

DECLARATION OF JUDGE GREENWOOD

1. Although Guinea has brought this case in the exercise of its right of diplomatic protection, the case is in substance about the human rights of Mr. Diallo. The damages which the Court has ordered the Democratic Republic of the Congo (“the DRC”) to pay to Guinea are calculated by reference to the loss suffered by Mr. Diallo and are intended for his benefit, not that of the State. As the Court held in its 2010 Judgment, (*Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, *Merits, Judgment, I.C.J. Report 2010 (II)*, p. 692), the DRC committed serious violations of Mr. Diallo’s human rights. He was unlawfully and arbitrarily detained and expelled from the country in which he had long been resident without any semblance of due process and without being given the opportunity to wind up his affairs before he was forced out of the country. In accordance with long-established legal principle, there can thus be no doubt that the DRC must compensate for the loss and damage which those unlawful acts caused Mr. Diallo. The Parties having failed to agree upon the amount of compensation, Guinea now seeks a total of more than US\$11.5 million. The Court has ordered the DRC to pay US\$95,000, a sum amounting to less than one per cent of that claim. It is important to be clear about why Guinea has recovered what seems at first sight to be so little.

2. The first reason can be found in the Court’s two earlier Judgments in 2007 and 2010. In its Judgment of 24 May 2007 (*Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, *Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 582), the Court held that Guinea lacked standing to claim in respect of alleged infringements of the rights of Mr. Diallo’s two companies, Africom-Zaire and Africontainers-Zaire (see *ibid.*, pp. 614-616, paras. 86-94). In its Judgment of 30 November 2010 (*Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, *Merits, Judgment, I.C.J. Report 2010 (II)*, p. 693), the Court rejected Guinea’s claims for violation of Mr. Diallo’s rights as *associé* in the companies (see *ibid.*, pp. 673-690, paras. 99-159). Both of these rulings were based on an application of the principle in *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* (*Second Phase, Judgment, I.C.J. Reports 1970*, p. 35). At the heart of the *Barcelona Traction* principle is the elementary proposition that the rights, assets and liabilities of a limited company are separate and distinct from those of its shareholders and that a State exercising diplomatic protection of a shareholder may claim only in respect of the rights of the

shareholder, not those of the company. In its Memorial in the present phase, however, Guinea sought US\$4.36 million in compensation for what it claimed was the diminution of the value of Mr. Diallo's shareholding in the companies. Although couched in different language, this claim is in substance the same as the claims already rejected by the Court and thus has to be dismissed.

3. The second reason for the comparatively small sum recovered by Guinea lies in the lack of evidence presented in support of the claim for material damage allegedly sustained by Mr. Diallo. Guinea claimed in excess of US\$7 million for loss of earnings and loss of Mr. Diallo's personal property. For Guinea to succeed in that claim, it had to produce evidence which demonstrated that Mr. Diallo had sustained the loss claimed and that that loss had been caused by the unlawful acts of the DRC. Guinea has not, however, produced any evidence to that effect. If one takes the claim for loss of earnings, there is no evidence whatsoever of what Mr. Diallo was earning prior to, or following, his detention and expulsion from the DRC. If, as Guinea maintains, he was being paid a substantial salary as *gérant* of the two companies prior to his arrest, then that fact would have been recorded in the accounts of the companies and, presumably, have been reflected in Mr. Diallo's bank account records and tax records. Guinea has produced none of these documents. Nor has Guinea suggested that they no longer exist or are not accessible to Mr. Diallo, whereas Guinea has produced considerable numbers of documents from the two companies regarding other aspects of the case.

4. Indeed, as the Judgment records (at paras. 42-43), such evidence as there is suggests that, at least by 1995, Mr. Diallo was not in receipt of the income which Guinea now asserts he was receiving and that the two companies were in no position to pay him such an income. In the preliminary objections phase of the case, Guinea asserted, in marked contrast to the position which it now takes, that Mr. Diallo was "already impoverished" before he was detained by the DRC. In particular, Guinea submitted a certificate obtained by Mr. Diallo on 12 July 1995, i.e., some four months before he was first detained, in which he was "declared temporarily destitute, insolvent and lacking any means of subsistence". In the present phase of the proceedings, Guinea has sought to minimize the significance of this document but I do not think it can so easily be dismissed. If it was an honest and accurate statement of Mr. Diallo's affairs, then he was not receiving an income from his companies before he was detained and could not, therefore, have lost that income as a consequence of his detention; if it was not an honest and accurate statement, then it would appear to have been obtained by fraud, in which case it raises serious questions about whether any reliance can be placed upon assertions emanating from Mr. Diallo about his income or assets. In addition, the evidence before the Court at the merits phase of the case establishes that both companies had ceased trading activities several years before

Mr. Diallo was arrested and expelled, so that it would be surprising, to say the least, if they had been paying him a salary of US\$300,000 a year in 1995.

5. In these circumstances, I believe the Court had no option but to dismiss Guinea's claim for loss of earnings. It is not a case in which the Court would have been justified in making an award based on equitable considerations. I accept that such considerations may have a role in claims for material damage where the claimant is unable to produce evidence. However, that is not the case here. Guinea has produced evidence regarding the finances of both Mr. Diallo and the two companies but it is evidence which undermines, rather than sustains, its claim. Equitable principles should not be used to make good the shortcomings in a claimant's case by being substituted for evidence which could have been produced if it actually existed: equity is not alchemy.

6. With one qualification, the same is true of the claim for the alleged loss of Mr. Diallo's personal effects. Most of this claim related to a number of valuable items, such as works of art or jewellery, allegedly taken from Mr. Diallo's apartment. Yet there is no evidence that Mr. Diallo ever owned such items, that they were in his apartment at the time of his expulsion or that they were lost as a result of that expulsion. Nevertheless, it is clear from the record that Mr. Diallo was expelled without being given the opportunity to take care of his personal property and that no attempt was made by the DRC to safeguard his apartment. In these circumstances, I accept that some loss must have been sustained and have voted in favour of the award of US\$10,000 in respect of that head of claim.

7. That leaves the claim for non-material or moral damage. An award of compensation is plainly required under this heading. The Judgment (at para. 18) cites the opinion of the umpire in the *Lusitania* cases (United Nations, *Reports of International Arbitral Awards*, Vol. VII, p. 32) that injury for such damage is recoverable in international law. That opinion adds that "[s]uch damages are very real, and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real" (*ibid.*, p. 40). The nature of such damage means that specific evidence cannot be required and that the assessment of compensation can only be based upon equitable principles. Nevertheless, just as the damages are no less real because of the difficulty of estimating them, so the determination of compensation should be no less principled because the task is difficult and imprecise. What is required is not the selection of an arbitrary figure but the application of principles which at least enable the reader of the judgment to discern the factors which led the Court to fix the sum awarded. Moreover, those principles must be capable of being applied in a consistent and coherent manner, so that the amount awarded can be regarded as just, not

merely by reference to the facts of this case, but by comparison with other cases.

8. As this is the first occasion on which the Court has had to assess damages since the *Corfu Channel* case (*United Kingdom v. Albania*) (*Assessment of the Amount of Compensation, Judgment, I.C.J. Reports 1949*, p. 171), it is entirely appropriate that the Court, recognizing that there is very little in its own jurisprudence on which it can draw, has made a thorough examination of the practice of other international courts and tribunals, especially the main human rights jurisdictions, which have extensive experience of assessing damages in cases with facts very similar to those of the present case. International law is not a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others; it is a single, unified system of law and each international court can, and should, draw on the jurisprudence of other international courts and tribunals, even though it is not bound necessarily to come to the same conclusions.

9. A study of those judgments, however, shows that the sums awarded for moral damage are usually quite small. A few examples must suffice. So far as detention is concerned, the European Court of Human Rights in *Al-Jedda v. United Kingdom* (Grand Chamber, application No. 27021/08, judgment No. 27021/08) considered a figure of €25,000 (equivalent to approximately US\$36,000 at the rate of exchange on the date of that judgment) sufficient for a detention which lasted more than three years (judgment of 7 July 2011, 147 *International Law Reports* 107). In *Lupsa v. Romania* (application No. 10337/04, judgment of 8 June 2006), the same Court considered that a sum of €15,000 (approximately US\$19,000 at the rate of exchange on the date of that judgment) was equitable in respect of both moral and material damage in the case of a man who was unlawfully expelled from the respondent State after residing there for fourteen years, during which he had founded a family and established a business in the country. The Inter-American Court of Human Rights in *Gutiérrez-Soler v. Colombia* (judgment of 12 September 2005) awarded US\$100,000 to a man who had been tortured into signing a false confession, persecuted for an offence he had not committed and separated from his family for so long that he lost all contact with his child for several years. It is also instructive to look at the case of *MIV "Saiga" (No. 2) (Saint Vincent and the Grenadines v. Guinea)* (judgment of 1 July 1999, 120 *International Law Reports* 143) before the International Tribunal for the Law of the Sea. In that case, Guinea argued that compensation for moral damage in relation to unlawful detention should not exceed US\$100 per day. While that figure seems to have been derived from arbitral awards given several decades earlier, it stands in marked contrast to the sums claimed by Guinea in the present case.

10. I have no doubt that the treatment accorded to Mr. Diallo by the DRC was a serious violation of his human rights which caused substantial moral damage. Four factors seem to be relevant in assessing damages for this violation. First, Mr. Diallo was detained for a total of 72 days, without any semblance of due process or even explanation. Secondly, he was arbitrarily expelled. This breach is more serious than most cases of expulsion, because the DRC was the country in which Mr. Diallo had made his home and his career for over thirty years — almost the whole of his adult life — and in which he had a respected place in business and in society. Thirdly, in its 2010 Judgment, the Court found that Mr. Diallo's expulsion was designed to prevent him from pursuing litigation on behalf of his two companies (*I.C.J. Reports 2010 (II)*, p. 669, para. 82). Although I did not agree with that conclusion (see pp. 720-723, paras. 18-23 of the joint declaration of Judge Keith and myself), the Court having made that finding, it is plainly a factor which has to be taken into account in the assessment of damages. Lastly, it seems to me appropriate that the award of damages reflects the fact that there has been a considerable delay since the events in question. Mr. Diallo was detained in 1995 and expelled from the DRC at the beginning of 1996; it is now more than sixteen years later. There are various explanations for that delay (including Guinea's request for an extension of time for filing its pleadings) but I accept that the delay is an aggravating factor. All of these factors sustain the finding that Mr. Diallo's treatment caused him suffering, humiliation and loss of reputation and justify a substantial award in respect of moral damage.

11. Nevertheless, the sum awarded by the Court in respect of moral damage is higher than might be expected when one bears in mind the sums awarded by other international courts and tribunals, especially those with the most extensive experience of determining compensation for violations of human rights. I would therefore have been inclined to award a somewhat smaller sum than that determined by the Judgment. I have not voted against paragraph 61 (1) of the Judgment, because my difference with the conclusions reached by the Court is one of degree, rather than principle. Nevertheless, I feel compelled to note that this case is very far from being one of the gravest cases of human rights violations. If US\$85,000 is an appropriate sum to compensate for Mr. Diallo's moral damage, the sum which is required in a case where, for example, a person has been tortured or forced to witness the murder of family members would have to be several magnitudes higher.

(Signed) Christopher GREENWOOD.
