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**INTERNATIONAL COURT OF JUSTICE**

**CASE CONCERNING AHMADOU SADIO DIALLO  
(REPUBLIC OF GUINEA *v.* DEMOCRATIC REPUBLIC OF THE CONGO)**

**REJOINDER OF THE  
DEMOCRATIC REPUBLIC OF THE CONGO**

**5 June 2009**

*[Translation by the Registry]*

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## INTRODUCTION

01. Following the delivery of the Judgment of 24 May 2007 on the Preliminary Objections, the Democratic Republic of the Congo (hereinafter “DRC”) filed its Counter-Memorial dated 27 March 2008 on the merits of the dispute in respect of the two issues declared admissible by the Court: (1) the alleged violation of Mr. Diallo’s rights as an individual and (2) the alleged violation of Mr. Diallo’s direct rights as *associé* in Africom-Zaire and Africontainers-Zaire.

02. On 19 November 2008, the Republic of Guinea filed its Reply to respond to the points made and the submissions presented by the DRC in its Counter-Memorial.

03. The DRC is filing this Rejoinder in accordance with the Order made by the Court dated 5 May 2008, by which it authorized the submission of a Rejoinder in this case with a time-limit of 5 June 2009.

04. In drafting this Rejoinder, the DRC is mindful of the provisions of Article 49 (3) of the Rules of Court<sup>1</sup>. In this respect it recalls that the two issues authorized by the Court in its Judgment of 24 May 2007 on the Preliminary Objections to be dealt with on their merits by the two Parties were already thoroughly debated during the proceedings on the aforementioned objections. The DRC then returned to the two points concerned in great detail in its Counter-Memorial of 27 March 2008. To avoid unnecessary repetition at this stage of the proceedings, it will confine itself to making a number of observations to rebut some of the Applicant’s assertions. Nevertheless, it reserves the right to elucidate and elaborate on some of its arguments during the oral proceedings.

05. The DRC believes it important to underline that it will be extremely quick to resist any attempt by the Applicant to slip into the debate before the Court on the merits of the dispute any matters which the Court already clearly barred in its Judgment of 24 May 2007. For example, Guinea’s assertion that “any violation of the companies’ rights could not help but have an effect on the rights of the sole *associé*, and vice versa”<sup>2</sup> shows that the Applicant is attempting to return to the issue of the debts due to the Congolese companies Africom-Zaire and Africontainers-Zaire, an issue which the Court has refused to consider, and that it is interpreting the Court’s Judgment in a biased and self-interested way.

06. Having clarified these points, the DRC will respond to certain of the allegations made by Guinea in its Reply in accordance with the following outline: the alleged violations of Mr. Diallo’s rights as an individual (Chap. I) and the alleged violations of Mr. Diallo’s direct rights as *associé* in Africom-Zaire and Africontainers-Zaire (Chap. II). Finally, it will present its submissions (Chap. III).

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<sup>1</sup>“The Reply and Rejoinder . . . shall not merely repeat the parties’ contentions, but shall be directed to bringing out the issues that still divide them.”

<sup>2</sup>See Reply of the Republic of Guinea (RG), p. 3.

## CHAPTER I

### ALLEGED VIOLATION BY THE DRC OF MR. DIALLO'S RIGHTS AS AN INDIVIDUAL

#### SECTION 1

#### INHUMAN AND DEGRADING TREATMENT THAT THE DRC IS ALLEGED TO HAVE INFLICTED ON MR. DIALLO DURING HIS ARREST AND DETENTION IN 1995-1996

1.01. On page 30 of its Memorial, the Applicant accused the DRC of inflicting inhuman and degrading treatment on Mr. Diallo in the following terms:

“Mr. Diallo spent a total of 75 days in detention. Despite the 32 years he had spent in the Democratic Republic of the Congo, he suffered treatment violating his most basic rights and freedoms. He was held under perilous conditions, both physical and psychological, and was subjected to maltreatment and death threats on the part of those overseeing his detention. He was also prevented from meeting or communicating with members of the Guinean Embassy or with his lawyers. He received no food from the detention centre.”<sup>3</sup>

1.02. It adds on page 51 that:

“[Mr. Diallo] was immediately arrested by the Zairean police and placed in the custody of the Immigration Department; there was no form of judicial process or even any examination. He remained a prisoner, without any visit from his lawyers or members of the Guinean Embassy, until 10 January 1996.”<sup>4</sup>

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1.03. In its Counter-Memorial of 27 March 2008, the DRC asked the Court to reject these allegations on the grounds that they lacked credibility and evidentiary support<sup>5</sup>.

1.04. The DRC was expecting Guinea to submit evidence to support these accusations and is therefore surprised to read the following declaration by the Applicant in its Reply:

“at the time in Zaire, contacts between prisoners and people outside were frequent, proper and even officially provided for in some ways, since the authorities typically relied on such contacts to keep the prisoners fed. ‘As a rule, the prisoners are fed by non-governmental organizations, church associations and their own families’, in the words of a report on the situation of human rights in Zaire dated 19 December 1994. As a matter of fact, during Mr. Diallo’s whole time in detention it was only thanks to help provided by his family that he was able to eat. And it was also because he had contact with those outside the prison that he was able to give instructions to write the 30 November letters and that he was able to sign them.”<sup>6</sup>

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<sup>3</sup>See Memorial of the Republic of Guinea (MG), p. 30.

<sup>4</sup>See MG, p. 51.

<sup>5</sup>See Counter-Memorial of the Democratic Republic of the Congo (CMC), pp. 13-14.

<sup>6</sup>See RG, p. 17.

It adds that other channels were used to alert the public, and “on 21 December [1995] Guinea’s ambassador in Kinshasa reported to his superiors on the situation”<sup>7</sup>.

1.05. The DRC is only too pleased to take note of this spectacular reversal in Guinea’s stance on the serious accusations that Mr. Diallo was mistreated during his detention in the Immigration Service. It is plain that, when presented with the robust arguments put forward by the DRC, Guinea acknowledges that its national was properly fed during his detention, that he was in contact with people outside the facility, including his lawyers, and that Guinea’s ambassador in Kinshasa was aware of the situation.

5 1.06. The Respondent therefore requests the Court kindly to take note of this spectacular reversal in the Applicant’s stance. The Applicant admits by this reversal — despite couching it in terms which should fool no one — that it made serious, unsupported accusations.

## SECTION 2

### THE ALLEGED UNLAWFUL NATURE OF MR. DIALLO’S ARRESTS AND PERIODS IN DETENTION

#### §1. The arrest and detention of 1988-1989

1.07. The Applicant reproaches the DRC for not devoting a single word of its Counter-Memorial to the arrest and detention suffered by Mr. Diallo in 1988 and states that this approach cannot obscure the fact that Mr. Diallo’s arrest and incarceration in 1988 were completely unlawful and give rise to the DRC’s international responsibility<sup>8</sup>.

1.08. In fact it is the Applicant itself that has been silent in this regard, having omitted to accuse the DRC of arbitrarily arresting and detaining Mr. Diallo in 1988. This being the case, the Respondent could not defend itself against an accusation that had neither been brought to its attention nor established in fact and in law.

1.09. Indeed, at no point in its 109-page Memorial filed in the Court on 23 March 2001 did Guinea set out the facts relating to Mr. Diallo’s arrest and detention in 1988 or hold the DRC responsible for these alleged unlawful acts. This will be demonstrated by the DRC in the subsequent paragraphs.

1.10. The first sentence of Guinea’s Memorial concerns the seisin of the Court and the procedural history and begins “[o]n 31 January 1996 . . .”, the date of Mr. Diallo’s expulsion from the DRC. Subsequently, Guinea devotes 23 pages to expounding the relevant facts underlying the present dispute<sup>9</sup>. There is no mention of the events of 1988. Moreover, in the section on

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<sup>7</sup>See RG, p. 17.

<sup>8</sup>See RG, p. 6.

<sup>9</sup>See MG, pp. 10-33.

Mr. Diallo's arrest and detention, the Applicant refers solely to the arrest and detention of 1995-1996<sup>10</sup>.

6 1.11. In its submissions at the end of its Memorial, Guinea refers only to the arrest and detention of 1995-1996 and asks the Court to declare the DRC responsible for these alleged internationally wrongful acts. There is nothing on the events of 1988.

1.12. Moreover, in its Judgment of 24 May 2007, the Court itself only examined the case of Mr. Diallo's arrest and detention in 1995-1996 in the light of the Parties' written pleadings and oral arguments<sup>11</sup>. There had been no debate on the events of 1988.

1.13. It is only in its Reply, filed in the Court on 19 November 2008, that Guinea describes for the first time before the Court the facts pertaining to the events of 1988 — 20 years after they occurred and 10 years after filing its Application instituting proceedings — and attempts to have the DRC declared legally responsible for them. The Applicant is clearly seeking to put forward a new claim by means of the Reply and consequently to amend the Application at an inappropriate stage of the proceedings. This new claim, which is not in any way linked to the main claim concerning the events of 1995 to 1996 forming the basis of this dispute, entitles the [Respondent] to raise the objection of failure to exhaust the local remedies available in the Congolese legal system with respect to the arrest and detention of 1988-1989.

The DRC therefore requests the Court to reject this new claim brought by Guinea in violation of the relevant provisions of the Rules of Court, the obvious tardiness of which also presents particular procedural complications.

1.14. Subject to the foregoing, the DRC will now demonstrate, for the record, that the claim relating to the events of 1988 has no foundation in fact or in law.

1.15. The DRC begins by reproducing the version of the facts set out by the Guinean Embassy in Kinshasa, about one week after Mr. Diallo's arrest, in a letter to the Guinean Minister for Foreign Affairs in Conakry, dated 3 February 1988:

7 “Mr. Diallo . . . is accused of embezzling 170,000,000 zaires for the benefit of his company Africom-Zaire, of which Mr. Diallo is chairman and chief executive . . .

That accusation was extensively reported on the radio and television in a programme of 20 January 1988, broadcast at considerable length, and was on the front page of all the newspapers of the Zairean capital . . .

Until 22 January 1988, when no action had yet been taken against Mr. Diallo and he was still a free man, he saw no harm in putting together certain documents in his possession for his defence, or in going to the press as if to defy the State . . .

Things came to a head on Monday 25 January 1988, when two police officers executed an arrest warrant. Mr. Diallo was taken to the office of the Kinshasa prosecutor for the purposes of interrogation and on Wednesday 27 January 1988 was transferred to the large prison at Makala, eight kilometres from Kinshasa.”

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<sup>10</sup>See MG, pp 29-33.

<sup>11</sup>See Judgment of 24 May 2007, paras. 15-19.

On 28 January 1989, the *Procureur Général* in Kinshasa ordered Mr. Diallo to be released and wrote in a letter to him that “the annotated judicial case file opened against you has been closed for inexpediency of prosecution”<sup>12</sup>.

1.16. The DRC observes firstly that, as Guinea itself admits, Mr. Diallo had been imprisoned in 1988 pursuant to a judicial investigation opened by law officers in the Prosecutor’s Office of Kinshasa into acts of fraud of which he had, rightly or wrongly, been accused. This judicial investigation was later closed for inexpediency of prosecution. Mr. Diallo was therefore released on the orders of Kinshasa’s *Procureur Général*.

1.17. The DRC next notes that the events that befell Mr. Diallo are repeated every day in Guinea and wheresoever in the world someone suspected of having committed an offence may be placed on remand for purposes of a judicial investigation.

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1.18. Finally, Guinea has devoted five pages of its Reply to analysing the unlawful nature of Mr. Diallo’s arrest and detention in 1988, mainly on the basis of the provisions of Article 9 of the International Covenant on Civil and Political Rights (hereinafter “Covenant”). As the DRC will now show, the Applicant has failed to make a convincing case that Mr. Diallo’s arrest and detention in 1988 were internationally wrongful under the relevant provisions of the Covenant.

1.19. Article 9 (1) of the Covenant provides that:

“Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”

1.20. In the present case, Mr. Diallo was arrested and detained pursuant to a judicial investigation on the grounds of fraud and in accordance with Congolese criminal procedure. Guinea takes similar action every day on its own territory in respect of both its own nationals and aliens. Contrary to Guinea’s allegations, the DRC has done nothing wrong from this perspective. The Covenant has not therefore been violated by the DRC.

1.21. Pursuant to Article 9 (2) of the Covenant:

“Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.”

The [Applicant] maintains in this regard that

“the [Congolese] authorities never informed [Mr. Diallo] of the acts of which he stood accused”<sup>13</sup>.

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<sup>12</sup>See Observations of the Republic of Guinea on the Preliminary Objections of the Democratic Republic of the Congo, pp. 18-19.

<sup>13</sup>See RG, p. 12.

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1.22. The DRC confesses that it does not understand how the Applicant can make such an assertion given that it acknowledges in its own pleadings that Mr. Diallo was brought to the office of the Judicial Inspector, who told him that his arrest was related to the [Prime Minister's] press release (about his being accused of fraud) and that Mr. Diallo "then produced documentary evidence"<sup>14</sup>. It is of course a fact that Mr. Diallo was not a football player being taken to the Prosecutor's Office in Kinshasa to explain how he plays football and scores goals against the opposition. If Mr. Diallo did not know that he was being taken in for questioning at the Prosecutor's Office in Kinshasa in connection with fraud, the Applicant does not explain how and why its national prepared the documentary evidence (exculpating him from what?) that he produced before the Judicial Inspector.

1.23. Having regard to the foregoing, the DRC requests the Court to hold that the provisions of Article 9 (2) of the Covenant were respected in this case and therefore to reject Guinea's allegations as unfounded.

1.24. Guinea also accuses the Respondent of breaching the provisions of Article 9 (3) of the Covenant, pursuant to which:

"Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release."

1.25. The Applicant interprets this provision of the Covenant wrongly in maintaining that the DRC violated the Covenant because "the officials before whom Mr. Diallo was brought were neither independent of the executive nor empowered to release Mr. Diallo"<sup>15</sup>.

1.26. The DRC notes that Mr. Diallo was arrested on 25 January 1988 and brought promptly, that is to say the same day, before an officer authorized by law to exercise judicial power, in this case the Judicial Inspector attached to the Kinshasa Prosecutor's Office, who is responsible by law for initiating criminal proceedings against individuals suspected of violating the provisions of the Congolese Criminal Code. At no point does the Covenant state that the officer concerned has to be independent of the executive authorities, bearing in mind that in countries such as Belgium, France, Guinea and the DRC, for example, the Prosecutor's Office or *Ministère Public* acts as an instrumentality of the executive in initiating criminal proceedings.

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1.27. It is true that the Prime Minister, Mr. Mabi (First State Commissioner), had asked the Minister of Justice (Judicial Council), who heads the Prosecutor's Department in the Congolese judicial system, to prosecute Mr. Diallo for fraud. Guinea cites this request as evidence of interference by the executive in the workings of justice. However, the Applicant ignores the relevant portions of the letter of 4 July 1988 that the new Prime Minister, Mr. N'sambwa, sent to the Minister of Justice, six months after Mr. Diallo's arrest, to clarify certain points and to ask him to refer the Diallo case to the Prosecutor's Office for an independent and impartial investigation<sup>16</sup>.

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<sup>14</sup>See RG, p. 13.

<sup>15</sup>See RG, p. 13.

<sup>16</sup>See letter reproduced in RG, p. 9.

1.28. Furthermore, it was the Prosecutor's Office in Kinshasa that took Mr. Diallo in for questioning on 25 January 1988, and it was the same Prosecutor's Office that ordered him to be released on 28 January 1989 following the closure of the judicial investigation.

1.29. In addition, Guinea cites the second sentence of Article 9 (3) of the Covenant, which provides that:

“It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.”

The Applicant claims that the DRC violated this provision because: (1) Mr. Diallo was neither tried nor immediately released, (2) there was no justification for a one-year period in detention, (3) no risk could have arisen from Mr. Diallo's immediate release, since there was nothing that could be held against him, and so on<sup>17</sup>.

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1.30. The DRC notes that Guinea is once again misreading the provision relied on and is raising concerns that are entirely unrelated to it. The second sentence of Article 9 (3) of the Covenant does not say that a person has to be tried or released immediately. Furthermore, the Covenant neither prohibits States Parties from arranging for individuals to be detained on remand because of a judicial investigation nor stipulates the maximum period of time for which they may be held. In accordance with the Covenant, the DRC remanded Mr. Diallo in custody because he was under investigation and it was not bound by any rule of international law to release him temporarily pending his trial. The time that Mr. Diallo spent in custody was no more than that strictly necessary to conclude the judicial investigation, which had been opened against a grand master in simulation and dissimulation.

1.31. In conclusion, the DRC maintains that it has not violated the provisions of Article 9 (3) of the Covenant and that Guinea has not demonstrated the contrary.

1.32. The Applicant also accuses the DRC of having violated Article 9 (4) of the Covenant, pursuant to which:

“Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”

1.33. Here Guinea states in a single sentence, as proof of its accusations against the Respondent, that

“Mr. Diallo was not given the opportunity to take any proceedings to obtain a ruling on the lawfulness of his detention.”<sup>18</sup>

The DRC finds it extremely difficult to defend itself against such a casual and arbitrary accusation, given that its accuser is not even able to name one single measure that the DRC is supposed to have taken to prevent Mr. Diallo from taking proceedings to contest his pre-trial detention.

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<sup>17</sup>See RG, p. 14.

<sup>18</sup>See RG, p. 14.

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1.34. The Respondent notes that the Congolese Code of Criminal Procedure makes detailed provision for a specific procedure under which any individuals who have been remanded in custody are entitled to petition the competent judge for their temporary release. Guinea has produced no evidence to show that its national was prevented by the DRC from taking such proceedings. The DRC therefore concludes that this accusation lacks substance and requests the Court to disregard it.

1.35. A further accusation made by Guinea against the Respondent concerns the alleged breach of Article 9 (5) of the Covenant, which provides that “[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation”.

1.36. The Applicant states that

“Mr. Diallo has received no compensation for his unlawful arrest and detention.”<sup>19</sup>

This, according to Guinea, implies that the Respondent has breached this provision of the Covenant.

1.37. The DRC observes firstly that, following his release in 1989, Mr. Diallo would first have had to demonstrate before the Congolese courts that his arrest or detention had been unlawful in order to justify and claim compensation. He did nothing in this regard until he was expelled in January 1996, that is, seven years later. Had he initiated such proceedings within the Congolese legal system, he would have received an appropriate response.

Furthermore, before raising this issue before the Court at the international level, Guinea must first demonstrate that its national had clean hands and that he had exhausted the local remedies available for this purpose in the Congolese legal system. In fact Guinea is unable to do so and cannot be authorized to do so at this stage of the proceedings.

1.38. In sum, the DRC maintains that Mr. Diallo’s arrest and detention in 1988 were part of a judicial investigation conducted in accordance with Congolese law. They were not unlawful and no compensation was therefore owed to Mr. Diallo.

1.39. In conclusion, the DRC did not violate any provisions of the International Covenant on Civil and Political Rights when it arrested and detained Mr. Diallo in 1988. Neither did it violate Mr. Diallo’s rights as an individual when he was arrested and detained in 1995-1996.

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## **§2. The arrest and detention of 1995-1996**

1.40. The DRC has already explained at length in its pleadings the events surrounding Mr. Diallo’s arrest and detention in 1995-1996. It devoted four pages to this issue in the proceedings on the preliminary objections<sup>20</sup> and 14 pages in its Counter-Memorial of 27 March 2008<sup>21</sup>. It requests the Court kindly to refer to these earlier discussions given that there are no new arguments of substance in the 36 pages that Guinea devotes to this subject in its Reply.

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<sup>19</sup>See RG, p. 14.

<sup>20</sup>See Preliminary Objections of the Democratic Republic of the Congo (POC), pp. 39-42.

<sup>21</sup>See CMC, pp. 8-21.

1.41. Nevertheless, the DRC will make a few brief observations below.

1.42. Guinea maintains that the reason why Mr. Diallo was arrested, detained and expelled from the DRC by the Congolese Government was to prevent him from recovering the debts due to his companies. Guinea itself reports, however, that the Minister of Justice, hence the Government, had an official announcement broadcast on Congolese radio and television “saying that the debts held by Mr. Diallo’s companies were due and should be paid to them”<sup>22</sup>. The [Applicant] does not explain why a government that wants to prevent Mr. Diallo from recovering the debts due to his companies should make a request, officially no less, for those very debts to be paid to the companies concerned. This contradiction clearly shows that there is no substantial, credible evidence to support Guinea’s thesis that Mr. Diallo was expelled to prevent him from recovering the debts due to his companies.

1.43. The Applicant submits in its Reply that the Decree of 31 October 1995 expelling Mr. Diallo was unlawful because it was enacted by the Prime Minister instead of the President of the Republic in breach of the 1983 Legislative Order relating to immigration control<sup>23</sup>.

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1.44. In response to this erroneous assertion, the Respondent wishes to point out that the 1983 Legislative Order was promulgated under the 1974 Constitution, which was based on the one-party dictatorship, which was a widespread model in Africa during the Cold War and which placed all of the power in the hands of one man, the President-Founder of the DRC’s only party, Field Marshal Mobutu Sese Seko. A new constitution was promulgated on 9 April 1994 during the DRC’s transition to democracy, which provided that executive power should be shared by the President of the Republic and the Government. The Prime Minister, the head of the Government, held regulatory power and was therefore empowered to sign decrees to carry out the laws of the Republic.

1.45. The Decree of 31 October 1995, which was adopted under the 1994 Constitution, was therefore in conformity with the provisions of the 1983 Legislative Order relating to immigration control.

1.46. Citing the Court’s decision in the *Nicaragua* case, Guinea also claims in its Reply that the DRC enjoyed no discretion in assessing the threat to its national security when it took steps to expel Mr. Diallo and that the Court is entitled to determine whether such a threat existed. The case in question involved a bilateral treaty between the United States and Nicaragua establishing a national-security exception, which the Court had the power to review. No such treaty exists between the DRC and Guinea, so there are no clauses in respect of measures to protect national security for the Court to review. The case law cited by Guinea is not therefore relevant to this case.

1.47. Finally, Guinea accuses the DRC of infringing Mr. Diallo’s right to property

“in regard to [Mr. Diallo’s] personal possessions, which he had to leave behind without being given any chance to arrange for them to be repatriated or sold before he was abruptly expelled”<sup>24</sup>.

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<sup>22</sup>See RG, p. 21.

<sup>23</sup>See RG, p. 22.

<sup>24</sup>See RG, p. 54.

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1.48. The DRC notes firstly that Guinea is behaving like a person shipwrecked, clinging on to anything it can find in a bid to get out of the water and instead sinking deeper and deeper into inextricable confusion. Guinea declared in its Memorial that an inventory had been drawn up of Mr. Diallo's personal effects shortly after he was expelled. Its own conclusion about Mr. Diallo's personal effects was: "This category does not raise any particular legal problems."<sup>25</sup> The matter was therefore settled in regard to this category of property.

1.49. The DRC does not understand what has changed or what has happened to make the Applicant return to this issue in its Reply, eight years later, and reverse its position, stating that Mr. Diallo's personal effects do raise problems. The DRC is astonished that Guinea should behave so childishly before the International Court of Justice. It requests the Court to take note of Guinea's contradictory behaviour and therefore to reject its statements about Mr. Diallo's personal effects.

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<sup>25</sup>See MG, p. 55, para. 3.36.

## CHAPTER II

**ALLEGED VIOLATION BY THE DRC OF MR. DIALLO'S DIRECT RIGHTS  
AS ASSOCIÉ IN AFRICOM-ZAIRE AND AFRICONTAINERS-ZAIRE**

2.01. The DRC dealt thoroughly with the issue of Mr. Diallo's direct rights as *associé* during the preliminary objections stage of the proceedings when it devoted 12 pages to explaining clearly that these rights were never violated after Mr. Diallo was expelled from Congolese territory in January 1996<sup>26</sup>. The DRC does not therefore believe it necessary to repeat the points that it has already made on this subject in its preliminary objections and requests the Court kindly to refer to them. The Respondent also returned to this issue in its Counter-Memorial of 27 March 2008<sup>27</sup>. It therefore stands by its entire line of argument on the subject as stated in all of its previous pleadings.

2.02. In this Rejoinder the Respondent will therefore confine itself to making a few brief observations on a number of issues that continue to divide the two Parties.

## SECTION 1

**REPARATION FOR THE DAMAGE SUFFERED BY AFRICOM-ZAIRE  
AND AFRICONTAINERS-ZAIRE**

2.03. In its Reply Guinea states:

“First, while the injuries suffered by Mr. Diallo cannot be totally equated with those which his companies sustained, they do largely cover the same ground, insofar as the acts carried out against the person of Mr. Diallo, and in particular, his wrongful expulsion, had as a direct consequence the difficulties the companies experienced and the subsequent cessation of their activities, which in turn resulted in a considerable and very direct prejudice to Mr. Diallo; second, as, according to the DRC, the two companies have been struck off the Register of Companies and have thus ceased to exist, the reparation which the Court is requested to order indeed must cover the whole of their assets and receivables.”<sup>28</sup>

2.04. This allegation by the Applicant shows clearly that it still blurs the distinction between “Diallo and his companies” and that it is attempting to reintroduce into the debate the question of the debts due to these Congolese companies, an issue that the Court declared inadmissible in its Judgment of 24 May 2007. So that Guinea may understand the difference between the rights of *associés* as such and the rights of companies, the DRC asks it carefully to reread the *Barcelona Traction* case, the DRC's analyses and comments in the preliminary objections and the Judgment of 24 May 2007 on the Preliminary Objections.

2.05. The DRC reminds Guinea that at this stage of the proceedings it behoves the Applicant to explain clearly what are Mr. Diallo's direct rights as *associé* in the Congolese companies Africom-Zaire and Africontainers-Zaire and to demonstrate how his expulsion by the Congolese State in January 1996 caused these rights to be violated. In the light of the Judgment on the

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<sup>26</sup>See POC, pp. 76-87.

<sup>27</sup>See CMC, pp. 25-32.

<sup>28</sup>See RG, p. 92.

Preliminary Objections, it is inappropriate to devote six pages of the Reply to resurrecting the issue of reparation for the damage suffered by the companies, which the Court clearly rejected in that Judgment.

## SECTION 2

### RIGHT TO THE RESIDUAL ASSETS OF AFRICOM-ZAIRE AND AFRICONTAINERS-ZAIRE

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2.06. The Applicant maintains that the DRC deprived Mr. Diallo of his right to the residual assets of the companies by surreptitiously proceeding with their dissolution and liquidation. It is worth explaining to Guinea that there is a difference between striking a company off the Register of Companies on the one hand and a company's dissolution and subsequent liquidation on the other. The first is a purely administrative measure, simply placing on record that a company has ceased trading. The company continues to exist legally and may always resume trading at a later date by requesting a new registration number from the Registry of Companies. The second may ensue from a voluntary decision by the *associés* (voluntary dissolution) or from a decision handed down by a court (judicial dissolution). The dissolution (legal demise) leads to the liquidation (physical demise) of the company. The two companies concerned were in a state of undeclared bankruptcy even when Mr. Diallo was still living in the DRC. In the Respondent's view, these two private commercial companies have not yet been officially dissolved, as only the *associés* have the authority to take such a step, and legally they continue to exist.

2.07. In the light of the foregoing, the DRC challenges Guinea to provide the slightest proof that: (1) the two companies have been dissolved by the Respondent; (2) there was a liquidation surplus after payment of taxes and any debts; and (3) Mr. Diallo was prevented by the Congolese authorities from receiving his share of that surplus.

2.08. For the rest, the Respondent regards Mr. Diallo's alleged right to the residual assets of the two companies to be sheer fantasy on Guinea's part and unsupported by any credible, substantial evidence.

## SECTION 3

### MR. DIALLO'S DIRECT RIGHTS AS ALLEGED ASSOCIÉ IN AFRICOM-ZAIRE

2.09. The Court reserved its position on Africom-Zaire, stating the following in its Judgment of 24 May 2007:

“The Court begins by noting the existence of a disagreement between the Parties on the circumstances surrounding the establishment of Africom-Zaire and the conduct of its activities, on the continuation of those activities after the 1980s, and on the consequences these questions may have under Congolese law. It nonetheless takes the view that this disagreement essentially relates to the merits and that it has no bearing on the question of the admissibility of Guinea's Application as challenged in the Congo's objections.”<sup>29</sup>

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<sup>29</sup>See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment, *I.C.J. Reports 2007*, p. 605, para. 59.

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2.10. Now that the merits of the dispute are being examined, the DRC observes that for more than ten years now, Guinea has been unable to produce the Articles of Incorporation of Africom-Zaire to enable the Court to verify whether Mr. Diallo was an *associé* in this company and how many *parts sociales* he held. The identity of the other *associés* in the company is not even known, bearing in mind that there is no provision in Congolese commercial law for a unipersonal company to exist. We do not know the number of employees or the address of its registered office in Kinshasa. All we know about this company is that it is itself *associé* in Africontainers-Zaire.

2.11. The records of the Kinshasa Registry of Companies show that no annual financial statements or tax returns have been filed since the mid-1980s. No trace of any other commercial activity has been found since the order for listing paper was placed by the State at the beginning of the 1980s. Both Guinea and its national Mr. Diallo have themselves refused to say anything at all about this company's activities in the eight years prior to Mr. Diallo's expulsion in January 1996.

2.12. This being the case, the DRC can only conclude that the company had been in a state of undeclared bankruptcy for several years before Mr. Diallo's expulsion from Congolese territory.

2.13. In the light of the foregoing, it beggars belief — indeed it is improper — that Guinea should be arguing before the Court that the DRC violated Mr. Diallo's direct rights as *associé* in a company that had not engaged in any demonstrable commercial activity for several years, was in a state of undeclared bankruptcy, no longer held general meetings, did not employ any Congolese staff and did not pay any taxes and that it should be claiming financial reparation to compensate the individual concerned. This is clearly an unacceptable attempt to use the Court for mercenary purposes of unlawful enrichment and to despoil the Congolese public treasury.

2.14. The DRC therefore requests the Court to find that it did not violate any of Mr. Diallo's direct rights as alleged *associé* in Africom-Zaire when it ordered his expulsion in January 1996.

#### SECTION 4

##### THE ALLEGED VIOLATION OF MR. DIALLO'S DIRECT RIGHTS AS ASSOCIÉ IN AFRICONTAINERS-ZAIRE

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2.15. Mr. Diallo's position as *associé* and the issue of his direct rights in this capacity in Africontainers-Zaire, contrary to the case of Africom-Zaire, do not raise any particular factual or legal problems. In its Reply, Guinea claims that, in expelling Mr. Diallo in January 1996, the Respondent violated the following direct rights of Mr. Diallo as *associé* in Africontainers-Zaire: (1) the right to participate in general meetings and to choose a new *gérant*<sup>30</sup>; (2) the right to oversee and control acts by the management and the operations of the company<sup>31</sup>; and (3) the right of ownership in the *parts sociales*<sup>32</sup>. Thus, these three direct rights of Mr. Diallo as *associé* are the only ones that Guinea claims were violated by the DRC in the Reply that it has submitted to the Court and it has waived claims in respect of any other rights. The Respondent will make a number of observations on the alleged violation of these rights below.

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<sup>30</sup>See RG, pp. 59-65.

<sup>31</sup>See RG, pp. 65-68.

<sup>32</sup>See RG, pp. 69-90.

**§1. The alleged violation of the right to participate in general meetings and to choose a new *gérant***

2.16. The DRC has already explained its position on this issue in its Counter-Memorial and stands by all that it has said on the subject<sup>33</sup>. As regards the right to choose a new *gérant*, Guinea seems to be suffering from total amnesia, and for good reason, failing to mention the appointment of Mr. N’Kanza as *gérant* of Africontainers-Zaire after Mr. Diallo’s expulsion from the DRC. Proof of this appointment was however produced by Guinea itself and submitted with its Memorial (Ann. 201); the DRC pointed it out in its oral arguments on the preliminary objections in November-December 2006.

If we accept Guinea’s argument that Diallo equals Africontainers and Africontainers equals Diallo, then the new *gérant* of Africontainers, Mr. N’Kanza, must have been appointed by Mr. Diallo himself, who was also giving him instructions. This new *gérant* was therefore a *gérant* of Mr. Diallo’s choosing.

This being the case, Guinea’s assertion that the only *gérant* that Mr. Diallo would choose would be himself is laughable and pure fantasy.

2.17. As regards Mr. Diallo’s right to participate in general meetings, the Respondent wishes to make it clear that Congolese commercial law does not stipulate where commercial companies have to hold their general meetings. The only legal obligation concerns where a company formed under Congolese law must have its registered office, which has to be on Congolese territory. A Congolese company may therefore legitimately hold a general meeting abroad. If it does, the minutes [*procès-verbal*] of that general meeting have to be certified by the DRC’s Embassy in the country concerned to be legally valid, before they can be filed officially with the Registry of Companies in whose jurisdiction the registered office of the company is located on Congolese territory.

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2.18. Since, according to Guinea, Mr. Diallo equals Africontainers, he was able, quite legitimately, to hold a general meeting in Conakry and send the certified minutes to Kinshasa without having to be physically in the DRC. This is how he was able to appoint a new *gérant* of Africontainers in the person of Mr. N’Kanza.

2.19. Article 1 of Legislative Order [*Ordonnance-loi*] 66-341 is cited. It provides that “[c]ompanies whose main centre of operations is situated in the Congo must have their administrative seat in the Congo”. This law was promulgated in a special context, six years after the DRC gained independence, and was designed to oblige Belgian colonial companies which still maintained their registered offices in Belgium while having their main centres of operations in the Congo to transfer the former to Congolese territory. This particular legislation does not oblige all commercial companies formed under Congolese law to hold their general meetings on Congolese territory. The Applicant’s interpretation of this provision is therefore completely wrong and should be rejected.

2.20. The DRC is bound to draw the Court’s attention to the fact that throughout these proceedings Guinea has stated over and over that the reason Mr. Diallo was expelled in January 1996 was to prevent him from recovering the debts owed to his companies, that is to say, to himself. The Applicant repeated this in its Reply in the following terms:

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<sup>33</sup>See CMC, pp. 28-29 and 31-32.

“One must not forget that the sole reason for Mr. Diallo’s expulsion was to prevent him from benefiting from the enforcement of judicial decisions handed down in favour of his companies.”<sup>34</sup>

2.21. According to Guinea itself, therefore, the motive behind Mr. Diallo’s expulsion was not to prevent him from appointing a new *gérant* or from participating in general meetings of Africontainers. Its sole and exclusive purpose, in Guinea’s own words, was to prevent Mr. Diallo from making money.

2.22. In the light of the foregoing, the DRC requests the Court to find that it did not violate Mr. Diallo’s right either to participate in general meetings of Africontainers-Zaire, which moreover were never convened, or to appoint a new *gérant* of his choice.

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**§2. The alleged violation of Mr. Diallo’s right to oversee and control acts by the management and the operations of the companies**

2.23. As the DRC has stressed above, the motive behind expelling Mr. Diallo was not to violate his right to oversee and control acts by the management and the operations of his companies. The expulsion was in no way directed at this right.

2.24. In its Reply Guinea has quoted the relevant provisions of Congolese commercial law concerning the rights of oversight and control in SPRLs<sup>35</sup>. However, the conclusions that it draws are unreasonable.

2.25. It is clear from the logic of Articles 71 and 75 of the Decree of 27 February 1887 on commercial companies and Article 19 of the Articles of Incorporation of Africontainers-Zaire that the task of controlling and overseeing the management of an SPRL is entrusted not to an *associé* individually but to financial experts known as “statutory auditors” [*commissaires aux comptes*]. They act on behalf of the *associés*, to whom they report annually at the company’s general meeting on the performance of their duties. Neither business law nor practice in the DRC allows for an *associé* personally to conduct a financial or other audit of the company, independent of the report drawn up by the statutory auditors or other auditors engaged for the purpose. The right of the *associé* is limited to participating in the appointment of one or more statutory auditors at the company’s general meeting.

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2.26. In the present case, the DRC has never interfered in any way in Mr. Diallo’s relationship with Africontainers-Zaire to prevent him from exercising his right as *associé* to appoint a statutory auditor to oversee and audit the management of the company on behalf of the *associés*. Moreover, the Respondent did not have any interest in doing so, especially given that Mr. Diallo had appointed a new *gérant* to head Africontainers-Zaire without any impediment having been placed in the way.

2.27. The Respondent therefore maintains that it did not violate Mr. Diallo’s right to oversee and control Africontainers-Zaire, which was moreover in a state of undeclared bankruptcy.

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<sup>34</sup>See RG, p. 63.

<sup>35</sup>See RG, pp. 65-67.

**§3. The alleged violation of Mr. Diallo's property rights  
in the *parts sociales* in Africontainers-Zaire**

2.28. In its Reply, Guinea devotes lengthy discussion to what it calls the indirect or *de facto* expropriation of Mr. Diallo's *parts sociales* in Africom-Zaire and Africontainers-Zaire following his expulsion from the DRC in January 1996. It maintains that even though Mr. Diallo remained the holder of legal title to his *parts sociales*, his expulsion nevertheless destroyed the economic value of these *part sociales*, which thus became an empty shell. It concludes that the DRC therefore violated Mr. Diallo's property rights in his *parts sociales* and claims reparation for this internationally wrongful act.

2.29. The DRC draws the Court's attention to the following statement made by Guinea in its Reply about the alleged expropriation of Mr. Diallo's *parts sociales*:

"The *parts sociales* were expropriated by means of the wrongful expulsion of Mr. Diallo, the only motive for which was, quite plainly . . . to prevent him from pursuing, on behalf of his companies, the various sets of legal proceedings which had been brought."<sup>36</sup>

2.30. It is clear once again, by Guinea's own admission, that Mr. Diallo's expulsion did not amount to interference in his relationship with Africontainers-Zaire as *associé* aimed at denying him either directly or indirectly his property rights in the *parts sociales* in the company. On the contrary, it was intended to prevent him, according to Guinea, from taking legal action to recover the debts due to his companies. The DRC does not therefore understand how Mr. Diallo's expulsion could constitute a violation of his property rights in the *parts sociales* or an expropriation of them. The DRC has never ordered Africontainers not to pay Mr. Diallo his share of the annual dividend.

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2.31. The DRC also contests the argument that Mr. Diallo's presence on or absence from Congolese territory would be respectively beneficial or detrimental to the value of his *parts sociales*. The stock exchange value of the shares of a number of large commercial companies does not depend on whether or not their senior managers and shareholders are in the territory where these companies are established. In the case of Africontainers-Zaire, it is even established that it was already in a state of undeclared bankruptcy and was not engaged in any reported commercial activity at the time. Even when Mr. Diallo was its *gérant* and was living in the DRC, it had just a few dozen rusty containers scattered across various locations in Kinshasa. There is no record of annual financial statements or tax returns being filed in the years immediately prior to Mr. Diallo's expulsion.

2.32. To sum up, the Respondent maintains that it did nothing to interfere in the relationship between Mr. Diallo in his capacity as *associé* and Africontainers with a view to violating his property rights in his *parts sociales*.

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<sup>36</sup>See RG, pp. 88-89.

## CHAPTER III

## SUBMISSIONS

While expressly reserving the right to supplement and expand on its grounds in fact and in law and without admitting any statement that might be prejudicial to it, the Respondent requests the Court to adjudge and declare that:

1. the Democratic Republic of the Congo has not committed any internationally wrongful acts towards Guinea in respect of Mr. Diallo's individual personal rights;
2. the Democratic Republic of the Congo has not committed any internationally wrongful acts towards Guinea in respect of Mr. Diallo's direct rights as *associé* in Africontainers-Zaire or alleged *associé* in Africom-Zaire;
3. accordingly, the Application of the Republic of Guinea is unfounded in fact and in law.

5 June 2009,

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

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