

DECLARATION OF JUDGE YUSUF

Disagreement with point 3 of the operative paragraph — Improper characterization of actual material injury suffered — Reformulation of claim as loss of professional remuneration is restrictive, without legal or logical reasoning — Existence of causal nexus between unlawful detention and injury suffered by Mr. Diallo — Unsatisfactory evidence of pre-detention earnings does not detract from existence of an injury resulting from detention — Court's decision inconsistent with jurisprudence and practice of human rights courts and tribunals — Equity considerations should have been applied — Compensation fixed in equity on the basis of causal link between unlawful detention and the material injury suffered by Mr. Diallo.

1. I have voted in favour of the operative part of the Judgment except point 3 which

“*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.*”

I consider it my judicial duty to explain the reasons for my disagreement with this finding and with the considerations on which it is based, particularly as it relates to the “loss of earnings” by Mr. Diallo due to his unlawful detentions in 1995-1996.

2. The Court, in its Judgment on the merits of 30 November 2010, stated that

“The Court is of the opinion that the Parties should indeed engage in negotiation in order to agree on the amount of compensation to be paid by the DRC to Guinea for the injury flowing from the wrongful detentions and expulsion of Mr. Diallo in 1995-1996, including the resulting loss of his personal belongings.” (*Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, *Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 691, para. 163.)

3. The Parties having failed to reach agreement on the amount of compensation, the matter was submitted to the Court for settlement. In considering the compensation to be paid to Guinea for the injuries suffered by Mr. Diallo, the Court refers to the four heads of damage identified by Guinea in the following manner:

“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.’” (Judgment, para. 14.)

4. In its Memorial, Guinea refers to United Nations General Assembly resolution 60/147 of 16 December 2005 and to the Basic Principles and Guidelines annexed to it which define the types of compensable damage due to victims of human rights violations as follows:

“Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:

- (a) Physical or mental harm;
- (b) Lost opportunities, including employment, education and social benefits;
- (c) Material damages and loss of earnings, including loss of earning potential;
- (d) Moral damage;
- (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.” (United Nations General Assembly resolution 60/147 of 16 December 2005 (UN doc. A/RES/60/147), Annex, para. 20.)

5. The Court has decided to reformulate as a “loss of professional remuneration” the material damage claimed by Guinea to have been suffered by Mr. Diallo due to his detentions and characterized in Guinea’s Memorial as a “loss of earnings” in conformity with the above-mentioned Basic Principles as well as with the practice of human rights courts, such as the European Court of Human Rights (ECHR) and the Inter-American Court of Human Rights (IACHR). I can see no legal or logical reason for this restrictive reformulation of Guinea’s claim for compensation for this material injury.

6. The characterization of the claim by Guinea for “loss of earnings” by a businessman, who was the manager and sole *associé* of two companies which he himself had founded, as a claim for “loss of professional remuneration” does not, in my view, 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.

7. Mr. Diallo as a businessman, was not only remunerated for his managerial responsibilities but had overall responsibility, being the sole

associé, for the income-generating activities of the companies from which he also personally benefited in terms of earnings. As was stated by the Court in its Judgment of 30 November 2010 on the merits:

“it is difficult not to discern a link between Mr. Diallo’s expulsion and the fact that he had attempted to recover debts which he believed were owed to his companies by, amongst others, the Zairean State or companies in which the State holds a substantial portion of the capital, bringing cases for this purpose before the civil courts” (*Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 669, para. 82).

8. Bearing in mind that Mr. Diallo was detained in 1995-1996 with a view to his expulsion, it is not unreasonable to assume that the intended consequence of his detentions and expulsion, which were found by the Court to be unlawful, was to frustrate his efforts to recover those debts. This had a direct effect on his personal earnings as a businessman and as the sole *associé* of the two companies. Moreover, the detention of a businessman for such a long period of time does not only disturb his commercial and entrepreneurial activities, but is likely to interrupt his ability to generate income from such activities.

9. It is true that the Republic of Guinea has failed to provide satisfactory evidence on the amount of monthly earnings of Mr. Diallo before his detention, but that cannot automatically lead to the conclusion that there was no loss of earnings resulting from his unlawful detention. A loss of earnings arises, in the first instance, from a disruption of the activities which help generate the income of the individual concerned. It is through such disruption or, in some cases, total interruption of the activities of the individual that an unlawful detention causes the victim an injury whose final material consequence is a loss of earnings. 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. Thus, the amount of the income itself can neither determine the existence of an injury nor of the causal link between the injury and the unlawful act, although it may be useful for fixing the compensation due to the victim.

10. By focusing solely on the lack of reliable evidence relating to the amount of monthly earnings of Mr. Diallo (paragraphs 42-44 of the Judgment), the Court has 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. It also appears to have overlooked the circumstances of the expulsion of Mr. Diallo from the DRC which did not clearly allow him to collect and save all the documents related to the activities of his companies.

11. The fact that the Republic of Guinea was unable to establish, to the satisfaction of the Court, the actual amount of Mr. Diallo’s pre-detention earnings can neither detract from the existence of an injury due

to his detentions nor from the fact that these unlawful detentions interfered with his ability to engage in his normal income-generating entrepreneurial activities. It is on the basis of the injury suffered as a result of this interference with his activities that the Court should have fixed, in equity, the compensation due to him in view of the causal nexus between this injury and the unlawful detentions.

12. Moreover, the practice of international human rights courts, which have the most extensive jurisprudence in this area, does not appear to have been taken into account by the Court with respect to the fixing of compensation for loss of earnings resulting from the unlawful detention of Mr. Diallo, despite the fact that it is stated in paragraph 13 of the Judgment that

“The Court has taken into account the practice in other international courts, tribunals and commissions (such as the International Tribunal for the Law of the Sea, the European Court of Human Rights (ECHR), the Inter-American Court of Human Rights (IACHR), the Iran-United States Claims Tribunal, the Eritrea-Ethiopia Claims Commission, and the United Nations Compensation Commission), which have applied general principles governing compensation when fixing its amount, including in respect of injury resulting from unlawful detention and expulsion.”

13. The absence of reliable evidence or information on the earnings of the victims of unlawful acts by States has not deterred those courts 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. For instance, in *Delta v. France* (1990), although the applicant was unemployed at the time of his arrest and detention, the ECHR held that it did “not find it unreasonable to regard Mr. Delta as having suffered a loss of real opportunities” as a result of the detention. Consequently, the Court awarded, on an equitable basis, a global sum for both pecuniary and non-pecuniary damages (*Delta v. France* (application No. 11444/85), 19 December 1990, paras. 40-43).

14. Similarly, the ECHR in *Stafford v. United Kingdom* (2002), having found that a causal nexus existed between the unlawful detention and the injury suffered, considered that though the applicant failed to substantiate his claims for lost earnings, such a claim for pecuniary loss “cannot be completely discounted”, and awarded, in equity, a global sum for both pecuniary and non-pecuniary damages (*Stafford v. United Kingdom* (application No. 46295/99), 28 May 2002, paras. 92-94). In *Assanidze v. Georgia* (2004), the applicant failed to produce evidence of his monthly income prior to his arrest, and the ECHR was unable to make a precise calculation of his lost earnings. However, the ECHR found that the applicant must necessarily have sustained such a loss as a

result of being held without cause when, from the date of detention onwards, he should have been in a position to find employment and resume his activities. Once again, on the basis of equity, the request for pecuniary damages was not discounted (*Assanidze v. Georgia* (application No. 71503/01), 8 April 2004, paras. 200-201).

15. This flexible approach is not limited to the jurisprudence of the European Court of Human Rights. The Inter-American Court of Human Rights has developed a clear set of standards for valuation of lost earnings where there is insufficient or unreliable information on actual earnings (see for example *Caracazo v. Venezuela*, judgment of 29 August 2002 (reparations and costs), IACHR, para. 88; *El Amparo v. Venezuela*, judgment of 14 September 1996 (reparations and costs), IACHR, para. 28). In the *Ituango Massacres* case (2006), while the IACHR considered that pecuniary damage should be calculated on the basis of probative elements which allow the real damage to be ascertained, it granted compensation, on grounds of equity, in favour of those victims whose loss of income was not proved specifically (*Ituango Massacres*, judgment of 1 July 2006 (preliminary objections, merits, reparations and costs), paras. 371-372).

16. Finally, I find 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. As pointed out in my 2010 joint dissenting opinion with Judge Al-Khasawneh, Mr. Diallo was

“for all intents and purposes one and the same with the two companies. Nor were his *parts sociales* a small amount of his wealth, they were practically all his wealth with the result that, as a consequence of the actions taken by the DRC authorities against him, he was reduced to destitution.” (*Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, *Merits, Judgment*, I.C.J. Reports 2010 (II), joint dissenting opinion of Judges Al-Khasawneh and Yusuf, p. 701.)

17. The unlawful detentions of Mr. Diallo undermined his ability to manage the activities of his companies or whatever was left of them, 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. Through his unlawful detentions, and consequent arbitrary expulsion, Mr. Diallo was prevented, as the sole *associé gérant* of the two companies, from promoting and managing the activities of his two companies and from ensuring that their assets and income-generating business could be properly sustained during the period of his illegal incarceration. This prevention had a direct impact on his ability to continue to receive an income from his businesses which suffered from further pertur-

bation 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.

(Signed) Abdulqawi A. YUSUF.
