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8 The VICE-PRESIDENT, Acting President: Please be seated. The hearing is now open. The Court is meeting today to hear the second round of oral arguments of the Democratic Republic of the Congo. I now give the floor to Mr. Tshibangu Kalala. You have the floor, Mr. Kalala.

Mr. KALALA: Mr. President, thank you for giving me the floor.

**THE DEMOCRATIC REPUBLIC OF THE CONGO HAS NOT COMMITTED ANY
INTERNATIONALLY WRONGFUL ACTS AGAINST
THE REPUBLIC OF GUINEA**

1. Mr. President, Members of the Court, I would like first of all to reassure the Court that I shall not, during this presentation, reiterate in detail what the DRC has thoroughly explained in its written pleadings and in my statements on Monday concerning the alleged violations of Mr. Diallo's individual personal rights and of his direct rights as *associé* in Africom-Zaire and Africontainers-Zaire. I shall confine myself to highlighting a few fundamental issues which continue to divide the Parties and to which Professor Alain Pellet returned in his presentation yesterday. I shall then conclude my statement today by presenting the DRC's final submissions in my capacity as Co-Agent.

2. Before going to the core of the matter, I would first like to make two comments: about establishing the facts and about the evidence.

First, Professor Pellet took the view yesterday that any fact not expressly disputed by the DRC had to be considered proven. As a process for establishing the facts, this one advocated by Guinea is unacceptable. Only those facts on which both Parties have indicated their agreement can be treated as uncontested and, accordingly, as established.

By contrast, allegations by Guinea which are not supported by solid evidence cannot be considered proven.

Secondly, in respect of the evidence, Guinea yesterday further criticized the DRC for not playing by the rules. It should be pointed out here that Guinea has produced numerous documents concerning the litigation involving Africom-Zaire and Africontainers-Zaire.

Guinea therefore cannot claim now that it is unable, owing to Mr. Diallo's expulsion, to obtain the other documents concerning those companies.

9 For its part, the DRC would emphasize here that these documents relate essentially to commercial companies. What is more, given what the country has gone through since 1996, which is public knowledge internationally, many documents from before that time have been lost or misfiled and the DRC is therefore unable to produce them to the Court.

I. MR. DIALLO'S INDIVIDUAL PERSONAL RIGHTS

A. The alleged violation of Article 36 (1) (b) of the 1963 Vienna Convention on Consular Relations

3. Mr. President, Members of the Court, Professor Pellet returned in his oral arguments yesterday to the issue of whether or not the DRC informed Mr. Diallo of his right to consular assistance. He maintained that the DRC failed to discharge this international obligation imposed on it by international law by not informing Mr. Diallo of his consular rights.

4. I shall respond to this statement by Professor Alain Pellet by saying that, in general, international law is not formalistic and that the Vienna Convention does not prescribe the manner in which the receiving State must inform detainees of their consular rights. According to the established practice in that regard in the DRC, and I think the situation is hardly different in Guinea, when a person is detained or imprisoned by the police or the prosecutor's office, he is asked to give the address of a relative or close friend who is to be informed of his arrest and the place where he is being held. The person is not sent a letter requesting acknowledgement of receipt asking him to tell his family or friends about his detention. That is what happened when Mr. Diallo was arrested and detained in 1995-1996. He was informed orally by the competent official that he was entitled to contact his family and his embassy to obtain the necessary consular assistance. Guinea itself acknowledges that he was indeed given such assistance.

5. It is a well-established general principle of law that the party asserting a fact bears the burden of proving it. It is therefore for Guinea to adduce solid persuasive evidence to the contrary proving that the DRC did not inform Mr. Diallo of his consular rights. Mr. Diallo's belated declarations contained in an affidavit drawn up in Conakry, by Diallo and his cronies, and uncorroborated by credible and varied independent sources, are simply a farce which cannot constitute evidence meeting the standards of proof defined by the Court in *inter alia* the *Nicaragua*

case (see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits, Judgment*, *I.C.J. Reports 1986*, pp. 40-41, paras. 62-64).

B. Mr. Diallo's arrest and detention in 1988-1989

6. The DRC asserted in its written pleadings and its oral arguments on Monday that the Court should decline to examine the facts concerning Mr. Diallo's arrest and detention in 1995-1996 because Guinea had failed to indicate the facts and grounds on which its claim was based in its Application instituting proceedings or in its Memorial, contrary to Article 38 of the Rules of Court, and that it did so for the first time only at a late stage, in its Reply of 19 November 2008.

7. Professor Pellet said not a word about this in his presentation yesterday. I conclude from this that he appreciated the force of the DRC's argument and avoided any discussion of the matter. I therefore ask the Court to draw all the inescapable conclusions.

C. The mistreatment suffered by Mr. Diallo

8. Mr. President, Professor Pellet roused himself during his presentation yesterday to air once again the question of the mistreatment allegedly suffered by Diallo, which Guinea had forgotten to address in its oral arguments on 19 April. He relied basically on Mr. Diallo's statements in the affidavit which I mentioned a moment ago, an affidavit with no serious evidentiary value, above all when account is taken of the character of Mr. Diallo, described in the documents submitted by Guinea itself as someone prone to fits of inspiration.

9. Professor Pellet maintains that it was NGOs, religious organizations and Diallo's family which fed him, not the Congolese State itself, which in his view failed to discharge its international obligations. This assertion is surprising and wrong, given that it is the Congolese State, through the Ministry of Social Affairs and Humanitarian Action, which enters into partnerships with local NGOs, giving them the financial and logistical means to take responsibility for prisoners' living conditions. If we follow the logic of Professor Pellet's argument, then we would have to see Congolese ministers themselves in prisons dishing out food to prisoners to be certain that it is the Government which feeds them. In addition, the Congolese Government always sends food into the prisons, but it is the prisoners themselves who prefer the food prepared by their own families,

considered to be better than that prepared in the prison. Mr. Diallo's other assertions that he was mistreated in prison are accordingly completely groundless.

D. The lawfulness of Mr. Diallo's expulsion

10. Mr. President, I elaborated at length during my presentation on Monday 26 April, in reply to the question from the Vice-President on the legal basis of the power of the Prime Minister, instead of the President of the Republic, to issue a decree expelling an alien. Professor Pellet disputed that explanation, relying on recent official reports presented on the international stage by the Congolese authorities and stating that the President of the Republic still holds that power according to the 1983 Legislative Order concerning immigration control. I am a little surprised at Professor Pellet's objection because a State official charged with writing a report on the current state of Congolese legislation on immigration control is going to reproduce verbatim what he reads in the law in preparing his report. He is not going to carry out an in-depth legal analysis in order to explain the Prime Minister's power to act by decree to expel an alien, doing so in the stead of the President of the Republic, following the adoption of a new constitution that repealed all conflicting legal, regulatory and constitutional provisions. Professor Pellet's objection is therefore untenable.

E. Notification of the expulsion decree

11. Professor Pellet also stated yesterday that Mr. Diallo had not received notification of the expulsion decree. That statement does stand up. The material before the Court in fact shows that the organization *Avocats Sans Frontières*, which had had contact with Mr. Diallo, went to the press to denounce and demand annulment of the Prime Minister's expulsion decree¹. The fact that this NGO was aware of the decree presupposes that Mr. Diallo was aware of it.

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F. Mr. Diallo's wealth

12. In his statement on what he called "the 1983 episode", Professor Alain Pellet portrayed Mr. Diallo as a wealthy man whom the DRC was describing, perhaps out of malice, as a completely unscrupulous common adventurer. That is not the DRC's fault, Professor Pellet. Quite

¹Memorial of Guinea (MG), Anns. 192 and 193.

the reverse: it is Mr. Diallo himself who confounds the fine words you uttered in a spirit of generosity and good faith in order to defend him.

13. In fact, on 12 July 1995, that is to say, a year before his expulsion from the DRC, Diallo approached the Congolese authorities to apply for a certificate declaring him to be officially “destitute” so that he could obtain benefits in connection with the *Africontainers-Zaire v. Zaire Shell* case then pending before the Kinshasa/Gombe *Tribunal de grande instance*. That document states that:

“Mr. Diallo Amadou Sadio, of Guinean nationality, statutory administrator of the company Africontainers SPRL, resident at No. 20, Immeuble PLZ, 9th floor, in the zone of Gombe, is declared temporarily destitute, insolvent and lacking any means of subsistence, after examination of his file.”

14. This official document was submitted by Guinea itself as Annex 22 to its Observations on the DRC’s preliminary objections. Mr. President, Members of the Court, you will find the certificate in the judges’ folder in front of you at tab 1. Mr. President, what kind of multimillionaire acts like this and describes himself as destitute, that is to say, as a pauper deserving of welfare assistance? Does Guinea know of a rich man anywhere in the world who lives in a foreign country and behaves like this with the authorities of the host country? Can the DRC expropriate such a person, someone destitute, a poor unfortunate seeking welfare assistance? Mr. Diallo has seriously misled the Guinean authorities and they, being honourable and dignified, like Professor Alain Pellet, have believed, in good faith, that their compatriot indeed left behind immense wealth in the Congo. It is easy to see, in the light of Mr. Diallo’s own behaviour, that there is no such fortune. I shall return to this point. In fact, Mr. President, Diallo has taken everyone in Guinea for a ride to the point of bringing the Congolese and Guinean peoples— fraternal peoples and friends— into conflict internationally in a completely fabricated case all about money.

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G. The debts owed to Africom and Africontainers by third parties

15. Mr. President, Guinea attempted in its oral arguments yesterday to demonstrate, while not denying that Africom and Africontainers had not conducted any business since 1991, that Mr. Diallo’s *parts sociales* still had a certain value by virtue, on the one hand, of debts owed to

those companies by third parties and forming part of their assets and, on the other, of the fact that those companies were themselves free of debt.

16. As regards debts owing by the companies, Professor Pellet's assertion is incorrect. There is no annual turnover figure, no balance sheet, no accounting record to demonstrate that the two companies had no debts. Have all taxes and the like been paid to the State? No one knows. Furthermore, so long as a commercial company is not in liquidation, which the two companies in question are not, one cannot assert in the absence of any evidence whatsoever that it has no debts.

17. As regards claims for payment which are certain, recognized and due, these belong *prima facie* to the companies and Mr. Diallo is not entitled to them so long as the companies continue to exist. In the present case, save as regards the listing paper, none of the debt claims cited by Guinea is based on goods or services actually provided to third parties; rather, they are wild claims for damages strenuously disputed by the companies identified as the debtors. The DRC already gave a full picture of all these debt claims at the preliminary objections stage of proceedings². I shall not revisit it here and would refer the Court to the preliminary objections.

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18. In reality, as I have just said, the sums which those companies claim were owing to them at the time of Mr. Diallo's removal consist of completely outrageous demands which are not based on invoices issued for goods or services provided by either of the companies. They are claims for damages sought often on completely baseless grounds, but above all in inordinate amounts. Guinea in fact now acknowledges that the figures in its Application based on the sums allegedly owing to those companies were exaggerated. Indeed, we should not be talking about debts held — that is a misuse of the term — but rather of overblown claims by the two companies which their former partners have regarded as patently unfounded and completely preposterous given the amounts claimed.

19. I shall now, Mr. President, with your permission, say a few words about the amounts allegedly owing which Professor Pellet cited during his presentation yesterday as evidence for the value of Mr. Diallo's *parts sociales*, referring to the claims of the two companies in the

²Preliminary Objections of the DRC (PODRC), paras. 1.09 to 1.52.

proceedings between those companies and, respectively, PLZ, a subsidiary of the multinational Unilever, Gécamines and Zaire Shell.

1. *Africom-Zaire v. PLZ*

20. This dispute concerns compliance with a lease granted by Plantations Lever au Zaire (PLZ), a subsidiary of the multinational Unilever, to Africom-Zaire for an apartment owned by PLZ and occupied by Mr. Diallo for seventeen years³. Since Diallo had been unable to pay the rent since 1991, the same year as the bankruptcy of Africontainers, as I explained in my presentation on Monday 19 April, in 1992 PLZ brought proceedings seeking a judgment against Africom-Zaire in the amount of some US\$32,000 for unpaid rent, together with Mr. Diallo's eviction from the premises. Africom-Zaire, in turn, asked the court to order PLZ to pay over US\$32 million, alleged to represent the "overpayment of monthly rent for 17 years, given that Africom-Zaire paid the rent for a furnished apartment, whereas the apartment rented was unfurnished"⁴, and US\$200,000 in damages.

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21. Mr. President, Members of the Court, you have indeed heard correctly that the sum Africom-Zaire — and therefore Diallo — claimed was US\$32 million just for alleged overpayment of monthly rent on an unfurnished apartment! Indeed, it is none too clear how Mr. Diallo obtained a judgment, of 24 August 1993, from the Kinshasa *Tribunal de grande instance* ordering PLZ to pay nearly US\$33 million representing the overpayment of rent and damages⁵. How many apartment blocks could be built in Conakry for that amount? That decision, clearly handed down by a judge bribed by Diallo, was quashed at second instance in March 1994 by the Kinshasa Court of Appeal, which upheld PLZ's action for the payment of rent due and for eviction⁶. Africom-Zaire has brought an appeal, currently pending, to the Supreme Court against that decision⁷. At the current stage of proceedings, Mr. President, one might also point out that since under Congolese law appeals to the Supreme Court do not stay enforcement in civil cases, it is

³MG, Ann. 130.

⁴MG, Ann. 130.

⁵*Ibid.*

⁶See in this regard the appeal to the Supreme Court to which the appellate judgment gave rise, MG, Ann. 146.

⁷MG, Ann. 146.

Africom-Zaire which is in debt to PLZ, not the reverse. Professor Pellet was therefore wrong and mistaken when he relied on this case to show that there was a sum owing which made Mr. Diallo's *parts sociales* worth something. Quite the contrary: the position is completely unfavourable to Mr. Diallo.

2. *Africontainers v. Gécamines*

16 22. The dispute between Africontainers and Gécamines, to which Professor Pellet referred, likewise shows how grossly excessive Africontainers' claims are. I would point out here that, apart from the fact that Gécamines has argued that many of Africontainers' demands are unfounded⁸, Africontainers-Zaire since filing its initial claims has repeatedly revised its claims on the basis of the number of containers it considered to have been left idle at the Gécamines facilities, or improperly used by Gécamines, and also on the basis of a unilateral revision of its rates, and this has led it to assert ever bigger financial claims. So, whereas in 1992 Africontainers put the loss it had incurred as a result of the situation at more than US\$30 million⁹, by 1996 the estimate of that damage had grown to a total of US\$14 billion — in the space of three years Diallo goes from US\$30 million to US\$14 billion, that is to say, more than the DRC's entire external debt¹⁰! That Africontainers' claims were out of all proportion emerges also from the fact that Africontainers was seeking US\$32,000 from Gécamines for the replacement of each damaged container, whereas a new container was worth US\$3,000 according to information obtained by Gécamines from a foreign freight operator¹¹.

23. Mr. President, negotiations conducted between Africontainers-Zaire and Gécamines in 1992-1995¹² continued until late September 1997¹³, that is to say, nearly two years after Mr. Diallo's expulsion, in an attempt to reach a final settlement of the dispute. During those negotiations, Gécamines wrote to Africontainers protesting at the fraudulent schemes carried out by

⁸PODRC, paras. 1.11 to 1.20.

⁹See the minutes of the meeting held between the parties on 1 June 1995, MG, Ann. 151, p. 2.

¹⁰See the formal demand for payment served by bailiff on Gécamines at the request of Africontainers-Zaire on 5 Feb. 1996, MG, Ann. 198.

¹¹Letter of 16 July 1991, MG, Ann. 90.

¹²See Gécamines' letter of 20 Oct. 1992, PODRC, Ann. 12, and the minutes of the meeting held between the parties on 1 June 1995, MG, Ann. 151.

¹³See the minutes of meetings of 2 and 7 July 1997, MG, Anns. 224 and 226.

Africontainers-Zaire staff to the detriment of Gécamines which had just come to light¹⁴. Mr. President, you will find that document in the judges' folder at tab 2. Those schemes, put in place in order to swindle Gécamines, which Gécamines had just discovered, consisted — and this shows another aspect of Mr. Diallo's character — of “introducing into the batch of containers for Gécamines despatched to its base at Lubumbashi” a number of additional containers which were despatched to the same town by Africontainers for other local companies. Returning those containers empty to Kinshasa would have cost Africontainers about US\$1,000 per unit. By fraudulently incorporating them into the group of containers regularly sent to Gécamines, Africontainers had Gécamines cover the cost of their return to Kinshasa. Gécamines found 186 instances of such fraud in its initial review and intended to pursue its investigations¹⁵. That is how Diallo was getting rich by defrauding the interests of the Congolese State.

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24. It was the exposure of that fraudulent practice, engaged in for many years by Mr. Diallo, as *gérant* of Africontainers, which explains why Africontainers, from Conakry, instructed its representatives in the negotiations to stop participating in the negotiations with Gécamines and why, despite several threats that it would¹⁶, Africontainers never dared bring its dispute with Gécamines before the Congolese courts.

25. In any event, it transpired that the prospects for final settlement offered by the negotiations carried on in September 1997 were borne out for several other companies — Kincontainers, ATAF, and FLUCOCO — which recovered several hundreds of thousands of United States dollars in total at the outcome of the negotiations¹⁷. I would point out to the Court that the documents recording those agreements show clearly that these companies rented out their containers at rates of between one-sixth and one-twentieth of those charged by Africontainers¹⁸.

¹⁴Letter DAT/DIR/54.137/97 of 17 Sep. 1997, PODRC, Ann. 8.

¹⁵*Ibid.*

¹⁶See, amongst other documents, the formal demand for payment served by bailiff on Gécamines at the request of Africontainers-Zaire on 5 Feb. 1996, MG, Ann. 198.

¹⁷See PODRC, Ann. 9, pp. 36-39.

¹⁸*Ibid.*, pp. 29-39.

26. To conclude on this point, it is difficult to see where there is any sum owing to Africontainers, one which is certain and acknowledged by Gécamines, which can reasonably be counted as an Africontainers asset.

3. *Africontainers v. Zaire-Shell*

27. Mr. President, Professor Pellet also referred to Africontainers' claims against Zaire-Shell.

18 28. In that dispute as well, Africontainers' claims, expressed through Mr. Diallo, turned out to be wildly exaggerated and totally unfounded. Let us recall that the dispute between Africontainers and Shell also arose out of the 1983 tripartite contract. In May 1992 Africontainers suddenly asserted various claims against the oil company¹⁹. Africontainers accused Shell of having improperly terminated the 1981 and 1983 contracts and it demanded US\$10,000,000 from Shell as compensation for the termination of the contracts and US\$1,700,000 as compensation for unfair competition²⁰. Shell was quick to reject these claims and argued, as did other companies, that there was no clause granting any exclusivity to Africontainers-Zaire in this — that is to say, in this contract²¹. Africontainers kept quiet for nearly two years, making no demands whatsoever.

29. Two and a half years later, in early 1995, Africontainers decided to bring this dispute before the courts, seeking in its principal claim a judgment against Shell ordering it to pay Africontainers slightly more than US\$13,000,000 for terminating the 1981 and 1983 contracts, together with US\$10,000,000 in damages. The trial court in Kinshasa, ruling at first instance and in default proceedings vis-à-vis Zaire-Shell, upheld the first of these claims in its judgment of 3 July 1995²². Essentially, the court based its decision on the fact that “the amount owed [was] certain and has been verified and acknowledged by the defendant”²³. This was incorrect: Shell has always denied that the debt was certain and most definitely has never acknowledged it.

30. In fact, it was on the basis of an accounting document submitted by Africontainers that the court reached that conclusion. This was a document prepared by the auditors Coopers and

¹⁹See Africontainers-Zaire's letter to Shell of 25 May 1992, PODRC, Ann. 59.

²⁰*Ibid.*

²¹See Africontainers-Zaire's letter to Shell of 17 July 1992, PODRC, Ann. 60.

²²MG, Ann. 153.

²³*Ibid.*

Lybrand, who had been engaged by Shell to audit its accounts for 1993. In connection with this, the oil company sent a form letter in February 1994 to all its suppliers of goods and services asking them, in accordance with customary practice, to contact the auditors for the purpose of confirming the existence of any debts owed by Shell²⁴.

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31. Africontainers-Zaire received this letter, as did all other suppliers of goods and services to Shell²⁵. This is settled business practice. Taking advantage of the opportunity thus presented, Africontainers-Zaire forwarded the document to Coopers and Lybrand on 15 March 1994, having entered on it, next to the minor receivables acknowledged by Shell in the total amount of US\$540, a bogus debt supposedly owed by the oil company in the amount of US\$13,000,000²⁶. This, Mr. President, is thus nothing but a unilateral demand that the Kinshasa-Gombe *Tribunal de grande instance* unfortunately considered to have been acknowledged by Shell because it was noted in one of the auditors' documents.

32. However that may be, Mr. President, that judgment was quashed by one handed down by the Kinshasa-Gombe Court of Appeal on 20 June 2002²⁷ ordering Shell to pay Africontainers US\$540 for the principal debt and US\$1,000 in damages. The Court of Appeal thus rejected Africontainers' claims concerning violations of the 1983 contract for which Shell was allegedly liable.

33. Mr. President, Professor Pellet was only interested in the beginning of the story of the so-called 13-million-dollar debt he cited, but the Court now knows the end of the story. Mr. Diallo is free at any time to ask Guinea's Embassy in Kinshasa or his lawyers in Kinshasa to go pick up the 540 dollars — not 13 million, but 540 dollars — to be handed over to Africontainers, which holds no 13-million-dollar debt owing by Shell, and that is the "debt" to which Professor Pellet was referring yesterday.

²⁴PODRC, Ann. 61.

²⁵PODRC, Ann. 62.

²⁶*Ibid.*

²⁷*Ibid.*

4. *Africontainers v. Onatra*

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34. I am going to conclude the section on the purported debt claims with the dispute between Africontainers and Onatra and this will show, yet again, an aspect of Mr. Diallo's character. The dispute was the subject of a properly concluded settlement in 1990 pursuant to the terms of which Onatra, a State-owned undertaking, was to pay 150 million zaires to Africontainers to put an end to the disagreement²⁸. Onatra honoured its commitments by paying the agreed amount in full to Africontainers. After collecting that sum, Mr. Diallo a few days later repudiated the settlement which had been agreed to and already carried out, and demanded 42 billion for misuse of containers²⁹. The State-owned undertaking rejected this claim, asserting in particular that the settlement covered both cases of immobilization and those of improper use³⁰.

35. Mr. President, that then is what made up the fortune left behind by Mr. Diallo in the Congo, the fortune of which he was allegedly expropriated by the DRC: *parts sociales* in Zairean companies which had been inactive since the early 1990s and whose gross assets consisted essentially of claims by them against their former trading partners. Aside from the fact that most of these claims have been deemed unjustified by all of the companies' partners, they are patently out of all proportion, and Guinea itself so admitted in court in its argument on Monday. Can such claims be considered real assets of a company, worthy of being counted as such and capable of giving any certain, proven economic value to its share capital?

H. The right to manage and control the companies

36. Mr. President, I now come to another completely unfounded assertion made by Guinea. During his statement yesterday, Professor Pellet claimed that Mr. Diallo's expulsion prevented him from managing the companies and more particularly from pursuing Africontainers' so-called creditors. And yet, apart from the fact that everyday corporate management falls within the *gérant's* authority, as I already pointed out in my statement on Monday, and is not therefore part of the *associé's* direct rights, we may well ask what, in practical terms, there was left to manage in 1995-1996.

²⁸MG, Ann. 69.

²⁹MG, Ann. 72.

³⁰PODRC, Ann. 22.

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37. As I have just said, the only activity of the companies, as Professor Pellet acknowledged — and I agree with him on this point —, was making certain claims against their former trading partners, be this in correspondence or even before the courts. Now, Mr. Diallo's deportation did not prevent these "activities" from continuing. To give an example, Mr. Diallo's expulsion in January 1996 did not adversely affect the management of the dispute between Africontainers and Gécamines, the DRC's leading mining company. Here I would point out that if, as Guinea contends, the DRC's aim was to prevent Mr. Diallo from pursuing his companies' alleged creditors, it is difficult to see why a State concern such as Gécamines would have continued to negotiate with Africontainers after Mr. Diallo's expulsion. And yet it is clear from the evidence in the record that the negotiations initiated between Africontainers and Gécamines in 1992-1995³¹ continued until the end of September 1997³², and that Guinea was directly represented at them by a diplomatic agent expressly entrusted with that task.

38. In this connection, Mr. President, on 1 July 1997 — almost two years, rather, over one year after Mr. Diallo's expulsion — Guinea's ambassador in Kinshasa wrote the following to the Guinean Minister for Foreign Affairs:

“[t]he Embassy has recommended Mr. Diallo's representatives to attend the meeting [on the Africontainers-Gécamines negotiations], to listen to the proceedings, to gather as much information as possible on Gécamines' intentions, and to bring it to the attention of Mr. Diallo”.

The Guinean ambassador in Kinshasa went on to say: “Mr. Touré, First Secretary for Financial and Consular Affairs, will accompany them discreetly.”

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39. You will find the proof that Guinea was itself a direct participant in the negotiations between Gécamines and Africontainers in the judges' folder at tab 3. These events occurred more than one year after Mr. Diallo's expulsion. The same can be said, Mr. President, of the progress report on the negotiations with Gécamines sent by the new *gérant* of Africontainers to the Guinean ambassador in Kinshasa on 9 January 1997. So, despite Mr. Diallo's removal from Congolese territory in January 1996, Africontainers continued to participate in and to be represented at those negotiations by two of its representatives, Mr. Kanza Ne Kongo and Mr. Ibrahim Diallo, as well as

³¹See the Gécamines letter of 20 Oct. 1992, PODRC, Ann. 12, and the minutes of the meeting held between the parties on 1 June 1995, MG, Ann. 151.

³²See the minutes of 2 and 7 July 1997, MG, Anns. 224 and 226.

by two of its lawyers³³. The company's representatives participated in those meetings until the end of September 1997³⁴, after which they were not heard from again. Likewise, in respect of the Africontainers–Shell dispute, Africontainers continued to attend the hearings before the Kinshasa Court of Appeal after Mr. Diallo's expulsion. The judgment rendered by the Kinshasa Court of Appeal on 20 June 2002 shows that Africontainers had attended the hearings of 14 February, 27 March, 24 April, 24 July and 3 October 1996³⁵, nine or ten months after Mr. Diallo's expulsion. It was only at the hearing of 10 August 2001 before the Court of Appeal that, for reasons unknown, Africontainers would fail to appear. Therefore, Mr. President, Guinea is wrong to persist in contending that Mr. Diallo's expulsion prevented Africom-Zaire and Africontainers from operating and more particularly from pursuing their alleged creditors.

I. The DRC is not responsible for Mr. Diallo's difficulties or for the bankruptcy of the companies

40. Mr. President, the entire argument laid out by Guinea throughout these proceedings is based on the erroneous and unproved assertion that the DRC is responsible for Mr. Diallo's destitution and the bankruptcy of his Congolese companies, of which he is, says Guinea, the sole *associé* and the sole *gérant*. I will return to this last point in a few moments.

41. During my presentation of last Monday, I explained at length, with evidence to support this, how Africontainers was in a state of undeclared bankruptcy from 1991 onwards, the year in which it ceased its activities. And given that the only known "activity" of the second company, Africom, was its 60 per cent holding in the capital of Africontainers, Mr. President, it therefore has to be accepted that the logical and inevitable consequence of the bankruptcy of one — Africontainers — was also the bankruptcy of the other — Africom. Here let me bring in an additional piece of evidence further confirming that the two companies were in undeclared bankruptcy from at least 1991.

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42. During the negotiations held between Gécamines and the freight forwarders, Africontainers included, on 9 December 1991, almost 12 months after Diallo left, the Chairman

³³*Ibid.*

³⁴*Ibid.*; see also PODRC, Ann. 7.

³⁵PODRC, Ann. 64.

and Chief Executive Officer of Gécamines explained the source of the company's difficulties, which also accounted for the difficulties encountered by the companies which had contracted with it. Gécamines revealed that its copper and cobalt production had fallen from 480,000 tonnes a year to 50,000 tonnes a year and, in addition, that serious operational problems had arisen on the railway line between Kinshasa and Lubumbashi, which was used for the containerized transport of both the lubricants it ordered from oil companies and its own products. For these reasons, Gécamines was no longer in a position to require their transport services. Mr. President, you will find the minutes from that meeting in the judges' folder at tab 4. I would point out that this document was appended by Guinea itself to its Memorial. This explains Africontainers' statement that all orders coming from Gécamines fell each year, before stopping altogether in 1991. I have already provided this document to the Court in the judges' folder presented at my oral argument last Monday. On top of this came the serious events and rioting which the country experienced in 1991 and 1993 and which negatively affected the country's economic structure, a subject I addressed on Monday.

43. Further, in a letter sent on 14 April 1992 to Africontainers by Zaire Fina, the latter clearly stated that Africontainers was having severe operating difficulties. It promised to resume its business dealings with Africontainers once Africontainers had resolved the difficulties it faced. Mr. President, you will also find that letter in the judges' folder at tab 5. Once again, I would point out that Guinea appended this document to its Memorial.

44. Under those circumstances, I cannot see any reasonable, persuasive grounds on which Guinea can hold the DRC responsible for Mr. Diallo's misfortunes, the lack of any further investment on his part, the dwindling value of the capital, or the undeclared bankruptcy of the companies, because of his arrest in 1988 and expulsion a few years later. Professor Pellet remained silent on this matter and, in any case, has failed to supply a single probative document which would allow for the conclusion that Mr. Diallo's arrest in 1988 and then his expulsion — and, may I remind you, he was already destitute at the time, despite being *gérant* of the companies — were the cause of his poverty and the bankruptcy of the companies, when in fact they had already ceased all activities at least five years before the expulsion, in 1991.

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45. The DRC cannot therefore be held responsible for Mr. Diallo's difficulties, the diminishing value of his *parts sociales*, or his personal troubles. On all of those counts, the DRC

categorically rejects Guinea's approach, which consists of making the DRC the scapegoat for the misfortunes of an alleged Guinean millionaire who, in reality, was just a pauper who, like other companies, was the indirect victim of the situation in the country at the time.

J. The expropriation of Mr. Diallo's *parts sociales*

46. In his statement yesterday, Professor Pellet revisited at length the question of the expropriation of Mr. Diallo's *parts sociales*. I will now respond to his arguments on that issue.

47. In effect, Guinea's general argument is built on the erroneous assertion that Africontainers and Africom are one and the same as Mr. Diallo because he is their sole *associé* and sole owner, and that any injury caused to them is an injury caused to Mr. Diallo, for which the DRC is answerable. Professor Alain Pellet made this very clear again in his statement yesterday, Wednesday 28 April, when he said:

“[O]ne might at first glance think this argument an attempt to circumvent paragraph 3 of the operative clause in the 2007 Judgment. But that is not at all so: this feeling arises from a factual element specific to this case: the fact that Mr. Diallo is the sole *associé* in the two companies, that is to say, the only owner of the *parts sociales* in Africom and Africontainers. As a consequence, [he added] even though officially they have separate legal personalities, the very special characteristics of the relationship between Mr. Diallo and his companies means that, from the factual perspective, which is the perspective of expropriation (expropriation is a question of fact), the property of the two companies merges with his [with Mr. Diallo's]. Thus, in expropriating his companies, the DRC infringed Mr. Diallo's ownership right in his *parts sociales*.”

He added that “this is entirely a product of the particular circumstances and follows from the unipersonal nature of the companies in question”³⁶.

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48. Mr. President, Members of the Court, Guinea's arguments should be rejected both on legal and factual grounds. On legal grounds, first. How can it still be maintained at this stage of the proceedings that the DRC should compensate for the injury allegedly suffered by the companies without calling into question the very authority of the Court's decision on the Preliminary Objections? The Court already stated in its 2007 Judgment on the Preliminary Objections, referring in this connection to the decision in the *Barcelona Traction* case, that: “[c]onferring independent corporate personality on a company implies granting it rights over its own property, rights which it alone is capable of protecting”. The Court continued:

³⁶See CR 2010/5, p. 28, para. 47 (Pellet).

“Congolese law accords an SPRL independent legal personality distinct from that of its *associés*, particularly in that the property of the *associés* is completely separate from that of the company, and in that the *associés* are responsible for the debts of the company only to the extent of the resources they have subscribed.” (*Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007*, pp. 605-606, paras. 61 and 63.)

49. I note that, in deeming the property of Africom and Africontainers to be merged with, and therefore not separate from, that of Mr. Diallo, Professor Pellet is championing an argument completely at variance with the Court’s view and, in doing so, is disregarding Congolese law, which is clear on that issue, and the position of the Court. I therefore believe this to be a direct attack on the Court’s authority and the DRC asks the Court to defend against this challenge to its authority. For my part, I can only reject the factual, *ad hoc* analysis set out by Professor Pellet in favour of an analysis based on Congolese law, which makes no provision for unipersonal companies.

50. Furthermore, Professor Pellet stated during his oral argument yesterday that “in expropriating his companies, the DRC infringed Mr. Diallo’s ownership right in his *parts sociales*”³⁷. Mr. President, I admit that I am completely baffled by this statement from Professor Pellet because this has never been about the expropriation of the companies, but rather the expropriation of Mr. Diallo’s *parts sociales*. And yet this can be explained by Guinea’s litigation strategy, which consists of hiding behind Diallo, assuming the guise of Diallo, to raise the issue of reparation for damages and losses actually suffered by the companies.

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51. Further, Guinea’s argument is based on a truncated version of the facts, and on unsubstantiated facts. Guinea thus portrays Mr. Diallo to us as the sole *associé* in Africontainers and Africom, and therefore as indirectly controlling Africontainers, of which Africom-Zaire holds 60 per cent. However, Guinea, to whom it falls to prove this, has failed to supply a single evidential document to show that Mr. Diallo was an *associé* in Africom-Zaire at the time of his expulsion from Congolese territory and, if he were, how many *parts sociales* he held. In addition, Guinea has failed to produce the register of the *parts sociales* in the company which, pursuant to Article 55 of the Decree of 27 February 1887 on commercial corporations, must be kept by SPRLs

³⁷See CR 2010/5, p. 28, para. 47, *in fine* (Pellet).

to allow *associés* and third parties to identify the holders of *parts sociales*³⁸. In respect of Africontainers, in 1980, 60 per cent of its share capital was held by Africom-Zaire and 40 per cent by Mr. Diallo. There would appear to have been no subsequent change in this situation. Therefore, neither Guinea's description of Mr. Diallo as the sole *associé* in Africom-Zaire nor its claim that he directly or indirectly controlled Africontainers can be accepted: the only thing that is certain is that in 1980 Mr. Diallo held 40 per cent of the capital in Africontainers, the remaining 60 per cent belonging to a company, Africom-Zaire, about which we in the end know very little today. Mr. President, the concept of a company with a sole *associé* or sole owner does not exist under Congolese law. Guinea also raised the issue of Mr. Diallo's investments in the Congo.

K. Mr. Diallo's investments

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52. Guinea also contends that Mr. Diallo made substantial investments in the 1970s in the two companies³⁹. However, none of the evidence produced by Guinea provides any basis for believing that investments were made in Africom-Zaire. In respect of Africontainers, Guinea now contends that the investments were made by Mr. Diallo. This is not entirely accurate. Indeed, as Guinea itself stated in its Memorial, those investments, used for the most part to purchase containers and trailers, were made by Africontainers, a legal entity, thus entitled to tax and customs benefits under the Investment Code⁴⁰ to be deducted from its taxable profit. Accordingly, those investments were not made by Mr. Diallo in his individual capacity. The fact that the investments were made by Africontainers, and not by Mr. Diallo, is further confirmed by documents produced by Guinea itself⁴¹.

Likewise, Guinea presents Mr. Diallo as the sole *gérant* of those companies, but here too, although there is no dispute as to his being their *gérant*, there has been no evidence produced to

³⁸Counter-Memorial of the DRC (CMDRC), Ann. 15 (Decree of 27 Feb. 1887 on commercial corporations). Guinea is in no position to offer as an excuse that it was unable to produce a credible document relating to Mr. Diallo's position as *associé* in that company because of his expulsion from the territory, in view of the impressive number of documents it has produced on other aspects of the dispute and notably on the so-called debts owed to Mr. Diallo. In this respect, see PODRC, paras. 0.08 and 0.09. The DRC, for its part, has not uncovered any documents relating to the *parts sociales* in that company.

³⁹Reply of Guinea (RG), para. 2.83.

⁴⁰MG, para. 2.15.

⁴¹MG, Anns. 9 and 16.

prove that he was the sole *gérant*. Mr. President, I will now address the issue of the bankruptcy of the companies.

L. The bankruptcy of the companies

28 53. The two companies, which Guinea is today wrongly seeking to impute to the DRC or to its former trading partners, were nothing out of the ordinary. In the 1980s, Africontainers' activities centred on the tripartite contract among itself, three oil companies — Mobil Oil, Zaire Shell and Zaire Fina — and Gécamines⁴². Under that agreement, the oil companies supplied Gécamines with petroleum products, using Africontainers' secure containers to transport them from Kinshasa to regions in the interior of the country. Furthermore, Africontainers undertook to transport some of Gécamines' production from the areas where it was mined to the ports of Kinshasa, or from Matadi to Kinshasa. A number of things were to bring an end to those transport activities. Firstly, in 1986, major redevelopment work was started at the port of Kinshasa, as a result of which container-unloading operations were relocated from the port of Kinshasa to that of Matadi, 350 km away. As a result of that decision, the traffic of containers of the various freight forwarders operating on that railway line was hampered⁴³. Next, at the end of the 1980s, following on from the unrest experienced by the country, Gécamines' annual production fell — as I have said — from almost 470,000 tonnes to just 50,000 tonnes. At a meeting between Gécamines and the freight forwarders, Africontainers included, Gécamines explained the source of its problems. It was under those circumstances that the oil companies, no longer supplying products to the struggling Gécamines, had no further need of Africontainers. As a result of this, Africontainers, whose only customers were those companies, found itself without any business in 1991.

54. Furthermore, need I mention here the serious political, economic and social crisis that swept through the DRC at the start of the 1990s? Thus, in 1991, unprecedented mass rioting destroyed the economic fabric of the DRC and led to large-scale plundering of public and private enterprise, proving fatal for many companies in the country. Likewise, in 1993, further mass

⁴²MG, Ann. 13 and PODRC, paras. 1.07 *et seq.*

⁴³PODRC, para. 1.08.

rioting broke out — during which, as I pointed out, the French ambassador in Kinshasa was killed — leading to substantial plundering of both public and private property⁴⁴.

Guinea cannot now pretend that Africom and Africontainers miraculously escaped unscathed from that situation. Furthermore, the fact that at the start of the 1990s Africontainers was no longer able to pursue its containerized transport activities is confirmed by letters sent to it by one of its former trading partners, Zaire Fina, in 1992, in which the latter pointed out that it was not responsible for the interruption in performance of the tripartite contract, but rather that it was Africontainers which had been unable to supply the services required by the agreement owing to the wretched state of its containers, as well as to difficulties encountered by Africontainers at a particular time⁴⁵. Zaire Fina thus suggested that Africontainers get back in touch with it if Africontainers thought itself in a position to resume its activities under the agreement⁴⁶.

29 Africontainers took no action on Zaire Fina's suggestion, which would confirm that its condition hardly improved afterwards. Mr. President, Professor Pellet raised the issue of the valuation of Mr. Diallo's *parts sociales*.

M. Valuation of Mr. Diallo's *parts sociales*

55. The DRC believes it clear beyond doubt that Mr. Diallo's *parts sociales* can only be valued, if required, after the assets and liabilities of Africom and Africontainers have first been valued. However, the only existing assets of the two companies are the purported debts or claims for monies allegedly owed to them by third parties. It is self-evident that the Court would thus have to reverse itself by allowing Guinea to concern itself with rights and debt claims of companies not having its nationality in order to determine the value of the *parts sociales* held by Mr. Diallo in those companies, which would be at variance with the Court's Judgment of 24 May 2007.

56. Furthermore, Guinea does not make it clear from what point or date the expropriation of Mr. Diallo's *part sociales* is alleged to have taken place because, as I explained just a moment ago during this pleading, Africontainers continued to operate after Mr. Diallo's expulsion until September 1997 under Guinea's direct control by means of its embassy in Kinshasa.

⁴⁴CMDRC, paras. 1.04 to 1.06.

⁴⁵PODRC, Anns. 50 and 51.

⁴⁶PODRC, Anns. 50 and 51.

57. To sum up, I have just explained to the Court how all of Guinea's claims are unfounded. The DRC has never violated Mr. Diallo's individual personal rights. Nor has it interfered in any way with Mr. Diallo's rights as *associé* in Africom and Africontainers. I therefore ask the Court to reject all of Guinea's claims.

58. Mr. President, Members of the Court, I thank you for your attention.

59. Mr. President, if you would be so kind as to give me the floor, I will present the submissions of the Respondent in my capacity as Co-Agent.

30 The VICE-PRESIDENT, Acting President: This is what the Court is now expecting from you and what is provided for by the Rules of Court, and I would add that those final submissions should be transmitted in writing, duly signed by either the Agent or the Co-Agent, to the Registry on the conclusion of the hearing. You have the floor, Mr. Kalala.

Mr. KALALA: Thank you very much for giving me the floor, Mr. President. I can reassure you that the submissions have already been signed and that the Court's administration is already in possession of the signed documents. Mr. President, before reading the final submissions of the DRC, I would like to say a few words in my capacity as Co-Agent. The Democratic Republic of the Congo greatly appreciates the patience shown by Members of the Court and all staff during these oral proceedings. The Democratic Republic of the Congo once again puts its faith in the Court and trusts in its wisdom to settle this dispute between two fraternal and friendly countries, who have and will continue to have good and amicable relations, in spite of this unfortunate incident brought on by Mr. Diallo. The DRC would like to reassure the Court and Guinea that, in light of this case, it has revisited its legislation on the rights of aliens and that a bill, based on the laws of Belgium and France in this area, which are among the most advanced in the world, is currently in the Congolese Parliament and will soon be adopted to replace the existing law at issue in these proceedings. This will afford nationals of Guinea, and other aliens, living in the Congo better protection for themselves and for their property. If the Court wished, for its information, to be supplied with the documents relating to this new legislation, as it was for the Constitution, for instance, the Congolese Government would be happy to submit these to it on request, and even also to Guinea. To conclude, should the Court so decide, the Democratic Republic of the Congo is

prepared to apologize to Guinea, as it requested in its Application, in respect of the matters concerning Mr. Diallo's expulsion and detention, and it would do so with the aim of maintaining good relations between two brotherly, friendly countries. However, the DRC's willingness to do so should not be interpreted in any way as an admission of having violated Mr. Diallo's individual rights. Mr. President, I shall now present the submissions of the Democratic Republic of the Congo.

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II. SUBMISSIONS

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

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

Thank you, Mr. President.

The VICE-PRESIDENT, Acting President: Thank you, Professor, firstly for your presentation as Counsel and Advocate, and then for your statement in your capacity as Co-Agent of the Democratic Republic of the Congo. The Court takes note of the final submissions which you have just read on behalf of the Democratic Republic of the Congo, as it took note yesterday of the final submissions presented by the Republic of Guinea.

This brings us to the end of the hearings devoted to the oral arguments in this case. I would like to thank the Agents, Counsel and Advocates of the two Parties for their statements during these

two weeks. In accordance with the usual practice, I would ask that the Agents remain at the Court's disposal to provide any further information that the Court may require.

With this proviso, I now declare closed the oral proceedings in the case concerning *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*. The Court will now retire for deliberation. The Agents of the Parties will be advised in due course as to the date on which the Court will deliver its Judgment. As the Court has no other business before it today, the sitting is now closed.

The Court rose at 5.20 p.m.
