



INTERNATIONAL COURT OF JUSTICE

Peace Palace, Carnegieplein 2, 2517 KJ The Hague, Netherlands

Tel.: +31 (0)70 302 2323 Fax: +31 (0)70 364 9928

Website: www.icj-cij.org

Summary

Not an official document

Summary 2012/3
19 June 2012

Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)

(Compensation owed by the Democratic Republic of the Congo to the Republic of Guinea)

Summary of the Judgment of 19 June 2012

I. Procedural and factual background of the case (paras. 1-17)

The Court begins by recalling the procedural background of the present case.

On 28 December 1998, the Republic of Guinea (hereinafter “Guinea”) filed in the Registry of the Court an Application instituting proceedings against the Democratic Republic of the Congo (hereinafter the “DRC”, named Zaire between 1971 and 1997) in respect of a dispute concerning “serious violations of international law” alleged to have been committed upon the person of Mr. Ahmadou Sadio Diallo, a Guinean national.

In its Judgment of 24 May 2007 on preliminary objections, the Court declared the Application 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”. However, the Court declared the Application 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”.

In its Judgment of 30 November 2010 on the merits, the Court found that, in respect of the circumstances in which Mr. Diallo had been expelled on 31 January 1996, the DRC had violated Article 13 of the International Covenant on Civil and Political Rights (hereinafter the “Covenant”) and Article 12, paragraph 4, of the African Charter on Human and Peoples’ Rights (hereinafter the “African Charter”) (subpara. (2) of the operative part). The Court also found that, in respect of the circumstances in which Mr. Diallo had been arrested and detained in 1995-1996 with a view to his expulsion, the DRC had violated Article 9, paragraphs 1 and 2, of the Covenant and Article 6 of the African Charter (subpara. (3) of the operative part). In addition, the Court found that the DRC had violated Mr. Diallo’s rights under Article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations (hereinafter the “Vienna Convention”).

In its Judgment on the merits, the Court further decided that “the Democratic Republic of the Congo [was] under obligation to make appropriate reparation, in the form of compensation, to the Republic of Guinea for the injurious consequences of the violations of international obligations referred to in subparagraphs 2 and 3 [of the operative part]”. The Court did not however order the

DRC to pay compensation for the violation of Mr. Diallo's rights under Article 36, paragraph 1 (b) of the Vienna Convention. The Court decided that failing agreement between the Parties on the compensation owed by Guinea to the DRC within six months from the date of the said Judgment, the question would be settled by the Court. The time-limit of six months thus fixed by the Court having expired on 30 May 2011 without an agreement being reached between the Parties on the question, it was therefore for the Court to decide on the amount of compensation to be paid to Guinea as a result of the wrongful arrests, detentions and expulsion of Mr. Diallo by the DRC, in accordance with the conclusions set forth in its Judgment on the merits.

The Court notes that Guinea seeks compensation under four heads of damage: non-material injury (referred to by Guinea as "mental and moral damage"); and three heads of material damage: alleged loss of personal property; alleged loss of professional remuneration (referred to by Guinea as "loss of earnings") during Mr. Diallo's detentions and after his expulsion; and alleged deprivation of "potential earnings". As to each head of damage, the Court states that it will consider whether an injury is established. It will then "ascertain whether, and to what extent, the injury asserted by the Applicant is the consequence of wrongful conduct by the Respondent", taking into account "whether there is a sufficiently direct and certain causal nexus between the wrongful act . . . and the injury suffered by the Applicant". Lastly, the Court points out that if the existence of injury and causation is established, the Court will then determine the valuation.

II. Heads of damage in respect of which compensation is requested (paras. 18-55)

(A) Compensation for the non-material injury suffered by Mr. Diallo

The Court is of the view that non-material injury can be established even without specific evidence. In the case of Mr. Diallo, the fact that he suffered non-material injury is an inevitable consequence of the wrongful acts of the DRC already ascertained by the Court. In its Judgment on the merits, the Court found that Mr. Diallo had been arrested without being informed of the reasons for his arrest and without being given the possibility to seek a remedy; that he was detained for an unjustifiably long period pending expulsion; that he was made the object of accusations that were not substantiated; and that he was wrongfully expelled from the country where he had resided for 32 years and where he had engaged in significant business activities. The Court therefore considers it reasonable to conclude that the DRC's wrongful conduct caused Mr. Diallo significant psychological suffering and loss of reputation.

Furthermore, the Court has taken into account the number of days for which Mr. Diallo was detained — he was continuously detained for 66 days, from 5 November 1995 until 10 January 1996, and was detained for a second time between 25 and 31 January 1996, that is, for a total of 72 days — and the conclusion in its Judgment on the merits that it had not been demonstrated that Mr. Diallo was mistreated in violation of Article 10, paragraph 1, of the Covenant.

The Court also notes that the circumstances of the case point to the existence of certain factors which aggravate Mr. Diallo's non-material injury, in particular the context in which the wrongful detentions and expulsion occurred. In addition to the fact that Mr. Diallo's arrests and detentions aimed at allowing the expulsion measure were arbitrary within the meaning of Article 9, paragraph 1, of the Covenant and Article 6 of the African Charter, the Court emphasizes that it also noted in its Judgment on the merits that it was difficult not to discern a link between Mr. Diallo's expulsion and the fact that he had attempted to recover debts which he believed were owed to his companies by the Zairean State or companies in which the State held a substantial portion of the capital. The Court observes that quantification of compensation for non-material injury necessarily rests on equitable considerations.

In the light of the circumstances set out above, the Court considers that the amount of US\$85,000 would provide appropriate compensation for the non-material injury suffered by Mr. Diallo.

(B) Compensation for material injury suffered by Mr. Diallo

The Court explains that it will begin by addressing Guinea's claim relating to the loss of Mr. Diallo's personal property; it will then consider Guinea's claims concerning loss of professional remuneration during Mr. Diallo's unlawful detentions and following his unlawful expulsion from the DRC; and, finally, it will turn to Guinea's claim in respect of "potential earnings".

1. Alleged loss of Mr. Diallo's personal property (including assets in bank accounts)

The Court notes that, according to Guinea, Mr. Diallo's abrupt expulsion prevented him from making arrangements for the transfer or disposal of personal property that was in his apartment and also caused the loss of certain assets in bank accounts. The Court states that it will address Guinea's claim for the loss of Mr. Diallo's personal property, without taking into account property of the two companies, given the Court's prior decision that Guinea's claims relating to the companies were inadmissible. The Court notes that the personal property at issue in Guinea's claim may be divided into three categories: furnishings of Mr. Diallo's apartment that appear on the inventory of personal property in the apartment, certain high-value items alleged to have been in Mr. Diallo's apartment, which are not specified on that inventory; and assets in bank accounts.

As to personal property that was located in Mr. Diallo's apartment, the Court notes that the inventory of the property in Mr. Diallo's apartment, which both Parties have submitted to the Court, was prepared approximately 12 days after Mr. Diallo's expulsion from the DRC. The Court considers that, although both Parties appear to accept that the items that are listed on the inventory were in the apartment at the time the inventory was prepared, there is, however, uncertainty about what happened to that property. Guinea has failed to prove the extent of the loss suffered by Mr. Diallo and the extent to which any such loss was caused by the DRC's unlawful conduct. The Court adds that even assuming that it could be established that the personal property on the inventory was lost and that any such loss was caused by the DRC's unlawful conduct, Guinea offered no evidence regarding the value of the items on the inventory. Despite the shortcomings in the evidence related to the property listed on the inventory, the Court recalls that Mr. Diallo lived and worked in the territory of the DRC for over 30 years, during which time he surely accumulated personal property. Even assuming that the DRC is correct in its contention that Guinean officials and Mr. Diallo's relatives were in a position to dispose of that personal property after Mr. Diallo's expulsion, the Court considers that, at a minimum, Mr. Diallo would have had to transport his personal property to Guinea or to arrange for its disposition in the DRC. Thus, the Court is satisfied that the DRC's unlawful conduct caused some material injury to Mr. Diallo with respect to personal property that had been in the apartment in which he lived, although it would not be reasonable to accept the very large sum claimed by Guinea for this head of damage. In such a situation, the Court considers it appropriate to award compensation based on equitable considerations in the amount of US\$10,000.

The Court next considers Guinea's contention that Mr. Diallo's apartment contained certain high-value items not specified on the inventory described above. It notes that Guinea mentions several items in its Memorial, but offers few details and provides no evidence to support the assertion that Mr. Diallo owned those items at the time of his expulsion, that they were in his apartment if he did own them, or that they were lost as a result of his treatment by the DRC. For these reasons, the Court rejects Guinea's claims as to the loss of high-value items not specified on the inventory.

As to assets alleged to have been contained in bank accounts, the Court considers that Guinea offers no details and no evidence to support its claim. There is no information about the total sum held in bank accounts, the amount of any particular account or the name(s) of the bank(s) in which the account(s) were held. Further, there is no evidence demonstrating that the unlawful detentions and expulsion of Mr. Diallo caused the loss of any assets held in bank accounts. For example, Guinea does not explain why Mr. Diallo could not access any such accounts after leaving the DRC. Thus, it has not been established that Mr. Diallo lost any assets held in his bank accounts in the DRC or that the DRC's unlawful acts caused Mr. Diallo to lose any such financial assets. Accordingly, the Court rejects Guinea's claim as to the loss of bank account assets.

The Court therefore awards no compensation in respect of the high-value items and bank account assets.

2. Alleged loss of remuneration during Mr. Diallo's unlawful detentions and following his unlawful expulsion

At the outset, the Court notes that, in its submissions at the conclusion of its Memorial, Guinea claims US\$6,430,148 for Mr. Diallo's loss of earnings during his detentions and following his expulsion. However, Guinea makes reference elsewhere in its Memorial to a sum of US\$80,000 for Mr. Diallo's loss of earnings during his detentions. As presented by Guinea, this claim for US\$80,000, although not reflected as a separate submission, is clearly distinct from its claim for US\$6,430,148 which, in the reasoning of the Memorial, only concerns the alleged "loss of earnings" following Mr. Diallo's expulsion. The Court will interpret Guinea's submissions in light of the reasoning of its Memorial, as it is entitled to do. Therefore, it will first consider the claim of US\$80,000 for loss of professional remuneration during Mr. Diallo's detentions and then will examine the claim of US\$6,430,148 for loss of professional remuneration following his expulsion.

As to the alleged loss of professional remuneration during the unlawful detentions of Mr. Diallo, the Court recalls that Guinea maintains that, prior to his arrest on 5 November 1995, Mr. Diallo received monthly remuneration of US\$25,000 in his capacity as *gérant* of Africom-Zaire and Africontainers-Zaire. Based on that figure, Guinea estimates that Mr. Diallo suffered a loss totalling US\$80,000 during the 72 days of his detention, an amount that, according to Guinea, takes account of inflation. The Court notes that the DRC contends that Guinea has not produced any documentary evidence to support the claim for loss of remuneration. The DRC also takes the view that Guinea has failed to show that Mr. Diallo's detentions caused a loss of remuneration that he otherwise would have received. In particular, the DRC asserts that Guinea has failed to explain why Mr. Diallo, as the sole *gérant* and *associé* of the two companies, could not have directed that payments be made to him.

The Court considers whether Guinea has established that Mr. Diallo was receiving remuneration prior to his detention and that such remuneration was in the amount of US\$25,000 per month.

The Court first observes that Guinea provides no proof that Mr. Diallo was earning US\$25,000 per month as *gérant* of the two companies. There are no bank account or tax records; there are no accounting records of either company showing that it had made such payments.

Moreover, the Court considers that there is evidence suggesting that Mr. Diallo was not receiving US\$25,000 per month in remuneration from the two companies prior to his detentions. First, the evidence regarding Africom-Zaire and Africontainers-Zaire strongly indicates that neither of the companies was conducting business — apart from the attempts to collect debts allegedly owed to each company — during the years immediately prior to Mr. Diallo's detentions. Secondly, in contrast to Guinea's claim in the present phase of the proceedings devoted to compensation that Mr. Diallo was receiving monthly remuneration of US\$25,000, Guinea told the Court, during the

preliminary objections phase, that Mr. Diallo was “already impoverished in 1995”. This statement to the Court is consistent with the fact that, on 12 July 1995, Mr. Diallo obtained in the DRC, at his request, a “Certificate of Indigency” declaring him “temporarily destitute” and thus permitting him to avoid payments that would otherwise have been required in order to register a judgment in favour of one of the companies. The Court therefore concludes that Guinea has failed to establish that Mr. Diallo was receiving remuneration from Africom-Zaire and Africontainers-Zaire on a monthly basis in the period immediately prior to his detentions in 1995-1996 or that such remuneration was at the rate of US\$25,000 per month.

The Court notes that Guinea also does not explain how Mr. Diallo’s detentions caused an interruption in any remuneration that Mr. Diallo might have been receiving in his capacity as gérant of the two companies. If the companies were in fact in a position to pay Mr. Diallo as of the time that he was detained, it is reasonable to expect that employees could have continued to make the necessary payments to the gérant. Moreover, Mr. Diallo was detained from 5 November 1995 to 10 January 1996, then released and then detained again from 25 January 1996 to 31 January 1996. Thus, there was a period of two weeks during which there was an opportunity for Mr. Diallo to make arrangements to receive any remuneration that the companies allegedly had failed to pay him during the initial 66-day period of detention.

Under these circumstances, the Court considers that Guinea has not proven that Mr. Diallo suffered a loss of professional remuneration as a result of his unlawful detentions.

As to the alleged loss of professional remuneration following Mr. Diallo’s expulsion, the Court recalls that Guinea asserts that the unlawful expulsion of Mr. Diallo by the DRC deprived him of the ability to continue receiving remuneration as the gérant of Africom-Zaire and Africontainers-Zaire. Based on its claim that Mr. Diallo received remuneration of US\$25,000 per month prior to his detentions in 1995-1996, Guinea asserts that, during the period that has elapsed since Mr. Diallo’s expulsion on 31 January 1996, he has lost additional “professional income” in the amount of US\$4,755,500. Guinea further asserts that this amount should be adjusted upward to account for inflation, such that its estimate of Mr. Diallo’s loss of professional remuneration since his expulsion is US\$6,430,148. The Court notes that the DRC reiterates its position regarding the claim for unpaid remuneration from the period of Mr. Diallo’s detentions, in particular the lack of evidence to support the claim that Mr. Diallo was receiving remuneration of US\$25,000 per month prior to his detentions and expulsion.

The Court observes that it has already rejected the claim for loss of professional remuneration during the period of Mr. Diallo’s detentions. It considers that those reasons also apply with respect to Guinea’s claim relating to the period following Mr. Diallo’s expulsion. Moreover, Guinea’s claim with respect to Mr. Diallo’s post-expulsion remuneration is highly speculative and assumes that Mr. Diallo would have continued to receive US\$25,000 per month had he not been unlawfully expelled. While an award of compensation relating to loss of future earnings inevitably involves some uncertainty, such a claim cannot be purely speculative. Thus, the Court concludes that no compensation can be awarded for Guinea’s claim relating to unpaid remuneration following Mr. Diallo’s expulsion.

The Court therefore awards no compensation for remuneration that Mr. Diallo allegedly lost during his detentions and following his expulsion.

3. Alleged deprivation of potential earnings

The Court notes that Guinea makes an additional claim that it describes as relating to Mr. Diallo’s “potential earnings”. Specifically, Guinea states that Mr. Diallo’s unlawful detentions and subsequent expulsion resulted in a decline in the value of the two companies and the dispersal of their assets. Guinea also asserts that Mr. Diallo was unable to assign his holdings (parts

sociales) in these companies to third parties and that his loss of potential earnings can be valued at 50 per cent of the “exchange value of the holdings”, a sum that, according to Guinea, totals US\$4,360,000. The Court notes that the DRC considers that Guinea’s calculation of the alleged loss to Mr. Diallo is based on assets belonging to the two companies, and not assets that belong to Mr. Diallo in his individual capacity. Furthermore, the DRC contends that Guinea provides no proof that the companies’ assets have, in fact, been lost or that specific assets of the two companies to which Guinea refers could not be sold on the open market.

The Court considers that Guinea’s claim concerning “potential earnings” amounts to a claim for a loss in the value of the companies allegedly resulting from Mr. Diallo’s detentions and expulsion. Such a claim is beyond the scope of the proceedings, given this Court’s prior decision that Guinea’s claims relating to the injuries alleged to have been caused to the companies are inadmissible. For these reasons, the Court awards no compensation to Guinea in respect of its claim relating to the “potential earnings” of Mr. Diallo.

*

Having analysed the components of Guinea’s claim in respect of material injury caused to Mr. Diallo as a result of the DRC’s unlawful conduct, the Court awards compensation to Guinea in the amount of US\$10,000.

III. Total sum awarded and post-judgment interest (paras. 56-57)

The Court concludes that the total sum awarded to Guinea is US\$95,000 to be paid by 31 August 2012. The Court expects timely payment and has no reason to assume that the DRC will not act accordingly. Nevertheless, considering that the award of post-judgment interest is consistent with the practice of other international courts and tribunals, the Court decides that, should payment be delayed, post-judgment interest on the principal sum due will accrue as from 1 September 2012 at an annual rate of 6 per cent. This rate has been fixed taking into account the prevailing interest rates on the international market and the importance of prompt compliance. The Court recalls that the sum awarded to Guinea in the exercise of diplomatic protection of Mr. Diallo is intended to provide reparation for the latter’s injury.

IV. Procedural costs (paras. 58-60)

The Court notes that Guinea requests the Court to award costs in its favour, in the amount of US\$500,000, because, “as a result of having been forced to institute the present proceedings, the Guinean State has incurred unrecoverable costs which it should not, in equity, be required to bear”. The DRC asks the Court “to dismiss the request for the reimbursement of costs submitted by Guinea and to leave each State to bear its own costs of the proceedings, including the costs of its counsel, advocates and others”.

The Court recalls that Article 64 of the Statute provides that, “[u]nless otherwise decided by the Court, each party shall bear its own costs”. While the general rule has so far always been followed by the Court, Article 64 implies that there may be circumstances which would make it appropriate for the Court to allocate costs in favour of one of the parties. However, the Court does not consider that any such circumstances exist in the present case. Accordingly, each party shall bear its own costs.

V. Operative part (para. 61)

For these reasons,

THE COURT,

(1) By fifteen votes to one,

Fixes the amount of compensation due from the Democratic Republic of the Congo to the Republic of Guinea for the non-material injury suffered by Mr. Diallo at US\$85,000;

IN FAVOUR: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Keith, Bennouna, Skotnikov, Caçado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde; Judge ad hoc Mahiou;

AGAINST: Judge ad hoc Mampuya;

(2) By fifteen votes to one,

Fixes the amount of compensation due from the Democratic Republic of the Congo to the Republic of Guinea for the material injury suffered by Mr. Diallo in relation to his personal property at US\$10,000;

IN FAVOUR: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Keith, Bennouna, Skotnikov, Caçado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde; Judge ad hoc Mahiou;

AGAINST: Judge ad hoc Mampuya;

(3) By fourteen votes to two,

Finds that no compensation is due from the Democratic Republic of the Congo to the Republic of Guinea with regard to the claim concerning material injury allegedly suffered by Mr. Diallo as a result of a loss of professional remuneration during his unlawful detentions and following his unlawful expulsion;

IN FAVOUR: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Keith, Bennouna, Skotnikov, Caçado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde; Judge ad hoc Mampuya;

AGAINST: Judge Yusuf; Judge ad hoc Mahiou;

(4) Unanimously,

Finds that no compensation is due from the Democratic Republic of the Congo to the Republic of Guinea with regard to the claim concerning material injury allegedly suffered by Mr. Diallo as a result of a deprivation of potential earnings;

(5) Unanimously,

Decides that the total amount of compensation due under points 1 and 2 above shall be paid by 31 August 2012 and that, in case it has not been paid by this date, interest on the principal sum due from the Democratic Republic of the Congo to the Republic of Guinea will accrue as from 1 September 2012 at an annual rate of 6 per cent;

(6) By fifteen votes to one,

Rejects the claim of the Republic of Guinea concerning the costs incurred in the proceedings.

IN FAVOUR: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Keith, Bennouna, Skotnikov, Caçado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde; Judge ad hoc Mampuya;

AGAINST: Judge ad hoc Mahiou.

Judge Caçado Trindade appends a separate opinion to the Judgment of the Court; Judges Yusuf and Greenwood append declarations to the Judgment of the Court; Judges ad hoc Mahiou and Mampuya append separate opinions to the Judgment of the Court.

Separate opinion by Judge Cançado Trindade

1. In his Separate Opinion, composed of 10 parts, Judge Cançado Trindade presents the foundations of his personal position on the matters dealt with in the present Judgment of the Court. He supports the Court's decision to order reparations for the damages suffered by Mr. A. S. Diallo, as an individual, under two human rights treaties (the U.N. Covenant on Civil and Political Rights, Article 13, and the African Charter on Human and Peoples' Rights, Article 12 (4)), in addition to the Vienna Convention on Consular Relations (his right to information on consular assistance, under Article 36 (1) (b)). He further supports the decision of the ICJ to take into account the experience of other contemporary international tribunals in the matter of reparations for damages.

2. He singles out (part I) the particular importance of the case-law of the international tribunals of human rights (in particular that of the Inter-American and the European Courts of Human Rights — IACtHR and ECtHR), to the determination of reparations to be awarded to individuals for damages inflicted upon them. Although he agrees with the Court's majority as to the determination of reparations in the present Judgment, there are some points, not fully reflected in the reasoning of the Court, that he feels obliged to dwell upon in his Separate Opinion, so as to clarify the matter dealt with by the Court, and the foundations of his own personal position thereon.

3. Judge Cançado Trindade begins his reflections by identifying the subject of the rights breached and the subject of the right to reparations (part II), in the framework of the position of individuals as subjects of contemporary international law, and, accordingly, as titulaires of the right to reparation for the damages they have suffered. In effect, as made clear by the legal proceedings and the Judgment (of 30.11.2010) on the merits of the present case, the subject of the rights violated in the cas d'espèce was a human being, Mr. A. S. Diallo, not a State. Likewise, the subject of the corresponding right to reparation is a human being, Mr. A. S. Diallo, not a State. He is the titulaire of such right to reparation, and the beneficiary of the reparations ordered by the Court in the present Judgment.

4. This has also been reckoned in the legal proceedings and the present Judgment on reparations, wherein the relevant case-law of the IACtHR and the ECtHR has been taken into account. Judge Cançado Trindade adds that “[t]he fact that the mechanism for dispute-settlement by the ICJ is, as disclosed by its interna corporis, an inter-State one, does not mean that the Court's findings, and its corresponding reasoning, ought to be invariably limited to a strict inter-State approach” (para. 9). He then refers to a series of cases, settled by the ICJ throughout the last decades (in addition to the exercise of its advisory function), that have directly concerned the condition of individuals, in the light of which — he proceeds — “[t]he insufficiency, if not artificiality, of the exclusively inter-State outlook of the procedures before the ICJ has become manifest” (para. 11).

5. Judge Cançado Trindade adds that “[d]espite the limitations of the inter-State conception of its mechanism of operation, the Court can at least disclose its preparedness to reason in the light of the progressive development of international law, thus contributing to it, beyond the outdated inter-State outlook” (para. 11). To his satisfaction, the Court does so in the Judgments on the merits (2011) and now on reparations in the present case A. S. Diallo. And he adds that, “[a]fter all, breaches of international law are perpetrated not only to the detriment of States, but also to the detriment of human beings, subjects of rights — and bearers of obligations — emanating directly from international law itself. States have lost the monopoly of international legal personality a long time ago” (para. 12). And Judge Cançado Trindade concludes, on this particular point, that

“Individuals, — like States and international organizations, — are likewise subjects of international law. A breach of their rights entails the obligation to provide reparations to them. This is precisely the case of Mr. A. S. Diallo; the present case bears eloquent witness of that, and of the limits imposed by contemporary international law upon State voluntarism. States cannot dispose of human beings the way they want, irrespective of their rights acknowledged in the corpus juris of the International Law of Human Rights; if they breach their rights enshrined therein, they are to bear the consequences thereof, in particular the ineluctable obligation to provide reparation to the individual victims” (para. 13).

6. In part III of his Separate Opinion, Judge Cançado Trindade embarks on an examination of the historical roots of the duty of reparation (in the light of the basic principle neminem laedere), going back to the origins of the law of nations (the writings of Francisco de Vitoria, Hugo Grotius, Samuel Pufendorf and Christian Wolff, in addition to those of Alberico Gentili, Francisco Suárez and Cornelius van Bynkershoek). He ponders that the teachings (during the XVIth to the XVIIIth centuries) of the “founding fathers” of the law of nations on the matter have never faded away. Successive grave violations of the rights of the human person (some on a massive scale) awakened human conscience to the need to restore to the human being the central position from where he had been unduly displaced by the exclusive inter-State thinking which prevailed in the XIXth century.

7. Judge Cançado Trindade adds that “[t]he reconstruction, on human foundations, as from the mid-XXth century onwards, took, as conceptual basis, the canons of the human being as subject of rights (titulaire de droits), of the collective guarantee of the realization of these latter, and of the objective character of the obligations of protection, and of the realization of superior common values. The individual came again to be perceived as subject of the right to reparation for damages suffered” (para. 21). He then turns (part IV) to the distinct theoretical frameworks of legal writing on the rationale of the duty of reparation for international wrongs, as from the late XIXth century onwards (such as, e.g., the writings of Dionisio Anzilotti, Hans Kelsen, Paul Fauchille, Hildebrando Accioly, F. V. García-Amador).

8. He further recalls the contribution of the Permanent Court of International Justice (PCIJ), mainly in its Judgment of 1927 in the Chorzów Factory case, to the acknowledgment of the obligation of reparation as corresponding to a principle of international law, and as conforming an “indispensable complement” to the wrongful act, so as to efface all the consequences of this latter (i.e., the provision of full reparation). In Judge Cançado Trindade’s perception, “[t]he duty of reparation within the realm of international responsibility is attached to subjectivity in international law, ensuing from the condition of being subject of rights and bearer of duties in the law of nations (droit des gens)” (para. 32). He adds that the advent of the International Law of Human Rights and of contemporary International Criminal Law has had the impact of clarifying this whole matter, “leaving no doubts that individuals — no longer only States — are also subjects of rights and bearers of duties emanating directly from international law (the droit des gens)” (para. 32).

9. In part V of his Separate Opinion, Judge Cançado Trindade focuses attention on what he terms as the indissoluble whole conformed by the breach of international law and the compliance with the duty of reparation for damages. In this respect, he evokes his own Dissenting Opinion in the Court’s Judgment of 03.02.2012, in the recent case concerning the Jurisdictional Immunities of the State (Germany versus Italy, Greece intervening), to sustain once again his view that compliance with the State’s obligation of reparation ineluctably ensues from the occurrence of the breaches of international law, as their “indispensable complement”; that obligation is governed by

international law in all its aspects (e.g., scope, forms, beneficiaries), and cannot be modified or suspended by the invocation of alleged difficulties of domestic law.

10. In the understanding of Judge Cançado Trindade, the breach of international law and the ensuing compliance with the duty of reparation for injuries are two sides of the same coin: they form an indissoluble whole, which cannot at all be disrupted by an undue invocation of State sovereignty or State immunity. This is the view he has firmly sustained in his Dissenting Opinion in the recent case on the Jurisdictional Immunities of the State (Judgment of 03.02.2012), and which he again sustains in the present Judgment of the A. S. Diallo case. In his view, the regime of reparations for breaches of human rights does not exhaust itself at inter-State level; after all, the individual victims of those breaches “are the titulaires of the right to reparation”.

11. In upholding this “humanized outlook”, Judge Cançado Trindade ponders that the full reparatio (from the Latin reparare, “to dispose again”) does not actually “erase” the human rights violations perpetrated, but rather ceases all its effects, thus at least avoiding the aggravation of the harm already done, besides restoring the integrity of the legal order, as well as that of the victims. He further warns that the duty of reparation is a fundamental (not a secondary) obligation, and this becomes clearer if one looks into it from the perspective of the centrality of the victims, which is his own. “The indissoluble whole that violation and reparation conform admits no disruption by means of the undue invocation, by the responsible State, of its sovereignty or its immunities, so as to evade the indispensable consequence of the international breaches incurred into: the reparations due to the victims” (para. 40).

12. In part VI of his Separate Opinion, Judge Cançado Trindade concentrates his thoughts on the centrality of the victims in the present domain of protection and its implications for reparations. The rights at issue, being inherent to the human person, and anterior and superior to the State, are not reduced to those which the State is prepared to “grant” or “concede” to persons under its jurisdiction, at its sole discretion. The centrality of their position in the present domain of protection is well-established, responding to a true need of the international community itself, — as perceived and heralded, some decades ago, in the first half of the XXth century, in a pioneering way, by a generation of jurists (André N. Mandelstam, Georges Scelle, Charles de Visscher).

13. In our times, — he proceeds, — the growing acknowledgment, by the international legal order, of the importance of reparations to victims of human rights violations, is a sign of its maturity, even though there remains a long way to go. In this way, the historical process of the humanization of international law, intuitively detected and propounded, a couple of decades ago, by another generation of jurists with a humanist formation (M. Bourquin, A. Favre, S. Sucharitkul, S. Glaser), will keep on advancing, with particular attention to those — individually or in groups — who find themselves in a situation of special vulnerability.

14. The implications of the international subjectivity of individuals for reparations due to them were to challenge the postulates of traditional doctrine of State responsibility, and in particular its unsatisfactory and artificial inter-State outlook. As the present case A. S. Diallo clearly shows, the damage was done to an individual, and not to a State, and it is that damage that is taken as “the measure” for the determination of the reparation due to the individual. In effect, — he adds, — the U.N. International Law Commission (ILC) itself, in the 2001 Report on its work on the international responsibility of a State, admitted the possibility of this happening, and of the beneficiary of a reparation being an individual and not the State. In the perception of Judge Cançado Trindade, the cas d’espèce, in clarifying this point in respect of reparations, bears

witness of the reassuring historical process, presently in course, of the humanization of international law, — as he has been pointing out and supporting since the nineties.

15. In circumstances such as those of the present case A. S. Diallo, a strict inter-State approach to the State's compliance with the duty to provide reparation appears anachronistic and unsustainable. It has in fact been in the domain of international human rights protection, — Judge Cançado Trindade adds, — that reparations have been reckoned as comprising, in the light of the general principle of neminem laedere, the restitutio in integrum (reestablishment of the prior situation of the victim, whenever possible), in addition to the indemnizations, the rehabilitation, the satisfaction, and the guarantee of non-repetition of the acts or omissions in violation of human rights.

16. Contemporary doctrine, — he proceeds, — has identified the aforementioned distinct forms of reparation from the perspective of the victims, of their claims, needs and aspirations. It goes beyond solutions of private law, and the essentially patrimonial content (ensuing from civil law analogies) of traditional doctrine. Judge Cançado Trindade further sustains that reparations are to be constantly reassessed as from the perspective of the integrality of the personality of the victims themselves, bearing in mind the fulfillment of their aspirations as human beings and the restoration of their dignity.

17. The 2005 U.N. Basic Principles and Guidelines on the Right to a Remedy and Reparations are also victim-oriented, having been preceded by a unique and innovative jurisprudential construction of the IACtHR on this subject-matter (in particular on the distinct forms of reparation), which took place largely in the years 1998-2004, and which has been attracting growing attention of expert writing in recent years. That jurisprudential construction of the IACtHR has, in its conceptualization, for the purposes of reparation, gone further than the 2005 U.N. Basic Principles and Guidelines, in fostering the expansion of the notion of victim, by encompassing as such the next of kin, also regarded as “direct victims” in their own right (given their intense suffering), without conditionalities (such as that of accordance with domestic law), in individualized as well as collective cases.

18. Judge Cançado Trindade next reviews in detail (part VII) the pioneering contribution of the case-law on reparations of both the IACtHR and ECtHR. He finds it reassuring that the ICJ takes their contribution into account in the present case A. S. Diallo (reparations), “given the common mission of contemporary international tribunals of securing the realization of justice” (para. 62). Furthermore, in the perspective of legal history, he stresses the importance of fundamental principle neminem laedere for reparation of moral damages inflicted upon individuals (part VIII). He points out that “consideration of moral damages inevitably turns attention to human suffering, proper to human beings rather than to States. In fact, States do not suffer; not seldom, they tend to inflict suffering upon human beings under their respective jurisdictions or elsewhere. The importance of moral damages became manifest in face of the need of protection of individuals” (para. 77).

19. He further observes the analogies with solutions proper to common law or to civil law (droit civil) have never appeared convincing or satisfactory to him, by focusing — for the purpose of reparation — on the relationship of the human person with material goods; he insists on the need to go beyond the short-minded patrimonial or financial approach, and to look also into the human person's aspirations, freedom and integrity. And he stresses the importance to reparations for moral damages, and the particular relevance of the rehabilitation of victims (part IX), — to be considered as from the integrality of the personality of the victims, — in the framework of restorative justice. The realization of justice (an imperative of jus cogens) is in itself a form of reparation (satisfaction) to the victims. He adds that reparatio does not put an end to the suffering

ensuing from the human rights violations, but, in ceasing the effects of those breaches, it at least alleviates the suffering of the individual victims (as titulaires of the right to reparation), by removing the indifference and oblivion of the social milieu, and the impunity of the perpetrators.

20. In his concluding reflections (part X), Judge Cançado Trindade recalls the State obligations vis-à-vis the human person — individually or in groups (as in the “solidarisme de la liberté” of Léon Duguit, opposing abuses perpetrated under the guise of absolute State sovereignty), as well as the jusphilosophical contribution of juridical “personalism”, aiming at doing justice to the individuality of the human person, to her inner life and the need for transcendence on the basis of her own experience of life (as in the writings of Emmanuel Mounier and Gabriel Marcel).

21. He adds that such trends of humanist thinking, almost forgotten in our hectic days, can, in his view, still shed much light towards further development of reparations for moral damages done to the human person. Another lesson he extracts from the present case of A. S. Diallo (Guinea versus D.R. Congo), unprecedented in this Court’s history, is that the determination of reparations for human rights breaches is not a matter of legal technique only, as the incidence of considerations of equity fully demonstrates.

22. In sum, — Judge Cançado Trindade concludes, — the reasserted presence (and a central one) of the individual in the framework of the law of nations has much contributed to the more recent progressive development of international law in respect of reparations for damages ensuing from violations of human rights. In the cas d’espèce, where damage was done to an individual, the Court, in the dispositif of the present Judgment, fixes the amount of compensation for non-material as well as material damage “suffered by Mr. Diallo” (resolatory points (1) and (2)). The ultimate subject (titulaire) of the right to reparation and its beneficiary is Mr. A. S. Diallo, the individual who suffered the damages. The amounts of compensation have been determined by the Court to his benefit. This is, in the perception of Judge Cançado Trindade, the proper meaning of resolatory points (1) and (2) of the dispositif of the present Judgment, in combination with paragraph 57 of the reasoning of the Court.

Declaration of Judge Yusuf

1. In appending a declaration to the Judgment, Judge Yusuf expresses his disagreement with point three of the operative paragraph in which the Court rejects Guinea’s claim for material injury “allegedly suffered by Mr. Diallo as a result of a loss of professional remuneration during his unlawful detentions and following his unlawful expulsion”. He first observes that the Court reformulates to a “loss of professional remuneration” the material damage characterized in Guinea’s Memorial as a “loss of earnings.” In his assessment there is no legal or logical reason for this restrictive reformulation of Guinea’s claim for compensation for material injury. He states that as a businessman, Mr. Diallo was not only remunerated for his managerial responsibilities but had overall responsibility, being the sole associé, for the income-generating activities of the companies. The detention of a businessman for such a long period of time did not only disturb his commercial and entrepreneurial activities, but had a direct effect on Mr. Diallo’s personal earnings as a businessman and as the sole associé of the two companies. Thus, in Judge Yusuf’s view, the reformulation by the Court does not constitute a proper qualification of the actual material injury suffered in this case, nor does it correspond to the context in which the damage was caused or the particular circumstances of the victim of the human rights violations recognized by the Court.

2. Secondly, Judge Yusuf addresses the conclusions reached by the Court on the lack of evidence on the amount of Mr. Diallo's pre-detention monthly earnings. While he acknowledges the Republic of Guinea's failure to produce satisfactory evidence of the sums claimed, he nevertheless argues that this lack of evidence cannot negate the existence of a causal link between the unlawful detentions and the material injury suffered. The existence of this injury and its causal link with the wrongful act can be ascertained through the determination of the extent to which it prevented the individual from engaging in his or her habitual income-generating activities. By focusing solely on the lack of reliable evidence relating to Mr. Diallo's monthly earnings, the Court lost sight of the actual injury caused by the unlawful detention of Mr. Diallo — i.e., the disruption of his income-generating activities and the fact that the detention prevented him from engaging in such activities.

3. Furthermore, he notes that the absence of reliable evidence or information on the earnings of the victims of unlawful acts by States has not deterred international courts, tribunals and commissions from awarding compensation on the basis of equitable considerations. Those courts and tribunals have adopted a flexible approach, based on equity, in assessing lost earnings where evidence of earnings was either insufficient or was not established to the satisfaction of the court. He observes that the Court failed to take this practice into consideration despite claiming to do so in paragraph 13 of the Judgment.

4. Finally, he finds it regrettable that the Court appears to overlook in this Judgment as well as in the previous one on the merits the fact that Mr. Diallo was the central figure and the sole associé gérant of two companies which were in reality unipersonal companies, though they were incorporated as companies with limited liability. Alluding to his joint dissenting opinion with Judge Al-Khasawneh, Judge Yusuf notes that the unlawful detentions of Mr. Diallo undermined his ability to manage the activities of his companies, to recover the debts owed to the companies by the Government of Zaire (DRC), and thus to generate the revenue from which his activities would be compensated. This prevention had a direct impact on his ability to continue to receive an income from his businesses which suffered from further perturbation and interruption of their activities. It is the causal link between the unlawful detentions and the material damage suffered by Mr. Diallo during this period in the form of loss of earnings that should have been used by the Court to determine compensation on grounds of equity.

Declaration of Judge Greenwood

Judge Greenwood considers that the comparatively low amount awarded to Guinea, relative to the sums claimed, is justified in light of the absence of any evidence to sustain the claims for material damage and the fact that the Court, in its Judgments in 2007 and 2010, had excluded damage to the companies (Africom Zaire and Africontainers) from the scope of the case. With regard to the compensation for moral damage, equitable principles had to be applied in a consistent and coherent manner, which required that the amount awarded should be just, not only by reference to the facts of each particular case, but by comparison with other cases. For this reason, Judge Greenwood would have awarded a smaller sum for moral damage in the present case.

Separate opinion of Judge ad hoc Mahiou

The Court has seldom had occasion to rule on the issue of compensation, and in particular to determine its amount. In the celebrated case concerning the *Factory at Chorzów* it identified the principles which should govern reparation of an injury resulting from an illegal act of a State, and it ruled on the amount of reparation in the *Corfu Channel* case. The rules governing compensation

are now quite firmly established in international law, as a result of the decisions of various international courts and tribunals and of the work of the International Law Commission.

Applying those rules to the present case, I have agreed with the Court's reasoning and solution regarding Guinea's four heads of claim concerning, respectively, non-material or moral injury, loss of personal property, loss of assets of the companies and the fixing of a time-limit for the payment of compensation, together with a rate of interest to be applied with effect from a specific date. On the other hand, I have been unable to subscribe to the Court's overall reasoning, nor *a fortiori* to its solution of outright dismissal, regarding Guinea's claims concerning the professional remuneration due to Mr. Diallo, and, to a lesser extent, the procedural costs.

Separate opinion of Judge ad hoc Mampuya

Judge ad hoc Mampuya largely supported the principal conclusions adopted by the Court in its Judgment, but was unable to agree with the majority on two points.

1. Excessive amount of the compensation for non-material or moral injury

The first disagreement concerns a simple matter of fact, relating not to the principle of compensation, which he fully accepts, but to the amount of the compensation which should be awarded to Guinea for the non-material or moral injury sustained by Mr. Diallo. In his reasoning, Judge ad hoc Mampuya develops a line of argument which, while addressing this issue of fact, relies on legal principles deriving both from jurisprudence and from doctrine. Thus, stating that the sum of US\$85,000 awarded by the Court is too high, he refers in support of his argument to the practice of other courts and tribunals. This reference can be explained by the fact that, with the sole exception of the case concerning the Corfu Channel ((United Kingdom v. Albania), Assessment of Amount of Compensation, Judgment, I.C.J. Reports 1949, pp. 244 et seq.), the Court has very little experience in determining compensation; in contrast, certain other international courts and tribunals, in particular the regional human rights courts (the European Court and the Inter-American Court), as well as joint claims tribunals (such as the Iran-United States Claims Tribunal and the United States/Mexico General Claims Commission) and international arbitral bodies, have extensive and rich experience in this area, experience which the Court has itself readily agreed to draw upon. Among the principles which emerge from this jurisprudence is the undeniable principle that, while the primary aim of compensation is to remedy as fully as possible all forms of loss suffered as a result of an internationally wrongful act, compensation is in no way intended to punish the responsible State and should not have an expressive or exemplary character. This approach was adopted by the ILC in its very first reports on State responsibility, citing the doctrinal principle laid down, *inter alia*, by Jiménez de Aréchaga: "punitive or exemplary damages . . . are incompatible with the basic idea underlying the duty of reparation" (E. Jiménez de Aréchaga, "International Responsibility", in Manual of Public International Law, London, Macmillan, 1968, cited in UN doc. A/CN.4/425 & Corr.1 and Add.1 & Corr.1, Second Report on State Responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur, 1989, para. 24). It is incorporated in the ILC's Draft Articles on State Responsibility, first in the commentary on Article 36, relating to compensation, and then in Article 37, paragraph 3, in respect of satisfaction. This principle, which may be described as the principle of proportionality between the reparation and the injury, is well established: the extent of the injury should be the measure of the level or amount of compensation, thus ensuring that the latter simply represents fair compensation for the injury suffered; it even appears in the case law of the Inter-American Court of Human Rights, which is, however, extremely favourable to the compensation claims of victims of human rights violations. Notwithstanding its necessarily dissuasive role, compensation must correspond to the principle of full reparation and should not, therefore, represent anything more than an amount of compensation reflecting not only as fully as possible, but at the same time as precisely as possible, the scale of the injury sustained.

Furthermore, Judge *ad hoc* Mampuya recognizes that the amount of compensation awarded may also depend on whether or not there were particular circumstances accompanying the State's internationally wrongful act: the conditions of detention or expulsion, for example, solitary confinement, torture, the duration of the wrongful or arbitrary detention, ill-treatment, etc., might explain a higher or lower award. In the present case, however, the Court recognized that Mr. Diallo did not suffer inhuman or degrading treatment during his detentions, while recalling the specific circumstances — which it does not expressly describe as aggravating — of the latter's detentions and expulsion, as set out in its Judgment on the merits (Judgment of 30 November 2010, paras. 74-84, 89).

This is why, in general, the compensation awarded for non-material injury is relatively modest, in keeping with the nature of the injury suffered, especially if that injury has had no proven significant somatic effects (frequently such awards are between €3,000 and €50,000; on the other hand, lower sums have sometimes been awarded in respect of more serious situations). Accordingly, Judge *ad hoc* Mampuya believes that “with regard to the circumstances of this case”, the sum of US\$85,000 is grossly excessive, and does not appear to him to be “appropriate”.

2. The compensation for the material injury resulting from the loss of personal property has no legal basis

The second point with which the judge disagrees relates to a question of law concerning the absence of proof and legal basis in respect of the compensation awarded for the material injury caused by the loss of Mr. Diallo's personal property. He disagrees because there is an important legal question of principle at issue: that of evidence in relation to reparation, even though the US\$10,000 compensation awarded is modest. Here, too, with regard to the fundamental question of evidence, the Court's source of reference, as in the previous point, is its Judgment in the Corfu Channel case (the only judgment it has delivered on the question of determining compensation), and the jurisprudence since followed by the other international courts.

In his opinion, Judge *ad hoc* Mampuya first sets out the current rules adhered to in the jurisprudence and doctrine to date, and which the Court disregarded when it determined the reparation due on account of the material injury allegedly suffered by Mr. Diallo. Having set out those rules, the judge then considers the present case, concluding in particular that the Court failed to adhere scrupulously to the traditional requirements governing evidence. The point of law at issue here is that of the burden of proof: proof of the existence of the injury, which is the effective basis and measure of compensation, and proof of the causal link between the injury and the wrongful conduct of the responsible State.

In respect of the existence of the injury, it is indeed well established that “[a]s a general rule, it is for the party which alleges a fact in support of its claims to prove the existence of that fact”, as the Court recalled in its Judgment on the merits in the present case (Judgment on the merits of 30 November 2010, para. 54). This is why judges and arbitrators have always demanded a higher standard of proof to substantiate allegations of material injury, requiring the applicant to support its allegations with “sufficient proof” or “proof to the satisfaction of the Court”. Judge *ad hoc* Mampuya bases this view on jurisprudence which has been well established by the European Court of Human Rights, the Inter-American Court of Human Rights, the Iran-United States Claims Tribunal and a number of arbitral awards. With respect to material injury, although the courts have occasionally based reparation on considerations of equity, they have not done so because there were doubts as to the existence of the injury itself, but simply for the purpose of estimating the value required as basis for the calculation of compensation.

Compensation also depends on evidence of the causal link between the injury and the wrongful conduct of the responsible State: the alleged injury must have a direct causal link to the alleged misconduct; this has always been required by the courts.

In the present case, a problem is posed by certain property which Mr. Diallo claims has been lost, but whose very existence is not substantiated by the inventory drawn up in his apartment by the Guinean Embassy. The Court indeed appears to take the view that there is no clearly established causal link that would support the conclusion that the alleged loss of that property “was caused by the DRC’s unlawful conduct” (para. 32), since “Guinea has failed to prove the extent of the loss of Mr. Diallo’s personal property listed on the inventory and the extent to which any such loss was caused by the DRC’s unlawful conduct” (para. 31); therefore, it should have rejected this head of claim.

Paradoxically, however, having concluded that there is no “definite” proof, the Court nevertheless decides to award an amount of compensation which is no longer justified by the loss of the property in question, or in terms of the responsibility of the Congolese Government. The compensation awarded thus lacks any legal basis.

Judge ad hoc Mampuya thus concludes his opinion by stating that his disagreement with the majority is fully justified, because the latter failed to assess the situation correctly in holding that it was proper to award compensation for the loss of physical property, whose existence and value had not been demonstrated, or indeed its loss, or the DRC’s responsibility for that loss.
