CR 2006/51 (translation)

CR 2006/51 (traduction)

Tuesday 28 November 2006 at 10 a.m.

Mardi 28 novembre 2006 à 10 heures

8 Le PRESIDENT : Veuillez vous asseoir. L'audience est ouverte. La Cour est réunie aujourd'hui pour entendre la République de Guinée en son premier tour de plaidoiries. Je donne maintenant la parole à l'agent de la Guinée. M. Camara, vous avez la parole.

Mr. CAMARA: Thank you, Madam President.

I. INTRODUCTION

1. Madam President, Members of the Court, it is a very great honour for me to appear before you as Agent of my country, the Republic of Guinea, which for the first time is party to a case brought before your distinguished Court.

2. Madam President, although Guinea has submitted to the Court a dispute between it and the Democratic Republic of the Congo, relations between the two States before you today have always been marked by deep respect and mutual esteem. They will not be affected by this case. Moreover, our Congolese brothers, whose eminent representatives in this Great Hall of Justice I salute, have already placed their disputes in your hands in recent years, thereby demonstrating their trust in your justice. It is the same trust that has prompted the Republic of Guinea to submit this dispute to you.

3. We are conscious of the long years of suffering experienced by our Congolese brothers, having ourselves all too often witnessed at our gates the civil wars wreaking havoc on neighbouring peoples. And we warmly congratulate the Congo on the considerable efforts it has made in recent years to rebuild a pacified civil and political society. Moreover, the presidential elections, whose second round has just ended, mark the dawn of a new era for the Congo, which the Republic of Guinea warmly welcomes.

4. The facts which lie at the heart of the present dispute relate, as we know, to another era, during which the Democratic Republic of the Congo was still called Zaire. Yet neither the political changes since then, nor time, and still less the many difficulties faced by the Congo have erased or excused the harm done by Zaire to a Guinean national. The Congo would gain credit by acknowledging the errors of the past and making good their prejudicial consequences or placing that matter in the hands of the Court.

9 5. Alas, such is not the case, since the Democratic Republic of the Congo seeks to prevent you from exercising your jurisdiction in the present case. It has raised arguments which, in its view, would justify the Court in ruling that the claims made by my country are inadmissible. I shall leave it to the eminent counsel who will address the Court after me to show that, both in fact and in law, these arguments are misguided. I shall confine myself to a few introductory remarks but which we believe are important for an understanding of the ins and outs of this case.

6. Madam President, the dispute before the Court concerns the treatment meted out by the Zairean authorities, between 1985 and 1996, to a Guinean national, Mr. Ahmadou Sadio Diallo, and to the fruit of his labours, which is to say his investments on Zairean territory. This arbitrary and discriminatory treatment has caused him serious damage, for which he has not obtained justice in Zaire. In accordance with international law, the Republic of Guinea has therefore decided to adopt his cause, by exercising its right to exercise diplomatic protection with respect to its nationals.

7. Madam President, it is exceptional and probably unique for a country such as Guinea to move an international court in order to defend the rights of one of its nationals. Indeed, the case submitted to you by this African country, poor, beset by a whole host of problems, and "peripheral" vis-à-vis the globalized capitalism which today characterizes the international economy, is exceptional and in many ways exemplary.

8. If it has decided to protect the interests of Mr. Diallo and his companies, this is because, although Guinea falls into the category of the least developed countries, it is convinced that it has one rich asset: its nine million people, who see their reflection in the national slogan: "labour, justice, solidarity". To them, the Republic of Guinea has a duty of solidarity and justice, whether they are within its territory or abroad. This is the spirit of Guinea's action here.

9. In its statement yesterday morning, Mr. Kalala though he was being ironic in claiming that we would invite the Court "to settle some quarrels over money, arguments about billing,
10 differences over interest rates between Congolese registered businesses"[1]. That accusation self-evidently has no basis and calls for two remarks:

[1]CR 2006/50, p. 42, para. 97.

— first, in settling this dispute, Members of the Court, you will recall that international law protects the investments of Africans in African countries, just as it protects others; the protection of rights, be they financial or commercial, of a Guinean national is no less worthy of interest than those of a Canadian or American company; and

— second, the DRC forgets that, in any event, Guinea's application is not solely aimed at protecting Mr. Diallo's commercial rights and, by substitution, those of his companies, but also and first and foremost at obtaining compensation for the harm done to him through his unjust imprisonment (twice) then his unlawful expulsion (described as "refoulement" (forced return) by the then Zairean authorities). The financial damage on which Congo has exclusively focussed is but the consequence of these acts wholly at variance with international law.

10. Madam President, the Congo has dwelt on the amount of the prejudice indicated in the Application of 28 July 1998 with a view to disputing its credibility. But the discussion on the "quantum" of the compensation claimed by Guinea is not the purpose of the proceedings at this stage, as it is a purely substantive question. Furthermore, the Republic of Guinea has already stated, and I wish to expressly confirm this, that in any event it does not intend to restate the assessments presented in the Annex to its Application as they stand. And on this point we would ask the Court and the opposing Party to excuse those initial estimates, whose approximation and manifest exaggeration — which we readily acknowledge, as, moreover, we indicated in our Observations[2] — stemmed from our inexperience of this type of case.

11. On the other hand, Guinea firmly maintains that grave internationally unlawful acts can be attributed to the Respondent, and that they caused prejudice, which will need to be assessed at the stage of the merits.

11 12. Before concluding these preliminary remarks, Madam President, let me point out that in yesterday's oral arguments, the representatives of the Democratic Republic of the Congo limited themselves to reading out extracts from the Preliminary Objections of 1 October 2002, without replying to Guinea's Observations and without even referring to them. We, however, in

[2]Observations of the Republic of Guinea on the Preliminary Objections of the DRC (OG), pp. 2-3, para. 0.09.

accordance with the requirements of Article 60 of the Rules of Court, will refrain from repeating what is in those Observations; we will develop and amplify them.

13. In order to set out our legal arguments in that spirit, my country has the benefit of the expertise and aid of eminent jurists, who have generously agreed to assist it and whose particular tasks here will be as follows:

(1) Mr. Mathias Forteau, Professor at the University of Lille, will present the pertinent facts in these proceedings;

(2) Mr. Samuel Wordsworth, Member of the English Bar and *Avocat* at the Paris Bar, will show that Guinea is entitled to exercise its diplomatic protection in favour of its national owing to the violations of his shareholder's rights;

(3) Mr. Alain Pellet, Professor at the University of Paris X-Nanterre, member and Former Chairman of the International Law Commission of the United Nations, Deputy Agent of the Republic of Guinea, will show that Guinea may also exercise its protection in favour of Mr. Diallo owing to the prejudice suffered by the companies of which he was sole *gérant* and *associé*; lastly,

(4) Mr. Jean Marc Thouvenin, Professor at the University of Paris X-Nanterre and *Avocat* at the Paris Bar, will show that the rule of the exhaustion of local remedies could not be applied in this case.

14. Before concluding my statement, I wish to thank the Registry of the Court, and particularly its Registrar, Mr. Couvreur, for all his understanding and assistance throughout the written proceedings.

15. Madam President, Members of the Court, thank you for your attention. May I ask you, Madam President, to give the floor to Professor Mathias Forteau. Thank you.

Le PRESIDENT : Merci beaucoup. J'appelle à présent le professeur Forteau à la barre.

12 Mr. FORTEAU: Thank you, Madam President.

II. THE FACTS

Madam President, Members of the Court, I would like to begin by telling you how honoured I am as I take the floor for the first time before the full Court, having already had the privilege of doing so before one of your Chambers.

1. Madam President, as the Agent of Guinea has just said, it is my task to set out the facts which will enable you to come to an informed decision on the preliminary objections raised by the Democratic Republic of the Congo. I shall do so keeping in mind at all times the specific constraints in these incidental proceedings: at this stage in the case, it is not yet time to debate all points of fact or to consider the merit or possible justification for the acts of which the Respondent has been accused; it is solely a matter of setting out the factual elements relating to the objections made to the admissibility of Guinea's claim.

2. As Mr. Kalala recalled yesterday[3], Mr. Diallo, a Guinean national, settled in Zaire in 1964. For the purpose of engaging in business activities there, he played a role in founding two private limited liability companies, Africom and Africontainers, and he was their sole managing director *(gérant)* and shareholder *(associé)* throughout the entire period of interest to us[4].

3. In the 1980s, these two companies established a number of contractual relationships, both direct and indirect, with the Zairean State[5]. Mr. Diallo's companies entered into several commercial contracts with the Zairean State itself, with two public undertakings (Gécamines and Onatra), and with three oil companies in which the Zairean State held a controlling stake — I am referring to Zaire Mobil Oil, Zaire Shell and Zaire Fina[6].

13 4. As a result of the breach of their contractual obligations by the trading partners of Mr. Diallo's companies, disputes arose in the 1980s and 1990s, some of which were to yield favourable trial-court decisions for Mr. Diallo's companies.

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[3]CR 2006/50, pp. 16-17, para. 4.

[4]Memorial of Guinea (MG), pp. 10-11, paras. 2.3-2.5, and Ann. 3, Extraordinary General Meeting of Africontainers, 18 April 1980.

[5]See MG, pp. 12-14, paras. 2.7-2.13; Preliminary Objections (POC), p. 12, para. 1.07.

[6]See OG, pp. 14-15, paras. 1.29-1.32.

5. The various disputes should normally have been resolved once and for all within the Zairean legal order, and Guinea does not deny this. But, and this is the nub of the case, rather than letting internal proceedings take their course, Zairean authorities in the executive branch intervened to block them, first by stopping the proceedings to enforce the decisions handed down in favour of Mr. Diallo's companies and then by arresting, imprisoning and finally expelling their sole managing director and shareholder.

6. Most curiously, the Congo kept very quiet yesterday on the subject of these measures, which nevertheless lie at the heart of the dispute before you. Contrary to what counsel for the Respondent gave us to understand[7], Guinea has not referred domestic contract disputes to the Court; it has brought proceedings before the Court, in the framework of the law of State responsibility, concerning measures taken *by a State* to the detriment of private parties. Accordingly, to identify the relevant facts, we should review the chronology and nature of the complained-of measures taken by the Congolese State.

7. As for any justification of the Respondent's conduct, on which Mr. Kalala spoke at great length yesterday, levelling serious accusations against Mr. Diallo and his companies, such justification is in the nature of a defence on the merits and therefore does not belong in the debate at this stage in the proceedings. I will nevertheless say a few words about them, preliminarily, in order to dispel the unwarranted opprobrium sought to be heaped on Mr. Diallo through them.

I. The unjustified accusations against Mr. Diallo

8. In its written pleadings and its oral statements yesterday, the Congo has based the measures taken against Mr. Diallo on two sets of accusations, without, by the way, making very clear whether those accusations are cumulative or in the alternative. First, the Congo alleges that Mr. Diallo "had been involved in currency trafficking and . . . was moreover guilty of a number of attempts at bribery . . . of Zairean judicial and political officials"[8]. Second, Mr. Diallo is said to have "made claims", deemed "arbitrary and unjustified" by the Congo[9]. Both of these accusations are unfounded.

[7]CR 2006/50, p. 17, para. 5; p. 42, para. 97 (Kalala).

[8]POC, p. 39, para. 1.53; p. 42, para. 1.57; CR 2006/50, p. 39, para. 87 (Kalala).

[9]POC, pp. 98-99, para. 2.98; CR 2006/50, p. 39, para. 86 (Kalala).

9. *In respect of the first*, there is a rather striking contrast between, on the one hand, the seriousness of the accusation and, on the other, the lack of any shred of proof whatever. Indeed, the Congolese side has offered absolutely nothing to support the accusation that Mr. Diallo was a financial criminal or briber. Aside from the fact that making unsubstantiated accusations is morally reprehensible, it runs counter to the most widely accepted general principles of proof under international law. As the Eritrea/Ethiopia Claims Commission recently noted, the gravity of an accusation requires that it be proved by "clear and convincing evidence"[10], which is not at all the case here.

10. That said, this evidentiary shortcoming on the part of the Congo is hardly surprising:

— since the reason now advanced by the Respondent to justify Mr. Diallo's removal *(refoulement)* from the country appears nowhere in the expulsion decree of 31 October 1995, which fails to state any reasons, the Congo now finds itself unable to rely on its own records to prove its groundless accusations[11];

— and it is that much more difficult for it to do so in that at no time before or since his expulsion has Mr. Diallo ever been accused of anything of the sort;

— it is moreover particularly worthy of note on this point — because this stands in complete contradiction to what the Congo asserts[12] — that when Mr. Diallo won in the Zairean trial courts, the losing parties never appealed to have those judgments set aside on the ground that the lower court judges had been bribed by Mr. Diallo[13]. This argument was never raised, or even alluded to, in the various proceedings brought by the very parties who would have been the only ones with an interest in raising the issue.

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[10]Eritrea/Ethiopia Claims Commission, Partial Award, Prisoners of War, Eritrea's Claim 17, 1 July 2003, para. 46 (www.pca-cpa.org).

[11]POC, Ann. 75, Decree No. 0043 dated 31 October 1995 expelling Mr. Diallo from the territory of the Republic of Zaire.

[12]POC, p. 39, para. 1.53; CR 2006/50, p. 39, para. 87 (Kalala).

[13]See POC, Ann. 54, Judgment of the Court of Appeal of Kinshasa-Gombe dated 24 February 1994 (Africontainers/Zaire Fina litigation); MG, Ann. 146, submissions by the public prosecutor *[ministère public]* in the appeal to the Court of Cassation against Judgment RCA 17244, 11 January 1995 (which reviews the grounds and reasoning in the judgment by the Court of Appeal dated 9 March 1994) (Africom/PLZ litigation); POC, Ann. 63, document from Shell appealing against the trial court judgment handed down on 3 July 1995 by the *tribunal de grande instance* of Kinshasa-Gombe; POC, Ann. 64, judgment of the Court of Appeal of Kinshasa-Gombe dated 20 June 2002; POC, Ann. 66, writ of summons for a stay of execution submitted by Zaire Shell on 29 August 1995; POC, Ann. 67, application lodging an appeal to the Court of Cassation, 18 September 1995, submitted by Zaire Shell (Aftricontainers/Shell litigation).

11. *In respect of the other ground* now invoked by the Congo to justify the *refoulement* or expulsion — Mr. Diallo's alleged assertion of "arbitrary and unjustified claims"[14] against his companies' contracting partners, I shall first note that, by raising this argument, the Congo necessarily admits, and moreover admits this expressly in its preliminary objections[15], that there was no other motive for the forced removal from Zairean territory than to strike at Mr. Diallo's companies through their sole managing director and shareholder, with a view to putting their claims to rest.

12. However that may be, the Congo's argument is inconsistent with evidence in the record. The truth proves much more complex than was described by Mr. Kalala yesterday:

(1) Some of the claims asserted by Mr. Diallo on behalf of his companies were subject to evaluation by parties independent of the litigants; those appraisals confirmed the validity of the claims. This was the case in the dispute between Africontainers and Zaire Fina; an evaluation was made by the *Association nationale des entrepreneurs zaïrois* [National Association of Zairean Businesses], which recognized the legitimacy of Mr. Diallo's claim, as reported in the 12 August 1993 judgment of the *tribunal de grande instance* of Kinshasa, which itself upheld this claim, by the way[16].

(2) The Respondent often abbreviates the facts for its own benefit. I shall cite two examples:

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(i) First example: in its Preliminary Objections[17] and its oral statements yesterday[18], the Congo accused Mr. Diallo of, between 1992 and 1996, having inflated the estimated loss caused to Africontainers by Gécamines' actions. But the Congo forgot to state the reasons for this increase in the loss: by 1996 the dispute between the two companies was no longer limited to the initial disagreement (concerning the lay-up of 32 containers at Gécamines' facilities[19]); the initial dispute had grown to encompass further contract

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[14]POC, pp. 98-99, para. 2.98.

[15]*Ibid.*

[16]POC, Ann. 53, judgment of the *tribunal de grande instance* of Kinshasa-Gombe, 12 August 1993, RC 61538, penultimate page of the judgment, point IV.

[17]POC, pp. 19-20, para. 1.18.

[18]CR 2006/50, pp. 25-26, para. 44 (Kalala).

[19]MG, Ann. 151, minutes of the meeting on 1 June 1995 between Gécamines and Africontainers concerning the use by Gécamines of Africontainers' containers under the tripartite contract.

breaches (unfair competition by Gécamines and improper, non-contractual use by Gécamines of nearly 500 containers on the Kinshasa-Matadi route[20]).

(ii) Second example: yesterday Mr. Kalala accused Mr. Diallo of having engaged in "scandalous conduct" in 1990 on the ground that, having agreed to settle with Onatra, he allegedly then called into question the settlement terms by claiming further compensation[21]. But, here again, Mr. Kalala forgets that Mr. Diallo had in the meantime realized that other contract breaches had been committed, namely Onatra's fraudulent use over three years of no fewer than 211 containers[22].

(3) Far from rejecting out of hand Mr. Diallo's claims on the ground that they were excessive beyond reason, the partners of Mr. Diallo's companies on the contrary felt the need to develop, as Mr. Kalala noted yesterday, "sophisticated legal arguments" in their own defence[23], and they even admitted that some of the damage indisputably warranted reparation (as Mr. Kalala again said yesterday morning[24]).

(4) The fact is, and I shall show this in a moment, that just before Mr. Diallo was imprisoned and expelled, the Zairean domestic courts had at the trial-court level recognized the merit of the

17 claims referred to them and had thus upheld them. Moreover, submissions to the Court of Cassation had been made in favour of Mr. Diallo's companies. Thus, as the Zairean judicial authorities said themselves, the companies' claims were not completely unfounded.

(5) Mr. Kalala took umbrage yesterday, on several occasions, at the interest rates charged by Mr. Diallo, which he deemed "exorbitant"[25]. But here too, Mr. Diallo's claims must be placed in the economic context of Zaire then: as you will observe from the public documents placed in the judges' folder at tabs 1 and 2, bank interest rates in Zaire at the end of the 1980s and the first half of the 1990s were 55 per cent, and even 95 per cent, per annum[26]; more importantly,

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[20]POC, Ann. 6, note of 16 September 1997 on the timetable of work of the Containers Disputes Commission (Gécamines), p. 2, point 1.2.1.

[21]CR 2006/50, pp. 29-30, para. 54.

[22]MG, Anns. 72 and 91.

[23]CR 2006/50, p. 26, para. 45.

[24]CR 2006/50, p. 26, para. 46.

[25]CR 2006/50, p. 33, para. 68; p. 36, para. 75.

[26]See judges' folder, No. 1.

Zaire was then experiencing runaway inflation: at rates of from 80 to 104 per cent between 1987 and 1990; more than 2,000 per cent in 1991, and between 3,500 and 23,000 per cent in 1992[27]. Under the circumstances, the charging of very high interest rates was inevitable. These fluctuations obviously made it very difficult to produce a financial evaluation of the losses and explain certain errors made by Mr. Diallo, who ended up overestimating some of the debts owed to his companies.

(6) The Congo is clearly aware of the limitations of its accusation, because it finds it necessary to base it on an additional element: the fact that Mr. Diallo contacted foreign officials by means of a letter dated 30 November 1995 allegedly damaged the Congo's "credibility and image" and "that was the backdrop", according to Mr. Kalala, to issuing the expulsion decree[28]. Not only am I sceptical as to whether a letter could by itself create the slightest disturbance to public order, but also Mr. Kalala's grasp of the chronology is rather curious: the 30 November letter came after the expulsion decree, which had been adopted one month earlier, on 31 October 1995. Thus, I do not see how that letter could have justified the expulsion decree, as Mr. Kalala claims.

18 (7) And finally the very background to the adoption of the complained-of measures taken by the Congolese State shows that at that time the Congo *did not consider the claims by Mr. Diallo's companies to be unfounded*, since, if the Zairean authorities had then truly deemed Mr. Diallo's claims to be unfounded, as the Congo asserts today, they would have had nothing to fear from action by internal courts, which would certainly have rejected them. Normal proceedings therefore simply needed to be allowed to take their course. Yet that is precisely what the Zairean authorities did not do; they intervened to stop the judicial actions in progress. There is only one — not just plausible, but possible — explanation for this behaviour: the Congolese executive authorities feared that the domestic courts would uphold the claims by Mr. Diallo's companies, and, if such a fear existed, it is indeed because those claims were not wholly devoid of merit. This last comment leads me straight to my second point, in which I shall recall:

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[27]See judges' folder, No. 2.

[28]CR 2006/50, pp. 38-39, paras. 84-87.

II. The measures taken by the Congolese State against Mr. Diallo and his companies

13. What does the evidence in the record show in this respect, evidence which, let me say, comes from the very Zairean authorities whose conduct is challenged and, pursuant to your settled case law, that gives this evidence particular probative weight[29]? The evidence shows that in 1988, as in 1995-1996, the Zairean executive authorities did not hesitate arbitrarily to stay the internal proceedings for the enforcement of decisions handed down in favour of Mr. Diallo's companies, before arresting and then imprisoning him and finally expelling him in 1995-1996. With your permission, Madam President, I shall review these two periods in detail in turn, beginning with . . .

Le PRESIDENT : Oui, certainement, mais pourriez-vous le faire en allant un peu plus lentement ?

M. FORTEAU : Oui.

Le PRESIDENT : Je vous remercie.

19 **Interference in proceedings in progress, arrest and detention in 1988**

14. As Mr. Kalala noted yesterday[30], in June 1986 Africom and the Zairean State entered into a contract, as they had done in 1983, a contract under which Mr. Diallo's company agreed to fill an order by the State for listing paper[31]. Africom was chosen thanks to its reliability, according to the Congo itself, in performing the 1983 contract[32] (incidentally, in 1986 the State had still not performed under that contract, when the invoice had still not been paid).

15. Ultimately on 13 November 1987, five bills of exchange were issued for the payment to Africom of all invoices for the orders filled pursuant to the contracts entered into with the Zairean

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[29]See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, Judgment of 19 December 2005, para. 61, citing *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, 27 June 1986, I.C.J. Reports 1986*, p. 41, para. 64.

[30]CR 2006/50, p. 18, para. 11.

[31]MG, Ann. 26, letter dated 20 June 1985 from the Department of Finance, Budget and Investment to the Commissioner for Finance and Budget in Kinshasa-Gombe.

[32]*Ibid.*

State since 1983[33] and, on 22 December of that year, the Commissioner for Finance asked the Governor of the Bank of Zaire to pay those bills by debiting the account of the Treasury[34].

16. But, even though the fact of the debt was not and never has been disputed by the Congo and although it only involved an "insignificant amount"[35] in the words of the Congo itself, the Zairean authorities first abruptly decided to halt payment of the sums owed just before it was to be made, and then took arbitrary measures to arrest and imprison, solely on the ground that Mr. Diallo had dared to claim payment of debts, debts which the State itself had recognized as due and payable.

17. On 14 January 1988 the First Commissioner of Zaire asked the Commissioner for Finance to cease payment of the invoices[36]. This was followed by a media campaign launched by the executive authorities against Mr. Diallo, accusing him of cheating the State, when all he had done was demand payment of a debt which had been fully acknowledged. He was then arrested and imprisoned without further ado, on the orders of the same First Commissioner of Zaire, at the end of January 1988[37].

18. Six months later, Mr. Diallo was still being held, as shown by a letter from the First Commissioner dated 4 July 1988[38], and he was to wait until 28 January 1989, one year after the events, before the *procureur général* finally recognized, coldly and without offering any apology, that the case opened against the managing director of Africom had to be closed for inexpediency of prosecution[39]. As Mr. Kalala had absolutely nothing to say yesterday about these coercive measures[40], which are nevertheless described in Guinea's Observations[41], I conclude that the Respondent admits this to be true.

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[33]See OG, p. 16, para. 1.38 and MG, Anns. 46-50 (bills of exchange of 13 November 1987).

[34]MG, Ann. 51, letter dated 22 December 1987 from the Department of Finance to the Governor of the Bank of Zaire.

[35]POC, pp. 14-15, para. 1.10; CR 2006/50, p. 19, paras. 15-16 (Kalala).

[36]MG, Ann. 51, cited above.

[37]See OG, pp. 17-18, paras. 1.40-1.42.

[38]See OG, Ann. 15, letter No. 0639 dated 4 July 1988 from Mr. Sambwa Pida Nbagui, First Zairean State Commissioner to the President of the Judicial Council.

[39]OG, Ann. 16, letter No. 431 dated 28 January 1989 from the *procureur général* at the Court of Appeal of Kinshasa to Mr. Diallo.

[40]CR 2006/50, pp. 18-19, paras. 11-16,

[41]OG, pp. 17-18, paras. 1.40-1.43.

19. After his release, Mr. Diallo, exhibiting a deference and prudence easily understood given the measures which had just been taken against him, did indeed ask the competent Zairean authorities to pay the amounts due of their own accord[42]. But the State's only response was to incorporate the debt into the Congo's national public debt[43] and to refer the matter to the *Office de la gestion de la dette publique*[44], where "all matters concerning the public debt [had been] centralized"[45]; the *Office* never took any action on Africom's claim.

Interference in proceedings in progress, arrest, detention, expulsion and removal in 1995-1996

20. In retrospect, it is apparent that the measures taken against Mr. Diallo in 1988 were merely a foretaste of those, even more tragic in their consequences, he was to suffer seven years later at the hands of the same Zairean executive power. It was not a good idea to take on the Congolese State in 1988 and it was no better seven years later to demand debt payment from undertakings in which the State had obvious equity stakes. On 31 October 1995, a decree expelling Mr. Diallo was adopted[46], and he was arrested and imprisoned on 5 November of that year[47], released on 10 January 1996[48], only to be arrested again and finally removed *(refoulé)* from Zairean territory on 31 January permanently, with no possibility of return[49].

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21. What prompted these measures? The chronology shows the answer very clearly: Mr. Diallo's companies had won, or were about to win, before the various Zairean courts in which they had brought suit, and the executive power in Zaire, whose financial interests were at stake, would not accept this.

22. The year 1995 looked promising from the judicial standpoint for Mr. Diallo's companies:

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[42]See MG, Ann. 57, letter of 27 July 1989 from the Director of the Bureau of the President of Zaire to the First Commissioner; OG, Ann. 18, letter of 30 November 1989 from Mr. Diallo to the Governor of the Bank of Zaire.

[43]POC, p. 15, para. 1.10.

[44]MG, Ann. 71, letter of 3 August 1990 from the Ministry of Finance to the *président délégué général* of the OGEDEP; POC, p. 15, para. 1.10.

[45]POC, Ann. 57, letter from the Minister of Finance of Zaire (undated).

[46]POC, Ann. 75, Decree No. 0043 of 31 October 1995 expelling Mr. Diallo from the territory of the Republic of Zaire.

[47]OG, Ann. 27, notice of imprisonment dated 5 November 1995.

[48]MG, Ann. 194, order releasing Mr. Diallo, 10 January 1996.

[49]MG, Ann. 197, "refusal-of-entry notice" *(procès-verbal de refoulement)* of Mr. Diallo, 31 January 1996. See MG, pp. 29-33, paras. 2.63-2.74.

— on 11 January, and then on 20 April, the *ministère public* (Public Prosecutor) made submissions to the Supreme Court of Justice which were in favour of Africom in the case between it and PLZ and of Africontainers in its case against Zaire-Fina, recommending the quashing in each case of the appellate judgments which had vacated the trial court judgments rendered on every occasion in favour of Mr. Diallo's companies[50];

— further, on 3 July 1995 the *tribunal de grande instance* of Kinshasa upheld Africontainers' claims in its dispute with Zaire-Shell, ordering the latter to pay US$13 million[51]. This

22 judgment indirectly concerned the other two oil companies, Mobil Oil and Fina, because Africontainers accused them of the same contract breaches as those committed by Zaire-Shell.

23. Zaire-Shell attempted to obtain a stay of execution of the tribunal's judgment through ordinary judicial channels but failed. Its application for a stay was rejected on 24 August by the Court of Appeal[52], which on 13 September reaffirmed, in response to a further application by Shell, that the judgment handed down by the *tribunal de grande instance* was fully enforceable[53].

24. To get round the impossibility of escaping enforcement of the judgment rendered against it by judicial means, Shell then turned to the executive, asking it to interfere in the judicial proceedings in progress. That was in effect the purpose of the letter it sent on 29 August to the Minister of Justice[54]; that letter was to be echoed by another, similar, letter sent to the Prime Minister on 15 November by Mobil Oil and Fina[55].

25. It is perhaps worth pointing out here — because this clearly shows that full-scale interference in proceedings in progress was being sought — that the request for a "stay of

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[50]MG, Ann. 146, Submissions by the *ministère public* (Public Prosecutor) in the appeal on points of law against appeal court judgment RCA 17244 (the trial court judgment appears in Ann. 130 of Guinea's Memorial); MG, Ann. 149, Submissions of *the ministère public* (Public Prosecutor) in the appeal on points of law against appeal court judgment RCA 17229 of 24 February 1994 (the trial court judgment appears in Ann. 53 of the preliminary objections, and the appellate court judgment in Ann. 54 of the preliminary objections).

[51]MG, Ann. 153, judgment of the *tribunal de grande instance* of Kinshasa, RCA 63824 RH 26767 of 3 July 1995.

[52]POC, Ann. 65, service on Zaire-Shell of the judgment of 24 August 1995 rendered by the Court of Appeal of Kinshasa-Gombe.

[53]MG, Ann. 170, letter dated 13 September 1995 from the First President of the Court of Appeal of Kinshasa-Gombe to the enforcement division of the *tribunal de grande instance* of Kinshasa-Gombe. See also MG, Ann. 169, report dated 5 September 1995 with a view to obtaining approval for execution of judgment RC 63824 in the *Africontainers* v. *Zaire-Shell* case.

[54]MG, Ann. 166, letter of 29 August 1995 from Zaire-Shell to the Zairean Minister of Justice regarding the request for a stay of execution of appellate and trial court judgments.

[55]POC, Ann. 74, joint letter from Mobil and Fina to the Zairean authorities dated 15 November 1995.

execution of judgments" made by Shell did not concern only Mr. Diallo's companies. Shell found itself — these are not made up but are its own words — in the "particularly worrying and recurring situation" of having been on the losing side repeatedly (no less than 13 times) in disputes with a number of its contracting partners. According to Shell, the stay which it was seeking of these 13 proceedings for the execution of judicial decisions was necessary to "safeguard [its] property", property in respect of which the Zairean State was not indifferent, as it held an ownership interest in it.

26. The executive power responded quickly to this request. Enforcement of the judgment in the *Africontainers* v. *Zaire-Shell* case was stayed, on 13 September, by order of the Minister of
23 Justice, without any legal basis[56]. On 28 September, the Minister of Justice finally admitted in a letter to the First President of the Court of Appeal that there had been "no manifest error of judgment". He accordingly asked that execution of the judgment resume[57]; this made it possible to effect an attachment of goods on 6 October[58]. But, in another about-face, of which the Respondent is unaware[59], the attachments were once again revoked on 13 October, this time permanently, on "oral instructions" from the Minister of Justice and outside the law[60].

27. Thus the enforcement procedure was abruptly and arbitrarily terminated, even though it had been approved by the domestic courts and the same Minister had just a few days earlier acknowledged that it should be carried out. This was the background to the adoption, on 31 October, of the decree expelling Mr. Diallo[61], the sole motive for which was clearly not only to deter him, but more generally, in keeping with the measures already taken, to prevent him from pursuing the various proceedings underway on behalf of his companies. In imprisoning and then expelling the sole *gérant* and *associé* of the private limited liability companies Africom and

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[56]MG, Ann. 171, report in execution RH 26853, *Africontainers* v. *Zaire-Shell*, 13 September 1995; POC, Ann. 70, letter of 13 September 1995 from Vice-Minister Maître Kikadi Gapongolo to the First President of the Court of Appeal of Kinshasa-Gombe.

[57]MG, Ann. 177, letter of 28 September 1995 from the Minister of Justice to the First President of the Court of Appeal of Kinshasa-Gombe.

[58]MG, Ann. 179, attachment of goods RH 26853 on Zaire-Shell premises, 6 October 1995.

[59]POC, pp. 124-126, paras. 3.47-3.50; CR 2006/50, p. 35, para. 73 (Kalala).

[60]OG, Ann. 26, notice of 13 October 1995 revoking the seizure of property belonging to Shell.

[61]POC, Ann. 75, Decree No. 0043 of 31 October 1995 expelling Mr. Diallo from the territory of the Republic of Zaire.

Africontainers, the Congo knew full well that it would hinder the business activity of the two companies and would prevent any recovery of debts owed to them — which is in fact what occurred[62].

28. The circumstances under which the expulsion process was carried out by the Zairean executive authorities confirms moreover that their action was in no way dictated by public interest but that their real intention was to ensure that Mr. Diallo would be unable to pursue, on behalf of his companies, the lawsuits that had been brought. It is enough to set the applicable legislative provisions and the measures actually taken almost literally side by side to show the patent

24 arbitrariness, within the meaning ascribed to that term by your case law, and the arbitral jurisprudence[63], of the process by which the expulsion was carried out:

— first, the requirements as to reasons to be given, procedure and prior consultation laid down by Articles 15 and 16 of the Order of 12 September 1983 concerning immigration control[64] — which you will find in the judges' folder as document No. 3 — were not respected by those who drew up the expulsion decree;

— secondly, if Mr. Diallo had attempted to evade expulsion, Article 15 of that Order would have given the Zairean authorities no right to detain him beyond eight days, the absolute maximum, a period far exceeded in the present case, contrary to Mr. Kalala's unsupported assertion here yesterday: Mr. Diallo was indeed imprisoned on 5 November 1995, as proved not only by a letter from *Avocats sans frontières* dated 13 December 1995 but also by a notice of imprisonment *(billet d'écrou)* dated 5 November 1995[65]; the Congo recognizes moreover that Mr. Diallo was still in detention the following month, December 1995[66]; finally, Guinea produced in its Memorial a notice of release not dated until 10 January 1996[67]. The period of

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[62]OG, pp. 26-27, paras. 1.66-1.168.

[63]See *Elettronica Sicula S.p.A.* (*ELSI*) (*United States of America* v. *Italy*), *Judgment, I.C.J. Reports 1989*, p. 76, para. 128; ICSID, *Azurix Corp. and the Argentine Republic*, ARB/01/12, award of 14 July 2006, para. 393 (available at http://ita.law.uvic.ca/); *LG&E Energy Corp. and the Argentine Republic*, ARB/02/1, decision of 3 October 2006, para. 157 (available at http://ita.law.uvic.ca/).

[64]POC, Ann. 73, Legislative Order No. 83-033 of 12 September 1983 concerning immigration control, and judges' folder (tab 3).

[65]MG, Ann. 190, letter of 13 December 1995 from *Avocats sans frontières* to the Prime Minister of Zaire; OG, Ann. 27, notice of imprisonment dated 5 November 1995.

[66]POC, p. 41, para. 1.56.

[67]MG, Ann. 194, notice of release of Mr. Diallo, 10 January 1996.

detention therefore clearly exceeded, by far, the strict maximum of eight days. Moreover, Mr. Diallo suffered further coercive measures before his permanent removal *(refoulement)* on 31 January. What is more, he was not given the opportunity to communicate with his consular authorities during his detention;

— last comment, this is a notice of refusal of entry *(refoulement)* which made Mr. Diallo's permanent removal from the Respondent's territory a reality[68], even though under Zairean law

25 Mr. Diallo could not legally be "refused entry" *(refoulé)* because he was in the Congo when this measure was carried out[69].

29. These various elements show the obvious haste with which the Zairean authorities acted, without troubling to respect the applicable procedural and formal requirements. Mr. Diallo was a nuisance, he had to be got rid of, regardless of the means used, because it was an urgent necessity to thwart his companies' claims, of which the domestic courts in Zaire were beginning to recognize the merit. That was the objective, and that has been the effect, of the measures taken by the Congolese State, which in so doing infringed the rights of Mr. Diallo and his companies. Those, Madam President, are the relevant facts which I have found it necessary to indicate at this stage in the proceedings.

Thank you, Madam President, Members of the Court, for your kind attention. May I ask you to call Mr. Wordsworth.

Le PRESIDENT : Merci, M. Forteau. J'appelle à présent M. Wordsworth à la barre.

M. WORDSWORTH :

Le PRESIDENT : Merci, Monsieur Forteau. J'appelle M. Wordsworth à la barre.

M. WORDSWORTH :

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[68]MG, Ann. 197, refusal-of-entry notice *(process-verbal de refoulement)* concerning Mr. Diallo, 31 January 1996.

[69]See Arts. 13 and 15 of the above-cited Order of 12 September 1983.

III. Le droit de la Guinée d'exercer sa protection diplomatique au sujet de la détention et de l'expulsion arbitraires de M. Diallo, ainsi que de ses droits en tant qu'actionnaire

1. Madame le président, Messieurs de la Cour, c'est un honneur que de comparaître devant vous dans le cadre d'une affaire qui met en lumière deux questions très importantes concernant la portée des droits relatifs à la protection diplomatique. Il s'agit là de deux questions qui, d'une certaine manière, attendaient d'être examinées plus avant par la Cour, après que celle-ci les a tout juste abordées en l'affaire de la *Barcelona Traction* (*Barcelona Traction, Light and Power Company, Limited (Belgique c. Espagne), deuxième phase, arrêt, C.I.J. Recueil 1970*, p. 3.), et qui ont été passées sous silence ous sous un quasi-silence dans la décision de la Chambre en l'affaire de l'*Elettronica Sicula S.p.A.* (*Elettronica Sicula S.p.A. (ELSI) (Etats-Unis d'Amérique c. Italie), arrêt, C.I.J. Recueil 1989*, p. 15).

a) La première de ces questions concerne la portée des droits des actionnaires. En l'affaire de la *Barcelona Traction*, la Cour a, bien entendu, reconnu que l'Etat des actionnaires avait le droit d'exercer une protection diplomatique lorsque «les actes incriminés [étaient] dirigés contre les

26 droits propres des actionnaires en tant que tels» (par. 47)[70]. Les Parties conviennent qu'il existe un droit d'exercice de la protection diplomatique dans de telles circonstances. Dès lors, le différend porte sur la question de savoir si M. Diallo dispose en l'espèce de droits d'actionnaire propres pertinents, et telle est la question sur laquelle je vais m'appesantir.

b) La seconde question concerne la «thèse» évoquée par la Cour en l'affaire de la *Barcelona Traction* selon laquelle, dans l'hypothèse où le préjudice concerné a été causé à la société, «l'Etat des actionnaires aurait le droit d'exercer sa protection diplomatique lorsque l'Etat dont la responsabilité est en cause est l'Etat national de la société» (par. 92). Tel est précisément le cas en l'espèce : la responsabilité de la RDC est en cause, et la RDC est l'Etat national des deux sociétés de M. Diallo. M. Pellet examinera la question de savoir si la Guinée a, par conséquent, un droit de protection diplomatique au sujet du préjudice causé aux deux sociétés.

2. Pour ce qui concerne les droits des actionnaires, la thèse présentée hier par M. Mazyambo était assez simple. En substance, il a dit que la Guinée se contentait de répéter les arguments des

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

actionnaires belges qui avaient été jugés irrecevables en l'affaire de la *Barcelona Traction*, que la décision rendue en ladite affaire réglait par conséquent les questions posées en l'espèce[71], que la Guinée confondait les droits de la société avec ceux des actionnaires[72], et que, bien qu'une demande relative aux droits des actionnaires puisse en théorie être formulée, ces droits étaient très limités et n'étaient pas en cause en l'espèce[73].

3. La réponse de la Guinée est la suivante :

4. Premièrement, elle s'étonne d'un silence : deux aspects de sa demande n'ont pas du tout été abordés hier. La Guinée invoque un droit d'exercice de la protection diplomatique au sujet de la détention illicite et de l'expulsion arbitraire dont aurait été victime son ressortissant, M. Diallo. La Guinée invoque également des droits au sujet de l'absence de notification à M. Diallo de son droit à communiquer avec ses autorités consulaires. Ces questions sont examinées de manière détaillée dans le mémoire de la Guinée[74]. Pourtant, la RDC a tout simplement passé sous silence ces aspects de la demande de la Guinée, tant dans ses écritures qu'hier à l'audience.

27 5. Deuxièmement, si l'affaire de la *Barcelona Traction* constitue un point de départ utile pour l'examen de la Cour en l'espèce, elle n'en constitue néanmoins en aucune manière le point final. Il ne s'agit pas d'une *Barcelona Traction* numéro II, ni d'une *ELSI* numéro II, et ce bien que cette dernière affaire puisse en réalité se révéler le précédent le plus utile pour la Cour.

6. Troisièmement, la RDC a choisi de ne pas répondre à l'argument de la Guinée concernant les droits des actionnaires. Cet argument ne repose pas sur une confusion entre les droits de l'actionnaire et les droits patrimoniaux ou autres de la société, et s'en tient bien à la violation des droits dont jouit l'actionnaire vis-à-vis la société.

7. Permettez-moi de développer ces points, en m'intéressant tout d'abord aux différences entre la présente affaire et celle de la *Barcelona Traction*. Il y a cinq grandes différences :

8. Premièrement, l'affaire de la *Barcelona Traction* — tout comme, d'ailleurs, *ELSI* — portait sur un préjudice causé d'abord et avant tout à une société : la faillite de la société, dans

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[71] CR 2006/50, 27 novembre 2006, p. 47-48, par. 13, et 16-18.

[72] CR 2006/50, 27 novembre 2006, p. 46, par. 9.

[73] CR 2006/50, 27 novembre 2006, p. 45, par. 8 ; p. 49, par. 21.

[74] Mémoire de la Guinée, par. 3.2-3.12.

Barcelona Traction, et, dans *ELSI*, la confiscation des avoirs de la société et la faillite qui s'en est suivie. En l'affaire de la *Barcelona Traction*, la question était, selon la formulation employée par la Cour, de savoir si l'on pouvait dire qu'un droit, en l'occurrence celui de la Belgique, avait été violé dès lors que «les mesures incriminées [avaient] été prises à l'égard non pas de ressortissants belges mais de la société elle-même», laquelle n'était pas une société belge (par. 32 ; voir également par. 33-35). En l'espèce, en revanche, l'allégation principale — ou du moins l'une des principales — porte sur des mesures prises à l'encontre du ressortissant guinéen, M. Diallo.

a) C'est M. Diallo qui a été détenu illégalement et expulsé arbitrairement, et non ses sociétés. C'est M. Diallo qui n'a pas été informé de ses droits à communiquer avec ses autorités consulaires. Il n'était question d'aucune mesure de ce type dans l'affaire de la *Barcelona Traction*, ni d'ailleurs dans *ELSI*, et l'issue de la première aurait certainement été différente si tel avait été le cas. Si la question est bien, suivant la formulation de la Cour en l'affaire de la *Barcelona Traction*, celle de savoir si un droit de la Guinée a été violé du fait de la détention arbitraire et de l'expulsion de M. Diallo, alors la réponse doit être «oui» (voir l'affaire de la *Barcelona Traction, Light and Power Company, Limited (Belgique c. Espagne), arrêt, C.I.J. Recueil 1970*, p. 33, par. 35). Un droit de la Guinée a également été violé du fait que M. Diallo n'a pas été informé de son droit à communiquer avec ses autorités consulaires, et ce en violation de la convention de Vienne sur les relations consulaires. Il se peut néanmoins que, s'agissant de la protection diplomatique, la question soit plutôt de savoir quelle personne ou entité dispose du motif pertinent d'action en justice. Telle fut l'approche suggérée par sir Gerald Fitzmaurice dans son opinion individuelle en l'affaire de la *Barcelona Traction*,

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opinion à laquelle avaient souscrit à l'époque d'éminents auteurs (voir *C.I.J. Recueil 1970*, opinion individuelle de sir Gerald Fitzmaurice, p. 66. Voir également Higgins, «Aspects of the Case Concerning the Barcelona Traction, Light and Power Company, Limited», *Virginia Journal of International Law*, 11, 327, 330). Il va de soi que c'est M. Diallo qui dispose du motif pertinent d'action en justice pour ce qui concerne la détention et l'expulsion arbitraires dont il aurait été victime, et que la Guinée peut sans nul doute faire sienne cette cause.

b) Il s'agit également là d'une courte réponse aux exceptions préliminaires. Des questions de fait doivent sans nul doute être tranchées, tout comme celles relatives aux pertes qui résultent de la

violation des droits de M. Diallo, y compris celle de savoir si celui-ci peut obtenir réparation des pertes engendrées par l'incapacité de ses sociétés à recouvrer leurs créances, incapacité qui a découlé de sa détention et de son expulsion. Mais ce sont là des questions qui relèvent du fond. Le droit d'exercer la protection diplomatique et les autres droits existent bel et bien ; ils ne sont pas contestés, et cela signifie que les exceptions préliminaires doivent être rejetées, à tout le moins en partie.

9. J'en viens maintenant à la deuxième différence : ce sont, de la même manière, les droits propres de M. Diallo actionnaire qui ont été violés, y compris — comme je vais le démontrer — ses droits, en tant qu'actionnaire, de supervision, de contrôle et de gestion de ses sociétés. Dans l'affaire de la *Barcelona Traction*, en revanche, la Belgique n'avait pas expressément fondé sa demande sur une atteinte aux droits propres des actionnaires (voir par. 49).

10. Troisième différence : dans l'affaire de la *Barcelona Traction*, la Cour avait à déterminer l'étendue des droits de protection diplomatique dans une hypothèse où trois Etats étaient susceptibles d'être impliqués dans une «relation triangulaire» : les actionnaires belges, une société canadienne et les actes illicites allégués de l'Espagne. En la présente affaire, bien entendu, seuls deux Etats sont impliqués : la Guinée, Etat de nationalité de M. Diallo, et la RDC, Etat où ont été constituées les sociétés de M. Diallo, et aussi Etat qui aurait commis les actes illicites. Dès lors, la conclusion principale de l'affaire *Barcelona Traction* — à savoir que la Belgique ne pouvait pas faire sienne une demande concernant le préjudice causé aux intérêts d'actionnaires belges par suite d'actes dirigés contre une société canadienne— n'est pas applicable en l'espèce.

11. Quatrième différence : il ne s'agit pas ici d'un actionnariat complexe et multinational ni de concurrence entre différents Etats de nationalité des actionnaires. En effet, il n'y a qu'un seul actionnaire et, il va de soi, il n'y a qu'un seul Etat de nationalité. Le fait que M. Diallo était l'actionnaire unique revêt une importance particulière dans la mesure où il ressort des faits allégués et, de fait, de la thèse de la RDC, telle qu'exposée hier, que le défendeur confond actionnaire et

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société. La RDC a perpétré des actes contre M. Diallo — notamment en le détenant et en l'expulsant— dans le but précis — but effectivement atteint d'ailleurs — de l'empêcher d'exercer ses droits de supervision, de contrôle et de gestion des sociétés ; le défendeur a de ce fait empêché les deux sociétés de fonctionner et rendu impossible le recouvrement de leurs créances. Ainsi, bien

que l'argumentation de la Guinée soit centré sur les droits de M. Diallo en tant qu'actionnaire, la question du préjudice causé aux sociétés en demeure une dimension importante, notamment pour ce qui concerne l'évaluation des pertes ayant résulté de la violation desdits droits.

12. Cinquième différence : les deux sociétés de M. Diallo n'étaient pas des «sociétés anonymes» — alors que la société *Barcelona Traction Company*, elle, l'était — mais revêtaient la forme très particulière de «sociétés privées à responsabilité limitée» («SPRL»), définies comme une forme hybride de société, comparable à certains égards à un simple partenariat ou à une «société de personnes»[75], avec des droits et des mesures de protection spécifiques pour les actionnaires, tant s'agissant de la cession des parts que — ce qui est important en l'espèce — des droits de contrôle.

13. Cela m'amène donc à l'argument de la Guinée sur la nature et l'étendue des droits de M. Diallo en tant qu'actionnaire, dont l'analyse doit commencer par la question préliminaire de l'identification de la source juridique de ces droits.

La source des droits de M. Diallo en tant qu'actionnaire

14. Evidemment, le droit d'exercer une protection diplomatique au sujet des droits propres d'un actionnaire existe en droit *international*. En la matière, le droit international renvoie toutefois au droit *interne*, lequel définit le contenu des droits propres pertinents.

15. Ainsi, dans l'affaire de la *Barcelona Traction*, la Cour a établi une distinction entre les actes affectant directement la société et ceux affectant directement l'actionnaire en indiquant ce qui suit :

> «La situation est différente si les actes incriminés sont dirigés contre les droits propres des actionnaires en tant que tels. Il est bien connu *que le droit interne leur confère* des droits distincts de ceux de la société, parmi lesquels le droit aux dividendes déclarés, le droit de prendre part aux assemblées générales et d'y voter, le droit à une partie du reliquat d'actif de la société lors de la liquidation. S'il est porté atteinte à l'un de leurs droits propres, les actionnaires ont un droit de recours indépendant.» (Par. 47.)

[75] Louis Frédéric, *Traité de droit commercial belge*, t. V, Fecheyr (dir. de publ.), Gand, 1950, p. 877 ; voir également, s'agissant de l'équivalent français pour SPRL, la «société à responsabilité limitée» (SARL), Paul Le Cornu, *Droit des sociétés*, Montchrestien, Paris, 2003, p. 733 et Philippe Merle, *Droit commercial. Sociétés commerciales*, Dalloz, Paris, 2000, p. 189.

30 16. Deux remarques s'imposent : premièrement, la Cour ne cherche aucunement à établir une liste exhaustive de droits propres — elle cite quelques exemples fort connus, mais ce ne sont que des exemples, et j'ai cru comprendre que M. Mazyambo en convenait (CR 2006/50, 27 novembre 2006, p. 49, par. 23) ; deuxièmement, il aurait été difficile pour la Cour de faire plus que donner des exemples dans la mesure où elle semble considérer que ces droits pertinents découlent d'un droit interne qui n'est pas précisé.

17. Cette position a été à présent reprise à l'article 12 des projets d'articles de 2006 de la CDI sur la protection diplomatique, adoptés le 8 août 2006, article que j'ai reproduit au point 4 du plan de mon exposé figurant dans le dossier des juges. Cet article dispose :

> «Dans la mesure où un fait internationalement illicite d'un Etat porte directement atteinte aux droits des actionnaires en tant que tels, droits qui sont distincts de ceux de la société, l'Etat de nationalité desdits actionnaires est en droit d'exercer sa protection diplomatique à leur profit.»

Le commentaire de l'article 12 précise (au par. 4)) :

> «Le projet d'article 12 ne précise pas quel est le système juridique applicable pour déterminer quels sont les droits propres des actionnaires par opposition à ceux de la société. Dans la plupart des cas, cette question doit être tranchée par le droit interne de l'Etat où celle-ci a été constituée.»[76]

18. Il n'y a là rien de surprenant. Le droit de l'Etat où la société a été constituée est le droit qui fonde la relation juridique entre la société et l'actionnaire, et c'est aussi le droit en vertu duquel la personnalité de la société est reconnue internationalement[77]. Corrélativement, ce droit doit aussi être celui en vertu duquel les droits des actionnaires vis-à-vis de la société sont reconnus sur le plan international.

Le droit applicable de la RDC : le décret de 1887

19. Les droits propres de M. Diallo en tant qu'actionnaire peuvent dès lors, en l'espèce, être considérés comme établis en droit de la RDC, notamment par le décret de 1887 sur les sociétés commerciales, tel que modifié[78].

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[76] Voir également le quatrième rapport du rapporteur spécial, M. Dugard, par. 92.

[77] *Bakalian* v. *Ottoman Bank* (1965) *ILR*, 216, 228. Voir également le chapitre rédigé par Lowe, «Injuries to Corporations» ; dans «La responsabilité internationale», Crawford et consorts (dir. de publ.).

[78] OG, annexe 35.

31 20. J'ai rappelé les articles pertinents au point 5 de mon plan; ils figurent également sous l'onglet 4 du dossier des juges. Il ressort de ces articles — sur lesquels je reviendrai plus en détail dans un instant — que les droits dont jouissait M. Diallo en tant qu'actionnaire se répartissaient entre ce qu'on pourrait considérer plus ou moins comme des droits patrimoniaux, tels que les droits aux bénéfices et aux produits de la liquidation et, ce qui est bien plus important en la présente affaire, des droits de contrôle. Par «droits de contrôle» j'entends non pas le pouvoir de direction des sociétés au quotidien — pouvoir dont M. Diallo jouissait assurément en sa qualité de «gérant» et du fait de son droit de vote en tant qu'actionnaire unique[79] —, mais les droits concrets de participation au contrôle des deux SPRL, l'une des formes de sociétés prévues par le droit des sociétés de la RDC.

21. Pour en venir aux dispositions prises individuellement — en haut de la page 3 de mon plan —, j'ai relevé :

a) L'article 51, qui confère à chaque actionnaire «an equal entitlement in the exercise of members' prerogatives».

b) L'article 65 : «managers shall be appointed either in the instrument of incorporation or by the general meeting, for a period which may be fixed or indeterminate» : il s'agit du droit qu'ont les actionnaires de nommer le «gérant», un droit important, là encore, de participation au contrôle de la société. M. Diallo, en tant qu'actionnaire unique, avait le droit de se nommer lui-même gérant. Et, selon une pratique tout à fait courante dans les SPRL, c'est bel et bien ce qu'il a fait, et ce — le point mérite d'être souligné —, pour une durée non déterminée[80].

c) Parce que cela nous conduit alors à l'article 67 : «unless the statutes provide otherwise, member-managers» — et c'est ce qu'est M. Diallo, en l'espèce, «un gérant associé» — «appointed for the life of the company» — comme l'était M. Diallo — «can be removed only for good cause, by a general meeting deliberating under the conditions required for amendments to the statutes. Other managers can be removed at any time.» Il existe une nette différence entre «gérant associé» nommé pour la durée de la société et les autres «gérants», qui sont simplement «révocables en tout temps». Le «gérant associé» d'une SPRL jouit donc d'un

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[79] Voir BT, par. xx

[80] MG, annexe 3.

statut et de protections particuliers : dès lors qu'il a été nommé pour la durée de la société, il ne peut être révoqué — si ce n'est à l'issue d'un vote spécial de l'assemblée générale de la société.

32 Ce cas est donc très différent de celui de la «société anonyme». Pour citer un commentateur :

> «It is in the provisions concerning executive management (*gérance*) that the difference between an SPRL and an SA appears most clearly. No matter how great the authority granted in some SAs to the managing director (*administrateur délégué*) . . . , 'full control' (*«la maîtrise de l'affaire»)* can never be granted to him or her as in an SPRL.»[81]

d) Toutefois, à la suite de sa détention et de son expulsion, M. Diallo n'a, de fait, plus été en mesure de jouir de ces droits importants. En contradiction avec les dispositions de l'article 65, il a été privé du droit de nommer le «gérant» de son choix, en l'occurrence lui-même — il ne lui était en effet plus possible, sur un plan pratique, de remplir les fonctions de «gérant» depuis la Guinée. Les protections prévues à l'article 67, de même, ne lui étaient d'aucune utilité.

e) J'en viens maintenant à l'article 68 — reproduit en bas de la page 3 de mon plan. Cet article porte sur les pouvoirs du gérant. «Each manager shall have all the powers to act on behalf of the company in all circumstances and to perform the administrative acts and take the measures that the purpose of the company implies.» Tels sont les pouvoirs dont jouit le gérant. Or, en tant qu'actionnaire unique des deux SPRL, M. Diallo avait le droit de se nommer lui-même gérant, et, partant, de se conférer le droit d'exercer ces pouvoirs. Ainsi, les articles 65 et 67 créent certains droits pour l'«associé» ou pour le «gérant associé», alors que l'article 68 peut être considéré comme donnant un contenu à ces droits.

f) J'en viens à l'article 71 — un article qui revêt une importance particulière en l'espèce : «oversight of the management shall be entrusted to one or more administrators, who need not be members, called "auditors" if the number of members does not exceed five» — et tel était bien sûr le cas des sociétés de M. Diallo ; il en était le seul actionnaire ; il n'y avait qu'un seul «associé» — «the appointment of auditors is not compulsory, and each member shall have the powers of an auditor». M. Diallo étant l'unique actionnaire de ses deux sociétés ; il jouissait, aux termes de l'article 71, de tous les droits et pouvoirs reconnus aux «commissaires». Ce droit

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[81] M. Coipel, *Les sociétés privées à responsabilité limitée*, Larcier, Bruxelles, 1993, p. 82. Voir aussi J. Van Houtte, *Traité des sociétés de personnes à responsabilité limitée*, t. I, Larcier, Bruxelles, 1962, p. 81.

est également énoncé à l'article 19 des statuts d'Africontainers : «Each of the members shall exercise supervision over the company.»[82]

g) Le contenu du droit énoncé à l'article 71 est ensuite précisé à l'article 75 : «The auditors' job is to oversee and check, without such powers being subject to any limitation, all actions taken by management, all corporate operations and the register of members.»

33 i) Manifestement, il s'agit là de droits extrêmement importants et d'une très grande portée. Pour citer M. Makela Massamba, de l'Université de Kinshasa : «The auditors play a crucial role in companies. They ensure that corporate affairs run smoothly and that the provisions of the law and of the company's articles concerning the company's accounts are complied with.»[83]

ii) Par ailleurs, il découle des articles 71 et 75 que M. Diallo avait le droit de surveiller et de contrôler, sans restriction aucune, la gestion et les activités de ses deux sociétés. Là encore, du fait de sa détention et de son expulsion, M. Diallo a été mis dans l'incapacité d'exercer ces droits importants.

h) Les articles 78 et 79, qui figurent à la page 5 de mon plan, énoncent ensuite certains droits relatifs aux assemblées générales, qui sont eux aussi des droits concrets de participation au contrôle de la société reconnus aux actionnaires.

i) L'article 78 dispose : «The general meeting of members shall have the widest powers to perform or ratify acts concerning the company . . .». L'assemblée générale — en l'espèce, elle se résume bien sûr, de fait, à la personne de M. Diallo — a donc «the widest powers to perform . . . acts concerning the company». Il s'agit là d'un droit d'actionnaire des plus larges possibles.

j) L'article 79 traite ensuite du droit de prendre part aux assemblées générales et de voter, un droit qui est bien entendu l'un des droits mentionnés dans le passage de l'arrêt rendu en l'affaire *Barcelona Traction* que je vous ai déjà cité (par. 47).

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[82] MG, annexe 1.

[83] Roger Makela Massamba, *Droit des affaires — Cadre juridique de la vie des affaires au Zaïre*, Cadicec/De Boecke Université, 1996, p. 313.

i) Les droits énoncés aux articles 78 et 79 doivent être lus à la lumière des obligations découlant de l'article premier de l'ordonnance-loi n° 66-341[84], également reproduit à la page 5 du plan. Cet article fait obligation à M. Diallo d'établir le siège de ses sociétés en RDC, ainsi que de tenir des assemblées générales en RDC.

ii) En procédant à son arrestation puis à son expulsion, la RDC a, dans les faits, mis M. Diallo dans l'incapacité de jouir de ce droit. L'assemblée générale devait se réunir en RDC ; M. Diallo avait été expulsé du pays ; sur un plan pratique, il lui devenait impossible de prendre réellement part et de voter aux assemblées générales de ses sociétés. Nous ne

34 disons certes pas que M. Diallo était dans l'impossibilité de voter par procuration ou par correspondance, mais dans la mesure où il s'agit ici de sociétés détenues par un actionnaire unique, lequel actionnaire et gérant unique avait été frappé d'une mesure d'expulsion, l'impossibilité qu'il y avait de tenir l'assemblée générale est tout à fait évidente.

22. Or ces différents droits de contrôle, de surveillance et de gestion sont à l'évidence des droits propres de l'actionnaire, exactement comme le droit de «constituer, contrôler et gérer» énoncé au paragraphe 2 de l'article III du traité d'amitié examiné dans l'affaire *ELSI*. Le paragraphe 2 de l'article III dudit traité d'amitié dispose dans le passage qui nous intéresse — lequel figure en haut de la page 6 de mon plan :

> «Les ressortissants, sociétés et associations de chacune des Hautes Parties contractantes seront autorisés, en conformité des lois et règlements applicables à l'intérieur des territoires de l'autre Haute Partie contractante, à constituer, contrôler et gérer des sociétés et associations de cette autre Haute Partie contractante en vue de poursuivre des activités touchant la fabrication ou la transformation industrielles…»

ou d'autres activités.

23. La Cour se rappellera que, dans l'affaire *ELSI*, l'Italie protesta contre le fait que les droits à la protection et la sécurité constantes ainsi que la clause de la nation la plus favorisée figurant aux paragraphes 1 et 3 de l'article V du traité d'amitié ont été accordés uniquement au sujet des biens appartenant à la société sans créer de droit pour les actionnaires, mais aucune protestation de cette sorte n'a été soulevée relativement au paragraphe 2 de l'article III. Pour reprendre les termes de M. Lowe, ce paragraphe 2 de l'article III est «clairement un droit des actionnaires. On ne saurait

[84] OG, annexe 35.

soutenir qu'il s'agit là d'un droit conféré à la société ; et il est difficile de souscrire logiquement à l'idée que ce droit pourrait être conféré à une société que des actionnaires constituent, contrôlent et gèrent.»[85] *[Traduction du Greffe.]*

24. M. F.A. Mann a fait la même remarque : «Même le plus fervent partisan de l'expression verbeuse doit admettre que le droit «de contrôler et gérer» ne peut être garanti que pour l'actionnaire», à savoir pour l'actionnaire unique en l'espèce, «plutôt que pour la société elle-même.»[86] *[Traduction du Greffe.]*

25. On peut dire précisément la même chose ici en ce qui concerne les droits de surveillance et de contrôle énoncés aux articles 71 et 75 du décret de 1887, ainsi que dans les autres articles sur lesquels j'ai déjà appelé l'attention de la Cour. Le fait que ces droits découlent du droit interne et non d'un traité ne peut nullement modifier leur nature et les transformer en droits de la société et non de l'actionnaire.

35 26. Par ailleurs, l'affaire *ELSI* établit qu'un acte visant une société est susceptible de violer le droit de contrôle et de gestion d'un actionnaire. Ainsi, soulignant les répercussions de la réquisition, la Cour conclut (par. 70) : «Il est indéniable que la réquisition de «l'usine et des équipements connexes» d'une entreprise doit normalement équivaloir à une privation, du moins pour une part importante, du droit de contrôler et de gérer.»

27. En l'espèce, la Cour examine de manière pragmatique ce que constituent le contrôle et la gestion afin de se prononcer sur le point de savoir si, dans le cas où l'objet sur lequel ils portent est supprimé dans les faits, il s'ensuit qu'il y a atteinte au droit de contrôle et de gestion.

28. Eh bien, la situation, en l'espèce, concernant les faits allégués par la Guinée est encore bien plus évidente : c'est l'actionnaire qui est habilité par le droit applicable à surveiller, contrôler et gérer ce qui a été, en réalité, écarté de la scène.

a) En détenant, puis en expulsant M. Diallo, la RDC a cherché à l'empêcher, et l'a effectivement empêché, d'exercer ses droits de contrôle, de surveillance et de gestion. Il ne pouvait pas

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

[86] F.A. Mann, «Foreign Investment in the International Court of Justice : The ELSI Case», *AJIL* vol. 86, p. 97-98. Voir également sir Arthur Watts, «Nationality of Claims: Some Relevant Concepts», dans V. Lowe et M. Fitzmaurice, *Fifty Years of the International Court of Justice, Grotius, Cambridge,* 1996, p. 435.

contrôler, surveiller ou gérer ses sociétés, de manière réellement sérieuse, depuis la Guinée. Et même s'il avait été en mesure de nommer un nouveau «gérant» et un «commissaire» — or, il ne l'était pas, du fait qu'il manquait de moyens financiers —, il était toutefois privé du droit de nommer celui de son choix, en violation des articles 65 et 67 du décret de 1887, et on ne pouvait attendre de lui qu'il remette ou abandonne la gestion de ses sociétés à quelque tierce partie.

b) Si j'ai bien saisi les arguments développés hier par M. Mazyambo, la RDC considère qu'une expulsion ne constitue pas une ingérence dans les droits des actionnaires. Cette thèse est par principe douteuse, mais cela importe peu en l'espèce, l'intention précise à l'origine de la détention et de l'expulsion de M. Diallo étant de l'empêcher d'exercer ses droits de contrôle, de surveillance et de gestion, parmi lesquels bien évidemment le droit de contrôler le déroulement des diverses procédures locales. La détention et l'expulsion de M. Diallo sont directement dues à la lettre adressée au ministre de la justice le 29 août 1995 par Shell Zaïre, dans laquelle celle-ci demandait que des mesures soient prises au sujet de l'arrêt Africontainers, arrêt qui concernait l'une des sociétés de M. Diallo ; M. Forteau vous a déjà parlé de cette lettre[87].

36 M. Diallo a été expulsé précisément parce qu'il avait, et exerçait, les droits de contrôler, de surveiller et de gérer ses deux sociétés.

c) Cette expulsion a eu — encore une fois, telle semble avoir été l'intention — des effets dramatiques sur les deux sociétés, lesquelles furent définitivement empêchées de poursuivre leurs activités, y compris le recouvrement des créances de la société.

d) Et là, de nouveau, l'affaire *ELSI* constitue un précédent utile, car l'une des précisions apportées dans la décision est l'accent mis par la Chambre sur l'intention qui était à l'origine de l'acte illicite allégué (par. 70). Mettant l'accent sur l'intention à l'origine de la réquisition de l'usine d'ELSI, la Chambre conclut :

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

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[87] MG, annexe 166.

L'affaire n'ayant ensuite pas abouti au regard des faits, il n'y eut, en l'occurrence, aucune conclusion à la violation du paragraphe 2 de l'article III.

29. Mais nous n'en sommes pas à ce stade en l'espèce et l'important pour le moment, c'est de ne pas nous égarer dans des questions de fond, dont celle de l'étendue du préjudice que la violation de son droit à ne pas être détenu et expulsé arbitrairement et celle de ses droits de contrôle, de surveillance et de gestion de ses deux sociétés ont causé à M. Diallo. Pour les besoins actuels, tout ce qu'il faut démontrer, c'est ceci :

a) Il faut, en premier lieu, établir l'existence d'un droit à ne pas être détenu et expulsé arbitrairement et que ce droit n'a pas été respecté. En vérité, il n'y a pas de débat en tant que tel, il n'y a pas de débat du tout, quant à l'existence de ce droit et la RDC n'a pas contesté le droit de la Guinée à exercer sa protection diplomatique à ce sujet.

b) En second lieu, il faut démontrer l'existence des droits des actionnaires et que ces droits n'ont pas été respectés. Là encore, les Parties s'accordent à reconnaître à tout le moins que la Guinée peut, au moins en théorie, exercer un droit à la protection diplomatique en ce qui concerne les droits des actionnaires. Et nous estimons que la RDC n'a tout simplement pas répondu aux arguments de la Guinée concernant la nature et l'étendue de ces droits en l'espèce.

30. Bien entendu, les questions de fait objet d'un débat acharné entre les Parties ne manquent pas en l'espèce, mais ces questions ne sont pas à trancher pour le moment.

37 Madame le président, ceci met un terme à mon exposé sur ce point et je vous saurais gré de bien vouloir appeler à la barre M. Pellet, afin qu'il puisse au moins commencer sa plaidoirie avant la pause de ce matin. Je vous remercie de votre attention.

Le PRESIDENT : Merci Monsieur Wordsworth. Je donne la parole à M. Pellet.

M. PELLET : Je vous remercie, Madame le président.

IV. Protection of Mr. Diallo by Guinea in his capacity as a shareholder in Congolese companies for damage suffered by those companies

1. Madam President, Members of the Court, as Mr. Wordsworth has just stated, the case before us today gives the Court an opportunity to clarify issues of fundamental importance regarding the diplomatic protection of companies in contemporary international law, issues that

were touched upon but not finally resolved in *Barcelona Traction*, still the flagship case in this area.

2. In its 1970 Judgment the Court asked itself whether, "for reasons of equity, a State should be able, in certain cases, to take up the protection of its nationals, shareholders in a company which has been the victim of a violation of international law", in particular "when the State whose responsibility is invoked is the national State of the company" (*Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970, Judgment*, p. 48, para. 92). This eminent Court did not answer the question directly — it did not arise in that case. However, it does arise today and it seems to me almost beyond dispute that, in the special circumstances of our case at all events, the answer must be in the affirmative.

3. Indeed, we are precisely in the situation that the Court had expressly ruled out in 1970. Moreover BT — the familiar name given by international lawyers to *Barcelona Traction* — was a limited company, a very special category of legal entity characterised *inter alia* by a complex and fluctuating body of shareholders, whereas Mr. Diallo's companies are private limited liability companies (SPRL), in which *intuitu personae* has a fundamental role.

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I. Guinea can extend its diplomatic protection to the shareholder of a company having the nationality of the respondent State

A. The exception to the rule of the non-protection of shareholders in the 1970 Judgment of the Court

4. Madam President, if the DRC is to be believed, the facts of the *Barcelona Traction* case are disconcerting in their simplicity: "In that case, the Applicant, Belgium, claimed to be protecting the Belgian shareholders of a company which did not have that nationality."[88] One point, that is all — and that is a great deal too brief, if only because our opponents gloss over an essential fact, which no one disputed (*Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970, Judgment*, pp. 42-44, paras. 71-76): BT had the nationality of a third State (it was Canadian), whereas Mr. Diallo's two companies, Africom-Zaire and

[88] POG, p. 47, para. 2.03: see also, for example, p. 97, para. 2.95.

Africontainers-Zaire, have the nationality of the Respondent itself (they are Congolese — at the time they were Zairean) — which no one disputes either[89].

5. Without doubt, therefore, we are in the exception hypothesis — what is commonly called the "substitution" hypothesis — envisaged by the Court in its 1970 Judgment:

— it starts by restating the theory that in such circumstances "a State should be able, in certain cases, to take up the protection of its nationals, shareholders in a company which has been the victim of a violation of international law" (*I.C.J. Reports 1970*, p. 48, para. 92);

— without making a clear decision on its sanctioning by positive law, the Court notes that "[w]hatever the validity of this theory may be, it is certainly not applicable to the present case, since Spain is not the national State of Barcelona Traction" (*ibid*.);

— the Court explains nonetheless that "[in] view, however, of the discretionary nature of diplomatic protection, considerations of equity", which would justify the exception. "cannot require more than the possibility for *a* protector State to intervene, whether it be the national State of the company, by virtue of the general rule . . ., or, in a secondary capacity, the national State of the shareholders who claim protection" (*ibid*., p. 48, para. 94: emphasis added).

39 In other words, one of the factors explaining the rejection of protection for the Belgian shareholders of BT is the fact that in that case Canada could exercise its protection (though in ways other than legal action). This is out of the question in the case before us: it is quite simply absurd to think that the DRC might extend its diplomatic protection in favour of Africom and Africontainers against . . . the DRC.

6. Let me say in passing that this is exactly what we wrote in the passage cited yesterday by Professor Mazyambo[90] from the textbook of which I am one of the co-authors: there we state that *the national State of a company* cannot act by way of diplomatic protection when at the same time it is the perpetrator of the internationally wrongful act[91]. On the other hand we give the question whether the State of which the majority shareholders of a company are nationals can extend its

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[89]See MG, p. 79, para. 4.12, p. 96, para. 4.59; POG, p. 13, para. 1.08, or p. 47, para. 2.01; OG, p. 30, para. 2.05, p. 33, para. 2.13.

[90]CR 2006/50, p. 49, para. 20. See also POG, p. 59, para. 2.23.

[91]Patrick Daillier and Alain Pellet, *Droit international public (Nguyen Quoc Dinh*), 6th ed., Paris, *LGDJ*, 1999, p. 774; see also 7th ed., 2002, p. 811.

protection to them and against the national State of the company precisely the same affirmative answer[92] as Guinea has in the present case (and as the Court gave in the 1970 Judgment). As Sir Gerald Fitzmaurice wrote in the separate opinion that he appended to the Judgment, in a case of this kind "the normal rule of intervention only on behalf of the company by the company's government becomes not so much inapplicable as irrelevant or meaningless in the context"[93]. These are considerations, of common sense as much as of "equity", that provide the explanation for the exception to the "normal rule", an exception which your distinguished Court rightly refrained from applying in the *Barcelona Traction* case.

B. The customary nature of diplomatic protection for shareholders of a company with the nationality of the internationally responsible State

7. Madam President, in its Memorial Guinea has referred to a large number of arbitral awards spread over a considerable period, which establish that the shareholders of a company can enjoy the diplomatic protection of their own national State as regards the national State of the company when that State is responsible for an internationally wrongful act against them[94]. The

40 Congo does not deny this, but asserts that "these old arbitrations . . . are based on specific conventional procedures which cannot be transposed into the ordinary law of diplomatic protection"[95]. Two comments on this "defence", Madam President, in telegraphic style because we certainly have very little time (I note in this connection in passing that, in *BT,* the Court heard pleadings by our illustrious predecessors at forty-three sittings in the first phase and at sixty-four in the second (*I.C.J. Reports 1964,* pp. 9-10 and *I.C.J. Reports 1970*, p. 7, para. 7. *I.C.J. Pleadings, Barcelona Traction*, Vol. II-III and VIII-X). We are far short of that):

(1) some of these arbitrations do refer to the principles of justice, but this was common currency at the time and there is no doubt that the tribunals intended to apply, and did apply, the law in force as they saw it; and

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[92]*Ibid*., p. 774 (1999) or pp. 811-812 (2002).

[93]*Ibid*., p. 72, para. 14.

[94]See MG, pp. 84-90, paras. 4.30-4.44; see also OG, pp. 50-51, para. 2.53. See *inter alia* United States-Peru Mixed Commission, S.A., 26 February 1870, *Ruden*, in J.B. Moore, *International Arbitrations*, II, p. 1653; arbitration by MacMahon, 24 July 1875, *Delagoa Railway*, *RIAA*, Vol. III, p. 637; arbitration by H. Strong, M. Dickinson, D. Castro (then J. Rosa Pacas), *El Triunfo* (case concerning the *Salvador Commercial Company*), 8 May 1902, *RIAA*, Vol. XV, p. 467 or arbitration by Sir Herbert Sisnett, *Shufeldt*, 24 July 1930, *RIAA*, Vol. II, p. 1098.

[95]POG, p. 69, para. 2.46.

(2) it is obvious that, in order to assess their competence, the tribunals in these cases took the agreement submitting the dispute to them as the basis — but none of these agreements mentioned how the problem that concerns us should be solved. Thus, for example, the agreement in the *Shufeldt* case confined itself, apart from the rules of procedure, to stating the questions put to the tribunal, in particular whether "P.S. Shufeldt [has] the right to claim pecuniary indemnification"[96]. Such a question in no way prejudices the tribunal's answer; this was doubtless in favour of protection "by substitution".

8. The *Baasch and Römer*[97] and *Jacob Henriquez*[98] cases, both decided by the Mixed Dutch-Venezuelan Commission, on which the Congo laid great stress in its preliminary objections[99] and to which Professor Mazyambo referred yesterday morning[100], cannot refute the

41 "trend", which is very firm and in any event favourable to the exception, to say the least. These two decisions are clearly at odds with the solutions adopted by the other Venezuelan Commissions, which for the most part favoured the *jus standi* of shareholders or partners in local companies — i.e., Venezuelan law[101].

9. As early as 1934, following an in-depth analysis of the jurisprudence, Charles de Visscher wrote:

> "In vain would the defendant State object that the company had its nationality. It will be replied that this nationality is separate from that of the shareholders solely for the purpose of legal protection that the local law has proved powerless to guarantee. Only then can international action open the way to compensation demanded for foreign interests. To reason otherwise is to give legal personality effects that compromise the very purpose for which it was constituted; it is to exploit an abstract idea at the expense of the only realities that justify its use."[102] *[Translation by the Registry]*

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[96]See agreement dated 2 November 1929, *RIAA*, Vol. II, p. 1081.

[97]Dutch-Venezuelan Commission, 1903 award, *Baasch and Römer*, *RIAA*, Vol. X, p. 723.

[98]Dutch-Venezuelan Commission, 1903 award, *Jacob M. Henriquez*, *RIAA*, Vol. X, p. 727.

[99]POG, pp. 94-95, para. 2.90.

[100]CR 2006/50, p. 55, para. 48.

[101]See Mixed United States-Venezuelan Commission, 1903 award, *Kunhardt*, *RIAA*, Vol. IX, p. 171 or Mixed Italian-Venezuelan Commission, 1903 award, *Massardo, Carbone & Co.*, *RIAA*, Vol. X, p. 538; see also Lucius C. Caflisch, *La protection des sociétés commerciales et des intérêts indirects en droit international public*, Martinus Nijhoff Publishers, The Hague, 1969, pp. 182-183.

[102]"De la protection diplomatique des actionnaires d'une société contre l'Etat sous la législation duquel cette société s'est constituée", *RDILC*, Vol. 15, 1934, pp. 641-642. On the same lines see also, for example: J.M. Jones, "Claims on Behalf of Nationals Who are Shareholders in Foreign Companies", *BYBIL*, Vol. 26, 1949, p. 255; Lucius C. Caflisch, *La protection des sociétés commerciales et des intérêts indirects en droit international public*, Martinus Nijhoff Publishers, The Hague, 1969, p. 192.

10. This was the situation when the Court adopted its judgment in 1970. Subsequent practice, conventional or jurisprudential, about which our opponents are careful to say nothing, has dispelled any uncertainty, if uncertainty there were, on the positive nature of the "exception". Thus, for example, Article 25, paragraph 2 b, of the 1965 Washington Convention — the ICSID Convention — accepts that a local company "because of foreign control, . . . should be treated as a national of another Contracting State" for the purposes of the protection offered by the Convention, and many bilateral treaties for the encouragement and protection of investment[103], including those

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entered into by the Congo[104], or even multilateral treaties[105] include similar clauses. In accordance with these provisions the jurisprudence, starting with the ICSID[106] or the Iran-United States Claims

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[103]See, for example, the Treaty between the United States of America and the Argentine Republic concerning the reciprocal protection and encouragement of investment, 14 November 1991, Art. VII, para. 8. For an application of this provision see *Pan American Energy LLC and BP Argentina Exploration Company* v. *The Argentine Republic (ICSID* Case No. ARB/03/13), *BP America Production Company, Pan American Sur SRL, Pan American Fueguina SRL and Pan American Continental SRL* v. *The Argentine Republic (ICSID* Case No. ARB/04/8), Decision on Jurisdiction, 27 July 2006, http://www.investmentclaims.com/decisions/PanAmerican_BP-Argentine-Jurisdiction.pdf.

[104]See for example Articles I c) and III 2)of the bilateral treaty on the reciprocal protection and encouragement of investment with the United States of America dated 3 August 1984, http://www.unctad.org/sections/dite/iia/docs/bits/us_demo_rep_congo.pdf; the first Article of the bilateral treaty with France dated 5 October 1972, http://www.unctad.org/sections/dite/iia/docs/bits/france_zaire_fr.pdf; the first Article of the bilateral treaty with Switzerland dated 10 March 1972, http://www.unctad.org/sections/dite/iia/docs/bits/switzerland_zaire_fr.pdf or the first Article of the bilateral treaty with Germany dated 18 March 1969, http://www.unctad.org/sections/dite/iia/docs/bits/germany_congo_fr.pdf. See also Article 1, paragraph 2, of the treaty with the Belgium-Luxembourg Economic Union dated 17 February 2005 (not yet entered into force), reproduced in draft Law le5578/00 approving agreements between the Belgium-Luxembourg Economic Union and certain third countries concerning the reciprocal protection and encouragement of investment, http://www.chd.lu/servlet/ShowAttachment?mime=application%2fpdf&id=844603&fn=844603.pdf.

[105]See for example Article 1117 of the NAFTA.

[106]See *inter alia*: *Asian Agricultural Products Limited* v. *Democratic Socialist Republic of Sri Lanka* (Case No. ARB/87/3), Award, 27 June 1990, *ICSID Rev. — FILJ*, Vol. 6, 1991, pp. 526 *et seq*.; *American Manufacturing & Trading, Inc.* v. *Democratic Republic of the Congo* (Case No. ARB/91/1), Award, 21 February 1997, *ICSID Reports*, Vol. 5, pp. 14 *et seq*.; *Antoine Goetz and others* v. *Republic of Burundi* (Case No. ARB/95/3) and Award, 10 February 1999, *ICSID Rev. — FILJ*, Vol. 15, 2000, pp. 457 *et seq*.; *Lanco International, Inc.* v. *Argentine Republic* (Case No. ARB/97/6), preliminary decision on jurisdiction, 8 December 1998, *ILM*, Vol. 40, 2001, pp 457 *et seq*.; *Emilio Agustín Maffezini* v. *Kingdom of Spain (Case No. ARB/97/7)*, preliminary objections, decision, 25 January 2000, *ICSID Rev. — FILJ*, Vol. 16, 2001, pp. 212 *et seq*.; *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil* v. *Republic of Estonia*, Award, 25 June 2001, http://www.worldbank.org/icsid/cases/genin.pdf, paras. 319-329; *Compañía de Aguas del Aconquija S. A. & Vivendi Universal* v. *Argentine Republic* (Case No. ARB/97/3), Cancellation, Award, 3 July 2002, *ICSID Rev. — FILJ*, Vol. 19, 2004, pp. 89 *et seq*.; *Azurix Corp.* v. *Argentine Republic* (Case No. ARB/01/12), decision on jurisdiction, 8 December 2003, http://www.worldbank.org/icsid/cases/azurix-decision-en.pdf.; *CMS Gas Transmission Company* v. *Argentine Republic* (Case No. ARB/01/8), preliminary objections, decision, 17 July 2003, http://www.worldbank.org/icsid/cases/CMS_Decision_english.pdf.; *LG & E Energy Corp, LG & E Capital Corp. and LG & E International Inc.* v. *Argentine Republic* (Case No. ARB/02/1), preliminary objections, decision, 30 April 2004, http://www.worldbank.org/icsid/cases/lge-decision-en.pdf.; *Plama Consortium Limited* v. *Republic of Bulgaria* (Case No. ARB/03/24), decision on jurisdiction, 8 February 2005, *ICSID Rev. — FILJ*, Vol. 20, 2005, pp. 262 *et seq*.; *Suez, et al.* v. *Argentine Republic (Case No. ARB/03/19)*, decision on jurisdiction, 3 August 2006, http://www.worldbank.org/icsid/cases/pdf/ARB0319_DecisionJurisdiction03-19.pdf.; *Pan American Energy LLC, and BP Argentina Exploration Company* v. *The Argentine Republic* (*ICSID* Case No. ARB/03/13), *BP America Production Company, Pan American Sur SRL, Pan American Fueguina, SRL and Pan American Continental SRL* v. *The Argentine Republic* (*ICSID* Case No. ARB/04/8), Decision on Jurisdiction, 27 July 2006, http://www.investmentclaims.com/decisions/PanAmerican_BP-Argentina-Jurisdiction.pdf.; in particular para. 218.

Tribunal Reports[107], confirms that a shareholder can seise an international tribunal in respect of damage to a local company[108].

11. I am well aware, Madam President, Members of the Court, that these treaty provisions and this jurisprudence, which are virtually unanimous, do not constitute the direct application of the principles and rules governing diplomatic protection, and the ICSID tribunals do not fail to recall this[109]. It is nonetheless true that the number of these treaties and of these awards is overwhelming and that all endorse rules and principles conceived on the same model inspired by the same concerns, and serve as illustrations of the "objection" advocated by the Court 36 years ago. Even assuming that it did not then reflect positive law, which I believe not to be true, there can be no doubt, to reiterate what the Court said in 1969, that "it has since acquired a broader basis" (*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969,* p. 41, para. 69) which makes it today opposable to the DRC. As explained by Professor Dugard, Special ILC Rapporteur on diplomatic protection "the fact that the cases relied on for this exception are based on special agreements does not deprive them of value in the law-formation process" and makes it possible to affirm that the twin requirements for the crystallization of a customary rule, *usus* and *opinion juris*, have been met[110].

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12. The possibility of protection "by substitution" is therefore no longer in doubt today. And, in view of the Congolese nationality of the two companies of which Mr. Diallo is sole

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[107]See Article VII, para. 2, of the Algiers declaration of 1981, and in particular: *William Bikoff and George Eisenpresser* v. *The Islamic Republic of Iran*, award n° 138-82-2, 22 June 1984, *Iran-US CTR*, Vol. 7, pp. 4 *et seq*.; *Blount Brothers Corporation* v. *The Government of the Islamic Republic of Iran, et al.*, Award No. 215-52-1, 28 February 1986, *Iran-US CTR*, Vol. 10, pp. 60 *et seq*.; *Combustion Engineering, Inc.* v. *The Islamic Republic of Iran*, Partial Award No. 506-308-2, 18 February 1991, *Iran-US CTR*, Vol. 26, pp. 65 *et seq*.

[108]See also, for example, decision No. 4 taken by the Governing Council of the United Nations Compensation Commission, para. (e), http://www2.unog.ch/uncc/decision/dec_04.pdf.

[109]See, for example, *Azuriz Corp*. v. *Argentine Republic* (case No. ARB/01/12), Decision on Competence, 8 December 2003, http://www.worldbank.org/icsid/cases/azurix-decision-en.pdf, para. 72; *LG & E Energy Corp., LG & E Capital Corp and LG & E International Inc.* v. *Argentine Republic* (case No. ARB/02/1), Preliminary Objections, Decision, 30 April 2004, http://www.worldbank.org/icsid/cases/lge-decision-en.pdf, para. 52; and *Pan American Energy LLC, and BP Argentina Exploration Company* v. *The Argentine Republic* (ICSID case No. ARB/03/13), *BP America Production Company, Pan American Sur SRL, Pan American Fueguina, SRL and Pan American Continental SRL* v. *The Argentine Republic* (ICSID case No. ARB/04/8), Decision on Jurisdiction, 27 July 2006, http://www.investmentclaims.com/decisions/PanAmerican_BP-Argentina-Jurisdiction.pdf, paras. 216-217.

[110]Seventh report on diplomatic protection, A/CN.4/567, para. 64 *(a)*; see also his Fourth report on diplomatic protection, A/CN.4/530, para. 84; see also the separate opinion of Judge Gros in the *Barcelona Traction* case, *I.C.J. Reports 1970*, pp. 277-278, or Richard B. Lillich, "The Rigidity of Barcelona", *AJIL*, Vol. 65, 1971, pp. 525-532, and Stephen M. Schwebel, "The Influence of Bilateral Investments Treaties on Customary International Law", *ASIL, Proceedings*, 2004, pp. 27-30.

associate and managing director, Guinea indisputably has *jus standi* enabling it to stand squarely behind its national in respect of the prejudice suffered by his companies.

Madam President, this is perhaps the moment for a well-deserved break.

Le PRESIDENT : Je vous remercie, Monsieur Pellet.

La Cour va se retirer et l'audience reprendra plutôt rapidement.

L'audience est suspendue de 11 h 30 à midi

44 Le VICE-PRESIDENT, faisant fonction de président : Veuillez vous asseoir. Le président, le juge Koroma et le juge Buergenthal devant assister à une importante cérémonie ailleurs, ils ne seront pas en mesure d'être sur le siège pour la seconde partie de la séance d'aujourd'hui. Dans ces circonstances, le président m'a demandé de présider le reste de l'audience d'aujourd'hui et je vous demande, M. Pellet, de reprendre votre plaidoirie.

M. PELLET : Je vous remercie infiniment, Monsieur le président.

II. The circumstances of the case reinforce the applicability of protection "by substitution" in the present case

13. Before the break I observed that the possibility of protection by substitution was no longer in doubt today even if it might have been in 1970, which I do not believe, and I stated that Guinea indisputably has the necessary *jus standi* to enable it to stand squarely behind its national in respect of the prejudice suffered by his companies. Madam President, whatever our opponents may say about it, this well-established rule is completely in keeping with equity, and the special characteristics of Mr. Diallo's companies prescribe its application in our case even more pressingly.

A. The role of equity

14. In its Memorial, Guinea noted in passing that after recalling the "general rule" that only the national State of the company can exercise its diplomatic protection with regard to a State responsible for a breach of international law, the Court nevertheless, in its 1970 Judgment,

> "expressly reserved the possibility that, for considerations of equity, the State of the shareholders in the company in question retains the right in certain circumstances,

> including in particular in situations comparable to the present one, to exercise its diplomatic protection, independently of the violation of the shareholders' direct rights"[111].

Seizing upon that sentence, which nevertheless strictly reflects the position of the Court, the DRC pretends to be indignant at "[t]he argument of the Republic of Guinea founded on equity *contra legem*"[112].

45 15. In the first place, the Congo's position simply begs the question: the exception to the principle of exclusive protection by the State of the nationality of the company is well established in contemporary international law; it is therefore not a matter of equity *contra legem* as the Congo would have us believe[113], but *infra legem*. This sort of equity which, far from contradicting the legal rules, underpins and justifies them, has been mentioned by the Court and by its Members, most of whom endorsed its position (*I.C.J. Reports 1970*, separate opinion of Sir Gerald Fitzmaurice, pp. 71-75, paras. 13-20; separate opinion of Judge Jessup, pp. 191-193, paras. 51-52; separate opinion of Judge Tanaka, p. 134; see also the separate opinion of Judge Wellington Koo attached to the Judgment of 24 July 1964, *Barcelona Traction (Preliminary Objections)*, *I.C.J. Reports 1964*, p. 58, para. 20. See MG, pp. 93-96, paras. 4.53-4.96, or OG, p. 47, paras. 2.45-2.46) only as an explanation given of the exception, its material source in a way. The point, as the 1970 Judgment also makes clear, is to make "a reasonable application" (*I.C.J. Reports 1970*, p. 48, para. 93) of the rules relating to diplomatic protection. The purpose is not to deprive foreign shareholders in a company who have the nationality of all State responsible for the internationally wrongful act of all possibility of protection.

16. Secondly, as to the substance, the Congo's arguments are no sounder. According to it, "[a]pplication of the solution advocated by the Republic of Guinea would in this case lead to an inequitable result"[114]:

— it would result in a régime of discriminatory protection;

— this "solution" would not take account of the conduct of Mr. Diallo; and

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[111]MG, p. 93, para. 4.52.

[112]POC, p. 88, A; see also, in the same terms: CR 2006/50, p. 54, para. 42 (Mazyambo).

[113]POC, pp. 88-90, paras. 2.82-2.83.

[114]POC, p. 95, 2; see also: CR 2006/50, p. 55, para. 44 (Mazyambo).

— his "refusal" to exhaust the remedies available in the DRC "would in any event render any protection by substitution inequitable"[115].

With all the respect I have for our opponents, these objections are groundless and are even somewhat absurd.

17. In the case of the first argument, that of the alleged incidences of "discrimination" between shareholders who are protected and those who are not[116], they are inherent in the very

46 institution of diplomatic protection since the State has discretion to exercise or not to exercise its protection. In any event, the problem does not arise in this case since Mr. Diallo is the only shareholder of the two companies concerned.

18. The other two arguments, both of which pertain to Mr. Diallo's conduct, are wholly inadmissible:

— the first concerns his alleged "dirty hands": the Congo itself recognizes that *clean hands* are not a condition of the admissibility of complaints, which, after some vicissitudes, the International Law Commission was unanimous in firmly recognizing in 2005[117];

— as to the affirmation that Mr. Diallo "refused" to exhaust all the remedies available in the DRC, not only does it raise questions of fact to which my colleague and friend Jean-Marc Thouvenin will be coming shortly, but it can have no impact whatsoever on the question of protection by substitution.

B. The special characteristics of Mr. Diallo's companies

19. Mr. President, not only is the exercise by Guinea of diplomatic protection in respect of damage suffered by the companies in question in no way contrary to equity, but also the admissibility of its action before the Court is particularly compelling on account of the special characteristics of these companies

— that Mr. Diallo had to set up in Zaire; and

— which are of a marked *intuitu personae* character.

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[115]POC, p. 100 *(c)*; see also, in the same terms, CR 2006/50, p. 56, para. 50 (Mazyambo).

[116]See POC, pp. 97-98, paras. 2.95-2.97.

[117]J. Dugard, Sixth report on diplomatic protection, A/CN.4/546 and Report of the International Law Commission, Fifty-seventh Session, 2006, *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), p. 110, para. 231.

20. The alleged principle that diplomatic protection of the shareholders of a company having the nationality of the responsible State is only possible if "incorporation in that State was required by it as a precondition for doing business there"[118], this alleged principle is hardly substantiated in positive law. Moreover, in the commentaries on Article 11 of its draft, affirming that requirement,

47 the International Law Commission shows its awareness of this. It is careful to state on the one hand that the way in which the law has evolved in this area would suffice to "sustain a general exception" to the rule of protection by the national State of the company alone[119], and, on the other, that "it is not necessary that the law of that State require incorporation. Other forms of compulsion might also result in a corporation being 'required' to incorporate in that State"[120].

21. In any event, in our case, the legal obligation well and truly exists. It results from the first subparagraph of Article 1 of the 1996 order-law relating to the headquarters of companies[121] whereby: "companies whose main operational headquarters is located in the Congo must have their administrative headquarters in the Congo" *[translation by the Registry]*. And Article 2 even required the transfer to the Congo of companies not fulfilling that condition at the date of entry into force of the law.

22. There can then be no doubt that the incorporation of the companies in question in Zaire was a "precondition" set by that country for their being able to "do business there". To that initial constraint a second was added which constitutes a rather strange feature of Congolese (or Zairean as it then was) law. For if foreign investors have to incorporate their companies in the form of companies under local law, such companies are nonetheless subject to a different and discriminatory régime, and one much less favourable than the other companies under Zairean law.

23. As a specialist has written, "Law No. 73-009 of 5 January 1973 known as the *special commerce law*, substantially limits the access of foreigners to the commercial profession" and in principle reserves "*the monopoly of the exercise of commerce for Zaireans*, more precisely for '*individuals of Zairean nationality and for companies under Zairean law the capital of which*

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[118]Art. 11 of the ILC draft Articles on Diplomatic Protection.

[119]*Ibid.*, p. 66, para. 12 of the commentary on Art. 11.

[120]*Ibid.*, p. 67, para. 12 of the commentary on Art. 11.

[121]OG, Ann. 35, p. 244.

belongs entirely to Zaireans'"[122] *[translation by the Registry]*. Special dispensations may be granted to foreigners but, according to the same author, they come at the cost of "a thousand and one administrative hassles"[123] *[translation by the Registry]* and in return for the deposit of a sizeable financial guarantee[124]. It does not then appear conceivable that such "foreign national" companies, subject in many respects to the legal régime applicable to foreigners, under Congolese law itself, should once more become exclusively national companies for the purposes of their diplomatic protection.

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24. While hardly national, having been incorporated in the Congo to meet the requirements of that country's law, Africom-Zaire and Africontainers-Zaire also have the peculiarity of being "private limited liability companies" (SPRL, *sociétés privées à responsabilité limitée*), and not limited liability companies *(sociétés anonymes)*. Now only the latter (limited liability companies) were at issue in the *Barcelona Traction* case (*I.C.J. Reports 1970*, p. 33, para. 37 or p. 34, para. 40), in which the Court emphasized in particular that "[t]he legal difference" between the limited liability company and other sorts of company "is that for the limited liability company it is the overriding tie of legal personality which is determinant; for the other associations, the continuing autonomy of their several members" (*ibid*., p. 34, para. 40).

25. One of these differences is more particularly deserving of attention in the present case: the shares of a joint-stock company are freely transferable while, as in the case of the associations of individuals concerned by the 1970 Judgment, the shares of an SPRL "are not freely transmissible"[125] *[translation by the Registry]*, as stipulated in Article 36 of the Decree of 27 February 1887, amended in 1965 and in force in the Congo. This in one reason why these SPRLs are regarded as a medium term between associations of individuals and capital companies, on account of the very marked *intuitu personae* character pervading their status and the legal

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[122]Roger Makela Massamba, *Droit des affaires — Cadre juridique de la vie des affaires au Zaïre*, Cadicec/De Boecke Université, 1996, p. 67; original emphasis.

[123]*Ibid.*, p. 73.

[124]See Order-Law No. 66-260 of 24 April 1996 (see judges' folder) and Art. 3 of the special law on commerce of 5 January 1973, amended on 10 July 1974 (see judges' folder).

[125]Art. 36 of the Decree of 27 February 1887 on commercial companies (as amended in 1965); see also Arts. 57 and 58 (see judges' folder).

régime applicable to them (for example, the associates can in some cases be held personally liable for the debts of the company[126]).

26. A second peculiarity of the relations between Mr. Diallo and his companies is that they were statutorily controlled and managed by one single person. Mr. Diallo was at once sole managing director of the two companies — of which he directly or indirectly possessed 100 per cent of the capital — and by the same token their only associate. The upshot is a very close interlinkage of the status of associate and of managing director of the two companies since

49 Mr. Diallo alone was authorized under Congolese law, in his capacities as associate and managing director, to convene, participate in and vote in the general assemblies of the two companies[127]. This means that in fact and in law it was virtually impossible to distinguish Mr. Diallo from his companies. Their fates were and are linked. And we can echo word for word the reasoning of the Italy/United States Conciliation Commission, which, in the *De Leon* case, deduced from the fact that

> "Arthur De Leon became the sole owner of all the shares of stock and that his personal capacity was merged completely with the joint stock corporation's property . . . that it is unavailing to make a separation between the two sets of property, and that, in the instant case, the claimant should be regarded as entitled to claim, personally, with respect to the corporate rights accruing to him in their entirety."[128]

Furthermore, the confusion between the interests of Mr. Diallo and of his companies is further aggravated by the fact that the purpose of the measures taken against him was precisely to deprive those companies of any possibility of future action[129].

27. As a result, moreover, the Court's hesitations in the *Barcelona Traction* case with respect not to protection by substitution but to the diplomatic protection of the shareholders of a foreign company are "neutralized":

— any investment involves risks — including the risk that diplomatic protection may not be exercised (*I.C.J. Reports 1970*, p. 35, para. 43; p. 46, paras. 86 and 87; p. 50, para. 99)? Most

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[126] *Ibid*., Arts. 103 and 106 (see judges' folder).

[127] *Ibid*., Arts. 78 to 88 (see judges' folder).

[128] Italo-American Conciliation Commission, 15 May 1962, *De Leon*, *ILR*, Vol. 40, p. 143.

[129] OG, pp. 23-24, paras. 1.56-1.60.

certainly; but, here, the diplomatic protection of the company's (notional) national State is not uncertain but completely ruled out;

— "the adoption of the theory of diplomatic protection of shareholders as such, by opening the door to competing diplomatic claims, could create an atmosphere of confusion and insecurity in international economic relations" (*ibid*., p. 49, para. 96)? Certainly again; but it could not be so when all the shareholders are of the same nationality or, *a fortiori*, when, as is the case here, just one shareholder exists and there are considerable limitations on the transmissibility of the shares[130];

50 — for the same reason, there can be no fearing any proliferation of "the claims to which recognition of a general right of protection of foreign shareholders by their various national States might give rise" (*I.C.J. Reports 1970*, p. 50, para. 98; p. 38, para. 98).

28. Everything thus supports the conclusion, Members of the Court, in the specific case before you, that it was possible for Guinea to protect Mr. Diallo's rights — both as an individual and as a shareholder whose rights have been violated by the internationally wrongful acts of the Respondent, and, by substitution, in respect of the damage suffered by the companies, formally Congolese (Zairean at the time), of which Mr. Diallo was the sole associate.

Members of the Court, I thank you for your attention. Mr. President, may I request you to call Professor Jean-Marc Thouvenin to the Bar?

Le VICE-PRESIDENT, faisant fonction de président : Je vous remercie, Monsieur Pellet, pour votre exposé et j'invite M. Thouvenin à la barre.

M. THOUVENIN : Merci beaucoup, Monsieur le président.

V. The exhaustion of local remedies

1. Mr. President, Members of the Court, it is a very great honour for me to appear once more before the Court and to speak as Counsel and Advocate of the Republic of Guinea.

2. It falls to me to discuss the Congo's second preliminary objection, and I shall focus on the exhaustion of local remedies, starting with three clarifications.

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[130] See above, para. 25.

3. First, it was not "*the choice* of the Republic of Guinea to submit a case to the Court"[131]. Nor does it aim to "use the Court"[132], as Maître Kalala asserted yesterday. It brought the matter to the Court because it had no alternative. Three internal Guinean ministerial communications, dating from the period preceding the filing of the Application, make this clear:

(i) As early as April 1996, the Minister for Foreign Affairs of Guinea took note of the fact that Mr. Diallo had been expelled at a time when the proceedings instituted by his companies were culminating in favourable judgments, the Minister deploring the fact that "instead of seeing these judgments properly enforced, Mr. Diallo Cravate [had been] quite simply arrested and expelled from Zaire, unceremoniously and in patent violation of all procedures in such matters"[133].

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(ii) That same year, the Guinean Minister of Justice emphasized that Mr. Diallo "[had been] concerned about exhausting domestic remedies, both amicable and contentious, before seeking the diplomatic protection of his own State. However, he [had been] prevented from following through the domestic remedy procedures because of his sudden expulsion"[134].

(iii) In February 1997, the Minister for Foreign Affairs observed that Mr. Diallo was unable to take any useful step since he had been "prohibited from entering Zaire"[135].

4. Guinea does not appear before you out of choice, but because it had a duty to protect its national, as stated by Guinea's agent this morning, especially as Zaire deprived Mr. Diallo of the protection afforded by the 1961 Vienna Convention on Consular Relations, with the result that Guinea had no other alternative for exercising its diplomatic protection.

5. I note, secondly, that the rule on the exhaustion of local remedies, recently upheld in your Judgment of 31 March 2004 (see *Avena and Other Mexican Nationals (Mexico* v. *United States)*, Judgment of 31 March 2004, para. 40; see also *Ambatielos, Merits, Judgment, I.C.J. Reports 1953*, p. 10; *Interhandel (Switzerland* v. *United States of America) Preliminary Objections, Judgment,*

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[131]POC, p. 4, para. 0.07.

[132]CR 2006/50, p. 42, para. 96.

[133]MG, Ann. 203. See judges' folder, tab 7.

[134]MG, Ann. 212. See judges' folder, tab 8.

[135]MG, Ann. 216. See judges' folder, tab 9.

I.C.J. Reports 1959, p. 27; *Elettronica Sicula S.p.A. (ELSI) (United States of America* v. *Italy), I.C.J. Reports 1989*, p. 42) and codified in Article 14, of the ILC's draft Articles on Diplomatic Protection, is agreed upon by both Parties[136]. Nor is it disputed that the rule "ought to be understood in a rational manner"[137] and is subject to numerous exceptions, which have moreover

52 been codified in Article 15 of the ILC's draft Articles[138]. The exhaustion of local remedies cannot be required when there are no local remedies to exhaust[139]. To say it in English: "It would be a mistake to regard the rule as rigidly and inexorably established without possibility of reasonable exceptions being recognized, particularly beyond the existing and accepted limitations."[140]

6. I believe that the Parties also concur that "The futility of local remedies must be determined at the time at which they are to be used."[141]

7. And finally, my third point is that it will not have escaped the Court's attention that three separate "persons" are under Guinea's protection in this case. Its national, Mr. Diallo, but also the two companies, of which Mr. Diallo was the sole manager and partner, Africom-Zaire and Africontainers. As the causes of the futility of local remedies were the same for each of these three persons, my presentation will take the form of three points, each of which can be included under one or another or several of the five exceptions to the rule on exhausting local remedies, as codified in Article 15, of the ILC's draft.

8. With the benefit of those explanations, Mr. Vice-President, I will begin by showing that

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[136]MG, p. 97, para. 4.60; POC, p. 103, para. 3.0; CR 2006/50, p. 58, para. 4 (Kalala).

[137]*Eliza* [*Montano*] case (1863), *International Arbitration Digest*, Vol. II, p. 1637.

[138]MG, p. 100, para. 4.68; POC, p. 104, para. 3.03; WObsG, p. 60, para. 2.10; see judges' folder, tab 10.

[139]*Finnish Ships Arbitration*, 9 May 1934, *UNRIAA*, Vol. III, p. 1543; *Panevesys-Saldutiskis Railway*, *P.C.I.J. Series A/B No. 76*, pp. 4-22; *Ambiatielos* Arbitral Award of 6 March 1956, *UNRIIA*, Vol. XII, pp. 91-124; *Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959*, pp. 27-29; *The Electricity Company of Sofia and Bulgaria, P.C.I.J. Series A/B No. 77*, p. 138, dissenting opinion of P. de Visscher; *Certain Norwegian Loans, Judgment, I.C.J. Reports 1957*, p. 39, separate opinion of Sir Hersch Lauterpacht. See also the Hague Conference on the Codification of International Law, 1929-1930, in doc. C.75.M.69.1929, pp. 136-139, 171-172, 180, 182, 190, 192-193, 195, 206, 209, 216; in doc. C75*(a)*.M.69*(a)*.1929, p. 23; in doc. C.351*(c)*.M.145*(c)*.1930, p. 203.

[140]C.F. Amerasinghe, *Local Remedies in International Law*, Cambridge University Press, Second Ed. 2003, p. 203. See CR 2006/50, p. 60, para. 12 (Kalala).

[141]C.F. Amerasinghe, *The Exhaustion of Procedural Remedies in the Same Court*, 1963, 12 *ICLQ*, pp. 1285-1312; quoted in the Third Report on Diplomatic Protection, A/CN.4/523, p. 8, para. 24; see also ECHR, *Demirtepe* v. *France*, 21 December 1999, No. 3482/97. See CR 2006/50, p. 60, para. 11 (Kalala).

53 **I. The DRC cannot object on the ground of non-exhaustion of local remedies in this case because "The injured person is manifestly precluded from pursuing local remedies"[142]**

A. Zaire deported Mr. Diallo to prevent him from using local remedies

9. Mr. Vice-President, as Professor Mathias Forteau demonstrated earlier, there can be no doubt on the fact: the Congolese State deliberately chose to deny access to its territory to Mr. Diallo *because of the legal proceedings that he had initiated on behalf of his companies*.

10. Legal proceedings: that was what was characterized yesterday as "wrongful conduct under Congolese law"[143] or threats "to breach . . . public order"[144].

11. In these circumstances, to accuse Mr. Diallo of not having exhausted the remedies would not only be manifestly "unreasonable" and "unfair"[145], but also an abuse of the rule regarding the exhaustion of local remedies.

12. One of the bases of this rule lies in the notion that a foreign national who freely chooses to reside in a country must agree to abide by the local legal system. The link between the choice of the place of residence by the foreign national, whether a natural or legal person, and the corresponding obligation to accept its consequences is reflected in the commentary on the ILC's draft Article 14, which refers to the cases concerning *Interhandel* (*I.C.J. Reports 1959*, p. 27) and *Salem*[146] cases. In the Salem case, the arbitral tribunal found that: "As a rule, a foreigner must acknowledge as applicable to himself the kind of justice instituted in the country in which he did choose his residence".

13. Conversely, however, if a State deliberately chooses to remove a foreign national from its territory, that is to say to deny him the right to reside there, because that foreign national is seeking local redress, that State can no longer reasonably demand that that foreign national seek redress only through the legal means available in its territory. International law does not impose obligations which are impossible to meet. Much less does it enable the State making this obligation impossible to meet to turn the failure to meet it to its own advantage. The Permanent

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[142]Art. 15 *(d)* of the ILC's draft Articles on Diplomatic Protection. See judges' folder, tab 10.

[143]CR 2006/50, p. 14.

[144]CR 2006/50, p. 39, para. 88 (Kalala).

[145]Report of the International Law Commission, Fifty-Eighth Session, 2006, Sup. 10 (A/61/10), Art. 15, p. 77, para. 1.

[146]*UNRIIA*, Vol. II, p. 1202.

54 Court of International Justice found in 1937 in the *Factory at Chorzów* case that it was a practice generally accepted in international jurisprudence

> "as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him" (*Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927 P.C.I.J Series A, No. 9,* p. 31).

14. Just recently, the ILC codified this principle. According to paragraph *(d)*, of draft Article 15, no objection can be made on the ground of the rule regarding the exhaustion of local remedies if "the injured person is manifestly precluded from pursuing local remedies". In the commentary, the commentary on this paragraph, it explains that the exception of manifest impossibility relates, among other things, to circumstances in which the respondent State prevents the injured person from entering its territory[147]. In the present case, Mr. Diallo was deprived of his freedom, and removed from the territory precisely to prevent him from pursuing local remedies, particularly on behalf of his companies.

B. The circumstances of Mr. Diallo's deportation precluded him from pursuing Zairean remedies for himself or for his companies

15. There is no doubt that when Zaire turned on Mr. Diallo, with his arrest in January 1988 and again in November 1995, two periods of detention, the first lasting for a year in 1988, the second for over two months in 1995, and then finally his arbitrary expulsion in January 1996, it was to punish a company manager who had ventured, on behalf of his companies, to bring administrative and legal claims. In 1988, which was the very time when he was claiming the payment of money owed by the Zairean State, he was arrested and thrown into prison; in 1995, which was when court rulings had been made in his favour and he was seeking their enforcement he was, once again, arrested, detained, and, this time, removed from Zairean territory.

16. The Diallo case is clearly one of those examples of "factual denial of access to local remedies" referred to by John Dugard in his Third Report on Diplomatic Protection[148]. In that report, he notes that: "A State may prevent an injured alien from gaining factual access to its

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[147] A/CN.4/523.

[148] A/CN.4/523.

tribunals by, for instance, denying him entry to its territory or exposing him to dangers that make it
55 unsafe for him to seek entry to its territory."[149] The ILC's commentary on draft Article 15, paragraph *(d)*, returns to this point: the obligation to exhaust local remedies does not apply when "the injured person is prevented by the respondent State from entering its territory, either by law or by threats to his or her personal safety, and thereby denying him the opportunity to bring proceedings in local courts"[150].

17. Denial of entry or threats, says the International Law Commission. Here, the incapacity to act which is at issue results directly from *both* the threats weighing on the manager of the companies and the denial of entry into the territory of which he was the object.

18. The Court will note that, while it is certain that Zaire wanted to prevent Mr. Diallo from pursuing legal proceedings, it is just as clear that it has succeeded. In this respect, to paraphrase the arbitral tribunal in the Biloune[151] case: "Given the central role of [Mr. Diallo] in [managing the proceedings of his companies], his expulsion from the country effectively prevented [his companies] from further [exhausting local remedies]."

19. Mr. Vice-President, it should be added that the circumstances of Mr. Diallo's expulsion made it materially impossible for him to pursue any remedy whatsoever in Zaire.

20. I would agree with my opponent on one point: Mr. Diallo's financial situation is, *in itself*, without relevance to the rule regarding the exhaustion of local remedies[152]. Rich or poor, no matter: the rule is the same for all. But that is not the issue here. Guinea refers to Mr. Diallo's financial situation *as a consequence of the acts of Zaire* and, in particular, his arbitrary deportation and denial of entry to the country. In such a case, as emphasized by Amerasinghe, when raising poverty as an exception, "there may be considerations of estoppel or waiver that may operate . . ."[153].

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[149] *Ibid*, p. 38, para. 100.

[150] Report of the International Law Commission, Fifty-Eighth Session, 2006, Sup. 10 (A/61/10), Art. 15, p. 83.

[151] UNCITRAL, *Biloune* case, 27 October 1989 and 30 June 1990, YCA, Vol. XIX, 1994, p. 14 and p. 71, para. 28.

[152] CR 2006/50, p. 62, para. 21 (Kalala).

[153] Amerasinghe, *Local Remedies in International Law, op. cit.*, p. 215.

21. I would note in this respect that the two Parties to this case have both ratified the African
56 Charter on Human and Peoples' Rights. In the *Rhaddo* v. *Zambia* case [154], for example, whereas the Zambian Government invoked the rule on the exhaustion of local remedies against the persons it had deported, the Commission countered that the fact that the victims has been held in detention before their sudden deportation "gave the complainants no opportunity to establish the illegality of these actions in the courts. Thus, the recourse referred to by the government under the Immigration and Deportation Act was as a practical matter not available to the complainants."

22. I know full well, Members of the Court, that the Congo likes to cast doubts on Mr. Diallo's poverty following his deportation. But speculate as our opponents may[155], the fact remains.

23. Following his deportation, Mr. Diallo was able to follow certain proceedings in Zaire for a while from a distance, assisted by unpaid volunteer lawyers. Such things happen. Nevertheless, he soon found it impossible to keep track of a court case in the Congo. That is the conclusion of a letter of April 1996 from the Guinean Minister for Foreign Affairs to the Secretary General of the country's Presidency, "Mr. Diallo is currently living in Conakry without any income and can only count on the State of Guinea to see his rights upheld"[156].

24. This of course perturbs our opponents[157], who made much yesterday of the negotiations held in 1997. But the 1997 negotiations, in which representatives of Mr. Diallo's companies took part, certainly do not prove that the man had any financial wherewithal. Those representatives were acting on the recommendation of the Guinean Embassy in Zaire and Mr. Diallo had no part in it. This is apparent from a letter of 1 July 1997 signed by Guinea's Ambassador in Kinshasa no less[158]. Moreover, when those representatives decided to write a summary of their discussions, they sent it to the Ambassador and not to Mr. Diallo[159]. You .will find these documents in the judge's folder, tabs 11 and 12. As to the statement that Mr. Diallo ordered them to break off

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[154]African Commission on Human and Peoples' Rights, communication No. 71/92 (1996).

[155]POC, p. 80, paras. 3.33-3.34 and 3.36.

[156]MG, Ann. 203.

[157]POC, p. 79, para. 3.29; CR 2006/50, p. 62, para. 20 (Kalala).

[158]MG, Ann. 223.

[159]MG, Ann. 213.

57 negotiations[160], it is both absurd and inadmissible. Absurd in that Mr. Diallo had everything to gain by seeing these talks through to the end. Inadmissible because there is not a shred of evidence to support it.

25. Guinea did not have to finance domestic legal proceedings. There is no rule in international law which obliged it to do so. As Mr. Diallo had no money, things remained as they were.

26. Members of the Court, no matter which way we look at it, the *Diallo* case shows that his attempts to seek redress were thwarted within the meaning of Article 15, paragraph *(d)*, of the International Law Commission's draft Articles. This, Mr. Vice-President, brings me to my second point, which shows that:

II. There were no "reasonably available local remedies" to challenge Mr. Diallo's removal from the country[161]

27. In its written pleadings, if not yesterday, although nothing precise was said about it then[162], the Congo affirmed that Mr. Diallo could have challenged the deportation order by applying further up the administrative hierarchy, "with a prospect of success within the framework of Zaire's domestic legal order"[163]. In support, cases of persons granted the right to return to Congolese territory after having been deported were cited.

28. This argument is shaky. The Court will note that while the DRC included in the judges' folder the deportation notice for Mr. Yaghi[164], the one for Mr. Diallo cannot be found. And with good reason: Mr. Diallo was in fact forcibly repatriated for "illegal residence"[165] in the country. Why was his deportation dealt with as a "repatriation" when, legally, he could not be "repatriated"? In any case, what should be noted is that, according to Article 13 of the Legislative Order

[160]CR 2006/50, p. 26, para. 45 (Kalala).

[161]Art. 15, para. *(a)* of the ILC's draft Articles on Diplomatic Protection.

[162]CR 2006/50, p. 41, para. 94 (Kalala).

[163]POC, p. 91, para. 368.

[164]Judges' folder Congo, tab 2.

[165]MG, Ann. 197.

58 concerning Immigration Control of 12 September 1983, such a measure "*shall not be subject to appeal*"[166].

29. The DRC invokes "a general principle of administrative law", while acknowledging that that is, at best, "an informal possibility"[167]. Article 14, paragraph 2, of the ILC's draft Articles provides that "'Local remedies' means legal remedies which are open to the injured person". That is not so of an "informal possibility".

30. The Court might note that the Congo's distinguished Minister of Justice indicated yesterday that, with respect to deportation, his country "has always pardoned"[168]. Possibly, but that just goes to show that there is no *mechanism for redress*; merely pardons.

31. Scholarly opinion, however, has always been hostile to including extra-legal remedies, whose purpose is "to obtain a favour and not to vindicate a right"[169]. Local remedies "comprise all forms of recourse as of right, including administrative remedies of a legal nature 'but not extra-legal remedies or remedies as of grace'"[170]. Administrative remedies which are neither legal nor quasi-legal and of a discretionary nature are not therefore taken into account by the rule regarding the exhaustion of local remedies[171]. And the International Law Commission indicated that:

> "The injured alien . . . is not required to approach the executive for relief in the exercise of its discretionary powers. Local remedies do not include remedies whose 'purpose is to obtain a favour and not to vindicate a right' nor do they include remedies of grace unless they constitute an essential prerequisite for the admissibility of subsequent contentious proceedings."[172]

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[166]POC, Ann. 73; our emphasis. See judges' folder, tab 3.

[167]POC, p. 91, para. 3.68.

[168]CR 2006/50, p. 14.

[169]*De Becker* v. *Belgium*, Application No. 214/56 (1958-1959), 2, *Yearbook of the European Convention on Human Rights*, p. 238; E. Jiménez de Aréchaga, "Cours general de droit international public", *Collected Courses of The Hague Academy of International Law*, 1978-I, p. 293.

[170]I. Brownlie, *Principles of Public International Law*, 6th ed. (2003), p. 475, J.L. Brierly, *The Law of Nations*, 6th ed. (Ed: H. Waldock), p. 281; F.C. Amerasinghe "The Local Remedies Rule in Appropriate Perspective" (1976), 36, *Zeitschrift für ausländisches öffentiches Recht und Völkerrecht*, 747; A.M. Aronovitz, "Notes on the Current Status of the Rule of Exhaustion of Local Remedies in the European Convention of Human Rights" (1995), 25, *Israel Yearbook on Human Rights*, p. 89; *Greece* v. *United Kingdom*, Application No. 299/57 (1958-1959), 2, *Yearbook of the European Convention on Human Rights*, p. 192; *Finnish Vessels Arbitration (1934)*, 3, *UNRIAA*, 1479.

[171]Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law* (1983), p. 62; F.C. Amerasinghe, "Local Remedies", *op. cit.*, p. 161; J.E.S. Fawcett, *The Application of the European Convention on Human Rights* (1965), p. 295.

[172]Report of the International Law Commission, Fifty-Eighth Session, 2006, Sup. 10 (A/61/10), Art. 14, p. 72, para. 5.

59 32. The practice referred to by the Congo confirms the lack of real remedies[173]. Although the expulsion order on Mr. Yaghi, who has attained celebrity through his presence before the Court in the written pleadings of the Parties was cancelled by the National Immigration Board[174], no reasons were given for that decision. Purely an act of grace, in its application, but not in law and one, moreover, which was made outside any legal framework. The Legislative Order on Immigration of 12 September 1983 establishes and defines the Board's powers, but does not confer any decision-making powers on it[175]. Its authority, incidentally, seems to have been somewhat relative. It was not even consulted before Mr. Diallo's deportation, although this formality is mandatory in principle under the terms of the law which I have just cited[176].

33. Mr. Vice-President, having established the absence of all remedies, I come to my third point, which is that, even if there had been remedies,

III. At the time the Zairean judicial system provided "no reasonable possibility"[177] of protection, owing to the "undue delay"[178] in proceedings

A. The Government had the discretionary power to overrule judicial decisions

34. At this point, the question that arises is: would Mr. Diallo's companies have been able, if they had had the possibility — *quod non* — to appeal against interference by the Zairean Government, in the legal proceedings concerning them, with any reasonable hope of success? Similarly, could Mr. Diallo have hoped, if he had been able to bring the matter before a court — *quod non* — for a judicial review of his situation?

35. Probably not, on the Congo's own admission, for at the time of the events, the enforcement of legal decisions depended solely on the government's goodwill. In the Congolese written pleadings it is stated that, whatever remedy might have been sought, the final decision lay

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[173]POC, p. 91, para. 3.69.

[174]POC, Ann. 69; judges' folder Congo, tab 2.

[175]POC, Ann. 73.

[176]POC, Ann. 75, Decree No. 0043 dated 31 October 1995 expelling Mr. Diallo from the Territory of the Republic of Zaire; POC, Ann. 73, Legislative Order No. 80-033 of 12 September 1983 Concerning Immigration Control, Art. 16.

[177]Art. 15 *(a)* of the ILC's draft Articles on Diplomatic Protection.

[178]*Ibid.*, Art. 15 *(b)*.

60 with the government, which had total discretionary power which, moreover was not granted by any text.

36. Indeed, according to our opponents, in their written pleadings:

> "when the enforcement of a judicial decision is liable to provoke social unrest or to lead to serious public disorder, the Minister of Justice can suspend its enforcement and request the Inspectorate-General of Courts to review it. After hearing all the Parties and the judge or judges who gave the decision in question, the Inspectorate sends a report to the Minister of Justice. In light of this report, the Minister of Justice may either withdraw the suspension and permit enforcement of the decision to continue or maintain the suspension in force . . ."[179]

37. These are the elements of a denial of justice which Amerasinghe defines as "an act of the executive interfering with the judicial process"[180]. Yet in practice the Minister did as he pleased as Professor Forteau showed a few moments ago when discussing interference and explaining the interference by the Zairean Government in the legal proceedings brought by Mr. Diallo's companies. The upshot of this is that any legal action that Mr. Diallo or his companies might have brought against the government could only result in a decision by that government based on political considerations.

38. Members of the Court, the remedies were therefore not "reasonably available", within the meaning of the ILC's Draft Article 15, the commentary on which refers, as an exception to the rule of exhaustion, to the case in which "the respondent State does not have an adequate system of judicial protection"[181]. This was manifestly the case in Zaire at the time, particularly as, and in any event, the wholly unreasonable length of the proceedings rendered them futile.

B. Assuming that recourse to the remedies was feasible, the excessive delays in the proceedings in which the companies had already been engaged demonstrated their futility

39. I hope I am not going to exceed the length in my own case, but the excessive length of the domestic proceedings is a ground for the inapplicability of the rule of exhaustion. Moreover, the Respondent admitted this in its written pleadings[182], by stating — this was in 2002 — that in the case concerned a time-frame of ten years, which is excessive on the face of it, had not yet been

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[179]POC, p. 86, para. 3.50.

[180]Amerasinghe, *Local Remedies in International Law, op. cit.,* p. 98.

[181]Report of the International Law Commission, Fifty-eighth Session, 2006, A/61/10, p. 99.

[182]POC, p. 128, para. 3.54.

61 achieved[183]. We have now far exceeded ten years. Moreover, on this ground, our opponents are very uneasy.

40. Mr. Kalala referred yesterday to the *Africom-Zaire* v. *PLZ* case[184]. According to the incomplete chronology of this which he retraced, it started in 1992[185] an appeal has been pending since 1994[186]. Mr. Kalala asserts that he knows nothing of the outcome of the proceedings[187]. The same applies to the *Africontainers* v. *Zaire Fina* case[188]. The legal action began in 1993[189]. The appeal dates from 23 February 1995. The case was still in deliberations in 2002[190]. But the Congo yesterday claimed to know nothing of the outcome of these proceedings[191].

41. Mr. President, the Respondent cannot seriously assert that it has no knowledge of the outcome of these cases. It is quite inconceivable that, when preparing these oral pleadings, the Congolese authorities should have failed to enquire about the state of the proceedings. They could have done so without any difficulty. Moreover, I note that Mr. Kalala was able to obtain such information in 2002, in a mere two days, via a simple counsel's letter addressed to the Registry of the Supreme Court of Justice (these documents will be found under tab No. 13 in the judges' folder)[192]. The Court will note, in passing, that, on that occasion, the Registrar of the Supreme Court of Justice acknowledged that a period of seven years corresponded to the "normal course" of proceedings, which shows that the excessive lengths were general and probably not exceptional.

42. In any event, I would suggest that the Court should not draw any conclusions whatever from our opponents' show of ignorance: even if the Congo fights shy of admitting it, the two cases concerned are still pending, after 14 years of proceedings in the first case and 13 years in the second.

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[183] *Ibid.*, para. 3.55.

[184] CR 2006/50, pp. 19-21, paras. 18-24; see also POC, pp. 36-38, paras. 1.48-1.52.

[185] CR 2006/50, p. 20, para. 20 (Kalala).

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

[187] *Ibid.*, para. 24.

[188] CR 2006/50, pp. 32-34, paras. 61-69.

[189] *Ibid.*, para. 64.

[190] POC, Ann. 47.

[191] *Ibid.*, para. 65.

[192] POC, Ann. 47.

62 43. This provides a perfect demonstration of the futility of the remedies which Mr. Diallo's companies, or indeed he himself, might have done their utmost to seek. Well over ten years later, the appeal court decisions awaited by Africontainers and Africom-Zaire have still not been delivered, whereas the best that they could do would be to reopen the discussions on the merits. The legal avenues in Zaire were thus manifestly futile, which irrefutably confirms that Guinea cannot be accused of having prematurely exercised its diplomatic protection in this case.

44. Mr. Vice-President, I am delighted to say that these remarks bring to a close my oral argument of this morning, and also the first round of the Republic of Guinea's oral pleadings. My sincere thanks for your attention.

Le VICE-PRESIDENT, faisant fonction de président : Je voudrais vous remercier, Monsieur Thouvenin, pour votre exposé. Un juge, le juge Bennouna, m'a fait savoir qu'il avait une question qu'il souhaiterait poser aux deux Parties, et je lui donne la parole.

Mr. BENNOUNA: Thank you, Mr. Vice-President. I wish to request a clarification of the two Parties on whether the legislation of the Democratic Republic of the Congo or the jurisprudence of the courts of that country authorize the creation of a private limited company with a single shareholder and by one person. That is the clarification I should like from the two Parties. Thank you, Mr. Vice-President.

Le VICE-PRESIDENT, faisant fonction de président : Je remercie le juge Bennouna. Je vois que les réponses à la question que vient de poser le juge Bennouna peuvent être données lors du second tour de plaidoiries, ou par écrit, dans lequel cas la réponse doit parvenir au Greffe le 6 décembre 2006 au plus tard.

Ceci met fin au premier tour de plaidoiries. Je voudrais remercier chacune des Parties pour les exposés présentés au cours de ce premier tour de plaidoiries.

Les audiences reprendront demain à 15 heures pour entendre la République démocratique du Congo en son second tour de plaidoiries sur ses exceptions préliminaires. La RDC présentera ses conclusions finales sur lesdites exceptions à l'issue de l'audience. Je rappelle que la République de

63 Guinée prendra la parole pour ce qui la concerne le vendredi 1er décembre à 10 heures, pour son second tour de plaidoiries et présentera ses conclusions finales à l'issue de l'audience

Je tiens à rappeler que le second tour de plaidoiries ne doit pas constituer une répétition de ce qui a été dit auparavant et que les Parties ne sont pas obligées d'utiliser la totalité du temps qui leur est attribué.

Je vous remercie infiniment. La Cour va à présent lever la séance.

L'audience est levée à 13 heures.

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