alone. Thus, Guinea has also failed to explain how two companies which belonged to Mr. Diallo, and of which he was the sole *gérant* and *associé*, could refuse to pay him his monthly salary during his two months of detention.

2.21. It follows that, since Mr. Diallo did not suffer a loss of professional income during his detention of 72 days, the claim for the loss of that income after his detention and expulsion from the DRC cannot be sustained, since the two companies which owed him that income, and of which

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[*]Translator's note — In its Memorial, Guinea used the term "perte de revenus". In English, both French terms would normally be rendered as "loss of earnings".

[43]See MG, para. 47.

he was and still is *gérant* and *associé*, continued to operate without any interference from the Congolese authorities.

2.22. On the subject of those companies, the Court stated:

> "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'. . . 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."

and that "Mr. Diallo was, both as *gérant* and *associé* of the two companies, fully in charge and in control of them"[44].

2.23. Returning to the three injurious consequences of the expulsion alleged by Guinea, the DRC considers these claims to be unfounded, and it does so for a number of reasons, which are developed below.

28 2.24. Firstly, contrary to Guinea's contentions, the fact that Mr. Diallo could not return to Kinshasa did not make it impossible or considerably more difficult for him to perform his functions as managing director and *gérant* of the two companies. Indeed, Guinea had previously raised this argument during the merits stage of the dispute, observing that "following [Mr. Diallo's] detention and expulsion by the [Congolese] authorities, it became impossible for him, in practical terms, to perform the role of 'gérant' from Guinea, because he was outside the [Congolese territory]" [Reply of Guinea, para. 2.22].

2.25. The Court rejected that reasoning in the following terms:

> "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.
>
> In fact, it is clear from various documents submitted to the Court that, even after
> **29** 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.

[44]See ICJ, case concerning *Ahmadou Sadio Diallo*, Judgment of 30 November 2010 (Merits), paras. 113 and 114.

> 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."[45]

2.26. In view of that position taken by the Court, which requires no comment, Guinea's claim regarding the first injurious consequence of Mr. Diallo's expulsion must be rejected.

2.27. Secondly, despite what Guinea alleges, the fact that Mr. Diallo was expelled before he could entrust his functions to a third party, in accordance with proper procedures, did not deprive him of his usual professional income.

2.28. In the light of the Court's position as set out above, Guinea's claim regarding the second injurious consequence of Mr. Diallo's expulsion must, like the first, be rejected. It is in fact established, as the Court observed, that, in order to guarantee the payment of his professional income, Mr. Diallo entrusted the day-to-day management of the two companies following his expulsion to individuals who continued to act on behalf of those companies under his supervision. It is also interesting to note that the inventory of Africontainers-Zaire's property, signed on 12 February 1996, includes the following note (NB) concerning certain of the company's vehicles: "The Saviem 301 unit KN 1794E, trailer KN 9773K and the fork-lift truck could be repaired on the instructions of the Chairman and Chief Executive, Mr. Ahmadou Sadio Diallo, and brought back into service."[46] It can be clearly seen that Mr. Diallo continued to manage his concerns in the DRC in spite of his expulsion and, therefore, that he was not deprived of his professional income as a result.

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2.29. Thirdly, Guinea contends that the expulsion of the sole *associé* and *gérant*, reducing him to penury, has driven his companies to the brink of bankruptcy. This claim by Guinea as to the third injurious consequence of Mr. Diallo's expulsion must also be rejected, since it falls outside the scope of the Judgment of 30 November 2010.

2.30. In fact, had Mr. Diallo's expulsion driven the two companies to the brink of bankruptcy, any possible damage would be to the companies as legal entities, and not to Mr. Diallo personally. However, the present proceedings concern the fixing of the amount of compensation to be paid to Guinea for the injury caused to Mr. Diallo personally and not as an *associé* of the companies in question.

2.31. In that connection, the Court stated that the "rights and assets of a company must be distinguished from the rights and assets of an *associé*"[47] and that "[s]o long as the company is in existence the shareholder [or *associé*] has no right to the corporate assets"[48].

It is worth recalling here that Guinea's claims concerning the rights and debts of the two companies were declared inadmissible by the Court.

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[45]See ICJ, case concerning *Ahmadou Sadio Diallo*, Judgment of 30 November 2010 (Merits), paras. 135-137.

[46]See Ann. I, p. 3 of the inventory.

[47]See ICJ, case concerning *Ahmadou Sadio Diallo*, Judgment of 30 November 2010 (Merits), para. 155.

[48]See ICJ, case concerning *Ahmadou Sadio Diallo*, Judgment of 24 May 2007, ICJ Reports 2007, para. 63.

2.32. With respect to Mr. Diallo's purported penury, said to be the result of his expulsion, the DRC points out that he was issued, at his own request, with certificate of lack of means
31 No. 01/DUAS/B.2./0974/95 of 12 July 1995, drawn up by the Social Affairs Urban Division of the city of Kinshasa. That certificate, which was drafted several months prior to his detentions and expulsion from the DRC, states that "Mr. Diallo . . . is . . . temporarily destitute, insolvent and lacking any means of subsistence, after examination of his file"[49]. The certificate was produced by Guinea itself as Annex 22 to its Observations on the Preliminary Objections of the DRC of 7 July 2003[50]. It is clear therefore that, by his own admission, Mr. Diallo had considerable financial problems well before his detentions and expulsion from the DRC in 1995-1996.

Furthermore, the DRC draws the Court's attention to the fact that, since 1991, more than four years prior to his detentions and expulsion from Congolese territory, Mr. Diallo lacked the funds to pay the monthly rent on the apartment he occupied in Kinshasa. It was in reaction to that situation that PLZ, the company which owned the apartment, terminated the lease on 30 April 1992 and brought proceedings before the Congolese courts to force Mr. Diallo to vacate the premises and to pay the accrued rent, which amounted to US$32,964 as at 19 November 1992[51]. That situation is further proof that Mr. Diallo had major financial problems, to the point that he was unable to pay the monthly rent on the apartment he occupied, causing the lessor to bring proceedings before the Congolese courts to secure his eviction and payment of the outstanding rent, and that he had these problems several years prior to his expulsion from the DRC.

32 Thus, there has been no credible or convincing evidence produced before the Court in support of Mr. Diallo's alleged state of penury, said to have resulted from his expulsion from the DRC.

In view of the above, the DRC submits that Mr. Diallo was in very serious financial difficulty long before his detentions and expulsion from the Congolese territory in 1995-1996, and that the Respondent is in no way responsible for that difficulty.

2.33. To conclude on this point, the DRC seeks assistance from the Court's jurisprudence in the *Corfu Channel* case concerning the assessment of the amount of compensation owed by Albania to the United Kingdom[52]. In that case, the United Kingdom claimed from Albania an amount of £50,048 in compensation for the deaths and injuries of British naval personnel. That sum represented the cost of pensions and other grants made by the United Kingdom to the victims or their dependants, and the costs of administration, medical treatment, etc.

2.34. The Court awarded the said sum to the United Kingdom, stating:

> "This expenditure *has been proved to the satisfaction of the Court by the documents produced by the United Kingdom Government*[53] as Annexes 12 and 13 to

[49]See Ann. II to this Counter-Memorial.

[50]See *Observations of the Republic of Guinea on the Preliminary Objections of the Democratic Republic of the Congo*, Vol. II (Annexes), 7 July 2003, Ann. 22.

[51]See the details of that case, Preliminary Objections of the DRC, 1 October 2002, Vol. I, p. 36.

[52]See ICJ, case concerning the *Corfu Channel* (assessment of the amount of compensation owed by the People's Republic of Albania to the United Kingdom of Great Britain and Northern Ireland), Judgment of 15 December 1949, *I.C.J. Reports 1949*, p. 244.

[53]Emphasis added.

its Memorial, and by the supplementary information and corrections made thereto in Appendices I, II and III of that Government's Observations of July 28th, 1949."[54]

33 2.35. It is thus clear that the Court awarded the United Kingdom the sum it claimed because the United Kingdom produced probative documents substantiating the costs it had incurred. However, in the present case, Guinea has failed to produce any evidence attesting to the existence of Mr. Diallo's alleged professional income or to his loss of earnings in respect of that income. The Applicant has also omitted to explain how Mr. Diallo could have been deprived of his monthly salaries when he was the sole *gérant* and *associé* of the two companies which paid those salaries prior to his detentions and expulsion.

2.36. Aware that its claims are not based on any documents of irrefutable evidential value, the Applicant leaves it to the Court to find, in its place, the evidence to support its allegations, even including Mr. Diallo's own monthly salary statement[55]. In that regard, the DRC points out that the Applicant must either produce documentary evidence in support of its financial claims or withdraw those claims for lack of evidence. And if it lacks the evidence, the Court can but note that deficiency and draw from it the necessary legal consequences in this type of situation.

2.37. In conclusion, and in view of all of the foregoing, the Respondent requests that the Court reject Guinea's claim concerning payments of US$80,000 and US$6,430,148 to compensate, respectively, Mr. Diallo's alleged loss of professional income during his 72 days of detention and his purported loss of earnings in respect of that income in the period following his expulsion from Congolese territory.

II. The loss of assets (including bank assets)

2.38. The Applicant alleges that, following the expulsion of Mr. Diallo from the DRC, he
34 lost all of the movable property which had been in the apartment where he was living in Kinshasa. The DRC would point out in this connection that this was an apartment rented for Mr. Diallo from PLZ by Africom-Zaire.

Guinea explains that the inventory of Mr. Diallo's personal belongings drawn up after his expulsion is incomplete and does not reflect the true situation, in that certain objects are claimed to have been fraudulently removed between the date of his expulsion and the date of the inventory, because the Congolese State failed to take appropriate steps to protect his property. In this regard, Guinea cites certain valuable objects which are not listed in the inventory, such as jewellery, a Cartier watch with 16 small diamonds, 50 gold ballpoint pens as gifts for visitors, etc.

2.39. Guinea further cites the loss of movable property of Africontainers-Zaire, of which the inventory, drawn up on 12 February 1996, is also alleged to be incomplete. The DRC would point out in this regard that this reference to the alleged loss of property of Africontainers is misplaced, since the Court has already held that all claims by Guinea relating to the rights of that company are inadmissible.

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[54] *Ibid*., pp. 249-250.

[55] See MG, pp. 16-17, para. 49.

2.40. As compensation for the material damage resulting from the loss of Mr. Diallo's personal property, Guinea is claiming from the DRC payment of a lump sum of **US$550,000**, representing the value of the lost assets, including his bank assets[56].

2.41. The DRC will explain to the Court that this claim by Guinea is not based on any serious and credible evidence, and should be dismissed for a number of reasons, which will be set out below.

2.42. As has been noted earlier, it is true that the Court clearly stated in its Judgment on the merits of the dispute that the DRC must pay compensation to Guinea for the injury flowing from
35 the wrongful detentions and expulsion of Mr. Diallo in 1995-1996, *including the resulting loss of his personal belongings*[57]. The Respondent considers that this is simply a statement of principle by the Court regarding the possible loss of Mr. Diallo's personal belongings. It is thus now for Guinea, at the present stage of the proceedings, to provide the Court with evidence under three heads: (1) credible and convincing evidence of the genuine, rather than imaginary, existence of Mr. Diallo's personal belongings; (2) evidence of the real, rather than hypothetical, loss of those belongings following his expulsion; and (3) credible and irrefutable proof of their financial value.

2.43. As regards the existence of Mr. Diallo's personal belongings, Guinea cites the inventory of those belongings drawn up on 12 February 1996, namely 12 days after his expulsion on 31 January 1996[58]. Examination of this document shows that it was also drawn up on the instructions, and under the supervision, of the Embassy of Guinea in Kinshasa by two representatives of Mr. Diallo, including a member of his family, Mr. Ibrahim Diallo. The same applies to the inventory of the property of Africontainers-Zaire[59].

2.44. It is this inventory of the personal belongings of Mr. Diallo at his residence in Kinshasa, drawn up under the supervision of Guinea itself, which alone constitutes the sole credible and serious evidence of the existence of those belongings. It is thus no longer open to Guinea to claim that there existed other personal belongings of Mr. Diallo that were not included in the inventory which it had itself caused to be drawn up *in tempore non suspecto.*

2.45. As regards the loss of Mr. Diallo's personal belongings, the DRC would begin by pointing out to the Court that he was living in an apartment with his domestic servants, who were responsible for its care. Moreover, the DRC did not order Mr. Diallo's eviction from the apartment
36 containing his personal belongings, and thus had no control over the apartment. It is accordingly for Guinea, which had a detailed inventory prepared of Mr. Diallo's personal belongings, to indicate to the Court the steps taken by it to protect those belongings. It is apparent from the terms of the inventory that Mr. Diallo's personal belongings could not have been lost, since they were in the possession of Guinea, and of his friends and close relatives. In any event, no responsibility can be attributed to the DRC for the alleged loss of the said belongings, since these were in Guinea's own possession, and Guinea had had them properly inventoried in due time.

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[56] *Ibid.*, pp. 17-19, paras. 50-61.

[57] Emphasis added.

[58] See Ann. III to this Counter-Memorial.

[59] See Ann. I to this Counter-Memorial.

2.46. Regarding the specific case of the loss of Mr. Diallo's bank assets alleged by Guinea, the DRC is surprised, and has great difficulty in understanding how he could have lost his bank assets after being expelled. If there is one place in the world where a person's financial assets are secure, it is in a bank. The DRC would also point out to the Court that it is surprising to see that the Applicant gives no indication in its pleadings either of the Congolese banks which held Mr. Diallo's assets or of the amount of those assets.

2.47. In any event, Guinea fails to explain how Mr. Diallo could have lost his bank assets after his expulsion from the DRC, since he must surely have evidence of these, as well as knowing the banks concerned, enabling him to recover his assets. Thus Guinea produces no evidence that Mr. Diallo attempted to recover the assets lodged by him with Congolese banks, or that the Congolese authorities requested those banks not to hand them over to him.

2.48. In regard to the value of the personal belongings of Mr. Diallo inventoried in his apartment, Guinea itself explains in its pleadings that these represent a ridiculously small number of very minor items. However — paradoxically — Guinea even manages to accuse the inventory
37 of having concealed certain items of property, when it is the Applicant State itself which had the inventory prepared. Guinea seeks to show that Mr. Diallo's apartment contained objects of great value by citing as evidence an article from the magazine *Jeune Afrique* of 16 February 1984, published 12 years before his expulsion, where his apartment is described as clean and plain and tastefully furnished[60].

However, praise from a well-intentioned journalist does not mean to say that the apartment rented by Diallo contained the non-inventoried objects described in 2011 by Guinea in its pleadings. Thus, the good journalist of *Jeune Afrique* could not have imagined that, 12 years later, the millionaire Diallo would be unable to pay the rent on that apartment and that his landlord would have to take him to court to have him evicted for non-payment of rent, amounting to a total of US$32,964.

2.49. The DRC would point out to the Court that the contradictions and inconsistencies of the Applicant in regard to the loss and value of Mr. Diallo's personal belongings demonstrate the utter confusion surrounding its attempts to justify its exaggerated and unreal claims, and in particular the sum of US$550,000 on account of compensation.

2.50. In the light of the foregoing, the Respondent requests the Court to find, firstly, that Guinea has failed to show in a sufficient and convincing manner, beyond all reasonable doubt, that Mr. Diallo possessed personal belongings other than those listed in the inventory and that these have been lost; and, secondly, that the Applicant has also failed to justify to the satisfaction of the Court, through probative documents filed by it, the amount of US$550,000 claimed by it as compensation to make good the purported other material loss allegedly suffered by its national; and that, accordingly, no compensation is due under this head of damage.

38 **III. The potential loss of earnings**

2.51. The Applicant requests the Court to order the Respondent to pay it the sum of US$4,360,000 as compensation to make good the injury suffered by Mr. Diallo on account of potential loss of earnings.

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[60] On this section, see MG, p. 18, paras. 55 and 56.

2.52. In its pleadings, Guinea describes the potential loss of earnings suffered by Mr. Diallo as follows:

> "Mr. Diallo was also obstructed in the pursuit of his activities at the head of the two companies and, in particular, in the assignment of his shares to third parties before being expelled. As a result of his expulsion and the conditions in which it was carried out, the fortunes of both companies, and in particular of Africontainers, immediately went into sharp decline and their assets were dispersed."

The Applicant explains that:

> "[t]he financial consequences of the resulting 'potential loss of earnings' can be valued at *a fraction of the exchange value of the shares making up the entire share capital of the two companies*[61]. In case of sale, the value of the two companies, which had no liabilities, would have taken account of:
>
> — the value of the movable and immovable property which they owned, as catalogued in the case of Africontainers, in a non-exhaustive inventory; and
>
> — the debts owed to them by their various clients, including the Congolese State itself in the 'listing paper' case."[62]

39 2.53. Regarding the method of calculation of the amount of compensation to make good the potential loss of earnings suffered by Mr. Diallo, Guinea proceeds as follows: (1) the sum of US$1,000,000, representing the debt owed to Africom-Zaire by the Congolese State in connection with the "listing paper" case; plus (2) the sum of US$5,000,000, representing the cost of the purchase and development of the first plot of 8,000 sq m owned by Africom-Zaire; plus (3) the sum of US$2,000,000, representing the cost of the purchase and development of the second plot of 2,400 sq m of Africom-Zaire; plus (4) the sum of US$720,000, representing the value of 600 containers, at US$1,200 each, belonging to Africontainers-Zaire; giving a total of **US$8,720,000**[63].

2.54. According to Guinea, the potential earnings of which Mr. Diallo was allegedly deprived may be evaluated, in view of his central and essential role in the activities of the two companies, at 50 per cent of the total sum of US$8,720,000 as calculated above, namely the sum of **US$4,360,000**[64].

2.55. The Respondent will show in the following paragraphs that this claim by the Applicant is neither credible nor justified, and will accordingly request the Court to dismiss it out of hand.

2.56. In this regard, the DRC would begin by pointing out that the assets and debts relied on by Guinea in order to calculate Mr. Diallo's alleged potential loss of earnings belong not to him but to the companies Africom-Zaire and Africontainers-Zaire, which, according to the Court, are still in existence today. However, according to the Court's well-established jurisprudence, as moreover

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[61] Emphasis added.

[62] See MG, p. 20, paras. 63-64.

[63] *Ibid.*, p. 21, paras. 66-68.

[64] *Ibid.*, p. 20, para. 65.

recalled above, "[s]o long as the company is in existence the shareholder [or *associé*] has no right to the corporate assets".

Guinea is thus not entitled to calculate the purported potential loss of earnings allegedly
40 suffered by Mr. Diallo on the basis of assets which do not belong to him. It could only do so on the basis of Mr. Diallo's own personal activities and assets.

2.57. Moreover, the assets of the two companies relied on by Guinea in order to calculate the purported potential loss of earnings suffered by Mr. Diallo still exist today. Guinea has provided no evidence, and has not claimed, that these assets have been lost. The two plots with a value of US$7,000,000 allegedly belonging to Africom-Zaire have not been expropriated by the Congolese State. Thus, if Africom-Zaire succeeds in selling these two plots, or in recovering its debt from the Congolese State, Mr. Diallo, who is the company's *gérant* and sole owner, will recover the entire sale price of those plots, as well as the amount of the debt in respect of the listing paper, namely the sum of US$8,000,000, since Guinea states that the company has no liabilities[65]. The same reasoning is equally valid as regards any sale of the 600 containers belonging to Africontainers-Zaire. The position would remain the same as regards Mr. Diallo's rights in the event of the two companies being judicially or voluntarily wound up and liquidated.

2.58. The DRC would point out that Guinea is revealing for the first time before the Court that Africom-Zaire, and hence Mr. Diallo according to the thesis of the Applicant, owns two important plots of land situated in the centre of Kinshasa, with a total value of US$7,000,000. In these circumstances, Guinea does not explain why Mr. Diallo has not sold these plots of land in order to acquire funds and set himself up in business again in Guinea, instead of living, as the Applicant claims, in a state of poverty and destitution in Conakry.

It follows that Mr. Diallo's alleged state of poverty and destitution, which is claimed to be an injurious consequence of his expulsion from the DRC, and which has been referred to a number of
41 times by Guinea in the course of the present dispute, is simply an untruth put forward for purposes of the case before the Court.

2.59. However, the DRC can also envisage the contrary hypothesis, where Africom-Zaire is not the owner of the two plots of land in question, since Guinea has failed to file any document of title in respect of these plots, established by the competent Congolese authorities in the name of that company.

2.60. The subject of immovable property is governed under Congolese domestic law by the Real Property Law *[loi foncière]* of 20 July 1973, as amended by the Law of 18 July 1980. Article 219 of that Law provides as follows:

> "In order for a beneficial right to land to be legally established, a certificate of registration of title granted by the State is required.
>
> Private ownership of a building affixed to land, which is always regarded as distinct from the land, can be legally established only through registration of the building on the certificate evidencing the grant of the land. It may be established by a separate certificate of registration, noted on the certificate evidencing the grant."[66]

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[65] *Ibid.*, p. 20, para. 64.

[66] See Ann. IV to this Counter-Memorial.

Guinea contends that Africom-Zaire is the owner of two plots of land in Kinshasa with a total value of US$7,000,000. But it fails to produce to the Court two certificates of registration — the only documents of title recognized under Congolese law — in respect of these two plots of land, in order to prove their existence and the fact that they are owned by that company.

42 2.61. In these circumstances, Guinea's claim of US$7,000,000 as representing the value of the two plots owned by Africom-Zaire, without its having filed any evidence of the existence of those plots, of their legal registration in the name of that company, and of their official valuation, is based on no serious and credible evidence.

2.62. What is still more ridiculous and contradictory in Guinea's claim is that the Applicant fixes at 50 per cent of the value of the assets of the two companies, calculated at US$8,360,000, the potential loss of earnings suffered by Mr. Diallo. However, given that, according to Guinea, Mr. Diallo is the sole *associé* of the two companies, and hence their sole owner, and that the companies had no liabilities, the DRC is at a loss to identify those to whom Guinea leaves or gives the remaining 50 per cent of the total value of the said assets.

In other words, the DRC cannot understand why Guinea does not claim the entire amount of the value of the assets of the two companies on behalf of Mr. Diallo, instead of confining itself to 50 per cent thereof.

2.63. This all serves to demonstrate the Applicant's improper judicial strategy, which consists in presenting to the Court a number of heads of damages and claim, even at the cost of all intellectual rigour, so as to multiply the possibilities of securing money for Mr. Diallo.

2.64. In the light of the foregoing, the DRC is bound to conclude that Guinea has not justified to the satisfaction of the Court, through probative documents filed by it, the amount of the compensation of US$4,360,000 claimed by it in order to make good the purported potential loss of earnings allegedly suffered by Mr. Diallo. For this reason, the Respondent requests the Court to find that no compensation is due to Guinea under this head of claim.

43 2.65. In the following section, the DRC will address the issue of the reimbursement of the costs of the proceedings, as claimed by the Applicant in its pleadings.

SECTION III

THE COSTS OF THE PROCEEDINGS

3.01. The Applicant contends that it has been forced to institute the present proceedings, in the course of which it has incurred costs which it should not be required to bear. It accordingly asks the Court to order the DRC to pay it the sum of **US$500,000**, as reimbursement in respect of the costs which it has thus had to incur in order to assert its rights[67].

3.02. The DRC will explain to the Court in the following paragraphs that this claim by Guinea is unfounded, and should accordingly be dismissed.

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[67] *Ibid.*, p. 22, para. 69.

3.03. The DRC would begin by referring to the practice of the European Court of Human Rights on the question of the reimbursement of legal costs. The European Court of Human Rights regularly hands down judicial decisions on claims by parties for the reimbursement of the alleged costs of proceedings. In its abundant practice on the subject, an established general principle can be identified, governing claims for reimbursement of the costs of proceedings.

3.04. Thus, in *Oçalan* v. *Turkey*, where the applicant claimed reimbursement from Turkey of the legal costs incurred by him in the course of the proceedings, the ECHR recalled its established case law in the matter in the following terms:

> "According to the Court's established case-law, costs and expenses will not be awarded under Article 41 [of the Convention] unless it is established that they were actually incurred, were necessarily incurred and are also reasonable as to quantum. Furthermore, legal costs are only recoverable in so far as they relate to the violation found."[68]

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3.05. Applying this principle to the case before it, the Court, ruling on an equitable basis, awarded Mr. Oçalan the sum of €120,000.

3.06. In *Mooren* v. *Germany*, the ECHR again recalled its established jurisprudence, stating that:

> "costs and expenses will not be awarded under Article 41 [of the Convention] unless it is established that they were actually and necessarily incurred, and were reasonable as to quantum. Furthermore, legal costs are only recoverable in so far as they related to the violation found."[69]

3.07. The ECHR restated and applied this same principle in *M.S.S.* v. *Belgium and Greece*, where it dismissed the part of the claim for reimbursement of costs which was not accompanied by supporting documents[70].

3.08. In the present case, Guinea has asked that the DRC be ordered to pay it the sum of **US$500,000** as reimbursement of the costs and expenses which it claims to have incurred during the *present*[71] proceedings.

3.09. This claim by Guinea raises two basic questions, to which there is no answer in the Applicant's pleadings. First, does the sum claimed relate solely to the present phase of the proceedings, regarding determination of the amount of compensation, or to all three of the case's phases? Secondly, does there, or does there not, exist any evidence of the costs and expenses incurred by Guinea?

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3.10. The DRC considers that Guinea lost the case on the essential part of its claim for payment of debts of US$36 billion owed to Africom-Zaire and Africontainers-Zaire. It was this

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[68]See ECHR, *Oçalan* v. *Turkey*, Judgment of 12 May 2005, para. 215.

[69]See ECHR, *Mooren* v. *Germany*, Judgment of 9 July 2009, para. 134.

[70]See ECHR, *M.S.S.* v. *Belgium and Greece*, Judgment of 21 January 2011, paras. 418 and 422.

[71]Emphasis added.

principal claim which represented the raison d'être of its proceedings for diplomatic protection instituted before the Court in December 1998. The Court itself found in its Judgment on the preliminary objections that:

> "the greater part of Guinea's Application concerns the disputes between Africom-Zaire and Africontainers-Zaire . . . and their public and private business partners . . . Specifically, Guinea devotes a lengthy part of its Application to describing the debts allegedly owed to the companies and Mr. Diallo, as well as to expounding the legal grounds on which the DRC is alleged to be liable for all these debts."

The Court further adds that: "[i]n its Memorial on the merits, Guinea continues to devote considerable attention to the issue of debts allegedly owed to Africom-Zaire and Africontainers-Zaire and to Mr. Diallo"[72].

3.11. In other words, the major part of Guinea's activities before the Court related to this essential aspect of its claim. Having lost the case on its principal head of claim, Guinea cannot be entitled to any reimbursement in respect of the costs and expenses incurred by it on account of work carried out on that part of the case.

3.12. Moreover, Guinea also lost the case on the issue of Mr. Diallo's direct rights as *associé* **46** in Africontainers-Zaire and Africom-Zaire. As a result, and just as has been stated in the preceding paragraph, Guinea is not entitled to claim any reimbursement of the funds and expenses in respect of the work relating to this head of claim.

3.13. There remains the matter of Guinea's success on the secondary issue of the violation, as found by the Court, of Mr. Diallo's individual rights, namely, his wrongful detentions and expulsion in 1995-1996. On this point, the DRC cannot accept that the costs and expenses incurred by Guinea on account of work limited to this head of claim can be evaluated at US$500,000.

3.14. The DRC readily accepts that Guinea has indeed incurred expenses in the course of this case, but Guinea has provided the Court with no evidence of the expenditure actually incurred, or of whether it was necessary, and reasonable as to quantum. It therefore follows that the amount of US$500,000 claimed by the Applicant represents an arbitrary, lump-sum determination, unsupported by any serious and credible evidence.

3.15. The DRC has, like Guinea, also expended large sums of money in defending itself before the Court, and has won on several heads of claim. It would therefore be inequitable for it to be ordered by the Court to reimburse the costs incurred by Guinea, while obtaining no reimbursement at all from the latter. Given that, in the present case, each State has won on certain heads of claim and lost on others, the just solution would be for each State to bear its own costs and to claim nothing from the other.

3.16. On this point, the DRC would refer to the practice of the International Centre for Settlement of Investment Disputes between States and Nationals of Other States ("ICSID") as regards the question of reimbursement of costs.

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[72]See ICJ, case concerning *Ahmadou Sadio Diallo,* Judgment of 24 May 2007 (Preliminary Objections), ICJ Reports 2007, paras. 27 and 29.

47 3.17. Thus in *Patrick Mitchell* v. *DRC*, the ICSID *Ad Hoc* Committee held, in its decision of 1 November 2006, that "each Party shall bear its own defence costs, including counsel's fees"[73].

3.18. Again, in *African Holding Company of America and Société Africaine de Construction* v. *DRC*, the ICSID Arbitral Tribunal held that "each Party shall settle its own legal costs and expenses"[74].

3.19. It is true that the Court is bound neither by the decisions of ICSID nor by those of the ECHR as regards the reimbursement of costs incurred by the Parties. But the practice of those bodies provides helpful guidance on the way issues of this kind are settled.

3.20. In the present case, the DRC requests the Court, for the reasons set out above, to dismiss the request for the reimbursement of costs submitted by Guinea and to leave each State to bear its own costs of the proceedings, including the costs of its counsel, advocates and others.

SECTION IV

PAYMENT OF STATUTORY DEFAULT INTEREST

3.21. In its pleadings, the Applicant asks the Court to order the Respondent to pay it *statutory default interest*[75] on the amount of US$11,590,148[76], which is the total of all the sums claimed by Guinea from the DRC.
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3.22. The DRC would observe to the Court that Guinea fails to indicate in its pleadings what law requires the payment of statutory default interest in the present case. Is it Guinean law, Congolese law, or some rule of positive international law applicable to both States?

3.23. Furthermore, the DRC notes that the Applicant nowhere indicates the rate of interest applicable here. Nor does it specify the international legal instrument where we might find such a rate of default interest which would be binding on both Parties to the present dispute.

3.24. In the light of what has just been said, the Respondent requests the Court to dismiss Guinea's claim for payment of statutory default interest on any sums that it might award it in respect of compensation.

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[73]See ICSID, *Patrick Mitchell* v. *DRC*, (case No. ARB/99/7), Annulment Proceedings regarding the Award Rendered on 9 February 2004, Decision on the Application for Annulment of the Arbitral Award, 1 November 2006, para. 67.

[74]See ICSID, case No. ARB/05/21, Award of 29 July 2008, para. 125.

[75]Emphasis added.

[76]See MG, p. 21, para. 69.

SECTION V

SUBMISSIONS

3.25. Having regard to all of the arguments of fact and law set out above, the Democratic Republic of the Congo asks the Court to adjudge and declare that:

(1) compensation in an amount of US$30,000 is due to Guinea to make good the non-pecuniary injury suffered by Mr. Diallo as a result of his wrongful detentions and expulsion in 1995-1996;

(2) no default interest is due on the amount of compensation as fixed above;

(3) the DRC shall have a time-limit of six months from the date of the Court's judgment in which to pay to Guinea the above amount of compensation;

49 (4) no compensation is due in respect of the other material damage claimed by Guinea;

(5) each Party shall bear its own costs of the proceedings, including costs and fees of its counsel, advocates, advisers, assistants and others.

21 February 2012

Professor Tshibangu KALALA,
Co-Agent of the Democratic Republic of the Congo.