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Lundi 19 avril 2010 à 10 heures 50

Monday 19 April 2010 at 10.50 a.m.

8 The PRESIDENT: Please be seated. The sitting is open.

The Court meets today to hear the oral arguments of the Parties in the case concerning *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)*.

Before continuing, I should like to express my regret, on behalf of the Court, at the fact that this hearing has opened late, because a difficulty first had to be resolved. The issue that arose stems from a situation of which everyone is aware, namely the disturbances caused by the volcanic eruption in Iceland. The Democratic Republic of the Congo has informed the Registry that, in view of the current air traffic problems, its delegation cannot be present for today's hearings. Consequently, and after consulting Guinea's delegation on a proposal submitted by the Democratic Republic of the Congo for the rescheduling of the hearings, the Court has decided for the moment to hold today's hearings, bearing in mind the problem encountered by the DRC's delegation, with the agreement of Guinea. The Court will communicate new dates to the Parties for the remainder of the proceedings without delay.

I would now like to note that, for reasons which have duly communicated to me, Judges Shi and Buergenthal, who sat in previous phases of the case, will not be able to sit in the present phase.

Since the Court does not include upon the Bench a judge of the nationality of either of the Parties, both Parties have availed themselves of the right, under Article 31, paragraph 2, of the Statute, to choose a judge *ad hoc*. The Republic of Guinea first chose Mr. Mohammed Bedjaoui, who resigned on 10 September 2002, and subsequently Mr. Ahmed Mahiou. The Democratic Republic of the Congo chose Mr. Auguste Mampuya Kanunk'A-Tshiabo. Both Mr. Mahiou and Mr. Mampuya were installed as judges *ad hoc* in the case on 27 November 2006 at the opening of the hearings on the preliminary objections raised by the Democratic Republic of the Congo.

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9 Before recalling the principal steps of the procedure, I would first like to pay solemn tribute, on behalf of the Court, to the memory of one of its former Members, Judge Géza Herczegh, who died on 11 January this year.

Judge Géza Herczegh was born in 1928 in Nagykapos, Slovakia. After studying law at the University of Szeged and gaining a Ph.D. in jurisprudence, he began an academic career devoted to the teaching of international law in several universities in his own country and abroad, before becoming, in 1967, Head of the International Law Department of the Law Faculty of the University of Pécs, then, in 1981, Dean of the same Faculty. He published numerous works and articles, chiefly on international humanitarian law, but also on general international law, on the law of international relations and on the rights of minorities. His expertise in these many fields earned him national recognition: after having been elected a Member of the Hungarian Academy of Sciences, he was appointed Vice-President of the Department of Legal and Economic Sciences of this prestigious institution.

Géza Herczegh also enjoyed a brilliant diplomatic career in his favourite field, humanitarian law. He was chosen to represent the Hungarian Red Cross Society as expert on international humanitarian law at the conferences of The Hague (1971), Vienna (1972), Tehran (1973) and Monaco (1984). He was also selected to act as governmental expert on international humanitarian law at the conferences of Geneva in 1971 and 1972, before serving as a member of the Hungarian delegation at the Diplomatic Conference of Geneva on the protection of victims of international armed conflicts from 1974 to 1977, and later as Vice-President of the Third Commission of the same Conference. He was also Rapporteur at the Third Conference on Parliamentary Democracy organized in 1991 by the Council of Europe on the topic of "Problems of Transition from an Authoritarian or Totalitarian Régime to a Genuinely Democratic System", and a member of the expert working group preparing the draft convention on peaceful settlement of disputes within the framework of the Conference on Security and Co-operation in Europe in 1992.

Finally, Judge Herczegh was a member of the Constitutional Court of the Republic of Hungary from 1990 to 1993, before being elected to the International Court of Justice, where he
10 served for almost ten years from 10 May 1993 to 5 February 2003. Modest, discreet and ever courteous, he was also self-assured. A dedicated worker, he was renowned for his extensive knowledge of case files, as well as his intellectual rigour and integrity. A man of conviction who was also open to discussion, he actively participated in the collective work of the Court. All of his former colleagues can attest to the richness and clarity of his thinking, as well as to his commitment

in his work within our institution. We will remember his many astute contributions during the Court's deliberations. Géza Herczegh was a highly respected Member of the Court. He remains, to this day, the only Hungarian judge, elected or *ad hoc*, to have sat at the Court. The Court pays tribute to the memory of a very dear colleague and an eminent judge.

I would equally like to pay tribute to two other distinguished figures of international law who have also recently passed away, and who held very close ties with our Court: Krzysztof Skubiszewski and Sir Ian Brownlie.

President Krzysztof Skubiszewski was born in 1926 in Poznań, Poland. He had a long and brilliant career devoted to the teaching of international law in several universities in his own country and abroad.

He was the first Polish Minister for Foreign Affairs in the post-communist era between 1989 and 1993, and made a significant contribution to improving relations between Poland and the recently reunified Germany, thanks to an agreement on the recognition of the border between them.

Krzysztof Skubiszewski was chosen by Portugal to sit as judge *ad hoc* in the case concerning *East Timor (Portugal* v. *Australia)*, then by Slovakia to sit as judge *ad hoc* in the case concerning *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*. A man admired by all for his immense knowledge of law, of great rigour, he was endowed with keen analytical skills and an extraordinary capacity for work. His death is an enormous loss to international law and international justice.

Professor Sir Ian Brownlie was born in 1932 in Liverpool. A respected academic and well-known practitioner among those involved in international law, he served many times as

11 Counsel before the International Court of Justice. Over a quarter of a century, in that capacity he appeared before the Court in more than 40 cases, including the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, and, more recently, the case concerning *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)*, the case *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, and the case concerning *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua)*. He was held in high esteem by Members of the Court, who, over the years, were able to appreciate his professionalism, his talent in argument, his integrity and his independence. He had, during the

course of his career, the opportunity to put his quick intelligence and extensive knowledge of law to the service of the most varied causes. His death, under tragic circumstances, is a major loss to international justice and to the development of international law.

I would now like to invite you to stand and observe a minute's silence in memory of Judge Herczegh, President Skubiszewski and Sir Ian Brownlie.

The Court observed a minute's silence.

The PRESIDENT: Please be seated.

I shall now turn to the case which is before the Court today and regarding which I shall recall the principal steps of the procedure.

On 28 December 1998, the Government of the Republic of Guinea filed in the Registry of the Court an Application instituting proceedings against the Democratic Republic of the Congo in respect of a dispute concerning "serious violations of international law" allegedly committed "upon the person of a Guinean national". The Application consisted of two parts, each signed by Guinea's Minister for Foreign Affairs. The first part, entitled "Application", contained a succinct statement of the subject of the dispute, the basis of the Court's jurisdiction and the legal grounds relied on. The second part, entitled "Memorial of Guinea", set out the facts underlying the dispute, expanded on the legal grounds put forward by Guinea and stated Guinea's claims. In the first part of the Application, Guinea maintained that:

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> "Mr. Ahmadou Sadio Diallo, a businessman of Guinean nationality, was unjustly imprisoned by the authorities of the Democratic Republic of the Congo, after being resident in that State for thirty-two . . . years, despoiled of his sizable investments, businesses, movable and immovable property and bank accounts, and then expelled."

Guinea added that "[t]his expulsion came at a time when Mr. Ahmadou Sadio Diallo was pursuing recovery of substantial debts owed to his businesses by the State and by oil companies established in its territory and of which the State is a shareholder". According to Guinea, Mr. Diallo's arrest, detention and expulsion constituted, *inter alia*, violations of

> "the principle that aliens should be treated in accordance with 'a minimum standard of civilization', [of] the obligation to respect the freedom and property of aliens, [and of] the right of aliens accused of an offence to a fair trial on adversarial principles by an impartial court".

To found the jurisdiction of the Court, Guinea invoked in the first part of its Application the declarations whereby the two States have recognized the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute of the Court.

By an Order of 25 November 1999, the Court fixed 11 September 2000 as the time-limit for the filing of a Memorial by Guinea and 11 September 2001 as the time-limit for the filing of a Counter-Memorial by the Democratic Republic of the Congo. By an Order of 8 September 2000, the President of the Court, at Guinea's request, extended the time-limit for the filing of the Memorial to 23 March 2001; in the same Order, the time-limit for the filing of the Counter-Memorial was extended to 4 October 2002. Guinea duly filed its Memorial within the time-limit as thus extended.

On 3 October 2002, within the time-limit set in Article 79, paragraph 1, of the Rules of Court as adopted on 14 April 1978, the Democratic Republic of the Congo raised preliminary objections in respect of the admissibility of Guinea's Application. In accordance with Article 79, paragraph 3, of the Rules of Court, the proceedings on the merits were then suspended. By an Order of 7 November 2002, the Court, taking account of the particular circumstances of the case and the agreement of the Parties, fixed 7 July 2003 as the time-limit for the presentation by Guinea of a written statement of its observations and submissions on the preliminary objections raised by the

13 Democratic Republic of the Congo. Guinea filed such a statement within the time-limit fixed, and the case thus became ready for hearing on the preliminary objections.

The Court held hearings on the preliminary objections raised by the Democratic Republic of the Congo from 27 November to 1 December 2006. In its Judgment of 24 March 2007, the Court declared the Application of the Republic of Guinea to be admissible "in so far as it concerns protection of Mr. Diallo's rights as an individual" and "in so far as it concerns protection of [his] direct rights as *associé* in Africom-Zaire and Africontainers-Zaire". On the other hand, the Court declared the Application of the Republic of Guinea to be inadmissible "in so far as it concerns protection of Mr. Diallo in respect of alleged violations of rights of Africom-Zaire and Africontainers-Zaire".

By an Order of 27 June 2007, the Court fixed 27 March 2008 as the time-limit for the filing of the Counter-Memorial of the Democratic Republic of the Congo. That pleading was duly filed within the time-limit thus prescribed.

By an Order of 5 May 2008, the Court authorized the submission of a Reply by Guinea and a Rejoinder by the Democratic Republic of the Congo, and fixed 19 November 2008 and 5 June 2009 as the respective time-limits for the filing of those pleadings. The Reply of Guinea and the Rejoinder of the Democratic Republic of the Congo were duly filed within the time-limits thus prescribed.

I note the presence at the hearing of representatives of both Parties. In accordance with the arrangements for the organization of the procedure which have been decided by the Court, the hearings will comprise a first and second round of oral argument. However, as I have already said, the schedule for the proceedings will have to be modified, with the co-operation of the Parties.

The Republic of Guinea, which is the Applicant in the case, will be heard first. Before giving the floor to its Agent, I wish to say that, because of the delay of almost an hour at the start of the hearing, some adjustments will have to be made in the distribution of the speaking time allocated to the Republic of Guinea. Since Guinea's first round of oral argument must be completed today, this afternoon's sitting will be extended as necessary. Having said that, I now give the floor to the Agent of Guinea, Mr. Mohamed Camara. You have the floor.

14 Mr. CAMARA:

1. Mr. President, Members of the Court, once again it is a great honour for me to represent my country before the Court. However, I must begin by pointing out that our delegation would be significantly larger were it not for the effects of the volcanic ash cloud coming from Iceland: the delegation appointed by the Prime Minister himself — which was to be led by Colonel Siba Lohalamou, Minister of Justice and Keeper of the Seals, accompanied in particular by Ms Djénabou Saïfon Diallo, Minister of Co-operation — has been detained in Conakry. The seniority of the members it was due to include nonetheless reflects the importance attached by the Republic of Guinea to the case it has brought before you, going beyond political divisions and in spite of the difficulties which we have been able to overcome.

2. This, despite what the Democratic Republic of the Congo would have you believe, is not — at least not simply — a "big money" case, if I may use that expression. Granted, there are financial interests at stake, even if, as I have already had the honour to explain to the Court, they are not on the scale suggested in our Application — we acknowledge that the figures given at that time were exaggerated, on account of our inexperience. More than that, however, this is a case about basic questions of principle:

— Can a State, as the DRC claims, expropriate companies — whether national or foreign — and expel those managing them, simply because they are requesting that the debts owed to the companies in question should be honoured?

— Can a State of residence "refuse entry" to an alien who has lived in its national territory for 32 years, without any other form of judicial process?

— Is it acceptable to throw a person in prison — irrespective of the acts of which he stands accused — on several occasions and for long periods, without informing him of the charges laid against him?

— Can it be tolerated that a State should use expulsion as a (poorly) concealed means of expropriating the property of a foreign national?

— Is it acceptable for the alien in question to have his property expropriated without any judicial decision or compensation, on the pretext that the companies which he owns in the country supposedly have that country's nationality, even though he is the sole *associé*, and therefore the sole owner?

15 3. Having said that, Mr. President, I wish to repeat in the strongest possible terms that the referral to the Court and the maintenance of our Application must not be interpreted at all negatively by the people and Government of the DRC, the Democratic Republic of the Congo, with whom we have a very amicable relationship. A dispute is merely a very small cloud in an otherwise blue sky; but since the cloud is there, it needs to be dispersed, and this Court is the obvious and appropriate setting in which to settle this dispute, which must in no way cast a shadow over the excellent relations between our two sister republics.

4. Before giving them the floor, Mr. President, I should like to express publicly the Republic of Guinea's very sincere thanks to our counsel: their selflessness in working on this case has been

matched only by their efficiency. And I take this opportunity to express my regret at the absence of Professor Alain Pellet, Deputy Agent, who has also been kept away from the bar today by the cloud of ash coming from Iceland. The oral argument he had prepared on Guinea's right to reparation and questions of causality will be presented by Professor Thouvenin this afternoon, which will conclude our presentations. Before that, in a few moments, I shall be followed by Mr. Luke Vidal, member of the Paris bar, who will give a general account of the facts in the case. He will be followed this morning by Professors Thouvenin and Forteau, who will explain in turn why the DRC bears international responsibility for the arrests and arbitrary detentions which it carried out, and for the expulsion of Mr. Diallo; Mr. Sam Wordsworth will then describe the violations by the Respondent of the rights belonging to Mr. Diallo as sole *associé* of Africom-Zaïre and Africontainers-Zaïre. This afternoon, before Professor Thouvenin reads out our final argument, Mr. Daniel Müller will show that the actions of the DRC do in fact constitute an indirect and unlawful expropriation of Mr. Diallo's property.

5. Mr. President, Members of the Court, thank you for your attention. I should be grateful, Mr. President, if you would now give the floor to Mr. Luke Vidal.

The PRESIDENT: Thank you, Mr. Camara. I now give the floor to Mr. Luke Vidal.

16 Mr. VIDAL:

I. THE RELEVANT FACTS

1. Mr. President, Members of the Court, this is the first time that it has fallen to me to address this Court, the highest international judicial body, and it is a great honour for me to be before you, as the curtain rises on these two rounds of oral arguments, with the task of describing the factual background to the coming proceedings. I would like to express my profound appreciation to the authorities of the Republic of Guinea for the trust they have in this way shown and the heavy responsibility they have placed upon me.

2. The case brought before you today for your judgment is a remarkable one, and yet, paradoxically, its interest lies in its very simplicity. It centres on one man, Mr. Ahmadou Sadio Diallo, a Guinean national, and his relations with the respondent State.

Mr. Diallo was not a representative of a foreign power, even though the Republic of Guinea did, subsequently, afford him its diplomatic protection so that his interests might be protected in the courts. Nor was he a representative of any major industrial or economic grouping, even though it is cross-border private interests which have, quite clearly, been behind the DRC's bid to destabilize and then dispossess Mr. Diallo, which has given rise to this dispute.

3. If I had to give a summary at this stage of the facts giving rise to the case which you are called upon to decide, it is that Mr. Diallo is a foreign businessman who, in his occupation and his life in general, came up against the arbitrary exercise of power by his State of residence, the DRC.

I. Mr. Diallo's investments in Zaire

4. It is beyond doubt, and indeed has never been disputed by the DRC, that Mr. Diallo was an intuitive and brilliant businessman and that the projects he led throughout the 1980s were characterized by successes all the more remarkable in that he had no external support.

5. Having arrived in the Congo in 1964 at the age of 17, Mr. Diallo had, some 15 years later, set up the two trading companies which were to be the vehicles for the expansion of his activity and his business success:

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(i) Africom-Zaire, first of all, which was registered in 1974, offering services in the import-export field;

(ii) then Africontainers, incorporated in 1979, engaged in the carriage of goods[1].

6. Both those companies, set up in the form of private limited liability companies *(sociétés privées à responsabilité limitée)* or SPRLs, were incorporated in accordance with Congolese law. However, given the departure of the other founding shareholders *(associés)*[2], the entire capital of the two corporations was, from 18 April 1980, directly or indirectly held by Mr. Diallo.

7. The business of the first company, Africom-Zaire, was plainly prosperous, both in terms of its customers, which included the Congolese State itself[3], and of the value of the import operations it was able to finance[4]. The activity of Africontainers is however more unusual and is

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[1]Guinea's Memorial (MG), Anns. 1 and 2.

[2]MG, Anns. 3, 34 and 46.

[3]MG, Ann. 13.

[4]MG, Anns. 46 to 51.

worth dwelling on briefly. The reason behind the success of Africontainers during the 1980s and until the beginning of the 1990s lies in the development and exploitation of a concept, innovative in the country at the time, of transporting goods by container. Whereas on occasion the public infrastructure of the Congo could not ensure the transportation of goods under normal circumstances, in particular of the supplies required for the exploitation of natural resources, the solution developed by Mr. Diallo was quite clearly an attractive, if not vital, transport solution for many economic operators[5].

8. A list of Africontainers' customers and contracts gives a clear picture of the success met by its economic model:

(i) on 1 October 1980, a contract was concluded with Zaire Mobil Oil[6], under which, amongst other terms, Zaire Mobil Oil undertook, after an initial period, to use Mr. Diallo's company to transport each month a minimum of 400 tonnes of petroleum products, viz. the equivalent of 30 containers, from the capital to the eastern region of Shaba[7];

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(ii) On 24 July 1981, another agreement was signed with Zaire Shell[8], this time reserving to Africontainers exclusive rights to the containerized transport of Zaire Shell's petroleum products along the same route from Kinshasa to the interior[9];

(iii) On 29 June 1982, it was Gécamines, no less, the national company responsible for all the mining concessions in the country, which called on the services of Africontainers to transport its mining products from its mines to the ports of export from the DRC[10].

9. Performance of these contracts soon marked out Africontainers as the partner of choice for journeys between the port areas and the mining sites of the interior: in one direction, Mr. Diallo's company carried the products supplied to Gécamines by the oil companies; in the other, it transported the products mined by the State company. It made sense, therefore, that all the parties,

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[5]See MG, para. 2.10, p. 13.

[6]MG, Ann. 6.

[7]*Ibid*., para. 3.03: "The company [Zaire Mobil Oil] undertakes likewise to make the above-referred quantities of products available to the Carrier [Africontainers]."

[8]MG, Ann. 8.

[9]*Ibid*., para. 3.2: "The Parties agree that exclusive rights to transport Zaire Shell products by container shall be granted only to Africontainers."

[10]MG, Ann. 12.

Africontainers, Gécamines, Zaire Mobil Oil, Zaire Fina and very soon Zaire Shell[11] should combine to conclude, on 13 July 1983, a "tripartite contract"[12] to regulate the traffic.

10. Those four contracts all had one-year terms, renewable automatically for the same period, unless expressly terminated. It is worth noting that none of them was ever formally terminated.

11. During the 1980s, Africontainers expanded constantly, to meet the ever-growing demand for transport. The acquisition of 600 containers[13] — Mr. Diallo had undertaken, in fact, under the
19 "tripartite" contract, to "maintain a sufficient stock of containers" to meet any request from Zaire Fina[,] Zaire Mobil Oil and soon Zaire Shell[14] —, the fivefold increase in Africontainers' business, which rose from 2,090 tonnes of freight carried in 1980 to 10,215 tonnes four years later, the 120 people working for the company or again the investment of over four million deutschmarks in acquiring a river-going container barge[15] in 1987, are all testimony to the success of the project of this immigrant from Guinea.

12. In 1984, this "brilliant idea", in the words the press used of him[16], had made Mr. Diallo a "prosperous man", who had in only a few years become an indispensable partner for the foremost companies in the Congo, first-ranking amongst which was the State company Gécamines.

II. The arbitrary measures taken against Mr. Diallo

13. The progress of Mr. Diallo's businesses was however abruptly halted in 1988, when a first arrest, followed by detention for over a year, put a stop to his plans. Somewhat unexpectedly, it was from the direction of Africom-Zaire, despite its being less susceptible, by reason of its activity, to falling foul of the interests of the public authorities, that the first dispute arose between Mr. Diallo and the Congolese State, in the "listing paper" case.

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[11]MG, Ann. 14.

[12]MG, Ann. 13.

[13]MG, Anns. 10 and 16.

[14]MG, Anns. 13 and 14.

[15]MG, Ann. 18; Observations of the Republic of Guinea (OG), Anns. 7 and 9.

[16]MG, Ann. 18.

14. The facts are as follows. At the end of 1987, Africom-Zaire found itself a creditor of the Congolese State, owed 178 million zaires, that is to say, at the time, nearly US$1 million[17]. This was the consideration for three orders, placed between 1983 and 1986 by the Computer Directorate of the Finance Department of the Congolese Government with Mr. Diallo's import-export company, for office supplies, primarily for printer listing paper. Those orders had been met in full[18], to the satisfaction of the people with whom Mr. Diallo dealt, who indeed acknowledged on that occasion how "reliable" his company was[19].

20 15. The debt to Africom-Zaire, neither the existence nor the amount of which was ever disputed, would in fact see the first stages of enforcement. On 13 November 1987, payment in full was ordered by the Finance Department, which would for that purpose issue five bills of exchange[20], falling due between January and May 1988. This was a crucial decision for the activity of Mr. Diallo's group, since the acquisition of a self-propelling barge by Africontainers, his other company, was to be financed from those payments[21]. The importance of that investment to the DRC[22] also explains why instructions were given to the Governor of the Bank of Zaire to "pay these bills on the dates indicated"[23].

16. However, such a payment was plainly out of keeping with the priorities of the executive then in power. Preferring to give precedence to certain "substantial disbursements", it was decided, at the highest level of the Congolese State, once and for all to ignore the debt to Africom-Zaire. On 14 January 1988, the Prime Minister therefore ordered suspension of payment of the bills issued, two months previously, by his Finance Minister[24]. Then, the following week, a smear campaign, set in train at the highest level of the State and taken up right on cue by the Congolese press[25], would describe the issuing of the bills of exchange as the result of fraud by Mr. Diallo. It then only

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[17]Guinea's Reply (RG), Ann. 3.

[18]OG, Anns. 11 and 12.

[19]MG, Ann. 26.

[20]MG, Anns. 46 to 50.

[21]OG, Ann. 8.

[22]MG, Ann. 52.

[23]MG, Ann. 51.

[24]MG, Ann. 53.

[25]OG, Ann. 14.

remained for the Respondent to deprive this Guinean national of any possibility of refuting those allegations. On 25 January 1988, on instructions from the Prime Minister[26], Mr. Diallo was accordingly arrested, and subsequently imprisoned, two days later, in Makala prison.

17. One would have to wait nearly a year after his incarceration for Mr. Diallo to be released, without any form of trial, on 3 January 1989. He would be informed only three weeks later that the *Ministère Public* (Public Prosecutor) had "closed" the case, "for inexpediency of prosecution"[27].

21 As for the debt of 178 million zaires, whose enforceability was, quite clearly, the sole reason for that long and arbitrary deprivation of liberty, it has never been honoured.

18. Mr. Diallo realized then that his relations with the Congolese State authorities would never be the same. It was not that he had given up hope of recovering from the Respondent monies to which he was, and remains, entitled[28]. However, conscious that only the greatest prudence could shield him from actions threatening, if not his life, at least his freedom, he would never again publicly seek to hold his public-sector partners responsible, whether they were the Congolese State, Gécamines or Onatra.

19. Nevertheless, his involuntary absence for over a year had, it would appear, left the way open for all manner of exploitative acts under the contracts with Africontainers[29]. Mr. Diallo thus decided to seek judicial remedies in the disputes existing for several years between his company and its private-sector partners. The response he received from the Congolese courts could only have vindicated his decision, until, that is, the executive saw fit to put a stop to the danger which the actions being prosecuted by Mr. Diallo represented to its interests or those of companies connected to it.

20. On behalf of Africom-Zaire and Africontainers, Mr. Diallo brought three separate actions before the Congolese courts, seeking the recovery of commercial debts or damages from his companies' contractual partners. The decisions handed down in those proceedings confirmed not

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[26]OG, Ann. 15.

[27]OG, Anns. 16 and 17.

[28]OG, Ann. 18.

[29]MG, Ann. 55.

only that there was, irrefutably, on each occasion, an actionable interest but, above all, that in at least one case, that interest should have enabled Mr. Diallo to recover significant sums of money.

21. In the first two sets of proceedings, against Zaire Fina and PLZ respectively, the Kinshasa *Tribunal de grande instance* found in favour of Mr. Diallo's companies:

22 (i) on 12 August 1993, Zaire Fina was ordered to pay damages to Africontainers in partial compensation for the injury caused by the loss of two containers which had been leased to it under the "tripartite" contract[30];

(ii) on 24 August 1994, PLZ, the landlord of a property leased to Africom-Zaire, was ordered to repay to Africom-Zaire sums wrongly received in respect of rent[31].

22. On 24 February[32] and 9 March 1994[33], however, the Kinshasa *Cour d'appel*, hearing the appeals of Zaire Fina and PLZ, overturned those judgments, although in the absence of Africontainers and Africom-Zaire, whose submissions had been ruled inadmissible.

23. Each of Mr. Diallo's companies then lodged an appeal on points of law. The submissions filed in those proceedings by the Ministère Public, in January[34] and April 1995[35], are similar in both cases. Having upheld such unambiguous grounds of appeal as the "inadequacy [or, even] absence of a statement of reasons", and the "misapplication or mistaken application of the law", the Ministère Public submitted that the contested judgments should be quashed[36]. The final outcome of those disputes is not yet known, since the *Cour de cassation* has never ruled on Mr. Diallo's appeals, after his sudden expulsion from Congo in 1996.

24. The third set of proceedings is, in fact, the direct cause of that expulsion, although it does not, any more than the other two disputes, justify it. The chronology of the action between Zaire Shell and Africontainers in fact follows that of the coercive measures taken against Mr. Diallo.

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[30]Preliminary Objections presented by the Democratic Republic of the Congo (PODRC), Ann. 53.

[31]MG, Ann. 130.

[32]PODRC, Ann. 54.

[33]MG, Ann. 146.

[34]*Ibid*.

[35]MG, Ann. 149.

[36]*Ibid*.

25. On 3 July 1995, the Kinshasa *Tribunal de grande instance* upheld the claims brought by
23 Mr. Diallo's company against Zaire Shell and accordingly ordered the oil company to pay an amount valued at the time at more than US$13 million, and also ordered provisional enforcement of the decision[37].

26. By all appearances, that decision caused great concern to the oil company, above all after its first application for a stay of the provisional enforcement was dismissed, on 24 August 1995, by the Kinshasa *Cour d'appel*[38]. Five days later, on 29 August, Zaire Shell had no hesitation in requesting[39], and then demanding[40], of the Minister of Justice a "decision to save [its] property"[41], thereby confirming the collusion between the executive and the oil companies to defeat the court rulings which had upheld Mr. Diallo's claims.

27. Things were indeed becoming awkward for Zaire Shell. Twice, on 13[42] and 28[43] September 1995, the First President of the Kinshasa *Cour d'appel* and then the Minister with responsibility drew attention to the fact that, notwithstanding the appeals lodged by Zaire Shell, the contested judgment remained enforceable. Likewise twice, on 13 September[44] and 6 October[45], Mr. Diallo, his entitlement confirmed by the view of the *Cour d'appel*, attempted to levy execution of the judgment against Zaire Shell. Each time, however, even as the bailiff was carrying out the forced execution of the first instance judgment, the executive intervened to have the seizures of the company's property lifted[46].

28. That response by the executive was apparently still not enough for the oil companies. Zaire Fina and Zaire Mobil Oil then joined Zaire Shell to complain about Mr. Diallo and request
24 directly of the Prime Minister, on 15 November 1995, "Government intervention to warn the courts

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[37]MG, Ann. 153.

[38]PODRC, Ann. 65.

[39]MG, Ann. 166.

[40]PODRC, Ann. 72.

[41]MG, Ann. 166.

[42]MG, Ann. 170.

[43]MG, Ann. 177.

[44]MG, Ann. 171.

[45]MG, Ann. 179 and OG, Ann. 26.

[46]MG, Ann. 171 and OG, Ann. 26.

and tribunals of Mr. Diallo Amadou Sadio's activities in his campaign to destabilize trading companies"[47].

29. In actual fact, the Head of Government had by that time already fulfilled the hopes of the oil companies. As early as the preceding 31 October, that is to say, in the days following the attachment of Zaire Shell's accounts on application by Mr. Diallo, an expulsion decree had been issued against him[48], and he was then arrested and detained until his departure could be organized[49].

30. Mr. Diallo's actual "refusal of entry to" Congolese territory only took place three months later, on 31 January 1996, and the Parties to these proceedings dispute what happened during that period. Far from the contrived interpretation advanced by the Respondent in its attempt to justify the treatment meted out to a Guinean national, the manner in which Mr. Diallo was, again, repeatedly deprived of liberty, is clearly established in the documents produced in the proceedings:

(i) he was arrested on 5 November 1995[50], under no legal or administrative provision whatsoever, and would be detained directly in the "immigration department's lock-up" for more than sixty days[51];

(ii) he would then be released, without trial, on 10 January 1996[52], on instructions from the Congolese President himself[53];

(iii) however, this was only to be rearrested, four days later, on 14 January, on the instructions of the Prime Minister, who had obviously decided to enforce his expulsion decree[54], even though it involved disregarding the wishes of the Head of State and the views of his own Minister of Justice who had, for his part, upheld Mr. Diallo's claims[55];

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[47]PODRC, Ann. 74.

[48]The DRC's Counter-Memorial (CMDRC), Ann. 5.

[49]OG, Ann. 27.

[50]*Ibid*.

[51]MG, Ann. 193.

[52]MG, Ann. 194.

[53]RG, Ann. 2.

[54]CMDRC, Ann. 5.

[55]RG, Ann. 2 and MG, Ann. 177.

25 (iv) lastly, on 31 January 1996, after a further fourteen days' detention, Mr. Diallo was expelled from the Congo, without even being able to recover his personal possessions[56]. The newspaper *Evénement de Guinée* would describe his return to his native country as follows: "He arrived in Conakry penniless, having just the coat and pants he was wearing. Rich yesterday, destitute today."

31. A Zairean newspaper published, in its 6 February 1996 edition[57], a report that the plane ticket needed for Mr. Diallo's expulsion was paid for by Zaire Shell. That report, which was confirmed by Guinea's Ambassador in Kinshasa at the time[58], has never been disputed by the DRC. It must therefore be taken as correct and is a good illustration of the fact that, behind the — already crumbling — façade of an administrative procedure, the expulsion was the last action in a campaign orchestrated at the highest level of political and financial power in the country, to put an end to an astute businessman's thirty-two year presence in the Congo.

32. Mr. Diallo did not, after his involuntary departure from Zaire, give up all hope of continuing his activities or, at the very least, of protecting his rights in his former country of residence. However, those wishes need to be seen well and truly in the context of the circumstances in which he found himself on his return to Guinea.

33. Mr. Diallo had spent his entire adult life in the Congo. All his investments had been made and he had built up his whole fortune in that country. If he was heavily burdened by debt already in 1995, when he was still struggling to assert his companies' rights in the courts[59], his abrupt expulsion the following year plunged him into utter destitution[60]. He no longer had the means to pursue his activities, in any effective way, in his former country of residence.

34. This concludes my account of the facts of this dispute.

26 35. I thank you, Mr. President, Members of the Court, for giving me your attention, and would ask you, Mr. President, to give the floor to Professor Jean-Marc Thouvenin, who will set out

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[56]RG, Ann. 1.

[57]MG, Ann. 196.

[58]RG, Ann. 2.

[59]OG, Ann. 22.

[60]RG, Ann. 1.

the violations of international law committed by the Respondent on the two occasions on which Mr. Diallo was arrested.

The PRESIDENT: Thank you, Mr. Luke Vidal. I shall now give the floor to Professor Jean-Marc Thouvenin.

Mr. THOUVENIN:

II. THE DRC'S RESPONSIBILITY ARISING FROM MR. DIALLO'S ARREST AND DETENTION

Mr. President, Members of the Court, it is always an honour and very moving for me to appear before your Court, and I sincerely thank the Republic of Guinea for giving me the opportunity to do so.

1. Mr. President, the facts whose chronology has just been set out by Mr. Vidal clearly show three sets of serious events, during which the Respondent State committed multiple violations of Mr. Diallo's rights as an individual: his arrest and detention in 1988-1989; his arrest and detention on several occasions between 1995 and 1996 and his expulsion in 1996.

2. Professor Forteau will revert in detail to Mr. Diallo's expulsion so I will not deal with it here. My task is to show that the various arrests and detentions engage the responsibility of the Democratic Republic of the Congo by virtue of the violations of international law which characterized them. I will first show that the facts are established (I), then that they constitute numerous wrongful acts (II).

I. Establishment of the facts

A. Arrest and detention from 1988 to 1989

Facts not disputed

3. Mr. President, Members of the Court, strictly as regards proof of the facts being discussed before you, the pleadings amply show you, and the DRC accepts or does not dispute:

27 (i) that "Mr. Diallo was arrested on 25 January 1988"[61];

[61] RDRC, p. 9, para. 1.26; see also, RG, p. 8, para. 1.13.

(ii) that he was arrested solely at the behest of the First State Commissioner, or then Prime Minister of Zaire[62];

(iii) that the judicial inspector before whom Mr. Diallo was brought during his detention was not independent of the executive authorities. He was, according to the DRC, "an instrumentality of the executive"[63];

(iv) that Mr. Diallo was detained for a year without a hearing, until January 1989[64];

(v) that at no time was Mr. Diallo informed of his rights under Article 36 (1) *(b)* of the Vienna Convention on Consular Relations[65];

(vi) that the only known charges brought by the head of the Zaïrean Government against Mr. Diallo for his imprisonment related exclusively to the debt owed to Africom by Zaire, amounting to 178 700 000 Zaires[66], a sum which "[t]he Democratic Republic of the Congo has never denied owing to Africom-Zaire"[67].

What is disputed between the Parties

4. The above facts are established. The Parties disagree solely on *the ground* for Mr. Diallo's arrest and detention.

5. Here, the Court will have to decide between two arguments. Guinea's argument is that the "documentary evidence" (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)*, *Judgment, I.C.J. Reports 2007*, p. 708, para. 161) included in the written pleadings shows that the only reason why Mr. Diallo spent a year of his life in the Zaïrean jails was the decision by the head of the Zaïrean Government not to honour the debt

28 indisputably owed to Africom[68]. Meanwhile, the DRC argues that Mr. Diallo was imprisoned as part of a judicial investigation by law officers in the Prosecutor's Office of Kinshasa into acts of

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[62]RDRC, p. 10, para. 1.27; see also, RG, p. 11, para. 1.20.

[63]RDRC, p. 9, para. 1.26; see also, RG, p. 13, para. 1.24.

[64]RDRC, p. 10, para. 1.28; see also, RG, pp. 9-10, para. 1.16.

[65]CMDRC, p. 15, para. 1.19; see also, RG, p. 24, para. 1.49.

[66]RDRC, pp. 7-8, paras. 1.15-1.16; see also, RG, pp. 7-8, paras. 1.9-1.13.

[67]CR 2006/50, p. 19, para. 15.

[68]*Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)*, *Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 591, para. 18; RG, pp. 7-10, paras. 1.9-1.16.

fraud of which he had, rightly or wrongly, been accused[69]. Members of the Court, this argument does not bear scrutiny.

6. *Firstly*, no charge of fraud was brought *by Zaïrean justice* against Mr. Diallo in this case. It was the First State Commissioner at the time, Mr. Mabu Mulumba, who alone took the initiative to have an announcement broadcast on national radio and television saying that Mr. Diallo had sought to defraud the sum of 178 700 700 Zaires from the public purse[70], whereas he well knew that that sum was owed and did not constitute any embezzlement, as the Respondent has consistently recognized[71].

7. Furthermore, the only accusation of fraud of which Mr. Diallo or the Embassy of Guinea knew was not judicial in origin. The only accusation of which they were informed is the one relayed by the press, radio and television, following the initiative by the First Commissioner of Zaire[72].

8. And there was never another one, as witnessed by the fact that the press was the only source of information for the judicial officers also. Symptomatically in this respect, when Mr. Diallo was arrested, the only reply as to the reasons for his arrest given by the officials concerned was simply to ask whether he had heard the news[73]. Clearly, that was all they knew. Also, and even more significant, the *only* information given to Mr. Diallo by the judicial authority before which he was brought during his detention was that his "arrest was related to the Prime Minister's communiqué"[74]. The judicial authority therefore had no file, no indictment, nothing to

29 show to Mr. Diallo authorizing his arrest then his imprisonment, other than the Prime Minister's communiqué. Nor does the DRC dispute this, since, on the contrary, it relies on this fact in its attempt to find support for its defence[75].

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[69]RDRC, p. 7, para. 1.16.

[70]RG, Vol. II, p. 5, Transcript of hearing of the victim, Mr. Diallo.

[71]PODRC, pp. 13-14, para. 1.10; CR 2006/50, p. 19, para. 5.

[72]RDRC, p. 7, para. 1.15.

[73]RG, Vol. II, p. 2, Transcript of hearing of the victim (Mr. Diallo).

[74]*Ibid.*, p. 6.

[75]RDRC, p. 8, para. 1.22.

9. *Secondly*, there is no doubt, nor is it disputed, that it was indeed the First Commissioner of State in person who ordered Mr. Diallo's arrest. Not a judicial authority. Moreover, his successor, Mr. Sambwa Piba Nbagui expressly confirmed this in a letter of 4 July 1988 referring to "the order given by my predecessor to bring Mr. Diallo before a court"[76]. The DRC has no option but to acknowledge this in its Rejoinder[77].

10. *Thirdly*, the First State Commissioner's only motive for launching a media campaign against Mr. Diallo and throwing him into prison is revealed by his letter of 14 January 1988 addressed to the Minister for Finance instructing him not to settle the debts owing to Mr. Diallo's company because he wished to keep the Government's resources intact so as to meet "substantial commitments", such as elections[78]. There is strictly no trace of any other motive whatever in the pleadings submitted to the Court, a fact, moreover, not disputed by the DRC.

11. *Fourthly*, no investigation of any kind was conducted in this case. And if the investigation was closed for "reasons of inexpediency of prosecution", this was only as a result of an about-turn by the executive[79].

12. Mr. President, Members of the Court, everything points to the conclusion:

— that it was not in connection with a judicial investigation that Mr. Diallo was arrested, but following a media campaign orchestrated by the executive;

— that no investigation was conducted by law officers in the Prosecutor's Office, who were merely obeying instructions from the executive;

30 — that no act of fraud of any kind was ever alleged before a Congolese court in 1988 with respect to Mr. Diallo, whose financial claims on Zaire have never been disputed.

13. Mr. Diallo was therefore not a victim of judicial proceedings but of patently arbitrary acts. Yet the Respondent believes it can justify itself by maintaining that "the events which befell Mr. Diallo are repeated in Guinea and wheresoever in the world someone suspected of having committed an offence may be placed on remand for purposes of judicial investigation"[80]. No,

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[76]RG, p. 9, para. 1.14.

[77]RDRC, p. 10, para. 1.27.

[78]RG, pp. 7-8, para. 1.11.

[79]RG, p. 10, para. 1.16.

[80]RDRC, p. 7, para. 1.17.

Mr. President, whatever our opponents may say, I do not believe that every day persons of foreign nationality (any more than nationals moreover) are thrown into prison, outside any judicial context, because their companies have undisputed amounts owing from the State for which they have performed services.

14. Visibly ill at ease with its past, the DRC complains in its Rejoinder that it was only informed of the events of 1988 *after* the end of the proceedings on the preliminary objections. Until its Reply, Guinea thus allegedly "omitted to accuse the DRC of arbitrarily arresting and detaining Mr. Diallo in 1988"[81].

15. Mr. President, Guinea is all the more at a loss to understand this allegation as the Judgment of 24 May 2007, which the DRC has read, and which *predates the Reply*, refers not once but twice, and unambiguously, to the events of 1988. Paragraph 18 of that Judgment contains the comment:

> "Guinea contends that Mr. Diallo had already suffered one year of imprisonment, in 1988, after trying to recover debts owed to Africom-Zaire by the Zaïrean State." (*Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Preliminary Objections, I.C.J. Reports 2007*, p. 591, para. 18.)

Then, in paragraph 45, the Court further states that:

> "Guinea described in detail the violations of international law allegedly committed by the DRC against Mr. Diallo. Among those cited is the claim that Mr. Diallo was arbitrarily arrested and detained on two occasions. First in 1988 and then in 1995." (*Ibid.*, p. 600, para. 45.)

31 16. This shows how solid the Congo's criticism is, and it is highly doubtful whether, when presenting its oral pleading, the Respondent will be able to explain away its alleged surprise on reading the Reply, whereas the facts it refers to were already known "in detail" by the Court in 2007. The Congo's indignation is patently mere artifice, as it is clear that the Respondent had every opportunity to familiarize itself with the facts of 1988 well before the 2007 Judgment, and has had many an opportunity to comment upon them. The DRC did not do so before its Rejoinder. It may well regret this now, but the fact nevertheless remains that, as the Court pointed out:

> "[T]he DRC *did not address* the issue of exhaustion of local remedies in respect of Mr. Diallo's arrest, his detention or the alleged violations of his other rights, as an individual, said to have resulted from those measures, and from his expulsion, or to have accompanied them." (*Ibid.*; emphasis added.)

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[81] RDRC, p. 5, para. 1.08.

17. It therefore ill becomes the Respondent to complain of "procedural complications", the nature of which, moreover, it does not explain[82]. But, Mr. President, the DRC's errors go far beyond procedural quibbles, because they are also patent when it seeks to dispute the substance of the facts of 1995-1996.

B. The events of 1995-1996

Facts which are undisputed

18. The Parties agree that Mr. Diallo was undeniably arrested and imprisoned several times in 1995 and 1996 before being expelled. It is also not disputed that he was not informed of his rights under Article 36 (1) *(b)* of the Vienna Convention on Consular Relations[83].

What is disputed between the Parties

19. On the other hand, the Parties disagree on the dates of the periods of imprisonment and release, on the number and duration of the periods in detention, on the motives for the detentions and their arbitrariness[84].

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20. As regards the number and length of the periods of imprisonment, the argument put forward in the DRC's Counter-Memorial is that there were allegedly three periods of detention, all lasting less than eight days. And it is on the basis of this argument that it claims that no period of detention exceeded the maximum of eight days fixed by Congolese law — even though the total of periods of detention which Congo admits amounts to 16 days, which in any event runs counter to the requirements of Zaïrean law, which does not allow more than eight days' detention per expulsion proceedings, whether those eight days are split up into several periods of detention or not[85]. The DRC had no objection at all to the detailed discussion of the evidence on this question presented in the Reply, under the terms of which it is indisputable that Mr. Diallo was detained for two periods well in excess of eight days, of 66 days and two weeks respectively[86]. So I shall not go over this again, and would respectively invite the Court to refer to it.

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[82]RDRC, p. 6, para. 1.13.

[83]RG, pp. 24-26, paras. 1.49-1.53.

[84]RG, p. 15, para. 1.29.

[85]RG, p. 15, para. 1.30.

[86]RG, pp. 15-18, paras. 1.29-1.40.

21. For the rest, the Respondent confines itself to "a few brief observations", claiming to dispute the fact that the sole motive for the arrests and detentions was, as Guinea maintains, to prevent Mr. Diallo from recovering the debts due to his companies, of which he was *gérant* and sole *associé*[87]. This is allegedly contradicted, according to the Rejoinder, by a communiqué from the Ministry of Justice in January 1996, which proves Mr. Diallo right by saying that the debts held by Mr. Diallo's companies were due and should be paid to them[88]. For the DRC, this is enough to demonstrate that the Congolese Government never sought to prevent Mr. Diallo from recovering debts since, on the contrary, he had allegedly publicly confirmed them through his representative, the Minister of Justice.

22. Mr. President, all this communiqué shows is that the Minister of Justice was convinced of the merits of Mr. Diallo's claims. In no way does it show that this was the case of the executive as a whole. Yet, in 1996 precisely, the Government was deeply divided. The episode in January 1996 provides a spectacular illustration of the serious dissent in the Congolese Government

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regarding the sums due to Mr. Diallo's companies, between the First Commissioner of State's clan and President Mobutu's clan. The chronology of the events between September 1995 and Mr. Diallo's expulsion shows the gravity of that dissent. In this respect, it should be noted that:

— on 13 September 1995, the execution of the "fully enforceable" judgment of the Kinshasa *Tribunal de Grande Instance*, which had ordered Zaire Shell to pay Africontainers over $13 million was stayed on the direct but purely verbal orders of the Vice-Minister of Justice[89];

— on 28 September, the Minister of Justice contradicted his Vice-Minister and asked the First President of the Court of Appeal to make arrangements for the enforcement of the decision[90];

— on 6 October, the seizure of the property resumed[91];

— on 13 October, the Minister went back on his decision and verbally instructed the First President of the Kinshasa Gombe Court of Appeal to release the attachments and return the property seized[92];

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[87]RDRC, p. 13, para. 1.41.

[88]*Ibid.*

[89]RG, p. 9, para. 1.41.

[90]RG, p. 20, para. 141.

[91]*Ibid.*

— on 31 October, the First State Commissioner, Kengo Wa Dondo, signed a decree ordering Mr. Diallo's deportation[93];

— on 5 November, Mr. Diallo was apprehended and imprisoned until 10 January 1996[94];

— on 10 January, he was released following the intervention of President Mobutu, who was manifestly opposed to the policy pursued by Mr. Dondo in this case[95];

— the same day, a report by the Minister of Justice, again acting against the instructions of Mr. Dondo, said that the debts due to Mr. Diallo's companies would be paid[96];

34 — Mr. Diallo was immediately rearrested and imprisoned on the instructions of Mr. Dondo[97], then expelled ("refoulé") on the border.

23. This chronology, which sets out the facts which are undisputed, unambiguously shows that Mr. Diallo was at the centre of a political conflict which went far beyond his own person, but also that Mr. Diallo was at the centre of a political conflict in which the sole issue at stake was the payment of the debts concerned. Divided as it was, the Government had no unity or consistency on this matter, contrary to what the DRC would have us believe by claiming that the Minister of Justice was its faithful mouthpiece[98]. This explains the fact that Mr. Diallo was sometimes backed, but most often obstructed, in his attempts to defend the interests of the companies of which he was the *gérant* [manager] and only *associé*, in particular by two successive periods of imprisonment. But there is absolutely no doubt that it was ultimately the First Commissioner of State who carried the day, by resorting to the most effective and radical means, being without appeal: expelling Mr. Diallo, or rather, refusing him entry.

24. I would add that, in any event, the Committee of the Minister of Justice had no effect whatever on the totally arbitrary nature of the treatment inflicted on Mr. Diallo, since it did not prevent him from being again imprisoned then expelled without any legal proceedings.

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[92]RG, p. 20, para. 141.

[93]*Ibid.*

[94]*Ibid.*

[95]RG, Vol. II, p. 16, Transcript of hearing of witness (Mr. Abdoulaye Sylla, former Ambassador of the Republic of Guinea in Kinshasa).

[96]*Ibid.*, p. 17.

[97]*Ibid.*

[98]RDRC, p. 13, para. 1.42.

Consequently, Mr. President, Members of the Court, these acts can but engage the Congo's responsibility, constituting as they do violations of major treaty provisions to which the DRC and Guinea are parties, namely, Article 36 (1) *(b)* of the 1963 Vienna Convention on Consular Relations, and Article 9 of the 1966 Covenant on Civil and Political Rights, to which might be added Article 6 of the African Charter on Human and Peoples' Rights.

II. The unlawful acts

25. Mr. President, Guinea has already demonstrated at length the unlawfulness of the acts perpetrated by the DRC, notably in its Reply[99], and I would respectfully ask the Court to refer to it, as the Rejoinder either does not reply to it at all (A), or replies to it with inconsistent observations (B).

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A. What the Rejoinder omits

The violations of international law constituted by the arrests and detentions in 1995 and 1996

26. An analysis of what the Rejoinder omits shows that the Respondent has refrained from disputing most of Guinea's arguments relating to the violations of international law committed by the arrests and detentions in 1995 and 1996. I will thus have no need to revert to the unlawfulness, with respect to the Covenant on Civil and Political Rights or the African Charter on Human and Peoples' Rights, of both the duration of the periods of imprisonment[100] and the conditions in which the arrests and detentions occurred[101].

The violations of Article 36 (1) *(b)* of the Convention on Consular Relations

27. But the Respondent's silence regarding the violations of Article 36 (1) *(b)* of the Vienna Convention on Consular Relations is somewhat unsettling when it suggests that the DRC does not plan to amend its practices in future. Indeed, it has hardened its completely indefensible position set out in the Counter-Memorial, according to which it was not under an obligation to inform Mr. Diallo — which it did not do —the only obligations imposed upon it by Article 36 (1) *(b)* of

[99]RG, pp. 21-26, paras. 1.42-1.53.

[100]RG, pp. 21-24, paras. 1.42-1.48.

[101]RG, para. 1.48 and p. 44, para. 1.112.

the Vienna Convention being allegedly to respond favourably to any request from an alien in detention for the consular authorities to be informed[102]. The DRC therefore allegedly committed no offence in not informing Mr. Diallo of his rights.

28. This is currently the DRC's position and, logically, Mr. President, it must be inferred that, according to its current practices, the DRC does not always inform foreign nationals of their rights under the Convention. However, the Court has already unambiguously noted the unlawfulness of such an omission. In the *LaGrand* case, the Court found almost unanimously, that:

> "by not informing Karl and Walter LaGrand without delay following their arrest of their rights under Article 36, paragraph 1 *(b)* of the Convention . . . the United States of America breached its obligations to . . . the LaGrand brothers" (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 515, subparagraph (3) of the operative paragraph).

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29. The Judgment delivered in the *Avena* case further emphasized that the obligation to inform is unconditional and cannot be adapted to the circumstances or particular situation of arrested aliens. The Court has stated that "the clear duty to provide consular information under Article 36, paragraph (1) *(b)*, does not invite assumptions as to what the arrested person might prefer, as a ground for not informing him" (*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 46, para. 76).

30. The cases I have just cited concern the United States of America, but this also obviously applies to all the other parties to the Convention. The DRC's responsibility cannot therefore but be duly recognized.

B. The inconsistent observations in the Rejoinder

Violations of Article 9 (1) of the Covenant

31. The DRC breaks its self-imposed silence in its Rejoinder by stating that Mr. Diallo was allegedly arrested and detained in 1988-1989 in connection with a judicial investigation into fraud and in accordance with Congolese criminal procedure. This assertion is clearly intended to give the impression that the Congolese acts comply with Article 9 (1) of the Covenant on Civil and Political Rights, according to which "no one shall be subjected to arbitrary arrest or detention. No one shall

[102] RDRC, pp. 24-25, para. 1.50.

be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

32. To defend itself against any accusation of arbitrariness, the DRC therefore refers to a *judicial procedure*. But where are the *acts* evincing it? They are not in the case documents. However, it is indeed for the DRC to prove what it claims, for it is "a general principle of law, confirmed by the jurisprudence of this Court, that a party which advances a point of fact in support of its claim must establish that fact" (*Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment of 23 May 2008, para. 45; *Application of the Convention for the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 128, para. 204, citing
37 the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 437, para. 101). Also, as regards the violations of Article 9 of the Covenant, the burden of proof lies even less with the victims alone for the obvious reason that, in the cases which deal with this, "frequently the State party alone has access to the relevant information"[103]. This is precisely the case here. Moreover, it is because it is the only one to have all the documents likely to prove its assertions that the level of requirements as regards proof generally required of a State claiming that a disputed arrest is not arbitrary is so high. On the other hand, the untenable nature in this respect of the DRC's position, limited as it is to vague assertions without even a scintilla of proof, is readily apparent from even a brief glance at the *Famara Koné* v. *Senegal* case, which came before the Human Rights Committee. In that case, the United Nations Human Rights Committee was convinced of the absence of arbitrariness because, according to the Committee, the Respondent had:

> "provided detailed information about the charges against the author [of the complaint], their legal qualification, the procedural requirements under the Senegalese Code of Criminal Procedure, and the legal remedies available to the author to challenge his detention. The records reveal that these charges were not based, as claimed by the

[103]Human Rights Committee, Communications No. 146/1983 *Baboeram Adhin and others* v. *Suriname*, views adopted on 4 Apr. 1985, para. 14.2; No. 139/1983, *Conteris* v. *Uruguay*, views adopted on 17 July 1985, para. 7.2; No. 202/1986, *Graciela alto del Avellanal* v. *Peru*, views adopted on 31 Oct. 1988, para. 9.2; No. 30/1978, *Bleier* v. *Uruguay*, views adopted on 29 Mar. 1982, para. 13.3; No. 107/1981, *Elena Quinteros Almeida* v. *Uruguay*, views adopted on 21 July 1983, para. 11; No. 992/2001, *Bousroual* v. *Algeria*, views adopted on 30 Mar. 2006, para. 9.4.

> author, on his political activities or upon his expressing opinions hostile to the Senegalese government."[104]

Mr. President, the contrast with the vague Congolese assertions is striking and, of course, the Respondent's argument can only be rejected.

Violations of Article 9 (2) of the Covenant

33. It also flies in the face of all evidence that the DRC should maintain that Mr. Diallo was adequately informed of the motives for his arrest, in accordance with the requirements of Article 9 (2), of the Covenant, according to which the authorities must inform persons it arrests, at the time of arrest, of the reasons for their arrest and must be promptly informed of any charges

38 against them[105]. Whether it likes it or not, asking Mr. Diallo whether he had heard the news[106], does not meet the criteria of "information" within the meaning of Article 9 (2) of the Covenant, in other words, of being informed "sufficiently"[107].

Violations of Article 9 (3) of the Covenant

34. Not only was he not "informed", but Mr. Diallo was also not brought before a judge or other officer authorized by law to exercise judicial power, according to the obligation set out in Article 9 (3) of the Covenant, under which anyone arrested or detained on a criminal charge — and it is hard to see how fraud could fail to fall within the field of criminal law — must be brought promptly before a judge or other officer authorized by law to exercise judicial power. The Judicial Inspector assigned to the Prosecutor's Office, before which Mr. Diallo was brought, can patently not be characterized as an officer authorized by law within the meaning of this text[108]. The DRC seeks to evade this obvious fact by emphasizing, in its Rejoinder, that the Covenant does not state that the authority referred to must be independent of the executive[109]. But this is what is pointed out by the Human Rights Committee, which consistently maintains that a prosecutor cannot be regarded as having the necessary institutional objectivity and impartiality to qualify him as an

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[104]Communication No. 386/1989, *Famara Koné* v. *Senegal*, finding adopted on 21 Oct. 1994, para. 8.3.

[105]RDRC, pp. 8-9, paras. 1.21-1.22.

[106]RG, Vol. II, p. 5.

[107]HRC No. 43/1979, *Adolfo Drescher Cadas* v. *Uruguay*, 21 July 1983, paras. 13.2 and 14; see also, L. Hennebel, *La jurisprudence du comité des droits de l'homme des Nations Unies*, Brussels, Bruylant, 2007, p. 166.

[108]RG, p. 13, para. 1.24.

[109]RDRC, p. 9, para. 1.26.

"officer authorized by law"[110]. Also, it is not so much the organic link between the judicial inspector and the executive which raises a problem in this case, but the fact that the said judicial inspector *was obeying the direct orders* of the First State Commissioner[111].

35. Mr. President, Members of the Court, it was as a result solely of these direct orders that Mr. Diallo, in 1988, spent a year of his life in detention on remand without ever appearing before a judge. The assertion of the Respondent, for which this year lost by Mr. Diallo was "strictly
39 necessary" in order to finish the judicial investigation concerning him[112] is a further gratuitous and baseless assertion which cannot exonerate its responsibility.

Violations of Article 9 (4) and (5) of the Covenant

36. All the less so since, during that long year, Mr. Diallo was unable to pursue any remedy for a ruling on the legality of his detention or on possible reparation, as laid down by Article 9 (4) and (5) of the Covenant[113]. The Code of Criminal Procedure behind which the Respondent hides made no difference at all[114]: no remedy of any kind was accessible to Mr. Diallo, since the office of the Judicial Inspector had clearly told him that he had no hope in that respect, strict instructions for his detention "until further notice" having been given by the First Commissioner of State[115].

37. Mr. President, Members of the Court, neither the Zaïrean Code of Criminal Procedure nor the other arguments put forward by the DRC will allow it to evade its responsibility stemming from the numerous rules of international law which it has breached in arbitrarily arresting then imprisoning Mr. Diallo, in 1988 and also in 1995 and 1996.

This concludes my comments, so may I ask you, Mr. President, to give the floor when you think it appropriate to Professor Forteau.

The PRESIDENT: Thank you, Mr. Thouvenin. I now give the floor to Professor Forteau.

Mr. FORTEAU: Thank you, Mr. President.

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[110]L. Hennebel, *op. cit.*, p. 168.

[111]RG, p. 13, para. 1.24.

[112]RDRC, p. 11, para. 1.30.

[113]RG, p. 14, para. 1.27.

[114]RDRC, p. 11, para. 1.33.

[115]RG, p. 13, para. 1.24.

IV. THE EXPULSION

1. Mr. President, Members of the Court, it is a very great honour to appear before the principal judicial organ of the United Nations to defend the interests of the Republic of Guinea in a
40 case which will enable to Court to make helpful clarifications on the scope and operation of certain "internationally guaranteed" rights of individuals (*Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 599, para. 39).

2. Professor Thouvenin has just referred in that regard to the arbitrary arrests and detentions of which Mr. Ahmadou Sadio Diallo was the unfortunate victim. It falls to me to set out in what respects Mr. Diallo's expulsion was also, for its part, decided upon and carried out in violation of the international obligations of the respondent State. I shall do so, Mr. President, forthwith. However, that involves my dispelling, at the outset, a double ambiguity which could impact on the Court's examination of the expulsion issue.

First preliminary observation

3. The first of these ambiguities concerns the word "expulsion" itself. Although Guinea speaks of "expulsion", it must be pointed out that this is purely within the meaning of international law, and not within the meaning of Congolese domestic law. Expulsion in international law is in fact a concept autonomous of domestic legislation, one which is generally understood as including "any measure compelling the alien's departure from the territory where he was lawfully resident"[116]. The fact that there may be an expulsion within the meaning of international law does not necessarily mean, conversely, that the characterization as such corresponds to the definition used domestically by the national authorities responsible for the measure in issue in these proceedings.

4. We are in the present case in precisely that latter situation. Mr. Diallo was beyond doubt expelled within the meaning of international law since he was compelled to leave the territory

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[116] ECHR, Judgment of 5 Oct. 2006, *Bolat* v. *Russia*, Application 14139/03, para. 79, or Judgment of 12 Feb. 2009, *Nolan and K* v. *Russia*, Application 2512/04, para. 112 (www.echr.coe.int); United Nations International Law Commission, Memorandum prepared by the Secretariat, *Expulsion of aliens*, A/CN.4/565, 10 July 2006, p. 58, para. 67; second report on the expulsion of aliens submitted by Maurice Kamto, A/CN.4/573, 20 July 2006, p. 63, para. 194, draft Article 2 *(b)*; Sir Robert Jennings and Sir Arthur Watts (eds.), *Oppenheim's International Law*, Vol. 1, *Peace. Parts 2 to 4*, Longman, 1996, p. 940, footnote 1.

where he was lawfully resident[117]. Yet that did not mean that Mr. Diallo was "expelled" in terms of the Congolese legal system. He was the object of a "refusal of entry". The Court drew attention

41 to this in its Judgment on the preliminary objections, stating that Mr. Diallo "was justified in relying on the consequences of the legal characterization thus given by the Zairean authorities" (*Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 601, para. 46).

5. As we set out in the Reply, that characterization amounted to an abuse of procedure and this is one of the reasons why Mr. Diallo's expulsion cannot be treated as having been ordered "in accordance with law" as nevertheless required by the rules applicable to this dispute[118].

Second preliminary observation

6. The second ambiguity which I would like to dispel at the outset concerns the part which the expulsion plays in Guinea's action. Of course, and this will be the subject-matter of my statement, it is firstly as an expulsion per se that it gives rise to responsibility in view of the fact that it was carried out in such circumstances and in such a manner that the international rules governing the power to expel were violated. The role of the expulsion in the responsibility incurred by the DRC, however, by no means ends there and two important things need to be said in that regard.

7. First, the expulsion was also one of the "means" (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 811, para. 21) — itself wrongful, in fact — of violating other international obligations, in particular those concerning the protection of Mr. Diallo's property rights and rights as *associé*. Those rights were in effect violated by the very fact of the expulsion as Sam Wordsworth and then Daniel Müller will demonstrate[119].

8. Secondly and consequently, given these inextricably-linked wrongful acts, there are several alternative grounds for the obligation to make reparation for the loss caused to Mr. Diallo. It is for example clear that the economic loss suffered by Mr. Diallo by reason of the involuntary

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[117]See CMDRC, p. 14-15, para. 1.16; on Mr. Diallo's lawful residence, see RG. p. 29, para. 1.62.

[118]RG, p. 33, para. 1.76 and pp. 46-49, para. 1.114-1.122.

[119]See also RG, pp. 53-54, paras. 1.134-1.138.

interruption of his business is deserving of reparation in its entirety, both on the basis of the
42 unlawful expulsion because it caused that loss and, equally, by reason of the fact that the expulsion is also an expropriation. Guinea will come back to those points in greater detail this afternoon.

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9. Having clarified those preliminary points I now come, Mr. President, to the nub of my statement, the unlawfulness, the manifest unlawfulness even, of the expulsion per se. No jurist, indeed no honest person with powers of reason, would fail to see Mr. Diallo's expulsion as an act which "shocks, or at least surprises, a sense of juridical propriety" to use the Court's definition of arbitrariness in the *ELSI* case (*Elettronica Sicula S.p.A. (ELSI) (United States of America* v. *Italy), Judgment, I.C.J. Reports 1989*, p. 76, para. 128).

10. That arbitrariness emerges very clearly from the chronology of the events preceding Mr. Diallo's expulsion and which culminated in Zaire Shell's buying a ticket for the plane which Mr. Diallo boarded against his will on 31 January 1996[120]. The arbitrary nature of the expulsion is equally apparent from the fact that fourteen years after the facts and after more than eleven years of proceedings before the Court, the Respondent has not produced any evidence, any exhibit, any "relevant document"[121] to prove that in October 1995 — I am citing the expulsion decree — Mr. Diallo's "presence and conduct [had] breached Zairean law and order, especially in the economic, financial and monetary areas, and continue[d] to do so"[122].

11. Admittedly, the DRC has, in these proceedings, offered a few explanations seeking to justify the expulsion. Those explanations are completely without foundation, however. Nor are they even believable. I shall demonstrate this in a first section (I). I shall then indicate the legal
43 grounds — and there are several of them — on which the Respondent's responsibility is engaged in this case specifically as a result of the expulsion (II).

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[120]RG, p. 26, para. 1.54, and p. 47, para. 1.118. See also above in Mr. Vidal's oral submission on "The facts", and RG, Ann. 1, p. 10-11 (Answer to Question 28), and Ann. 2, p. 16, penultimate paragraph.

[121]*Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France)*, Judgment of 4 June 2008, para. 151, www.icj-cij.org.

[122]Expulsion decree of 31 Oct. 1995, last recital (PODRC, Ann. 75).

I. The explanations for the expulsion put forward after the event by the Democratic Republic of the Congo are neither well-founded nor even believable

12. On the first point, I do not think it helpful to refer in minute detail to the various explanations retroactively put forward by the Respondent in its attempt to justify Mr. Diallo's expulsion — I speak advisedly of retroactive explanations, and not of a "statement of reasons", since there has never been any "statement of reasons", in the legal sense of the word, in this case, something which is in itself alone a first ground on which responsibility is engaged[123]. We have refuted those "explanations" in the Reply to which accordingly I would most respectfully ask the Court to refer[124]. At this stage, I shall merely comment that those explanations have not been substantiated and that they are furthermore quite unbelievable.

A. The absence of any evidence supporting the Respondent's explanations

13. As regards first of all any evidence that the explanations proffered by the DRC are legally valid, it is indisputable that no such evidence has been submitted.

14. If one is to believe the 1995 expulsion decree, whose existence Guinea and Mr. Diallo only discovered in October 2002 on reading the DRC's Preliminary Objections[125], there was a "personal file" on Mr. Diallo which purportedly provided the grounds for his expulsion. The DRC, however, has never produced that "file", any more than it has established, however that may have been, the actual existence of the reasons for the expulsion, with the effect that the "file" has remained to this day a completely empty shell. It has remained a paper shell, moreover, since the "file" to which the expulsion decree refers existed in name only, intended to suggest that there were reasons.

15. The same can be said of the purported "regular reports on "[Mr. Diallo's] general
44 conduct" written by "DRC special services"[126]. Those reports were referred to without warning in this courtroom in November 2006. However, nothing, nothing whatsoever, has been produced subsequently to substantiate their alleged existence.

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[123]See RG, pp. 38-39, paras. 1.93-1.96.

[124]RG, pp. 38-43, A; see also *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 592, para. 19.

[125]PODRC, Ann. 75.

[126]CR 2006/52, p. 20, para. 10 (Kalala).

16. Two findings, Mr. President, follow from this lack of evidence:

(i) Since the Congolese State has been unable to substantiate a version of the facts different from that established by Guinea in terms of the real motives for the expulsion, the Guinean version of events has to be taken as the only valid one: if Mr. Diallo was expelled, it was for the sole purpose of preventing him from recovering the debts owed to his companies[127];

(ii) Since it is for the expelling State to prove that the expulsion was based on good reasons, as has long been required by the case law[128], the mere fact that the respondent State has neither stated reasons, nor provided grounds, for the expulsion is in any event sufficient for it to be found to be unlawful, whatever the actual motives behind it may have been.

B. The explanations proffered by the Respondent lack all credibility

17. Even were one to assume, something which no one would dare to argue in a court, that an explanation advanced without evidence might have any evidential value whatsoever, the explanations offered by the DRC should anyhow be dismissed in the present case because they are quite simply not credible.

18. First of all, those explanations have been found to contain a mistake in chronological terms. The Congo claimed that the expulsion of "31 November 1995" was justified by letters which Mr. Diallo had sent to various well-known figures the preceding day, that is to say, 30 November 1995[129]. In actual fact, however, those letters could never have been grounds for the expulsion decree since the decree was adopted not on 31 November as the DRC stated, but on 31 *October* 1995, that is to say, a month before the letters were sent[130].

45 19. In order to re-establish the chronology, the DRC then suggested a new explanation: the implementation, for its part, of the expulsion decree occurred two months after Mr. Diallo's letters were sent[131]. That is indeed true. It changes nothing, however. The implementation measures had

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[127]See above, Mr. Vidal's oral submission on "The facts", and RG, pp. 19-21, paras. 1.41-1.42.

[128]See RG, pp. 31-32, paras. 1.71-1.72.

[129]CR 2006/50, p. 38-39, paras. 85-87 (Kalala).

[130]RG, p. 41, para. 1.103.

[131]CR 2006/52, p. 20, para. 10 (Kalala).

to have a legal basis in an order for expulsion which had in turn to contain a statement of reasons based on fact, and those facts, by definition, had to be in existence at the time of the order. As I have just observed, Mr. Diallo's letters were later than the expulsion decree which, and nothing else, was capable of providing a legal basis for the measures implementing the expulsion.

20. In the absence of chronologically credible explanations, the DRC launched headlong into a series of very serious accusations against Mr. Diallo, accusations which became more and more serious throughout the proceedings before the Court — without the slightest evidence to corroborate them and, moreover, without the DRC ever claiming that any corresponding criminal prosecutions had been brought against Mr. Diallo.

21. Accused not only of "numerous attempts at bribery"[132] but also of "currency trafficking"[133], Mr. Diallo would subsequently find himself likened to the "organized crime groups" which, according to the DRC, wrought havoc in the country at the time of the measures taken against Mr. Diallo. There was one last step to take between organized crime groups and organized, even "rampant", economic crime, which the Respondent did not flinch to take in its Counter-Memorial, although once again, without the slightest evidence to support it[134].

22. Those accusations, as I have just said, have never been substantiated. They are in any event no more credible than those made earlier.

23. In fact, by dint of several of its statements or the stances it adopted, the DRC itself undermined the credibility of the gratuitous allegation that Mr. Diallo was a dangerous criminal.

24. The DRC thus asserted, to refute any arbitrary detention of Mr. Diallo, that it had allowed him complete freedom of movement between November 1995 and the end of

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January 1996[135] whereas, I would point out, in other cases of expulsion which the DRC mentions in its pleadings, the person subject to an expulsion decision had to leave the country within 24 hours[136].

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[132]CR 2006/50, p. 39, para. 87 (Kalala).

[133]PODRC, p. 39, para. 1.53.

[134]CMDRC, pp. 9-12, paras. 1.04-1.11, in particular pp. 10-11, paras. 1.07-1.08.

[135]CMDRC, pp. 8-9, paras. 1.09-1.11.

[136]PODRC, Ann. 69, record of notice of expulsion; Ann. 76, p. 3 of the decree.

25. The DRC's assertion is incorrect, as Professor Thouvenin described, since Mr. Diallo was arbitrarily kept in detention throughout that time, well beyond the maximum period established by law[137]. It remains the case, however, that even were the assertion correct, as the DRC believes it to be, the fact that it claims that Mr. Diallo was restored to complete freedom after adoption of the expulsion decree and during the three months preceding his removal is at odds with the statement that Mr. Diallo was a dangerous criminal whose mere presence in its territory was a threat to the Congolese nation[138].

26. The leniency from which Mr. Diallo could have benefited — as the Congolese authorities, after the event, told this Court — likewise sits ill with the portrait which the DRC is now painting of Mr. Diallo. The Respondent's Minister of Justice asserted, before the Court, in November 2006, that "the Democratic Republic of the Congo has always *pardoned* other foreign nationals who have been expelled *on the same grounds*" as those levelled against Mr. Diallo[139]. The prospect of such a pardon is completely at odds with the very serious accusations being made, now, against Mr. Diallo.

27. I will also point out that in January 1996, that is to say, a few days before the expulsion, the President of the Republic of Congo ordered Mr. Diallo's release[140]. According to the Respondent, "[i]t is not every day that a President of the Republic intervenes to seek the release of an alien being held pending deportation"[141]. The statement can scarcely be disputed, but it is indeed difficult to conceive that the Congolese President would have taken upon himself such an exceptional decision had Mr. Diallo been a highly dangerous criminal as the DRC would now have

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us believe. Quite on the contrary, the intervention shows that the President believed Mr. Diallo's detention to represent an abuse of power which needed to be stopped[142].

28. The Respondent has also contradicted itself in relation to even its most fiercely argued denials: Mr. Diallo's expulsion was not, the DRC has constantly pointed out, in any way linked to

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[137]See the oral submissions of Professor Thouvenin, above: "The DRC's responsibility arising from Mr. Diallo's arrest and detention", para. 13.

[138]RG, p. 52, para. 1.129.

[139]CR 2006/50, p. 14; emphasis added.

[140]RG, Vol. II, Anns., Ann. 2, p. 17.

[141]CMDRC, p. 20, para. 1.33.

[142]RG, Ann. 2, p. 17; also MG, Ann. 194.

the legal actions brought on behalf of his two companies. However, the Respondent's Co-Agent stated twice, in November 2006, that Mr. Diallo had been expelled in the context of and as a result of those financial claims[143].

29. The Co-Agent later withdrew the assertion, although then using an argument which leaves one speechless: if the true motive had been to prevent Mr. Diallo's "two companies from recovering the monies due to them", the DRC would not have expelled Mr. Diallo; in that case, states the DRC sanctimoniously, "the best solution would have been simply to expropriate the two companies concerned"[144]. As if, Mr. President, the DRC was entitled to expropriate Mr. Diallo's companies for the sole reason that they were seeking payment of monies owing to them.

30. Purely in terms of motives, the DRC's thesis is in fact unconvincing. If, instead of expelling Mr. Diallo, the DRC had formally expropriated his companies to prevent them from recovering what they were owed, Mr. Diallo could have challenged that formal expropriation. Expelling him, on the other hand, was a means of ensuring once and for all that Mr. Diallo would no longer be able to claim the protection of any right whatsoever. That is why it was this particularly radical means which the Congolese authorities employed to achieve their ends.

31. Finding itself quite simply unable to justify Mr. Diallo's expulsion, the Respondent resorted to two arguments which are as absurd as they are unacceptable and which amount purely and simply to an admission that the expulsion was arbitrary: according to the Respondent, there were indeed grounds for expelling Mr. Diallo but, on the one hand, it was impossible to tell Mr. Diallo what those grounds were and, on the other, the Court did not in any event have jurisdiction to review their validity.

48 32. As regards the first point, the Respondent maintains that the absence in the expulsion decree of any specific fact supporting the decision made against Mr. Diallo is because "the Congolese authorities could not in a legal document specify all the individual acts of which Mr. Diallo was accused"[145]. This is patently absurd since nothing has ever prevented the reasons for an expulsion decision from being stated in detail. It is also an admission that the Respondent

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[143]CR 2006/50, p. 21, para. 25; CR 2006/52, p. 19, para. 8.

[144]CR 2006/52, p. 22, para. 20 (Kalala).

[145]CR 2006/52, p. 19, para. 6 (Kalala).

acted unlawfully since under both Congolese law and under international law a statement of reasons had to be given[146].

33. According to the DRC, furthermore, the Court is in any event not entitled to review whether there were grounds for the expulsion, because the power to expel is, it asserts, a discretionary power [147]. The DRC is forgetting, however, that a discretionary power is not a power to dispense with all judicial constraint and with all judicial oversight. A discretionary power merely leaves leeway in the choice to be made between several options all of which must be lawful. That is exactly the nature of the power to expel. Although States have power to expel, that power can only be exercised within the limits set by international law[148] and, accordingly, as we demonstrated in the Reply and in the Court's further case law in *Djibouti* v. *France*, it is indeed for the competent international courts to review the legal validity of the exercise of such a power[149]. If that power has been exercised in violation of international law it is then possible, without the slightest doubt, to engage the responsibility of the State concerned before the courts. This is so in the present case, since the respondent State did undeniably breach numerous obligations in the exercise of its power to expel, and this brings me, without any ado, to the second part of my submission.

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II. The manifold nature of the legal basis on which the Democratic Republic of the Congo's international responsibility is engaged

34. Allow me at this point, Members of the Court, to draw your attention to two things which I believe must be kept in mind when considering the lawfulness of the DRC's actions.

35. First of all, it must be remembered that expulsion is by nature a grave act. As the Respondent acknowledged in its Counter-Memorial, "[d]eciding to expel an alien lawfully in its territory is not a step lightly taken by any State"[150].

36. Next, I must point out that we are not dealing with an ordinary instance of expulsion in this case, for several series of reasons, all of which constitute aggravating circumstances:

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[146]RG, pp. 31-32, para. 1.71 and p. 34, para. 1.78.

[147]RDRC, p. 14, para. 1.46.

[148]RG, pp. 27-28, paras. 1.56-1.58.

[149]See RG, pp. 30-32, paras. 1.69-1.73.

[150]CMDRC, p. 18, para. 1.28.

(i) firstly, the expulsion followed a long period of unlawful and arbitrary detention;

(ii) next, the expulsion was decided upon and carried out for reasons completely unrelated to the public interests of the Respondent[151]; this is proven in particular by Zaire Shell's purchase of the ticket for the plane on to which Mr. Diallo was forcefully boarded, against the wishes of the airline which, noting the lack of an expulsion order, had initially refused to carry Mr. Diallo, before eventually yielding to the commercial blackmail of the Congolese authorities[152];

(iii) moreover, the subject of the expulsion was a man who had legally resided in the DRC for more than 30 years, who had spent his entire adult and working life there: indeed the highest Congolese authorities told this Court in 2006 that their country had become Mr. Diallo's "second country"[153]. Such were his ties to the country that, as the Respondent pointed out in its Counter-Memorial, Mr. Diallo had even chosen to remain in the DRC during the riots in the early 1990s which, however, had led "[m]ost of the expatriates . . . [to] fle[e] the country"[154];

50 (iv) the injury, already considerable in the light of the foregoing, has only become worse since the expulsion because the Respondent, far from accepting its actions over time, has stuck firmly to a line of defence amounting to slinging unfounded accusations, equating to slander, against Mr. Diallo.

37. All of these things, Members of the Court, aggravate an already evident responsibility.

A. The legal basis on which the responsibility of the Respondent is engaged

38. In its Reply, the Republic of Guinea drew up a list of provisions applicable in respect of expulsion, before comparing it to the facts of the case. The result was the following points, which I shall summarize very generally.

39. In respect of the law applicable, the lawfulness of Mr. Diallo's expulsion must be considered in the light of the minimum standard of treatment of aliens, but also of a number of

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[151]RG, pp. 19-21, paras. 1.41-1.42.

[152]RG, p. 47, note 183.

[153]CR 2006/50, p. 14 (Minister of Justice of the DRC); RG, p. 37, para. 1.90.

[154]CMDRC, p. 9, para. 1.05.

treaty obligations regarding expulsion which, at the time of the events, were — and still are — incumbent upon the Respondent under the 1966 International Covenant on Civil and Political Rights and the 1981 African Charter on Human and Peoples' Rights[155].

40. Furthermore, since international law refers to compliance with domestic legislation in respect of the rule that the decision to expel must be "in accordance with law"[156], the non-compliance with Congolese law provides an additional basis on which the DRC's international responsibility is engaged[157].

41. These various rules were violated by the Respondent concurrently on several accounts, each of them sufficient for its responsibility to be engaged:

(i) the decision to expel was not formally reasoned[158];

(ii) furthermore, the Respondent has never been able to explain after the fact its alleged legitimate motive[159];

51 (iii) several of the jurisdictional, formal and procedural rules stipulated by Congolese law were not followed, meaning that the expulsion was "not in accordance with law". In particular, the National Immigration Board was not consulted beforehand, as it should have been, and Mr. Diallo was never notified of the expulsion decree[160];

(iv) the procedure for refusing entry, used to carry out the expulsion, was misused in a way inconsistent with its purpose[161];

(v) Mr. Diallo — as the DRC acknowledges moreover[162] — was never able to submit the reasons against his expulsion or to have his case reviewed by the competent authority

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[155]See RG, pp. 27-32, as well as p. 37, para. 1.90.

[156]RG, p. 29, para. 1.65.

[157]See RG, pp. 33-35.

[158]RG, pp. 38-39, paras. 1.93-1.96.

[159]RG, pp. 39-43, paras. 1.97-1.108.

[160]RG, pp. 43-45, paras. 1.109-1.113.

[161]RG, pp. 46-49, paras. 1.114-1.122.

[162]CMDRC, pp. 18-19, para. 1.28.

before his expulsion, as required under international law[163], or to be represented for the purpose[164];

(vi) the fact that he was never notified of the expulsion decree resulted, in particular, in Mr. Diallo being unable to avail himself in a timely fashion of the right conferred on him by Congolese law to request suspension of implementation of the decision to expel[165];

(vii) finally, resorting to a refusal-of-entry measure to carry out the expulsion deprived Mr. Diallo of any subsequent effective right to recourse against his enforced removal[166].

B. The lack of grounds for the (only) two lines of defence set out in the Rejoinder

42. Since, by virtue of the Rules of Court, the Rejoinder must be directed to bringing out the issues that still divide the parties[167], Guinea was expecting the Rejoinder to respond in detail to the numerous facts and legal considerations set forth in the Reply in support of the unlawful nature of
52 the expulsion. The Rejoinder contained only two brief observations in this respect, which respond only very selectively to the arguments in the Reply.

1. Regarding the authority of the person issuing the expulsion decree

43. In its Rejoinder, the DRC first contends that no unlawfulness arises from the fact that the expulsion was decided upon by a Decree issued by the Prime Minister, rather than a reasoned Order issued by the President of the Republic, as the 1983 Legislative Order concerning immigration control requires. According to the Rejoinder, the new distribution of powers, which took effect within the Congolese executive with the Constitution of 9 April 1994, and which conferred regulatory power on the Prime Minister from that point onwards[168], must be taken into consideration.

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[163]See RG, p. 30, note 120 (*Hammel* v. *Madagascar* case before the United Nations Human Rights Committee), as well as p. 29, note 118.

[164]RG, p. 30, paras. 1.67-1.68.

[165]See Article 21, second paragraph, of the Legislative Order of 12 Sep. 1983 concerning immigration control ("An alien subject to a deportation order and who can prove that it is impossible for him to leave Zairean territory may, until he is in a position to do so, be compelled by Decree of the State Commissioner for the Administration of the Territory to reside in a specific place; he must report periodically to the police.") (PODRC, Ann. 73.)

[166]RG, pp. 49-53, paras. 1.123-1.132.

[167]Art. 49, para. 3.

[168]RDRC, pp. 13-14, paras. 1.43-1.45.

44. This argument is vague to say the least. The DRC appears to consider the 1983 Legislative Order to have been abrogated by the 1994 constitutional revision, yet it does not state whether a new law, fixing the legal conditions for expulsion and determining the competent authority to carry this out, was adopted in its place. If no new law exists, this means that the expulsion procedure has been indeterminate since 1994, in violation of the rule of "conformity with law", which requires the law on which the power to expel is based to be foreseeable, precise and accessible[169].

45. However, the DRC's argument is not just vague. More than that, it directly contradicts the position and official statements of the Respondent, which prove that the 1983 Legislative Order has never been modified, nor abrogated, since its adoption.

46. You will indeed have noted, Members of the Court, that it is this text, and this text alone, which the DRC appended to its Preliminary Objections[170], and again to its Counter-Memorial[171]; you will also have noted that it is on this text, and on this text alone, that the DRC has always based Mr. Diallo's expulsion, from the Preliminary Objections to the Rejoinder[172].

53 47. Furthermore, this position has been confirmed before other authorities. In its reports to the Human Rights Committee in 2005 and the African Commission on Human and Peoples' Rights in 2007[173], the DRC confirmed that the 1983 Legislative Order remained the law in force on expulsion in its territory.

48. In those two reports of 2005 and 2007, the DRC's Minister for Human Rights also unequivocally confirmed that "[the] [e]xpulsion of an alien is the prerogative of the President of the Republic"[174]. This declaration is evidence of the fact that bestowing regulatory powers on the

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[169]See Frédéric Sudre, *Droit européen et international des droits de l'homme*, PUF, Paris, 2006, pp. 208-212, No. 150.

[170]Ann. 73.

[171]Ann. 10.

[172]PODRC, p. 40, para. 1.54; CMDRC, p. 17, para. 1.25; RDRC, p. 14, para. 1.45.

[173]Democratic Republic of the Congo, third periodic report submitted to the Human Rights Committee on 30 Mar. 2005, CCPR/C/COD/2005/3, 3 May 2005, paras. 128-140 (http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/6efff92dc06cfce8c1257093002ce1e0/$FILE/G0541436.pdf); Democratic Republic of the Congo, Minister for Human Rights, eight, ninth and tenth periodic reports to the African Commission on Human and Peoples' Rights, implemented by the African Charter on Human and Peoples' Rights , Kinshasa, June 2007, paras. 137-144 (http://www.achpr.org/english/state_reports/DRC/DRC_State%20Report.pdf).

[174]*Ibid.*, para. 131 and para. 138 respectively.

Prime Minister in 1994 did not have the effect of revoking the President of the Republic's exclusive authority in respect of expulsion, as provided for by the 1983 Legislative Order.

49. All of this goes to confirm, therefore, that at the critical moment, the expulsion of aliens was still the exclusive prerogative of the President of the Republic. Mr. Diallo's expulsion decree, since it was issued by the Prime Minister, is therefore null and void for lack of authority.

50. This lack of authority was not purely an issue of formality, given that it is known that the President of the Republic was opposed to Mr. Diallo's arbitrary detention (see paragraph 27 above). Moreover, it merely adds to a very long list of breaches of the rule of law in respect of which the DRC has chosen to maintain a very telling silence in its Rejoinder.

2. Regarding the discretionary nature of the power to expel

51. The second selective observation to be found in the Rejoinder is just as inadmissible. It concerns the national security exception. It is written in the Rejoinder that the DRC enjoyed "discretion in assessing the threat to its national security when it took steps to expel Mr. Diallo" and that the Court was not "entitled to determine whether such a threat existed", as it was in the

54 *Nicaragua* case, since "[n]o such treaty [of the type of that in question in the *Nicaragua* case] exists between the DRC and Guinea"[175] in the present case. That conclusion, Mr. President, is erroneous on several accounts.

52. Firstly, the DRC acts as though the national security exception referred to in Article 13 of the 1966 Covenant is applicable to the entire expulsion procedure, when in fact it only allows for exemption from the obligation to allow the person against whom the action is being taken to submit the reasons against his expulsion. It is not applicable to the other obligations on the State carrying out the expulsion.

53. The "compelling reasons of national security" exception is thus very clearly included in a treaty, the very one which allows for it to be invoked, the 1966 Covenant, and Guinea does not understand how the Respondent can refute this evidence. As such, reliance on that exception is effectively subject to judicial review, directly following this Court's decision in the *Nicaragua* case.

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[175]RDRC, p. 14, para. 1.46.

54. Finally, the Respondent has failed to prove the existence of "compelling reasons of national security" in this case. When one considers that, during the period of "the war", which raged in the DRC between 1998 and 2002, the Congolese State declared "neither a state of emergency or state of exception" and itself considered that it "remained under an ordinary law regime" pursuant to the 1966 Covenant[176], it is difficult to see how it could now invoke the exception of "compelling reasons of national security" in our case, which deals with events from an earlier date.

55. The conclusion is all the more compelling still since, at the time of the events for which Guinea is seeking reparation, the DRC refrained from invoking the derogatory clause of the 1966 Covenant. However, as the Court clearly stated in its Advisory Opinion of 9 July 2004, an abstention of this kind carries with it the automatic and absolute applicability of human rights guaranteed by the Covenant[177].

55 56. It is clear from all of this, Members of the Court, that you undoubtedly have not only jurisdiction, but also a duty, to proceed without the slightest doubt to the conclusion that, in respect of the lawfulness of Mr. Diallo's expulsion, international law has been breached. Mr. Diallo's expulsion was blatantly arbitrary, it was blatantly unlawful, and it was so on a number of grounds. Under these circumstances, it is up to you to find that, on the basis of Mr. Diallo's expulsion, the international responsibility of the Respondent is engaged.

Mr. President, Members of the Court, these final words conclude my address. I sincerely thank you for listening and I would be grateful, Mr. President, if after the adjournment for lunch you would give the floor to Mr. Wordsworth, who will continue the Republic of Guinea's presentation. Thank you.

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[176]Democratic Republic of the Congo, third periodic report submitted to the Human Rights Committee on 30 Mar. 2005, CCPR/C/COD/2005/3, 3 May 2005, para. 59 (http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/6efff92dc06cfce8c1257093002ce1e0/$FILE/G0541436.pdf).

[177]*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004,* pp. 187-188, para. 127.

Mr. PRESIDENT: Thank you, Professor Forteau. The Court now rises and will meet again this afternoon at 3 p.m. to hear further oral submissions by the Republic of Guinea. The sitting is closed.

The Court rose at 1.05 p.m.

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