

**INTERNATIONAL COURT OF JUSTICE**

**CASE CONCERNING**

**AHMADOU SADIO DIALLO**

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

**MEMORIAL OF  
THE REPUBLIC OF GUINEA**

**6 December 2011**

*[Translation by the Registry]*

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### **Annexes:**

- Annex 1: Letter (No. 131) to the Ambassador and Agent of the Democratic Republic of the Congo dated 30 March 2011 from the State Judicial Agent of the Republic of Guinea
- Annex 2: Letter (No. 265) to the Registrar dated 27 May 2011 from the State Judicial Agent of the Republic of Guinea

1. In its judgment delivered on 30 November 2010<sup>1</sup> in the case concerning *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, the International Court of Justice in The Hague found *inter alia* that:

- “in respect of the circumstances in which Mr. Diallo was expelled from Congolese territory on 31 January 1996, the Democratic Republic of the Congo violated Article 13 of the International Covenant on Civil and Political Rights and Article 12, paragraph 4, of the African Charter on Human and Peoples’ Rights” (operative paragraph, subpara. (2));
- “in respect of the circumstances in which Mr. Diallo was arrested and detained in 1995-1996 with a view to his expulsion, the Democratic Republic of the Congo violated Article 9, paragraphs 1 and 2, of the International Covenant on Civil and Political Rights and Article 6 of the African Charter on Human and Peoples’ Rights” (operative paragraph, subpara. (3));
- “by not informing Mr. Diallo without delay, upon his detention in 1995-1996, of his rights under Article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations, the Democratic Republic of the Congo violated the obligations incumbent upon it under that subparagraph” (operative paragraph, subpara. (4));
- “the Democratic Republic of the Congo is under obligation to make appropriate reparation, in the form of compensation, to the Republic of Guinea for the injurious consequences of the violations of international obligations referred to in subparagraphs (2) and (3) above” (operative paragraph, subpara. (7)).

2. The Democratic Republic of the Congo (DRC) is therefore under a legal obligation to make “appropriate reparation” in the form of compensation to the Republic of Guinea on account of the violations of Mr. Diallo’s individual rights, excluding, however, the breach of the Vienna Convention on Consular Relations, for which the Court considers that adequate reparation has already been made by virtue of the very finding of that breach.

3. Furthermore, the Court also acceded to Guinea’s request for both Parties to be given time to seek an agreed settlement on the amount of compensation to be paid in reparation for the injurious consequences of the internationally wrongful acts committed by the DRC<sup>2</sup>. It emphasized that “the Parties should indeed engage in negotiation”<sup>3</sup> to that end.

4. More explicitly, it states:

“In light of the fact that the Application instituting proceedings in the present case was filed in December 1998, the Court considers that the sound administration of justice requires that those proceedings soon be brought to a final conclusion, and thus that the period for negotiating an agreement on compensation should be limited. Therefore, failing agreement between the Parties within six months following the

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<sup>1</sup>Case concerning *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment of 30 November 2010.

<sup>2</sup>*Ibid.*, paras 162-164.

<sup>3</sup>*Ibid.*, para. 163.

delivery of the present Judgment on the amount of compensation to be paid by the DRC, the matter shall be settled by the Court in a subsequent phase of the proceedings. Having been sufficiently informed of the facts of the present case, the Court finds that a single exchange of written pleadings by the Parties would then be sufficient in order for it to decide on the amount of compensation.”<sup>4</sup>

5. As part of the engagement process recommended by the Court, and in the absence of any initiative from the DRC, the Republic of Guinea, through its diplomatic mission in Central Africa and the Congolese mission in Conakry, then addressed to the DRC letter No. 131 of 30 March 2011 containing, as a basis for negotiation, an assessment of the various heads of damage suffered by Mr. Diallo. That letter was forwarded by Note Verbale No. 0344 of 6 April 2011.

6. Having obtained no response from the Congolese authorities to the letter of 30 March 2011 and having therefore noted that the DRC showed no sign of any concern to comply with the Court’s wishes — for which it should bear the legal consequences — the Republic of Guinea so informed the Registrar of the Court by letter No. 265 of 27 May 2011.

4 7. On 20 September 2011 the President of the Court issued an Order fixing 6 December 2011 and 21 February 2012, respectively, as the time-limits for the filing of the Memorial of the Republic of Guinea and the Counter-Memorial of the Democratic Republic of the Congo on the sole question of compensation owed by the latter to the former under paragraphs 163 and 165 (7) of its Judgment of 30 November 2010. Those time-limits were fixed taking account of the views expressed by the Parties at a meeting which the President of the Court held with their representatives on 14 September 2011 in The Hague.

8. The purpose of the present Memorial is, precisely, to establish the Republic of Guinea’s legal and financial positions on the question of compensation. It will thus be structured around the following two points:

- the legal bases for Guinea’s position;
- the financial criteria for assessing the damage suffered by Mr. Diallo.

### **Section 1** **Legal bases for Guinea’s position**

9. While the Court drew attention to the international law principle that the purpose of compensation must be to make full reparation for injury, that principle must be viewed in the context of the violations of international law which it found against the DRC in the present case. These constitute the two bases for Guinea’s position on the question of compensation for the injury suffered by Mr. Diallo as a result of the DRC’s conduct.

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<sup>4</sup>*Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment of 30 November 2010, para. 164.

## A. The purpose of compensation

10. Since it is materially impossible to restore the situation which existed previously, given how long ago the facts occurred and the particular nature of some of the heads of damage, reparation not only may<sup>5</sup> but *must* take the form of payment of compensation.

11. This is the intent of the Court's Judgment, which states in paragraph 161:

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“In the light of the circumstances of the case, in particular the fundamental character of the human rights obligations breached and Guinea's claim for reparation in the form of compensation, the Court is of the opinion that, in addition to a judicial finding of the violations, reparation due to Guinea for the injury suffered by Mr. Diallo must take the form of compensation.”

12. The *amount* of that compensation must be determined in accordance with the rules of international law, not domestic law. In the exercise of diplomatic protection by a sovereign State, the compensation that may be due to that State must, in addition, be assessed in the light of the injury suffered by the protected national<sup>6</sup>, as the Court noted in paragraph 163 of its Judgment, which reads as follows:

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

13. As for the *starting point for the calculation of damages*, these must be assessed in accordance with the general principle of law that the compensation needed to make good the injury must be calculated on the basis of the value of the damage on the day of the judgment.

14. Since the specific purpose of compensation is to restore as exactly as possible the balance disturbed by the injury and to enable the victim, at the responsible party's expense, to return to a position identical to that in which he would have found himself had the injurious act not taken place, it follows that the amount of damages must take account of the effects of any currency depreciation that has occurred since the injurious act was committed.

15. The compensation must therefore include interest at the statutory rate.

16. Consequently, Guinea considers that it is entitled to claim compensation for each of the heads of damage suffered by Mr. Diallo which are the direct consequence of an internationally wrongful act found against the DRC by the International Court of Justice.

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<sup>5</sup>*Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 27.*

<sup>6</sup>*Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17.*

## 6 B. Breaches of international law found by the Court

17. The Court found that the DRC had violated a number of its international obligations in its treatment of Mr. Diallo, at the time of the arrest, detention and expulsion measures taken against him in 1995-1996, the only period considered in the context of the present proceedings<sup>7</sup>.

18. First of all, it found that the Respondent had breached the provisions of Article 13 of the International Covenant on Civil and Political Rights and of Article 12, paragraph 4, of the African Charter on Human and Peoples' Rights, which require non-nationals legally admitted to the territory of a State Party to be protected against any unlawful expulsion. Mr. Diallo's expulsion on 31 January 1996 was not preceded by consultation of the National Immigration Board, nor was it based on reasoned grounds, thereby contravening the provisions of the DRC's own national law<sup>8</sup>.

19. Furthermore, the conditions in which the expulsion took place deprived Mr. Diallo of his right, under Article 13 of the Covenant, to challenge that measure before a "competent authority".

20. The Court also decided that the DRC was internationally responsible for the arbitrary deprivation of liberty which Mr. Diallo suffered in breach of Article 9, paragraphs 1 and 2, of the Covenant and Article 6 of the African Charter. As the Court found, Mr. Diallo's arrests and detentions between 5 November 1995 and 31 January 1996 were not only not in accordance with Congolese law<sup>9</sup>, they were also arbitrary, since the Congolese authorities did not at any stage seek to give the reasons for his being held for a "particularly long" time or to ascertain whether his detention was necessary<sup>10</sup>. Furthermore, the fact that Mr. Diallo was not at any stage informed of the reasons for his detention constitutes an additional breach by the Respondent of the above-mentioned obligations.

7 21. Lastly, it should be pointed out that, in the Court's view, the human rights obligations breached are of a "fundamental character"<sup>11</sup>, which must be taken into account for determining the "adequate . . . reparation"<sup>12</sup> to be paid to Guinea.

### Section 2

#### Financial criteria for assessing the damage suffered by Mr. Diallo

22. In its resolution 60/147 of 16 December 2005, the United Nations General Assembly set out the following rules governing financial compensation for damage resulting from violations of internationally protected individual rights:

"*Compensation* should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of

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<sup>7</sup>Cf. *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment of 30 November 2010, para. 47: "For all of the reasons set out above, the Court finds that the claim concerning the arrest and detention measures to which Mr. Diallo was subject in 1988-1989 is inadmissible."

<sup>8</sup>*Ibid.*, para. 71.

<sup>9</sup>*Ibid.*, para. 79.

<sup>10</sup>*Ibid.*, para. 82.

<sup>11</sup>*Ibid.*, para. 161.

<sup>12</sup>United Nations General Assembly, resolution 60/147, 16 December 2005, Ann. VII (b).

each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:

- (a) Physical or mental harm;
- (b) Lost opportunities, including employment, education and social benefits;
- (c) Material damages and loss of earnings, including loss of earning potential;
- (d) Moral damage;
- (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.”<sup>13</sup>

23. The Republic of Guinea considers that the damage suffered by Mr. Diallo as a result of the serious violations of his fundamental rights may be assessed on the basis of those rules in order to determine the most adequate reparation.

## 8 A. Compensation for the mental harm and moral damage suffered by Mr. Diallo

24. It cannot be disputed that Mr. Diallo suffered moral and mental harm, including emotional pain, suffering and shock, as well as the loss of his position in society and injury to his reputation as a result of his arrests, detentions and expulsion by the DRC:

- (i) first of all, it should be emphasized that he was the victim of serious violations of his rights by the public authorities in a country where he had spent most of his life developing economic activities that were unquestionably useful to that country<sup>14</sup>. Mr. Diallo was continuously and permanently resident in Congolese territory for almost 32 years; he had established all his personal and professional ties there, and he had no assets or property in his country of origin that might enable him to live in equivalent or even normal circumstances;
- (ii) it must also be emphasized that, as stated by the Court, “*it is difficult not to discern a link between Mr. Diallo’s expulsion and the fact that he had attempted to recover debts which he believed were owed to his companies by, amongst others, the Zairean State or companies in which the State holds a substantial portion of the capital, bringing cases for this purpose before the civil courts*”<sup>15</sup>; the serious injustice felt by Mr. Diallo as a result of his arrests, detentions and expulsion caused him deep psychological trauma and consequent moral damage;
- (iii) that trauma was all the greater since Mr. Diallo, who belonged to the country’s wealthiest section of society, was expelled from the DRC in conditions which prevented him from being able to take any of his belongings with him; he was thus suddenly left utterly destitute, falling from the highest to the lowest rung of the social ladder, where he has remained for more than 15 years, with no hope of one day returning to the Democratic Republic of the Congo, although that is where he has all his personal and professional ties;

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<sup>13</sup>United Nations General Assembly, resolution 60/147, 16 December 2005, Ann. VII (b).

<sup>14</sup>See Memorial of the Republic of Guinea (MG) of 23 March 2001, pp. 12 *et seq.*

<sup>15</sup>*Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment of 30 November 2010, para. 82.

- (iv) the fact that, prior to his arrests and expulsion, Mr. Diallo belonged<sup>16</sup> to the country's wealthiest social class can be seen from the fact that he was the sole *associé* and the *gérant* of two companies, the main partners of which are the Congolese State and major public, semi-public and private companies in the country.

The first company, Africontainers, had signed an exclusive contract with Gécamines, the country's biggest public company, for the container transport of the country's mining products<sup>17</sup>. It fulfilled its contractual obligations for the execution of that contract, which included the purchase of 600 containers. It also had ties with oil companies through contracts for the container transport of oil products. In return for its undertakings, it received the total amount of US\$2,500 per container of products transported for a round trip between Lubumbashi and Kinshasa. It was even preparing to buy a self-propelled container barge capable of carrying 56 containers.

The second company, Africom-Zaire, owns plots of land with a total surface area of over one hectare in the very centre of Kinshasa, accommodating warehouses, offices and apartments, surrounded by 4 metre-high reinforced concrete perimeter walls with 2 metre-deep foundations.

Both companies are owed considerable sums of money by the Congolese State and various other partners<sup>18</sup>, and they employed more than 120 staff, including:

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- Mr. Paul Bandoma, Minister of National Defence for six years;
- Mr. Ngutu, a university professor, responsible for market research;
- Mr. Poto, a former economic adviser to the DRC Presidency;
- Mr. Tamboué, former assistant managing director of Citibank-Zaire, Finance Director;
- Mr. Teza, an accountant who had resigned from Coopers;
- Baldé Abdoulaye, a Canadian of Guinean origin, a Doctor of Business Administration;
- Mr. Saba, a captain in the Zairean army, who had just been acquitted of plotting against national internal security;
- Mr. Meyers, a Belgian;
- Mr. Philippe, a Frenchman.

25. Mr. Diallo was an extraordinary personality:

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<sup>16</sup>For more details on the facts, including Mr. Diallo's history, see MG of 23 March 2001, under the heading "The relevant facts", pp. 10-15, and MG of 7 July 2003 on the Preliminary Objections of the Democratic Republic of the Congo (PODRC), chapter on "The salient facts", pp. 4 *et seq.*

<sup>17</sup>See leasing agreement of 29 June 1982, Ann. 12, MG of 23 March 2001.

<sup>18</sup>For more detail, see MG of 23 March 2001, pp. 10 *et seq.*, and pp. 55 *et seq.*



- he lived in a five-star hotel for nineteen years, first in apartment 202 at the Memling Hotel, then in the residential district in an apartment on the 9th floor of the Losonia building owned by PLZ;
  - he drove a Citroën CX Prestige armoured car;
  - neither he nor either of his companies owes a penny to anyone;
  - he was publicly presented by President Mobutu as an exemplary foreign investor and successful role model for African investors in Zaire. As such he was even visited at his offices on the 16th floor of the *Centre commercial international du Zaïre* (CCIZ) by the French President Valéry Giscard d'Estaing, accompanied by President Mobutu<sup>19</sup>;
  - as *gérant* of Africom-Zaire and Africontainers his monthly salary was the equivalent of US\$25,000;
- 11** — as the French weekly *Jeune Afrique* reported in its issue of 16 February 1984, he entertained guests at the best restaurants in Kinshasa<sup>20</sup>. These included:

- Mr. U Thant, then United Nations Secretary-General, accompanied by Mr. Diallo Telly, Secretary-General of the OAU, on the sidelines of an OAU summit in Kinshasa;
- Nicéphore Soglo, former President of Benin;
- Babacar Ndiaye, President of the African Development Bank;
- Pelé, the famous Brazilian footballer;
- Kamanda Wa Kamanda, Adviser to President Mobutu, then Minister of Justice;
- Cheick Anta Diop, a Senegalese scientist;
- Joseph Ki Zerbo, an historian from Burkina Faso;
- Mr. Bissengué Mana, Director of President Mobutu's private office for 15 years;
- Mr. Siradiou Diallo, vice-president of *Jeune Afrique*, his wife and many other journalists;
- Djouga Kébé and Djilli Mbaye, both wealthy Senegalese businessmen;
- President Mitterrand's aide-de-camp;
- Sennen Andriamirado, editor-in-chief of *Jeune Afrique*;
- Bah Mouctar, an expert from the African Development Bank, and many other colleagues;
- Mr. Boussokota, Zairean State Secretary for Planning, etc.

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<sup>19</sup>Photographs of this visit were left behind in the DRC.

<sup>20</sup>See MG of 23 March 2001, pp. 11 and 12 and Ann. 18.

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26. Furthermore, it will be noted that, ever since having problems with the DRC, Mr. Diallo has consistently been portrayed by that country as a dangerous criminal, not just at the time of his arbitrary arrests and expulsion, but also before the Court and publicly since the start of the hearings, with no valid justification, as the Court held in paragraph 82 of its Judgment; this has caused serious injury to his reputation and image and, at the same time, equally serious moral injury.

27. The mental and moral harm suffered by Mr. Diallo as a result of the repeated accusations of corruption and fraud made against him by the DRC has been exacerbated by the fact that those accusations were designed solely to tarnish his honour and reputation; the consequences for him have been disastrous: for more than 15 years he has been unable to engage in any economic activity whatsoever because third parties who might work with him now shun him, fearing that they are dealing with a fraudster.

28. The Republic of Guinea assesses the mental harm and moral damage suffered in this case by Mr. Diallo at US\$250,000.

### **B. Loss of earnings**

29. As the Court found, Mr. Diallo was arrested arbitrarily and detained equally arbitrarily, first from 5 November 1995 to 10 January 1996, then a second time from 25 to 31 January 1996, before finally being expelled on the latter date.

30. A person who is unlawfully arrested and detained, then expelled, suffers material damage which the Inter-American Commission on Human Rights has described as follows:

“Consequential damages have been understood as pertaining to the direct and immediate consequence of the acts. In this sense, the effects on patrimony derived immediately and directly from the acts are considered in relation to costs incurred by the affected party to obtain justice, in this case, relating to the efforts taken to free [the person detained]. On the other hand, the loss of profits is understood as the loss of income or benefits that have not been obtained because [the person detained] had to leave his job and can be quantified based on measurable and objective indicators.”<sup>21</sup>

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31. It will be recalled in the present case that Mr. Diallo was, at the time of his arrest, the manager and sole *associé* of two companies, Africom-Zaire and Africontainers-Zaire. Moreover, as paragraph 82 of the Court’s Judgment states, it was because he was the *gérant* of those companies and had brought cases before the courts on their behalf that he suffered the harmful consequences recognized as unlawful by the Court.

32. The salaries he received in that capacity were his main source of income.

33. Throughout the period of his detention Mr. Diallo was unable to carry out his normal management activities or ensure that his companies — for which he was solely responsible — were being run properly, or to receive the monthly fruits of his activity and, consequently, that of his companies.

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<sup>21</sup>Inter-American Commission on Human Rights, *Lysias Fleury and his family v. Republic of Haiti* (Case 12.549), 5 August 2009, para. 111.

34. It should be noted that Mr. Diallo's monthly income, in his capacity as *gérant* of Africom-Zaire and Africontainers, was equivalent to US\$25,000 at the time prior to his arrest, amounting to US\$10,000 for the first company and US\$15,000 for the second.

35. Taking account of inflation, the Republic of Guinea estimates at US\$80,000, at today's rates, the direct injury suffered by Mr. Diallo as a result of not receiving his professional income during the 72 days of his detention.

36. The Republic of Guinea considers that it is also entitled to claim full compensation for its national's loss of earnings following his expulsion, even if, as the Court notes, "[w]hile the performance of Mr. Diallo's duties as *gérant* may have been rendered more difficult by his presence outside the country, Guinea has failed to demonstrate that it was impossible to carry out those duties"<sup>22</sup>.

37. Although outside the territory of the DRC, Mr. Diallo could, admittedly, have performed the role of *gérant* through an intermediary. If he had delegated his functions to a third party, or if he had simply given a third party the power to act on his instructions in the DRC, that would, subject to certain reservations, have allowed his companies to continue their activities and even given them the economic vitality and sound management which had been the key to their dynamism at a given time.

14 38. However, the fact that Mr. Diallo did not entrust the *gérance* of his companies to a third party does not exempt the DRC from its responsibility for any of the heads of damage, including loss of earnings; the more so because such delegation of powers would have meant that Mr. Diallo was exercising a prerogative, not fulfilling an obligation, particularly since it would not be sufficient to guarantee that he would receive his usual income despite being outside the territory of the DRC. As the Court noted in paragraph 131 of its Judgment, Article 17 of Africontainers-Zaire's Articles of Incorporation states:

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

39. Furthermore, it should be noted that, despite his expulsion, Mr. Diallo remained the *gérant* in law; however, he ceased to be the *de facto gérant*, a role which he would now be forced to entrust to a third party in order to ensure that the companies continued their activities. While it is true, as the Court noted, that it was not impossible for him to act as *gérant* because he was outside the territory of the DRC, the fact remains that the conditions in which he was expelled prevented him from entrusting the *gérance* to a third party with all due precautions, and this was not without consequences for his chances of being able to continue to receive the same professional income as in the past.

40. When he was released on 10 January 1996 on the order of President Mobutu himself, after more than two months in detention, Mr. Diallo was not yet aware that he was the subject of an expulsion measure and that, in spite of everything, he would immediately be sent back to prison

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<sup>22</sup>*Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment of 30 November 2010, paras. 135 ff.

and then taken to the airport a few days later and expelled, without having had the opportunity to entrust the *gérance* of his companies to anyone at all. At the time of his expulsion, therefore, it was absolutely impossible for Mr. Diallo to entrust that *gérance* to a third party.

41. Furthermore, Mr. Diallo was expelled without being able to take with him any personal effects or any documents that might show the precise circumstances of his companies, without being able to entrust them to a third party before his departure, and without any hope of one day returning to the DRC. He could not, therefore, explain the true position of those companies to any new *gérant*. In other words, he was not able, from Guinea, to entrust the *gérance* of those companies to a third party in accordance with proper procedures.

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42. [*Opening text missing*] only to those still in the DRC, even if it would be better to choose a person resident elsewhere, given that he cannot afford the travel and installation costs of the person concerned.

43. The DRC's conduct towards Mr. Diallo is also discriminatory. Contrary to customary practice in this respect and, in particular, the cases of the 86 foreign nationals (mainly Lebanese) who were the subject of Expulsion Decree No. 4 of 22 February 1995 and the 84 other foreign nationals (again mainly Lebanese) who were the subject of the Expulsion Decree of 27 February 1995<sup>23</sup>, which the DRC sought to equate with the present case<sup>24</sup>, Mr. Diallo was not notified of the expulsion decree against him and did not leave Congolese territory of his own accord; consequently, unlike the 170 foreign nationals concerned by the above-mentioned decrees, he was unable to reorganize the management of his affairs before he left; that would have allowed him to avoid his current state of destitution, to be able to choose a new *gérant* even outside the DRC, if that was found to be the best choice, and above all to give himself some chance of continuing to receive a monthly income. Furthermore, unlike Mr. Diallo, the Lebanese nationals, after their arrest, had not been detained beyond the statutory time-limit and, as is clear from the preamble to the expulsion decrees, had been expelled following consultation of the National Immigration Board.

44. Moreover, because of his expulsion, Mr. Diallo is himself prevented from doing his usual work, that is to say, from carrying out the functions of *gérant* in person, which guaranteed him the substantial monthly income he received prior to his arrests and expulsion; *gérance* by proxy, had it come about, would not have provided that guarantee, in view of the conditions in which he was expelled.

45. There is nothing to prove, *a priori*, that despite the conditions in which he was expelled, Mr. Diallo would have continued to receive the same monthly income as in the past, provided that he entrusted the *gérance* of his companies to a third party, even if that third party, who, for the reasons explained above, would have to be chosen from among the persons left behind in the DRC, was not the best choice.

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46. In other words, while it is true that the conditions in which Mr. Diallo was expelled, as described earlier, did not prevent him from entrusting the *gérance* of his companies to a third party, the fact remains that those conditions were liable seriously to affect the smooth running of those

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<sup>23</sup>See Ann. 76, PODRC.

<sup>24</sup>See Counter-Memorial of the Democratic Republic of the Congo (CMDRC) of 27 March 2008, pp. 10 and 11, para. 1.08.

companies' affairs and therefore to compromise his chances of being able to continue to receive his usual professional income, which, needless to repeat, placed him, prior to his arrests and expulsion, among the wealthiest people in the DRC.

47. To sum up, Mr. Diallo's expulsion had the following injurious consequences:

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

48. Taking account of the period that has elapsed since his expulsion, the Republic of Guinea assesses the damage suffered by Mr. Diallo as a result of the loss of his professional income over that period at US\$4,755,500, which must be adjusted for inflation and cannot now be less than US\$6,430,148.

49. Lastly, as Guinea noted in its earlier submissions<sup>25</sup>, Mr. Diallo was expelled from the DRC very abruptly, with no possibility of taking with him his personal belongings, *let alone his records*, some of which were subsequently recovered by a few friends, but in a haphazard and unsystematic fashion. As a result it has been extremely difficult to gather evidence. Guinea has endeavoured to present, in a reasonably orderly manner, all the evidence it has in its possession, but it respectfully asks the Court to use its investigating powers under Article 44, paragraph 2, of its Statute and Article 66 of its Rules to gather whatever additional evidence it might consider useful, if any, at this stage of the proceedings.

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### C. Other material damage

50. Given the particularly abrupt manner of Mr. Diallo's expulsion and the fact that he was held in detention for most of the three months prior to the implementation of that measure, he was unable to make satisfactory arrangements for the transfer or disposal of his assets.

51. The resulting *de facto* expropriation of his personal effects, borne out by the fact that none of his personal possessions in the territory of the DRC have been returned to him, constitutes a first head of damage in respect of other material injury.

52. Mr. Diallo, who had lived continuously on Congolese territory for almost 32 years and belonged to the wealthiest social class in the country, owned, at the time of his expulsion, considerable tangible and intangible assets which are now irretrievably lost.

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<sup>25</sup>MG of 23 March 2001, p. 5, para. 1.9.

53. Furthermore, the inventories of the property owned by Mr. Diallo and his companies, far from being exhaustive, reflect what was found at the time they were drawn up in this case, rather than the actual state of affairs on the date of his expulsion, many days earlier. It should be noted that Mr. Diallo was expelled without being able to entrust his property or that of his companies to anyone before he left, and there is no evidence or even suggestion that the Congolese State took appropriate steps to ensure the security of that property.

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54. In any event, it will come as no surprise that objects were fraudulently removed between the date of his expulsion and the dates of the inventories, which in fact are far from reflecting the true situation. The inventory of Africontainers' movable property, for instance, which was drawn up on 9 February 1996, nine days after Mr. Diallo was expelled, lists for the drawing room in the main building "one radio or TV stand with two speakers"<sup>26</sup>, suggesting that there was no device on the stand, whereas there had been a large Grundig satellite radio.

55. Likewise, the inventory of movable property in Mr. Diallo's residence<sup>27</sup>, drawn up on 12 February 1996, 12 days after he was expelled, lists for the bedroom, for example, a ridiculously small number of very minor items, including a sweater, a shirt, a new suit and a jacket, thus manifestly concealing many other similar items, as well as expensive curtains, shoes and suits, to give just a few examples. Yet the French weekly *Jeune Afrique*, in its issue of 16 February 1984 referred to earlier, talked about the extraordinary personality of Mr. Diallo in the following terms: "His apartment, in an elegant tower on the Boulevard du 30 Juin, is like his suits: clean and plain. It is tastefully furnished . . ." <sup>28</sup> Mr. Diallo himself had fitted out that apartment, and his offices too, with Roche Bobois furniture from an order placed with the company Techno France<sup>29</sup>, and his suits came from the great French couturiers *Ted de Lapidus* and *Yves Saint-Laurent*.

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56. The inventory of 12 February 1996 also lists, again in Mr. Diallo's bedroom, a locked trunk and a mini-safe, without specifying their contents. It fails to mention, for example: jewellery; a Cartier watch with 16 small diamonds, purchased in 1979 from the Place Vendôme in Paris; a top-of-the-range Leica camera purchased at the Hayat Hotel in Canada; a Louis Vuitton wallet; three Chinese carpets purchased at a trade fair in Kinshasa; a bookcase; the complete memoirs of General de Gaulle; a bronze Yolo statue; 50 gold ballpoint pens as gifts for visitors; and two Salvador Dali paintings, one depicting his wife, the other Voltaire.

57. All these tangible and intangible assets belonging to Mr. Diallo are now irretrievably lost. The value of those lost assets can be put at a total lump sum of US\$550,000 (including his bank assets).

58. Moreover, although Certificate of Lack of Means No. 1 of 12 July 1995<sup>30</sup> was issued in favour of Mr. Diallo, it was in fact intended to allow him to defer payment of over US\$1,500,000 in costs for registering Judgment RC 63.824 of 3 July 1995, and not to exempt him from that payment at the expense of the national exchequer. The certificate contains the words "temporarily destitute", and Mr. Diallo had also given the tax authorities an undertaking to pay the costs in full once the judgment was enforced.

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<sup>26</sup>See CMDRC of 27 March 2008, p. 5, and Ann. 12, heading "Building No. 2 (large building)".

<sup>27</sup>MG of 23 March 2001, Ann. 200.

<sup>28</sup>See MG of 23 March 2001, pp. 4-5, para. 2.6, and Ann. 18.

<sup>29</sup>The invoices for this furniture were left behind in the DRC.

<sup>30</sup>Observations of the Republic of Guinea (OG), Ann. 22.

59. It is clear that, first, in that judgment the Kinshasa *Tribunal de grande instance* had ordered Shell to pay Africontainers the sum of US\$13,156,704 in respect of the principal amount plus interest of US\$50,000, and, second, that the cost of registering that judgment would amount to over US\$1,500,000.

60. Furthermore, an indigent person obviously does not live in a five-star hotel while still, moreover, not owing anyone a penny, as was the case with Mr. Diallo. Nor does such a person employ more than 120 workers for almost 20 years only to be hauled one day before the police or the courts, as Mr. Diallo was.

61. On the same point, it should lastly be emphasized that the issuing of the certificate of temporary lack of means enabled Mr. Diallo to avoid having to pay such huge registration costs for a judgment which would subsequently not be enforced precisely because of his abrupt and arbitrary expulsion.

## 20 D. Loss of earning potential

62. In order to assess the material damage resulting from an internationally wrongful act, account must also be taken of “the potential loss of earnings” where that is a direct consequence. Non-receipt of salary comes under this head of damage<sup>31</sup> and its distinctive characteristic resides in the fact that it appreciates relative to the time elapsed since the injurious act was committed.

63. In this particular case, having been prevented from administering his companies by his unlawful arrest, which was designed precisely to achieve that purpose, Mr. Diallo was also obstructed in the pursuit of his activities at the head of the two companies and, in particular, in the assignment of his shares to third parties before being expelled. As a result of his expulsion and the conditions in which it was carried out, the fortunes of both companies, and in particular of Africontainers, immediately went into sharp decline and their assets were dispersed<sup>32</sup>.

64. The financial consequences of the resulting “potential loss of earnings” can be valued at a fraction of the exchange value of the shares making up the entire share capital of the two companies. In case of sale, the value of the two companies, which had no liabilities, would have taken account of:

- the value of the movable and immovable property which they owned, as catalogued in the case of Africontainers<sup>33</sup>, in a non-exhaustive inventory; and
- the debts owed to them by their various clients, including the Congolese State itself in the “listing paper” case<sup>34</sup>.

65. In view of Mr. Diallo’s central and essential role in the activities of the two companies, the potential earnings he lost can be put at 50 per cent of the exchange value of the shares he held on the date of his first arrest, namely, a total value of US\$4,360,000.

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<sup>31</sup>See paras. 26-39 above.

<sup>32</sup>OG, Anns. 31, 32 and 33.

<sup>33</sup>MG, Ann. 199.

<sup>34</sup>MG, Anns. 46-50.

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66. This valuation takes account of the debt of US\$1,000,000 owed to Africom-Zaire by the Congolese State in connection with the “listing paper” case, and of the value of the two plots of land in the very centre of Kinshasa, mentioned earlier, of which it is the legitimate owner. Warehouses for both of Mr. Diallo’s companies are sited on one of those plots of 8,000 square metres; the other, of 2,400 square metres, is the site of Africontainers’ offices and accommodation.

67. Africom-Zaire had invested US\$5,000,000 in the purchase and development of the first of those plots, and US\$2,000,000 in the second. The sale of the plots had been notarized, but in view of the circumstances of the expulsion the related documents were left behind in the DRC, together with the invoices relating to their development.

68. The valuation also takes account, in the case of Africontainers, of the cost of 600 containers, assessed at a knockdown price of US\$1,200 per unit, giving a total of US\$720,000.

### CONCLUSIONS

69. In compensation for the damage suffered by Mr. Ahmadou Sadio Diallo as a result of his arbitrary detentions and expulsion, the Republic of Guinea begs the Court to order the Democratic Republic of the Congo to pay it (on behalf of its national) the following sums:

- US\$250,000 for mental and moral damage, including injury to his reputation;
- US\$6,430,148 for loss of earnings during his detention and following his expulsion;
- US\$550,000 for other material damage; and
- US\$4,360,000 for loss of potential earnings;

amounting to a total of eleven million five hundred and ninety thousand one hundred and forty-eight American dollars (US\$11,590,148), not including statutory default interest.

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Furthermore, as a result of having been forced to institute the present proceedings, the Guinean State has incurred unrecoverable costs which it should not, in equity, be required to bear and which are assessed at US\$500,000. The Republic of Guinea also begs the Court to order the DRC to pay it that sum.

The Democratic Republic of the Congo should also be ordered to pay all the costs.

Then justice will be done!

6 December 2011,

(Signed) Hassane II DIALLO,  
Co-Agent of the Republic of Guinea.

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